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)

Reply Brief of Appellant National Review, Inc.

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INTRODUCTION

In his response brief, Dr. Mann acknowledges that the First Amendment protects National Review's right to criticize the merits of his scientific work, including by asserting that the hockey-stick graph is false and misleading in its methods and conclusions. Mann Br. 26-27. He further agrees that "colorful" adjectives and "statements of opinion" are not actionable, because libel claims must be based on *specific* allegations of provably false *fact*. *Id.* at 35, 37. He does not dispute that it is the *court*, not the jury, that must decide whether a statement is provably false. And he does not deny that in order to provide "breathing space" for free expression, statements on an issue of scientific and political controversy are actionable only if they contain a *clear* accusation of provably false fact.

Consequently, it is undisputed that National Review's statements cannot be actionable if they merely criticize Dr. Mann's scientific methodology as incorrect and misleading. Under this standard, it is quite clear that, for example, the subjective assertion that Dr. Mann's work is "intellectually bogus and wrong" is constitutionally protected expression beyond the reach of a defamation claim.

Apparently recognizing this fatal flaw, Dr. Mann nonetheless seeks to revive his defamation claim by contending that, although the "use of colorful language" "qualif[ies] for constitutional protection," the "publication becomes actionable" if a "defendant chooses to accompany his loose figurative language with specific factual allegations that are capable of being proven true or false." Mann Br. 37, 38. But these established principles in no way help Dr. Mann, because the derogatory characterizations of his work here plainly were *not* accompanied by any such specific, disprovable factual allegations. Dr. Mann's contrary contention is based on three clearly erroneous propositions of law and fact: (1) that pejorative labels such as "fraudulent" and "intellectually bogus" are *themselves* disprovable assertions of fact; (2) that the pejorative labels were accompanied by disprovable assertions of fact; and/or (3) that such pejorative labels are actionable if they *could be interpreted* to imply disprovable assertions of fact.

1. *First*, it is axiomatic that pejorative or derogatory adjectives cannot themselves be "false." They can only be, at worst, "wrong" or "unfair." It does not suffice, as Dr. Mann sometimes suggests, that the statements are "defamatory,"— *i.e.*, "sufficiently derogatory" to "damage[e] . . . [his] reputation." Mann Br. 27. They must also be "provably false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *id.* at 11 (explaining that a statement must be "false *and* defamatory" (emphasis added)).

For example, calling someone a "racist" is not actionable by itself or if based on the person's opposition to affirmative action. It would be actionable only if accompanied by a *disprovable* assertion of *objective* fact; *e.g.*, that the person participated in an act of racial violence. Whether it is "racist" to oppose affirmative action is not a "fact," but a subjective characterization. The First Amendment does not permit juries to decide that type of issue, because it does not allow the State, through common-law tort damages, to penalize those deemed to have the "wrong" view on matters of public concern.

Derogatory adjectives and non-factual *characterizations* or interpretations of events are not actionable; defamation reaches only *factual* statements asserting *verifiable events* that can be deemed *objectively* "false." An actionable statement must assert some verifiable "fact"— *i.e.*, a "thing done" or an "actual happening in time or space," *Webster's New International Dictionary of the English Language* 782 (1993). It cannot be a mere "subjective assertion" of "opinion," *id.* at 22—*i.e.*, a "*judgment* as to [the] quality, value, [or] authenticity" of the plaintiff's work, Restatement (Second) of Torts § 538A (1977). Consequently, a statement is actionable only if the derogatory assertion is accompanied by an objectively disprovable, factual assertion about what the plaintiff *did*. But a subjective assertion about the *propriety* of what the plaintiff did is beyond the reach of a defamation claim. That is why defamation law cannot penalize the assertion that a politician's economic analysis is "misleading, "fraudulent" or "intellectually bogus" for *presenting* data in a misleading way. Such derogatory

adjectives become "provably false" only if accompanied by a specific accusation—e.g., that the politician *fabricated* raw data. In short, accusations of dishonest or misleading *presentation* or *interpretation* of data cannot be actionable, particularly when they address matters of public concern.

2. Thus, the dispositive question here is whether any of the statements accused Dr. Mann of engaging in some verifiable activity that could be proved false—*e.g.* fabricating raw data—or whether they simply characterized his interpretation and presentation of climate data as misleading (and thus a departure from proper scientific standards). The latter criticism is not actionable because it is not a factual assertion of a verifiable event, but a subjective judgment.

Here, the statements published by National Review reflected four long-standing and widespread criticisms of the hockey stick, as described in National Review's opening brief, NR Br. 2-6. The first three criticisms relate to Dr. Mann's (selective) reliance on tree-ring "proxy" data to estimate changes in global temperatures. National Review believes that Dr. Mann's presentation and interpretation of such data was "fraudulent" and misleading because (1) using such data to estimate historical temperatures is inherently unreliable and misleading; (2) *consistent* use of "tree-ring" data to estimate the earth's temperature since 1960 would have indicated a *decline* in global temperature and (3) the hockey-stick graph's switch from pre-1960 tree-ring data to post-1960 instrumental data to estimate global temperatures is misleading, particularly because the graph did not properly highlight the switch. *Id.* at 3-5. Accordingly, the questions for a jury to resolve would be whether it is misleading and consistent with proper academic standards to rely on such tree-ring data for ancient temperatures and, if so, whether it is proper to present these data in the same graph with temperature readings produced by modern instruments and, if so, whether it was misleading to switch from tree-ring to instrumental data without more prominently alerting readers to that change.

Needless to say, none of these are *factual* questions about what Dr. Mann *did*, but are instead highly *subjective* questions about the *propriety* of what he did. Resolving this dispute would require

both ethical judgment and detailed knowledge about biology, statistics, and proper academic standards. Indeed there is *no factual dispute* between the parties about what Dr. Mann did or the data he used. The dispute is solely about whether his interpretation and presentation of that data was sufficiently honest and transparent. Thus, the jury would merely be offering its (untutored, lay) opinion about whether Dr. Mann's opinion concerning the validity of his use of tree-ring data is more persuasive than Defendants' contrary opinion.

Again, this is the kind of subjective judgment the First Amendment prohibits juries from making, because such competing opinions must be resolved through private debate unfettered by state-imposed penalties on the "losing" side. The same is even more obviously true concerning the fourth criticism of the hockey stock—*i.e.*, that Dr. Mann's statistical techniques are improperly and misleadingly based on a particular "Principal Component Analysis" that exaggerates the modern trend of global warming—which would require the jury to decide the complex and subjective issue of proper statistical techniques, not the objective *facts* of what techniques Dr. Mann *did* use.

Moreover, if juries are now to be empowered to penalize participants in the global-warming debate with whom they disagree, then Dr. Mann must also be held to account for his even harsher accusations that his opponents have engaged in "pure scientific fraud" and the "fraudulent denial of climate change," and have "willfully . . . led the public and policymakers astray." NR Br. at 7. Thus, if Dr. Mann's frontal assault on free speech is accepted here, the *entire* hockey-stick and global-warming debate will be chilled and burdened by *dueling* claims for damages awards in jurisdictions that libel plaintiffs can select for their "sympathetic" juries. Or, worse still, Dr. Mann will be enabled to *skew* the debate by *selectively* punishing his opponents for using the same derogatory rhetoric he routinely dishes out, thus "licens[ing] 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).

3. Dr. Mann is wrong to suggest that the statements here are actionable merely because they *could be* interpreted to suggest that he committed some objectively verifiable act such as fabricating raw data—a specific accusation that none of the Defendants here ever made. Even if the statements were somehow ambiguous, and could be read *either* as core protected speech *or* as actionable, the First Amendment would require this Court to "err on the side of nonactionability,'" *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("*Moldea II*"). Any other rule would turn the presumption in favor of free speech on its head. As this Court has recognized, holding defendants "responsible for every inference a reader might reasonably draw from [an ambiguous statement] would undermine the uninhibited discussion of matters of public concern." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 601 (D.C. 2000). Moreover, it is impossible to prove "actual malice" based on "imprecise language" where the intended meaning is unclear. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 492 (1984) (citation omitted). That is precisely why courts must keep ambiguous statements from jury "fact-finding," by deciding the meaning of statements for *themselves* based on an "independent," *de novo* review. *Id.* at 514.

Notwithstanding the straw-men attacked by Dr. Mann, accepting these basic First Amendment principles would not somehow provide a "free pass to say anything" about him, "no matter how outrageous and provably false." Mann Br. 27. For example, a clear accusation of some verifiable event, such as a claim that he embezzled research funds or fabricated raw data, would not be protected merely because it is *connected to* a public-policy debate. Instead, the First Amendment simply requires that statements that are *part of* the public-policy debate—such as whether crucial scientific data has been misleadingly presented—will not be subject to damages awards or the whims of the jury system, but will be resolved through unfettered debate in the marketplace of ideas.

I. DR. MANN'S CLAIMS MUST FAIL BECAUSE THEY ARE NOT BASED ON ANY CLEAR AND SPECIFIC STATEMENT OF PROVABLY FALSE FACT

As noted, Dr. Mann acknowledges that the First Amendment protects National Review's right to "disagree with his work," Mann Br. 26, and to criticize his methods and conclusions for being "incorrect or misleading," *id.* at 27. If a jury were to adjudicate the "truth" of such criticism, it would not be adjudicating any question of fact, but instead would be making subjective judgments about debatable questions such as the proper methods for presenting scientific data, the accuracy of temperature models, and the ethics of certain scientific behavior. To avoid penalizing such core protected speech on a critical public issue, the First Amendment requires Dr. Mann to show that his claims are based on an accusation that he committed some *specific* act that a jury could *objectively* verify.

Again, Dr. Mann concedes as much, acknowledging that he can challenge characterizations of his work as "incorrect" or "misleading" only if such "loose figurative language" is "accompan[ied]" by "specific factual allegations that are capable of being proven true or false." Mann Br. 38; *see also id.* at 27-28, 38. But this concession dooms Dr. Mann's case. All of the statements here are the functional equivalents of the concededly non-actionable adjective "misleading," and all the derogatory labels are based on subjective criticisms about the way Dr. Mann has interpreted and presented his data. None of the statements assert or imply that Dr. Mann committed any specific action that is objectively provable or disprovable—such as "manufacturing data out of whole cloth." Mann Br. at 32.

A. Dr. Mann Fails to Identify Any Specific, Provably False Accusation

1. There is no dispute between the parties on the *objective fact* that various versions of the hockey-stick graph deliberately omit tree-ring data after the year 1960. *See* NR Br. 5-6; Mann Br. 10-13. Where they disagree is on the *subjective* question of whether the omission is "misleading" and unethical: National Review believes it is, whereas Dr. Mann contends that it is a *legitimate* "trick" to deal with the "problem" of the "enigmatic decline in tree-ring response to warming temperatures

after 1960." Mann Br. 11 & n.21. By Dr. Mann's own admission, the "correct" position on this dispute is a matter of "interpretation." *Id.* at 11.

National Review's "interpretation" simply stated that Dr. Mann's hockey stick bogusly compares apples to oranges, and thereby inflates the degree of modern global warming. *See supra* at 3. This is nothing but fair commentary about an important act of scientific interpretation, which Dr. Mann wants to use as the basis for severely altering current energy policy.[1] And the "correctness" of National Review's criticism cannot be determined by assessing whether "X" event occurred or was performed by a certain person, but only by offering one's "interpretation" or opinion on the *propriety* of what indisputably occurred.

2. Having failed to identify any specific factual allegation underlying Defendants' challenged criticisms, Dr. Mann contends that the adjectives *themselves* somehow constitute specific factual allegations. This is plainly untrue. Every assertion here is, at worst, a more caustic version of the concededly protected assertion that Dr. Mann's work is "misleading." Adjudicating the "truthfulness" of such statements would require the jury to resolve the subjective question of whether National Review's or Mann's opinions on the hockey stick are more convincing.

First and most obviously, the only statement at issue actually authored by National Review was the statement by its editor, Rich Lowry, which expressly disclaimed any libelous meaning and instead explained that Steyn's commentary was nothing more than a "polemical" assertion that the hockey stick is "intellectually bogus and wrong." NR Br. at 43-44. It cannot seriously be argued that this characterization of the intellectual validity of the hockey stick is a "provably false" statement

[1] For this reason, the common-law doctrine of fair comment also protects the challenged statements, because they are all an "honest expression of opinion on matters of legitimate public interest" . . . and "based upon the true" and undisputed "fact" that post-1960 tree-ring data was omitted from various versions of the hockey-stick graph. *Milkovich*, 497 U.S. at 13 (quoting 1 F. Harper & F. James, Law of Torts § 5.28, at 456 (1956)).

(particularly since it seeks to *soften* the harshness of Steyn's characterization). It is simply a contention that Dr. Mann's work is intellectually "spurious"—*i.e.*, unworthy of serious consideration.[2] If anything, "intellectually bogus" is even *less* derogatory than "misleading," because an opinion can be "spurious" or "bogus" even if the speaker did not cherry-pick data that misleads readers.

Second, Dr. Mann claims that Steyn somehow accused him of a specific, objectively verifiable act when he stated that Dr. Mann is "[t]he man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." J.A. 91. But Dr. Mann himself affirmatively states that "fraudulent" is a "synonym" for "bogus." Mann Br. at 3 n.3; 29 n.54. Therefore, using the adjective "fraudulent" to characterize Dr. Mann's work is no more provably false than calling Mann's work "bogus," "spurious," or "misleading."

Apparently recognizing this, Mann makes the almost-comical assertion that Steyn's words were intended to literally accuse him of common law "civil" fraud. Mann Br. 2, 28-29. But, of course, common-law fraud involves "schemes to deprive [people] of their money or property," *McNally v. United States*, 483 U.S. 350, 356 (1987), and, under Mann's own definition, occurs only if "action is taken in reliance upon [a false] representation." Mann Br. at 29 (quoting *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (involving a specific charge that defendant fraudulently obtained money by making false representations regarding oil and gas investments)). Steyn plainly did not accuse Mann of literal civil fraud: Even Dr. Mann does not contend that Steyn accused him of misleading people in order to secure *money* or *property*, or that anyone directly relied on his representations to their financial detriment. Rather, even under Mann's interpretation, Steyn accused him of misleadingly presenting data to advance Mann's *ideological beliefs*.

[2] The very same dictionary that Dr. Mann cites defines "bogus" as "spurious." *See* http://dictionary.reference.com/browse/bogus?s=t. *Compare* Mann. Br. 3 n.3.

Because Steyn plainly was not accusing Mann of civil fraud (and concededly not alleging criminal fraud, Mann Br. 2-3), it is entirely beside the point that Steyn could have been potentially liable for defamation if he had literally accused Mann of engaging in a Ponzi scheme or similar commercial fraud—the type of accusation that juries can objectively adjudicate. Juries can also adjudicate whether someone has committed "blackmail" or behaved as a "traitor," and those might be false factual assertions in *some* contexts. This does not mean, however, that they are actionable when loosely made in the discussion of a public controversy, where they are not literal accusations of crimes (or civil torts). *Cf. Greenbelt Coop. Publ'g Assn. v. Bresler*, 398 U.S. 6, 7 (1970) ("blackmail"); *Nat'l Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 268 (1973) ("traitor").

Because Steyn obviously was not alleging any literal legal violation, the only possibility is that he was using the term "fraudulent" in a loose, figurative sense. When a word is used figuratively, it is not actionable because its meaning is too "debatable, loose and varying," to be "[]susceptible to proof of truth or falsity." *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976); *see also Farah v. Esquire*, 736 F.3d 528, 540 (D.C. Cir. 2013) ("loose, figurative [and] hyperbolic language" not actionable). To the extent that Mann is suggesting that "fraudulent" *necessarily* connotes some particular action to fabricate or manufacture data (as opposed to presenting it in a misleading form), he is plainly wrong. Rather, according to the dictionary Dr. Mann himself cites, the non-legal meaning of "fraud" is synonymous with "bogus," as well as other terms that do not suggest falsifying data or results—*e.g.*, a "sharp practice" or "humbug."[3] Indeed, even when the term "fraudulent" is used in a technical *legal* sense, it can have a wide variety of meanings, some of which do not imply any intentional wrongdoing, such as a "fraudulent conveyance" in bankruptcy. Even *criminal* fraud does not necessarily connote data fabrication or any other action that would be provably false in the context

[3] *See* http://dictionary.reference.com/browse/fraud?s=t.

of a public debate, because it can reach statements that are merely misleading—where, for example, a statement implies knowledge the speaker does not possess. *See Knickerbocker Merch.Co. v. United States*, 13 F.2d 544 (2d Cir. 1926) (Learned Hand, J.).

For these reasons, as National Review's opening brief showed and Dr. Mann simply ignores, numerous cases have found accusations of "fraud," lying, and deception non-actionable in the course of public debate because they did not contain specific factual accusations. *See* NR Br. 26-28. Dr. Mann also does not address the awkward fact that he *himself* has used rhetorical epithets such as "pure scientific fraud" and "fraudulent" to attack his opponents in the climate-change debate. *Id.* at 6-7. And he fails to grapple with the numerous examples of mainstream writers in respected publications using the term "fraudulent" to express protected criticism. *Id.* at 24, 39-40. Instead he says simply that those writers may have "gotten away with" using that language for now, foreshadowing the wave of litigation that his legal theory would invite. Mann Br. 33-34.

Third, Dr. Mann contends that National Review alleged some provably false fact by reprinting the metaphor that he "molested and tortured data." Mann Br. 37. But the verbs "molested" and "tortured" in this context obviously cannot bear their *literal* meaning, because it would be absurd to say that Dr. Mann committed some literal act of "molestation" or "torture" against his data. Instead, the terms are obviously used figuratively, to express the criticism that Dr. Mann analyzed and presented his data in a way that Defendants consider highly flawed, misleading, and unethical. Once again, that is exactly the type of assertion that is "so imprecise [and] subjective that it is not capable of being proved true or false" in court. *Farah*, 736 F.3d at 540. Moreover, Dr. Mann does not dispute that phrases like "molested and tortured data" and "tortured" statistics are "commonly" used to express protected criticism of statistical techniques. NR Br. 39-40.

Fourth, Dr. Mann suggests that it was provably false to assert that he committed some unspecified act of "academic and scientific misconduct" or "data manipulation." Mann Br. 31. He

fails to note that National Review did not reprint these quoted phrases, which were published only by CEI and Simberg. But in any event, these statements are not actionable because standing alone they are imprecise "subjective assertions," and are not accompanied by any specific allegation of any "verifiable event" that could be proved objectively true or false. *Milkovich*, 497 U.S. at 22 (citation omitted). Of course, academic and scientific bodies can and should decide whether they believe Dr. Mann's work is misleading or unethical, but this is not a *factual* inquiry within the meaning of the First Amendment. It is an exercise of inherently *subjective* judgment based on standards of conduct developed by expert bodies to make such judgment calls. Particularly instructive on this point is *Rosen v. AIPAC*, 41 A.3d 1250 (D.C. 2012), where this Court held that it was not actionable to say that an employee had fallen below "the standards that AIPAC expects and requires of its employees," because that statement was "too subjective, too amorphous, too susceptible of multiple interpretations . . . to make [it] susceptible to proof[.]" *Id.* at 1252 n.3. Compared to the specific "standards" referenced in *AIPAC*, here the characterizations of "misconduct" and data "manipulation" were even more imprecise and subjective: They were expressed at a "high[] level of generality," and "could have meant many things, none self-evident." *Id.* at 1260. Dr. Mann does not even mention *AIPAC*, much less attempt to distinguish it.

Finally, Dr. Mann contends that all of the Defendants must have been making specific factual allegations because CEI and Simberg have called for scientific and academic investigations into Dr. Mann's work. Mann Br. 33. But, of course, they were calling for expert bodies to make professional value judgments about the *propriety* of Dr. Mann's work, not to "resolve" the *non-existent factual* controversy about whether Mann *falsified* data. Again, the First Amendment requires that such subjective judgments be left open for debate and disagreement among *private* parties, and forbids them from being adjudicated and penalized in public courts.

B. The Cases Cited by Dr. Mann Confirm That His Arguments Must Fail

Dr. Mann cites a flurry of cases in an attempt to shore up his argument, but all of them undermine his position. Far from erasing the protection for subjective opinions, *Milkovich* reconfirmed that, in order to be actionable, "statement[s] on matters of public concern *must* be provable as false"—*i.e.*, must be objective factual assertions. 497 U.S. at 19 (emphasis added). Accordingly, "full constitutional protection," *id.* at 20, must be extended to "subjective assertions" that do not "articulat[e] . . . an objectively verifiable event," *id.* at 22 (citation omitted). Thus, *Milkovich* plainly did not erase constitutional protection for subjective opinions, but simply explained that a statement that *does* assert a provably false fact cannot be immunized from liability merely by labeling it an "opinion." *Id.* at 18. The facts of *Milkovich* are strikingly different from the present case in three respects: there was no speech on a matter of public concern and no public-figure plaintiff, but there *was* a clear allegation that the plaintiff committed a specific, verifiable act of perjury by "l[ying] under oath" in a particular "judicial proceeding." 497 U.S. at 3.

Dilworth v. Dudley supports only the obvious point that scholars may sue for defamation if they are "falsely accused" of specific acts of misconduct such as "plagiarism or sexual harassment or selling high grades." Mann Br. 29 (citing 75 F.3d 307, 310 (7th Cir. 1996)). *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369 (N.Y. 1977), likewise held that it was actionable to call a judge "corrupt" only because that label was accompanied by specific allegations of verifiable facts: The defendant alleged, for example, that "the Joint Legislative Committee on Crime has a whole file full of suspicious dispositions" by the plaintiff judge. *Id.* at 376. Similarly, in *Bentley v. Burton*, 94 S.W. 3d 561 (Tex. 2002) (Mann Br. 32), the accusations of judicial "corruption" were actionable only because they were accompanied by specific allegations of verifiable events—e.g., that the judge had "delayed resolution" of a particular case to manipulate the defendant's father, threatening that the defendant's son would "not get out of prison while you're alive" unless the defendant complied with the judge's

wishes. *Id.* at 570-71. Moreover, the defendant claimed to have "court records show[ing] that his allegations were factual," and "offered to make the records he had available." *Id.* at 571. Those were assertions of objective fact, not subjective characterizations.

The rest of Dr. Mann's cases likewise confirm that subjective adjectives and characterizations such as "fraudulent" are *non-actionable*. For example, the requirement of specific factual allegations was dispositive in *Weyrich v. The New Republic, Inc.*, 235 F.3d 617 (D.C. Cir. 2001) (Mann Br. 33). It was *not* actionable to characterize Weyrich as "paranoi[d]" without any specific factual accusation. *Id.* at 624-25. But it *was* actionable to relate "false anecdotes," fabricated "quotations," and "historical vignettes," including that Weyrich had "snapped" and "froth[ed] at the mouth" in a particular episode. *Id.* at 626. Those accusations were provably false because, unlike the subjective characterization of "paranoia," they gave a "direct account of events that speak for themselves." *Id.* (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971)).

Similarly, in *Buckley v. Littell*, the statement was actionable because its "clear meaning" was that William F. Buckley, Jr., had committed specific, provable acts of libel. 539 F.2d at 896 (Mann Br. 38). The defendant had stated that Buckley could be "taken to court" because he "lied day after day in his column," just "[l]ike Westbrook Pegler" had done "about Quentin Reynolds." *Id.* at 895. The comparison to the lawsuit between Pegler and Reynolds was crucial, because the defendant "knew . . . that Pegler's lies had been proved (by Reynolds) to be libels." *Id.* at 896. By contrast, the court held that it was *not* actionable for the defendant to characterize Buckley as a "deceiver" and a "fellow traveler" of "fascism," because the meaning of such statements was "debatable, loose and varying," making them "insusceptible to proof of truth or falsity." *Id.* at 894.

Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 671 (D.C. Cir. 1987) ("*CCNV*"), also confirms National Review's position that specific allegations of data *fabrication* are actionable, but not criticisms of misleading data *presentation*. *CCNV* held it was not actionable to convey that the

plaintiff's statistics were "grossly overestimated" by stating that they were "not the result of a thorough census," and "not drawn from . . . systematic evidence." *Id.* at 670-71. That is a matter of subjective characterization, not objective fact. The Court reached a different result based on separate, specific accusations that the plaintiff committed an objectively verifiable act of data fabrication—i.e., that the plaintiff had "grabbed [a statistic] out of the air," and that when the defendant "check[ed] with" the plaintiff "to determine the basis of [the statistic]," "[i]t turned out that there was no . . . basis for the figure." *Id.*

C. The First Amendment Imposes a Clear-Statement Rule For Libel Claims In The Realm of Political and Scientific Controversy

The statements at issue here cannot be actionable if they contain any ambiguity or lack of clarity. As National Review demonstrated in its opening brief, the First Amendment imposes a clear-statement rule for defamation claims in the realm of political and scientific controversy. *See* NR Br. 30-33. If there is any serious risk that a libel claim would subject a defendant to punitive litigation for expressing a protected opinion on a matter 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) (opinion of Roberts, C.J.) (emphasis added); *see also Moldea II*, 22 F.3d at 317 (courts must "err on the side of nonactionability."). Any other rule would subject a substantial amount of core protected speech to punitive litigation, casting a chill on free debate.

Because Dr. Mann does not address National Review's clear-statement argument, he tacitly concedes the point. *See* Mann Br. 26-27. Indeed, the cases he cites *confirm* that ambiguous characterizations are not actionable. *See, e.g., Potts v. Dies*, 132 F.2d 734, 735 (D.C. Cir. 1942) (not actionable to use the term "Nazi Trojan Horse" without further specific factual allegations, even though it plainly *could* mean "a concealed participant in an armed Nazi invasion") (Mann Br. 38).

Nonetheless, at times, Mann appears to suggest that even a subjective assertion about a matter of public concern is actionable if "a reasonable factfinder could conclude" that the statement

alleges an objectively disprovable fact. *See* Mann Br. 30 (quoting *Milkovich* 497 U.S. at 20). But that argument is both procedurally and substantively flawed. The procedural error, exemplified by the decision below, is assuming that the *jury* resolves ambiguities in statements on matters of public concern to determine whether they are constitutionally protected subjective assertions. But it is plainly the duty of the *court* "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.*, 466 U.S. at 505. The court (including an appellate court) must make its *own* "independent examination." *Bose Corp*, 466 U.S. at 499. And if there were any doubt, the Anti-SLAPP Act requires this Court to resolve the issue now, to avoid imposing the burdens of litigation on National Review for exercising its First Amendment rights: "The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself[.]" *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

Relatedly, as a substantive matter, the court does not ask whether the challenged statement "could" be viewed as an unprotected factual assertion, but determines whether it is "sure" that it is. *Bose Corp.,* 466 U.S. at 505. For that reason, statements that contain "imprecise language" or otherwise "bristle[] with ambiguities" cannot go to a jury because, in that circumstance, "it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Bose*, 466 U.S. at 492 (citation omitted); *Time*, *Inc.*, 401 U.S. at 290-91. Allowing *some* expressions of core protected opinion—*i.e.*, the ambiguous ones—to be subject to defamation claims would expose those opinions to the dual burdens of extended, intrusive litigation and crippling damages awards, rather than giving them the "*full* constitutional protection" to which they are entitled. *Milkovich*, 497 U.S. at 20 (emphasis added). That is why holding defendants

"responsible for every inference a reader might reasonably draw from [an ambiguous statement] would undermine the uninhibited discussion of matters of public concern." *Guilford*, 760 A.2d at 601.

In addition, as *Bose* demonstrates, the "actual malice" requirement also imposes a clear-statement rule for an independent reason: If it is *unclear* whether a defendant meant to assert a specific factual proposition, then it is impossible to prove by "clear and convincing" evidence that the defendant subjectively *knew* that the proposition he was asserting was false (or almost certainty false). *Bose*, 466 U.S. at 511-12.

Contrary to Dr. Mann's suggestion, nothing in *Milkovich* altered these bedrock principles. Quite the opposite, *Milkovich* repeated *Bose's* admonition that *courts* have "an obligation to make an independent examination" to ensure that a defamation claim does not work "a forbidden intrusion on the field of free expression." *Milkovich,* 497 U.S. at 17. The speech in *Milkovich* did not address any issue of public concern, and the plaintiff was not a public figure, so there was no need for a clear-statement rule. Indeed, it was only *after* determining that the First Amendment imposed no such barrier that the Court held that the "question in the present case *then becomes* whether a reasonable factfinder could conclude" that the challenged statement was a specific factual assertion. *Milkovich*, 497 U.S. at 21 (emphasis added). Because the challenged statement was a "clear" allegation of a specific and provably false fact, this wasn't even a close question. *Id.* In so holding, the Court obviously was not implicitly overturning *Bose* by relieving courts of their duty to resolve the critical constitutional question of whether speech on a matter of public concern is a protected "subjective assertion." Much less was it leaving that essential First Amendment safeguard to the discretion of juries, which are competent to act only as finders of *fact*.

In any event, for the reasons stated above, it is not "reasonable" to interpret the challenged statements here to allege data *fabrication* or other objectively disprovable facts. That is particularly

true since National Review *expressly* averred that the term "fraudulent" as used by Steyn was nothing more than a subjective assertion that the hockey-stick graph is intellectually bogus and wrong.

II. DR. MANN MUST SHOW THAT HE IS ACTUALLY "LIKELY" TO SUCCEED

The Anti-SLAPP Act requires Dr. Mann to show that his claims are "likely to succeed on the merits." D.C. Code § 16-5502(b). He asks this Court to ignore that plain text, and to require only that he meet the standard for surviving a summary-judgment motion by identifying disputed material facts. Mann Br. 22. That interpretation would grant Anti-SLAPP defendants no special protection at all, because *any* defendant can move for summary judgment on the pleadings. The entire point of the Anti-SLAPP Act is to require plaintiffs to do *more* than necessary to survive such a motion, *i.e.*, to show that they are *likely to succeed* on disputed facts.[4]

Dr. Mann contends that the D.C Anti-SLAPP Act is "model[ed]" on California law, *id.* at 23, but that is false as a matter of both text and history. Dr. Mann ignores the difference in the text of the two statutes: California merely requires a plaintiff to show "a probability" of prevailing, Cal. Code Civ. Proc. § 425.16(b)(1), but D.C. requires a plaintiff to show that he is actually "*likely* to succeed on the merits," D.C. Code § 16-5502(b) (emphasis added), which means "having a *high* probability of occurring or being true," *see Merriam-Webster Dictionary* (online ed. 2011) (emphasis added)). If the D.C. Council had wanted to use California as a "model," it would not have used different language.[5]

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[4] Dr. Mann argues that the D.C. Council did not really intend to adopt the preliminary-injunction standard because it did not say that plaintiffs must be "substantially" likely to succeed on the merits. Mann Br. 23. But it is nonsensical to think that the Council meant for plaintiffs to prevail based on an *insubstantial* likelihood of success, which is all Dr. Mann can show.

[5] Legislative history cannot overcome the plain text of the Act, especially because Dr. Mann adduces *no* evidence that the Act was based on California law. Instead he quotes a Committee Report as saying that the Act "follows the model set forth in a number of other jurisdictions." J.A. 167. But the Report does not single out California; it refers to "28 jurisdictions." J.A. 169.

III. DR. MANN IS NOT "LIKELY" TO SUCCEED IN PROVING ACTUAL MALICE

Dr. Mann does not dispute that his aggressive role in the hockey-stick controversy makes him a limited public figure, requiring him to prove "actual malice" by clear and convincing evidence. Mann Br. 41. Accordingly, it is not enough for him to show that National Review *should* believe the published statements are false. Instead he must show that National Review actually *does* believe they are false, or at least has a "high degree of awareness" of their falsity. NR Br. 44-45. To make this showing, Dr. Mann would have to prove that political conservatives do not really believe that the hockey-stick graph is "intellectually bogus and wrong." That is impossible for three reasons.

First, the First Amendment does not allow an "honest speaker" to "accidentally incur liability for speaking" based on a meaning he did not intend. NR Br. 45-46 (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring)). Simply put, because National Review *subjectively* believed the published statements were nothing more than rhetorical hyperbole, National Review could not have *subjectively* believed they were false (or almost certainly false) accusations of specific fact. Dr. Mann's sole response is that a "reasonable reader" "would" have understood the statements as specific accusations of fraud or data falsification. Mann Br. 44. But that misses the point. "Actual malice" does not turn on what was *conveyed* to an *objective* "reasonable *reader*," but on what the *speaker subjectively knew* or *believed*. As the Supreme Court clearly established 50 years ago, adopting a mere "reasonable person" negligence standard and imposing punishment based on some unintended meaning based on how a statement *might* be interpreted would eliminate the breathing space necessary for "uninhibited, robust, and wide-open" debate. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Because Dr. Mann offers *no* evidence that National Review *actually believed* it was publishing factual allegations rather than opinion (or did not believe those opinions), his actual-malice arguments fail at the threshold.

Second, Dr. Mann argues that National Review must be aware that its statements were false because some investigations have "exonerat[ed]" him. Mann Br. 42. To the extent the investigations found that he did not "falsify data," *id.*, that is irrelevant because National Review obviously did not accuse him of that. And to the extent the investigations opined that his actions should not be characterized as "misconduct," "manipulation," or "misleading" *id.*, that is the type of subjective opinion with which National Review is free to disagree. Dr. Mann suggests that National Review should not disagree with the judgment of expert bodies such as the National Science Foundation, which he claims is "the final arbiter of scientific research in the United States." *Id.* at 17. But, of course, the very point of the First Amendment is that there can be no "final arbiter of scientific research in the United States," least of all a federal "Ministry of Truth." *Alvarez*, 132 S. Ct. at 2547. On the contrary, scientific questions must remain open for debate, and the only "arbiter" of truth allowed by the Constitution is the marketplace of ideas.

Finally, Dr. Mann claims that National Review has a "motive" to lie about its views in order to "further[] [its] political agenda [by] casting doubt on the entire concept of global warming and climate change." Mann Br. at 45. But this supposedly sinister "political agenda" is nothing more than the desire to express an opinion on global warming that differs from Dr. Mann's. That is not "evidence" of actual malice; it simply reflects that there is sincere disagreement and an ongoing debate, which the State can play no part in "resolving."[6]

[6] Dr. Mann's intentional-infliction arguments fail for two reasons. First, because the commentary published by National Review addressed "a matter of public concern," it is "entitled to 'special protection' under the First Amendment," and "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). This protection "cannot be overcome by a jury finding that the [commentary] was outrageous," regardless of common-law rules. *Id.* at 1212. And second, even under the common-law rule, the statements published by National Review were not "extreme and outrageous." *Minch v. Dist. of Columbia*, 952 A.2d 929, 940 (D.C. 2008).

IV. THE COMMUNICATIONS DECENCY ACT IMMUNIZES NATIONAL REVIEW FROM LIABILITY FOR STEYN AND SIMBERG'S COMMENTARY

Dr. Mann fails to defeat National Review's claim of Section 230 immunity for commentary on its website that it did not author.[7] Dr. Mann claims that National Review is not entitled to immunity because it allegedly functioned as the "information content provider" for the challenged statements. But Dr. Mann does not even *assert* that Steyn is an employee of National Review, and provides no evidence that he is National Review's "agent." Nor does he point to any such allegation in his complaint. Moreover, the fact that National Review granted Steyn "administrative access to the Corner" and linked to his articles on its website, Mann Br. 50, in no way establishes that National Review was an "information content provider' *for the portion of the statement or publication at issue*." *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 320 (D.D.C. 2012) (emphasis added; citation omitted), *aff'd*, 753 F.3d 1354 (D.C. Cir. 2014). Indeed, Mann never disputes that Steyn was the exclusive author of the challenged comments and that he was able to post them "without prior editing or review." NR Br. 9. Courts are clear that immunity is available "even where the interactive service provider has an active, even aggressive role in making available content prepared by others," *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998), or performs the traditional functions of a publisher, *Doctor's Assocs. v. QIP Holder LLC*, No. 3:06-cv-1710, 2010 BL 50672, at *27 (D. Conn. Feb. 19, 2010). Here, National Review did even less than that.[8]

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[7] Dr. Mann urges this Court not to consider the issue because it was first raised in this interlocutory appeal. But since it is a pure issue of law that the lower court will have to address on remand, this Court should exercise its discretion to address the issue now. *See BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, No. 13-cv-546, 2014 BL 245915, at *5 (D.C. Sept. 4, 2014).

[8] Dr. Mann also conclusorily asserts that National Review played a "role in developing and endorsing Steyn's" comments, Mann Br. 50, but his complaint does not allege this, and the only evidence he cites is Lowry's letter, which was published *after* Steyn's comments, and which expressly stated that the comments were nothing more than an assertion that the hockey stick is intellectually bogus and wrong.

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CERTIFICATE OF SERVICE

I hereby certify that all parties consented in writing to electronic service under Rule 25(c)(1)(D), and on September 24, 2014, I caused a copy of the foregoing brief to be served by e-mail upon:

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