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Nos. 14-CV-101 / 14-CV-126

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*,

Defendants-Appellants,

and

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

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE SUPPORTING PETITION FOR REHEARING

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Dated: January 19, 2017

s/ Ilya Shapiro
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INTEREST OF *AMICUS CURIAE*

Amicus Cato Institute submits this brief in support of appellants' petition for rehearing. Cato was established in 1977 as a nonprofit, nonpartisan public-policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case concerns Cato because its scholars—like many people who live and work in the District of Columbia—have frequently voiced their concerns and suspicions regarding public figures, including by rhetorical comparison to "notorious" persons.[1] In fact, one has compared Mann himself to a "[playground] tattle-tale who complains to the teacher that someone said mean things about him."[2] Cato scholars have also been criticized with similar rhetoric, without realizing that, after the division's decision, they can now make money by suing

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[1] *See, e.g.*, Ilya Shapiro, *Eric Holder's Tenure*, Townhall, Sept. 28, 2014, http://bit.ly/2iQm6UJ ("One thing that differentiates Holder from other notorious attorneys general, like John Mitchell under Richard Nixon, is that Holder hasn't gone to jail (yet; the DOJ Inspector General better lock down computer systems lest Holder's electronic files 'disappear').").

[2] Trevor Burrus, *Hopefully Dr. Michael E. Mann Doesn't Sue Me for This Column*, Forbes, Aug. 14, 2014, http://bit.ly/2jfLUsu.

their critics.[3] The division's decision could even open the door for this brief's authors—among thousands of other commentators—to sue and be sued for libel on a regular basis. For the sake of free and open debate, that is a world we must avoid.

ARGUMENT

I. Disagreement with Official Bodies Is Not Evidence of Bad Faith

The libel trial of Émile Zola was one of the low points in the history of free speech. In his open letter *J'accuse…!*, Zola had accused a French military tribunal of corruptly exonerating an army officer of treason in order to cover up the wrongful conviction of Alfred Dreyfus for the same crime. During his trial, Zola's defense was repeatedly prevented from asserting any good-faith disagreement with Dreyfus's trial. Instead, they were forced to operate under the legal fiction that no skepticism of a duly completed judicial proceeding could even be entertained:

> The Judge —I repeat that no question will be put which would be a means of arriving at the revision of a case sovereignly judged.
>
> M. Clemenceau —Then the court will put no question concerning good faith?
>
> The Judge —Concerning anything that relates to the Dreyfus case. No. Offer your motions. I repeat that I will not put the question.
>
> M. Labori —Will you permit me, *Monsieur le Président*, in our common interest, to ask you, then, what practical means you see by which we may ascertain the truth?
>
> The Judge —That does not concern me.

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[3] *See, e.g.*, Scott Lemieux, *How ObamaCare's Fiercest Critic All But Admitted the Legal Case Against It Was a Scam*, The Week, July 22, 2015, http://bit.ly/2jNjRlg ("With this sentence, [Cato's Michael] Cannon is spitting out his own snake oil.").

The Trial of Émile Zola 35–36 (Benjamin R. Tucker, ed., 1898).

The division's decision here would create a similar legal regime in the United States. Rand Simberg and Mark Steyn have asserted a good-faith disagreement with the findings of several commissions, each assembled to investigate claims of misconduct against Dr. Michael Mann. But the division expresses bafflement as to "how [the defendants] came to have such beliefs in light of the reports that had been issued." Slip op. 89 n.56. The division notes that they were "struck . . . by the composition of the investigatory bodies," and that the reports "were conducted by credentialed academics and professionals." Slip op. 85. The clear implication is that anyone in their right mind should have been awed at the assortment of titles and degrees these commissions had collected. Such obvious and unimpeachable authority, in the division's view, lends itself to a new *res ipsa loquitur* proof of actual malice: some commissions are so eminent, some institutions are so established, and some personnel are so qualified, that the simple act of voicing dissent with their views may itself be taken as sufficient evidence of bad faith. Slip op. 96–97.

The defendants have indeed refused to accept the findings of these official reports. As Zola's prosecutor put it—anticipating the division by over 100 years—they have "done nothing here but open an audacious discussion on the thing judged." Trial of Émile Zola 254. But they could have been forgiven for thinking

their dissent was fully protected by the First Amendment's actual malice standard.

After all, Simberg and Steyn are hardly the first to voice disagreement with an official exoneration. Oliver North was found not guilty by a court of law, but a former president still calls him a "criminal."[4] George Zimmerman and O.J. Simpson were likewise acquitted, but those who find fault with their trials still call them murderers.[5] Despite a lack of prosecution, commentators have called for George W. Bush and Barack Obama to be tried for "war crimes,"[6] and predicted that the Director of National Intelligence "will get away with perjury."[7] More recently, no charges were filed against a presidential candidate after a lengthy investigation that reached the highest level of the FBI. Is it now *per se* bad faith to nonetheless assert that she is "unquestionably guilty"?[8] And, finally, would the division have found it actionable libel to say "Lizzie Borden took an axe and gave

[4] *Jimmy Carter: I Don't Pay Any Attention to Oliver North; He Was a Criminal*, CNN.com, March 28, 2014, http://cnn.it/1i2va0N.

[5] Etan Thomas, *George Zimmerman Is Not a Celebrity, He Is a Murderer*, Huffington Post, Jan. 31, 2014, http://huff.to/2j30YdC; Vincent Bugliosi, Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996).

[6] Rebecca Gordon, *They Should All be Tried: George W. Bush, Dick Cheney, and America's Overlooked War Crimes*, Salon, Apr. 30, 2016, http://bit.ly/2iQdZcV; Jordan Fabian, *Nader: Impeach Obama for 'War Crimes'*, The Hill, March 20, 2011, http://bit.ly/2iqkjo8.

[7] Paul Campos, *How James Clapper Will Get Away with Perjury*, Salon, June 12, 2013, http://bit.ly/19QgJye.

[8] Daniel Payne, *Sorry, Mark Cuban: Hillary Clinton is Unquestionably Guilty*, The Federalist, Sept. 6, 2016, http://bit.ly/2iVDSZm.

her mother forty whacks" given that Borden was acquitted? Sarah Miller, The Borden Murders: Lizzie Borden and the Trial of the Century (2016).

The National Science Foundation, which authored one of the reports at issue, is an eminent institution, much like our justice system. Mann describes it as "essentially the final arbiter of scientific research in the United States," a view the division seems to tacitly accept. Appellee's Brief 17. But it is precisely because so many official bodies can lay claim to being the "final arbiter" in their respective spheres that the division's decision is so dangerous. The division's rule would effectively make each such body a *de facto* truth commission, safe in the knowledge that its findings must be acknowledged as fact for fear that challenge would waive a speaker's actual malice protection.

That result should be feared by those on *all* sides of the political spectrum, since those bodies which have the most official authority will often change their views with the changing fortunes of our political parties. For example, President-Elect Trump recently met with vaccine skeptic Robert F. Kennedy, Jr., and is reportedly considering the creation of a commission to investigate vaccine safety.[9] If such a commission were formed, would its report be regarded as the "final arbiter" of the possible vaccine-autism connection, and would accusing vaccine

[9] Keith Kloor, *Robert F. Kennedy Jr. Takes His Debunked Vaccine Concerns to Trump*, Newsweek, Jan. 11, 2017, http://bit.ly/2jfYiME.

skeptics of "fraud" or "misconduct" then become actionable libel? Under the division's rule, those who agree with "final arbiters" today will find themselves unable to criticize them in the future, once the new makeup of our national institutions has made their views no longer "politically correct."[10] Bad faith must be proven by the conduct of a speaker, not by object of his criticism. To hold otherwise is to seriously endanger free expression and debate.

II. Calls for Investigation, Commonplace Pejorative Terms, and Analogies to "Notorious" Persons Cannot be Actionable for Libel

According to the division, "Mr. Simberg would not have concluded [his] article with the prescription that a 'fresh, truly independent investigation' is necessary, unless he supposed that 'ordinary, reasonable readers could read the [article] as implying,' that Dr. Mann was guilty of misconduct that had to be ferreted out." Slip op. 64-65 (citation omitted).

How much of the commentary and investigative journalism produced in the District of Columbia on a daily basis has been swept into the realm of actionable libel by this one sentence? An opinion columnist recently wrote that

> There is no direct evidence that the president-elect was involved or knew in advance about the Russian government's actions. But the

[10] The term originated in reference to the beliefs endorsed at any given moment by the Communist Party in the Soviet Union, which were therefore, by definition, "correct" (until they weren't). *Politically Correct*, in William Safire, Safire's Political Dictionary (2008).

circumstances underscore the nation's need for a full investigation.[11]

And when four indictments were issued shortly before an election, an editorial board urged that "Congress should investigate whether the indictments violated Justice Department guidelines."[12] Calls for investigation are now so common that the division's rule would sweep up not just pundits, but politicians themselves: recently a sitting senator and congressman declared that the directors of the FBI and CIA "should be investigated."[13] After the division's decision, will anyone feel comfortable calling for investigations on matters of national importance?

Further, the division finds potential liability from the use of words such as "deception" and "misconduct." Slip op. 61. Senators will now have to watch what they say in political debates (away from the Senate floor)—describing the policy of a political opponent as a "massive consumer fraud" will likely be actionable.[14] Likewise, the sitting governor of California might well be haled into court for

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[11] John Shattuck, *Donald Trump Raises Specter of Treason*, Boston Globe, Dec. 16, 2016, http://bit.ly/2hDShIM.

[12] Editorial, *U.S. Attorneys, Reloaded*, N.Y. Times, May 10, 2007, http://nyti.ms/2iApp1n.

[13] Nikita Vladimirov, *Reid: Comey Should Be Investigated in Wake of Russia Report*, The Hill, Dec. 10, 2016, http://bit.ly/2hfN86M; Ian Kullgren, *Peter King: CIA's Brennan Should Be Investigated for 'Hit Job' On Trump*, Politico, Dec. 18, 2016, http://politi.co/2i3JRqE.

[14] M.D. Kittle, *Ron Johnson: 'Obamacare Is a Massive Consumer Fraud'*, Wisconsin Watchdog, Sept. 16, 2016, http://bit.ly/2d4p7R9.

accusing an FBI director of a "gross violation of professional responsibility."[15] But these are just the tip of the iceberg: in recent years politicians have referred to a public official's policy decision as "treasonous" and accused critics of "blood libel," far harsher terms than any used by Simberg and Steyn.[16]

Finally, according to the division, comparing Dr. Mann to "notorious persons" is enough to make a statement actionable. Slip op. 69. How will this new rule change the terms of debate in "this town"? For one thing, opponents of the gun lobby will have to take their passion down a notch because, in the words of one columnist, "the only difference between [NRA Executive Director Wayne] LaPierre and, say, Timothy McVeigh, or Charles Manson, for that matter, is a good tailor."[17] Debating which presidential candidate to "pin the Stalin moustache" on could likewise be a costly choice for pundits,[18] and Bill Moyers might have to compensate Mitch McConnell for describing Republicans as "stalking" Obamacare

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[15] Carla Marinucci, *Brown: FBI Director Comey Guilty of 'Gross Violation of Professional Responsibility'*, Politico, Oct. 31, 2016, http://politi.co/2jfpabU.

[16] Chris McGreal, *Rick Perry Attacks Ben Bernanke's 'Treasonous' Federal Reserve Strategy*, The Guardian, Aug. 16, 2011, http://bit.ly/2iQb4AU; Jennifer Epstein, *Palin Charges Critics with 'Blood Libel'*, Politico, Jan. 12, 2011, http://politi.co/2iVo7RT.

[17] John Young, *Trump Enlists the Trigger-Finger Fringe*, Austin American-Statesman, Aug. 17, 2016, http://atxne.ws/2j4uvni.

[18] Daniel Oliver, *We Should Pin the Stalin Moustache on Hillary, Not Trump*, The Federalist, July 14, 2016, http://bit.ly/29EZ26k.

"like Jack the Ripper."[19] Even art critics will have to change their style. After this decision, who could have the confidence to start a magazine article with a sentence like "Le Corbusier was to architecture what Pol Pot was to social reform"?[20]

Political thinkers would certainly like to believe that historical analogies are integral to expressing their views on important political choices. Just in the last year, one candidate for office has been compared to Hitler,[21] Hitler,[22] Hitler,[23] Hitler,[24] and Mussolini.[25] Indeed, that public figure was so annoyed by this criticism that he threatened to "open up the libel laws" to prevent such speech in the future.[26] Luckily for him, the division's decision has done this work for him.

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[19] Matt Wilstein, *PBS' Bill Moyers: GOP 'Stalked' Obamacare Like 'Jack the Ripper'*, Mediaite, Nov. 2, 2013, http://bit.ly/2iq6juR.

[20] Theodore Dalrymple, *The Architect as Totalitarian*, City Journal, Autumn 2009, http://bit.ly/2iQVCSV.

[21] Peter Ross Range, *The Theory of Political Leadership that Donald Trump Shares with Adolf Hitler*, Wash. Post, July 25, 2016, http://wapo.st/2i4jrYS.

[22] Jonathan Chait, *How Hitler's Rise to Power Explains Why Republicans Accept Donald Trump*, N.Y. Mag., July 7, 2016, http://nym.ag/29vwVaY.

[23] Leonard Pitts, Jr., *If It Talks Like a Hitler and Walks Like a Hitler…*, Miami Herald, June 17, 2016, http://hrld.us/2iTTYm8.

[24] Yannik Thiem, *Fascism in America: Donald Trump, America's Hitler of the 21st Century?*, APA Blog, Oct. 20, 2016, http://bit.ly/2j3dWuT.

[25] Fedja Buric, *Trump's Not Hitler, He's Mussolini*, Salon, March 11, 2016, http://bit.ly/24VG177.

[26] Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, Politico, Feb. 26, 2016, http://politi.co/1QC9BDZ.

CONCLUSION

The division's interpretation of words, expressions, and analogies routine to political debate would expose thousands of commentators in the District of Columbia—including sitting members of Congress—to potential liability for exercising what had previously been assumed to be their First Amendment rights.

For the foregoing reasons, and for those stated by the appellants, the petition for rehearing should be granted.

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