NOS. 14-CV-101, 14-CV-126

In The
DISTRICT OF COLUMBIA COURT OF APPEALS

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COMPETITIVE ENTERPRISE INSTITUTE, NATIONAL REVIEW INC., RAND SIMBERG,
Appellants,

v.

MICHAEL E. MANN, PH.D.,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CASE NO. 2012 CA 008263 B
THE HONORABLE NATALIA COMBS GREENE &
THE HONORABLE FREDERICK WEISBERG

Brief of Amici Curiae Newsmax Media, Inc., Free Beacon LLC, The Foundation for Cultural Review, The Daily Caller, LLC, and PJ Media, LLC

In Support of Appellants' Petition for Rehearing

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 28(a)(2) and 29(c) of the District of Columbia Court of Appeals, *Amici* state as follows:

Newsmax Media, Inc. is a privately held, non-governmental entity with no corporate parents, affiliates, and/or subsidiaries that are publicly held.

Free Beacon, LLC is a for-profit limited liability company with no parent company. No publicly held corporation holds 10% or more of Free Beacon, LLC.

The Foundation for Cultural Review is a non-profit 501(c)(3) organization with no parent company.

The Daily Caller, Inc. is a Delaware corporation with no parent company. No publicly held corporation holds 10% or more of The Daily Caller, Inc.

PJ Media, LLC is limited liability company with no parent company. No publicly held corporation holds 10% or more of PJ Media, LLC.

STATEMENT OF INTEREST

Amici predominately consist of online publishers dedicated to providing commentary, review, and reporting on public policy, government affairs, culture, and the arts. *Amici* and other media groups serve a vital societal function by providing information and analysis needed to take informed positions on social, political, and economic issues.

This case concerns *amici* because the lower court's opinion weakens constitutional protections for online speech. *Amici* are interested in protecting their free speech rights through effective and well-enforced anti-SLAPP statutes. *Amici* have an especially pronounced interest because smaller entities like themselves lack the resources necessary to combat SLAPPs, making them more susceptible to their chilling effects on public policy and political speech. And like all internet publishers, *amici* are interested in ensuring that the District of Columbia affords full constitutional protection for online speech that is consistent with First Amendment jurisprudence throughout the country. The panel decision falls far short, putting at risk publishers that present political commentary, particularly commentary that criticizes the actions of politicians in the Nation's capital.

SUMMARY OF THE ARGUMENT

The panel decision's application of First Amendment standards, particularly the requirement that the speaker acted with actual malice, deprives speakers of the protections guaranteed by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). An examination of the panel's analysis reveals that the mistaken actual-malice standard it announced and applied throws open the courthouse doors to claims motivated by political disagreement rather than defamatory speech. By focusing on evidence of *whether an expert report contradicts a* speaker's statement, as opposed to evidence of *whether the speaker subjectively doubted the truth of his statement*, the panel strips away First Amendment protection for any speaker who dissents from an "expert" consensus on a matter of scientific or political controversy. To hold that the expression of such a view is prima facie evidence of "actual malice" is to effectively prohibit robust criticism of whatever may be the prevailing political and scientific orthodoxy at any given time. Following the panel's decision, a court would have to allow the question of actual malice, and therefore liability for speech, to go to the jury whenever it finds that the speakers were of a particular political persuasion that caused them to disagree with the prevailing establishment view. This is not the law, and would eviscerate a key First Amendment protection for dissenting viewpoints in public discourse.

Amici, as media groups regularly engaged in political speech and advocacy groups interested in a free and open public discourse in the most dynamic forums, offer this brief in support of appellants' petition for rehearing and rehearing en banc. The issues presented in this proceeding involve questions of exceptional importance that require the attention of the full court. D.C. APP. R. 35(a)(2).

ARGUMENT

The panel's application of the actual malice standard strips speakers on matters of public concern of the protections afforded by the First Amendment. In interpreting the District of Columbia's Anti-SLAPP Act, D.C. CODE § 16-5502, the panel determined that the appropriate standard for evaluating a special motion to dismiss was akin to the standard for adjudicating a motion for summary judgment. (Op. at 44.)

Following the panel's decision, to overcome the Anti-SLAPP Act's protections, all that a claimant must show is sufficient evidence to demonstrate only that success on its claims is merely possible. Particularly when viewed through the prism of its interpretation of the Anti-SLAPP Act, the panel's First Amendment analysis seriously harms the ability of speakers like *amici* to defend themselves from politically motivated lawsuits designed to suppress their speech on the important issues of the day.

The Court of Appeals did not even evaluate the non-moving party's evidentiary submission with the "independent judgment" that the Supreme Court has directed courts to apply in reviewing the factual record in such cases. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).[1]

Moreover, the panel decision directs trial courts to abdicate their responsibility to evaluate defamation claims in line with the standards proscribed by the Supreme Court. The panel decision abandons the traditional protections of First Amendment law, such as the requirement that a claimant make a legally cognizable showing of actual malice. Instead, the Court focuses on the evidence of falsity as a proxy for actual malice, which drastically undermines the protections in the Anti-SLAPP Act that the D.C. Council afforded to speakers on matters of public concern. In particular, the panel decision all but eliminates the actual malice standard. In doing so, the Court of Appeals has drafted a blueprint for subsequent claimants to attack their political opponents for exercising their First Amendment rights. Needless to say, this is not the outcome the D.C. Council

[1] The Supreme Court in *Bose* announced this standard in connection with an appellate court's duty to evaluate the factual record before it, despite the factfinder's conclusion. *Bose Corp*, 466 U.S. at 514. The same standard, which requires the court to apply its independent judgment to conclude that the record does not support, as a matter of law, that the defendant may be held liable to the claimant, may give effect to the D.C. Council's intent while avoiding the constitutional issues identified by the panel decision. (*See* Op. at 41-42.)

intended when it enacted the Anti-SLAPP Act, and it is a question of exceptional importance that merits review by the full Court of Appeals.

The Court of Appeals' analysis of actual malice breaks with decades of precedent. In a defamation action against a public figure, a plaintiff "must prove that the defamatory publication 'was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968). Put another way, "[t]he burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corp.*, 466 U.S. at 511 n.30.

The Court of Appeals' analysis applies the second avenue for proving bias; that the statement was made with reckless disregard of whether it was false. (Op. at 80-82.) Supreme Court precedent is "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731.

The Court of Appeals made a subtle but significant error in its formulation of the actual malice standard, one that provides the tenor for its analysis. When

setting out the two avenues for a plaintiff to show actual malice, the Court of Appeals stated that a claim could be proved by showing *subjective* knowledge of falsity, *or* that the defendant acted with reckless disregard for whether the statement was false or not. (Op. at 81.) This division assigns subjectivity to the first avenue but not the second, which implies that the second avenue is an objective standard. And, in fact, the Court of Appeals did embark on an essentially *objective* analysis of the state of mind of a hypothetical, reasonable speaker. This is not the law. As the Supreme Court stated in *Harte-Hanks Communications, Inc. v. Connaughton*: "The [actual malice] standard is a subjective one-there must be sufficient evidence to permit the conclusion that the defendant *actually had* a 'high degree of awareness of . . . probable falsity.'" 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)) (emphasis added).

That the panel's application of the actual malice standard focused primarily on whether there was evidence from which a reasonable jury could find that a reasonable speaker would have serious doubts whether their statement was false is evidenced in two parts of the panel decision. First, citing to *St. Amant*, the Court of Appeals stated that the question was whether the scientific reports "provided appellants with 'obvious reasons to doubt the veracity' of *their* subsequent statements that Dr. Mann engaged in misconduct." (Op. at 84-85 (citation omitted) (emphasis added)). This is not, however, what the Supreme Court said in *St.*

Amant. Rather, "recklessness may be found where there are obvious reasons to doubt the *veracity of the informant or the accuracy of his reports*." 390 U.S. at 732 (emphasis added).

The Court of Appeals' error is confirmed in its discussion of *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979). (Op. at 95-96.) In *Nader*, the defendant journalist had specifically alleged that the plaintiff had "falsified and distorted evidence," and had cited a specific report in support of that allegation. The court noted that the report cited by the journalist actually said the opposite—it unambiguously concluded that the plaintiff had acted in good faith and had not falsified evidence. Thus, there was "a sufficient evidentiary basis" to conclude that the defendant had acted with "actual malice" by telling a very specific lie about the contents of a very specific report—the report had been cited *by the defendant himself* to say one thing, but it actually said another. *Id.* at 53.

The holding in *Nader* was not, as the panel decision states, that "actual malice" can be inferred whenever a speaker offers a political or scientific opinion that conflicts with the conclusion of an expert report, much less when the opinion involves unspecified allegations of "misconduct" and "deception." Rather, *Nader* simply held that when a speaker claims that a specific report concluded one thing, but in fact it unambiguously concluded the opposite, then that is some evidence of the speaker's "actual malice" on the specific, discrete question of what the report

concluded.[2] By contrast, the panel's decision here adopts the view that once an expert report concludes that someone has not engaged in "misconduct," then that is prima facie evidence of "actual malice" by anyone who offers a dissenting view, even if that view is based on an entirely different definition of "misconduct." That is a recipe for the censorship of dissenting viewpoints, and it is squarely forbidden by Supreme Court precedent. *See St. Amant*, 390 U.S. at 731.

Instead of asking whether a jury could conclude that Mr. Simberg and Mr. Steyn *subjectively* harbored doubts that their statements were false, the panel asked whether "the investigations' conclusions . . . alerted them to the probable falsity of their beliefs." (Op. 93.) With this incorrect standard in hand, the panel merely stacks up evidence to demonstrate that, at the time they published, there was some evidence available to Mr. Simberg and Mr. Steyn that some expert reports may have contradicted their statements. Nowhere is there any evidence, much less evidence sufficient to satisfy the "clear and convincing" standard set by the Supreme Court, to demonstrate that Mr. Simberg and Mr. Steyn did not *subjectively* believe their assertions that the expert reports were wrong and untrustworthy. Moreover, Mr. Simberg and Mr. Steyn did not rely on the expert reports to support their claims, like the journalist in *Nader* relied on the report, or

[2] The panel's discussion of *Jankovic v. International Crisis Group*, 822 F.3d 576 (D.C. Cir. 2016), correctly focuses on whether a jury could conclude that a defendant subjectively doubted its sources. (Op. at 98-100.) The Court of Appeals failed to recognize that the same analysis was utilized in *St. Amant* and *Nader*.

the defendant in *Jankovic v. International Crisis Group* relied on its sources. Rather, the expert reports *themselves* were the target of their speech.

As the D.C. Circuit observed, it does not suffice to prove actual malice "for a plaintiff merely to proffer 'purportedly credible evidence that contradicts a publisher's story.'" *Jankovic v. Int'l Crisis Group*, 822 F.3d 576, 590 (D.C. Cir. 2016) (quoting *Lohrenz v. Donnelly*, 350 F.3d 1272, 1284 (D.C. Cir. 2003)). "Rather, it is only when a plaintiff offers evidence that 'a defendant has reason *to doubt the veracity of its source*' does 'its utter failure to examine evidence within easy reach or to make obvious contacts in an effort to confirm a story' demonstrate reckless disregard." *Id.* (quoting *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1509 (D.C. Cir. 1996)) (emphasis added).

Thus, the panel decision collapsed the actual malice standard into a question of falsity. If a party demonstrates evidence from which a reasonable juror could conclude that the speaker's statements were false, that same evidence proves actual malice. What this means is that, any time a writer criticizes an investigatory report to argue that further investigation is necessary, he runs the risk of libel liability for so doing.

Compounding the dangers to free speech posed by its misstatement of the actual malice standard, the panel incredibly held that a jury could infer a motive for Mr. Simberg and Mr. Steyn to publish a falsehood because of their ideological

position in the global warming debate. (Op. at 97-98.) Coupled with the panel's misapplication of the "reckless disregard" standard for actual malice, this holding hands the opponents of free speech a powerful weapon. If all that is required to bring a defamation case to a jury is a showing of credible evidence that the allegedly defamatory statement might be false and that the defendant chose not to credit third party sources that disagreed with their speech because of their ideological views, then any political disagreement becomes fodder for a lawsuit.

Far from providing the "breathing room" the First Amendment is intended to afford speakers on critical topics of the day, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988), the Court of Appeals invites all controversies into the courthouse. Accordingly, the issues of exceptional importance presented in this proceeding warrant rehearing or en banc review.

CONCLUSION

For the reasons above, and those presented by Appellants, this case should be reheard or reheard en banc.

Date: January 30, 2017

Respectfully submitted,

AMICI CURIAE

NEWSMAX MEDIA, INC., FREE BEACON LLC, THE FOUNDATION FOR CULTURAL REVIEW, THE DAILY CALLER, LLC, AND PJ MEDIA, LLC

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