Supreme Court Allows Defamation Suit by Climate Professor to Proceed, Over Alito's Dissent

By Dori Hanswirth and Jesse Feitel

On November 25, 2019, the United States Supreme Court announced that it would not review a 2016 decision by the D.C. Court of Appeals denying an anti-SLAPP motion to dismiss a defamation lawsuit by Pennsylvania State University Professor Michael Mann.

Professor Mann sued after two columnists published articles questioning the quality and veracity of his research on climate change. Despite the Petitioners' efforts to seek high court review, which were backed by several notable amicus briefs—including one filed on behalf of 21 sitting U.S. Senators and another filed on behalf of former U.S. Attorneys General Edwin Meese III, Michael B. Mukasey, and Jeff Sessions—the lawsuit now returns to the D.C. Superior Court over Justice Alito's vigorous dissent.

In his dissent, Justice Alito suggested that the Court's decision not to hear this appeal is inconsistent with its recent enforcement of the First Amendment in other cases where the challenged speech was less critical to "our Nation's system of self-government" than the debate over climate change at issue here.

The articles "employed pungent language" and accused Mann of committing "misconduct" and "wrong-doing," and of engaging in the "manipulation" and "tortur[e]" of data.

Background

Professor Mann is a well-known climate scientist who, along with two other colleagues, is responsible for creating the prominent "hockey stick" climate change graph, which illustrates a small drop in global temperatures between the years 1050 and 1900, followed by a sharp rise in temperature readings over the last century. Because only limited historical temperature data is available during those earlier years, Mann and his team extrapolated global temperatures from past centuries by referencing growth rings of ancient trees and other objects found in nature. The hockey stick graph is often cited as proof that human activity has led to global warming. The quality of Mann's work on the hockey stick graph and the underlying historical data used to create the graph has been the subject of controversy, particularly following the release of thousands of Mann's emails in 2009, which some argued included proof that Mann had manipulated historical climate data used in the graph (this claim was later rejected following an investigation by the U.S. Department of Commerce and the U.S. Environmental Protection Agency).

In 2012, two columnists published articles criticizing the accuracy of the hockey stick graph and the methodology underlying Mann's scientific research. The articles "employed pungent

(Continued on page 7)

(Continued from page 6)

language" and accused Mann of committing "misconduct" and "wrong-doing," and of engaging in the "manipulation" and "tortur[e]" of data. One article even observed that "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 service of politicized science that could have dire consequences for the nation and planet."

Mann filed a defamation suit in D.C. Superior Court against the columnists and the publications where these articles were posted, and the Petitioners moved below to dismiss Mann's complaint pursuant to the D.C. anti-SLAPP statute. The D.C. Superior Court denied that motion, and the D.C. Court of Appeals affirmed the Superior Court's order. *See* 150 A.3d 1213, 45 Media L. Rep. 1419 (D.C. 2016), *as amended* (Dec. 13, 2018). After the Petitioners moved for rehearing *en banc* before the D.C. Court of Appeals, which was denied in March 2019, they turned to the high court for review. On November 25, 2019, the Supreme Court issued a short order denying the petitions for certiorari.

Justice Alito's Dissent

Justice Alito, the sole justice to dissent from the Court's November 25 order, wrote that the D.C. Court of Appeals' decision goes "to the very heart of the constitutional guarantee of freedom of speech and freedom of the press: the protection afforded to journalists and others who use harsh language in criticizing opposing advocacy on one of the most important public issues of the day." In reviewing the two questions presented on appeal, Justice Alito questioned why the Court declined to hear the Petitioners' appeal when the Court in recent years has accepted appeals in order to confirm that statements involving less politically controversial topics were protected by the First Amendment, including an effort to register a trademark in the word FUCT and a lie someone told about being awarded a Congressional Medal of Honor.

Justice Alito wrote that the D.C. Court of Appeals' decision goes "to the very heart of the constitutional guarantee of freedom of speech and freedom of the press.

"Provably False": Question of Fact, or Question of Law?

First, Justice Alito considered whether, in a defamation action, the judge or the jury should consider if a factual connotation is "provably false" or whether that connotation is protected as opinion. Federal and state courts have not been consistent in determining who should evaluate this critical component of a defamation claim. While federal courts generally hold that this is a question of law for the court to decide, Justice Alito observed that some state courts, including those in Virginia, Massachusetts, and California, have come down differently and decided that whether an ordinary reader would have understood a statement to be a factual assertion is a question of fact that the *jury*, not the court, must decide. In this case, the D.C. Court of Appeals joined those state courts in observing that it was for the jury to decide whether in fact Mann had inaccurately treated the climate data in question.

(Continued on page 8)

(Continued from page 7)

Justice Alito wrote that this "split in the decisions of the lower courts . . . deserves a place on our docket" because the question of "whether the courts or juries should decide whether an allegedly defamatory statement can be shown to be untrue" is "delicate and sensitive and has serious implications for the right to freedom of expression." In this case, according to Justice Alito, the D.C. Court of Appeals' decision will effectively require jurors to determine whether the Petitioner's assertions about Mann's use of climate data "can be shown to be factually false," which is a "highly technical" question.

Second, given that climate change is a controversial subject, there is an increased risk in this case in particular that the jury's determination could "be colored by their preconceptions on the matter." According to Justice Alito, "[w]hen allegedly defamatory speech concerns a political or social issue that arouses intense feelings, selecting an impartial jury presents special difficulties." This concern is heightened in cases where the allegedly defamatory speech has been circulated nationally, because then "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff's point of view."

First Amendment Protection of Politically or Scientifically Controversial Statements

Next, Justice Alito considered the second question presented, which he suggested "may be even more important" than the first: "[W]hether the First Amendment permits defamation liability for expressing a subjective opinion about a matter of scientific or political controversy." The constitutional guarantees of free speech and freedom of expression serve their "most important role" in cases like this one, where those safeguards are invoked to "protect[] robust and uninhibited debate on important political and social issues." Justice Alito explained that the speech at issue in *Mann* falls close to the line between, on the one hand, a "pungently phrased expression of opinion regarding one of the most hotly debated issues of the day" (protected by the First Amendment) and on the other, "a statement that is worded as an expression of opinion but actually asserts a fact that can be proven in court to be false" (unprotected and actionable). This distinction was elucidated in *Milkovich* v. *Lorain Journal Co.,* 497 U. S. 1 (1990), where the Court provided examples of speech that would fall on either side of the line.

To demonstrate the close nature of this case, Justice Alito referred to one example statement relating to academic debate that the *Milkovich* Court held was protected by the First Amendment: "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." Why did the Court believe the First Amendment would apply to this statement? The *Milkovich* Court, according to Justice Alito, was not clear on this point. Was it because the statement was not particularly specific and therefore could not be proven false? Was it because the Court held a particular view about the way the First Amendment treats statements about scholarly theories? Or was it "something else"? The answer to this question would, perhaps, have a substantive impact on the statements at issue in

(Continued on page 9)

(Continued from page 8)

Mann. And, according to Justice Alito, the Court's defamation jurisprudence "would greatly benefit from clarification by this Court."

Finally, Justice Alito suggested that the Court's decision not to hear the appeal in *Mann* is inconsistent with its recent First Amendment jurisprudence, where it has "vigilantly enforc[ed] the Free Speech Clause even when the speech at issue made no great contribution to public debate." Justice Alito cited to several examples over the last decade, including the Court's recent rulings that the First Amendment protected the right of a manufacturer of jeans to register the trademark FUCT and the right of the rock group called "The Slants" to register its name with the U.S. Patent and Trademark Office (*Iancu v. Brunetti*, 588 U. S. ___ (2019); *Matal v. Tam*, 582 U. S. ___ (2017)); and older cases, including the Court's decision that a man's false claim that he had won a Congressional Medal of Honor did not violate the First Amendment (*United States v. Alvarez*, 567 U.S. 709 (2012)).

Alito suggested that the Court's decision not to hear the appeal in *Mann* is inconsistent with its recent First Amendment jurisprudence, where it has "vigilantly enforc [ed] the Free Speech Clause even when the speech at issue made no great contribution to public debate."

Had the speech in those cases been held to be unprotected, according to Justice Alito, "our Nation's system of self-government would not have been seriously threatened." Nevertheless, vigilant enforcement of the First Amendment even in trivial cases is important, because "[i]t can demonstrate that this Court is deadly serious about protecting freedom of speech" and serves as a "promise" that the Court will remain vigilant in "cases involving disfavored speech on important political or social issues." To fulfill that promise, according to Justice Alito, the Court should have granted review of this case, where the challenged speech concerned the science of climate change, which "has staked a place at the very center of this Nation's public discourse."

Justice Alito recognized that the D.C. Court of Appeals' decision arrived at the high court at an interlocutory phase, and that the case may return on a new certiorari petition "if the ultimate outcome below is adverse to [P]etitioners." Nevertheless, according to Justice Alito, the Court's decision not to hear the appeal suggests that it is not "serious about protecting freedom of expression." The defendants now return to the trial court to defend against Mann's defamation complaint, where Justice Alito recognized they are likely "shoulder all the burdens of difficult litigation" and perhaps even "be faced with hefty attorney's fees" before the Supreme Court has another opportunity to weigh in on this dispute.

Dori Hanswirth is a partner at Arnold & Porter and co-leads the firm's Technology, Media and Telecommunications industry group. Jesse Feitel is an associate at Arnold & Porter.