No. 18-1477

IN THE

Supreme Court of the United States

COMPETITIVE ENTERPRISE INSTITUTE
and RAND SIMBERG,

Petitioners,

v.

MICHAEL E. MANN,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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The decision below denies First Amendment protection to subjective commentary interpreting undisputedly true facts. In so doing, it conflicts with scores of lower court decisions to the contrary and this Court's longstanding recognition that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Respondent Michael Mann does not dispute that the decision below creates a conflict in authority.

The serious consequences of that decision call for the Court's review. According to the court below, simply identifying the evidence and inferences that one believes supports investigation of potential wrongdoing is tantamount to making a factual accusation of wrongdoing and due the same degree of First Amendment protection: none. It doesn't take a stable genius to predict how that rule will be abused by public officials and other powerful figures to shut down critical commentary and debate on claims of official misconduct, the conduct of law enforcement, and other matters of overriding public interest. The Court should grant review on the first question presented to enforce the policies of the First Amendment, resolve the conflict in authority, and provide needed guidance long sought by the lower courts.

On the second question presented, Mann concedes the existence of a longstanding conflict in authority over whether speech on matters of public concern is

"provably false" is a question of law for the court or a question of fact for the jury. The Court should grant review to resolve that conflict.

Seeking to avoid this Court's review, Mann attacks its jurisdiction. But the Court has routinely recognized that decisions like the one below that definitively decide important federal issues are "final decisions" fit for review. The Court's jurisdiction cannot seriously be questioned. It should exercise that jurisdiction because it "would be intolerable to leave unanswered…an important question of freedom of the press under the First Amendment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246–47 (1974).

I. The Court's Jurisdiction Cannot Seriously Be Questioned

Mann's jurisdictional argument fails to account for the "pragmatic approach…in determining finality" that the Court has long applied to review decisions by state courts. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975). The decision below falls squarely within two of the categories of interlocutory orders that the Court has recognized to be "final decisions" subject to review.

A. The Court has jurisdiction under the rule in *Cox*, which recognized finality where a state-court decision denied a threshold First Amendment defense to liability for speech and remanded for further proceedings on the merits. 420 U.S. at 485–86.

1. *Cox* held that an interlocutory state-court order presents a "final decision" fit for review when (1) a "federal issue has been finally decided," (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (3) "refusal immediately to review the state court decision might seriously erode federal policy." *Id*. at 482–83. It proceeded to apply that rule to a state-court decision upholding a state law imposing liability for publishing the name of the rape victim and allowing a jury trial on the matter to proceed. First, that decision was "plainly final on the federal issue" and "not subject to further review in the state courts." *Id*. at 485. Second, "the litigation could be terminated by [the Court's] decision on the merits." *Id*. at 486. And, third, "a failure to decide the question now will leave the press…operating in the shadow…of a rule of law and a statute the constitutionality of which is in serious doubt." *Id*. The federal question was therefore fit for review. *See also Tornillo*, 418 U.S. at 246–47 n.6 (exercising jurisdiction on same basis because it "would be intolerable to leave unanswered…an important question of freedom of the press under the First Amendment"); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (exercising jurisdiction on same basis because it would "intolerable" to leave unanswered the "limits the First Amendment places on state" law).

2. The decision below plainly satisfies the *Cox* rule. First, it "finally decided" a federal issue by holding

that the First Amendment does not immunize Petitioners' statements from liability and permitting Mann's claims to proceed. Second, reversal "would be preclusive of any further litigation on the relevant cause[s] of action" asserted against Petitioners because it would require their dismissal. And, third, denial of review would "seriously erode federal policy" by perpetuating an aberrant and incorrect rule of law that chills speech and press freedom on matters of overriding public concern. That is the very same federal policy that the Court found supported review in *Cox*, *Tornillo*, and *Fort Wayne Books*.

B. The Court also has jurisdiction because this case involves a "federal issue, finally decided by the highest court in the State, [that] will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. That issue concerns the Petitioners' First Amendment immunity from defamation liability. Even if Petitioners prevail entirely on the merits before the D.C. courts, that federal issue will survive because it controls their entitlement to award of attorney's fees under the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5504(a); *Doe v. Burke*, 133 A.3d 569, 576–78 (D.C. 2016) (holding that the Act entitles prevailing movants to attorney's fees). And if Petitioners do not prevail, then the issue will survive, in addition, with respect to the merits. No different than in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), which recognized jurisdiction on the same basis, "[n]othing that could happen in the course of the [proceedings], short of settlement

of the case, would foreclose or make unnecessary decision on the federal question." *Cox*, 420 U.S. at 480; *see also Carondelet Canal & Nav. Co. v. Louisiana*, 233 U.S. 362, 372–73 (1914); *Forgay v. Conrad*, 47 U.S. 201 (1848).

C. Mann's arguments to the contrary are meritless. Mann does not address, much less dispute, that the federal issue decided by the decision below will survive any possible state-court proceedings by operation of the D.C. Anti-SLAPP Act. And his arguments on the *Cox* rule miss the mark entirely.

1. Mann's argument (at 27–28) that the court below "did not decide a federal issue" is contradicted by his Statement of the Case, which correctly recognizes that the court below denied Petitioners' defense that the First Amendment precludes liability as a matter of law. *See* BIO.23, BIO.26 ("The court left no room for argument that these statements were somehow worthy of constitutional protection…."). That defense turns on the "constitutional limits on the type of speech which may be the subject of state defamation actions," including specifically the limitation that a challenged statement must be "objectively verifiable" as false. *Milkovich*, 497 U.S. at 16, 22. Determining the contours of that limitation—which is what the court below expressly did, *e.g.*, App.60–63, 70—necessarily presents a question of federal law under the First Amendment, just as in *Cox* and *Milkovich*.

2. Mann's argument (at 29–30) that a decision in Petitioners' favor would not be preclusive of further litigation misstates the applicable standard, which is

whether such a decision "would be preclusive of any further litigation *on the relevant cause of action*." *Cox*, 420 U.S. at 482–83 (emphasis added). The "relevant cause of action," as *Cox* explains, is the one or ones concerning the application of a "federal issue" to the "party seeking review." 420 U.S. at 482. Here, the relevant causes of action are Mann's defamation claims against Petitioners, and reversal of the decision below would necessarily require dismissal of those claims, precluding further litigation. That an additional defendant, Mark Steyn, is not a party to this appeal is irrelevant under *Cox*. *See, e.g.*, *Pierce County v. Guillen*, 537 U.S. 129, 141–42 (2003) (finding finality, and exercising jurisdiction under *Cox*, with respect to only one of two causes of action). It is also irrelevant as a practical matter, given that a decision in favor of National Review, which has also petitioned for review of the decision below, would be conclusive of Mann's defamation claims against Steyn for the same publication. Finally, on this point, Mann's reliance (at 29) on *Meagher v. Minnesota Thresher Manufacturing Co.*, 145 U.S. 608 (1892), is misplaced because that decision addressed only the final judgment rule and not any of the exceptions to it, as canvassed in *Cox*.[1]

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[1] Precedent squarely rejects Mann's argument (at 29–30) that Petitioners' entitlement to attorney's fees regarding the dismissed claims or other collateral issues undermines the finality of the decision below. *See Pierce County*, 537 U.S. at 142 (holding decision to be "final" and subject to review where claim to attorney's fees remained outstanding, as was a separate, collateral tort claim); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886,

3. Finally, Mann's argument (at 30) that the decision below "adhered to federal law" conflates the merits with the jurisdictional determination of whether "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The correct inquiry at this stage is whether denial of review would threaten the policies of the First Amendment. The answer is yes: "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books*, 489 U.S. at 55. As the Court has consistently recognized, leaving unanswered important questions of the freedom of speech and freedom of the press under the First Amendment "would be intolerable." *Cox*, 420 U.S. at 485; *Tornillo*, 418 U.S. at 247; *Fort Wayne Books*, 489 U.S. at 56. The importance of the federal issue presented here, and the threat to the federal policies of speech and press freedom, cannot be denied.

II. The First Question Presented Warrants Review

The decision below denies First Amendment protection to Simberg's commentary that the revelations of the Climategate emails (which are undisputedly au-

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907 n.42 (1982) (holding state-court judgment to be "final for purposes of our jurisdiction" notwithstanding that state supreme court "remanded for a recomputation of damages"); *see generally Cox*, 420 U.S. at 480–81 (dismissing the relevance of collateral issues to finality inquiry).

thentic) suggested wrongdoing and warranted independent investigation. Its holding—that subjective commentary and conjecture supported by undisputedly true facts is not shielded from defamation liability—conflicts with the decisions of this Court and of every lower court to consider the matter. Pet.15–22. Although declaring Petitioners' challenge to that holding "baseless," BIO.37, Mann does not dispute that Simberg's criticism of Mann and his research was factually premised on the Climategate emails, does not dispute that those underlying facts are true, and does not even dispute that the holding of the court below conflicts with scores of decisions of other lower courts and of this Court. On those grounds alone, review is warranted.

1. Mann's sole argument on this issue, that Simberg's disclosure of the facts was "incomplete," BIO.38, does not withstand scrutiny. Simberg's entire premise was that "independent investigation" was warranted *based on the Climategate emails*, App.105, which revealed efforts to blackball scientists skeptical of Mann's hockey stick and scientific 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. Pet.6. The emails also revealed that Mann had employed a "trick" "to hide the decline" in global temperatures where the hockey stick's upward-trending blade was supposed to be. *Id*. As the National Science Foundation recognized, the emails "contained language that reasonably caused

individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann. DCCA.JA.880–81. Simberg, rather than condemning Mann based on the emails, merely called for an "independent investigation," a modest conclusion amply supported by the emails' contents. Yet, to the court below, that call for investigation stripped Simberg's commentary of First Amendment protection because it implied that "facts…are there to be found." App.61; *see also* BIO.3–4, 31 (so characterizing holding below).

Under the "supportable interpretation" standard applied by other courts, Pet.15–20, and expressly rejected by the court below, App.70 n.46, Simberg's reliance on the Climategate emails would have been sufficient to shield his commentary from liability, given that Simberg nowhere suggested that he possessed undisclosed facts concerning Mann's research or conduct. *See, e.g.*, *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (holding conjecture that plaintiff participated in murder to be protected where article disclosed the general circumstances and did not claim to possess undisclosed facts); *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995) (same, concerning book and docudrama questioning whether an attorney committed specific acts of malpractice). Mann does not contend that the Climategate emails upon which Simberg relied were somehow inaccurate or incomplete. Moreover, Simberg not only disclosed the basis for his commentary but also disclosed that

Mann had been putatively "exonerated" following several investigations and hyperlinked to Penn State's investigation report and an article on the NSF's report. App.102–03. Any reader would understand that there were two sides to this debate over Climategate's meaning and import, one that considered Mann "exonerated" and one that remained skeptical.

At most, Mann's argument asserts his position on the merits that Petitioners may not prevail under application of the proper constitutional standard. That is no reason to deny review to determine and apply the proper standard. Granting review would permit the Court to resolve the conflict in authority created by the decision below, correct a serious aberration in an important area of the law, and provide much-needed guidance to the lower courts.

2. The importance of this issue, and the threat the decision below poses to debate on matters of public concern, cannot be overstated. Mann embraces the logic of the decision below that relying on undisputed factual evidence suggesting wrongdoing to call for investigation strips commentary of First Amendment protection. BIO.3–4, 31. But how exactly is one supposed to argue that investigation is called for without repeating the very evidence and inferences that he believes support that view and thereby (under the reasoning of the decision below) abandoning the protection of the First Amendment? The law now in the Nation's capital is that speakers engage in such conjecture at their peril. That has serious consequences for

speech on matters of public policy, politics, science, official misconduct, and law enforcement, to name but a few. *See* Br. of Cato Institute, *et al.*, as Amici Curiae, at 9–13.

III. The Second Question Presented Warrants Review

Mann concedes (at 30) that there is a split in authority on whether a court, as opposed to the jury, must determine whether a statement challenged as defamatory is verifiable as false and therefore unprotected by the First Amendment. He refuses, however, to take the court below at its word that it joined the minority position by assigning that duty to the jury.

Contrary to Mann's claim (at 31), the court below did not decide "for itself and as a matter of law" that the challenged statements are verifiable as false. As the decision below recounts, Petitioners did argue that the court itself should decide the issue "'as a matter of law.'" App.70 n.46. But the court disagreed, holding instead that the issue of verifiability was one for the jury: "the standard is whether a reasonable jury *could find* that the challenged statements were false. The issue comes down to the 'verifiability' of the defamatory statements." *Id.* (quotation marks omitted). It then proceeded to apply that (mistaken) standard. With respect to Simberg's commentary, it concluded that "a jury could reasonably interpret Mr. Simberg's commentary as asserting as *fact* that the CRU emails 'show[]' that Dr. Mann engaged in deceptive data manipulation and academic and scientific

misconduct." App.62. Likewise, it concluded, with respect to Steyn's commentary published by National Review, "a reader could take [it] to be an assertion of a true fact" concerning Mann. App.70. Rather than decide the issue, as the First Amendment requires, the court below made clear that it was leaving verifiability for the jury.

The scattered statements cited by Mann (at 31) do not even suggest that the court below decided the issue of verifiability for itself. For example, its statement that calling for an investigation indicates that "facts…are there to be found" simply identifies a basis by which the court believed a jury "could find" Simberg's commentary to be verifiable as fact. App.61. Likewise, its statement that "certain injurious allegations about Dr. Mann's character and his conduct as a scientist are capable of being verified or discredited" expressly presupposes (as the court stated in the preceding sentence) that the jury "could take [those allegations] to be an assertion of true fact," without actually deciding the matter. App.70–71. Neither of these statements, or the others identified by Mann, indicates that the court below applied anything other than the legal rule that it set out, namely that verifiability is a question for the jury.

Finally, it should not be overlooked that Mann provides no real defense of the minority position joined by the court below, only the bare assertion (at 32–33) that a "jury is entitled to impose liability" for statements potentially susceptible to interpretation as as-

serting facts. The minority position is indefensible because it is wrong. Pet.24–25. The Court should take this opportunity to enforce its precedents and resolve this conflict in authority.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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