No. 18-1451

IN THE
Supreme Court of the United States

NATIONAL REVIEW, INC.,
Petitioner,
v.
MICHAEL E. MANN,
Respondent.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONER

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, D.C. 20024

T. RUSSELL NOBILE
Counsel of Record
JUDICIAL WATCH, INC.
P.O. Box 6592
Gulfport, MS 39506
(202) 646-5172
rnobile@judicialwatch.org

Counsel for Amicus Curiae

Dated: June 20, 2019

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch and its staff monitor and investigate government and other agencies nationwide through public records laws. Judicial Watch routinely files Freedom of Information Act lawsuits seeking records relating to difficult and polarizing social issues, and it comments daily about its lawsuits and the records it produces. Judicial Watch and its staff monitor and investigate government and other agencies nationwide. In support of its mission, Judicial Watch regularly files *amicus curiae* briefs, and it has appeared as *amicus curiae* in this Court on a number of occasions.

The D.C. Court of Appeals' decision in this case raises important First Amendment concerns. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016). The decision threatens to chill public debate. The ruling particularly threatens DC-based private

---

[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this amicus brief. No party's counsel authored any of this brief; amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6. The parties received timely notice of this filing.

advocacy groups like Judicial Watch that engage in contentious public debates and thereby help to preserve and promote self-governance. If allowed to stand, the decision below would hamper the discussion of the nation's most consequential public issues. Litigation or even the threat of litigation can impair the ability of organizations to speak publicly or to espouse what may be perceived to be minority viewpoints.

This effect is especially pronounced when an advocacy organization seeks to challenge an ideologically homogenized group that controls an academic, governmental, or scientific institution. The decision below will have a substantial, adverse impact on public advocacy that question "official findings." Silencing dissent in pursuit of "consensus" is antithetical to our First Amendment liberties.

SUMMARY OF ARGUMENT

The Court should grant certiorari, not to protect the Petitioner, but to preserve uninhibited public debate in our national seat regarding. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), citing *Garrison v. State of La.*, 379 U.S. 64, 74-5 (1964). If allowed to stand, the D.C. Court of Appeal's ruling is a threat to all advocates who are subject to the jurisdiction of the local courts in the District of Columbia.

The issues surrounding climate change are of vital importance. Particular views about these issues are used to justify demands for radical changes in world governance and economics. Dr. Mann's research, methods, and conduct, moreover, have long been controversial. Indeed, the allegedly defamatory statements and criticisms published by the Petitioner about Dr. Mann's research had been made by other sources prior to the 2009 publication of leaked emails from the Climatic Research Unit at the University of East Anglia. This is exactly the kind of issue that deserves robust, unfettered public debate.

The Court should grant the Petition to clarify that a finding of malice sufficient to vitiate the protections ordinarily applying to public debate cannot be based on the fact that the speaker disagrees with the findings of an official or investigatory body. There is no way to render such a test for malice anything other than arbitrary, and there is no way to prevent its chilling effect on important public debates.

ARGUMENT

I. The D.C. Court of Appeals' Decision Threatens Political Speech on Highly Contentious Matters of Public Concern.

The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder*, 562 U.S. at 452, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "The First Amendment affords the broadest protection to such

political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quotation marks and brackets omitted), citing *Roth v. United States*, 354 U.S. 476, 484 (1957).

The need to facilitate the free expression of ideas is most acute in the seat of government, which hosts countless advocacy groups, like Judicial Watch, who engage in contentious and important policy debates.

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Garrison, 379 U.S. at 73. The decision below threatens core political speech, which is entitled to the highest level of constitutional protection. Advocating politically controversial viewpoints is the "essence of First Amendment expression" and "[n]o form of speech is entitled to greater constitutional protection." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (citations omitted). This Court should grant the Petition to prevent and rectify the infringement on First Amendment freedoms threatened by the decision below.

II. Dr. Mann's Research and Advocacy Are Controversial, Concern a Hotly Contested Issue of Momentous Importance, and Are Used to Justify Extraordinary Demands.

The occurrence of global warming, and how much of it is manmade, and how much should be done or sacrificed in order to combat its effects, are among the most polarizing issues fueling public debate on politics and policy. Because of the nature of the issue, both sides to this debate view its ultimate resolution as an existential threat to their way of life. There is virtually no national policy choice untouched by this debate. Accordingly, the partisan divide on the issue is striking. One poll, for example, found that 66% of Democrats believed that policies aimed at reducing climate change will do more good than harm, while only 27% of Republicans agreed. The same poll found that 57% of Republicans believed that such policies will hurt the economy, while only 14% of Democrats felt that way.[2]

It is widely known that *direct* evidence of temperature increases is nonexistent. "[B]ecause widespread, reliable instrumental records are available only for the last 150 years or so scientists estimate climatic conditions in the more distant past by analyzing *proxy evidence* from sources such as tree

---

[2] Cary Funk & Brian Kennedy, *How Americans see climate change in 5 charts*, PEW RESEARCH CENTER, Apr. 19, 2019, available at https://www.pewresearch.org/fact-tank/2019/04/19/how-americans-see-climate-change-in-5-charts/ (last visited June 19, 2019).

rings, corals, ocean and lake sediments, cave deposits, ice cores, boreholes, glaciers, and documentary evidence."[3] The absence of direct evidence has caused the debate to escalate over the last twenty years, causing some scientists to place greater reliance on increasingly tenuous "proxy data" in support of their "consensus."

In 1998, Dr. Mann published a paper depicting temperature readings over the last millennium based on a purportedly reliable proxy data set he assembled and analyzed.[4] His research has been used to prove the existence of anthropogenic global warming, as well to support his own advocacy. In 2001, the United Nations Intergovernmental Panel on Climate Change's Third Assessment Report, in which Dr. Mann was a lead author, relied on his research to conclude that human activity caused global warming during the 20th century.[5]

Dr. Mann and other like-minded climate scientists have used his research to predict worldwide catastrophes in the absence of a radical new approach

---

[3] NAT'L RESEARCH COUNCIL, SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS (2006), Chapter: Summary at 1, https://www.nap.edu/read/11676/chapter/2.

[4] Michael E. Mann, et al., *Global-Scale Temperature Patterns and Climate Forcing Over the Past Six Centuries*, 392 NATURE 6678 (1998) ("hockey stick graph").

[5] IPCC THIRD ASSESSMENT REPORT ix (2001), available at https://www.ipcc.ch/site/assets/uploads/2018/03/WGI_TAR_full_report.pdf (last visited June 6, 2019).

to climate change.[6] In the United States and internationally, these arguments are used to justify proposals for new limits on individual freedom, government seizures of entire industries, and the fundamental reordering of the world's economy. Thus, for example, the leader of U.N.'s Framework Convention on Climate Change declared that she believed the threat of climate change necessitated a restructuring of the world "economic development model reigning for at least 150 years, since the Industrial Revolution."[7]

However, "[q]uestions were raised about Mr. Mann's paper almost as soon as it was published."[8] Skepticism about his conclusions increased following the 2009 publication of leaked emails from the Climatic Research Unit at the University of East Anglia, which corroborated many of the criticisms and

---

[6] Michael E. Mann, *Earth Will Cross the Climate Danger Threshold by 2036*, SCI. AM., Apr. 1, 2014, https://www.scientificamerican.com/article/earth-will-cross-the-climate-danger-threshold-by-2036/?redirect=1; Gavin Schmidt & Michael Mann, *Convenient Untruths*, REALCLIMATE, Oct. 15, 2007, http://www.realclimate.org/index.php/archives/2007/10/convenient-untruths/.

[7] *U.N. Official Reveals Real Reason Behind Warming Scare*, INVESTOR'S BUS. DAILY, Feb. 10, 2015, https://www.investors.com/politics/editorials/climate-change-scare-tool-to-destroy-capitalism/.

[8] *Hockey Stick Hokum*, WALL ST. J., July 14, 2006, https://www.wsj.com/articles/SB115283824428306460.

concerns previously raised about Dr. Mann's academic practices and conduct.

III. Longstanding Criticism of Dr. Mann's Conduct Cannot Become Defamatory After Emails Corroborating Such Concerns Are Leaked.

Since his article was first published in 1998, Dr. Mann's use of proxy evidence to extrapolate global temperatures has been controversial. The pre-leak era (1998-2009) featured numerous private or official reports criticizing Dr. Mann's conduct and research, sometimes quite sharply. *See Competitive Enter. Inst.*, 150 A.3d at 1222-23 (discussing 2003 and 2005 studies that demonstrated the hockey stick graph "was the result of bad data and flawed statistical analysis").[9]

Thus, long before the email leak and the allegedly defamatory columns at issue in these proceedings, there was extensive commentary about and review of Dr. Mann's research which, among other things, raised questions about his academic practices and conduct. Two prominent 2006 reports evaluated Dr. Mann's research. While both focused on different questions, each confirmed widespread criticism of Dr. Mann's research methods. In a report

---

[9] *See also Global Warming Bombshell*, MIT TECH. REVIEW, Oct. 15, 2004, https://www.technologyreview.com/s/403256/global-warming-bombshell/ (explaining that statisticians testing Dr. Mann's methodology determined that even randomly generated data sets, a process known as "Monte Carlo analysis," produced a "hockey stick" chart).

solicited by the House Energy Committee, researchers found his work was plagued by basic statistical errors and that his methodology was biased in favor of yielding "hockey stick" graphs.[10] The report also investigated why it took outside researchers, rather than Dr. Mann's climatology peers, to uncover glaring errors and bias in his research and analysis. The report concluded that the climatology community is an echo chamber that is so politicized in favor of finding that human activity has caused global warming that its members "can hardly reassess public positions without losing credibility."[11]

While less critical, the National Research Council's 2006 report noted criticisms of Dr. Mann's work that predated the 2009 email leak:

> In the case of the hockey stick, the scientific process has proceeded for the last few years with many researchers testing and debating the results. Critics of the original papers have argued that the statistical methods were flawed, that the choice of data was biased, and that the data and procedures used were not

---

[10] Edward J. Wegman, et al., *Ad Hoc Committee Report on the "Hockey Stick" Global Climate Reconstruction*, April 26, 2010 ("Wegman Report"), http://scienceandpublicpolicy.org/wp-content/uploads/2010/07/ad_hoc_report.pdf (last visited June 10, 2019).

[11] *See* authorities cited in *Hockey Stick Hokum, supra* note 8 ("the coterie of most frequently published climatologists is so insular and close-knit that no effective independent review of the work of Mr. Mann is likely").

> shared so others could verify the work. . . . The reconstruction produced by Dr. Mann and his colleagues was just one step in a long process of research, and it is not (as sometimes presented) a clinching argument for anthropogenic global warming . . .[12]

These criticisms of Dr. Mann's conduct and methodology received newfound support in 2009, when leaked emails revealed climate researchers talking about "tricks" in presenting data and about the need to "hide" inconvenient facts. These emails seemed to confirm the long-suspected existence of an insular and even punitive scientific culture, where scientists actively sought to censor and suppress critics.[13]

The D. C. Court of Appeals effectively ruled that merely restating existing criticisms of Dr. Mann's research and conduct now is actionable—notwithstanding existence of emails seeming to corroborate these criticisms. The practical result is that it is now risky even to restate past criticism of Dr. Mann's academic practices and conduct. Yet there

---

[12] NAT'L RESEARCH COUNCIL, SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS (2006), Chapter: Preface, https://www.nap.edu/read/11676/chapter/1#ix.

[13] *See* Fred Pearce, CLIMATE CHANGE EMAILS BETWEEN SCIENTISTS REVEAL FLAWS IN PEER REVIEW, THE GUARDIAN, Feb. 2, 2010, https://www.theguardian.com/environment/2010/feb/02/hacked-climate-emails-flaws-peer-review.

continue to be serious questions about Dr. Mann's work given his suspect findings, his biased model, his punitive responses to critics, and his parsimonious release of his underlying research.[14] His research and advocacy cannot be decoupled. Yet the Court of Appeals has ruled that contrary views in this public debate may be actionable. There is no justification for silencing criticism of Dr. Mann.

IV. Even If Official Findings Had "Exonerated" Dr. Mann, Which They Did Not, Disagreeing With Such Findings Is Not a Valid Basis for Finding Malice.

Official bodies are not entitled to deference under the First Amendment, and findings from such bodies are not sufficient to cut off public debate. The decision below requires protected speech to yield where it rejects or conflicts with official findings. Any such requirement threatens all speakers and all ideologies in polarized political debates.[15] It is peculiarly un-American to prohibit speech that rejects official findings.

Advocates regularly dispute official findings. Claims of official, academic, or private misconduct may be and often are whitewashed or contrived to suit

---

[14] Antonio Regalado, *In Climate Debate, the "Hockey Stick" Leads to a Face-Off*, WALL ST. J., Feb. 14, 2005, https://www.wsj.com/articles/SB110834031507653590.

[15] This is especially true where, as here, the official bodies either provided summary reports, failed to produce all the underlying facts and interviews developed through investigation, or undertook a narrow or limited inquiry.

political expedience. The Court of Appeals professed to be "struck by the number, extent, and specificity of investigations, and by the composition of the investigatory bodies." *Competitive Enter. Inst.*, 150 A.3d at 1253. There are, however, considerable grounds for disagreement with these assessments, many of which were raised in the offending articles themselves. More to the point, there is simply no obligation under the First Amendment to accept such official interpretations. Protected speech does not have to yield where it conflicts with official findings. The refusal to accept such findings is not malice, even where such speech is controversial or otherwise contrary to the "consensus."

This new standard regarding malice raises unanswerable questions about which findings are "official enough" to constitute malice. Is it malicious to refuse to agree with a criminal jury verdict, a civil judgment, findings of fact, a judicial admonishment, or an evidentiary ruling at a sidebar? Is there more or less malice in disputing a finding by a district court, a magistrate, or an ALJ? Is it malice to reject a congressional finding or committee report? Is there more malice in disputing a government report as opposed to a private report? Is it malicious to reject the Mueller Report, or to reject Attorney General Barr's summary of it? To take an example from this case, is malice shown by disputing the official findings of a highly interested party like Penn State University, which stands to profit from academic "stars" like Dr. Mann? Even asking these questions is enough to show that the new standard is inherently arbitrary and unworkable.

Applying such a standard will chill public debate on national affairs on a myriad of issues. In highly polarized public debates, where each side accuses the other of deception, misconduct, or fraud, private parties can now weaponize official findings, perhaps even findings from foreign governments, to threaten their ideological opponents. They can do so even where those issuing the findings are interested in its outcome, and even where there are documented, longstanding questions about bias that conflict with such findings.

Scientific, academic, and governmental bodies are not the final arbiters of public debates. Indeed, Judicial Watch and advocacy groups like it owe their existence to a widespread distrust of official bodies and of self-policing scientific, academic, or governmental institutions.

CONCLUSION

For all these reasons, and those stated by the Petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, D.C. 20024

T. RUSSELL NOBILE
Counsel of Record
JUDICIAL WATCH, INC.
P.O. Box 6592
Gulfport, MS 39506
(202) 646-5172
rnobile@judicialwatch.org

Counsel for Amicus Curiae