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

BRIEF OF 21 U.S. SENATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are 21 currently serving United States Senators. They are listed alphabetically in the Appendix to this brief. As part of their duties as democratically elected representatives, *amici* actively participate in public debate on climate change and other issues, including as the authors of books, op-eds, essays, speeches, and lectures. *Amici* are concerned that the decision below, which allows juries in the nation's capital to impose defamation liability on speakers for subjective criticism relating to matters of public concern, will erode the tradition of vigorous and wide-open debate upon which American self-government relies.

SUMMARY OF ARGUMENT

Our constitutional tradition relies on vigorous debate to inform public policy. From politics to science to religion, the success and vitality of our nation depends on open disagreement, not subdued conformity. The lodestar of our First Amendment tradition is that government cannot "prescribe what shall be orthodox" in such matters. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Rather, the hard work of democratic self-government must be done by persuading our fellow citizens through open, and at times even raucous, debate. What Justice Holmes wrote 100 years ago has only grown truer as America has become more diverse: "the best test of truth is the power of the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amici curiae* and their counsel made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici curiae* timely contacted counsel for all parties and obtained their written consent to the filing of this brief.

thought to get itself accepted in the competition of the market." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

But for "free trade in ideas," *id.*, to perform its vital democratic function, there must be breathing space. Vigorous debate requires tolerance for "insulting, and even outrageous, speech." *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011) (quoting *Boos* v. *Barry*, 485 U.S. 312, 322 (1988)). And it requires that speakers be given leeway to express their opinions forcefully and colorfully, without fear that hyperbole, analogy, or over-the-top rhetoric will land them in court. As this Court has long recognized, when faced with distasteful or outrageous speech, "the remedy to be applied is more speech, not enforced silence." *Texas* v. *Johnson*, 491 U.S. 397, 419 (1989) (quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

The decision below lost sight of these basic principles. Left uncorrected, it will erode the freedom of political speech that lies at the foundation of our constitutional order. By allowing juries to punish subjective statements of political or scientific opinion as defamatory statements of fact, the decision below will shut down crucial debates on matters of public concern. And the chilling effect of this judicial heckler's veto will be especially pernicious because it will be felt in the nation's capital, where much of the nation's political debate is centered and where that debate is translated into public policy in the halls of Congress and the Executive Branch. The result will be forum shopping and politically motivated litigation that will stifle the marketplace of ideas upon which deliberative democracy depends. This Court should grant the petition for a writ of certiorari and reverse the judgment below.

ARGUMENT

I. OUR CONSTITUTIONAL TRADITION RELIES ON VIGOROUS DEBATE TO INFORM PUBLIC POLICY.

This Court has long recognized that "vigorous debate on public issues" lies at the heart of what "the First Amendment was designed to protect." *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133–34 (1979). Indeed, Americans' political speech is the core concern of the First Amendment's guarantees of freedom of speech and of the press. This Court has consistently recognized that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983); see also *Snyder*, 562 U.S. at 451–52; *Citizens United* v. *FEC*, 558 U.S. 310, 339–40 (2010).

As Members of Congress, *amici* enjoy the benefits of another protection for political speech that the Founders enshrined in the Constitution—the Speech or Debate Clause. The Founders understood that without the "fullest liberty of speech," democratically elected members of Congress would not be able to "discharge [the] public trust with firmness and success." 2 James Wilson, *Works of James Wilson* 38 (James DeWitt Andrews ed., 1896). Accordingly, following the English common-law tradition, the Founders adopted an absolute protection for legislative speech, providing that Members of Congress "shall not be questioned in any other Place" "[f]or any Speech or Debate in either House." U.S. Const. art. I, § 6, cl. 1. "Without exception," this Court has "read the Speech or Debate Clause broadly," *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975), recognizing that protection of vigorous debate "performs an important function in

representative government," "insur[ing] that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969).

But such protection is not enough to ensure vigorous debate. Unlike in England, the American founding generation recognized that "[t]he streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority," "THE CONSENT OF THE PEOPLE," and thus entrusted to ordinary Americans the responsibility of self-government. The Federalist No. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Because the American people are sovereign, the First Amendment freedoms of speech and the press are an essential corollary to the Speech or Debate Clause, assuring the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957); see also *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

The First Amendment does this by helping "produce informed opinions among members of the public, who are then able to influence the choices of a government." *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). "First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives." *Procunier* v. *Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). In short, freedom of speech is "the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

The price of vigorous political debate is that "[we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the

freedoms protected by the First Amendment." *Snyder*, 562 U.S. at 458 (alteration in original) (quoting *Boos*, 485 U.S. at 322). This includes the freedom to harshly criticize the ideas and actions of political or ideological opponents, and to do so with rhetorical gusto. As this Court has explained, allowing speakers to be punished for expressing opinions on matters of public concern using "rhetorical hyperbole" and "vigorous epithet" would "subvert the most fundamental meaning" of the First Amendment. *Greenbelt Coop. Publ'g Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970) (speakers could not be punished for characterizing plaintiff's negotiating position as "blackmail").

Americans have done more than attest to this principle—we have lived it. Our founding statesmen attacked one another so viciously that it would be inappropriate to reprint their insults here. See James Callender, *The Prospect Before Us* 57 (1801) (campaign surrogate for Thomas Jefferson colorfully describing President John Adams's "hideous" character); Ron Chernow, *Alexander Hamilton* 522 (2004) (President John Adams cruelly demeaning Alexander Hamilton's parentage); Robert V. Remini, *Andrew Jackson* 1 (1999) (supporters of President John Quincy Adams spread incendiary rumors about Andrew Jackson's mother). These "insulting, and even outrageous" statements were not litigated in courtrooms, but rather in newspapers, pamphlets, town squares, and polling places.

To be sure, in one of the more shameful episodes in American history, the federal government tried to suppress "seditious libel," but the effort backfired. Americans quickly repudiated the idea, "a wholly unjustifiable and much to be regretted violation of the First Amendment," and President Jefferson promptly pardoned those who had been prosecuted. See *N.Y. Times*

Co. v. *Sullivan*, 376 U.S. 254, 296 (1964) (Black, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting) (citation omitted) ("I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed."). While the Sedition Act was never formally "tested in this Court, the attack upon its validity has carried the day in the court of history." *N.Y. Times Co.*, 376 U.S. at 276 (footnote omitted).

As a result, vigorous public debate has characterized the United States from the Founding to the present. See Alexis de Tocqueville, *Democracy in America* 173 (Henry Reeve Trans., Colonial Press 1894) (1835) (Americans "are surrounded by the incessant agitation of parties, which attempt to gain their co-operation and to avail themselves of their support."). President Lincoln defended the freedom of the press at the height of the Civil War, even when the press was critical of the war effort and of Lincoln. See Harold Holzer, *Lincoln and the Power of the Press* 424–26, 440 (2014). A century later, following Lincoln's example, this Court consistently upheld the right of citizens to protest the Vietnam War, even when their protest was vulgar. *Cohen* v. *California*, 403 U.S. 15, 25–26 (1971).

The through line of American history—from the Founding to the Civil War to the Vietnam War to today—has been that when faced with "falsehood and fallacies," "the remedy to be applied is more speech, not enforced silence." *Texas* v. *Johnson*, 491 U.S. at 419 (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)); see also *Citizens United*, 558 U.S. at 361 ("it is our law and our tradition that more speech, not less, is the governing rule."). "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unrea-

soned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *United States* v. *Alvarez*, 567 U.S. 709, 727–28 (2012) (plurality opinion).

II. THE DECISION BELOW WILL CHILL SPEECH AND HARM THE DEMOCRATIC PROCESS.

The decision below disregards these foundational principles and will stifle the free exchange of ideas that is the lifeblood of democratic self-government.

The Court of Appeals initially recognized that statements of opinion are actionable only if they contain "provably false statements of fact." Pet. App. 49a; see *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"). As this Court explained long ago, Americans "are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression." *Wood* v. *Georgia*, 370 U.S. 375, 389 (1962). "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Id.*

But while paying lip-service to this foundational principle, the Court of Appeals adopted a rule that is inconsistent with the normal rule in federal courts and will radically undermine this principle, by allowing juries to punish statements that can reasonably be construed as expressions of subjective opinion relating to matters of public concern. Under the decision below, a

statement will expose the speaker to potential defamation liability in the District of Columbia if a "reasonable jury *could find*" it false, even though another reasonable jury could find it to be unfalsifiable opinion, and even though the statement concerns an inherently value-laden topic, such as whether the plaintiff engaged in "misconduct." Pet. App. 65a n.46. By treating such statements as potentially actionable, the Court of Appeals has made the scope of First Amendment protection depend on the unpredictable vagaries of jury selection.

An incensed jury can decide that an unpopular opinion is simply false, opening the door for monetary liability. The jury could do this intentionally, out of a desire to punish the defendant; or unintentionally, as a result of innocent but dangerous cognitive bias. See Dan M. Kahan, *The Cognitively Illiberal State*, 60 Stanford L. Rev. 115, 117 (2007) ("Where members of society disagree about the harmfulness of a particular form of conduct, we instinctively *trust* those who share our values—and whose judgments are likely to be biased in a particular direction by emotion, dissonance avoidance, and related mechanisms."). Worse, because that judgment will be made under the guise of factfinding, it will be effectively unreviewable. This is precisely the inverse of how the First Amendment should function. See *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968) ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

Even if defendants may ultimately prevail before the jury, the "threat of burdensome litigation" will inevitably chill speech. *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J., concurring).

Americans will think twice before expressing controversial opinions, weighing the risk of expensive litigation and potentially costly judgments. See *N.Y. Times Co.*, 376 U.S. at 277 ("fear of damage awards" can "inhibi[t]" speech). Before the specter of liability, "vigorous criticism" will "yield to silence." *Id.* at 304 (Goldberg, J., concurring in the judgment). "If liability can attach to political criticism . . . then no critical citizen can safely utter anything but faint praise." *Id.*

This case illustrates the danger. Public opinion is sharply divided on the nature and severity of climate change and what to do about it. See, *e.g.*, Glenn Branch, *New Climate Change Poll Highlights Political Differences*, Nat'l Ctr. for Sci. Educ. (May 28, 2019), https://ncse.com/news/2019/05/new-climate-change-poll-highlights-political-differences-0018916 ("Climate change is now more politically polarizing than any other issue in America."); Lydia Saad, *One in Four in U.S. Are Solidly Skeptical of Global Warming*, Gallup (Apr. 22, 2014), https://news.gallup.com/poll/168620/one-four-solidly-skeptical-global-warming.aspx. As the court below acknowledged, the soundness of Michael Mann's "hockey stick" graph is contested. Pet. App. 7a–9a. Yet for criticizing that graph, National Review has had to defend against this litigation for the better part of a decade. *Id.* at 9a–13a. Why would any would-be speaker risk the same fate?

Climate change is not the only debate the decision below will shut down. As the petition aptly observes, "[t]here is no public-policy debate that is not replete with accusations of deception, dishonesty, bad faith, and misconduct by both sides." Pet. 3. Americans disagree about abortion—the decision below would subject advocates on both sides to litigation over their opinions. They disagree about voter fraud and how to address it—the decision below means a politician

could sue over accusations of "voter suppression" and "stolen elections." So too with guns, drug policy, physician-assisted suicide, immigration policy, healthcare, gerrymandering, affirmative action, oil drilling and pipelines, minimum-wage laws, campaign finance, school choice, and many other issues. Each side of all these debates marshals scientific and statistical evidence for their position and against their opponents, and the public weighs the strength of that evidence. If the Court of Appeals decision stands, a single jury may usurp the place of the public in adjudicating these political disputes.

The decision below will also create a perverse incentive for forum shopping and politically motivated litigation. Plaintiffs will sue in D.C. hoping for a sympathetic jury, knowing that the District's population is significantly skewed toward one political party. See *N.Y. Times Co.*, 376 U.S. at 304 (Goldberg, J., concurring in the judgment) (warning that plaintiffs may "resort to friendly juries to forestall criticism"). Indeed, the fact that the decision below governs the nation's capital is particularly troubling. The District of Columbia, perhaps more so than any other jurisdiction, is home to political commentators, think tanks, and advocacy groups who play an important role in our public debates and in shaping public policy, and who will be prime targets for defamation lawsuits under the rule adopted below.

In short, the decision below creates a judicial heckler's veto that will enervate the robust public debate that is essential to deliberative democracy. It should not be allowed to stand. All Americans should be able to participate in public discourse—not just those wealthy enough to afford the resulting lawsuits.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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July 3, 2019

APPENDIX

APPENDIX A

COMPLETE LIST OF *AMICI CURIAE*

John Barrasso
Marsha Blackburn
Roy Blunt
Mike Braun
John Cornyn
Tom Cotton
Ted Cruz
Mike Enzi
Chuck Grassley
Josh Hawley
Jim Inhofe
Ron Johnson
John Kennedy
Mitch McConnell
Jim Risch
Mitt Romney
Marco Rubio
Ben Sasse
Tim Scott
Pat Toomey
Roger Wicker