

Nos. 18-1451 and 18-1477

IN THE
Supreme Court of the United States

NATIONAL REVIEW, INC., *Petitioner*,

v.

MICHAEL E. MANN, *Respondent*.

COMPETITIVE ENTERPRISE INSTITUTE
AND RAND SIMBERG, *Petitioners*,

v.

MICHAEL E. MANN, *Respondent*.

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

**BRIEF OF *AMICUS CURIAE*
MARK STEYN IN SUPPORT OF PETITIONERS**

CLIFTON S. ELGARTEN
MARK THOMSON
CROWELL & MORING LLP
1001 Pennsylvania
Avenue, NW
Washington, DC 20004

DANIEL J. KORNSTEIN
Counsel of Record
O. ANDREW F. WILSON
EMERY CELLI
BRINCKERHOFF &
ABADY LLP
600 Fifth Avenue
10th Floor
New York, NY 10020
(212) 763-5000
dkornstein@ecbalaw.com
Counsel for Amicus Curiae

June 20, 2019

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	2
STEYN’S STATEMENT	3
ARGUMENT	5
I. MANN’S “CLIMATE WAR”	5
II. PENN STATE AND CLIMATEGATE.....	10
III. CRITICISM IN COURTYARDS NOT COURTROOMS.....	12
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Beauharnais v. Illinois</i> , 343 U.S. 250 (1952).....	12
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990).....	5
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964).....	14
<i>ONY, Inc. v. Cornerstone Therapeutics, Inc.</i> , 720 F.3d 490 (2d Cir. 2013).....	13
<i>Underwager v. Salter</i> , 22 F.3d 730 (7th Cir. 1994).....	13
<i>Whitney v. California</i> , 274 U.S. 357 (1927).....	2

STATEMENT OF INTEREST¹

Amicus Mark Steyn is a defendant in this case. Steyn is a popular writer, cultural commentator, and columnist on matters of public interest, and he opposes several of the public policy positions advocated by Respondent, Michael Mann.² Steyn is also a human rights activist whose efforts on behalf of freedom of speech have been recognized by the Canadian Committee for World Press Freedom, the Eric Breindel Memorial Foundation in New York, by the Danish Free Press Society, and by the repeal in 2013 of Canada's Section 13 censorship law. While Steyn has not appealed the denial of his own motion to dismiss on Anti-SLAPP grounds as have the other defendants, he is directly concerned with the outcome of these proceedings. Most fundamentally, Steyn opposes Mann's attempt to use the claim of defamation to stifle essential, robust, uninhibited, and wide-open discourse on controversial public matters of crucial and widespread concern.

¹ No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than amici curiae and their counsel. Pursuant to Rule 37.2(a), timely notice of intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

² Michael Mann is a public figure and political activist who, in his original complaint in this case, falsely claimed to be a recipient of the Nobel Peace Prize. That claim was later removed after the Nobel Committee confirmed he was not, in fact, a Nobel prizewinner.

SUMMARY OF ARGUMENT

From the Scopes Monkey Trial to the Roman Catholic Church's trial of Galileo for teaching heliocentrism, courts have historically been poor forums for determining the validity of publicly contested scientific methods and theories. Rather, free and open inquiry and debate over time is how ideas, particularly scientific methods, and theories, are ultimately proven true or false. That is why the petitions for certiorari should be granted.

Democracy is debate. America needs open, direct, and powerful conversations. From discord, we ultimately obtain a collective truth. Law, therefore, must protect and preserve conditions necessary for conversation. *See Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). Conversely, law should not become a tool to muffle contrarians. These principles apply, of course, regardless of the topic; but the more important our disagreements, the more vital our discourse.

Right now, all around this country, a spirited debate is going on about the nature of global warming. The debate takes place in the pages of scholarly journals and at academic conferences, but also in break rooms and at dinner tables. It is often loud, frequently contentious, and undeniably alive.

Despite deeply-rooted principles of freedom of expression enshrined and repeatedly affirmed by this Court, there are still those who would seek to smother public debate through the courts themselves.

Mann filed this lawsuit seeking to use the blunt instrument of a defamation action to inject the

courts into the dispute, and thereby squelch criticism of his poor statistical methods, in particular his most prominent climate study, the so-called “hockey stick graph.” As the Petitions demonstrate, the decision of the court below allowing this suit to proceed is inconsistent with the First Amendment and the decisions of many other courts, including this one.

Rather than echo Petitioners’ arguments, Steyn submits this amicus brief to provide historical and contemporary context for the debate about Mann’s “hockey stick graph,” and thereby further illuminate both the supposedly actionable defamation and, ultimately, the stakes of this litigation. This Court should grant certiorari to uphold the rule that discussions in the context of vigorous debate over questions of public importance must be protected by the First Amendment.

STEYN’S STATEMENT

Steyn’s critique of Mann’s hockey stick graph—and its investigation by Pennsylvania State University—is three paragraphs and a quote:

In the wake of Louis Freeh’s report on Penn State’s complicity in serial rape, Rand Simberg writes of Unhappy Valley’s other scandal:

I’m referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it’s time that we revisit the Michael

Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point. Michael Mann was the man behind the fraudulent climate-change "hockey stick" graph, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same cove who investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.

If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up? Whether or not he's "the Jerry Sandusky of climate change," he remains the Michael Mann of climate change, in part because his "investigation"

by a deeply corrupt administration was a joke.³

This is the entirety of Steyn’s statement. Most of it focuses on Penn State, not Mann. Steyn does not accuse Mann of “wrongdoing” or “misconduct.” He does not describe Mann’s graph as “deceptive.”⁴

ARGUMENT

Steyn’s commentary must be understood in context. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 28 (1990). It did not emerge in a vacuum; it was the latest skirmish in what Mann himself has called the “Climate Wars.”

I. MANN’S “CLIMATE WAR”

On March 6, 2012, *a few months before the alleged defamatory statements*, Mann published his book titled “The Hockey Stick and the Climate Wars: Dispatches from the Front Lines” (Columbia University Press, 2012). The book’s description on Amazon states:

The Hockey Stick achieved prominence in a 2001 UN report on climate change and quickly became *a central icon in the “climate wars.” The real issue has never been the graph's data but rather its implied threat to those who oppose governmental regulation and other restraints to*

³ 18-1451 Pet. App. 99–100.

⁴ The first judge to hear this case mistakenly conflated Simberg’s comments with Steyn’s, and that inaccuracy continues to attach to filings in this case.

protect the environment and planet. Mann, lead author of the original paper in which the Hockey Stick first appeared, shares the story of the *science and politics behind this controversy. He reveals key figures in the oil and energy industries and the media frontgroups who do their bidding in sometimes slick, sometimes bare-knuckled ways.*⁵

As Mann described it, “[t]he hockey stick’s prominence in the climate change debate would secure its status as a principal *bête noire* for those who denied the importance or even the existence of climate change.”⁶

More than just the importance or existence of climate change, however, critics of Mann’s work focused on its validity, reliability, and academic quality. Many of these scientists and pundits have been brutal in their appraisals. For example, Dr. Judith A. Curry, an American climatologist and former chair of the School of Earth and Atmospheric Sciences at the Georgia Institute of Technology, in an essay titled “Hiding the Decline,” wrote:

There is no question that the diagrams and accompanying text in the [hockey

⁵ Sales page for *The Hockey Stick and the Climate Wars*, AMAZON.COM, <https://www.amazon.com/Hockey-Stick-Climate-Wars-Dispatches/dp/0231152558> (last visited June 19, 2019) (emphasis added).

⁶ Michael Mann, *THE HOCKEY STICK AND THE CLIMATE WARS*, at xvii (2012).

stick graph report] are misleading. I was misled.... [I]t did not occur to me that recent paleo data was not consistent with the historical record.... It is obvious that there has been deletion of adverse data Not only is this misleading, but it is dishonest.⁷

Theoretical physicist, string theorist, and former assistant professor at Harvard, Dr. Luboš Motl, Ph.D., was similarly scathing: he wrote of Mann's 2008 version of his hockey stick graph that "[i]t seems that the paper is not only a case of sub-prime science but an example of scientific fraud."⁸

The hockey stick graph stirred renewed controversy after an anonymous source published thousands of emails from the Climate Research Unit at the University of East Anglia, in which several climate scientists appeared to express their own skepticism about the methodology behind the graph in private. This episode became known as "Climategate." Both the University of East Anglia and Penn State University engaged in superficial investigations that purported to resolve questions about the efficacy of these scientists' work. They did not; the debate over the validity of Mann's graph only intensified.

⁷ Judith Curry, *Hiding the Decline*, CLIMATE ETC. (Feb. 22, 2011), <https://judithcurry.com/2011/02/22/hiding-the-decline/>.

⁸ Luboš Motl, *Jeff Id: cherry-picking in new hockey stick graph*, THE REFERENCE FRAME (Sept. 21, 2008), <http://motls.blogspot.com/2008/09/jeff-id-cherry-picking-in-new-hockey.html>

For example, Harold Lewis, the Emeritus Professor of Physics, University of California, Santa Barbara, and one of the most distinguished members of the American Physical Society, resigned in protest from that Society with an open letter lamenting the lack of independence for these investigations:

When Penn State absolved Mike Mann of wrongdoing, and the University of East Anglia did the same for Phil Jones, they cannot have been unaware of the financial penalty for doing otherwise.... Since I am no philosopher, I'm not going to explore at just which point enlightened self-interest crosses the line into corruption, but a careful reading of the ClimateGate releases makes it clear that this is not an academic question. I want no part of it, so please accept my resignation.⁹

Clive Crook, of *The Atlantic*, published another article that criticized the Penn State University "investigation." "I had hoped, not very confidently, that the various Climategate inquiries would be severe," he wrote.

This would have been a first step towards restoring confidence in the scientific consensus. But no, the reports make things worse. At best they are

⁹ Anthony Watts, *Hal Lewis: My Resignation From The American Physical Society*, WATTS UP WITH THAT (Oct. 16, 2010), <https://wattsupwiththat.com/2010/10/16/hal-lewis-my-resignation-from-the-american-physical-society/>

mealy-mouthed apologies; at worst they are patently incompetent and even willfully wrong. The climate-science establishment, of which these inquiries have chosen to make themselves a part, seems entirely incapable of understanding, let alone repairing, the harm it has done to its own cause.

The Penn State inquiry exonerating Michael Mann -- the paleoclimatologist who came up with "the hockey stick" -- would be difficult to parody. Three of four allegations are dismissed out of hand at the outset: the inquiry announces that, for "lack of credible evidence," it will not even investigate them. (At this, MIT's Richard Lindzen tells the committee, "It's thoroughly amazing. I mean these issues are explicitly stated in the emails. I'm wondering what's going on?" The report continues: "The Investigatory Committee did not respond to Dr Lindzen's statement. Instead, [his] attention was directed to the fourth allegation.") Moving on, the report then says, in effect, that Mann is a distinguished scholar, a successful raiser of research funding, a man

admired by his peers -- so any allegation of academic impropriety must be false.¹⁰

In a December 2009 interview about Climategate originally published in the Polish daily, *Our Journal*, the Chairman of the United Nations Scientific Committee on the Effects of Atomic Radiation, and of the Scientific Council of the Central Laboratory for Radiological Protection in Warsaw, Professor Zbigniew Jaworowski, Ph.D., stated that “these researchers are guilty of brazen fraud, bringing us into a trap, which has dire consequences. For many years they have been incredibly confident, ignoring any criticism of their arguments.”¹¹

II. PENN STATE AND CLIMATEGATE

Mann’s work was subjected to another wave of criticism in the wake of the revelations that Penn State University covered up sexual assault allegations regarding its football coach. On July 12, 2012, former FBI Director and special investigative counsel Louis Freeh issued a report that exposed Penn State and its senior figures as they ignored, abetted, and covered up systematic sexual abuse.

¹⁰ Clive Crook, *Climategate and the Big Green Lie*, THE ATLANTIC (July 14, 2010), <https://www.theatlantic.com/politics/archive/2010/07/climategate-and-the-big-green-lie/59709/>

¹¹ *Global Warming: A Lie Aimed At Destroying Civilization*, 37 EIR SCI. & TECH. 54, 55 (2010), https://larouchepub.com/eiw/public/2010/eirv37n02-20100115/eirv37n02-20100115_054-global_warming_a_lie_aimed_at_de.pdf

Several commentators immediately compared the school's efforts to obscure these revelations to its investigation of Mann's work. For example, the next day—July 13—*The Chronicle of Higher Education* published a piece by Peter Wood, titled “Culture of Evasion,” making the link:

Then there was the Michael Mann case, the well-known advocate of the theory of man-made global warming, accused in the wake of the Climategate memos in 2009 of scientific misconduct. Penn State appointed a university panel, headed by the vice president for research, Henry Foley, to investigate Mann. According to ABC News Foley's committee asked: whether Mann had 1) suppressed or falsified data; 2) tried to conceal or destroy e-mails or other information; 3) misused confidential information; or 4) did anything that “seriously deviated from accepted practices” in scholarly research.

The committee exonerated Mann on the first three and punted on the fourth. Make of this what you will, but a review by the university's vice president for research, who oversees grant-funded projects, does not have exactly the same standing as an investigation carried out by the former director of the FBI. Penn State has a

history of treading softly with its star players. Paterno wasn't the only beneficiary.¹²

The next day—July 14—Rand Simberg posted an article on the Competitive Enterprise Institute's website titled "The Other Scandal in Happy Valley," which suggested that, in light of the revelations regarding the "rotten and corrupt culture" at Penn State under the presidency of Graham Spanier, it might be worth revisiting another "investigation" conducted on Spanier's watch—that of Mann.¹³

It was in the setting of this ongoing debate about the efficacy of Penn State's investigation of Mann's work, that The National Review published Steyn's post on July 15, 2012. Instead of engaging in debate, Mann sued Steyn and Simberg for defamation.

III. CRITICISM IN COURTYARDS NOT COURTROOMS

"[D]iscussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Beauharnais v. Illinois*, 343 U.S. 250, 264 (1952).

Steyn's description of Mann's graph as "fraudulent" is one of many debatable, unverifiable, and critical opinions about that divisive diagram. Mann may not agree with Steyn or the hundreds of

¹² Peter Wood, *A Culture of Evasion*, THE CHRONICLE OF HIGHER EDUCATION (July 13, 2012), <http://chronicle.com/blogs/innovations/a-culture-of-evasion/33485>

¹³ See 18-1451 Pet. App. 94–98.

scientists¹⁴ who dare to question Mann’s iconic hockey stick graph—which was mailed to every household in Steyn’s native Canada by the government—but the remedy for a difference of opinion on political pamphlets is not libel.

Nor can Steyn’s criticisms of Penn State, or Penn State’s investigation, or any form of comparison to the investigation of Sandusky transform the meaning of “fraudulent” from a non-actionable assertion of opinion that a graph is misleading, into a verifiable fact that can be the basis for a defamation claim in the context of a matter of public debate over science. To be sure, the comparisons to the investigation of Sandusky and the athletic department are suggestive and hint at seriousness, and Steyn’s commentary is undeniably blunt in criticizing Penn State. But all that does is give bite to the commentary. It does not add to the mix any verifiable and defamatory facts about Mann.

Courts are rightly reluctant to serve as arbiters of intellectual battles waged by private parties over competing interpretations of what is “true.” See *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013) (“Needless to say, courts are ill-equipped to undertake to referee such controversies.”); *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (“Scientific controversies must be

¹⁴ See “A DISGRACE TO THE PROFESSION”: THE WORLD’S SCIENTISTS IN THEIR OWN WORDS ON MICHAEL E MANN, HIS HOCKEY STICK, AND THEIR DAMAGE TO SCIENCE (Mark Steyn ed., Stockade Books 2015).

settled by the methods of science rather than by the methods of litigation.”).

The public forum, not the courthouse, is the place to dispute the hockey stick graph. This is a dispute worth having, given what this Court has recognized is our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). But the guarantee of free speech requires more than mere words to protect against the onslaught of Mann and others who believe that guarantee applies only to themselves and not to their opponents.

On December 2, 2015, the Chairman of the United States Senate Subcommittee on Space, Science, and Competitiveness invited Steyn to address its hearing titled, “Data or Dogma? Promoting Open Inquiry in the Debate Over the Magnitude of Human Impact on the Earth’s Climate.” In his remarks, Steyn noted that the other *amici* who supported his position in this case did so, “not because they disagree[d] with [Mann] on global warming ... but because they understand that putting climate science beyond criticism and into the courtroom would inflict the greatest damage on the First Amendment in over 50 years.”¹⁵ Those are the stakes of this case.

¹⁵ *Data or Dogma? Promoting Open Inquiry in the Debate over the Magnitude of Human Impact on Earth’s Climate: Hearing Before the Subcomm. on Space, Science, and Competitiveness of the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. 74–75 (2015) (statement of Mark Steyn), (continued...)

CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

CLIFTON S. ELGARTEN
MARK THOMSON
CROWELL & MORING LLP
1001 Pennsylvania
Avenue, NW
Washington, DC 20004

DANIEL J. KORNSTEIN
Counsel of Record
O. ANDREW F. WILSON
EMERY CELLI
BRINCKERHOFF &
ABADY LLP
600 Fifth Avenue
10th Floor
New York, NY 10020
(212) 763-5000
dkornstein@ecbalaw.com
Counsel for Amicus Curiae

(continued...)

<https://www.govinfo.gov/content/pkg/CHRG-114shrg21644/pdf/CHRG-114shrg21644.pdf>