Nos. 14-cv-101, 14-cv-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Competitive Enterprise Institute, *et al.*,

Appellants,

v.

Michael E. Mann,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B
(The Honorable Natalia Combs Greene & Frederick Weisberg)

Appellants Competitive Enterprise Institute and Rand Simberg's Petition for Rehearing and Rehearing En Banc

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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 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 and Anthony J. Dick of Jones Day;

Defendant and Amicus Curiae Mark Steyn, represented by Michael J. Songer of Crowell & Moring LLP and Daniel J. Kornstein of Emery Celli Brinckerhoff & Abady LLP;

Amicus Curiae District of Columbia, represented by Irvin B. Nathan, former Attorney General for the District of Columbia, Ariel B. Levinson-Waldman, Todd S. Kim, and Loren L. AliKhan;

Amici Curiae Reporters Committee for Freedom of the Press, Advance Publications, 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 Seth D. Berlin, Shaina Jones Ward, and Mara J. Gassmann of Levine Sullivan Koch & Schulz, LLP;

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;

Amici Curiae Newsmax Media, Inc., Free Beacon, LLC, The Foundation for Cultural Review, The Daily Caller LLC, and The Electronic Frontier Foundation, represented by Phillip C. Chang of McGuireWoods LLP;

Amici Curiae Cato Institute, Reason Foundation, Individual Rights Foundation, and Goldwater Institute, represented by Ilya Shapiro of the Cato Institute and Bradley A. Benbrook and Stephen M. Duvernay of Benbrook Law Group; and

Amicus Curiae Alliance Defending Freedom, represented by David A. Cortman of Alliance Defending Freedom.

Defendant–Appellant Competitive Enterprise Institute discloses that it has no parent corporation or subsidiaries and that no publicly held corporation owns more than 10 percent of its stock.

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*The authorities upon which we chiefly rely are marked with an asterisk.

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Rule 35 Statement

Through two legal errors, the panel decision opens up libel law in the Nation's capital to authorize suits challenging the kind of opinionated commentary on politics and policy that is ubiquitous on our airwaves, in print, and online. *First*, the decision permits a libel suit to proceed whenever "[a] jury could find" that the challenged statement "accuses [the plaintiff] of engaging in specific acts" of wrongdoing. Op. 60. That holding incorrectly conflates the question of whether a challenged statement asserts a verifiable fact—a matter of constitutional significance decided by the court as a matter of law—with its capability of bearing a defamatory meaning, a common-law element on which some deference to the jury is due, in conflict with *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000), and *Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250 (D.C. 2012). It also conflicts with the position, adopted by this Court in *Guilford* and almost universally elsewhere, that a "supportable interpretation" of underlying true facts is constitutionally protected as pure opinion that cannot be proven objectively false, on the incorrect basis that the "supportable interpretation" standard has been limited to "reviews of artistic work." Op. 74 n.45.

Second, the decision abandons the rule that factual ambiguity defeats any attempt to show actual malice by clear and convincing evidence as a matter of law, conflicting with this Court's decision in *Nader v. Toledano*, 408 A.2d 31 (D.C. 1979), and those of the Supreme Court in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Rather than consider whether the factual materials relied upon by an author are

"reasonably susceptible of the interpretation [the speaker] advances," as those cases require, the decision holds that government reports on heavily disputed matters of fact place a matter beyond debate and thereby strip dissenting views of the protection guaranteed them since *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). In so doing, the panel closes off avenues to dispute the government's conclusions regarding public controversies—speech that lies at the heart of the First Amendment.

En banc rehearing is therefore necessary to maintain the uniformity of the Court's decisions and address questions of exceptional importance.

Background

Plaintiff Michael Mann is a climate scientist at Penn State University whose controversial "hockey stick" publications argue that human activity is causing an anomalous and catastrophic rise in global temperatures that began in the 20th century. Critics inside and outside academia have long argued that his climate models are inherently biased, with their hockey stick-shaped output being more a function of his assumptions as carried out through statistical methods than the underlying temperatures. Mann, in turn, has spent the past decade agitating for aggressive action on climate change and relentlessly attacking those who disagree, including academics who disagree only with his views as to the severity of climate change, as "deniers," "shills for the fossil fuel industry," and far worse.

Mann's critics found support in the 2009 leak of 1,000 or so private emails exchanged among climate scientists, including Mann—an event quickly dubbed "Climategate." One email described "Mike's Nature trick," referring to Mann's splicing together different temperature series "to hide the decline" in global tem-

peratures where the hockey stick's upward-trending blade was supposed to be. Other emails reflected efforts to blackball both scientists skeptical of the hockey stick and journals publishing criticisms of it, to block other scientists from accessing data and climate-model code, and to destroy materials so that they could not be obtained through public-records requests.

Although Climategate sparked a number of investigations, none reviewed the central charge of bias in Mann's and his allies' climate models. Only two—by Penn State and the National Science Foundation ("NSF")—addressed Mann's conduct, and neither found support for charges that Mann had engaged in plagiarism, fabrication, or falsification. As for charges of bias in Mann's research, Penn State declared itself satisfied that his findings were not "well outside the range of findings published by other scientists." That cursory review of the science did not satisfy Mann's critics, who viewed it as circling the wagons to protect a prominent faculty member.

Rand Simberg, an adjunct scholar at the Competitive Enterprise Institute ("CEI"), revisited that criticism in a blog post two years later, when Penn State was accused of having acted to protect another prominent faculty member, Jerry Sandusky. Simberg explained that Penn State and the NSF had "declared [Mann] innocent of any wrongdoing," but that "many in the skeptic community called [the Penn State investigation] a whitewash" because the "university circled the wagons and narrowed the focus of its own investigation to declare him ethical"—that is, narrowed the focus to exclude the serious questions about bias in Mann's research raised by the Climategate emails. Those emails, Simberg argued, raised red flags:

they "revealed [Mann] had been engaging in data manipulation to keep the blade on his famous hockey-stick graph" and showed him to be "the posterboy of the corrupt and disgraced climate science echo chamber" that acted to suppress any criticism. Thus, "Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science." Having covered up the Sandusky allegations, Simberg asked in conclusion, would Penn State "do any less to hide academic and scientific misconduct, with so much at stake" in terms of reputation and funding?

Mann sued for libel. On December 22, 2016, a panel of this Court held that the statements quoted above were not protected by the First Amendment because "[a] jury could find that the article accuses Dr. Mann of engaging in specific acts of academic and scientific misconduct in the manipulation of data." Op. 60. It also held that Mann had satisfied his burden to show that a jury could find, by clear and convincing evidence, that Simberg and CEI had subjective knowledge of the statements' falsity, or entertained serious doubts as to their truth—i.e., "actual malice"—based solely on the investigation reports Simberg had set out to question.

Reasons for Granting Rehearing

I. The Panel Decision Contravenes Decisions of This and Other Courts Protecting Supportable Commentary on Public Controversies

The Supreme Court has recognized "constitutional limits on the *type* of speech which may be the subject of state defamation actions." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). As a constitutional matter, "if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or

surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Guilford*, 760 A.2d at 597 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). Thus, in the Restatement's formulation, "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Restatement (Second) of Torts § 566 cmt. c ("Restatement"). Or, as the D.C. Circuit put it in its often-cited *Moldea II* decision, a plaintiff's burden is to show that "'no reasonable person could find that [a statement's] characterizations were supportable interpretations' of the underlying facts." *Washington v. Smith*, 80 F.3d 555, 557 (1996) (quoting *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) (quotation marks and emphasis omitted) ("*Moldea II*"). Such statements of interpretation are protected by the First Amendment because they are not "objectively verifiable" as being false. *Id*. at 556.

This Court expressly adopted "*Moldea II*'s reasoning" in *Guilford*, recognizing that the First Amendment shields from liability critical commentary on facts "that are capable of a number of possible rational interpretations." 760 A.2d at 603 (quoting *Moldea II*, 22 F.3d at 311–12). Applying that standard, the Court held that an op-ed's suggestion that a railroad (Guilford) entered into a sham lease arrangement to reduce its workers' wages and workplace rights was not of the "genre which would support a defamation case against the author of a column on the opinion page of a newspaper." *Id*. at 598. The author, it explained, "acknowledged in his column that the [Interstate Commerce Commission] 'sanctioned the lease

agreement and referred certain labor issues to arbitration'" and thereby "informed the reader that Guilford's actions had been upheld by a federal agency." *Id*. at 599. Thus, a reader "would understand that Guilford took certain actions, that [the author] was apparently unenthusiastic about those actions, and that the ICC basically sustained them." *Id*. This, it concluded, "is not the stuff of which successful libel suits are made." *Id*. *See also id*. at 601 (applying same reasoning to reject liability for implication that Guilford violated the Railway Labor Act).[1]

The panel decision here refused to follow *Guilford*, *Armstrong*, and the D.C. Circuit precedents on which they rely. The First Amendment's protection of a "supportable interpretation" of the facts, it stated, is limited to "reviews of artistic work." Op. 74 n.45. Instead, it held, the appropriate standard is whether "a jury could reasonably interpret Mr. Simberg's article as asserting as *fact*" that Mann committed wrongdoing. Op. 66. *See also* Op. 60 (holding that a libel suit may proceed whenever "[a] jury could find" that the challenged statement "accuses [the plaintiff] of engaging in specific acts" of wrongdoing); Op. 74 n.45 ("whether a reasonable jury *could find* that the challenged statements were false"). This "capable of bearing a particular meaning" approach, Op. 76, conflicts with the Court's precedents in two respects.

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[1] *Armstrong v. Thompson*, subsequently applied the same standard. 80 A.3d 177, 188 (D.C. 2013) (holding that characterizations of investigation of plaintiff as concerning "serious integrity violations," "serious misconduct and other violations," "gross misconduct and integrity violations," and "serious issues of misconduct, integrity violations and unethical behavior" were not actionable because they "reflected one person's subjective view of the underlying conduct").

First, *Guilford* expressly rejected the idiosyncratic view that the First Amendment's protection for supportable interpretations of facts is limited to things like book reviews. After quoting the D.C. Circuit's reasoning in *Moldea II*, which did involve a book review, it stated: "An Op-Ed column in a trade newspaper is indistinguishable in principle from a book review, and application to this record of *Moldea II*'s reasoning dooms the plaintiffs' action." 760 A.2d at 603. Needless to say, the op-ed at issue in *Guilford* was not a "review of artistic work." Instead, like Simberg's blog post here, it was opinionated commentary on a real-world controversy.

The panel decision's view that commentary on public affairs receives less protection than book reviews is indefensible. The "central commitment of the First Amendment" is that "debate on public issues should be uninhibited, robust and wide open." *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (quotation marks omitted). Yet the panel decision throws open the courthouse doors for challenges to the very kind of speech that is most likely to arouse strong passions, that is most likely to spark suits seeking to chill public participation, and that is most important to our democracy. *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report on Bill 18-893, at 2–4 (2010). That is why no court, until the panel issued its decision, has ever held that the First Amendment's protection of supportable interpretations of true facts is limited to book reviews and the like. To the contrary: in addition to *Guilford* and *Armstrong*, many deci-

sions apply that standard to what the panel decision deems "garden-variety libels."[2]

The panel decision erroneously took its "capable of bearing a particular meaning" approach from authorities addressing defamatory meaning, not whether a statement of opinion asserts verifiable facts.[3] The panel decision cites *Guilford* for the view that a statement asserts facts if a "jury could find" it "accuses [the plaintiff] of engaging in specific acts of…misconduct," Op. 60, but the cited passage concerns only defamatory meaning, which is ultimately a matter for the jury. *See* 760 A.2d at 600. *Guilford* recognizes that, separate from the common-law element of defamatory meaning, "modern defamation law also implicates constitutional principles," in particular the First Amendment's protection of subjective interpretations because they don't assert verifiable facts. *Id*. at 595–97. For that element, *Guilford* adopted "*Moldea II*'s reasoning," as described above. The panel de-

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[2] *E.g.*, *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1067–68 (9th Cir. 1998) ("Prime Time Live" report on alleged misconduct by judge); *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995) (book and television docudrama that impugned attorney's competence and performance in murder trial); *Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir 1996) (magazine article impugning competence and performance of basketball coach); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. Ct. App. 1996) (statement by talk show host impugning competence and performance of sports orthopedist); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 145 (D.D.C. 1995) (advertisement stating that plaintiff was "guilty of misleading the American public" regarding Kennedy assassination); *Fasi v. Gannett Co.*, 930 F. Supp. 1403, 1409–10 (D. Haw. 1995) (newspaper editorial that described mayor's actions as "legalized blackmail").

[3] "Defamatory meaning" is a common-law element of defamation, separate from the constitutional requirement that an actionable statement assert a verifiably false fact, that addresses whether a statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement § 559.

cision makes the same mistake when it cites *Tavoulareas v. Piro*, 817 F.2d 762, 779–80 (D.C. Cir. 1987) (en banc) (addressing whether the statement at issue was "capable of a defamatory meaning"). *See* Op. 60, 77 (citing that portion of *Tavoulareas*). *Tavoulareas* does not even address whether the statement at issue (a father "set up" his son in business) asserted a verifiable fact.

Likewise, in two separate places, the panel decision mistakenly cites Restatement sections concerning defamatory meaning in support of its open-ended standard for determining whether a statement asserts verifiable facts. A court's role, it states, is to determine only whether challenged statements are "capable of bearing a particular meaning" and let the jury go from there. Op. 76–77. But the Restatement section cited in support of that proposition actually concerns "the determination of whether a given communication is defamatory," not whether it asserts verifiable facts. Restatement § 614 cmt. b. And in support of its view that a statement is actionable where a "jury could find that the article accuses [the plaintiff] of engaging in specific acts of…misconduct," the panel decision cites (at 60) another Restatement section that, once again, concerns only defamatory meaning and is, according to the reporter, unchanged from the days before *New York Times v. Sullivan* constitutionalized libel law. *See* Restatement § 569, reporter's note. The separate Restatement section that addresses the post-*Sullivan* lay of the land for statements of opinion rejects the panel decision's approach, instead holding that "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation…." *Id*. at § 566 cmt. c.

Second, *Guilford* and other cases reject the panel decision's view that

whether a statement asserts verifiable facts is a question for the jury. Discussing the line between non-actionable opinion and actionable fact, *Guilford* explained that "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 (quotation marks omitted). Carrying out that mandate, it held that the statements at issue in that case were not actionable as a matter of law. *Id*. at 599, 601. Likewise, *Rosen* held that statements impugning a former employee's behavior did not implicate any "objectively verifiable facts" "as a matter of law." 41 A.3d at 1257–58. *See also id*. at 1258 (recognizing that such a statement "cannot be the basis of a successful defamation action because as a matter of law no *threshold* showing of 'falsity' is possible") (quotation marks omitted) (emphasis added). And, outside of the District, "the courts treat the issue of labeling a statement as verifiable fact or as opinion as one ordinarily decided by judges as a matter of law." *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510–11 (1984)). In this respect, the panel decision's contrary holding again confuses defamatory meaning, of which the jury is the ultimate arbiter, and whether a statement asserts facts such that it is actionable under the First Amendment, which the court decides as a matter of law.

However, confusion alone does not explain the panel decision's backwards reading of the Supreme Court's decision in *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984). In the panel decision's words, that case holds that a court is to determine only "whether a properly instructed jury could find for the

plaintiff '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.'" Op. 52 (quoting *Bose*, 466 U.S. at 505).

But the full sentence from *Bose* actually says the opposite: "In such cases [as libel actions], the Court has regularly conducted an independent review of the record 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." 466 U.S. at 505. Indeed, it rejects the panel decision's view of the court's and jury's respective roles in the very next sentence: "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*. Instead, in confronting such questions, courts are to exercise their "independent judgment." *Id*. Under *Bose*, policing the boundaries of First Amendment protection may *not* be left to the jury.

The panel decision's evident confusion about the distinction between defamatory meaning and actionability under the First Amendment led it to adopt a standard that clashes with the decisions of this and other courts and exposes almost any political commentator to the risk of extended litigation simply for expressing his or her take on the facts of a public controversy. Contrary to the panel decision, that genre of speech is constitutionally protected. Rehearing is warranted.

II. The Panel Decision Substitutes the Government's Say-So for the Actual Malice Showing Required by Decisions of This and Other Courts

The First Amendment requires a defamation plaintiff to demonstrate by clear and convincing evidence that the defendant made a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). That requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Factual ambiguity defeats a plaintiff's ability to satisfy that "actual malice" standard. *Time, Inc. v. Pape* held that a Civil Rights Commission report on police brutality, which repeated allegations against a police officer that a newsmagazine then published as fact, was sufficiently ambiguous as to preclude liability for the newsmagazine. 401 U.S. 279, 290–91 (1971). *Bose* held the same with respect to a consumer magazine's false statement that the plaintiff's loudspeakers caused instruments to "wander 'about the room.'" The Court explained that a writer may choose, without risk of liability, "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." *Bose*, 466 U.S. at 512 (quoting *Pape*, 401 U.S. at 290). "The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Id*. at 513. Following *Pape*, this Court held in *Nader v. Toledano* that, where a "report is reasonably susceptible of the interpretation [the defendant] advances…, his statement is immune from defamation liability." 408 A.2d 31, 53 (D.C. 1979). The

Court found sufficient evidence for actual malice to go to the jury in that case only because the report that the defendant's column identified as proving "conclusively that [Ralph] Nader falsified and distorted evidence to make his case against the [Corvair]" unambiguously stated the opposite. *Id*. at 53–54.

The panel decision departs from these principles, conflicting with *Nader* (on which it claims to rely) and governing Supreme Court precedent. If Simberg's blog post is to be taken as an actionable accusation of some kind of misconduct like falsifying data or results, then *Nader* requires that the Court consider whether that accusation is a possible interpretation of the materials on which he relied—the Climategate emails. Those are, after all, the stated basis of Simberg's commentary regarding Mann. And the emails contain language that could reasonably cause a reader to suspect some impropriety on the part of their authors—particularly the ones discussing Mann's statistical "trick" to "hide the decline" in temperatures, urging the destruction of records to stymie public-records requests for communications and data, and coordinating to block other scientists' access to their data and models. That is, in fact, the view of the National Science Foundation ("NSF") report. JA880–81 (stating that "many" of the Climategate "emails…contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors"). And that is enough to defeat actual malice, no matter what the government may think of the matter.

Moreover, the reports that the panel decision asserts place the matter of Mann and his hockey stick beyond debate actually do no such thing. The NSF report explains that Penn State's inquiry—the only other one that addressed Mann's

conduct—was incomplete and inadequate because "the University did not adequately review the [data falsification] allegation" and "did not interview any of the experts critical of [Mann's] research." JA880. The NSF report also states that its own inquiry did not investigate the charge that Mann "fabricated the raw data he used for his research or falsified his results" and did not investigate Mann's hockey stick research at all because it had been conducted before Mann "receive[d] NSF research funding as a Principal Investigator." JA881. The University of East Anglia ("UEA") Scientific Assessment Panel reviewed the work of UEA researchers, not Mann, and its report does not mention Mann once. *See* JA366. And the House of Commons Science and Technology Committee also investigated UEA researchers, not Mann, and its report does not address Mann's conduct, his research, or any allegations directed at him. *See* JA585–89 (reporting conclusions). Yet these reports, the panel states, leave any suggestion of impropriety "definitively discredited," such that to raise the matter is to risk punishment. Op. 101.

The upshot of the panel decision's holding is that even undisputed factual evidence suggesting wrongdoing—no one disputes that the Climategate emails are authentic—does not suffice to defeat actual malice if a government report asserts that there is nothing to see. But what if one, like Simberg, disagrees with the government's report, believing that its acknowledged shortcomings render it incomplete, inadequate, and far from definitive? What if one suspects there was a whitewash? How exactly is one supposed to argue that further investigation is called for, without repeating the very evidence and inferences that he believes support that view and thereby (under the panel decision's logic) abandoning the protection of

the First Amendment? These circumstances involve precisely the kind of "ambiguities and descriptive challenges for the writer" where the actual malice requirement most strongly applies so as "to eliminate the risk of undue self-censorship and the suppression of truthful material." *Bose*, 466 U.S. at 512–13 (quotation marks omitted). Yet, in the panel decision's view, questioning the government's conclusion when it has declared "case closed" is tantamount to spreading falsehoods and due the same degree of First Amendment protection: none.

But we have a tradition in this Nation of questioning government and its conclusions. Some doubted the government's assurances that Saddam Hussein had an active weapons of mass destruction program, others disagreed with the Bush Administration's conclusion that CIA personnel carrying out "enhanced interrogation techniques" were not engaged in torture, and partisans on both sides continue to debate the Starr Report's accusations against Bill Clinton. There are, to this day, people who doubt the conclusions of the Warren Report, and they have the right to do so. *See Lane v. Random House, Inc.*, 985 F. Supp. 141 (D.D.C. 1995).

The panel decision upends the law with a one-two punch of stripping subjective commentary of First Amendment protection, while allowing actual malice to be proven based on some official's say-so, never mind the underlying facts. In the current environment, the consequences of this decision—more libel suits against political opponents, more legal intimidation, more self-censorship, and less speech challenging those in power—are all too apparent.

Conclusion

For the foregoing reasons, this appeal should be reheard.

Respectfully submitted,

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I hereby certify that on January 19, 2017, I caused a copy of the foregoing Petition to be served by first-class mail, postage prepaid, upon:

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