No. 18-1451

IN THE

Supreme Court of the United States

NATIONAL REVIEW, INC.,

Petitioner,

v.

MICHAEL E. MANN,

Respondent,

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

PETITIONER'S REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

Mann concedes the entrenched split between state and federal courts on the first question presented: whether categorizing speech on matters of public concern as "provably false" presents a question of law for a court or a question of fact for a jury. That is an oft-recurring and undeniably important question, and (contrary to Mann's claims) it is one that the court below had to—and did—resolve in determining that Mann's defamation claims could proceed. This Court should grant review to resolve that conflict.

As to the second question presented, Mann admits that courts have long refused to entertain defamation claims for subjective critiques and value judgments, particularly on matters of public concern. While he attempts to distinguish the decision below, his efforts fail: The court's reasoning would reduce nearly every public-policy debate to dueling libel lawsuits and jury biases, warping free discourse in the nation's capital. That is why 21 sitting U.S. Senators and three former U.S. Attorneys General, among others, have filed amicus briefs urging review.

In response to all this, Mann seeks to evade review by challenging this Court's jurisdiction. But an unbroken wall of precedent, stretching back nearly half a century, leaves no doubt that the decision below is "final" because it finally resolved "the federal issue" of whether the statements are protected as a matter of law under the First Amendment. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975). And because the court below erred so egregiously on that crucial federal question, this Court has not only the power but the duty to step in.

ARGUMENT

I. THIS COURT'S JURISDICTION IS CLEAR.

Mann's principal argument is that this Court lacks jurisdiction due to lack of a "final" decision under 28 U.S.C. § 1257. BIO.26-27. That argument is refuted by this Court's longstanding precedent.

A. As the petition explained (at 4), this Court has jurisdiction under *Cox Broadcasting*. *Cox* held that this Court may review a state-court decision rejecting a threshold First Amendment defense and allowing a state-law civil suit to proceed based on potentially protected speech. This case is precisely the same.

In *Cox*, the father of a rape victim sued a broadcaster under state law for publishing the victim's name. 420 U.S. at 472-74. The Georgia Supreme Court held that the First Amendment "did not, as a matter of law, require judgment for" the broadcaster, so it remanded for trial. *Id*. at 475. This Court took jurisdiction under § 1257 because the decision was "plainly final on the federal issue"—whether "a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward." *Id*. at 485-86. This Court realized that the broadcaster might "prevail at trial" on other grounds, but the threshold First Amendment question was whether "there should be [a] trial at all." *Id*. at 485. *That* issue had been finally decided, and refusing immediate review would not only subject potentially protected speech to burdensome litigation, but would also "leave the press in Georgia operating in the shadow of … a rule of law … the constitutionality of which is in serious doubt." *Id*. at 486.

Under the *Cox* rule, this Court has jurisdiction so long as (1) "the 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.

All three conditions are easily satisfied here, for precisely the same reasons as in *Cox*. *First*, the D.C. Court of Appeals "finally decided" the federal issue by holding that Mann's defamation claims "may go forward," rejecting the argument that the speech is not actionable under the First Amendment. *Id*. at 475, 485. *Second*, reversing the decision below would preclude "any further litigation on the relevant cause of action," *i.e.*, Mann's defamation claim against National Review. *Id*. at 482-43. And, *third*, denying immediate review "might seriously erode federal policy," both by forcing National Review to endure costly litigation as the price of engaging in protected speech, and by perpetuating a dubious "rule of law" that would chill robust debate. *Id*. at 483, 486.

B. Mann's contrary arguments are without merit. *First*, he contends that the court below "did not decide a federal issue" at all. BIO.27. But, under the First Amendment, there are "constitutional limits" on defamation liability; one limit is that the statement forming the basis for the claim must be "objectively verifiable." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 20, 22 (1990). That is a classic "federal" issue. Although the issue arose in the *procedural* context of a D.C. anti-SLAPP motion to dismiss, the *substantive* issue is one of federal constitutional law.

Second, Mann argues that the D.C. Court of Appeals did not "finally" resolve the federal issue because it rejected the First Amendment argument "at the motion to dismiss phase." BIO.27. But the precise federal question on the motion to dismiss is whether the Constitution allows Mann's defamation claims to "go forward." *Cox*, 420 U.S. at 485. If not, then "there should be no trial at all." *Id*. In other words, the federal question is whether, accepting Mann's allegations as true, the First Amendment allows for defamation liability. The Court of Appeals finally resolved that federal question by allowing Mann's claims to proceed. Deferring this Court's review until after trial would defeat the entire point of the *Cox* rule.

Third, Mann argues that reversal of the decision below "would not be preclusive of further litigation." BIO.28-29 (quoting *Cox*, 420 U.S. at 482-83). But he truncates the key portion of the sentence he quotes: The question is whether reversal would preclude "any further litigation *on the relevant cause of action*." *Cox*, 420 U.S. at 482-83 (emphasis added). Here, the "relevant cause of action" is Mann's defamation claim against National Review. And reversing the decision below would obviously preclude further litigation on *that* cause of action. *See also, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (finding jurisdiction under *Cox* because "reversal … would bar further prosecution *on the RICO counts at issue here*" (emphasis added)).

Because *Cox* looks to the finality of the decision on "*the* federal issue" and "*the* relevant cause of action," *Cox*, 420 U.S. at 483 (emphases added), it obviously does not require that reversal would finally resolve the case as to "*all* parties and issues." BIO.29 (emphases added). Thus, it makes no difference that the courts below may have to resolve collateral issues of "attorneys' fees" and Steyn's "counterclaim" against Mann. *Id*. Moreover, even if it mattered, Mann is plainly wrong that his defamation claim against Steyn could still proceed if he lost here: If this Court holds that Mann cannot sue National Review for *publishing* Steyn's criticism, then Mann obviously cannot sue Steyn for *authoring* it.[1]

Finally, Mann says that denying immediate review would not "seriously erode federal policy" because the decision below "did not depart in any way from federal precedent." BIO.30 (quoting *Cox*, 420 U.S. at 483). That confuses the merits with the importance of the First Amendment issues at stake. Under *Cox*, the question is whether denying immediate review "*might* seriously erode federal policy" by subjecting potentially protected speech to burdens of litigation and preserving a precedent with chilling effects on speech. 420 U.S. at 483 (emphasis added). That test is self-evidently satisfied here.

[1] The only case that Mann cites on this point, *Meagher v. Minnesota Thresher Manufacturing Co.*, 145 U.S. 608 (1892), is wholly inapposite. *Meagher* was not a *Cox* case, but simply set forth the general rule that a decision is not "final"—and hence not reviewable—until it is final for all parties. But *Cox* recognized an *exception* to that rule, which allows this Court to grant review in certain circumstances when a federal issue has been finally decided, even if other parties or issues remain. *See* Stern & Gressman, *Supreme Court Practice* § 3.7 (9th ed.).

Most obviously, requiring a trial before granting review would destroy the First Amendment right that National Review seeks to vindicate. The issue is whether National Review should be forced to stand trial and be subject to damages for publishing criticism on matters of public concern. If the First Amendment protects such criticism, "there should be no trial." *Cox*, 420 U.S. at 485.

In addition, denying review now might deny it forever. If the case goes to trial, National Review "might prevail on the merits on nonfederal grounds," which would perpetuate the decision below as a governing precedent. *Id.* at 482. That would "leave the press in [D.C.] operating in the shadow of … a rule of law … the constitutionality of which is in serious doubt." *Id.* at 486. And that, in turn, would "harm the operation of a free press" in the nation's capital—an "intolerable" result. *Id.*

Accordingly, "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy'" that supports immediate review under *Cox*. *Fort Wayne Books*, 489 U.S. at 55. Indeed, even "uncertainty" about the "constitutional validity" of a decision below is enough to support review. *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). And here there is more than "uncertainty." The D.C. decision is so egregiously wrong that 21 sitting U.S. Senators and three former U.S. Attorneys General have filed amicus briefs supporting review to repel the threat to "deliberative democracy." U.S. Sens. Am. Br. 7; U.S. Atty. Gens. Am. Br. 2. Under these circumstances, this Court's jurisdiction is clear.

II. THE FIRST QUESTION WARRANTS REVIEW.

Mann admits that there is a well-established split over whether a court or a jury must decide whether an ambiguous statement is "provably false" and thus susceptible to defamation liability. BIO.33. And he does not dispute that this is an important, recurring question that merits review. Instead, he claims that this case does not *present* that question. Mann is wrong. The Court of Appeals resolved this question below, as it had to.

A. Mann says that the D.C. court did not defer the issue of verifiability to a jury, but instead decided "for itself" that the statements at issue are provably false "as a matter of law." BIO.31. That is not a plausible reading of the decision. The court expressly held, in addressing "verifiability," that "the standard is whether a reasonable jury *could find* that the challenged statements were false." Pet.App.65a n.46. In the same footnote, the court rejected the argument that it should treat the statements as provably false only if they were not reasonably susceptible to a non-factual construction. *Id.* In doing so, the court took a clear side in the conflict of authority. *See* Pet.16-20. Accordingly, the court held the statements actionable because "a *jury could reasonably interpret* [them] as asserting as *fact* that the CRU emails 'show[]' that Dr. Mann engaged in deceptive data manipulation." Pet.App.57a (first emphasis added). And the court repeated that the statements "deliver an indictment of reprehensible conduct against Dr. Mann that *a reader could take* to be an assertion of a true fact." Pet.App.64-65a (emphasis added).

To be sure, the court said in the next sentence that "these injurious allegations … are capable of being verified or discredited." Pet.App.65a-66a. But that was only *after* saying that "a reader could take" the statements to have made those provably false factual allegations. *Id*. That is, the court first held that a jury *could* construe the statements in a certain way, and then held that such a jury-imputed construction would be provably false. That is the state-court rule described in the petition, which ultimately leaves for a jury to decide whether to impute to the speaker the provably false reading of the ambiguous statement. And it conflicts with the federal-court rule, under which *the court* construes the statement to decide if it conveys provably false facts, and allows the claim to proceed only if the answer is unambiguously yes.

The same is true of the other snippets quoted by Mann, where the court said the statements are "not simply a matter of opinion" and are "capable of being proved true or false." BIO.31. Again, that was only after finding that the statements "can *fairly be read* as making defamatory factual assertions," and that "ordinary, reasonable readers *could read* the [article] as implying ... that Dr. Mann was guilty of misconduct." Pet.App.56a (emphases added).

B. Mann also argues half-heartedly that punting to a jury made no difference because the statements at issue *unambiguously* related verifiable facts. BIO.32. That is absurd. The statements are at a minimum most naturally read as criticizing the hockey-stick graph (and its creator) for portraying a deceptive and misleading picture of global warming—which is not a provably false factual claim. Certainly the statements *can* be read this way. *See* Pet.20.

More importantly, even the court below did not say otherwise. It did not remotely hold that the statements at issue were *unambiguous* assertions of verifiable fact, nor does Mann cite any instance of the court suggesting as much. That is enough to present the question of whether the court or the jury should resolve the supposed ambiguity.

C. Mann devotes a single paragraph to defending the decision below on the merits. He asserts that a jury "is entitled to impose liability" for statements that could be interpreted as protected criticism "on a matter of public concern." BIO.32-33. That simply ignores all of the contrary arguments in the petition, including that *Milkovich* in no way endorsed this burden on protected speech. Pet.21-26. Regardless, a defense on the merits is no basis to deny review of a clean vehicle that presents a conceded split on an important federal constitutional question.

III. THE SECOND QUESTION WARRANTS REVIEW.

Mann does not dispute the countless cases cited by National Review showing that inherently subjective critiques—"misleading," "deceptive," "misconduct," and comparisons to odious figures—are not capable of being proved false, especially in the context of hot-button political debates. Pet.27-30. Instead, Mann tries to distinguish this case, claiming that the D.C. court's decision is not to the contrary. Again, Mann is wrong. The decision below rendered subjective pejorative characterizations actionable, and so it is difficult to imagine a policy debate that would *not* allow either side to seek defamation damages against the other. That is why there is such a grave need for review, as evidenced by the amicus briefs.

A. Mann argues that while "generic" accusations of misconduct and deception cannot be proved false, here the statements are provably false because they made "reference to specific facts." BIO.34-35. That is, Simberg and Steyn explained to readers "*why* Dr. Mann's work was fraudulent and *why* he was guilty of misconduct, specifically referring to a concrete fact: the CRU emails." BIO.34 (emphases added).

Although that rationale mimics the reasoning of the Court of Appeals, it makes no sense. None of the referenced underlying facts (such as what the emails said, or which techniques Mann used to develop the hockey stick) are now—or ever have been—disputed. Nor is there any allegation that National Review misstated any of those facts. That is why Mann does not identify *any* specific "fact" that National Review got wrong. Rather, the only dispute is whether those *undisputed* facts support the *characterization* of the hockey stick as "misconduct" or "deceptive." That is a subjective question of political and scientific opinion that cannot be falsified. Mann asserts that his "trick" to "hide the decline" is a valid "statistical method." BIO.10. Defendants think it is misleading. Pet.5-6. The "truth" of these competing opinions must be resolved through free debate, not legal sanctions.

If anything, that Steyn and Simberg cited the (undisputed, not-alleged-to-be-false) factual basis for their opinions makes Mann's defamation claims even *weaker*. As CEI has explained, when a pejorative characterization is based on specific, disclosed facts, the characterization cannot be read as a provably false factual assertion. CEI.Pet.16-21. Providing the reader with the factual background makes clear that the critique is a subjective opinion based on the

disclosed facts. Indeed, here, the disclosed facts showed that the pejorative characterizations were not intended to imply a provably false fact—*e.g.*, that Mann changed a "3" to a "5" in the data—but were criticizing Mann as deceptively presenting the data as part of the ongoing hockey-stick controversy. Consequently, there is no *factual* dispute for a jury to resolve, only competing *characterizations* of the facts.

Contrary to Mann's assertion, the fact that certain academic experts or governmental agencies reached a contrary conclusion on his misconduct does not "close the book" on the public debate; nor were Defendants required to share those conclusions. BIO.15, 38. The National Science Foundation is not the Ministry of Truth. "If there is any fixed star in our constitutional constellation," it is that no government agency or academic body may "prescribe what shall be orthodox" on the questions of whether Mann's (undisputed) conduct is ethical or improper, transparent or misleading. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

B. While Mann claims the decision below "poses no threat to public advocacy, discussion, or debate" (BIO.39), that is belied by the amicus briefs urging review. Notably, 21 U.S. Senators worry that the decision "will shut down crucial debates on matters of public concern," by "allow[ing] juries to punish subjective statements of political or scientific opinion as defamatory statements of fact." U.S. Sens. Am. Br. 2. And three former Attorneys General fear its threat to the "rule of law," given the risk that juries will stray from "viewpoint neutrality" when asked to adjudicate the "truth" of hotly contested political or scientific opinions. U.S. Attys. Gen. Am. Br. 14.

Indeed, the decision below has already started to encourage similar lawsuits seeking to quash scientific debate. Curry Am. Br. 15-16. This Court should intervene now to stop that trend from accelerating.

CONCLUSION

The petition should be granted.

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