No. 20-70

IN THE
SUPREME COURT OF UNITED STATES

JAGAN MAHADEVAN,
Petitioner,

v.

PREM BIKKINA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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Petitioner, In Pro Per

QUESTIONS PRESENTED

Petitioner reported scientific research misconduct in climate change mitigation research to the federally funded Lawrence Berkeley National Laboratories (LBNL) under federal regulation 48 C.F.R. §952.235-71 to initiate an investigation. In response, Respondent, who conducted research at LBNL, filed state court lawsuit for defamation, intentional infliction of emotion distress (IIED) and negligence and obtained a large judgment after trial.

Petitioner's statements were based on uncontroverted scientific facts proving contamination in Respondent's data that was used by LBNL scientists leading to inaccurate results. Petitioner's complaint, which was neither inquired into nor investigated, satisfied the requirements of the federal regulation to implicate research misconduct by preponderance of the evidence. But state law demanded substantial truth.

The questions presented are:

1. Whether federal statutory and regulatory scheme, for research misconduct, displaced state law from subject matter jurisdiction on defamation claims arising from complaint made under that regulation, and
2. Whether First Amendment, applicable to the states through the Fourteenth Amendment, protects the complainant of research misconduct when he outlines the factual and scientific basis of his conclusions constituting an opinion on a subject of public concern.

PARTIES TO THE PROCEEDING

Petitioner, Appellant-Defendant below, is: Jagan Mahadevan.

Respondent, Appellee-Plaintiff below, is: Prem Bikkina.

RULE 29.6 STATEMENT

Petitioner, Jagan Mahadevan is not a business organization but rather a natural individual.

RELATED PROCEEDINGS

Court of Appeals, First District Division Four, California, *Bikkina v. Mahadevan*, Unpublished Opinion rendered January 14, 2020 and Modified February 11, 2020.

Superior Court of California, Alameda County, No. RG14717654, *Bikkina v. Mahadevan*, Order denying Motion to Vacate entered January 8, 2019.

Court of Appeals, First District Division Four, California, *Bikkina v. Mahadevan*, Published Opinion rendered October 15, 2015.

Superior Court of California, Alameda County, No. RG14717654, *Bikkina v. Mahadevan*, Order denying Motion to Strike entered September 4, 2014.

Supreme Court of California, No. S260776, *Bikkina v. Mahadevan*, Petition for Review Denied, March 11, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jagan Mahadevan respectfully requests that this Court reverse the ruling of California Court of Appeals First District Fourth Division, and the denial by California Supreme Court, and order the Superior Court of California in Alameda County to grant Petitioner's motion to vacate.

OPINIONS BELOW

Petitioner filed a motion to vacate stipulation, judgment and amended judgment entered after trial of Petitioner's allegations of scientific research misconduct under the state intentional tort laws. In the motion, Petitioner raised the issue of lack of fundamental subject matter jurisdiction due to federal preemption of state laws as a primary threshold and due to Petitioner's immunity from lawsuit granted by Oklahoma workers compensation laws as a secondary threshold.

In addition, Petitioner raised the issue of denial of his right to appeal the merits of the judgment without notice and consent thereby denying Due Process of law. The motion was denied (See 18a). A timely appeal from that decision was denied by the Court of Appeal in an unpublished opinion and later modified after rehearing petition (See 1a). Petitioner's review petition to the California Supreme Court was denied without further explanation (See 48a).

At the start of the litigation, Petitioner raised First Amendment defense in a motion to strike

which was denied (See 46a). An appeal from that denial was also denied. The Court of Appeal of First District Fourth Division issued a published opinion that forms the law of this case (See 20a). This published opinion further shaped the outcome at trial when trial court denied recognition of public interest basis for further denying First Amendment rights at trial also.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction under 28 U.S.C. §1257, as the issues presented have been decided in the highest court of the state. This Court issued an order on March 19, 2020 that extended the filing timelines to 150 days from the lower court order denying discretionary review. Therefore this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISION AT ISSUE

Petitioner appeals to the discretionary powers of this Court to decide the issue of denial of Petitioner's First Amendment rights in conjunction with the other federal regulatory and statutory issues raised herein (See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."). Respondent is not prejudiced by the Court's consideration of Petitioner's First Amendment rights as he has had the opportunity to fully litigate the issues and offer

all the evidence possible in this case which has already gone through a full trial. Fourteenth Amendment provisions of Equal Protection and Due Process are implicated in this case where Petitioner's First Amendment right to free speech and right to petition were denied.

Federal laws of copyright and the federal regulatory scheme on scientific research misconduct governed the ultimate issues of the case of plagiarism, falsification and fabrication in the published scientific articles. The federal statutory provision at issue is the element of "plagiarism" or copyright infringement falling within both the federal copyright laws of 17 U.S.C. §101 *et seq.* and the federal regulatory provisions for research misconduct.

The federal regulatory provision at issue, which Petitioner contends displaced state law, is 48 C.F.R. §952.235-71. 48 C.F.R. §952.235-71 was developed following the federal research misconduct policy that defines research misconduct regulation as applied to LBNL where Respondent conducted research. The federal research misconduct policy was issued in 2000 by the Office of Science and Technology Policy (OSTP) which is a creation of an Act of Congress (National Science and Technology Policy, Organization, and Priorities Act of 1976).[1]

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[1] According to the federal research misconduct policy, research misconduct is defined as fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. A). Fabrication is making up data or results and recording or reporting them; B). Falsification is manipulating research materials, equipment, or processes, or

(Footnote continues on next page)

This policy serves as the umbrella policy for all federal agencies involved in funding research including the Department of Energy (DOE) which is regulated under 10 C.F.R. 733. LBNL is a contractor of the DOE and therefore is governed by the same federal regulatory scheme.

In addition to the federal regulatory and statutory scheme, that displaced the state law, state law tort was further displaced by the Oklahoma workers compensation laws which barred the suit filed by Respondent in California. The California trial court's rejection of Full Faith and Credit to Oklahoma public laws under Article IV §1 and §2 implicated Fourteenth Amendment.

Further implicating the Due Process and the Equal Protection clauses of the Fourteenth Amendment is the deprivation of Plaintiff's right to appeal the merits of the judgment without notice or consent.

28 U.S.C. §1331 authorizes the United States federal courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States."

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changing or omitting data or results such that the research is not accurately represented in the research record. C). Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.[..]. Federal Register: December 6, 2000 (Volume 65, Number 235), pages 76260-76264, available online at https://www.govinfo.gov/content/pkg/FR-2000-12-06/pdf/00-30852.pdf accessed on 4/18/2020.

STATEMENT OF THE CASE

Petitioner is a scientist and a former professor. Petitioner is well recognized as a researcher in the subject of gas injection in porous media in application to geologic carbon dioxide sequestration. Geologic carbon dioxide sequestration is a technique involving injection of gas for safely storing very large quantities of carbon dioxide beneath the surface of Earth in porous rock formations.

Respondent conducted research at Lawrence Berkeley National Laboratories (LBNL) in the Earth and Environmental Sciences Division on the subject of geologic carbon dioxide sequestration to mitigate climate. Respondent published contaminated data in a climate change mitigation research journal called the International Journal of Greenhouse Gas Control without admitting it.

Respondent asserted in the publication that his data implicated the safety of entire populations of people, flora and fauna above on the surface of Earth when carbon dioxide is stored below.[2] Within

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[2] See Bikkina, P.K., 2011. Contact angle measurements of CO2–water–quartz/calcite systems in the perspective of carbon sequestration, International Journal of Greenhouse Gas Control, 5, 1259–1271. This paper and dates of publication can be accessed online from http://www.sciencedirect.com/science/article/pii/S1750583611001241. Respondent refers to "safety" issues many times including the abstract. "This important [data] has serious implications towards the design and safety issues, as a permanent [s]hift indicates lower [carbon dioxide] retention capabilities of sequestration site[s]."

two years of the publication of the contaminated data, half a dozen new scientific peer articles appeared in the scientific literature across the world, stating that Respondent's research was non-reproducible in their labs.

Respondent was made aware, before the publication, by both Petitioner and another scientist, Dr. Winton Cornell, who carried out tests on Respondent's samples, that laboratory analytical tests on those samples revealed very high levels of contamination and that his data were false.[3]

Other LBNL scientists used Respondent's contaminated data in their research program for making computer calculations of the fate of millions of tons of carbon dioxide that was to be injected in underground formations in field sites in densely populated areas of New York, New Jersey and Mississippi. The calculations were not mere citations but actual use of inaccurate data as Respondent's contaminated results were used in mathematical models leading to a physical mistake in the calculations as differentiated from statistical error.[4]

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[3] Respondent previously worked at University of Tulsa (TU) situated in Oklahoma where the contaminated data originated. Petitioner had personal knowledge of the contamination as Respondent worked under the supervision of Petitioner at TU. The key witness, Dr. Winton Cornell, was a faculty member at TU.

[4] The LBNL results implicating public safety arising from Respondent's contaminated data appeared in government website OSTI.gov. See https://www.osti.gov/biblio/1368193-characterization-triassic-newark-basin-new-york-new-jersey-geologic-storage-carbon-dioxide;

Petitioner, who was invited to LBNL for a research seminar on August 30, 2013, learned about the use of Respondent's contaminated data and reported to the concerned department head at LBNL that their carbon dioxide sequestration research calculations were likely affected by contamination.

Petitioner was then asked by LBNL research integrity officer to file a formal written complaint. Both Respondent and LBNL were mandated under 48 C.F.R. §952.235-71, clause (a), incorporated into its contract with Department of Energy, to prevent research misconduct and to maintain integrity of research performed at LBNL. The DOE regulatory framework in turn applied the federal research misconduct regulation, verbatim, to all DOE contractors including LBNL.

On September 25, 2013 Petitioner stated the basis for his assertion of contamination in Respondent's data along with the scientific evidence from newly published peer reviewed articles and laboratory analytical results showing contamination. Since Respondent knew of the contamination and yet did not admit it, leading the lay scientific reader to believe that his data were really true, the conduct amounted to falsification under the federal research misconduct regulation which applied to LBNL. Similarly, Respondent's statement in the article, that remaining samples were uncontaminated, amounted to fabrication as the remaining samples were never tested in light of the known contamination. Petitioner informed LBNL research integrity officer that its scientists were actually using the contaminated data.

However, the LBNL research integrity officer summarily dismissed that complaint and refused to even conduct an inquiry let alone investigate it. Under 48 C.F.R. §952.235-71 clause (d)(2) an inquiry is to be conducted by a subject matter expert with no unresolved conflict of interest. The LBNL officer declined to follow federal regulations by stating that the alleged research misconduct was not within their jurisdiction and that it had been investigated by Respondent's previous institution, Tulsa University (TU). The LBNL research integrity officer stated the decision in a letter addressed to Petitioner on October 2, 2013.

In addition, the research integrity officer broke the confidentiality clause 48 C.F.R. §952.235-71 (d)(4) under the federal regulation and copied the letter rejecting inquiry to Respondent thereby releasing Petitioner's confidential report to Respondent.

Soon after learning of Petitioner's report to LBNL, Respondent filed a lawsuit in the Superior Court of California in Alameda County where LBNL was situated and alleged defamation, intentional infliction of emotional distress (IIED) and negligence. Respondent added claims from Petitioner's supervisory role on the same issue of research misconduct that took place in Oklahoma under the normal course of employment at TU. On March 28, 2014 Respondent amended the complaint.

A. PETITIONER'S ANTISLAPP MOTION AND DISPOSITION.

Petitioner filed a motion to strike by invoking his First Amendment rights to petition the government funded lab on a matter of public interest and concerning publications by a limited purpose public figure. Petitioner submitted declaration of the key witness and collaborating scientist from TU, Dr. Winton Cornell, who is a geochemistry professor with at least thirty years of analytical lab experience, describing the details of the laboratory analytical tests showing contamination of Respondent's samples. Petitioner also submitted his own declaration and the several journal articles that criticized Respondent's article as not reproducible.

Respondent stated to court that the issues were investigated under TU's research misconduct policy. But TU could not have conducted any investigation into lack of research integrity in LBNL's research work due to Respondent's contaminated data or considered the newly published scientific articles showing non-reproducibility of Respondents data.[5]

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[5] Petitioner, in his post-trial motion to vacate, which is described later in this petition, attached an affidavit from a former federal research fraud investigator. The investigator reviewed the trial record and the deposition transcripts to conclude that research misconduct was never actually investigated by TU. The fraud investigator also concluded that no inquiry or investigatory committee was formed and the scientific report from key witness Dr. Winton Cornell was never considered.

The trial court denied Petitioner's motion to strike on September 4, 2014 (See 46a) and the Court of Appeal affirmed it on October 9, 2015. The Court of Appeal rejected notice of federal regulations and held that climate change "research" was not of public interest and that Respondent was not a limited purpose public figure (See 27a to 32a). It then denied the application of common interest or conditional privileges. Finally, it held that Petitioner's scientific evidence could not prove that the allegations of scientific misconduct were substantially true. The Court of Appeal and the trial court materially relied upon the wrong factual assertions by Respondent that the research misconduct issues were previously investigated.

The case law in California today is exactly the opposite of what the Congress intended the federal research misconduct regulation to provide the public with: to promote trust of the public in the veracity of scientific research.[6] In a diametrically opposite position, the California Supreme Court held, based on the opinion denying Petitioner's motion to strike, that *scientific research misconduct* is not of public interest (See *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133 (Cal. Sup. Court 2019) citing to *Bikkina v. Mahadevan*, 241 Cal. App. 4th 70 (2014) holding

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6 The federal research misconduct policy states in its reply to comments from public that "[s]ustained public trust in the research enterprise [r]equires confidence in the research record and in the processes involved in its ongoing development." Federal Register: December 6, 2000 (Volume 65, Number 235). See page 76260 under section "Supplementary Information."

"defendant's speech was "about falsified data and plagiarism in two scientific papers, not about global warming"").[7]

B. PROCESS OF TRIAL AND SUBJECT MATTER JURISDICTION.

The ultimate issues of the case of falsification, fabrication and plagiarism in scientific journals, that fell within the federal research misconduct regulations, were then subject to a jury trial between January 23, 2018 and February 9, 2018. The jury were not instructed on federal regulatory or statutory scheme. The issues were not even defined to the jury in the instructions or otherwise.

In addition, Petitioner's request for special instructions to determine whether Petitioner's speech, on the issue of scientific misconduct in climate change mitigation research, was a matter of

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[7] In a separate action Respondent published a second article containing Petitioner's original technical work and attributed it, without credit, to himself and a researcher outside the United States who had no contribution. This issue, of plagiarism, constitutes copyright infringement under the copyright laws as the published work is a written work of authorship. This publication was made online on September 21, 2011 after Plaintiff objected to publication, in June 03, 2011 by refusing to sign any agreement to transfer rights to publish his original work of authorship, ideas, methods and processes. See Bikkina, P.K., Shoham, O. and Uppaluri, R., 2011, Equilibrated Interfacial Tension Data of the CO2-Water System at High Pressures and Moderate Temperatures, Journal of Chemical and Engineering Data, 56 (10), 3725–3733. This paper and dates of publication can be accessed online from http://pubs.acs.org/doi/abs/10.1021/je200302h.

public concern was rejected by the trial court based on the previous Court of Appeal opinion even though that opinion should not have determined the law of the trial (See 20a). Consequently, the jury never even attempted to determine whether Petitioner had rights under the First Amendment of the Constitution of the United States.

The jury erroneously found that Petitioner was liable for defamation for "failing to use reasonable care to determine the truth or falsity" of the allegations of research misconduct, that those allegations of falsification of scientific research were not true and awarded nearly a million dollars in damages. In addition, jury found "malice, oppression or fraud," with malice defined as "intent to cause injury" with "knowing disregard of the safety and rights of another."

Because there was no investigation of research misconduct, by any agency TU or LBNL, the jurors substituted as fact finders of research misconduct but without any instruction of the relevant definitions or consideration of the federal regulatory scheme or even possessing any subject matter expertise.

The trial of facts of research misconduct, under common law tort of defamation, was at odds with the federal law and regulation on the same issues: it contradicted the burden of proof required to prove those same issues which only required preponderance of evidence under the federal law and regulation; it contradicted the federal law and regulation on admissibility of evidence and in the selection of persons competent to determine the same facts; and it contradicted evidence required

under federal law and regulation required to show good faith.

Petitioner actually met his burden at trial, by preponderance of evidence, to show that his statements were made in good faith.[8] But Respondent didn't carry any burden, not even with contrary scientific evidence, apart from a mere denial. Further, the state defamation law required Petitioner to meet a much higher bar of substantial truth of the statement made in his complaint.

The trial court proceedings were further marred by Respondent's discovery misconduct, witness and evidence suppression.[9] The trial court allowed video testimonies, which were not noticed, of as many as five TU officials lasting a full week of

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8 Neutral subject matter experts in the science, one of whom is a well-known surface scientist, Dr. Seth Miller, that graduated from California Institute of Technology (CalTech) and the other being a professor of chemistry, Prof. Roger Terrill, at a well-known California university, testified that all of Respondent's data were false and that Respondent's data were found non-reproducible by peer articles that specifically tried to do so. Respondent also knew that his data were all false before the publication and was in fact advised of it on record. Respondent presented no contrary scientific evidence except for a denial that he did not falsify. The trial court strictly ruled that the fact finding of falsification, not just falsity of data, was the domain of the jury and barred the experts from weighing on those ultimate issues.

9 Dr. Winton Cornell was directed by a powerful TU official to not testify in California or even depose in Oklahoma. Then Respondent moved to exclude the contradictory scientific data, contained in Dr. Cornell's prior court declaration, from jury's review.

video replays without a chance to cross-examine them in front of the jury. These TU officials, who admitted they were not subject matter experts but were administrators, offered inflammatory statements and offered cumulative testimony that the issue of scientific misconduct was investigated under their ethical conduct policy when in fact there was not even an inquiry committee formed under that policy with any scientific experts.

The trial court's decision to allow video replay for such a long time of the trial cost Petitioner the trial because he could not make any objections or expose the lack of investigation to the jury. Thus the jury decided solely based on the false evidence that TU investigated the alleged scientific research misconduct when in fact no such investigation or even inquiry took place.

In addition, Respondent's IIED and negligence claims arose from Petitioner's workplace supervisory role in Oklahoma on the same issue of scientific research misconduct. But these claims were non-exempt from workers compensation laws of Oklahoma. The trial of these non-exempt claims under the California common law court deprived Petitioner his rights to immunity from intentional torts from supervisory actions during normal course of employment at TU.

After the jury trial, on February 9, 2018, sensing that serious and prejudicial errors were made during trial, Respondent opportunistically solicited from Petitioner's trial counsel and obtained a stipulation to waive Petitioner's right to appeal the merits of judgment without giving notice to Petitioner or obtaining consent from Petitioner.

Petitioner was not given the opportunity to object to that stipulation by the trial court which simply entered the stipulation without any Due Process of law.

Financial stress led Petitioner to file a bankruptcy petition in the Southern District of Texas on February 15, 2018. But the trial court went ahead and entered stipulated judgment on the same day after the bankruptcy filing was made in Texas. The trial court also added costs of $64,256.88.

On July 24, 2018, Petitioner timely filed a notice of motion to vacate the stipulation, judgment and the verdict. Petitioner in his motion argued that the trial court completely lacked subject matter jurisdiction over the entire case as it was preempted by federal regulatory and statutory scheme on research misconduct. As a secondary threshold, that stripped the trial court from fundamental subject matter jurisdiction, Petitioner stated that Oklahoma workers laws governed the entirety of Respondent's claims from Oklahoma as Respondent was coemployed with Petitioner.

Even after notification of the motion to vacate, the trial court entered an *ex parte* stipulated judgment on August 1, 2018 without any Due Process of law in forcibly removing Petitioner's right to appeal. Petitioner had no opportunity to object and deny consent to the stipulation waiving his appeal at any point in time.

On January 8, 2019 the trial court denied the motion to vacate (See 18a). Petitioner timely filed an appeal to the California Court of Appeals First District Division Four.

C. COURT OF APPEAL OPINION AND CALIFORNIA SUPREME COURT PETITION FOR REVIEW.

The Court of Appeal affirmed the trial court's order denying Petitioner's motion to vacate in an unpublished opinion on January 14, 2020 (See 1a). On the issue of right to appeal the merits of trial, the Court of Appeal erroneously affirmed the trial court's summary entry of unauthorized stipulation without a hearing or determination by trial of the facts.

On the issue of subject matter jurisdiction concerning the trial of scientific research misconduct issues, the Court of Appeal held that the federal regulation governing scientific research misconduct did not state anywhere that the state courts were divested of jurisdiction on an inextricably linked common law claim. It then rejected Petitioner's request for judicial notice of the extensive federal regulations (See 12a).

Interestingly, the Court of Appeal completely skipped referring to Respondent's employment with LBNL and the research misconduct at LBNL even though it had done so in its previous published opinion (See 1a and contrast with 21a-22a). Based on this factual omission, the Court of Appeal rejected Plaintiff's request for judicial notice of the federal regulatory and statutory scheme.

Further implicating subject matter jurisdiction of the trial court, the Court of Appeal rejected full faith and credit to Petitioner's immunities under Oklahoma workers compensation statutes that completely barred Respondent's

intentional tort claims under negligence and IIED causes.

The Court of Appeal, after a rehearing petition pointing to new evidence, issued a modification on February 11, 2020 and acknowledged that Petitioner *demonstrated* evidence showing that there was never an investigation of research misconduct. However, the Court of Appeal refused to address the lack of subject matter jurisdiction on account of the incomplete administrative process of investigation of scientific research misconduct.

Petitioner raised the issue of trial court's complete lack of fundamental subject matter jurisdiction in his petition for review to the California Supreme Court. On March 11, 2020, the California Supreme Court denied the petition without a review. The discretionary decision left the Court of Appeal opinion as the final opinion and decision of the highest court in the state.

REASONS THE PETITION SHOULD BE GRANTED

The federal research misconduct regulation is unique in that it requires, or even invites, speech or statement which makes the complainant a ripe target for defamation suits. This is clear from the numerous cases within the relatively short legal history of 20 years since the publication of the federal research misconduct policy and regulation.

Because of the nature of the federal research misconduct regulation and policy inviting speech, and because of the nationwide reach of the federal

research misconduct regulations, reaching millions of researchers, state law defamation suits arising from allegations of research misconduct are bound to recur. This Court's review is critically and urgently needed to ensure national uniformity in the application of federal research misconduct regulations and establish federal preemption of state law to ensure complainants under those regulations are ensured of Due Process and Equal Protections under law.

California case law, arising from this case, sets the wrong precedent with its holding that research misconduct is not of public interest. This leads to irreconcilable conflict with federal research misconduct regulations and also sends a chilling message to complainants who will now never make research misconduct allegations for fear of massive and disproportionate state law prosecution to which there exists no defense in the absence of the investigation of such a complaint.

Complainants, like Petitioner, deserve protections under the First Amendment. However state law privileges and protection of the right to free speech or to petition are highly variable and not uniform as this case demonstrates. This Court's grant of certiorari is critically needed to identify and spell a rule of law that grants adequate protections to complainants of scientific research misconduct from massive tort liability.

A. FEDERAL LAW PREEMPTED STATE COURT.

Under 48 C.F.R. §952.235-71 clause (b) LBNL was required to conduct at least an inquiry which it refused to comply with. See relevant portion of that section below.

> Unless otherwise instructed by the Contracting Officer, the Contractor must conduct an initial inquiry into any allegation of research misconduct.

LBNL neither conducted an inquiry or investigation. Under 48 C.F.R. §952.235-71 clause (d) (1) LBNL must provide safeguards for complainants who bring complaints in good faith. which has been interpreted by federal administrative law courts to mean that the complaint was made with a reasonable belief that the elements of the complaint are true.

Petitioner more than satisfied that requirement by showing that 1) uncontroverted laboratory analytical data from key witness Dr. Winton Cornell revealed unadmitted contamination, 2) several journal articles explicitly tried reproducing Respondent's data and could not do so, 3) statements from neutral experts who confirm that all of Respondent's data are false, 4) that Respondent was advised of falsity of data prior to the publication, 5) that the dispute was initially subject to an inquiry that was never completed and never investigated and finally 6) that LBNL research was affected by Respondent's contaminated data which used the contaminated data to make predictions for

storage of immense quantities of carbon dioxide in real field projects in various parts of the USA.

Here LBNL was obligated under federal law to inquire or investigate the complaint of research misconduct. Respondent, by virtue of being an employee of LBNL was enjoined by federal law to subject his research to inquiry and investigation under federal law. Inquiry which is defined in 48 C.F.R. §952.235-71 is initial fact finding involving gathering information of LBNL research record affected by Respondent's contaminated data.

In *Anversa v. Partners Healthcare System, Inc.*, 835 F.3d 167 (1st Cir. 2016) the First Circuit held that defamation claim from the complaint of research misconduct under the federal misconduct policy is both statutorily and administratively preempted by federal regulations that require the agency to complete its investigation into the complaint.

In a recent federal case that presents issues nearly identical to the issues as this case, *i.e.* a defamation complaint arising from allegation of research misconduct, the federal district court ruled that if investigation is *incomplete* then the principle of *Anversa* applies. *See Medici v. Lifespan Corp.*, 239 F.Supp.3d 355 (D. Mass. 2017).

A federal court of law recognizing the federal regulatory procedures can find that the subject matter jurisdiction is lacking, without the completion of investigation, as the First Circuit did in *Anversa*. The ultimate issues of this case of scientific misconduct were not investigated by either LBNL or TU. The Court of Appeal acknowledged that Petitioner demonstrated evidence that the

investigation of research misconduct was incomplete but never inquired into the effect of that conflict on its own jurisdiction to try the subject matter (See 1a-2a).[10]

The principle that common law courts are preempted from adjudicating research misconduct disputes has been accepted by courts. The Seventh Circuit held that courts do not have subject matter jurisdiction over fact finding of scientific disputes (*See Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994), "Scientific controversies must be settled by the methods of science rather than by the methods of litigation. Cf. *Buckley v. Fitzsimmons*, 20 F.3d 789, 796-97 (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").

The fact finding of whether a scientific publication is falsified is necessarily a scientific exercise in itself which requires research, forensic evidence of unreported laboratory data, counter evidence in peer literature and evaluation of best practices by scientific experts in conjunction with the data, all of which cannot be implemented in a common law court by a jury. It is therefore an anomalous result that Respondent's article is not found falsified and fabricated by jury when the

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10 The admitted evidentiary record includes a statement from a TU official that the allegations of research misconduct were serious enough for a decision to conduct inquiry. But TU never progressed beyond that decision and there was no inquiry or investigation.

scientific evidence, considered under the federal research misconduct regulation, shows otherwise.

The California Court of Appeal squarely contradicted the First Circuit in *Anversa* and the Seventh Circuit in *Underwager*. The Court of Appeal rejected notice of federal regulations and erroneously held that federal regulations and policy do not explicitly state anywhere that state law is divested from subject matter jurisdiction (See 12a). But there is no presumption of jurisdiction of state courts in the subject of research misconduct. To take the subject matter outside the federal jurisdiction requires explicit authorization from Congress. See United States Supreme Court decision *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) ("in the absence of explicit statutory language, state law is preempted from jurisdiction in a field that Congress intended the Federal Government to occupy exclusively").

Similar to the exception to well pleaded complaint rule of copyright laws, the *implied* Congressional intent in the federal research misconduct regulations create exclusive federal jurisdiction. Thus the trial of the federal issues of research misconduct, to which the state law claim is inextricably linked to and solely dependent on, was held without subject matter jurisdiction and was preempted by federal laws.

In fact, copyright infringement, which is equivalent to plagiarism in this case due to written publications, is a common element of both copyright laws and the scientific research misconduct regulations. The trial of plagiarism which was an ultimate issue of this case was completely preempted

by federal copyright laws under 17 U.S.C. §101 *et seq.* See *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005) (holding that any state common law tort involving publishing rights is removable to federal court under complete preemption doctrine of the Copyright Act even if the complaint does not state federal basis of jurisdiction, but presents significant federal issues).

This entire case belonged in the federal court under 28 U.S.C. §1331. "A case `aris[es] under' federal law within the meaning of §1331 if `a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006) (quoting *Franchise Tax Bd. Of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 27-28 (1983)).

This Court, held in *Gunn v. Minton*, 568 U.S. 251 (2013), citing to *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), that "[f]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 259.

The issues in this case met all four of the above criteria especially because Respondent filed his state law suit in California for Petitioner's speech which arose as a complaint under 48 C.F.R. §952.235-71 which in turn is governed by the federal research misconduct policy. All of Respondent's

causes, including the IIED and negligence causes, were based on speech arising as a complaint under the federal research misconduct regulation. Thus the verdict and judgment read much like a declaration that Respondent did not commit research misconduct and did not plagiarize whereas that declaratory authority solely belonged under federal administrative law courts or federal district courts.

Respondent could have brought all his claims in a federal court where the federal regulations, central to this case, would have been noticed and the federal issues pertaining to investigation by LBNL could have been resolved first.

Gunn concerned a common law malpractice claim, which the appellant's attorney failed to properly raise a federal patent issue before the court, which had no relationship to the federal patent issue itself and did not depend on the resolution of the patent issue. However here, in this case, the common law claims cannot be born at all without the resolution of the federal issues. The common law issues are predicated solely upon the federal issues being resolved, one way or the other, under the federal statutory and regulatory scheme for research misconduct.

In *Anversa* the First Circuit cited to this Court in *Sinochem Intern. v. Malaysia Intern. Shipping*, 549 U.S. 422 (2007) to justify its holding that the administrative exhaustion doctrine, a lower non-jurisdictional threshold, was sufficient to displace the state law claims. First Circuit stated that it did not need to reach the *complex and uncertain* issue of explicit federal law preemption even though it held that it applied. See *Anversa* at

835 F.3d at 175. The First Circuit held so because, unlike in this case, the administrative agency complied with the federal regulations to initiate an inquiry and investigation and had not exhausted its process. It held that administrative exhaustion was sufficient to displace the district court's subject matter jurisdiction citing to this Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

However, as this case demonstrates, administrative exhaustion alone cannot be the basis for displacement of subject matter jurisdiction as that places the critical jurisdictional question in the hands of the officer of the administrative agency who can act whimsically or even not comply with federal laws.

Scientific research misconduct is an issue of public and national interest over which state law completely lacks expertise, severely lacks notice of the vast federal statutory and regulatory scheme, and directly conflicts with federal courts.

This Court is requested to grant review to establish the administrative exhaustion principle to federal research misconduct investigation and further affirm the explicit federal preemption of state courts in the regulation of scientific research misconduct by inextricably linked state law claims.

B. STATE COURT CHILLS FREE SPEECH AND CONFLICTS WITH FEDERAL COURTS.

I. Scientific Research Misconduct is of Public Interest and Resolve Conflict: State and Federal Courts Conflict.

Congress has recognized the integrity of scientific research to be of public interest, in the federal research misconduct policy issued in 2000, created through National Science and Technology Policy, Organization, and Priorities Act of 1976.[11] Thus a defendant's speech on issues of scientific research misconduct, especially in journal publications made by limited purpose public figures, should be protected by Constitution.

But First Amendment protection is absent in practice for the simple reason that research misconduct defendants necessarily make statements, that they believe to be factual, based on

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11 "While much is at stake for a researcher accused of research misconduct, even more is at stake for the *public* when a researcher commits research misconduct. Since "preponderance of the evidence" is the uniform standard of proof for establishing culpability in most civil fraud cases and many federal administrative proceedings, including debarment, there is no basis for raising the bar for proof in misconduct cases which have *such a potentially broad public impact.*" Federal Register: December 6, 2000 (Volume 65, Number 235). Emphasis added. See page 76262, answer to public question on burden of proof for scientific research misconduct in the first column.

contradictory scientific data. At issue is the recognition required of courts that an allegation of scientific misconduct under the federal regulation, while defamatory on the face, is an opinion based on scientific facts.

Federal circuit courts have interpreted the case law, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and have routinely held that statements alleging or imputing misconduct made in the context of scientific publications are usually read as opinions expressed as a fact when they are made with factual basis.

The Second Circuit, for instance, held that an allegedly false statement made in a published article was not defamatory even though the statement is published as a scientific fact (See *Ony, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490 (2d Cir. 2013), "It is clear to us, however, that while statements about contested and contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable "fact," *for purposes of the First Amendment* and the laws relating to fair competition and defamation, *they are more closely akin to matters of opinion*, and are so understood by the relevant scientific communities." Emphasis added.).

The Seventh Circuit held that the record suggested that the scholars clearly knew their subject and the record did not suggest otherwise to hold them liable for publishing false statements in reckless disregard of the probability of injury thus overcoming the actual malice bar. The *Underwager* scholar defendants state "[i]n defense of their judgment [of dismissal], that the undisputed facts

show that [their] statements are actually true, making their states of mind (and the care that preceded their statements) irrelevant."

Likewise, in this case, Petitioner knew the subject matter and researched the peer articles that could not reproduce Respondent's data. Petitioner supported his assertions with data from fellow scientist that tested the samples for contamination and only then reported scientific research misconduct. These beliefs of Petitioner were further confirmed by neutral expert witnesses at trial who uniformly testified that *all* of Respondent's data were contaminated and false. Finally Petitioner supplied evidence that the research misconduct allegations were never investigated by any institution.

On the issue of plagiarism, Petitioner stated his work of authorship was used by Respondent in articles without his consent and notification and there was copying. The Court of Appeal acknowledged that the act of copying was in fact tried as an inextricably linked issue to the alleged plagiarism in Petitioner's administrative complaint to redress copyright infringement (See 13a). The trial of the facts of copying properly belonged in the federal courts under 17 U.S.C. §101 *et seq.*

In *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Circuit 1992) the First Circuit held that "[a]s long as the author presents the factual basis for his statement, i[t] can only be read as his "personal conclusion about the information presented, not as a statement of fact." In *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), Fourth Circuit noted that "[b]ecause the

bases for the ... conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." Chapin, 993 F.2d at 1087.

In *Lott v. Levitt*, 556 F.3d 564 (7th Cir. 2009), the Seventh Circuit court held that a defendant's assertion in a publication that plaintiff's results were not replicable, imputing that plaintiff published falsified data thereby inviting a defamation lawsuit, was only an attack on the ideas proposed by the plaintiff and not on the plaintiff himself and dismissed the plaint.

The Seventh Circuit has routinely held that scholarly publications by authors in subjects of public importance automatically makes them limited purpose public figures ("We have concluded, however, that [plaintiffs] are not private persons; when talk turns to child abuse, they are public figures. Cases since [Denny] have made it clear that a public figure must establish that the defendant acted with actual malice."). Therefore, the circuit court held that the *Underwager* plaintiffs had to meet the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) actual malice standard to claim damages from defamation. See also *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996).

Likewise, Respondent in this case is a limited purpose public figure who injected himself into a controversy about climate change mitigation by publishing a paper that kicked up a storm of peer reviewed articles unsuccessfully trying to reproduce his results. In addition Respondent claims his results has impacts on safety of millions of people, animals and entire ecosystems. In any case,

Congress, in its federal research misconduct policy has held that scientific research integrity in itself is an issue of public interest.

Thus the subject matter of climate change mitigation research, on which Respondent published his articles, was of public interest. Respondent had to prove actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) standard.

Some circuit courts have applied the state law construct of qualified and common interest privileges to allegations of scientific research misconduct. In an exact replay of the facts of this case, in *Chandok v. Klessig*, 632 F.3d 803 (2011), the defendant, after finding that the plaintiff's results were not reproducible, published assertions of scientific research misconduct to more than half a dozen individuals, filed a research misconduct complaint and discussed with scientists at another university.

In its analysis, the Second Circuit considered that the defendant's allegations of scientific misconduct were supported by peer articles that could not reproduce the plaintiff's results even though the completed investigation concluded that research misconduct was not proven. While the Second Circuit did not reach First Amendment protections it discussed with willingness to apply the standard. *Id* at 814. In particular the Second Circuit held that the New York state common interest privilege and the qualified privilege could not be overcome without showing that spite and ill-will is the "sole cause" for the publication. *Id* at 818.

But state law and its application varies from state to state resulting in non-uniform protections under privileges as this case shows. In this case, the

trial court denied both common interest privilege and the condition privilege under California law before trial and the jury was not instructed on it (See 37a-40a).

In every one of the cases considered by First, Second and the Seventh Circuit, related to defamation arising from complaints of scientific research misconduct, the litigants were known to each other and had personal knowledge of the controversy and about each other either through coemployment in the same university or research group. Yet, that did not come in the way of the courts from extending the First Amendment protection and requiring the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) actual malice standard by either considering the plaintiff's to be limited purpose public figures or in addition that the subject matter was also of public interest or that the defendant's speech were opinions following *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Perhaps ironically to this case, the Ninth Circuit sitting in California, applied California's own anti-SLAPP statute to extend First Amendment protection to a scholar whose allegedly defamatory speech in an interview imputed falsity in claims related to a medicinal pill manufacturer's product (See *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001), citing to this Court's opinion in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and hold that ""[i]f the First Amendment provides heightened protection for rational comment on stereo speakers, it should also protect scientific comment on issues as important as public health."").

In the instant case, the trial court, even though it was prohibited, dutifully followed the law of the case established by the Court of Appeal in 2015, denied privileges, rejected Petitioner's First Amendment protections and went through a trial when it completely lacked subject matter jurisdiction. Even at trial, the court imposed a much higher standard of substantial truth than the preponderance of evidence standard is required under federal regulations, which burden Petitioner actually met.

In this, the California Court of Appeals joins other state courts such as the Illinois Court of Appeals in *Mauvais-Jarvis v. Wong*, 987 NE 2d 864 (Ill. Ct. of App. 2013) (holding that there exists no duty to report scientific research misconduct under the federal regulatory scheme and that there exists no absolute privileges or First Amendment protection to such reporting), the Maryland Court of Appeals in *Arroyo v. Rosen*, 102 Md. App. 101 (Md. Ct. of App. 1994) (holding that statements made in a research misconduct complaint under federal regulations is not absolutely protected; see also authorities cited therein), the D.C. Court of Appeals in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (DC. Ct. of App. 2016) (holding that scientific research misconduct allegation by a news publishing house is not protected and subject to jury trial on fact of whether scientific research misconduct took place) and the Michigan Court of Appeals in *Sarkar v. Doe*, 897 NW 2d 207 (Mich. Ct. of App. 2016) (holding that submission of a flyer to university authorities from a scientific peer review

website containing comments alleging research misconduct is actionable as defamation).

As this Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) it is well-nigh impossible for scientific research misconduct defendants to prove the substantial truth of their research misconduct allegations to a jury. This is so because the very objective of the allegation, to initiate an investigation, if it remains incomplete cannot provide the requisite evidence to the defendant that is required to prove his case.

This Court's review is critically needed to address the lack of First Amendment protection of the right to petition and right to free speech about scientific research misconduct in publications published by limited purpose public figures on issues of public concern and interest such as climate change mitigation or carbon dioxide sequestration to mitigate climate change as applied to this case.

Denial of First Amendment protections and then trial of the ultimate issues without subject matter jurisdiction denied Petitioner the Due Process of law under the Fourteenth Amendment.

This Court must grant review to resolve the widening chasm and deepening conflict between state courts and federal circuits in extending First Amendment protection to allegations made concerning scientific research integrity which are inherently expressed as facts but are really opinions, in the eyes of law, relying on scientific data and facts.

II. State Court Violates Article IV, by Rejecting Petitioner's Immunities, and Flouts This Courts Holding in Awarding Tort Damages.

This Court held in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) that there can be no award for IIED damages when speech is protected by First Amendment. Even though, in this case, jury never decided Plaintiff's rights under First Amendment, federal courts have applied those protections under similar circumstances as argued in the previous section. The damages awarded to Respondent can therefore be struck under *Hustler*.

In addition, Respondent's IIED and negligence claims were based on the same issues of research misconduct and were superfluous to the defamation claims occurring at workplace in TU in Oklahoma when Respondent and Petitioner were coemployed. The Court of Appeal acknowledged this fact in its opinion but considered the defense of lack of subject matter jurisdiction as waived (See 3a).

Petitioner, who was an academic and graduate advisor at TU, had a moral, professional and ethical duty enjoined upon him by virtue of his position to report Respondent's research misconduct within the channels available for such reporting.

Petitioner's actions arising from normal course of employment, including complaints, in the university are further protected by the Oklahoma Workers Compensation Act. There were no public policy or statutory exemptions applicable under

either the California workers laws or Oklahoma workers laws.

But the Court of Appeal arbitrarily rejected full faith and credit to Oklahoma immunity provisions, under Article IV §1 and §2, that barred tort claims arising from workplace conduct arising from the duties enjoining Petitioner at work in Oklahoma.

The case here presents an example of hostility to the public Act of another state. Unlike the fact situation of *Carroll v. Lanza*, 349 U.S. 408 (1955) where the injury that occurred in a forum state, here the alleged injury claimed, under IIED and negligence causes, happened in Oklahoma and the forum state of California neither applied its own rule of decision nor gave full faith and credit to the Oklahoma statutes where the alleged injury happened. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (holding that Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy[ed]).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) this Court held that "[w]hile a State may [] assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law."

Likewise, in the instant case the California Court's assumption of subject matter jurisdiction over Oklahoma workplace claims, even though it may have had personal jurisdiction over parties,

requires an independent evaluation of the choice of law that comports with the constitutional limits of Due Process.

In the jury's findings, the trial of barred workplace claims played no less part and the trial itself was absolutely unfair as described in the statement of facts section.

C. COURT OF APPEAL HOLDING ON MINISTERIAL ACTION EXCEPTION TO DENY PETITIONER'S APPEAL CONFLICTS WITH FEDERAL COURTS AND DENIES DUE PROCESS.

Denial of Petitioner's right to appeal the merits of the judgment, during the pendency of a bankruptcy stay order citing to ministerial exception, caused deprivation of Petitioner's right to Due Process and denial of Equal Protection rights under Fourteenth Amendment.

The appeal of a judgment in California was a matter of statutory right which was denied to Petitioner without giving him the opportunity to deny consent or object to the unauthorized stipulation. Petitioner was also denied the opportunity to give evidence of the absence of stipulation authority in a trial of facts. *See Lane v. Brown*, 372 U.S. 477 (1963). *See* also *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 22 (1987) (J. Stevens, concurring) (holding that "[s]ince [the state] has created an appeal as of right from the trial court's judgment, it cannot infringe on this right to appeal in a manner inconsistent with due process or equal protection").

The California Court of Appeal held that the verdict completed the decision on merits of the case, and that the amendment leading to addition of costs of $64,256.88 and directing entry of stipulated judgment, waiving right to appeal, was ministerial. These trial court actions were not ministerial as the decisions involved discretion that is antithesis of mechanical action and caused prejudice to Petitioner (*See In re Soares*, 107 F.3d 969 (1st Cir. 1997)).

Further, the California Court of Appeal holding, that trial court action was within the ministerial exceptions to automatic stay, went well beyond simply evaluating whether those actions were ministerial under state law. It decided that the purportedly ministerial action did not violate the bankruptcy stay under federal law.

In essence, the trial court and the California Court of Appeal modified the bankruptcy stay order *nunc pro tunc* in violation of the bankruptcy statute 11 U.S.C. §362 (d)(1) which authorizes only the bankruptcy courts to perform that function (*Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991)).

The California Court of Appeal decision conflicts with nearly all of the federal court authorities which hold that actions, *directing* the entry of judgment, in violation of stay are void and only the bankruptcy court can provide the retroactive modification, lift or annulment of the stay (*See In re Schwartz*, 954 F.2d.569 (9th Cir. 1992) and *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991)).

The Ninth Circuit, in *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000), held that "state courts are

allowed to construe the [discharge or stay] in bankruptcy, but what they are not allowed to do is construe the [discharge or stay] *incorrectly*, because an *incorrect* application [w]ould be equivalent to a modification of the [discharge or stay] order." Emphasis added.

The Court of Appeal admitted trial court's violation of bankruptcy stay order with its discretionary action, to waive appeal and to add monies, but cured it erroneously. It applied ministerial exception to automatic stay by citing a conflicting opinion of one of the circuit courts to deny Petitioner's right to appeal (See 7a, fn3; "This contention is [i]rrelevant, as we are not bound by decisions of the Ninth Circuit or any other lower federal court, even on matters of federal law. [citation omitted]").

CONCLUSION

This Court is requested to grant certiorari to resolve conflict between state and federal courts in the displacement of intentional tort claims from allegation of scientific research misconduct by federal regulatory and statutory scheme and the doctrine of administrative exhaustion requiring investigation of the alleged research misconduct.

Further, this Court should grant review to resolve conflict between state and federal courts, wherein state courts have uniformly rejected First Amendment protection to complainants of scientific research misconduct, when such a complaint constitutes an opinion based on scientific facts and

when the issue of scientific research misconduct is held by Congress to be a matter of public interest.

This Court should grant review to decide the issue not determined by jury, that Petitioner's speech was protected by First Amendment, and void the damages awarded to Respondent, as prohibited under *Hustler*, as the facts found at trial do not meet *New York Times Co. v. Sullivan* standard.

This Court should further grant review to redress the denial of Petitioner's Due Process right to appeal and order the state trial court to reverse the unauthorized stipulation to allow review of the merits of judgment.

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Respectfully submitted,

/s/

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