Nos. 18-1451 & 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 Writs of Certiorari to the District of Columbia Court of Appeals

BRIEF OF *AMICI CURIAE* FORMER UNITED STATES ATTORNEYS GENERAL SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former United States Attorneys General. Edwin Meese III served as United States Attorney General from 1985 to 1988. Michael B. Mukasey served as United States Attorney General from 2007 to 2009. Jefferson B. Sessions III served as United States Attorney General from 2017 to 2018. During their tenures as public officials and beyond, *amici* have been committed to advancing the rule of law and improving the administration of justice for all Americans. These cases offer the Court an ideal opportunity to clarify an important issue of constitutional law: whether courts or juries decide if statements on matters of public concern are protected by the First Amendment. *Amici* urge that the rule of law and public confidence in the American legal system are advanced when courts can consistently and predictably protect free speech by making that determination.

SUMMARY OF ARGUMENT

Courts, not juries, should decide whether speech on matters of public concern is constitutionally protected or punishable. Predictable protection of free speech advances the rule of law and enhances public confidence. Both within and beyond the defamation context, this Court's First Amendment jurisprudence has established standards limiting what speech can be punished. Predictable application of those standards requires independence and understanding of constitutional principles, making courts better suited than juries for the task. Juries are a critical element of our constitutional system, but they are

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[1] In accordance with Rule 37.2(a), timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

not well-suited to protecting dissenters' speech. Recognizing that, this Court has repeatedly tasked courts, both in the first instance and on appellate review, with deciding whether speech is protected or punishable.

With an increasingly polarized populace and with free speech under attack, this Court should grant review and reaffirm that courts, not disparate local juries, must decide whether challenged statements on public issues are constitutionally protected or punishable. Deferring to juries on that question will chill speech on public matters, undermine the rule of law, and degrade public confidence, as plaintiffs use friendly juries to punish unpopular speech.

ARGUMENT

I. COURTS SHOULD DETERMINE WHETHER SPEECH IS CONSTITUTIONALLY PROTECTED TO ADVANCE FIRST AMENDMENT PRINCIPLES AND THE RULE OF LAW MORE GENERALLY.

Courts—not juries—should determine whether challenged speech is constitutionally protected, "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). This, in turn, provides the predictability necessary to maintaining the rule of law and public confidence in the American legal system. The court of appeals held that several challenged statements were unprotected because a *jury could* interpret them as asserting verifiable facts. See Pet. App. 57a, 65a, 65a n.46. This Court's review—to reaffirm that judges, not juries, should decide whether challenged speech is protected or punishable—will advance not just free speech, but the rule of law more generally.

A. Predictable protection of open and vigorous debate on matters of public concern is critical to preserving the rule of law.

Predictable protection of free speech is a necessary element of the rule of law. In Justice Scalia's words, "uncertainty [is] incompatible with the Rule of Law." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). Moreover, "[t]he rule of law relies on a fragile consensus, which remarkably has endured and allowed us, uniquely among the nations of the world, to live as free people for more than 200 years." Robert K. Puglia, *Freedom is not Free*, 36 McGeorge L. Rev. 751, 754 (2005). "Every day we reap the benefits of our constitutionally guaranteed freedoms of speech, religion, assembly and association, and freedom from unreasonable and arbitrary government actions against our persons and property." *Id.* at 751.

This Court has long recognized that it must predictably protect free speech in light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). This is especially crucial now, "[a]t a time when free speech is under attack." *Iancu* v. *Brunetti*, No. 18-302, 2019 WL 2570622, at *6 (U.S. June 24, 2019) (Alito, J. concurring).

First Amendment jurisprudence "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose*, 466 U.S. at 503-504. As Madison famously observed, "free communication among the people" on matters of public concern is "justly deemed the only effectual guardian of every other right." James Madison, Virginia Resolutions (Dec. 21, 1798), in 17 The Papers of James Madison 303, 341 (David B. Mattern et al. eds., 1991).

Ongoing protection of robust, vigorous debate on matters of public concern is, therefore, one of the Judiciary's most important responsibilities. And these certiorari petitions afford the Court an ideal opportunity to resolve a conflict of authority implicating the "special responsibility on judges whenever it is claimed that a particular communication is unprotected." *Bose*, 466 U.S. at 505; see, *e.g.*,1 *Sack on Defamation* § 4.3.7 (5th ed. 2018) (recognizing a conflict between "all of the federal circuits," which hold that courts decide "whether a statement is fact or opinion" and "[s]ome state courts," which hold that it is "a triable issue of fact for the jury"). This Court should reaffirm that the question whether certain speech is protected or punishable is one for the courts, which are better positioned to understand and correctly apply fundamental free-speech protections.

B. This Court's defamation precedents correctly task judges with deciding whether challenged speech is protected or punishable.

This Court's First Amendment defamation law has evolved over a series of decisions circumscribing the scope of speech that is punishable and not protected. These precedents also dictate that courts, not juries, must decide whether challenged speech is protected or punishable.

Milkovich v. *Lorain Journal Co.* traced the evolution of this Court's defamation precedents. 497 U.S. 1, 14 (1990). The Court began placing First Amendment limits on defamation claims in *New York Times* v. *Sullivan*, which "recognized the need for 'a federal rule'" protecting the right to criticize public figures without having "to guarantee the truth of all [one's] factual assertions." *Milkovich*, 497 U.S. at 14 (quoting *N.Y. Times*, 376 U.S. at 279; *Gertz* v. *Welch*, 418 U.S. 323, 334 (1974)). After establishing the *New York Times* actual malice rule, the Court required some showing of fault even for "a private individual's defamation actions involving statements of public concern." *Id.* at 15 (discussing *Gertz*, 418 U.S. at 347-48).

Then "the Court fashioned 'a constitutional requirement that the plaintiff'" in a defamation action on matters of public concern "bear the burden of showing falsity, as well as fault"—supplanting the "common-law presumption that defamatory speech is false." *Id.* at 16 (quoting *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776-777 (1986)). Rounding out its recap of First Amendment defamation law's evolution, *Milkovich* cited several judicially created "limits on the *type* of speech" that may be punishable. *Id.* at 16-17 (discussing *Greenbelt Coop. Publ'g Ass'n, Inc.* v. *Bresler*, 398 U.S. 6 (1970); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264 (1974)).

With each development in First Amendment defamation law, the Court has generally followed "the rule * * * that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment * * * protect." *N.Y. Times*, 376 U.S. at 285 (second alteration in original) (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946)). *Milkovich* added another gloss to the boundary between protected and punishable speech, rejecting the existence of "a wholesale defamation exemption for anything that might be labeled 'opinion.'" 497 U.S. at 18. Observing that "existing constitutional doctrine" was enough, the Court held that a statement must be evaluated for whether it is "sufficiently factual to be susceptible of being proved true or false" (and thus punishable)—or merely "loose, figurative, or hyperbolic language," "rhetorical hyperbole," or "imaginative expression" (and thus protected). *Id.* at 19, 20, 21. This inquiry evaluates the nature of the challenged statement, asking objectively what the statement asserts and whether that assertion is "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21.

Strongly implying that this inquiry is for courts, *Milkovich* did not remand for a jury to evaluate whether the challenged statements were susceptible of being proved true or false. Rather, the Court itself evaluated the statements, rendering judgment that they *were* susceptible of being proved true or false and thus punishable. See *ibid.* ("We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false."). This was consistent with the Court's earlier declaration that "[w]hen the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose*, 466 U.S. at 503.

Milkovich thus requires courts to determine the type of speech at issue and classify challenged statements as belonging to either the broad class of protected speech or a discrete type of speech that can lawfully be proscribed. This is a familiar inquiry under other First Amendment defamation cases. See, *e.g.*, *Letter Carriers*, 418 U.S. at 284-286 (holding that a description of non-union workers as "traitors" "cannot be construed as [a] representation[] of fact" but is "merely rhetorical hyperbole" and "a lusty and imaginative expression of * * * contempt"); *Bresler*, 398 U.S. at 13 (holding "as a matter of constitutional law" that an accusation of "blackmail" is not actionable). It is unsurprising, therefore, that *Milkovich* did not assign this task to the jury. Courts properly answer this First Amendment inquiry, which turns on the classification of challenged speech under standards the Court has articulated over decades.

C. More broadly, this Court consistently holds that judges are best positioned to evaluate whether speech is protected or punishable.

Even beyond defamation, this Court has consistently recognized that *judges* are responsible under the First Amendment for evaluating specific speech and classifying

it as protected or punishable. In other words, the "Court has often recognized that in cases involving free expression we [judges] have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law." *Letter Carriers*, 418 U.S. at 282. "This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose*, 466 U.S. at 503.

Just as in the defamation context, the other "unprotected speech" cases demonstrate more universally that "the limits of the unprotected category, as well as the unprotected character of *particular communications*, have been determined by the *judicial* evaluation of special facts that have been deemed to have constitutional significance." *Id.* at 505 (emphasis added). In determining whether particular speech is protected by the First Amendment, courts have predictably protected free speech, bolstered public confidence, and helped to preserve the rule of law—by independently making "sure that the speech in question actually falls within the unprotected category and [by confining] the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Ibid.*

In assessing alleged incitements to violence or fighting words, for example, the Court disagreed that a decision below had "obviate[ed] our duty to examine the record for ourselves." *Street* v. *New York*, 394 U.S. 576, 589 (1969). Analyzing the statements' content, it held that the "words, taken alone, did not urge anyone to do anything unlawful," and thus were not punishable incitements to violence. *Id.* at 591. Nor were the words "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and

thereby cause a breach of the peace.'" *Id.* at 592 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942)).

In assessing alleged obscenity, the Court conceded that questions of "prurient interest" and "patent offensiveness" were factual inquiries, but nevertheless found "substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." *Jenkins* v. *Georgia*, 418 U.S. 153, 160-161 (1974). The Court then held that "[n]othing in the movie" under review contained "material which may constitutionally be found to meet the 'patently offensive' element" of the obscenity standard. *Id.* at 161.

The Court's campaign-finance precedents further support the rule that courts should be the arbiters of whether challenged statements are protected or punishable. In *Federal Election Commission* v. *Wisconsin Right to Life, Inc.*, for example, the Chief Justice emphasized that the question whether the First Amendment protects "speech on public issues" "must be *objective*, focusing on the *substance* of the communication rather than amorphous considerations of intent and effect." 551 U.S. 449, 451, 469 (2007) (hereinafter *WRTL*) (plurality op.) (emphases added). Just as the question whether a political advertisement contains express advocacy, *id.* at 470, the question whether a statement contains a connotation "susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21, focuses on the content and substance of the statement—not the intent of the speaker. As such, the Court properly performed that objective analysis itself in *Milkovich*. See *ibid.*

Courts are thus best suited to classify challenged speech as protected or punishable. A First Amendment inquiry may involve a clean "question of law." See, *e.g.*, *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 685 (1989). Or it may involve "special facts" of "constitutional significance." *Bose*, 466 U.S. at 504-505. Whatever the inquiry, a First Amendment analysis will undoubtedly entail

a "tightly circumscribed legal analysis" into which "factual questions" are "subsumed." *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1680 (2019). And when "an issue 'falls somewhere between a pristine legal standard and a simple historical fact,'" this Court typically "determin[es] that, as a matter of the sound administration of justice, one judicial actor"—the judge—"is better positioned than another to decide the issue in question." *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)).

The rationale of the Court's recent *Merck* decision is particularly instructive here. *Merck* held that an administrative law preemption issue "is a legal one for the judge, not a jury." 139 S. Ct. at 1679. Just as "judges are normally familiar with principles of administrative law," *id.* at 1680, they are also much more familiar with First Amendment principles than juries are. "To understand the question as a legal question for judges makes sense" because "[d]oing so should produce greater uniformity among courts; and greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of" the First Amendment, just as when it involves "the scope and effect of federal agency action." *Ibid.*

II. Deferring to Juries on Whether the First Amendment Protects Speech on Matters of Public Concern Would Undermine Free Speech and the Rule of Law.

This Court's modern First Amendment jurisprudence has recognized that courts must protect free speech instead of leaving these fundamental constitutional questions to juries. The Court has recognized that "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 466 U.S. at

505. This Court's directives have tasked judges with evaluating challenged speech in the first instance and with "conduct[ing] an independent review of the record." *Ibid.* Consequently, this crucial role of courts in protecting free speech has largely displaced juries in distinguishing between protected and punishable speech on matters of public concern. That displacement has advanced First Amendment protections and the rule of law more broadly. Any retreat from that position would undermine both.

A. Juries have not sufficiently protected dissenters' speech.

The jury has long and properly been "extolled as a great guarantor of individual freedom, including freedom of speech," but modern First Amendment law has shown that the attributes that made the jury a bulwark against tyranny during the colonial and framing periods make it less well-suited to reliably and consistently apply First Amendment principles today. Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 528 (1970).

More specifically, "the famous free speech cases of the past were really part of a much larger conflict between a fairly homogeneous citizenry and an unrepresentative government. In earlier times, therefore, freedom of speech was conceived primarily as a guarantee that the voice of the people—*the majority*—would be heard, that unrepresentative government would be forced to hear, if not heed, their rising voices." *Ibid.*; see also Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution"*, 15 Harv. J. L. & Pub. Pol'y 99, 104–105 (1992) ("Under the original (un-Reconstructed) vision, the paradigmatic First Amendment rights-holders are not Jehovah's Witnesses or Communists or unpopular speakers; they are the Republican Party of 1800 that actually represented a majority of the citizens, but whose speech was being suppressed by an unrepresentative Congress."). "As a bearer of majority sentiments," therefore, "the jury served as a powerful and

effective vehicle for preventing governmental repression of majority views." Monaghan, 83 Harv. L. Rev. at 528; see also Amar, 15 Harv. J. L. & Pub. Pol'y at 105 ("A jury will protect popular speech criticizing government, and that is why there is a strong linkage between free speech and jury trial in the Eighteenth Century.").

But although the "jury may be an adequate reflector of the community's conscience," and thus a powerful tool against government repression of the citizenry, "that conscience is not and never has been very tolerant of dissent." Monaghan, 83 Harv. L. Rev. at 529. The jury is not, therefore, a consistently reliable bulwark against majority oppression of unpopular speech. As our nation has become more pluralistic, it has become even more important for the rule of law to "do more than simply obey the will of the majority." *Evenwel* v. *Abbott*, 136 S. Ct. 1120, 1138 (2016) (Thomas, J. concurring); see *ibid.* ("The Framers believed that a proper government promoted the common good. They conceived this good as objective and not inherently coextensive with majoritarian preferences.").

This Court's modern First Amendment jurisprudence is thus a recognition that courts must protect the fundamental rights of individuals—especially when those individuals criticize others on matters of public concern. Moreover, although it may be an "unprovable premise that, by virtue of their training and occupation, judges are less inclined to be affected by passion and prejudice and more inclined to realize the importance of first amendment values," it is clear that "action taken by lower court judges is more readily reviewable than action taken by the jury." Monaghan, 83 Harv. L. Rev. at 529.

B. Unpredictable decision-making is inevitable if juries decide whether statements are protected or punishable.

It is no derogation of the American jury to "recogni[ze] that 'judges, as expositors of the Constitution,' have a duty

to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.'" *Connaughton*, 491 U.S. at 686 (quoting *Bose*, 466 U.S. at 511). After all, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803). Giving judges the role of protecting free speech mitigates the demonstrated danger of "allow[ing] a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Falwell*, 485 U.S. at 55. Whether local jury bias favors or disfavors a particular defendant, the existence of local bias itself is dangerous. It upsets the "fragile consensus" undergirding the rule of law, Puglia, 36 McGeorge L. Rev. at 754, by injecting unpredictability into the protection of constitutional rights.

Several recent studies have documented a substantial and growing polarization among the American public on matters of public policy. See, *e.g.*, Pew Research Center, *The Partisan Divide on Political Values Grows Even Wider* 1 (Oct. 5, 2017), https://tinyurl.com/y2e7mb9o (reporting "record levels" of polarization among Americans on "fundamental political values"); Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLoS ONE 6 (Apr. 21, 2015), https://tinyurl.com/y4mha4xx (documenting an ever-widening political gap among members of the U.S. House of Representatives between 1949 and 2011). Researchers have found, for example, a 36-percentage-point average difference in 2017 between members of the two political parties on a wide variety of public policy issues. From 1994 through 2004, that partisan gap was only 15-17 percentage points. See Pew Research, *Partisan Divide*, at 8.

Neither partisan polarization of the American public nor voting patterns of individual members of Congress are perfect proxies for the specific policy views of residents in any given location. But if those metrics offer even a rough

approximation of how residents across the country view public policy matters, it becomes obvious that the question whether a given statement on a contentious public policy matter is constitutionally protected or punishable would be answered much differently by juries empaneled in different parts of the country. That unpredictability over core free-speech rights is detrimental to the rule of law and to public confidence in the American legal system.

C. Speech on public issues will be chilled, the rule of law will be undermined, and public confidence will suffer if plaintiffs can use local juries to punish unpopular speech.

The Internet's global reach and the unlimited circulation of online news sources, blogs, and other publications has expanded the dangers associated with local juries deciding whether speech is protected or punishable. Because "the tort of libel is generally held to occur wherever the offending material is circulated," *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984), the Internet has dramatically expanded the range of possible forums in which a plaintiff can bring a defamation suit. Especially when allegedly defamatory statements concern contentious matters of national importance or concern, those statements will inevitably be extremely popular with some people and quite unpopular with others. With the entire country to choose from, a defamation plaintiff will have little trouble finding a venue in which the content of the allegedly defamatory statements—or simply the viewpoint of the defendant—is deeply unpopular. If local juries then decide whether those statements are constitutionally protected or punishable, the risk is enormous that juries will do so "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Falwell*, 485 U.S. at 55.

Wisconsin Right to Life remarked that a test for prohibited political speech that "focused on the speaker's intent could lead to the bizarre result that identical ads aired

at the same time could be protected speech for one speaker, while leading to criminal penalties for another." *WRTL*, 551 U.S. at 468 (plurality op.). In much the same way, a rule that allows local juries to decide whether the First Amendment protects specific speech on issues of national concern could result in the same statement being deemed protected speech in one jurisdiction, but punishable defamation in another. The only distinction would be whether local juries agree with the defendant's position on the issue, not whether the statements actually contain a connotation "susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21. Such a rule "'puts the speaker . . . wholly at the mercy of the varied [public policy views] of his hearers.'" *WRTL*, 551 U.S. at 469 (plurality op.) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 43 (1976) (*per curiam*)). It also would "unquestionably chill a substantial amount of political speech" and stifle debate on issues of public concern. *Ibid.*

As the Court recognized with the First Amendment's actual-malice rule for defamation, "the jury's application of such a standard 'is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.'" *Bose*, 466 U.S. at 510 (quoting *N.Y. Times*, 376 U.S. at 270). Those risks are not limited to applying the actual-malice standard; they extend equally to applying *Milkovich*'s "susceptible of being proved true or false" rule and to all First Amendment rules protecting speech. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech." *Connaughton*, 491 U.S. at 686.

Nor is the danger limited to the chilling of speech on matters of public concern. If the public comes to believe that the First Amendment applies only "on the basis of the jurors' tastes or views, or perhaps on the basis of their

dislike of a particular expression," *Falwell*, 485 U.S. at 55, the rule of law and public confidence in our legal system will suffer as well. Such uncertainty undermines the "principle of viewpoint neutrality that underlies the First Amendment." *Bose*, 466 U.S. at 505. "Viewpoint discrimination is poison to a free society." *Iancu*, 2019 WL 2570622, at *6 (Alito, J. concurring). So it is especially important for the Court to reaffirm the "special responsibility on judges whenever it is claimed that a particular communication is unprotected." *Bose*, 466 U.S. at 505. That responsibility for courts to decide whether a communication is protected by the First Amendment is an important bulwark in maintaining the rule of law and public confidence in our American legal system.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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