

STATE OF MICHIGAN
IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

COA Case No. 326667

JOHN and/or JANE DOE(S),

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

Defendants,

PUBPEER, LLC,

Appellee.

FAZLUL SARKAR,

Plaintiff-Appellee,

vs.

COA Case No. 326691

JOHN and/or JANE DOE(S),

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

Defendants,

PUBPEER, LLC,

Appellant.

**MOTION OF BRUCE M. ALBERTS AND HAROLD E. VARMUS
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

Bruce M. Alberts and Harold E. Varmus hereby move for leave to file the attached *amicus curiae* brief. In support of this motion, proposed *amici* state as follows:

1. Through their experiences as leaders of some of the nation's foremost scientific institutions and journals, Dr. Alberts and Dr. Varmus have long been involved in efforts to

improve the scientific process. Post-publication discussion of published research is a critical aspect of this process, and scientists everywhere are experimenting with different mechanisms through which such discussion can be facilitated and improved.

2. This case arises from discussion of the published articles of Dr. Fazlul Sarkar on the online forum PubPeer.

3. In light of their interest and expertise in the issue of post-publication discussion, proposed *amici* believe that their brief will be of assistance to this Court in understanding the scientific context surrounding the comments that Dr. Sarkar alleges to be defamatory and, therefore, in determining the proper scope of First Amendment protection for scientists who participate on PubPeer and similar fora anonymously.

Accordingly, Dr. Alberts and Dr. Varmus seek leave to file the *amicus curiae* brief that accompanies this motion

Respectfully submitted,

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January 19, 2016

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BRIEF OF *AMICI CURIAE*
BRUCE M. ALBERTS AND HAROLD E. VARMUS
IN SUPPORT OF PUBPEER, LLC

January 19, 2016

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INTEREST OF *AMICI CURIAE*

Bruce M. Alberts is the Chancellor's Leadership Chair in Biochemistry and Biophysics for Science and Education at the University of California, San Francisco. Dr. Alberts previously served as the President of the National Academy of Sciences, as the Editor-in-Chief of *Science*, and as one of the first United States Science Envoys. President Barack Obama awarded him the National Medal of Science in 2014. In addition to his work in biochemistry, Dr. Alberts has written extensively on science education, improving the quality of scientific research, and the importance of science to the national interest.

Harold E. Varmus is the Lewis Thomas University Professor at Weill Cornell Medicine and an Associate Member at the New York Genome Center. Dr. Varmus shared a Nobel Prize in Physiology or Medicine in 1989. He previously served as the Director of the National Cancer Institute, as the President of the Memorial Sloan-Kettering Cancer Center, and as the Director of the National Institutes of Health. Dr. Varmus has long advocated for open access to scientific publications as a strategy to maximize the effectiveness of scientific research. Together with Michael Eisen and Patrick Brown, he founded the Public Library of Science (PLOS), an organization that is now the leading publisher of open access, peer-reviewed online journals.

ARGUMENT

I. POST-PUBLICATION DISCUSSION OF SCIENTIFIC RESEARCH IS ESSENTIAL TO THE PROGRESS OF SCIENCE

Science is a community endeavor in which a reliable body of knowledge about how the world works is built up over time from the many small contributions of a large number of individual scientists. This process works because each scientist, in return for the privilege of publishing a particular research finding, provides access to the methods and data on which she or he relied so that other scientists can review the work, try to replicate it, and confirm (or deny) the

scientist's claims. Once the original work is confirmed, others can build on it in novel ways, generating new knowledge and beginning the process anew.

This process breaks down, and scientific progress is disrupted, when science fails to be self-correcting—that is, when it fails to separate reliable results from flawed ones and marshal resources toward research springing from the former and not the latter. A 2012 article by cancer researchers Glenn Begley and Lee Ellis provides one example of the costs of such a breakdown.¹ The two scientists reported the efforts of a leading biotechnology firm, Amgen, to replicate the published findings of 53 “landmark” hematology and oncology studies.² Even after consulting certain authors of the studies, Amgen scientists were able to replicate the results in only six of the 53 cases.³ Begley and Ellis observed that some of the non-reproducible papers had “spawned an entire field, with hundreds of secondary publications that expanded on elements of the original observation, but did not actually seek to confirm or falsify its fundamental basis.”⁴ More troubling still, “some of the research ha[d] triggered a series of clinical studies—suggesting that many patients had subjected themselves to a trial of a regimen or agent that probably wouldn’t work.”⁵ Researchers at the pharmaceutical company Bayer reported a similar experience with retesting preclinical research. They found inconsistencies between published data and data generated in-house for nearly two-thirds of the studies under review, and they ultimately abandoned many drug development projects because the evidence was insufficient to justify further investment.⁶

¹ Begley & Ellis, *Drug development: Raise standards for preclinical cancer research*, 483 *Nature* 531 (2012), available at <http://www.nature.com/nature/journal/v483/n7391/full/483531a.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Prinz, Schlange & Asadullah, *Believe it or not: how much can we rely on published data on potential drug targets?*, 10 *Nat Rev Drug Discov* 712 (2011), available at <http://www.nature.com/nrd/journal/v10/n9/full/nrd3439-c1.html>.

To prevent scientists from relying on studies containing errors or unsubstantiated claims, science needs mechanisms through which weaknesses in research are promptly identified. Scientific journals have long played a role in this regard by requiring that submitted work undergo peer review before being selected for publication. Typically, two or three anonymous referees review submitted papers. Errors and uncertain propositions detected by the referees will prompt further inquiry with the authors, and they may be cause for rejecting the submission.

Yet, it is clear that pre-publication review cannot be the exclusive means through which the scientific community identifies errors. The rate of retraction of published articles has increased more than ten fold since the turn of the millennium.⁷ Although retraction is still uncommon, more than half of all retractions arise from instances of serious misconduct.⁸ A more widespread problem is the existence of published work whose errors, mostly unintended, go undetected.⁹ Volunteer referees at journals lack the resources to identify all such errors and, indeed, pre-publication review is not designed to be a substitute for the independent review and retesting of published work that other scientists perform. Simply put, for science to fulfill its self-correcting potential, efforts to identify data errors or analytical flaws must not end with publication.

Robust post-publication discussion of scientific research is thus essential. The scientific community is currently experimenting with various ways of fostering such discussions,¹⁰ and

⁷ Van Noorden, *Science publishing: The trouble with retractions*, 478 *Nature* 26 (2011), available at <http://www.nature.com/news/2011/111005/full/478026a.html>.

⁸ *Id.*; Fang, Steen & Casadevall, *Misconduct accounts for the majority of retracted scientific publications*, 109(42) *Proc Nat'l Acad Sci* 17028 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3479492/>.

⁹ Collins & Tabak, *Policy: NIH plans to enhance reproducibility*, *Nature* (Jan 27, 2014), <http://www.nature.com/news/policy-nih-plans-to-enhance-reproducibility-1.14586>; Landis et al., *A call for transparent reporting to optimize the predictive value of preclinical research*, 490 *Nature* 187 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3511845/>.

¹⁰ See Collins & Tabak, *supra* n 8; Knoepfler, *Reviewing post-publication peer review*, 31 *Trends in Genetics* 221 (2015), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4472664/>; Bastian, *A Stronger Post-Publication*

PubPeer has provided one promising model. Scientists on PubPeer share their concerns regarding their peers' work and weigh in on the concerns raised by others. These discussions are freely available to anyone who is reading a particular paper and can inform scientists' decisions of how to build upon the research in question. If the errors detected are central to the paper's ultimate findings, comments on PubPeer may discourage scientists from wasting time and energy (and public funds) in pursuing a particular line of research.

Online discussions may be further enriched by the participation of authors themselves. Prompted by other scientists' comments, authors clarify matters that an article left unclear, provide further data that would allow their peers to better understand the article's analysis, or even issue errata in the journal that published the article in the first place. For example, one PubPeer user raised concerns regarding an article on stem cells after a "careful examination of th[e] article reveal[ed] a number of issues and inaccuracies."¹¹ The user went on to list specific criticisms under the headings (1) "Contradiction between text and figures," (2) "Incomplete or inconsistent description of methods and figures," (3) "Unusual hematological data," and (4) "Questionable data."¹² One of the authors of the paper in question responded to the comments point-by-point. The author admitted certain errors, provided additional details regarding the research to clarify certain matters, and refuted certain claims that the commenter had made.¹³

PubPeer also provides a forum for calling attention to more alarming errors. For example, on January 29, 2014, scientists from Japan's RIKEN Center for Developmental Biology and Harvard Medical School published two papers reporting an "astoundingly simple way to

Culture Is Needed for Better Science, PLoS Med 11: e1001772 (2014), available at <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001772>.

¹¹ PubPeer, *Maintenance of hematopoietic stem cells through regulation of Wnt and mTOR pathways*, <https://pubpeer.com/publications/03B1AD5C7EDCA06127EFCEC14AA07F> (accessed Jan. 18, 2016).

¹² *Id.*

¹³ *Id.*

generate stem cells that can theoretically develop into all of a body's cells.”¹⁴ Just a week later, scientists on PubPeer began to suggest that the papers might contain manipulated images and plagiarized text.¹⁵ RIKEN officials quickly announced an investigation, and in April 2014, they concluded that the principal author was guilty of research misconduct.¹⁶ The papers were ultimately retracted.¹⁷

Whether it results in retraction or simply enriches scientists' understanding of a study's weaknesses, post-publication discussion enhances the scientific community's ability to identify unreliable science so that resources are directed toward more promising avenues of research. To promote this self-corrective aim, however, PubPeer depends on the law's protection of the right to participate in scientific debates anonymously.

The story of Stefan Franzen underscores the risks of openly confronting one's peers over flaws in their research. In 2004, two North Carolina State University (NCSU) chemists, Bruce Eaton and Dan Feldheim, published an article detailing a novel process for creating metallic nanoparticles.¹⁸ Franzen, who became involved in research building on the initial discovery, soon became convinced that there were flaws in the underlying research.¹⁹ Yet, Eaton and Feldheim refused to retract their article.²⁰ Franzen resigned from the project and formally accused the pair of research misconduct.²¹ In 2008, NCSU investigators concluded that the pair

¹⁴ Normile, *High-Profile Stem Cell Papers Under Fire*, Science (Feb 17, 2014), <http://www.sciencemag.org/news/2014/02/high-profile-stem-cell-papers-under-fire>.

¹⁵ *Id.*

¹⁶ Normile, *In Japan, official effort to replicate STAP stem cells comes up empty*, Science (Aug 27, 2014), <http://www.sciencemag.org/news/2014/08/japan-official-effort-replicate-stap-stem-cells-comes-empty>.

¹⁷ *Id.*

¹⁸ Gugliotti, Feldheim & Eaton, *RNA-Mediated Metal-Metal Bond Formation in the Synthesis of Hexagonal Palladium Nanoparticles*, 304 Science 850 (2004).

¹⁹ Neff, *Part 1: NCSU professor attacks misleading research*, News & Observer (Jan. 19, 2014), <http://www.newsobserver.com/news/local/education/article53683020.html>.

²⁰ Neff, *Part 2: In notebook at NCSU, a 'smoking gun'*, News & Observer (Jan. 20, 2014), <http://www.newsobserver.com/news/local/education/article53690635.html>.

²¹ *Id.*

had indeed presented false data in their article.²² The National Science Foundation (NSF), which had funded the original study, recently concluded its own investigation. It reprimanded Eaton and Feldheim for their “misleading” publication and barred them from receiving future NSF funding unless they take steps to clarify their errors.²³

Throughout the eight-year ordeal, Franzen faced legal threats relating to an article he published attempting to refute Eaton and Feldheim’s 2004 study,²⁴ and Eaton and Feldheim launched a website, www.standup2sciencebullies.com, with the purported intention that their story of having “been covertly and cyber bullied by one scientist” might help others overcome their own “science bully experience.”²⁵

Although the actions of Eaton and Feldheim may have been extreme, the example serves to illustrate an inescapable fact: even with the truth on one’s side, the risks involved in openly questioning another scientist’s research may far outweigh the benefits. An individual scientist has little to lose by reserving commentary on others’ work, and institutions do little to encourage them to speak out against their peers. The risks of expressing reservations and concerns regarding published papers are even greater for junior scientists still trying to establish themselves in a competitive field. These individuals may want to avoid alienating future colleagues or future employers, or unnecessarily entering the scientific spotlight with the reputation as a troublemaker.

²² *Id.*

²³ Neff, *Former NCSU scientists reprimanded, lose future funding over 'misleading' research*, News & Observer (Jan. 8, 2016), <http://www.newsobserver.com/news/technology/article53699995.html>.

²⁴ Neff, *Part 2*, *supra* n 20.

²⁵ Oransky, *Scientists, do you feel bullied by critics? These chemists do*, Retraction Watch (Apr. 2, 2014), <http://retractionwatch.com/2014/04/02/scientists-do-you-feel-bullied-these-two-chemists-do/>.

For these reasons, many scientists on PubPeer choose to remain anonymous. If their anonymity is threatened, PubPeer's model will be compromised, and its contributions to the self-correcting nature of science severely diminished as a result.

II. THE SCIENTIFIC CONTEXT OF THE STATEMENTS AT ISSUE HERE DEMANDS THAT THEY BE GIVEN ROBUST FIRST AMENDMENT PROTECTION

Understanding the role that post-publication review of scientific research plays in advancing science is important because context matters in a defamation case. Not only does the context of an allegedly defamatory statement shed light on the meaning of its particular terms, see *Smith v Anonymous Joint Enter*, 487 Mich 102, 128; 793 NW2d 553 (2010), but context more generally informs where to draw the line between speech that is protected by the First Amendment and speech that is not. This Court has previously observed that “Internet messages boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact.” *Ghanam v Does*, 303 Mich App 522, 546-57; 845 NW2d 128 (2014). Other courts have reached similar conclusions. See, e.g., *Info Control Corp v Genesis One Computer Corp*, 611 F2d 781, 784 (CA 9, 1980) (acknowledging, in defamation case concerning statements to press regarding legal dispute, that “even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole” (internal quotation marks and citation omitted)); *Brahms v Carver*, 33 F Supp 3d 192, 199 (EDNY, 2014) (noting that “readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts,” particularly where comments are made anonymously (internal

quotation marks and citation omitted)). Each of these cases stands for the proposition that context—the participants to the discussion, its general subject matter, and the forum in which it takes place—has constitutional relevance independent of the particular content of the alleged defamation.

Here, the Court’s evaluation of Dr. Sarkar’s claims cannot be divorced from the context from which they arose: discussion by scientists of another scientist’s published work. The Constitution’s “special concern” for academic freedom, *Keyishian v Bd of Regents of the Univ of the State of NY*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967), has manifested itself in broad protection for scientific discourse. As the Second Circuit has explained,

Most conclusions contained in a scientific journal article are, in principle, capable of verification or refutation by means of objective proof. Indeed, it is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe. At the same time, however, it is the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation. Importantly, those conclusions are presented in publications directed to the relevant scientific community, ideally in peer-reviewed academic journals that warrant that research approved for publication demonstrates at least some degree of basic scientific competence. These conclusions are then available to other scientists who may respond by attempting to replicate the described experiments, conducting their own experiments, or analyzing or refuting the soundness of the experimental design or the validity of the inferences drawn from the results. In a sufficiently novel area of research, propositions of empirical ‘fact’ advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury.

ONY, Inc v Cornerstone Therapeutics, Inc, 720 F3d 490, 496-97 (CA 2, 2013) (internal quotation marks and citation omitted); see also *Underwager v Salter*, 22 F3d 730, 736 (CA 7, 1994) (“Scientific controversies must be settled by the methods of science rather than by the methods of litigation.”); *Arthur v Offit*, No 01:09CV1398, 2010 WL 883745, at *6 (ED Va, Mar 10, 2010) (“Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context.”).

Given these contextual considerations, the court in *ONY* concluded that “while statements about contested and contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable ‘fact,’ . . . , they are [for purposes of the First Amendment] more closely akin to matters of opinion, and are so understood by the relevant scientific communities.” *ONY, Inc*, 720 F3d at 497.

Those same words ring true here, for though *ONY* concerned claims made in scientific publications, the scientific discussions engendered by such publications are no less deserving of First Amendment protection. In fact, given that comments in fora such as PubPeer lack the imprimatur of a scientific journal and do not purport to be based on years of experimentation, the label of “opinion” to such commentary is even more appropriate.

For the scientific process to work, constitutional protection for the initial publication of ideas must be accompanied by robust protection for the subsequent discussion and dissection of those same ideas. To hold otherwise would be to inaccurately confine science to research and publication, ignoring the true dialectic nature of the enterprise. Scientists understand, and indeed depend on, this process, and the very purpose of publication is to move it along. Where controversies arise, the “scientific public” is best equipped to serve as referee, *ONY*, 720 F3d at 497, and this Court should not let unfounded and abusive discovery practices get in the way.

CONCLUSION

There is widespread agreement that greater post-publication discussion of scientific research would improve the scientific process, and the scientific community is experimenting with various ways to foster and enhance such discussion. PubPeer has emerged as an important model in these experiments. If Dr. Sarkar succeeds in unmasking the identities of the scientists who commented on his publications, the feasibility of this important model will be threatened.

Because the First Amendment guarantees broad protection for unfettered scientific discourse, Dr. Sarkar's unmasking efforts should fail, and this Court should reaffirm the scientists' right to participate anonymously in scientific discourse.

Respectfully submitted,

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January 19, 2016

CERTIFICATE OF SERVICE

ANDREW NICKELHOFF, being first duly sworn, deposes and says that on January 19, 2016, he did electronically file the aforesaid pleading with the Court Clerk via True Filing which will provide notice and service of such documents upon the parties through counsel of record.

/s/Andrew Nickelhoff _____
ANDREW NICKELHOFF (P37990)

Dated: January 19, 2016