

Nos. 18-1451 & 18-1477

IN THE
Supreme Court of the United States

NATIONAL REVIEW, INC.,
Petitioner,

v.

MICHAEL E. MANN,
Respondent.

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*,
Petitioners,

v.

MICHAEL E. MANN,
Respondent.

**On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals**

**BRIEF FOR *AMICUS CURIAE*
DR. JUDITH A. CURRY
IN SUPPORT OF PETITIONERS**

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**BRIEF OF *AMICUS CURIAE* DR. JUDITH A. CURRY
IN SUPPORT OF PETITIONERS**

Pursuant to Supreme Court Rule 37, Dr. Judith A. Curry respectfully submits this *amicus curiae* brief in support of petitioners National Review, Inc., Competitive Enterprise Institute, and Rand Simberg.¹

INTEREST OF *AMICUS CURIAE*

Dr. Curry is professor *emerita* and former chair of the Georgia Institute of Technology's School of Earth and Atmospheric Sciences. She has been a member of the National Research Council's Climate Research Committee and the United States Department of Energy's Biological and Environmental Research Advisory Committee. She has authored three books and nearly two hundred scholarly articles on climate science. Dr. Curry also maintains an active blog, Climate Etc., which provides a forum for climate researchers, academics, technical experts from other fields, citizen scientists, and the interested public to engage in a discussion on topics related to climate science and the science-policy interface. She has received many federal grants and contracts over the

¹ In accordance with Supreme Court Rule 37.2(a), counsel for *amicus curiae* notified the counsel of record for all parties at least ten days before the due date of this brief as to its filing, and all parties provided their consent. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except *amicus curiae* or its counsel financially contributed to its preparation. As petitioners have filed separate petitions, this brief is being filed in two dockets.

past decade to study climate science. Her full *curriculum vitae* is available online.²

As it relates to these cases, Dr. Curry is a stalwart supporter of free speech and believes it plays a crucial role in the advancement of scientific debate. She also has an interest in robust debate on climate science in keeping with the scientific principles she espouses. Dr. Curry filed an *amicus curiae* brief in the proceedings below.

SUMMARY OF ARGUMENT

Along with the arguments made by petitioners—National Review, Inc., Competitive Enterprise Institute, and Rand Simberg—and *amicus curiae* Southeastern Legal Association, this Court ought to grant both petitions for review because the debate on climate science is an ongoing one, and these suits are injuring one side of the debate. If the Court were to postpone addressing the important First Amendment issues raised below, grave decisions may be made based on the poor scientific understanding created in whole or in part by the chilling effects of these cases.

The history of scientific controversies is replete with hard words and long fought disputes, none of which litigation advanced. The key principles of frank scientific debate, proceeding under robust First Amendment protections, are under threat and need

² *Curriculum Vitae of Judith A. Curry*, Ga. Inst. of Tech., <http://b.gatech.edu/2k4d6Pf> (last visited July 2, 2019).

vindication whenever a clear case, such as this, is before the Court.

*Science is always sold as facts, and it's not, it's process. And that process is mainly arguing.*³

Scientific progress and democratic governance depend on vigorous and open debate. See Comm. on Sci., Eng'r, & Pub. Policy, Nat'l Acad. of Scis., et al., *On Being A Scientist: A Guide to Responsible Conduct in Research* at xv (3d ed. 2009) (“Scientific knowledge is achieved collectively through discussion and debate.”); see also Benjamin Franklin, *On Freedom of Speech and the Press*, Penn. Gazette, Nov. 17, 1737 (“Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.”). Efforts to use legislation or the courts to attack and silence those that disagree must be opposed. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the District of Columbia—where so many of the Nation’s public policy debates occur—speakers and writers should be confident in their ability to exercise their free speech rights while discussing politically contentious issues.

This Court has addressed directly the need for wide-ranging debate in the scientific community and the necessity of “perpetual revision.” It has also noted that scientific debate must have a broader leeway for speculation and debate than the courthouse allows.

³ *The perils of explaining science*, BBC Inside Science, Jan. 12, 2017, <http://bbc.in/2jwOwpn> (statement of Dr. Tamsin Edwards).

Specifically, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court addressed whether adopting the “*Daubert* standard” would calcify into scientific orthodoxy:

[Petitioners] suggest that recognition of a screening role for the judge that allows for the exclusion of “invalid” evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of

authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Id. at 596–97 (internal citations omitted).

If the Court were to allow these suits to continue a process that the Court itself has stated is in tension with the goals of science, then both the First Amendment and the search for “cosmic understanding” would be injured. Cases such as these are making the federal district courts a magnet for litigation designed to stifle debate and the Court ought to address that problem without delay.

ARGUMENT

I. The decisions below infect the law with concepts alien to First Amendment protections and threaten open scientific debate.

Petitioners here are being hauled into Court subject to the loss of property, in part, for using a metaphor. A metaphor is a “figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them.” *Webster’s New Collegiate Dictionary* (1981). Calling an individual the “Jerry Sandusky of climate science” because that individual “molested and tortured data in service of politicized

science” is a metaphor. Pet. App. 94a–97a. Similarly, the colloquialism “cover-up” to describe an insufficient investigation is in such common use that it would flood the courts if every mention were to be the basis for a lawsuit. Pet. App. 99a–100a, 129a.

One count of the Complaint below rests on the claim that petitioners “attempt[ed] to discredit consistently validated scientific research[.]” Pet. App. 191(a); see Pet. App. 200(a). Yet that is exactly what scientists do. Respondent’s argument from authority relying on “investigations” by the Environmental Protection Agency and the National Science Foundation, as well as Penn State, cannot make a scientific proposition or activity more or less true. Even so, here, exactly such an argument was used to support a claim that the statements in question were libelous. The Superior Court likewise deemed criticism of these investigations to be libelous because it ascribed to them features of the Tablets from the Sinai rather than recognizing challenges to their validity as part and parcel of ongoing debate. See Pet. App. 142a; Pet. App. 149a.

Most egregiously—and this alone is a reason the Court should grant the petitions—the District of Columbia Court of Appeals ruled that because petitioners were “deeply invested in one side of the global warming debate,” this belief gave them “a motive to defame” respondent. Pet. App. 87a. A malice standard that rewards insouciance rather than commitment ought not stand.

II. The history of science and its advancement is rife with harsher exchanges than those at issue.

The approach of many scientists involved in the greatest controversies of their age was to await the test of time. Charles Darwin, for example, wrote: “Although I am fully convinced of the truth of the views given in [the *Origin of Species*] * * * , I by no means expect to convince experienced naturalists whose minds are stocked with a multitude of facts all viewed, during a long course of years, from a point of view directly opposite to mine. * * * [B]ut I look with confidence to the future—to the young and rising naturalists, who will be able to view both sides of the question with impartiality.” *Origin of the Species*, as quoted in Thomas S. Kuhn, *The Structure of Scientific Revolutions* 150 (4th prtg. 2012).

The process of scientific debate and discovery is not a bloodless thing of lab coats, test tubes, and treatises. “Often, * * * [it] is charged with emotion. When introducing a new idea a scientist is likely to be stepping on the theories of others. * * * How does the loser feel when he or she sees a cherished theory being overturned, perhaps even sees immortality slipping away? When the loser goes down fighting, we have one kind of scientific feud[.]” Hal Hellman, *Great Feuds in Science: Ten of the liveliest disputes ever* at xii (1998). The climate debate seems to be such an argument. Those of rival camps do not always fight by the Marquess of Queensberry Rules.

Voltaire, for example, entered the scientific lists in a battle with John Turberville Needham, a prominent scientist of his day, over the origin of life. Both men parodied and insulted one another. “For Voltaire, the dispute with Needham was just one of many. His general feeling about disputes can be summed up with his comment, ‘Disputes among authors are of use to literature; as the quarrels of the great, and the clamours of the little, in a free government, are necessary to liberty.’” *Id.* at 78. In other words, “[d]isputes among natural philosophers are of use to science, as the quarrels of the great, and the clamors of the little, are necessary to freedom of thought and the advancement of learning.” *Id.* at 79.

The competition between the fossil hunters Edward Drinker Cope and Othniel Charles Marsh similarly “became legendary and included every form of duplicity and chicanery possible.” *Id.* at xiv. At the beginning of 1890, *The New York Herald* published the headline, “Scientists Wage Bitter Warfare.” The article that followed contained “nine columns of juicy detail, in which [Cope], of the University of Pennsylvania, advanced serious charges against [Marsh], who was not only Professor of Paleontology at Yale University, but also president of the National Academy of Sciences and an important member of the United States Geological Survey.” *Id.* at 121. Those charges included, among other things, “plagiarism, incompetence, and even the smashing of fossils to prevent others getting at them.” *Id.* But the result of this dispute and rivalry greatly improved the study of paleontology, see *id.* at 138–39, thus confirming Voltaire’s view of such sharp contests.

Perhaps the closest scientific analogy to the case *sub judice* is that of Alfred Wegner, an early theorist of “continental drift,” that is, the theory that the continents are not static but move over time on a bed of soft material. Once the theory was published and translated, other geologists immediately attacked Wegner in the strongest language. British geologist Philip Lake said of Wegner, “he is not seeking truth; he is advocating a cause and is blind to every fact and argument that tells against it.” *Id.* at 150. The American paleontologist E.W. Berry called Wegner’s theory “a selective search through the literature for corroborative evidence, ignoring most of the facts that are opposed to the idea, and ending in a state of auto-intoxication in which the subjective idea comes to be considered as objective fact.” *Id.* Other scientists opined that mere discussion of the theory “incumbers the literature and befogs the mind of fellow students.” *Id.* The whole thing was, according to these scientists, “a fairy tale.” *Id.*

This is close to what we have here. It is a *difference of views*, not a libel, to describe someone as subject to “auto-intoxication” of an idea. Berry used a metaphor when he accused Wegner of such “auto-intoxication”; he was not accusing Wegner of drunkenness. “[S]tatements that amount to ‘imaginative expression’ or ‘rhetorical hyperbole’ cannot be libelous, as such statements are ‘used not to implicate underlying acts but ‘merely in a loose, figurative sense’ to demonstrate strong disagreement’ with another.” *Bauman v. Butowsky*, No. 18-01191, 2019 WL 1433595, at *6 (D.D.C. Mar. 29, 2019) (quoting *Signal Constr. Corp. v. Stanbury*, 586 A.2d 1204,

1210–11 (D.C. 1991)). That is because scientific norms are reinforced and protected by First Amendment jurisprudence.

III. Scientific norms and First Amendment jurisprudence both embrace the view that robust debate is crucial to truth, progress, and democratic governance.

In his landmark work, *The Sociology of Science*, Robert Merton established norms on which scientists should rely, including communalism, universalism, dis-interestedness, originalism, and organized skepticism. See Robert K. Merton, *The Sociology of Science: Theoretical and Empirical Investigations* 268–78 (1973). These norms have been described elsewhere:

Communalism: Science is public knowledge, freely available to all * * *
 Universalism: There are no privileged sources of scientific knowledge * * *
 Disinterestedness: Science is done for its own sake * * *
 Originality: Science is the discovery of the unknown * * * [and]
 Skepticism: Scientists take nothing on trust.

John Ziman, *An Introduction to Science Studies: The Philosophical and Social Aspects of Science and Technology* 84–86 (1984). Merton completed his original work following World War II and made an

argument for the need for these norms for scientific advancement in a democratic society.⁴

The National Academy of Sciences (“NAS”) built on Mertonian norms by establishing guidelines of its own that seek to foster a “community characterized by curiosity, cooperation, and intellectual rigor.” Comm. on Sci., Eng’g, and Pub. Policy, *supra*, at 1. Although the NAS encourages open debate and criticism, *id.* at xv, it treats the falsification of data, intent to mislead, and retaliation against critics as examples of serious research misconduct. *Id.* at 15–17.

Mertonian norms, reinforced by modern, democratic principles guiding scientific research, complement the principles undergirding the First Amendment. Justice Holmes’s celebrated dissent in *Abrams v. United States*, encompasses this case:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

⁴ See Laura G. Pedraza-Fariña, *Patent Law and the Sociology of Innovation*, 2013 Wisc. L. Rev. 813, 836 (2013) (Merton sought to “show[] that academic science could foster democracy and that . . . democracy was crucial to the practice of academic science.”).

That at any rate is the theory of our Constitution. * * * [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe.

250 U.S. 616, 630 (1919) (Holmes, J. dissenting). Holmes's dissent expositis the principle that when litigation silences dissenting opinion, it "harm[s] not only [the litigants] but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Rutti v. Wyoming*, 100 P.3d 394, 401 (Wyo. 2004).

Other courts have used these principles to reject suits like those here. The Second Circuit, for example, noted its support for this approach to the First Amendment when it explained that in "cases involving 'matters of argument' appearing in print, we have been reluctant to recognize causes of action grounded on statements of fact that are best evaluated by an informed reader." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013). "[S]tatements made to summarize an argument or opinion *within* a book' are 'to be accepted or rejected by those who read the book,' even when such statements are made in advertisements." *Id.*

The Seventh Circuit similarly declined to allow suits based on claims of false conclusions in matters of scientific controversy to proceed, explaining that "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994). "More papers, more discussion, better

data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.” *Id.*

District courts presented with controversial scientific questions have declined to find them actionable, too. See *Arthur v. Offit*, No. 09-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (“Plaintiff’s claim * * * threatens to ensnare the Court in the thorny and extremely contentious debate over * * * which side of this debate has ‘truth’ on their side. That is hardly the sort of issue that would be subject to verification based upon a ‘core of objective evidence.’”); cf. *Padnes v. Scios Nova Inc.*, No. 95-1693, 1996 WL 539711, at *5 (N.D. Cal. Sept. 18, 1996) (“Medical researchers may well differ with respect to what constitutes acceptable testing procedures, as well as how best to interpret data garnered under various protocols. The securities laws do not impose a requirement that companies report only information from optimal studies, even if scientists could agree on what is optimal.” (internal citation omitted)).

In addition to these principles, the law is no stranger to “independent” internal reviews that are challenged both verbally and in court. See, e.g., *Castellucio v. Int’l Bus. Machs. Corp.*, No. 09-1145, 2013 WL 6842895 (D. Conn. Dec. 23, 2013) (discussing investigation designed more to exonerate defendant employer than to determine whether employee fairly treated). Such audits and reports are often flawed and lead to scandal in their own right. For instance, former Department of Homeland Security Acting

Inspector General John Kelly was forced to retire early after reports emerged that he directed auditors to produce “feel-good reports” about the Federal Emergency Management Agency’s disaster response performance. See Lisa Rein & Kimberly Kindy, *How a watchdog whitewashed its oversight of FEMA’s disaster response with ‘feel good’ reports*, The Wash. Post, June 6, 2019, <https://wapo.st/2XwVbnG>. To use criticism of an investigation as part of the charge and proof of libel is irresponsible and ignores the reality of such investigations.

The ruling below by the Court of Appeals leaves criticism, ridicule, and parody of scientific theories more vulnerable to libel than criticism of copyrighted material. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (copyrighted material may be subject to criticism, comment, and parody). In *Campbell v. Rose-Acuff Music, Inc.*, this Court noted that speech impairing the value of a copyright through ridicule and parody has both free speech and “fair use” protection. 510 U.S. 569, 574–76 (1994). Indeed, the court cited Lord Ellenborough for the proposition that, while every man is entitled to his copyright, “one must not put manacles upon science.” *Id.* at 575 (internal citation omitted). Here, respondent is trying to put similar manacles upon ongoing scientific debate. When a copyrighted work can be subject to ridicule and criticism that actually impairs its value, the comparatively mild criticisms at issue here ought not be subject to suit. See *id.* at 592–94.

IV. Subsequent litigation demonstrates the danger of failing to grant review here.

Finally, the threat is real. On September 29, 2017, Mark Z. Jacobson, a climate scientist, filed a lawsuit seeking ten million dollars from another scientist, Christopher T.M. Clack, and the NAS. See Compl., *Jacobson v. Clack*, No. 17-0006685 (D.C. Super. Ct. filed Sept. 29, 2017). One of the noteworthy features of the suit was that the plaintiff lived and worked in California and one of the defendants, Dr. Clack, was a resident of Colorado. *Id.* ¶¶ 1–2. Only the second defendant, the NAS, was a resident of the District of Columbia, where the case was filed. *Id.* ¶ 3. The NAS had published an article by Dr. Clack critical of Dr. Jacobson’s previous work. The suit was voluntarily dismissed without prejudice on February 22, 2018. Notice of Voluntary Dismissal, *Jacobson v. Clack*, No. 17-0006685 (D.C. Super. Ct. filed Feb. 22, 2018).

A remarkable document was concurrently published with the dismissal by Dr. Jacobson and uploaded to Stanford University’s website. See Mark Z. Jacobson, *Questions and Answers Concerning the Lawsuit Around The Paper PNAS 114, 6722-6727 (2017) (hereinafter C17)* (Feb. 22, 2018), available at <https://stanford.io/2KBNAOz>. In that document, Dr. Jacobson forthrightly states that he brought his lawsuit in the District of Columbia because of the cases at hand. *Id.* at FAQ #3. He also notes that he dropped the case because of the inordinate time and cost of prosecuting it. *Id.* at FAQ #9. Dr. Jacobson’s case was brought to the Court of Appeal’s attention by a Rule 28(k) notice of supplemental authority. See,

e.g., Rule 28(k) Citation of Suppl. Authority, *Competitive Enter. Inst. v. Mann*, No. 14-0101 (D.C. filed Fed. 26, 2018). The case stands as a warning of what awaits the world of science and the District of Columbia courts if *certiorari* is not granted.

CONCLUSION

For these reasons, and those set forth by petitioners, the petitions for writ of certiorari should be granted.

July 2, 2019

Respectfully submitted,

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