No. 14-CV-126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

National Review, Inc.,
Defendant–Appellant,

v.

Michael E. Mann, Ph.D.,
Plaintiff–Appellee

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B

(The Honorable Natalia Combs Greene;
The Honorable Frederick H. Weisberg)

Brief of Appellant National Review, Inc.

David M. Morrell (No. 1013411)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
(832) 239-3939
DMorrell@jonesday.com

Michael A. Carvin* (No. 366784)
Anthony J. Dick (No. 1015585)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
MACarvin@jonesday.com
AJDick@jonesday.com

August 4, 2014

RULE 28(a)(2) DISCLOSURE

The parties in the trial and appellate proceedings, and their respective counsel, are:

Plaintiff–Appellee Michael Mann, represented by John B. Williams of Williams Lopatto PLLC and Peter J. Fontaine and Catherine Rosato Reilly of Cozen O'Connor;

Defendants–Appellants Competitive Enterprise Institute and Rand Simberg, represented by David B. Rivkin, Jr., Mark I. Bailen, and Andrew M. Grossman of BakerHostetler LLP;

Defendant–Appellant National Review, Inc., represented by Michael A. Carvin, Anthony J. Dick, and David Morrell of Jones Day;

Defendant Mark Steyn, represented by Michael J. Songer of Crowell & Moring LLP and Daniel J. Kornstein and Mark Platt of Kornstein Viesz Wexler & Pollard LLP;

Amicus Curiae District of Columbia, represented by Irvin B. Nathan, Attorney General for the District of Columbia; Ariel B. Levinson-Waldman, Senior Counsel to the Attorney General; Todd S. Kim, Solicitor General; and Loren L. Alikhan, Deputy Solicitor General;

Amici Curiae Reporters Committee for Freedom of the Press, Advance Publicans, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, Association of American Publishers, Inc., Dow Jones & Company, Inc., First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., Investigative Reporting Workshop, McClatchy Company, MediaNews Group, Inc., National Press Club, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, New York Times Company, News Corporation, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, Politico LLC, Reuters, Seattle Times Company, Society of Professional Journalists, Student Press Law Center, Time Inc., and WP Company LLC (d/b/a The Washington Post), represented by Gregg P. Leslie and Cynthia A. Gierhart of the Reporters Committee for Freedom of the Press; and

Amicus Curiae American Civil Liberties Union of the Nation's Capital, represented by Arthur Spitzer of American Civil Liberties Union of the Nation's Capital.

National Review discloses that its parent corporation is Constitutional Enterprises Corporation. National Review has no subsidiaries, and there is no publicly held corporation that holds 10% or more of its stock

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ISSUES PRESENTED FOR REVIEW

1. Whether denial of a special motion to dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(b), is immediately appealable under the collateral-order doctrine.

2. Whether Plaintiff is likely to succeed in suing National Review for commentary on its opinion blog criticizing his controversial "hockey stick" graph depicting global warming.

STATEMENT OF THE CASE

Plaintiff Dr. Michael E. Mann sued National Review and its co-defendants for defamation and intentional infliction of emotional distress for publishing criticism of his research on global warming. Defendants filed a special motion to dismiss under the D.C. Anti-SLAPP Act. The lower court denied that motion and declined to certify an interlocutory appeal. National Review sought appellate review under the collateral-order doctrine. This Court ordered jurisdictional briefing and then ordered briefing on the merits of the appeal, reserving the jurisdictional question.

STATEMENT OF FACTS

A. The "Hockey Stick" Controversy

1. Dr. Mann's public advocacy on global warming

Plaintiff Dr. Michael E. Mann is a professor of meteorology at The Pennsylvania State University ("Penn State"), one of the largest public universities in the United States. As noted in his complaint, Dr. Mann is "well known for his work regarding global warming and the so-called 'Hockey Stick Graph,'" J.A. 64, which purports to depict global temperature trends over the past millennium. The graph is named for the shape of the data it presents, showing a relatively flat level of historical temperatures up until 1900, followed by a sharp rise in the 20th century. Dr. Mann attributes this increase to elevated levels of carbon dioxide resulting from the burning of fossil fuels. The hockey-stick graph first appeared in a 1998 research paper for the scientific journal *Nature*, and then received widespread international attention when it was featured on the front cover of the

World Meteorological Organization's 1999 Statement of Status of Global Climate ("1999 WMO Report"). In 2001, Dr. Mann served as a "lead author" for a chapter of the United Nations' Intergovernmental Panel on Climate Change ("IPCC") Third Scientific Assessment Report, which prominently featured a version of the hockey stick as evidence of global warming.

Dr. Mann's advocacy of the hockey-stick hypothesis has made him a prominent figure in the ongoing public controversy over global warming. In the course of that controversy, Dr. Mann has played both a scientific and a political role. For example, according to a *Science* magazine profile entitled "The Political Scientist," Dr. Mann recently "spen[t] days on the campaign trail with Virginia gubernatorial candidate Terry McAuliffe (D)," "was featured in millions of dollars' worth of television ads attacking McAuliffe's opponent, Ken Cuccinelli (R)," and "was even asked to introduce former President Bill Clinton at a major rally."[1] In February 2012 he joined a group of signatories in writing a widely publicized open letter to congressional leaders arguing against the controversial Keystone XL pipeline, stating, "We can say categorically that this pipeline is not in the nation's, or the planet's best interest."[2] In March 2012, Dr. Mann published a book recounting his extensive involvement in the rancorous public debate over global warming, entitled *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* (2012) ("*Climate Wars*").

2. <u>Public criticism of the hockey stick</u>

Since its initial publication, the hockey stick has been at the center of a firestorm of controversy and criticism. Two of the most prominent critics have been University of Guelph professor Ross McKitrick and retired mining engineer Stephen McIntyre, who published two peer-

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[1] David Malakoff, "The Political Scientist: Michael Mann's Moment in the Campaign Spotlight," *Science* (Nov. 6, 2013) http://news.sciencemag.org/climate/2013/11/political-scientist-michael-mann%E2%80%99s-moment-campaign-spotlight.

[2] *See* 350.org, "Top climate scientists warn Congress over Keystone XL" (Feb. 13, 2012) http://350.org/top-climate-scientists-warn-congress-over-keystone-xl/

reviewed articles in scientific journals arguing that the hockey stick is spurious in both its methods and its conclusions.[3] Other critics include academics such as Richard Lindzen, a distinguished professor in the Department of Earth, Atmospheric and Planetary Sciences at the Massachusetts Institute of Technology (MIT); Judith Curry, the former chair of the School of Earth and Atmospheric Sciences at the Georgia Institute of Technology; and John Christy, a climate scientist at the University of Alabama in Huntsville. Numerous books have been written criticizing the hockey-stick hypothesis, including most notably *The Hockey Stick Illusion: Climategate and the Corruption of Science* (2010), by A.W. Montford, and *Taken By Storm: The Troubled Science, Policy and Politics of Global Warming* (2002), by Ross McKitrick and Christopher Essex. In addition to the scientific criticism, the hockey stick remains deeply controversial in political circles. To take but one example, United States Senator James Inhofe has written a book entitled, *The Greatest Hoax: How the Global Warming Conspiracy Threatens Your Future* (2012). As described in the book's promotional summary, the thesis is that "the entire global warming, climate-change issue . . . is an effort to dramatically and hugely increase regulation of each of our lives and business, and to raise our cost of living and taxes."[4]

Critics of the hockey-stick graph have focused on what they believe to be four serious flaws in its underlying methodology. *First*, they have questioned the reliability of the graph's underlying data. Because there are no thermometer records before the middle of the 19th century, the bulk of the hockey stick is composed of so-called "proxy" data, such as ancient tree rings, sedimentary pollen levels, and oxygen isotopes frozen in polar ice caps. Dr. Mann argues that these proxy data can be interpreted to provide an accurate record of global temperatures going back more than a

[3] *See* Stephen McIntyre & Ross McKitrick, *Hockey Sticks, Principal Components, and Spurious Significance*, 32 Geophysical Research Letters (Feb. 2005); Stephen McIntyre & Ross McKitrick, *The M&M Critique of the MBH98 Northern Hemisphere Climate Index: Update and Implications*, 16 Energy & Environment 69 (2005).

[4] *See* http://www.amazon.com/The-Greatest-Hoax-Conspiracy-Threatens/dp/1936488493

thousand years. Some critics disagree. They argue, for example, that tree-ring formations cannot provide an accurate measure of global historical temperature trends—in part because temperatures fluctuate unevenly in different parts of the world, and in part because the relevant tree-ring characteristics are influenced not only by temperature changes but also by variable growth factors such as sunlight, water, and soil nutrients. In the eyes of critics, any statistical model that uses such data to reconstruct centuries of historical temperature trends is fundamentally flawed and misleading.

Second, critics have argued that the hockey stick relies on flawed statistical techniques, including a skewed Principal Components Analysis ("PCA"), producing an erroneous and misleading interpretation of the underlying data. For example, according to Professor David Hand, the former President of the Royal Statistical Society in Great Britain, "The particular technique [used by Dr. Mann and his co-authors] exaggerated the size of the blade at the end of the hockey stick. Had they used an appropriate technique the size of the blade of the hockey stick would have been smaller."[5] If one uses a better statistical method, "[t]he change in temperature is not as great over the 20th century compared to the past as suggested by the Mann paper." *Id.*

Third, critics have argued that the hockey stick is misleading because it splices together two different types of data without highlighting the change: For roughly the first nine centuries after the year 1000 A.D., the graph shows temperature levels that have been inferred solely from tree-ring samples and other "proxy" data. But from about 1900 onward, the graph relies on readings from modern instruments such as thermometers. In the words of one review conducted by a panel of independent scientists, many consider it "regrettable" that temperature reconstructions "by the

[5] Louise Gray, "'Hockey stick' graph was exaggerated," *The Telegraph*, (Apr. 14, 2010), http://www.telegraph.co.uk/earth/environment/climatechange/7589897/Hockey-stick-graph-was-exaggerated.html

IPCC and others" neglected to emphasize "the discrepancy between instrumental and tree-based proxy reconstructions of temperature during the late 20th century." J.A. 370.

Fourth, critics have contended that the hockey stick is misleading because it omits certain tree-ring data after the year 1960 that show a *decline* in global temperatures, and instead relies more heavily on thermometer readings that show an increase in temperatures during that period. The omission of these data gained widespread public attention after the leak of multiple e-mails from the University of East Anglia's Climate Research Unit ("CRU"), prompting an uproar popularly known as "Climategate." In one particularly controversial e-mail, CRU scientist Phil Jones wrote to Dr. Mann and two other scientists: "I've just completed Mike's [i.e., Dr. Mann's] Nature trick of adding in the real temps to each series for the last 20 years (i.e. from 1981 onwards) [and] from 1961 for Keith's to hide the decline."[6] Dr. Mann himself has not denied the omission of certain proxy data after the year 1960, but has argued that the omission is legitimate: "[T]hese data should not be used to represent temperatures after 1960," he explains, because "the density of wood exhibits an enigmatic decline in response to temperature after about 1960."[7] In other words, because temperature measurements from modern instruments show that these data points are not reliable, Mann contends that it is legitimate "not to show those data during the unreliable post-1960 period." *Id.* Critics disagree, arguing that the hockey stick should have included the post-1960 proxy data to give a more full and accurate picture: since modern instruments have shown tree-ring proxies to be inaccurate after 1960, they say, this also calls into question the reliability of the proxy data from earlier years, where no thermometer readings are available to provide an independent check.

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[6] *Independent Climate Change Emails Review* (July 2010), at 32.

[7] Michael Mann, "E-mail furor doesn't alter evidence for climate change," *Washington Post*, Dec. 18, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/17/AR2009121703682.html.

Based on these four separate criticisms, Dr. Mann and his detractors have engaged in a long-running public debate over the validity of the hockey stick and its underlying methodology. Dr. Mann and his defenders characterize the hockey stick as methodologically sound, contending that it gives an accurate picture of the dire threat global warming poses. Critics of the hockey stick characterize it as badly flawed, contending that its reliance on questionable statistical techniques and its method of data presentation render it false and misleading. In testimony before the United States Congress, Professor John Christy summarized the critical view by stating that "evidence now indicates . . . that an IPCC Lead Author working with a small cohort of scientists, misrepresented the temperature record of the past 1000 years by (a) promoting his own result as the best estimate, (b) neglecting studies that contradicted his, and (c) amputating another's result so as to eliminate conflicting data and limit any serious attempt to expose the real uncertainties of these data."[8]

3. <u>The tone of the debate</u>

Given the strong differences of opinion, the tone of the hockey-stick debate has been intense and at times vituperative, with both sides indulging in caustic rhetoric. Dr. Mann himself has harshly condemned his critics, branding them as "climate deniers," and denouncing them as liars and frauds. In 2005, for example, Dr. Mann wrote an e-mail to a *New York Times* reporter asserting that "[t]he McIntyre and McKitrick paper is pure scientific fraud," and that "[a] number of us are . . . very surprised that *Nature* is publishing it."[9] That same year, in a 2005 interview with a political magazine, Dr. Mann stated that "'[a]s it plays out in the peer-reviewed literature, it will soon be

[8] John Christy, Written Testimony, "Examining the Process concerning Climate Change Assessments," House Science, Space and Technology Committee (Mar. 31, 2011), *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/ChristyJR_written_110331_all.pdf

[9] See Environmental Protection Agency, 3 *EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* (2010) (quoting email from Michael Mann to Andy Revkin, reporter, N.Y. Times (Feb. 4, 2005)). The full text is available at http://di2.nu/foia/foia2011/mail/3045.txt.

evident that many of [the] claims made by the contrarians were fraudulent."[10] In his recent book, Dr. Mann similarly lambasted his critics as "those who have funded or otherwise participated in the fraudulent denial of climate change," including "individuals and groups who both made and took corporate payoffs for knowingly lying about the threat climate change posed to humanity," and "those who willfully have led the public and policy makers astray."[11] In 2010 he offered a political commentary in the *Washington Post*, claiming that the "attacks" on the hockey stick and other climate models "are not good-faith questioning of scientific research," but are instead "anti-science," and warning that the "failure to accept the reality of climate change will hurt our children and grandchildren."[12] More recently, he asserted that Fox News deliberately "sought to mislead its viewers" by "focusing attention" on a "deceptive . . . report" that "simply regurgitates standard shopworn denialist myths and erroneous talking points" on global warming.[13]

In *Climate Wars*, Dr. Mann explained his view that "the scientific community is in a street fight with climate change deniers," and that scientists must "fight[] back against this assault on science."[14] In a recent op-ed for the *New York Times*, he similarly lamented that despite "[t]he overwhelming consensus among climate scientists" on global warming, there is "a fringe minority of our populace" that still "clings to an irrational rejection of well-established science."[15] "This virulent

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[10] "The Man Behind the Hockey Stick," *Mother Jones*, April 17, 2005.

[11] *Climate Wars* at 249.

[12] Michael E. Mann, "Get the anti-science bent out of politics" (Oct. 8, 2010), *Washington Post*, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100705484.html.

[13] Michael Mann, "The IPCC, Climate Change and Bad Faith Attacks on Science," *Huffington Post* (Sept. 27, 2013) http://www.huffingtonpost.com/michael-e-mann/climate-change-report_b_3999277.html

[14] Suzanne Goldenberg, "The Inside Story on Climate Scientists Under Siege," *The Guardian* (Feb. 17, 2012), http://www.guardian.co.uk/environment/2012/feb/17/michael-mann-climate-war.

[15] Michael E. Mann, "If You See Something, Say Something," *New York Times*, Jan. 17, 2014, http://www.nytimes.com/2014/01/19/opinion/sunday/if-you-see-something-say-something.html.

strain of anti-science," he continued, "infects the halls of Congress, the pages of leading newspapers and what we see on TV, leading to the appearance of a debate where none should exist." *Id.*

In an apparent effort to stomp out "debate where none should exist," Dr. Mann has threatened or initiated litigation against a number of his critics. In addition to this suit, for example, Dr. Mann threatened a parody website with a lawsuit based on a satirical video of his climate-change research.[16] Dr. Mann also filed another libel suit against climate skeptic Dr. Timothy Ball, a retired professor from the University of Winnipeg, who criticized Dr. Mann in an interview with the Frontier Centre for Public Policy. *See Mann v. Ball et al.*, No. VLC-S-S-111913 (Sup. Ct. B.C. 2011).

B. National Review's Opinion Blog, "The Corner"

National Review was founded in 1955 as the nation's first major conservative opinion journal, dedicated to fostering public debate to counter what it perceived to be the prevailing liberal orthodoxy of the American intellectual establishment. National Review runs an annual operating deficit of roughly two million dollars, relying on donations to keep itself afloat. In addition to publishing a print magazine, National Review also hosts a website, National Review Online ("NRO"), which provides free opinion commentary over the Internet. Alongside more traditional articles commissioned and edited by National Review's editorial staff, NRO also includes a collection of more than a dozen blogs that are updated up to a hundred times each day. The most widely read blog is *The Corner*, a free-wheeling discussion forum that offers commentary on a diverse array of topics written by dozens of bloggers. By allowing them to post real-time commentary with little or no filter, National Review fosters a vibrant and uninhibited exchange of ideas on a scale that

[16] *See* Cease and Desist Letter from Peter J. Fontaine. Esq., on Behalf of Dr. Michael Mann, Mar. 8, 2010, *available at* http://www.nocapandtrade.com/images/Mann-Letter.jpg

would be impossible in a more traditional journalistic medium. Consistent with that function, *The Corner* has long described itself as "a web-leading source of real-time conservative opinion."[17]

One of the contributors to *The Corner* is Mark Steyn, a well-known freelance political commentator, polemicist, and humorist who is also a co-defendant in this case. At the time of Dr. Mann's lawsuit, Steyn was an outside contributor who would author and post his commentary directly to *The Corner* by logging into National Review's website with his own unique user name and password. Upon logging in, the system allowed him to post items without prior editing or review.

C. The Opinion Commentary Published by National Review

On July 15, 2012, Mark Steyn penned and posted a 272-word blog entry on *The Corner*—whimsically entitled "Football and Hockey"—which weighed in on the hockey-stick controversy. The occasion for the post was another blog entry posted on the website of the Competitive Enterprise Institute (CEI) by Rand Simberg, who had invoked a crude metaphor involving Dr. Mann and Jerry Sandusky, the disgraced former Penn State football coach. Steyn quoted Simberg's statement that "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." J.A. 52 Steyn then commented, "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point. Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." *Id.* As usual, National Review did not edit or review the post prior to publication.

On July 23, Dr. Mann sent a letter to National Review threatening a lawsuit over Steyn's blog post. On August 22, National Review responded with a letter stating that the blog post was

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[17] *See* http://www.nationalreview.com/taxonomy/term/22/about#

protected speech under the First Amendment because it was an expression of opinion through rhetorical hyperbole on a matter of public concern. National Review's editor, Richard Lowry, also wrote an article on NRO addressing the threatened lawsuit, reiterating the view that Steyn's commentary was a loose and colorful expression of opinion that did not allege any specific act of fraud in the literal sense. As Lowry put it: "In common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us." J.A. 94.

Dr. Mann accepted the invitation and sued National Review, contending that Lowry's use of the term "intellectually bogus" *itself* was libelous, because it was tantamount to an "allegation of academic fraud." J.A. 72. In his complaint, Dr. Mann alleged that "calling [his] research 'intellectually bogus' is defamatory per se and tends to injure Dr. Mann in his profession because it falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally." J.A. 78 (Count IV). Dr. Mann also brought claims against Steyn and National Review for libel and intentional infliction of emotional distress based on Steyn's blog post on *The Corner*. According to the complaint, referring to Dr. Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus" is defamatory because it is a literal accusation of criminal and academic fraud. S*ee* J.A. 76 (Count III). Dr. Mann further alleged a claim for intentional infliction of emotional distress for "comparing him to a convicted child molester." J.A. 82 (Count VI). Dr. Mann based this count on Steyn's quotation of Simberg's statement that he "could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science." He later amended his complaint to add a count of defamation based on the same language. J.A. 82 (Count VII). He brought similar claims against Simberg and CEI.

D. The Proceedings and Decision Below

After Dr. Mann filed his initial complaint in the D.C. Superior Court, National Review and co-defendant Steyn filed joint motions to dismiss under Rule 12(b)(6) and the D.C. Anti-SLAPP Act, which requires a plaintiff who sues over speech "in furtherance of the right of advocacy on issues of public interest" to prove that his claims are "likely" to succeed. D.C. Code § 16-5502(a)-(b). Co-defendants Simberg and CEI filed similar joint motions. After full briefing was complete, the trial court, Judge Natalia Combs Greene, held a joint hearing on all parties' motions to dismiss.

Shortly after the hearing, Dr. Mann filed an amended complaint adding one new claim of defamation against National Review and all other defendants, based on Steyn's quotation of Simberg's Jerry Sandusky analogy. J.A. 82 (Count VII). The new claim asserted that because Sandusky has "been convicted of multiple counts of child molestation," "has been widely criticized for violating the public's trust," and "is presently serving a life sentence in prison," the quoted comparison "caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally." J.A. 83. Aside from this new claim, the amended complaint was substantially identical to the original.

Despite Dr. Mann's filing of an amended complaint, the trial court issued an order on July 19, 2013, denying all defendants' motions to dismiss the original complaint. In that order, the court noted that "Plaintiff does not seriously challenge the applicability of the Anti-SLAPP Act because [the speech at issue] arises from an act in furtherance of the right of advocacy on issue of public interest." J.A. 106. Nor did Dr. Mann "seriously challenge the assertion that he is a public figure." J.A. 119. Thus, the court concluded, he must show "actual malice" to succeed.

While the court viewed the case as "very close," J.A. 115 n.14, the court held that Dr. Mann was "likely" to succeed on all six counts in his original complaint. The court acknowledged that "[l]anguage such as 'intellectually bogus[,]' 'data manipulation[,]' and 'scientific misconduct' in the

context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud," J.A. 116, and that such language "appears to have become what some may describe as the norm (in global warming criticism)," J.A. 113. Nonetheless, the court relied heavily on the "dictionary definition[s]" of "fraud" and "bogus" to find the statements actionable. J.A. 114. The court opined that "[t]o call [Dr. Mann's] work a sham or to question his intellect and reasoning" is to assert a statement of fact that is provably false because his work "has been investigated by several bodies (including the EPA)" who have "determined that Plaintiff's research and conclusions are sound and not based on misleading information." *Id.* The court further held that Dr. Mann was "likely" to prove "actual malice" by "clear and convincing" evidence. In the court's view, because "Defendants consistently claim that Plaintiff's work is inaccurate (despite being proven as accurate)," "there is a strong probability that the [defendants] disregarded the falsity of their statements and did so with reckless disregard." J.A. 120.

National Review and Steyn filed a joint consolidated motion for reconsideration and motion to dismiss Dr. Mann's amended complaint. The superior court did not act on the motion to dismiss the amended complaint but denied the motion for reconsideration on August 30, 2013. National Review and Steyn then sought certification of an interlocutory appeal, which the superior court denied. National Review and Steyn (and, separately, CEI and Simberg) then filed a notice of appeal. This Court consolidated the appeals and requested briefing on its jurisdiction to hear an immediate appeal under the collateral-order doctrine. After the parties and three sets of *amici* briefed the jurisdictional issue, this Court dismissed the appeals without prejudice due to mootness, in light of Dr. Mann's filing of an amended complaint, and the defendants' still-pending motions to dismiss it.

On remand, Judge Frederick Weisberg took over the case. Despite acknowledging that the Anti-SLAPP statute requires the court to hold "an expedited hearing" on an Anti-SLAPP motion, the court did not hold a new hearing, instead noting that "Judge Combs Greene already held such a

hearing on the original Anti-SLAPP motions." J.A. 162 n.3 (quoting D.C. Code § 28-5502(d)). The court then denied defendants' motions to dismiss the amended complaint in a six-page order on January 22, 2014, substantially adopting the reasoning of Judge Combs Greene's previous orders. Relying heavily on the dictionary definitions of "torture" and "molest," the court concluded that, "[v]iewing the alleged facts in the light most favorable to plaintiff, as the court must on a motion to dismiss, a reasonable jury is likely to find the statement that Dr. Mann 'molested and tortured data' was false, was published with knowledge of its falsity or reckless disregard of whether it was false or not, and is actionable as a matter of law[.]" J.A. 164. The court did not consider whether the Anti-SLAPP Act, which imposes an affirmative burden on the plaintiff to show a likelihood of success on the merits, makes it improper to follow the standard Rule 12 practice of "[v]iewing the alleged facts in the light most favorable to [the] plaintiff."

Without addressing the context of the heated public controversy over the hockey stick, the court adopted Judge Combs Greene's conclusion that the speech at issue is not protected as a matter of law. Again relying on dictionary definitions, the court held that the speech *could* be interpreted as a literal accusation of data falsification, and *if* it is so interpreted, then "[a]ccusing a scientist of conducting his research fraudulently, manipulating his data to achieve a predetermined or political outcome, or purposefully distorting the scientific truth are factual allegations." J.A. 163. The court acknowledged that "[a]ccusing [Dr. Mann] of working 'in the service of politicized science' is arguably a protected statement of opinion," J.A. 163 n.6, but held that, "[f]or many of the reasons discussed [by] Judge Combs Greene[] . . . to state as a fact that a scientist dishonestly molests or tortures data to serve a political agenda would have a strong likelihood of damaging his reputation within his profession, which is the very essence of defamation." J.A. 164.

All defendants appealed with the exception of Steyn. On appeal, this Court again ordered briefing on whether it had jurisdiction to review the denial of an Anti-SLAPP motion under the

collateral-order doctrine. The parties briefed the jurisdictional issue, with National Review again receiving *amicus* support from the District of Columbia government, the American Civil Liberties Union, and a coalition of the Reporters Committee for Freedom of the Press and 19 other media organizations. After reviewing the jurisdictional briefing, the Court ordered the parties to brief the merits of the appeal, reserving the question of immediate appealability.

JURISDICTION

This Court has jurisdiction to review the denial of National Review's Anti-SLAPP motion for the reasons set forth in Appellants' joint jurisdictional briefing and the supporting *amicus* briefs. In addition, this Court recently affirmed the immediate appealability of an Anti-SLAPP motion to quash in *Doe v. Burke*, 91 A.3d 1031 (D.C. 2014), and the same reasoning applies *a fortiori* here.

To qualify for immediate appeal under the collateral-order doctrine, an order must satisfy three criteria: it (1) "must conclusively determine a disputed question of law," (2) "must resolve an important issue that is separate from the merits of the case," and (3) "must be effectively unreviewable on appeal from a final judgment." *Burke*, 91 A.3d at 1037 (citation omitted). As this Court's decision in *Burke* confirms, these requirements are easily satisfied here.

First, the court's order squarely resolved the legal question of whether the Anti-SLAPP Act entitles National Review to protection from the costs of litigation for engaging in protected speech. As *Burke* recognized, such an order "satisfies any concerns regarding conclusivity." *Id.* (quoting *Henry v. Lake Charles Am. Press*, 566 F.3d 164, 174 (5th Cir. 2009)).

Second, denial of an Anti-SLAPP motion "resolves an important issue separate from the merits of the lawsuit." Again, as *Burke* held, the question whether the defendant's speech "qualifies for protection under the statute is a separate question from whether [the defendant] may be held liable for defamation." *Id.* The purpose of the Anti-SLAPP inquiry is "'not to determine whether the defendant actually committed the relevant tort,'" but instead to determine whether the defendant

is sufficiently *likely* to prove the tort to justify imposing the burdens of litigation on the defendant. *Id.* (quoting *Henry*, 566 F.3d at 175). "Put another way, the '[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed.'" *Id.* at 1038-39 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)). Thus, "the issue of immunity from having to defend against . . . [a] defamation claim is separate from the *merits* of that claim." *Id.* at 1039.

Third, denial of an Anti-SLAPP motion to dismiss is "effectively unreviewable on appeal from a final judgment," because the Anti-SLAPP Act "explicitly protects the right not to stand trial," which right is lost once a trial occurs. *Id.* at 1039 (citation and quotation marks omitted). Indeed, *Burke* found that even the denial of a special motion to quash was immediately appealable, because it "confer[red] an immunity *of a sort* from suit." *Id.* (emphasis added). It thus follows *a fortiori* that denial of a special motion to dismiss—which *Burke* expressly identified as granting a full-fledged immunity from suit—is immediately appealable as well. *See also id.* at 1039 ("[T]he denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus to be immediately appealable."). As the court explained, it makes no difference that the Anti–SLAPP Act "does not explicitly provide for the immediate appeal of the denial of a special motion," because the Act clearly creates an immunity from suit, the denial of which supports a right of immediate appeal. *Id.* at 1039 n.12.

STANDARD OF REVIEW

This Court reviews denial of an Anti-SLAPP motion *de novo*. *See Burke*, 91 A.3d at 1040.

SUMMARY OF ARGUMENT

Under the D.C. Anti-SLAPP Act, a plaintiff such as Dr. Mann who files a lawsuit over speech on a matter of public concern must shoulder the heavy burden of demonstrating that his claims are "likely" to succeed before courts will allow him to impose the full burdens of litigation on

the defendant. Where, as here, the plaintiff is a public figure who has thrust himself into a public controversy and is suing his critics, the burden is especially heavy. Dr. Mann cannot carry that burden. His audacious attempt to sue a public-affairs magazine for publishing commentary on its opinion blog criticizing his controversial hockey-stick graph is highly unlikely to succeed.

First, Dr. Mann's claims fail because the commentary published by National Review was nothing more than vigorous criticism of the methods and conclusions underlying the hockey-stick graph's depiction of global warming, which is a matter of intense political and scientific controversy. The First Amendment requires the merits of such criticism to be resolved through speech and counter-speech, not through costly lawsuits and court verdicts. In allowing this suit to proceed because defendants' fully protected critical commentary *could be* interpreted as a literal accusation of criminal fraud or data falsification based on the dictionary definition of the terms employed, the lower court failed to provide adequate breathing space for colorful expression and rhetorical hyperbole in public debate. This is particularly obvious with respect to the statement that the hockey stick is "intellectually bogus and wrong," which even under its most literal meaning expresses nothing more than caustic criticism of the merits of Dr. Mann's scientific work.

Second, Dr. Mann's suit should also be dismissed because he cannot possibly carry his burden of showing that he is "likely" to prove by "clear and convincing" evidence that National Review published any of the commentary with "actual malice"—that is, with knowledge or strong *subjective* suspicion that the statements are false. The purpose of the "actual malice" requirement is to ensure that speakers cannot be punished for expressing their sincere beliefs on matters of public concern. Here, the circumstances of the public debate plainly show that National Review is sincere in its belief that the hockey stick is "intellectually bogus and wrong"—or "fraudulent" and based on "molested and tortured data," especially as those terms are understood in their loose polemical sense.

Third, even if the opinion commentary of Steyn and Simberg were somehow actionable, National Review is immune from liability under the well-established federal immunity for Internet publishers who publish content authored by third parties. Because National Review's online opinion blog plainly qualifies for this immunity, Dr. Mann's claims against National Review based on commentary authored by Steyn and Simberg cannot possibly succeed.

At bottom, forcing National Review to bear any further costs before dismissing this lawsuit would thoroughly stifle free speech. It would convert the acrimonious public debate over the hockey stick into a litigation free-for-all, encouraging each side to try to sue the other into submission instead of resolving their disagreements through the free exchange of ideas. Allowing this type of case to proceed would also have a severe chilling effect on the broader field of public debate, authorizing partisans of all stripes to suppress criticism through the use of strategic lawsuits to inflict the costs and burdens of litigation on their intellectual opponents. This is exactly what the First Amendment and the D.C. Anti-SLAPP Act were designed to prevent.

ARGUMENT

I. The D.C. Anti-SLAPP Act Applies To Dr. Mann's Attempt To Silence His Critics

The D.C. Anti-SLAPP Act was enacted to protect defendants from being forced to "dedicate a substantial[] amount of money, time, and legal resources" to defend meritless suits intended to "punish[] or prevent[] opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." J.A 167. The Act applies where "the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b), and "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed at preventing their engaging in constitutionally protected actions on matters of public interest." J.A 170.

To effectuate these aims, the Anti-SLAPP Act alters the usual procedures for dismissal on the pleadings and imposes an affirmative burden on the plaintiff to prove that each of his claims "is likely to succeed on the merits." D.C. Code § 16-5502(b). Specifically, the plaintiff must establish both the legal adequacy of the complaint, as well as a likelihood of proving each element of his claim. *Forras v. Rauf*, No. 12-00282, 2014 WL 1512814, at *5 (D.D.C. Apr. 18, 2014). This is a demanding standard. *See 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 102 (D.D.C. 2012) ("There is no question that the special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid dismissal.").

In requiring the plaintiff to show a likelihood of success on the merits, the standard under the Anti-SLAPP Act is at least as onerous as on a motion for preliminary injunction. Unlike a traditional motion to dismiss under Rule 12, the Anti-SLAPP Act does not limit the court's review to the complaint or take plaintiff's allegations as true. *Boulter*, 842 F. Supp. 2d at 102. To the contrary, the plaintiff must "provide the court with sufficient evidence" to substantiate his claims. *DuPont Merck Pharm. Co. v. Sup. Ct. of Orange Cnty.*, 78 Cal. App. 4th 562, 568 (Cal. App. Ct. 2000). The court must then "undertake a fact-finding role," *Boulter*, 842 F. Supp. 2d at 108, to assess whether plaintiff is "likely" to prove each element of his claim. "[T]he statute ultimately mandates dismissal with prejudice if the plaintiff fails to demonstrate a likelihood of success on the merits, even where a plaintiff has raised a genuine issue of material fact." *Id.* at 106. In *Burke*, for example, this Court drew inferences from the circumstances to find the plaintiff unlikely to prove actual malice despite the factual allegations in the complaint. 91 A.3d at 1041.

In the court below, Dr. Mann conceded that his "Complaint 'arises from an act in furtherance of the right of advocacy on issues of public interest.'" *See* Plaintiff's Response to Motion to Dismiss at 37; *id.* at 8 ("We do not argue that the anti-SLAPP law is inapplicable in this

circumstance.”). That concession was inevitable, as the commentary at issue here was plainly a form of advocacy on global warming in general and the validity of the hockey stick in particular, both of which are issues of intense “public interest.” Accordingly, Dr. Mann’s claims must be dismissed unless he shows that they are “likely to succeed on the merits.” D.C. Code § 16-5502(b).

Dr. Mann’s claims against National Review are not remotely likely to succeed. The First Amendment “greatly restrict[s]” defamation liability “where the defendant is a member of the press, the plaintiff is a public figure, or the subject matter of the supposed libel touches on a matter of public concern. Where, as here, all of these considerations are present, the constitutional protection of the press reaches its apogee.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993). In light of that robust protection, Dr. Mann’s claims must fail for three independent reasons. *First*, the commentary at issue is protected under the First Amendment because it was vigorous expression of criticism on a matter of scientific and political controversy, and as such cannot be subject to legal sanction. *Second*, the commentary is protected because it reflects National Review’s sincere beliefs about the hockey stick, and Dr. Mann is not “likely” to show “actual malice” by “clear and convincing evidence.” And *third*, in any event, federal law makes clear that National Review cannot be held liable as an Internet publisher for any of the statements authored by Steyn or Simberg.

II. Criticism Of The Hockey Stick Is Not Actionable Under The First Amendment

Under the First Amendment, the merits of scientific and political controversy must be resolved through the process of free and open debate, not through costly litigation. That principle applies directly here, where Dr. Mann’s scientific work is at the center of a heated political debate. Dr. Mann cannot use the law of defamation to impose sanctions on National Review for publishing vigorous criticism of his hockey-stick graph, or for speech that can reasonably be interpreted as such.

A. The First Amendment Protects Vigorous Criticism on Matters of Political and Scientific Controversy

"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U. S. 138, 145 (1983). "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Garrison*, 379 U. S. at 74-75). "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). As far as the Constitution is concerned in this area, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

In its recent decision in *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012), the Supreme Court made clear that truth on matters of public controversy cannot be dictated by the government, including by the courts in defamation actions. As Justice Kennedy explained for the plurality, quoting George Orwell's *1984*, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 2547. Justice Breyer agreed, stating that in "the political arena" especially, imposing legal punishment for supposedly "false" speech "is particularly dangerous." *Id.* at 2556 (Breyer, J., concurring). Even the dissenting Justices acknowledged that "there are broad areas"—including, notably, "matters of public concern" such as "philosophy, religion, history, the social sciences, the arts, and the like"—"in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564 (Alito, J., dissenting). The First Amendment thus prohibits judicial determination of "truth" in the realm of public controversy, in recognition of the serious dangers to deliberative democracy that

would result from turning the federal courts into a truth squad on public affairs. *See Alvarez*, 132 S. Ct. at 2547-48 (plurality); *id.* at 2552, 2556 (Breyer, J., concurring); *id.* at 2564 (Alito, J., dissenting).

"Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of [] First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability." *Greenbelt Coop. Publ'g Assn. v. Bresler*, 398 U.S. 6, 12 (1970). Any claim for defamation must rest on a specific statement of fact whose truth or falsity can be "objectively verifi[ed]" in court without intruding on the field of free expression. *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000) (citation omitted).

1. Scientific controversy must be resolved through free and open debate, not through litigation.

The First Amendment recognizes that the surest path to truth in the realm of scientific controversy is through the free and open exchange of ideas, not through litigation. For this reason, courts use special care in discerning whether a statement is "provably false," *id.*, in the scientific context. Practically all scientific claims "are, in principle, 'capable of verification or refutation by means of objective proof,'" as "it is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496 (2d Cir. 2013) (quoting *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 n. 7 (1st Cir. 1992)). But "propositions of empirical 'fact'" themselves "may be highly controversial and subject to rigorous debate," and "courts are ill-equipped to undertake to referee such controversies." *Id.* at 497. As one court explained, even though "scientific truth" is theoretically verifiable, it is nevertheless "elusive." *Underwager v. Salter*, 22 F.3d 730, 735-36 (7th Cir. 1994).

Because scientific truth is "elusive," "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Id.* "More papers, more discussions, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us." *Id.* at 736. Consequently, for First Amendment

purposes, "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983 (10th Cir. 2005) (citation omitted). Indeed, even apart from bottom-line conclusions, "what constitutes acceptable testing procedures, as well as how best to interpret data garnered under various protocols," can itself invite contentious debate among scientists. *Padnes v. Scios Nova Inc.*, No. C 95-1693, 1996 WL 539711, at *5 (N.D. Cal. Sept. 18, 1996).

For these reasons, "[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context." *Arthur v. Offit*, No. 01:09-cv-1398, WL 883745, at *6 (E.D. Va. Mar. 10, 2010). Defamation claims touching on scientific controversy "threaten[] to ensnare the [courts] in [a] thorny and extremely contentious debate over . . . which side of this debate has 'truth' on their side," which "is hardly the sort of issue that would be subject to verification based upon a core of objective evidence." *Id.*; *see also Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006) ("Courts cannot inquire into the validity of scientific works, for any unnecessary intervention by the courts in the complex debate and interplay among the scientists that comprises modern science can only distort and confuse." (citation omitted)). In short, "putting to the pre-existing prejudices of a jury the determination of what is 'true' [in the realm of scientific debate] may effectively institute a system of censorship. Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity." *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part).

In keeping with these principles, criticism of a scientist's research must be answered by intellectual rebuttal, not through the filing of lawsuits. A statement is not actionable when it is "not the character but the *ideas*" of the plaintiff that are at stake. *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) (emphasis added). In *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 133 (D.D.C. 2009), for example, the court found that it was not actionable to claim that the plaintiff was "spreading lies,"

because the claim was "less an attack on [plaintiff's] general character and instead a dispute with the accuracy of a specific statement made by him." Similarly, in *Klein v. Victor*, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995), the court held that the phrase "pseudo-scientific propaganda materials" was not actionable because it was a criticism of the plaintiff's methods. As the court noted, "[w]hat one social scientist considers to be pseudo-scientific another could consider legitimate, but, in the context used here, neither can be tested or proven." *Id.* Indeed, if statements about the validity of scientific methodology could be subject to defamation suits, then the process of free debate would wither and die. Critics would be deterred from speaking out due to the threat of punishment for participating in the very process of truth-seeking that the First Amendment is designed to protect.

2. The First Amendment protects rhetorical hyperbole on matters of public controversy

Speakers who engage in protected expression on matters of public controversy often use vigorous language and rhetorical hyperbole to make their point. They do not hew to strict literalisms but regularly use words "in a loose, figurative sense" to express "strong disagreement," *Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1973), and attack their intellectual opponents through "rhetorical hyperbole" or "vigorous epithets." *Greenbelt Coop. Publ'g*, 398 U.S. at 14. Such vigorous expression is an inherent feature of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *N.Y. Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964).

"If the First Amendment's guarantees of freedom of speech and of the press are to ensure that these rights are meaningful not simply on paper, but also in the practical context of their exercise, then a newspaper Op-Ed column discussing a subject of public interest must surely be accorded a high level of protection, lest the expression of critical opinions be chilled." *Guilford Transp.*, 760 A.2d at 582. If courts did not provide strong protection for caustic criticism in public

debate, the threat of litigation would cast a "pall of fear and timidity . . . upon those who would give voice to public criticism," thus creating "an atmosphere in which the First Amendment freedoms cannot survive." *N.Y. Times Co.*, 376 U.S. at 278.

The realm of public debate is full of caustic rhetorical hyperbole. For example, Pulitzer Prize–winning columnist Charles Krauthammer penned a column in the *Washington Post* asserting that "[i]ntelligent design may be interesting as theology, but as science it is a fraud."[18] A writer for *The Atlantic* similarly asserted that it was "fraudulent" for actress Jenny McCarthy to claim that autism is linked to infant vaccination.[19] *New York Times* columnist Thomas Friedman asserted that "the climate-denier community, funded by big oil, has published all sorts of bogus science for years."[20] Also in the *New York Times*, another writer railed against the National Rifle Association for deploying "bogus" statistics on "defensive gun use."[21] Columnist Paul Krugman blasted House Republicans for passing "what was surely the most fraudulent budget in American history," adding, "[a]nd when I say fraudulent, I mean just that."[22] He also accused a fellow economist of "using a comparison that is completely fraudulent—and I say fraudulent, not wrong, because he is indeed enough of a policy wonk here to know that he is pulling a fast one."[23]

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[18] Charles Krauthammer, "Phony Theory, False Conflict," *The Washington Post* (Nov. 18, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111701304.html

[19] David M. Perry, "Destabilizing the Jenny McCarthy Public-Health Industrial Complex," *The Atlantic* (July 11, 2013), http://www.theatlantic.com/health/archive/2013/07/destabilizing-the-jenny-mccarthy-public-health-industrial-complex/277695/.

[20] Thomas L. Friedman, "Going Cheney on Climate," New York Times (Dec. 8, 2009), http://www.nytimes.com/2009/12/09/opinion/09friedman.html

[21] Juliet Lapidos, "Defensive Gun Use," *New York Times* (Apr. 15, 2013), http://takingnote.blogs.nytimes.com/2013/04/15/defensive-gun-use.

[22] Paul Krugman, "Pink Slime Economics," *The New York Times* (Apr. 1, 2012), http://www.nytimes.com/2012/04/02/opinion/krugman-pink-slime-economics.html

[23] Paul Krugman, "We Are Not Having a Serious Discussion, Obamacare Edition," *The New York Times* (June 1, 2013), http://krugman.blogs.nytimes.com/2013/06/01/we-are-not-having-a-serious-discussion-obamacare-edition/

In the heat of public debate, such rhetorical hyperbole is fully protected under the First Amendment. Indeed, if authors and publishers could be sued every time they used figurative language about "fraudulent" methodology, "bogus" science, or misleading statistics on matters of public controversy, the scope of free speech in our national discourse would be dramatically curtailed. "[A]uthors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered." *Guilford*, 760 A.2d at 599 (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995)).

The Supreme Court has made clear that the First Amendment provides broad leeway for rhetorical hyperbole on matters of public controversy. In *Greenbelt Publishing*, for example, a real-estate developer brought a defamation suit based on his critics' statement that he had resorted to "blackmail" in his business negotiations. 398 U.S. at 7. He contended that the statement was defamatory because it "imputed to him the crime of blackmail." *Id.* at 7. On that theory, the lower court had allowed the case to go to trial because the statement "could be found by the jury (as it was) to charge [the plaintiff] with the commission of a crime." 253 Md. 324, 352 (1969). The Supreme Court reversed, holding that it was improper to submit the meaning of the statement to the jury because, "as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported." *Greenbelt Publ'g*, 398 U.S. at 13. In so holding, the Court emphasized the need to provide broad protection for speech in a public debate on "a subject of substantial concern to all who lived in the community." *Id.* As the Court noted, the statement had been made in a public debate that was "heated, as debates about controversial issues usually are," and the term "blackmail" had been used as a colorful way of "characteriz[ing] the position [plaintiff] had taken in his negotiations." *Id.* For that reason, "the word was no more than

rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." *Id.* at 14. "To permit the infliction of financial liability" for such a statement, the Court explained, "would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Id.*

The Supreme Court reached a similar conclusion in *Letter Carriers v. Austin*, 418 U.S. 264 (1974). In that case, workers brought a defamation suit against a union that had distributed literature referring to them as "scabs" and "traitor[s]." *Id.* at 268. The plaintiffs pled that those terms were defamatory because they amounted to a specific allegation of traitorous behavior, "that these charges [we]re untrue; and that [defendants] knew they were untrue." *Id.* at 283. The Court rejected that argument, holding that although such terms might convey a concrete factual meaning in some contexts, the "use of words like 'traitor' cannot be construed as representations of fact" when spoken in the course of heated public debate. *Id.* at 284. As the Court noted, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." *Id.* (quoting *Cafeteria Emps. Local 302 v. Angelos*, 320 U. S. 293, 295 (1943)). Instead, such caustic terminology deployed in the heat of public controversy was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

Numerous cases illustrate the same point. For example, in *Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 620 (D.C. Cir. 2001), the plaintiff sued a political magazine over accusations of "paranoia" and other mental defects. The court held that the accusations were not actionable as a matter of law: Although "looking at these statements in isolation, a reasonable reader *might* interpret them to attribute a diagnosable and debilitating mental affliction," *id.* at 625, in context the words were "used . . . as a popular, not clinical, term, to embellish the author's view of [the plaintiff's] political zealotry and intemperate nature," *id.* at 620 Similarly, in *Faltas v. The State Newspaper*, a

professor at a medical school sued a newspaper for publishing letters to the editor claiming she had "lie[d] to suit her agenda" and "present[ed] lies as truth" in her "meta-analysis of homosexual behavior." 928 F. Supp. 637, 640-42 (D.S.C. 1996), *aff'd*, 155 F.3d 557 (4th Cir. 1998). Noting that the terms had been "used in the context of challenging plaintiff's position on a given controversial subject as to which 'experts' obviously disagree, often in less than collegial tones," the court held as a matter of law that "[a] reasonable reader would presume the letter is an impassioned response to the positions taken by [plaintiff] in her article, and nothing more." *Id.* at 648.

In *Arthur v. Offit*, the plaintiff sued for defamation based on the statement, "she lies," which appeared in an article about child vaccinations. 2010 WL 883745, at *5-6. The court held that the statement was not actionable as a matter of law because it addressed "an emotional and highly charged debate about an important public issue over which [the parties] have diametrically opposed views," thus signaling "to readers that they should expect emphatic language on both sides and should accordingly understand that the magazine is merely reporting [the defendant]'s personal opinion of [plaintiff]'s views." *Id.* at 5. The court explained that, "[a]gainst this contextual backdrop, the declaration 'she lies' is plainly understood as an outpouring of exasperation and intellectual outrage over Plaintiff's ability to gain traction for ideas that Defendant . . . believes are seriously misguided, and not as a literal assertion of fact." *Id.*

In *Schnare v. Ziessow*, 104 Fed. App'x 847 (4th Cir. 2004), the plaintiff sued for defamation where an article stated that he had previously filed an affidavit containing "some 60 pages of fact and fiction, innuendo, half-truths, exaggerations and fabrications." *Id.* at 851. The court held that the statements—"which on their face are accusations of lying"—were not actionable as a matter of law because they "are actually vigorous and angry expressions of disagreement." *Id.* at 852. In *Phantom Touring*, the First Circuit similarly held that it was not actionable to call a musical production "a fraud, a scandal, [and a] snake-oil job" that deliberately deceived the public. *Phantom Touring*, 953

F.2d at 728 ("Not only is this commentary figurative and hyperbolic, but we also can imagine no objective evidence to disprove it."); *see also Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 727 (R.I. 2000) (broker's assessment of an appraisal as "fraudulent" held to be a non-actionable "vigorous epithet"); *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 171 (D.N.J. 1982) (protected hyperbole to criticize a book as "the # 1 fraud ever perpetrated upon the gambling reader"). As these and many other cases show, "the First Amendment protects statements of imaginative expression and rhetorical hyperbole in order to assure that the public debate will not suffer for lack of these statements, which have traditionally added much to the discourse of our nation." *Guilford*, 760 A.2d at 589.

3. Protecting free speech requires substantive and procedural safeguards

To protect vigorous expression on matters of public concern from the chilling effect of defamation suits, courts have adopted both procedural and substantive safeguards.

a) The procedural protection of judicial gatekeeping

Courts must serve as gatekeepers to ensure that protected speech on matters of public controversy is not subject to the burdens of litigation and potential liability. As this Court has emphasized, "it is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal." *Guilford*, 760 A.2d at 583 (quoting *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) (per curiam)).

Under the First Amendment, the court's role is "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). Because different juries are not equipped to protect speech in a consistent and impartial manner, particularly on controversial subjects, the Supreme Court has stressed "the 'ultimate power of appellate courts to

conduct an independent review of constitutional claims when necessary." *Id.* at 507-08 (quoting *Miller v. California*, 413 U.S. 15, 25 (1973). Thus, in drawing "the line between speech unconditionally guaranteed and speech [that] may legitimately be regulated," courts "examine for [them]selves the statements in issue and the circumstances under which they were made." *Id.* at 508 (quoting *N.Y. Times Co.*, 376 U.S. at 285).

The court's role as gatekeeper is essential because once a defamation case goes to a jury, the chilling effect on protected speech is already achieved. "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). Due to the costs and burdens of litigation, there is a "significant risk" that allowing "even a non-meritorious defamation action" to go to a jury "may stifle open and robust debate on issues of public importance." *Myers*, 472 A. 2d at 50 (D.C. 1983). Without "freedom from the harassment of lawsuits," writers "will tend to become self-censors," and "debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open." *Keogh*, 365 F.2d at 968. Such censorship "is 'hardly less virulent for being privately administered'" by libel suits. *Id.* (quoting *Smith v. California*, 361 U.S. 147, 154 (1959)). To avoid this, "federal courts have historically given close scrutiny to pleadings in libel actions." *Offit*, 2010 WL 883745, at *3.

Judicial gatekeeping is also critical on matters of public controversy because allowing the meaning of an allegedly defamatory statement to be decided "by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276-77 (1971) (quoting *N.Y.*

Times Co., 376 U.S. at 270). "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose Corp.*, 466 U.S. at 505. Thus, "the First Amendment . . . imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected." *Id.*

Even if the First Amendment by itself did not require courts to protect defendants from the burdens of litigation before submitting a case to the jury, the Anti-SLAPP Act was designed to provide exactly that protection. Appellate courts must always "conduct an independent review" on "the dispositive constitutional issue" of whether a statement is actionable, *Bose Corp.*, 466 U.S. at 508, and the Anti-SLAPP Act requires that review to be conducted at the outset of the litigation. Instead of interpreting the defendant's statements "in the light most favorable to plaintiff," J.A. 164, the plaintiff has an affirmative burden to show that the statements are "likely" to have an actionable meaning. No discovery is needed: The court's task is simply to "examine for [itself] the statements in issue and the circumstances under which they were made," *Bose*, 466 U.S. at 508, and then determine how they would be interpreted by a hypothetical "reasonable reader," *Guilford*, 760 A.2d at 582 (quoting *Ollman v. Evans*, 750 F.2d 970, 986 (D.C. Cir. 1984)). That is quintessentially a question for the court to resolve as a matter of law. *Bose Corp.*, 466 U.S. at 508; *Greenbelt Publ'g*, 398 U.S. at 13 (finding statement not actionable "as a matter of constitutional law").

b) The substantive protection of "breathing space"

Where "it is highly debatable whether [a] statement is sufficiently verifiable to be actionable in defamation," or "'[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability.'" *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("*Moldea II*") (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988)). This follows

from the principle that "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U. S. 312, 322 (1988). Accordingly, in deciding whether to impose the burdens of litigation and the threat of liability for speech on matters of political and scientific controversy, "the First Amendment requires [courts] to err on the side of protecting political speech." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007). Holding defendants "responsible for every inference a reader might reasonably draw from [an] article would undermine the uninhibited discussion of matters of public concern." *Guilford*, 760 A.2d at 601.

In the context of a heated debate on a matter of public controversy, courts cannot allow libel claims based on statements that are merely ambiguous. Punishment "under state defamation law for a statement on a matter of public concern may be imposed only if the statement *is* provably false." *Id.* at 596 (emphasis added)). If the statement "is subject to different interpretations," it "is not so much false as it is ambiguous," and is therefore "protected by the First Amendment." *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995). On matters of public concern, the ability to sue is thus a very narrow exception to the general rule of free debate. Litigation is appropriate only in cases of clear and precise allegations of specific defamatory facts that could be objectively falsified in court, such as the commission of a particular crime or act of moral turpitude. This is necessary to "confine the perimeters of" actionable speech "within acceptably narrow limits . . . to ensure that protected expression will not be inhibited." *Bose Corp.*, 466 U.S. at 505 (emphasis added). "Where a statement is so imprecise or subjective that it is not capable of being proved true or false, it is not actionable." *Farah v. Esquire Magazine*, 736 F.3d 528, 534-35 (D.C. Cir. 2013).

Similarly, "when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation." *Moldea II*, 22 F.3d at 315. "[W]hile a critic's latitude is not unlimited, he or she must

be given the constitutional 'breathing space' appropriate to the genre." *Id.* Thus, "the correct measure of the challenged statements' verifiability as a matter of law is whether *no reasonable person* could find that the [] characterizations were supportable interpretations" of the work being criticized. *Id.* at 317. "[R]emarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances." *Rosen v. AIPAC*, 41 A.3d 1250, 1258 (D.C. 2012) (citation and quotation marks omitted)). This principle is closely related to the "fair comment" privilege at common law, which precludes claims for defamation "[s]o long as the comment is the speaker's actual opinion, based on fact, about a matter of public interest." *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. App. 1965). The privilege applies where the writer offers an "interpretation" based on facts and leaves the reader "free to draw his or her own conclusions based upon [the] facts." *Moldea v. N.Y. Times.*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) ("*Moldea I*").

Although broad speech protection on matters of public concern may result in dismissal of some defamation claims based on ambiguous statements that *could* be read as defamatory, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S., at 341. Indeed, "[t]o provide 'breathing space'" for protected speech on matters of public concern, "the Court has been willing to insulate even demonstrably false speech from liability[.]" *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (quoting *N.Y. Times Co.*, 376 U.S. at 272).

Strictly limiting defamation claims on matters of public concern comports with the primary function of defamation law, which is to protect the reputation of private figures on matters of private concern. "[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of

ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import." *Snyder*, 131 S.Ct. at 1215-16 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)). In addition, "private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements," and "they generally lack effective opportunities for rebutting such statements." *Dun & Bradstreet, Inc.*, 472 U.S. at 756.

B. The Lower Court Failed to Enforce the First Amendment's Substantive and Procedural Protection for Speech on Matters of Public Controversy

In holding that the commentary published by National Review was not protected, the lower court serially violated the procedural and substantive protections, outlined above, for free speech on matters of public concern. *First*, the court suggested that the commentary was actionable merely because it questioned Dr. Mann's "intellect and reasoning" and criticized the "sound[ness]" of his "research and conclusions." J.A. 114. That is flatly contrary to the First Amendment, which fully protects criticism on the merits of scientific research. "Scientific controversies must be settled by the methods of science rather than by the methods of litigation." *Underwager*, 22 F.3d at 735-36. If harshly criticizing a scientist's "intellect and reasoning" or his "research and conclusions" were actionable, then free speech on matters of scientific controversy would be a dead letter.

Second, the court denied protection to statements—i.e., calling the hockey stick "fraudulent" and based on "molested and tortured data"—that plainly *could be interpreted* as fully protected criticism of the hockey stick's "sound[ness]" and "reasoning," merely because a jury might interpret those statements as literal accusations of fraud or data falsification based on their dictionary definition. J.A. 114-15, 163-64. In reaching that conclusion, the court committed profound procedural and substantive error. As a procedural matter, the proper question is not how a *jury* might interpret the statements, but instead how *the court* interprets them based on its "independent review" of "the statements . . . and the circumstances under which they were made." *Bose Corp.*, 466 U.S. at 508 (quoting *N.Y. Times Co.*, 376 U.S. at 285). And, particularly under the Anti-SLAPP statute, the facts

are obviously not "interpreted most favorably to the *plaintiff*," J.A. 164 (emphasis added), but to the speaker protected from censorship by the First Amendment and from the chilling effects of burdensome litigation by the Anti-SLAPP Act. Even more importantly, as a substantive matter, the question is not whether the statements *could be* interpreted as specific factual assertions that Mann is a data falsifier, but instead whether the court can "be *sure* that the speech in question actually falls within the unprotected category." *Id.* at 505 (emphasis added). The answer turns on the full context, not solely on abstract dictionary definitions.

Because the First Amendment and the D.C. Anti-SLAPP Act conclusively preclude penalizing vigorous criticism on matters of public concern, a speaker cannot be subject to the burdens of litigation and the threat of damages based on the *chance* (a thirty-percent chance? a fifty-percent chance?) that a jury *might* interpret the words as not constituting such fully protected speech. This is especially true given the unpredictable, inconsistent, and potentially viewpoint-discriminatory way in which juries may interpret statements on controversial subjects. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505.

The present case illustrates the point: Under the lower court's reasoning, the jury would have to decide whether the reasonable reader would interpret Steyn's use of the word "fraudulent" as a provably false accusation of some specific act of "fraud," which even under its literal meaning can be an amorphous legal concept. *See, e.g.*, 15 U.S.C. § 78u-4(b) (defining "securities fraud" to include instances where the defendant "omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading"). The jury would then have to answer the complex and politically fraught question of whether it was "not misleading" for the hockey stick to rely on a certain type of "Principal Components Analysis" (PCA),

a complex statistical technique used to represent large spatiotemporal datasets in terms of a smaller number of leading patterns of variation in the data. They would also have to confront whether it was "not misleading" to combine tree-ring "proxy" data with modern temperature measurements, while excluding or de-emphasizing some proxy data that show a decline in temperatures in the 20th century. How a jury might come out on these questions is, to put it mildly, anyone's guess.

If vigorous expression is to survive, speakers on issues of public controversy require strong assurances that they will not be subject to costly defamation suits based on a coin flip or, worse, a politicized interpretation of their words. That is precisely why "a court should err on the side of nonactionability" when interpreting criticism on matters of political and scientific controversy. *Moldea II* 22 F.3d at 317. Indeed, that is why "the First Amendment *requires* [courts] to err on the side of protecting political speech," *Wisconsin Right to Life*, 551 U.S. at 457 (emphasis added), and why hyperbolic "characterizations" are actionable only if "*no reasonable person* could find that [they] were supportable interpretations" of the work being criticized. *Moldea II*, 22 F.3d at 317. The D.C. Anti-SLAPP Act, in particular, does not give the benefit of the doubt to the party seeking to suppress and penalize free speech. Instead, it favors the speaker, whose expression of ideas on a matter of public concern is "[a]t the heart" of First Amendment protection. *Hustler*, 485 U.S. at 50.

C. Under a Proper Application of the First Amendment, the Commentary Published by National Review Was Core Protected Speech

As the publisher of commentary on the political and scientific controversy surrounding the hockey stick, National Review is entitled to the "highest rung" of constitutional protection. *Connick*, 461 U.S. at 145. In the context of the hockey-stick debate, the commentary cannot be subject to the burdens of litigation and the threat of punishment because it cannot be understood as anything other than vigorous criticism of the hockey stick's methods and conclusions. That is especially true for the phrase "intellectually bogus and wrong," which could not possibly be read as defamatory in practically *any* context. Much less is the commentary the sort of unambiguous, "[]precise,"

"objectively verifiable" allegation of fact necessary to fall within the "narrow limits" of unprotected speech on public affairs. *Farah*, 736 F.3d at 534; *Guilford*, 760 A.2d at 597; *Bose Corp.*, 466 U.S. at 505.

In assessing whether commentary on a matter of public concern is protected, context is crucial because "it is in part the *settings* of the [words] in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea II*, 22 F.3d at 314; *see also Guilford*, 760 A.2d at 597 (finding it "critical to our inquiry that the allegedly defamatory utterances . . . appeared in an Op-Ed column in which [the defendant] was commenting on matters of substantial public concern").

Here, the context is critical in two respects. *First*, National Review's opinion blog is a well-known venue for political commentary, not hard news. "Any reasonable reader of political blog commentary knows that it often contains conjecture and strong language," "particularly where the discussion concerns such a polarizing topic" as global warming, on which "[a] reasonable reader would understand [the author's] statements to be expressions of his own opinion." *Farah* 736 F.3d at 540; *see also, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."). Indeed, National Review's blog has long described itself as "a web-leading source of real-time conservative opinion."[24] The commentary spans the tonal genres, from sarcasm to satire to humor to political banter, with colorful titles such as "Kathleen Sebelius Thinks You're An Idiot"; "Flop and Fluff"; "To Hell with You People"; "Trumka the Hacktacular!"; and "Spineless Jellyfish Terrorize Great Nation!," to name only a few.[25] In light of this general tenor, the "primary intended audience" of the commentary at issue here

[24] *See* http://www.nationalreview.com/taxonomy/term/22/about#

[25] *See generally* http://www.nationalreview.com/corner

"would have been familiar with" the highly opinionated and political nature of the writing on the blog. *Farah*, 736 F.3d at 537.

Second, the commentary was part of the heated public debate over the hockey-stick graph, where caustic criticism and hyperbolic rhetoric are the coin of the realm. Dr. Mann himself has set the tone of the debate, accusing his intellectual opponents of "pure scientific fraud," "the fraudulent denial of climate change," making "fraudulent" claims, "t[aking] corporate payoffs for knowingly lying about the threat climate change pose[s] to humanity," "willfully . . . le[a]d[ing] the public and policy makers astray," being "anti-science," and deliberately seeking to "mislead" people through "deceptive . . . report[s]" that "regurgitate[]" "denialist myths." *See supra* at 6-7 & nn. 9-13. Since Dr. Mann's references to "fraud" and "knowingly lying" reflect the linguistic reality of the global-warming debate, it cannot be seriously suggested that Dr. Mann can unilaterally punish his critics for similar rhetoric. Here, especially, "[t]he principle of viewpoint neutrality that underlies the First Amendment . . . imposes a special responsibility on judges" to determine that the challenged speech is actually "unprotected." *Bose*, 466 U.S. at 505. Allowing Dr. Mann to sue his critics for using such rhetoric would impermissibly "license one side of [the] debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

1. Read in context, Steyn's commentary was protected rhetorical hyperbole, not a literal accusation of fraud or data falsification

In Count III of his complaint, Dr. Mann alleges that Steyn accused him of some literal act of fraud by calling him "[t]he man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." J.A. 76. Similarly, Dr. Mann alleges in counts VI and VII of his complaint that Steyn made a literal allegation of fraud or data falsification by quoting Simberg's crude metaphor referring to Dr. Mann as the "Jerry Sandusky of climate science" who has

"molested and tortured data." [26] J.A. 81-83. Under the Plaintiff's legal regime, since "fraud" can include "misleading" statements, *see, e.g.*, 15 U.S.C. § 78u-4(b), participants in scientific or public-policy debates could be hauled into court every time they accused their opponents of "misleading" studies, thus dramatically increasing the entry barriers to the marketplace of ideas.

Here, it would be even worse because ascribing any literal or legalistic meaning to Steyn's writing would be absurd in the present context. By wading into the vituperative hockey-stick debate on a conservative opinion blog, Steyn was obviously employing "loose, figurative [and] hyperbolic language" to express his opinion that the hockey stick is deeply flawed and misleading in its depiction of global temperature trends. *Farah*, 736 F.3d at 40. By referring to "the tree-ring circus," Steyn made clear that he was taking one side of the well-known debate over the hockey stick, and engaging in wordplay to lampoon Dr. Mann's views. In a paragraph laden with pun and metaphor, he clearly was not using the words "fraudulent" or "molested and tortured" in any literal sense, much less alleging any "[]precise" act of fraud or data falsification that could be "objectively verified" in court. *Guilford*, 760 A.2d at 597; *Farah*, 736 F.3d at 534. Of course, words used as hyperbolic rhetoric almost always *could* be taken to bear a literal dictionary meaning that would be actionable, just like the terms "blackmail" and "traitor" in *Greenbelt* and *Letter Carriers*. But the entire point of rhetorical hyperbole is to use words to convey a *non-literal* meaning in the service of caustic criticism.

In the heat of public controversy, terms like "fraudulent," and "molested and tortured data" are common epithets for expressing disagreement—in this case, alleging that the hockey-stick graph is based on flawed methodology and statistical techniques, and that it does not accurately reflect

[26] Because the commentary appeared on a conservative opinion blog, it is highly unlikely that it caused any *actual* harm to Dr. Mann's professional reputation in the scientific field. He therefore must prove that the commentary was libel *per se*, i.e., "actionable as a matter of law irrespective of [actual] harm." *Beeton v. Dist. of Columbia*, 779 A.2d 918, 923 (D.C. 2001). A showing of "[l]ibel per se requires the actual imputation of a criminal offense," *Bannum, Inc. v. Citizens for a Safe Ward Five, Inc.*, 383 F. Supp. 2d 32, 40 (D.D.C. 2005), which cannot be satisfied here for the reasons stated.

historical temperature patterns, for the four reasons explained above. *See supra* 2-5. Such vigorous rhetoric is simply a shorthand way of disagreeing with the hockey stick, not an allegation of fraud or data falsification in any literal sense. "It therefore belongs to the language of controversy rather than to the language of defamation." *Dilworth*, 75 F.3d at 310.

Steyn's commentary did not become actionable merely because he quoted Simberg's statement that Dr. Mann is "the Jerry Sandusky of climate science," and that the hockey stick is based on "molested and tortured data." Crude as the metaphor may be (which Steyn acknowledged by stating that he would not have used it), the reference to "molested and tortured data" echoes the famous quip of economist Ronald Coase:"[i]f you torture the data enough, it will confess."[27] It also tracks the aphorism that "figures don't lie, but liars do figure." As one court has noted, "[w]hen it comes to 'imaginative expression' and 'rhetorical hyperbole,' few terms have enjoyed so frequent an association in the common culture as the terms 'lie' and 'statistic.'" *Faltas*, 928 F. Supp. at 648-49 (holding non-actionable the statement that plaintiff had "manipulated or ignored statistics" and "intentionally misinterpreted the available statistics to support her view of the issue").

Far from being "provably false" in a defamation suit, the general claim that statistics are "tortured" or misleading is both highly subjective and thoroughly commonplace in public debate. To take but a few examples: Paul Krugman recently wrote in the *New York Times* that "House Republicans released a deliberately misleading report on the status of health reform, crudely rigging the numbers to sustain the illusion of failure in the face of unexpected success."[28] He continued, "the survey was so transparently rigged [that it] is a smoking gun, proving that the attacks on Obamacare aren't just bogus; they're deliberately bogus. The staffers who set up that survey knew

[27] Gordon Tullock, A Comment on Daniel Klein's "A Plea to Economists Who Favor Liberty," Eastern Economic Journal, Spring 2001, at n.2.

[28] Paul Krugman, Inventing a Failure, New York Times (May 4, 2014), *available at* http://www.nytimes.com/2014/05/05/opinion/krugman-inventing-a-failure.html

enough about the numbers to skew them." *Id.* He then added that they were "try[ing] to advance their agenda through lies, damned lies and—in this case—bogus statistics." *Id.* Another pundit recently asserted that "[i]t is a statistical fraud when Barack Obama and other politicians say that women earn only 77 percent of what men earn—and that this is because of discrimination."[29] Even a sitting D.C. Circuit judge wrote a law-review article rebuking a law professor for his "tendency to push the data into bogus interpretations."[30] Such accusations are par for the course in intellectual sparring. As explained by Yale Law professor Stephen L. Carter, "'molested and tortured data' is the sort of molested and tortured prose that academics commonly inflict on each other (and the great unwashed beyond the campus) in this unenlightened era of discourse."[31] Such language is not actionable because "[c]lose cases should go to the critic, no matter how nasty or uninformed." *Id.*

a. These principles are particularly important here because the challenged statements are not fundamentally about the facts of what Dr. Mann *did*, but instead about whether what he undisputedly did was *misleading*. The underlying facts of this controversy are well known and not disputed: Dr. Mann does not deny, for example, that the hockey stick omits or de-emphasizes some tree-ring data showing a decline in temperature; instead he argues that this is a legitimate statistical technique for smoothing and screening out unreliable data. *See supra* p. 5 & n.7. Steyn and others strongly disagree, believing that this technique is highly misleading.

Whatever the merits of that debate may be, the truth of the matter does not turn not on any disputed *facts* of the type that would be "objectively verifiable" in court. Instead, the truth depends

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[29] Thomas Sowell, Statistical Frauds, The American Spectator (Apr. 15, 2014), http://spectator.org/articles/58740/statistical-frauds

[30] Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335, 1368 (1998).

[31] Stephen L. Carter, "Climate-Change Skeptics Have a Right to Free Speech, Too," *Bloomberg View* (Jan. 31, 2014), *available at* http://www.bloombergview.com/articles/2014-01-30/climate-change-skeptics-have-a-right-to-free-speech-too

on a complex and inherently contestable characterization of whether the hockey stick is sound as a matter of scientific and statistical methodology, or whether the data has been metaphorically "tortured" to "confess" to a particular conclusion. Juries cannot referee such disputes without becoming "ensnare[d] . . . in [a] thorny and extremely contentious debate over . . . which side of [the] debate has 'truth' on their side," *Offit*, 2010 WL 883745, at *6. Even if juries could resist the temptation to become a viewpoint-based "truth squad" with respect to speech on such controversial topics, the inherent risks and burdens of litigation would inevitably cast a dramatic chilling effect on core protected expression. For this reason, where the dispute involves *interpretations* of data or *opinions* about the ethics of presenting data in a certain way, it is not actionable. That is plainly the case here. The commentary is protected because it "is the speaker's actual opinion, based on fact, about a matter of public interest." *Fisher*, 212 A.2d at 337. It falls in the heartland of fair comment because it is an "interpretation" that leaves the reader "free to draw his or her own conclusions based upon [the] facts." *Moldea I*, 15 F.3d at 1144-45.

b. The non-actionable nature of Steyn's commentary is underscored by his disclosure of the factual premise of his statements, which further demonstrates that this speech is protected opinion under both the fair-comment privilege and the First Amendment. *See Phantom Touring, Inc.*, 953 F.2d at 730 (where an author discloses factual basis, statement can only be read as his "personal conclusion about the information presented, not as a statement of fact"); *Partington v. Bugliosi*, 56 F.3d at 1156-57 ("when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected"). By referring to "the tree-ring circus" and hyper-linking to other articles laying out the details of the hockey-stick controversy, Steyn made clear that he was weighing in on one side of the well-trodden debate over the merits of

the hockey stick's statistical methodology—in particular, its controversial use of tree-ring "proxy data," as detailed at length in numerous articles and books. *See supra* pp. 2-6.

In light of the ongoing controversy over the validity of the hockey stick's methods and conclusions, the references to the "fraudulent" hockey-stick graph or its reliance on "molested and tortured data" are not the type of specific factual statements that a jury can settle without infringing on the field of free debate. Instead, this is exactly the type of vague and figurative rhetorical statement that is "so imprecise [and] subjective that it is not capable of being proved true or false" in court. *Farah*, 736 F.3d at 534-35. To put such a heated issue "to the pre-existing prejudices of a jury" would "effectively institute a system of censorship." *Time, Inc.*, 385 U.S. at 406 (Harlan, J.).

Allowing the "truth" of Steyn's commentary to be submitted to a jury would be flatly inconsistent with numerous precedents. It would be directly at odds with *Greenbelt* and *Letter Carriers*, which held the terms "blackmail" and "traitor" to be protected as a matter of law in the heat of public debate. It would also be contrary to cases like *Weyrich v. New Republic*, where the D.C. Circuit held the accusation of "paranoia" to be non-actionable despite acknowledging that "a reasonable reader might interpret" it "to attribute a diagnosable and debilitating mental affliction." 235 F.3d at 626. Likewise with *Faltas*, where the court held allegations protected where the defendant charged that plaintiff "lied," "manipulated or ignored statistics" and "intentionally misinterpreted the available statistics to support her view of the issue" on a matter of public concern. 928 F. Supp. at 640-42, 648-49. *See also Offit*, 2010 WL 883745, at *5-6 (finding protection for defendant's statement that plaintiff "lie[d]" about the health effects of child vaccinations); *Schnare*, 104 Fed. App'x at 851 (finding non-actionable statements that "on their face [we]re accusations of lying," i.e., that the defendant had produced "fiction, innuendo, half-truths, exaggerations and fabrications").

2. Lowry's phrase "intellectually bogus and wrong" is not actionable

Even on the erroneous assumption that defamation claims may proceed against speech on matters of public concern that merely *could* be interpreted as actionable, and even on the assumption that Steyn's commentary *could* be reasonably interpreted as actionable when read in context, there is no conceivable way that Lowry's use of the phrase "intellectually bogus and wrong" could be interpreted as actionable. As noted, it is crystal clear that the First Amendment does not allow speakers to be punished for criticizing the soundness of reasoning or research by public figures on matters of public concern, any more than such speech about *elected officials* could be actionable. *See, e.g.*, *N.Y. Times Co.*, 376 U. S. at 273-74 (discussing Alien and Sedition Acts of 1798). But the only natural way to read "intellectually bogus and wrong" is as just such a criticism of reasoning and soundness. It is therefore a textbook example of a statement that is not actionable in defamation.

In making the statement in question, Lowry was simply offering a *non-defamatory* interpretation of what Steyn had previously written. Lowry wrote the passage after Dr. Mann threatened to sue over Steyn's blog post, which had lampooned Dr. Mann as "[t]he man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." J.A. 91. Lowry explained that any such lawsuit would be meritless due to the obviously figurative meaning of Steyn's writing: "In common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." J.A. 94. Lowry thus specifically stated that he was using the phrase "intellectually bogus and wrong" as a *saving construction* of Steyn's commentary, while expressly disclaiming any literal factual allegation that could be considered libelous. He was not even commenting on Dr. Mann directly, but was instead interpreting Steyn's writing in a way that was *more favorable* to Dr. Mann. It would be the height of absurdity to ascribe a libelous factual meaning to such a statement that explicitly disclaimed any libelous factual meaning.

Finally, even if Lowry *had* flatly asserted that the hockey stick is "intellectually bogus and wrong," such a statement would not be actionable because it does not assert any specific fact that could be "objectively verifi[ed]" in a judicial proceeding without intruding on free debate. *Guilford*, 760 A.2d at 597. Instead, the statement is plainly an expression of disagreement with the research and conclusions underlying the hockey stick. If the truth of this criticism were put on trial, the jury would be forced to sit as nothing less than a Ministry of Truth to resolve this political and scientific debate: to determine whether the hockey stick is truly "intellectually bogus and wrong," or is instead an intellectually sound representation of global temperatures over the past thousand years. Any effort to have juries penalize the "loser" of such debates with tort damages would work a blatantly "forbidden intrusion on the field of free expression." *New York Times*, 376 U. S., at 284-86.

III. Dr. Mann Cannot Demonstrate Actual Malice By Clear and Convincing Evidence Because National Review Sincerely Believes In The Truth Of The Statements

Even if Steyn's or Lowry's commentary could somehow be read to assert a specific factual statement whose truth could be objectively adjudicated in court without infringing on free speech, the First Amendment provides yet *another* protection: it precludes libel suits by public figures on matters of public concern as long as the speaker sincerely believes his statement to be true. *See N.Y. Times Co.*, 376 U.S. at 277-80 (establishing the "actual malice" rule for public figures); *Gertz*, 418 U.S. at 351 (plaintiffs are public figures for purposes of lawsuit where they have "voluntarily inject[ed]" themselves or been "drawn into a particular public controversy"); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 197 (8th Cir. 1966) (Blackmun, J.) (scientist was public figure when he "projected himself into the arena of public policy, public controversy, and 'pressing public concern'").

To protect sincere participants in public debate, the burden of proving "actual malice" falls on the plaintiff, who must "demonstrate with *clear and convincing evidence* that the defendant realized that his statement was false or that he *subjectively entertained serious doubt* as to the truth of his statement." *Bose Corp.*, 466 U.S. at 520 n.30 (emphases added) (quoting *New York Times*, 376 U. S. at

280); *see also Garrison*, 379 U.S. at 74 (actual malice includes "only those false statements made with the high degree of awareness of their probable falsity"). By design, this requirement is "very difficult to meet," *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1511 (D.D.C. 1987), as "erroneous statement is inevitable in free debate," and "must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *New York Times*, 376 U.S. at 271-72 (citation and quotation marks omitted). If critics had "to guarantee the truth of all [their] factual assertions—and to do so on pain of libel judgments," they would "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279.

To further ensure that sincere expression on matters of public concern is not chilled by "fear of the expense" of defamation suits, *id.*, the D.C. Anti-SLAPP Act puts the burden on plaintiffs to show *upfront* that they are "likely" to prove actual malice by clear and convincing evidence. *See, e.g.*, *Burke*, 91 A.3d at 1045 (granting Anti-SLAPP motion where actual malice was not "likely," because defendant's statements did "not suggest knowledge . . . or reckless disregard" of falsity, but "seem[ed] to suggest confusion or honest mistake"). Contrary to the lower court's analysis, the Anti-SLAPP Act does not require the court to "[v]iew[] the alleged facts in the light most favorable to the plaintiff" for purposes of assessing actual malice. J.A. 164. Quite the opposite: The entire purpose of the Anti-SLAPP Act is to make dismissal on the pleadings easier than under Rule 12. The Act thus requires some affirmative reason to think it "likely" that the defendant was not expressing his sincere views, but was instead deliberately lying or at least *subjectively* doubted the truth of his statements. A court cannot simply take the plaintiff's word for it.

In this case, Dr. Mann cannot show that he is "likely" to prove actual malice by "clear and convincing evidence." *Bose Corp.*, 466 U.S. at 520 n.30. Indeed, proving actual malice is an impossible task because all of the evidence confirms that National Review sincerely believes that the

hockey stick rests on shoddy methodology and depicts a misleading picture of global warming. Furthermore, as Lowry's article explained, National Review believes that this is exactly what Steyn and Simberg meant to convey when they stated that the hockey-stick graph is "fraudulent" and based on "molested and tortured data." In National Review's view, the speakers were using those terms in their loose "polemical" sense, rather than in any narrow technical sense. Even if Dr. Mann "proves" that National Review is somehow wholly incorrect about the validity of the hockey stick, that would not come close to showing "actual malice" because it would not show that National Review "subjectively" believed the statements to be false. *Burke*, 91 A.3d at 1045.

Nor has Dr. Mann offered any reason to think that Lowry's non-literal interpretation of Steyn's blog post reflects anything other than National Review's "honest," sincere views. Much less has Dr. Mann demonstrated that he is "likely" to prove by "clear and convincing evidence" that National Review "realized that [Steyn's statements were] false," that it "subjectively entertained serious doubt as to [their] truth," *Bose Corp.*, 466 U.S. at 520 n.30, or that it published the statements "with [a] high degree of awareness of their probable falsity," *Garrison*, 379 U.S. at 74-75. The only allegation Dr. Mann has advanced with any bearing on "actual malice" is his claim that various "investigations" of Dr. Mann and/or his colleagues have "laid to rest" "any question regarding the propriety of Dr. Mann's research." J.A. 68.

The referenced "investigations" have little if any bearing on National Review's subjective views. *First*, whatever the investigations may say about Dr. Mann's work, they say nothing about whether National Review interpreted Steyn's and Simberg's statements as literal allegations of fraud or data falsification, which is a necessary predicate for National Review to have subjective "actual malice" with respect to those statements. Because National Review sincerely interpreted the statements as rhetorical hyperbole, it makes no difference whether the investigations have found Dr. Mann innocent of literal "fraud" or data falsification. The First Amendment does not allow an

"honest speaker" to "accidentally incur liability for speaking" based on a meaning he did not intend. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring).

Second, whether the "investigations" in question purport to vindicate the merits of Dr. Mann's research is *itself* a matter of public controversy. National Review adamantly believes they do not, and several prominent public commentators agree.[32] For example, the East Anglia report expressly found that the hockey-stick graph on the cover of the 1999 WMO report was "misleading":

> Finding: In relation to "hide the decline" we find that, given its subsequent iconic significance . . . the figure supplied for the WMO Report was misleading in not describing that one of the series was truncated post 1960 for the figure, and in not being clear on the fact that proxy and instrumental data were spliced together. We do not find that it is misleading to curtail reconstructions at some point *per se*, or to splice data, but we believe that both of these procedures should have been made plain – ideally in the figure but certainly clearly described in either the caption or the text.[33]

Third, even if the investigations *did* purport to vindicate Dr. Mann, he has provided no evidence that National Review agrees with the investigations, and he cannot show actual malice merely by pointing to a number of supposed authorities who have taken his side in the debate. For a variety of reasons (including those detailed by other critics, *supra* pp. 2-6), National Review sincerely believes that the hockey stick is badly flawed, and recently published a cover story explaining why.[34] Right or wrong, that opinion is the subject of a heated public debate, and is shared by at least two full-length books, several experts, and multiple members of Congress.

In light of National Review's sincerely held views about the hockey stick, allowing this lawsuit to proceed to trial would invite nothing less than an inquisition, where the jury would be

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[32] *See, e.g.,* Jim Lindgren, "Steve McIntyre: was Michael Mann 'exonerated' by the Oxburgh Panel?" (Mar. 1, 2014), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/01/steve-mcintyre-was-michael-mann-exonerated-by-the-oxburgh-panel/

[33] J.A. 435 (first emphasis added; second emphasis in original).

[34] *See* Charles C.W. Cooke, "Climate Inquisitor," *National Review* (May 5, 2014), *available at* http://www.nationalreview.com/article/376574/climate-inquisitor-charles-c-w-cooke

convened to sit in judgment on the validity of National Review's political and scientific beliefs. If a judgment were awarded to Dr. Mann, then National Review would be effectively banned from expressing its opinion in the hockey-stick controversy. That is exactly what the First Amendment does not allow. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.

IV. National Review Cannot Be Held Liable For Third-Party Statements On Its Website

Under federal law, National Review cannot be held liable for publishing content on its website authored by third parties, including Steyn, Simberg, and CEI. Under Section 230 of the Communications Decency Act of 1996, "No provider . . . of an interactive computer service shall be treated as the publisher . . . of any information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). This law "immunize[s] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998). Accordingly, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Id.* at 50; *see also Parisi v. Sinclair*, 774 F. Supp. 2d 310, 315 (D.D.C. 2011) (Amazon.com immune from liability for publishing promotional material authored by others).

To assess Section 230 immunity, courts apply a three-part test: (1) whether the defendant "is a 'provider or user of an interactive computer service,'" (2) whether "the complaint seeks to hold [the defendant] liable as the 'publisher or speaker' of that information," and (3) whether "the

information for which [the plaintiff] seeks to hold [the defendant] liable was 'information provided by another information content provider.'" *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (quoting 47 U.S.C. § 230(c)(1)). Here, National Review satisfies that test because it did not author Steyn's commentary but merely provided a forum where Steyn could post it online.

1. National Review easily qualifies as a "provider . . . of an interactive computer service." An "interactive computer service" is "*any* information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2) (emphasis added). Based on that definition, "[c]ourts generally conclude that a website falls within the definition of an interactive computer service." *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012) (citing cases)); *see also Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 473 (E.D.N.Y. 2011) (collecting cases from the First, Fourth, and Ninth Circuits). Like any website, National Review Online is an "interactive computer service" because it is an "information service" that "enables computer access by multiple users to [its] computer server." 47 U.S.C. § 230(f)(2).

2. Dr. Mann's lawsuit also "seeks to treat [National Review] as publisher or speaker" of comments authored by Steyn. *Zuckerburg*, 910 F. Supp. 2d at 318. Publication is a necessary element of defamation. *Blodgett v. The Univ. Club*, 930 A.2d 210, 222 (D.C. 2007) (citation omitted). Dr. Mann's complaint expressly asserts that National Review is liable for "publishing the [defamatory] statements" contained in Steyn's blog post. J.A. 73, 76-77, 81-82.

3. Finally, National Review did not act as the author or "content provider" for the statements in Steyn's blog post but merely provided a forum where Steyn could post them on the Internet. As the Fourth Circuit has explained, "[s]tate-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008); *see also Chicago*

Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008). Even when a defendant is the author of *some* content on its website, "the relevant question [is] whether a defendant function[s] as an 'information content provider' for *the portion of the statement or publication at issue*." *Zuckerberg*, 910 F. Supp. 2d at 320 (emphasis added; citation omitted). Here, this is not a close question. National Review did not engage in any editorial functions, much less author the content: It simply provided an online forum where Steyn could log in and post commentary without editing or review. As the D.C. Circuit recently held, "a website does not create or develop content when it merely provides a neutral means by which [a] third part[y] can post information of their own independent choosing online." *Zuckerberg*, 753 F.3d at 1358.[35]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and all claims against National Review dismissed under the D.C. Anti-SLAPP Act.

[35] Whether National Review paid Steyn as a freelance writer is immaterial. A website operator does not lose its immunity under Section 230 by entering a contract with a third party who agrees to provide content for its website. In *Blumenthal v. Drudge*, for example, Matt Drudge had a contractual agreement with AOL to author a newsletter for AOL's website in exchange for a flat monthly "royalty payment." 992 F. Supp. at 47. The Court held that despite paying Drudge, publishing his newsletter on its website, and retaining the right to exert some editorial control by removing offensive material, AOL was still immune from liability for the content of Drudge's writings. *Id.*; *see also Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (finding website immune despite its "contract" with third parties to provide content). Moreover, because Steyn has never been an employee of National Review, liability cannot be premised on any theory of respondeat superior. *See Tolu v. Ayodeji*, 945 A.2d 596, 601–02 (D.C. 2008) (respondeat superior applies only where "the employer has the right to control and direct the servant in the performance of his work and the manner in which the work is to be done").

Respectfully submitted,

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MICHAEL A. CARVIN (No. 366784)
ANTHONY J. DICK (No. 1015585)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com
ajdick@jonesday.com

David M. Morrell (No. 1013411)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
(832) 239-3939
dmorrell@jonesday.com

Counsel for National Review

August 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that all parties consented in writing to electronic service under Rule 25(c)(1)(D), and on August 4, 2014, I caused a copy of the foregoing brief to be served by e-mail upon:

John B. Williams
Williams Lopatto PLLC
1776 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 296-1665
jbwilliams@williamslopatto.com

Catherine Rosato Reilly
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 912-4800
creilly@cozen.com

Peter J. Fontaine
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(856) 910-5043
pfontaine@cozen.com

Andrew M. Grossman
David B. Rivkin Jr.
Baker Hostetler LLP
1050 Connecticut Ave. NW, Suite 1100
Washington, DC 20036
agrossman@bakerlaw.com

____
Anthony J. Dick