No. 20-

IN THE

Supreme Court of the United States

MAGGY HURCHALLA,

Petitioner,

v.

LAKE POINT PHASE I, LLC & LAKE POINT PHASE II, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a person speaks to a government official on a matter of public concern, and a subsequent governmental action regarding that matter harms a third party, whether a tort award against the speaker and in favor of the third party violates the Free Speech or Petition Clause of the First Amendment to the U.S. Constitution when the statement could reasonably be construed as a verifiable and true assertion or as an unverifiable opinion, when the speaker genuinely believed the statement, and when there is no evidence that the statement caused the adverse governmental action.

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PETITION FOR A WRIT OF CERTIORARI

Maggy Hurchalla respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of Florida (App.1a-18a) is reported at 278 So.3d 58. The order of the Florida Supreme Court denying discretionary review of the decision of the Fourth District Court of Appeal (App.21a-22a) is unreported.

JURISDICTION

Ms. Hurchalla's petition for hearing to the Florida Supreme Court was denied on April 13, 2020. *See*

App.21a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

INTRODUCTION

In this extraordinary case, the Florida courts affirmed a $4.4 million tort judgment against Maggy Hurchalla, a well-regarded local environmentalist, for saying in an email to her elected county representatives that the "benefits" of a public-private development project had not been "documented." The decision will undermine the robust public debate that is essential to the health of our government by the People.

For reasons entirely unrelated to Ms. Hurchalla's remark, the county took several actions that were adverse to the developer—a prominent billionaire real-estate investor operating through respondents Lake Point Phase I, LLC, and Lake Point Phase II, LLC (together, "Lake Point")—including issuing notices of regulatory violations. Rather than attempting to invalidate those actions, Lake Point claimed that those actions breached its contract with the county and sued Ms. Hurchalla for tortiously causing those breaches. The jury found for Lake Point and awarded $4.4 million in damages.

The court below concluded that the First Amendment did not protect Ms. Hurchalla's remark that the project's "benefits" had not been "documented" because she spoke with "actual malice": she was "aware of" a "preliminary study" addressing one type of possible benefit of the project. That, the court determined, showed her statement to be false and showed Ms. Hurchalla to have spoken intentionally or recklessly without regard to the truth.

But as shown by another sentence in Ms. Hurchalla's email (which the court below omitted from its analysis) and by uncontroverted trial testimony (which the court below ignored), Ms. Hurchalla was referring to a particular type of study performed by a team administering a federal program for the protection of the Everglades. *That* study was undisputedly never performed, and Ms. Hurchalla considered the preliminary study inadequate to demonstrate the project's benefits—a view corroborated by an expert witness at trial.

The decision below badly misapprehends fundamental First Amendment principles, and the multimillion dollar damages award against Ms. Hurchalla will have a substantial and lasting chilling effect on citizens. The court not only disregarded the context of Ms. Hurchalla's statement, as just described, but also put words in her mouth to substantiate her supposed admission that the preliminary study "documented" the project's benefits. Properly understood in context, Ms. Hurchalla's statement was either true or an unverifiable opinion expressing her judgment about the insufficiency of the evidence she had seen. At worst, her statement is at least reasonably understood to be one of those things. And as most lower courts correctly recognize, a statement that is ambiguous in this way is still constitutionally protected. Insofar as the court below

aligned with the minority of courts allowing tort liability based on such an ambiguous statement, this Court should intercede. Further, the court below ignored the undisputed evidence that Ms. Hurchalla believed her statement to be true.

Finally, the court upheld the multi-million dollar verdict despite a total lack of evidence indicating any causal connection between Ms. Hurchalla's supposedly false statement and the county's supposed contract breaches. In fact, county officials testified that their actions were not influenced by Ms. Hurchalla's supposedly false statement.

These serious errors pose a grave risk to the fundamental protections guaranteed by the First Amendment. The decision below sends a clear message to any deep-pocketed private actors who might be harmed by some governmental action: they can now wield tort litigation as a cudgel to intimidate and silence any critic or opponent—whether a public policy organization supporting or opposing legislation, a religious group seeking a regulatory exemption, a company bidding for government contracts, or an ordinary concerned citizen, like Ms. Hurchalla. The decision below exposes such speakers to potentially massive liability if the plaintiff merely identifies some statement that *could* be considered false if read in isolation and that merely relates to the general subject of the unwanted governmental action. The resulting suppression of public engagement and petitioning activity will diminish the quality of public policy and the health of our democratic self-government.

This Court should grant the petition for certiorari and reverse the decision below to vindicate Ms. Hurchalla's constitutional rights, and the rights of all

citizens, to question, and to urge their governments to question, the propriety of actions by powerful entities—like Lake Point—free from the fear of crushing civil liability.

STATEMENT

A. The Lake Point Project

This case arises out of the development of two contiguous parcels of land in Martin County, Florida (together, "Property"). In 2008, Lake Point acquired the Property with the intent to mine limestone from it. App.2a-3a. Because the Property was located near the intersection of three water basins and might be used for storing, cleansing, and conveying water to different areas, Lake Point proposed to the South Florida Water Management District ("District") a public-private partnership to construct a stormwater treatment area on the Property. *Id.*

The District accepted the proposal and, in November 2008, entered into an agreement with Lake Point to govern the project ("Development Agreement"). App.3a. The project was to proceed in two phases. In Phase I, Lake Point would mine limestone from one of the parcels, which was subject to a preexisting development order that the County had issued to permit certain development activities ("Development Order"). App.2a. In Phase II, Lake Point would mine on the other parcel (which was not subject to the Development Order), with the limestone excavation creating stormwater management lakes. App.3a. The Development Agreement specified that, before Lake Point could begin Phase II, it had to obtain certain mining permits from the state and the Army Corps of Engineers. *Id.* The Development Agreement also specified

that Lake Point would donate the Property to the District in stages. The Development Order would remain in force until the covered parcel was donated and Lake Point had obtained the vacatur of the Development Order from the County so that the District would not be subject to the encumbrance. *Id.*

Because the project would be subject to the County's regulatory oversight, in May 2009 the District entered into an interlocal agreement with the County ("Interlocal Agreement"). App.3a-4a; *see* Fl. Stat. § 163.01. The Interlocal Agreement repeated many of the key provisions of the Development Agreement, including: the Development Order would remain in effect until Lake Point had donated the covered parcel to the District; and Lake Point could not begin Phase II until it had obtained the required permits. App.4a. The Interlocal Agreement also stated that the County would take no action that would encumber the Property and that Lake Point would make annual "contribution" payments to the County. *Id.*

Lake Point began to develop the project. It applied for and obtained the required permits. App.4a.

B. Ms. Hurchalla's Concerns About The Lake Point Project

In the fall of 2012, local media reported that Lake Point was secretly planning to convert the project into one for supplying water to the City of West Palm Beach for consumptive use. App.5a. Prompted by these reports to examine the project, in December 2012 County staff sent Lake Point a letter noting possible regulatory violations, including that Lake Point was excavating outside the authorized boundaries of the

Development Order, and issued a report reflecting similar preliminary findings. C.A.R.5974-5980, 7939-7944.[1]

These media reports also alarmed Maggy Hurchalla, a recipient of numerous awards recognizing her commitment to environmental issues who had also previously served as a Martin County commissioner. App.5a. Ms. Hurchalla was concerned that the water could not be put to consumptive use while still meeting the needs of the federally designated Wild and Scenic Loxahatchee River. Tr.1510-1511.

So, on January 4, 2013—after County staff had initiated their investigation and issued their initial report—Ms. Hurchalla sent an email to members of the Board of the Martin County Commissioners ("Board") expressing her concerns about the project. App.5a; App.27a-32a. She followed up with additional emails to commissioners on January 14, 2013. C.A.R.7185-7186. In these emails, Ms. Hurchalla made several statements that Lake Point later alleged were false.

For purposes of this appeal, only one such statement is relevant. In her January 4 email, Ms. Hurchalla said that "a rockpit in permeable limestone does not store water" and thus "doesn't do you any good" as a water storage facility. App.28a. Ms. Hurchalla then questioned the benefits of using the rockpit even for a water treatment facility:

> [In 2008,] the District staff continued to suggest some vague storage value but changed the emphasis to the [stormwater treatment area] that would be built on site at the completion of the project in 20 years. A study was to follow

[1] "C.A." refers to docket materials from the proceedings in the court of appeal.

> that documented the benefits [of the project]. That study has not been provided. There does not appear to be any peer review by the CERP team to verify benefits from the rockpit. … Neither the storage nor the treatment benefits have been documented.

App.28a.

The backstory to this passage from Ms. Hurchalla's January 4 email is critical. CERP—the Comprehensive Everglades Restoration Plan—was established by Congress for the protection of the Florida Everglades, and is administered in partnership with the State of Florida. *See* Nat'l Park Serv., *Comprehensive Everglades Restoration Plan (CERP)*, https://www.nps.gov/ever/learn/nature/cerp.htm (updated May 8, 2019); S. Fla. Water Mgmt. Dist., *CERP Project Planning*, https://www.sfwmd.gov/our-work/cerp-project-planning (visited Sept. 10, 2020). In 2008, shortly after Lake Point acquired the Property, Ms. Hurchalla met with Lake Point's owner and the project engineer to discuss their plans. Tr.1506-1508. During that meeting, Lake Point's owner and engineer assured Ms. Hurchalla of its commitment to doing the environmental studies that Ms. Hurchalla considered imperative, including a CERP peer-review study of the project's benefits. Tr.1511-1512.

Thus, when Ms. Hurchalla wrote, "A study was to follow that documented the [project's] benefits. That study has not been provided," she was referring to the CERP study—as the next sentence of her email made clear: "There does not appear to be any peer review by the CERP team to verify benefits from the rockpit." Ms. Hurchalla confirmed that at trial, testifying: "When I say that a [study] was promised and I haven't got it,"

"that is what I mean." Tr.1511. It is undisputed that no CERP peer-review study of the project's benefits was ever performed. *See* Tr.1166, 1188, 1191, 1511-1512. That is why Ms. Hurchalla concluded in her email: "Neither the storage nor the treatment benefits have been documented."

There was a "preliminary study" of the project, and Ms. Hurchalla was "aware" of it when she sent her January 4 email. App.11a. But that study was not performed by a CERP team. Further, Ms. Hurchalla's view was that the preliminary study was insufficient to "document[]" the project's benefits because it was preliminary, its analysis was too limited, and it was not subject to CERP peer review. Tr.1511-1512, 1550-1551. Ms. Hurchalla explained that "whether [the project is] worth doing" depends on "run[ning] the large scale model with all the CERP pieces in it"; only the CERP study would be "comprehensive," subject to CERP's peer-review process, and reviewed by the Corps—all of which, Ms. Hurchalla believed, would make the study "much more likely to get things right." Tr.1511-1512.

C. County Staff's Finding That Lake Point Violated County Codes

On January 8, 2013, the Board held a public hearing at which County staff presented findings regarding Lake Point's code violations—an issue that was unrelated to the project's benefits. C.A.R.7668-7669; Tr.505-519. The Board directed staff to continue their investigation and, if appropriate, to proceed with normal code enforcement. C.A.R.7762-7763. The Board postponed further discussion of the project until its next meeting, to give staff time to investigate and to give Lake Point an opportunity to address the Board. Tr.515-519.

Four days later, Ms. Hurchalla sent emails to commissioners expressing her view that the County could "void" the Interlocal Agreement because Lake Point "did not do what the county was promised," but suggesting that the Board await further findings from County staff regarding Lake Point's possible code violations. C.A.R.6784-6785.

In February 2013, Lake Point's lawyer demanded that Ms. Hurchalla retract her statements about the project and refrain from criticizing Lake Point in the future. C.A.R.2649-2650. Ms. Hurchalla did not respond.

On February 4, 2013, County staff issued two Notices of Violation ("NOVs") to Lake Point, one for each parcel. The NOVs required Lake Point to either cure the violations or refute the findings. C.A.R.7003-7013; Tr.1324-1330, 1558-1559. It is undisputed that the code violations identified in the NOVs were entirely unrelated to Ms. Hurchalla's January 4 statement that the project's benefits had not been "documented." And there is no evidence that Ms. Hurchalla had contact with County staff about their investigation or that the NOVs were issued because of any influence or direction by Ms. Hurchalla or the Board.

At the Board's next hearing, on February 5, 2013, County staff and the District made presentations about the project. At the recommendation of the County engineer, the Board took no further action regarding Lake Point, instead leaving code enforcement proceedings to staff. Tr.1324-1330. Lake Point representatives attended the Board's February 5 meeting but did not address the Board and never attempted to invalidate the NOVs.

D. Lake Point's Suits Against The County And Ms. Hurchalla

Instead, later on February 5, 2013, Lake Point sued the County in state court, alleging that the County breached the Interlocal Agreement by: (1) issuing the NOVs; (2) not terminating the Development Order; and (3) not accepting a contribution check from Lake Point. *See* C.A.Reply.8-11.[2]

About two weeks later, Lake Point sued Ms. Hurchalla, claiming that she tortiously caused the County's alleged breaches of the Interlocal Agreement through purportedly false emails sent to County commissioners. Lake Point sought damages and an injunction barring Ms. Hurchalla from speaking publicly about Lake Point's project. The County settled with Lake Point before trial without admitting that it breached the Interlocal Agreement. C.A.R.8114. Ms. Hurchalla did not settle.

1. Trial court proceedings

In a series of pretrial motions, Ms. Hurchalla argued that her emails were privileged under the First Amendment because they were communications with government officials regarding matters of public concern. Lake Point responded that Ms. Hurchalla forfeited her constitutional privilege by making deliberately false statements. C.A.R.1212-1213; C.A.R.3849-3851. The judge denied Ms. Hurchalla's dispositive motions.

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[2] As Ms. Hurchalla argued to the courts below, none of these actions actually constituted a breach of the Interlocal Agreement. *See* C.A.Br.32-37; C.A.Reply.8-11. The court of appeals rejected those arguments without analysis. App. 1a.

Lake Point's case against Ms. Hurchalla went to trial. Before she had presented her case, the judge asked to meet *ex parte* and *in camera* with each party. During the judge's *ex parte*, *in camera* meeting with Ms. Hurchalla, the judge told her he thought she would lose the case. He urged her to sign a letter of apology—which he claimed to have drafted himself on her behalf—admitting Lake Point's project was good and promising to refrain from criticizing it in the future. Tr.568. Ms. Hurchalla refused. Tr.569. She then moved for the judge's recusal and requested that the letter be placed in the record; the judge denied both requests. Tr.569, 588-589; C.A.R.8363. So, trial continued.

After trial, a jury returned a general verdict for Lake Point and awarded $4.4 million in damages. App.6a.

2. Appellate proceedings

Ms. Hurchalla appealed, arguing (among other things) that her allegedly false statements were privileged under the Free Speech and Petition Clauses of the First Amendment because Lake Point failed to prove by clear and convincing evidence that they were (1) false (2) factual statements (as opposed to opinions) (3) uttered with "actual malice," C.A.Br.20-21, 25-26; C.A.Reply.13-16, i.e., "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). Ms. Hurchalla also argued that Lake Point failed to prove any causal connection between the alleged falsity and the County's alleged breaches of the Interlocal Agreement. C.A.Br.37-41; C.A.Reply.11-12.

A panel of the Fourth District Court of Appeal of Florida rejected Ms. Hurchalla's arguments and affirmed the $4.4 million judgment against her. After purportedly conducting the requisite de novo review of the factual record, *see Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 486, 511 (1984) (courts "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" to tort liability), the court of appeal concluded that the passage in Ms. Hurchalla's January 4 email discussing the lack of "documented" project "benefits" is not protected by the First Amendment. App.10a-11a.

First, the court declared—without analysis—that Ms. Hurchalla's statement was "represented as [a] statement[] of fact" or at least a "mixed" opinion, rather than a "pure" opinion. App.11a. Next, the court found that Ms. Hurchalla had "admitted" the statement was false because she acknowledged that there had been a "preliminary" study that—in the court's words, not Ms. Hurchalla's—"document[ed] treatment benefits." *Id.* Finally, the court found that Ms. Hurchalla "was aware that her statement that there were *no* documented benefits was false" because she "admitted that she had reviewed" the preliminary study before sending the email. *Id.* And the court considered it "significant" that two of the commissioners who had received Ms. Hurchalla's January 4 email "were unfamiliar with the details about the Project"; in the court's view, that "establish[ed] [Ms. Hurchalla's] reckless disregard for the truth." *Id.* Notably, when the court quoted the key passage from Ms. Hurchalla's email, it omitted the sentence in that email stating: "There does not appear to be any peer review by the CERP team to verify benefits from the rockpit."

The court also summarily rejected Ms. Hurchalla's argument that there was insufficient evidence to find that the supposedly false statement in her January 4 email caused any of the County's alleged breaches of the Interlocal Agreement. App.2a.

The multi-million dollar judgment against Ms. Hurchalla far exceeded her net worth. To collect on its judgment, Lake Point had the sheriff seize her property: two kayaks and a 2004 Toyota Camry (which Lake Point later returned). *See* Patricia Mazzei, *The Florida Activist Is 78. The Legal Judgment Against Her Is $4 Million.*, N.Y. Times (Sept. 8, 2019).

Ms. Hurchalla moved the court of appeal for rehearing en banc or certification to the Florida Supreme Court. The court denied her motion. She then petitioned the Florida Supreme Court for review. That petition was denied on April 13, 2020. App.21a. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE FIRST AMENDMENT PROTECTS MS. HURCHALLA'S STATEMENT BECAUSE, READ IN CONTEXT, IT WAS TRUE OR UNVERIFIABLE AND SHE BELIEVED IT

To hold Ms. Hurchalla tortiously liable for the County's supposed breaches of the Interlocal Agreement, Lake Point was required by both the Free Speech and Petition Clauses of the First Amendment to prove that her January 4 email expressed a "provably false" and "objectively verifiable" fact. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20, 22 (1990). The First Amendment also required Lake Point to prove that the statement was in fact false. *Id.* at 16; *see also Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 246-247 (2014). And the First Amendment required Lake

Point to prove that Ms. Hurchalla spoke "with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *New York Times*, 376 U.S. at 279-280). That is, Lake Point had to "demonstrate" that Ms. Hurchalla "'in fact entertained serious doubts as to the truth of'" her statement, "or acted with a 'high degree of awareness of … probable falsity.'" *Id.* (quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), and *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964)). Finally, Lake Point had to prove these elements by "clear and convincing evidence." *Id.*[3]

The court below found that Lake Point carried its burden only because the court fundamentally misconstrued Ms. Hurchalla's email in ways that cannot be squared with the imperatives of the First Amendment. The court disregarded the context of her statement, including a critical sentence in her email and trial testimony. That context shows that her statement was true: the authoritative study of the project's benefits that was to be conducted by the CERP team had not been done.

Alternatively, her statement was an expression of her judgment about the insufficiency of the preliminary study of which she was aware—an expression that is simply not verifiable and thus is protected. Or at worst, her statement was ambiguous as to whether it

[3] The most demanding First Amendment standards apply because it is undisputed that Ms. Hurchalla made her statement to a public official on a matter of public concern, *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985) (Petition Clause), or that Lake Point is at least a "limited-purpose public figure" due to its involvement in the "public controversy" over its public-private project, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (Free Speech Clause).

was expressing a verifiable and true proposition, a verifiable but false proposition, or an unverifiable opinion. In such circumstances, the court should have declared her statement constitutionally protected as a matter of law. By failing to do so, the court aligned itself with an incorrect minority view among the lower courts, which this Court should reject.

Finally, whatever Ms. Hurchalla meant, the uncontroverted record shows she genuinely believed her statement. That alone is a complete defense under the First Amendment. But again, the court below disregarded the relevant record.

These errors individually, and especially together, profoundly erode the First Amendment's protections and expose ordinary citizens to devastating civil liability if they ask their representatives to scrutinize regulated projects in the interest of the public good. The decision below encourages private actors who are the object of such exhortation to wield litigation as a weapon to silence potential critics. The inevitable result is that speech will be stifled, to the public's detriment.

A. The Court Below Erroneously Interpreted Ms. Hurchalla's Statement Without Accounting For Its Context

The court of appeal's analysis of Ms. Hurchalla's statement rests on a fundamental error: failing to account for the statement's context. When construing a statement to determine whether it is protected by the First Amendment against tort liability, courts should consider the statement's whole context, including its "immediate context" and the "broader social context

into which the statement fits." *Jolliff* v. *NLRB*, 513 F.3d 600, 611-612 (6th Cir. 2008) (surveying cases).[4]

The court below did not do this. Instead, it blinded itself to vital aspects of the context surrounding Ms. Hurchalla's statement. The supposedly false statement in Ms. Hurchalla's January 4 email to County commissioners stated:

> [In 2008,] the District staff continued to suggest some vague storage value but changed the emphasis to the [stormwater treatment area] that would be built on site at the completion of the project in 20 years. A study was to follow that *documented the benefits* [of the project]. *That study has not been provided.* **There does not appear to be any peer review by the CERP team to verify benefits from the rock-pit.** … Neither the storage *nor the treatment benefits have been documented.*

App.29a (emphasis added). The italicized portions of this passage are the portions that the court below italicized in its opinion and found to be false and uttered with actual malice. *See* App.10a.

The deficiency of the court's analysis begins with its complete disregard of the bold sentence above—

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[4] *See also, e.g.*, *Levan* v. *Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240 n.28 (11th Cir. 1999) ("we must determine what the report, taken as whole, is actually alleging about" plaintiff"); *Lee* v. *Bankers Tr. Co.*, 166 F.3d 540, 546-547 (1st Cir. 1999) (considering content, verifiability, and context in determining whether a statement was defamatory); *Lapkoff* v. *Wilks*, 969 F.2d 78, 82 (4th Cir. 1992) ("In determining whether a statement expresses an actual fact about an individual such that the comment is actionable or whether the comment is a non-actionable opinion, the court may consider … the meaning of the statement in context ….").

which it omitted entirely: "There does not appear to be any peer review by the CERP team to verify benefits from the rockpit." *See* App.10a. That statement is critical to understanding Ms. Hurchalla's email. It explains that when Ms. Hurchalla wrote that a "study" was "to follow that documented the benefits" and "[t]hat study has not been provided," she was referring to the missing CERP study. Ms. Hurchalla confirmed this at trial. She testified that, based on her earlier meeting with Lake Point's representatives, she expected a CERP peer-reviewed study of the project's benefits to be performed and provided to her. Tr.1506-1508, 1511. And she specifically testified, without contradiction, that a CERP study was the study to which she was referring when she wrote that a study documenting the project's benefits was to follow but had not been provided. Tr.1511 ("When I say that a [study] was promised and I haven't got it," "that is what I mean."). Therefore, the immediate and broader context establish that Ms. Hurchalla's statement that a study documenting benefits was to follow but had not been provided was true, given that there is no dispute that a CERP study was never performed. *See* Tr.1166, 1188, 1191, 1511-1512.

This context also informs the meaning of her statement that no "treatment benefits have been documented." The omitted statement explains that the CERP study would "document" the project's benefits, for, as Ms. Hurchalla said in the omitted sentence, the purpose of the CERP study was "to verify benefits from the rockpit." Again, the broader context developed at trial confirms this. She testified that "whether [the project is] worth doing" depends on "run[ning] the large scale model with all the CERP pieces in it"; only the CERP study would be "comprehensive" and subject to CERP's peer review and to review by the

Corps, all of which would make the study "much more likely to get things right." Tr.1511-1512.

The court seized on Ms. Hurchalla's testimony that, "[a]s far as the treatment benefits, there is a study, and I did review that study." Tr. 1550; *see* App.11a. According to the court, this testimony showed that Ms. Hurchalla "admitted that she had reviewed the study showing treatment benefits, and thus, she was aware that her statement that there were no documented benefits was false." App.11a. That is wrong. To start, in quoting this testimony, the court inserted the phrase "documenting treatment benefits" after the phrase "there is a study." *Id.* As the transcript shows, Ms. Hurchalla never said that the preliminary study "documented" any benefits. Just the opposite: She testified that the study of which she was "aware" identified itself as a "preliminary study," *id.*, and she testified that this preliminary study itself noted that "other studies would need to be done." Tr.1551. She further testified that the preliminary study presented a model addressing only one limited issue: how much phosphorous would be removed from soil if water were "sen[t] through" "600 acres anywhere." Tr.1550. It is undisputed that the preliminary study had not gone through CERP peer review and did not assess the project overall or, as Ms. Hurchalla testified, assess whether a "better cost benefit ratio" could be achieved by instead increasing the size of a different, extant stormwater treatment area. Tr.1550-1551.

In other words, the January 4 email's focus on the CERP study reflected Ms. Hurchalla's view that the preliminary study, whose scope was limited and which was unreviewed by CERP, was insufficient to "document" the project's benefits; only the comprehensive,

peer-review CERP study could do that, but that study was never performed.[5]

By ignoring this vital context, the decision below invites every private actor who might be harmed by some governmental action to scour the public record for any critical remark that *could* be considered false if read in isolation. If that could properly result in liability, that would inevitably deter speakers from expressing their views to government officials because even carefully worded and supported statements will often be amenable to misinterpretation.

B. The Court Below Erroneously Deemed Ms. Hurchalla's Statement To Be A Verifiable Factual Statement

If Ms. Hurchalla's statement that the project's "benefits" had not been "documented" was not *true*, that was only because it was not even *verifiable*, and thus, it was constitutionally protected. The court erred in concluding otherwise.

1. "[S]tatement[s] of opinion relating to matters of public concern" are entitled to "full constitutional protection" unless they allege a "provably false" and "objectively verifiable" fact. *Milkovich*, 497 U.S. at 20, 22. This is among the most important "constitutional

[5] The court below said Ms. Hurchalla's "expert agreed that 2008 models showed storage and treatment benefits of the stormwater treatment area." App.11a. The court's assertion misunderstands the expert's testimony. Although the expert testified that the preliminary study "addressed" the "subject" of the project's benefits, Tr.1186, he also testified that the preliminary study did not "document storage and treatment benefits of the Lake Point project … adequately," Tr.1184—a view that accorded with the view Ms. Hurchalla expressed in her supposedly false email.

limits" on tort actions. *Id.* at 16; *see also Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 773 (1986).

Courts strictly enforce the distinction between verifiable and non-verifiable statements to ensure that tort suits do not become "an instrument for the suppression of" opposing viewpoints, particularly on controversial policy disputes. *Snyder* v. *Phelps*, 562 U.S. 443, 459 (2011) (quotation marks omitted). Lower courts have therefore consistently rejected plaintiffs' creative efforts to spin a statement of opinion as a statement of verifiable fact. *See, e.g.*, *Brokers' Choice of Am., Inc.* v. *NBC Universal, Inc.*, 861 F.3d 1081, 1121 (10th Cir. 2017) (no claim where defendant said plaintiff was "not telling the truth … that an annuity is the most liquid place a senior citizen could put their money").[6]

2. The court below ignored this line. Without any analysis, it stated that "Hurchalla's comments were represented as statements of fact," or "as 'mixed opinions,'" "as opposed to statements of pure opinion." App.11a. That is incorrect. The immediate and broader context described above shows that, in saying no benefits had been "documented," Ms. Hurchalla was expressing her *judgment* that the project's overall benefits had not been *sufficiently* substantiated. In the key sentence from Ms. Hurchalla's email that the court

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[6] *See also Hogan* v. *Winder*, 762 F.3d 1096, 1107 (10th Cir. 2014) (no claim for saying plaintiff was terminated for "performance issues" because statement was "nonspecific"); *Gardner* v. *Martino*, 563 F.3d 981, 987-988 (9th Cir. 2009) (no claim for accusing plaintiff of "lying"); *McClure* v. *American Family Mut. Ins. Co.*, 223 F.3d 845, 853 (8th Cir. 2000) (no claim for accusing plaintiff of "conduct unacceptable by any business standard"); *Phantom Touring, Inc.* v. *Affiliated Publ'ns*, 953 F.2d 724, 728 n.7 (1st Cir. 1992) (no claim for assertion that plaintiffs were "blatantly misleading the public").

omitted from its opinion, Ms. Hurchalla said that the purpose of the missing CERP study was "to *verify* benefits." App.28a (emphasis added). That omitted sentence is a Rosetta Stone, revealing that Ms. Hurchalla equated the term "documented" with *verifying* the existence of benefits. And Ms. Hurchalla's trial testimony confirms that she used "documented" to express her judgment about the sufficiency of the preliminary study of which she was aware. *See supra* pp.9, 19.

Ms. Hurchalla's use of "documented" is appropriate and natural. *See, e.g.*, *Document*, Merriam-Webster Dictionary (defining "document": "to provide with factual or *substantial* support for statements made or a hypothesis proposed[;] especially to equip with exact references … to *authoritative* supporting information" (emphasis added)), https://www.merriam-webster.com/dictionary/document (visited Sept. 10, 2020). Indeed, an expert witness used the term the same way, when he testified that the preliminary study did not "document storage and treatment benefits of the Lake Point project … adequately." Tr.1184.

A statement expressing such a *judgment* about the sufficiency of a study to demonstrate benefits authoritatively is inherently unfalsifiable. Therefore, the court should have declared Ms. Hurchalla's statement protected.

3. The court of appeals' determination that Ms. Hurchalla's statement was a verifiable but false assertion implicitly rested on a different meaning of "documented," namely, "to furnish documentary evidence of." *Document*, Merriam-Webster Dictionary, *supra*. Although that is a valid use in some contexts, that is not the right interpretation of Ms. Hurchalla's statement given its immediate and broader context, as just

explained. But if there is any doubt about which meaning to ascribe to "documented" as Ms. Hurchalla used it, that ambiguity should have been resolved in Ms. Hurchalla's favor and her speech deemed protected from tort liability. The court's failure to do so implicates a conflict among lower courts that this Court should resolve.

At worst, Ms. Hurchalla's statement is ambiguous about whether she meant there was no documentation addressing the project's benefits or there was no authoritative study sufficiently substantiating that the project was beneficial (in which case the statement was either true or not verifiable at all). This Court has indicated that when the falsity of a statement depends on adopting one among several reasonable interpretations, the ambiguous statement must be held privileged and protected as a matter of law. *Bose*, 466 U.S. at 512 (no liability where article reflected "one of a number of possible rational interpretations" of an event that "bristled with ambiguities" (quotation marks omitted)). And most lower courts (particularly federal courts) have followed suit. *See, e.g.*, *Phantom Touring*, 953 F.2d at 728 (words that "admit of numerous interpretations" are inherently "unprovable").[7]

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[7] *See also Campbell* v. *Citizens for an Honest Gov't, Inc.*, 255 F.3d 560, 567 (8th Cir. 2001) ("A plaintiff cannot choose what meanings to attach to … statements where several are available."); *Veilleux* v. *National Broad. Co.*, 206 F.3d 92, 113 (1st Cir. 2000) ("Defamation liability should not be premised on statements of such uncertain meaning."); *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 863 (9th Cir. 1999) (calling someone "Jimmy Hoffa" protected because not everyone would "associate the name and persona of Jimmy Hoffa with *criminal* activity"); *Briggs* v. *Ohio Elecs. Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995) (statement "protected by the First Amendment" if it "is not so much false as it is ambiguous"); *McCabe* v. *Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (state-

In nonetheless deeming Ms. Hurchalla's statement factual, the court below in effect aligned with the minority of courts that permit a statement that is only ambiguously verifiable to be a basis for tort liability. *See, e.g.*, *Ballard* v. *Wagner*, 877 A.2d 1083, 1087-1088 (Me. 2005) (If "average reader could reasonably understand the [allegedly defamatory] statement as either fact or opinion, the question of which it is will be submitted" to the fact-finder).[8]

This case presents an opportunity for the Court to resolve this disagreement—by rejecting the erroneous minority position. Under *Milkovich*, the proper inquiry is whether a statement is "provably false" and involves "*objectively* verifiable" assertions. 497 U.S. at 20, 22 (emphasis added). Where a statement is ambiguous as to whether it expresses a verifiable proposition, the statement necessarily *cannot* be *objectively* verified; on some plausible interpretation, the statement is not verifiable *at all*. And where a statement is ambiguous as to whether it expresses a true proposition, the state-

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ment that means "different things to different people" is "incapable of being proven true or false" (quotation marks omitted)).

[8] *See also Aldoupolis* v. *Globe Newspaper Co.*, 500 N.E.2d 794, 797 (Mass. 1986) (holding that if statement is ambiguously verifiable, "it is for the jury to determine" liability); *Wynn* v. *Smith*, 16 P.3d 424, 431 (Nev. 2001) (per curiam) (acknowledging that "[a]lthough ordinarily the fact-versus-opinion issue is a question of law for the court," where it is ambiguous if the statement is a verifiable factual assertion, "the issue must be left to the jury's determination"); *Yetman* v. *English*, 811 P.2d 323, 332 (Ariz. 1991) (sending claim to jury because "comment [was] sufficiently ambiguous that a reasonable listener … might reasonably interpret the words" as verifiable statement); *Campanelli* v. *Regents of Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 895 (App. 1996) (whether defendant is liable for ambiguously verifiable statement "should be resolved by a jury").

ment necessarily cannot be *proved* false; on some plausible interpretation, the statement is true.

After all, it is well-established that a speaker may be liable only if the court is "*sure* that the speech in question actually falls within the unprotected category … to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505 (emphasis added). Accordingly, liability may attach only if the speech is "susceptible of no reasonable interpretation" that would be protected. *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-470 (2007). Courts thus "must give the benefit of any doubt to protecting speech rather than stifling speech." *Id.*; *see also Hepps*, 475 U.S. at 776 ("[W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech."). Allowing liability for speech that could be interpreted in different ways, only some of which are false, would strip away the "breathing space" that free expression—and especially speech to government officials on matters of public concern—"require[s] in order to survive." *Milkovich*, 497 U.S. at 19 (quotation marks omitted).

C. The Court Below Incorrectly Disregarded The Evidence That Ms. Hurchalla Subjectively Believed Her Statement To Be True

However Ms. Hurchalla's statement should be interpreted, it cannot be the basis for tort liability because she believed it to be true. The court below committed a serious error in disregarding the uncontroverted evidence of Ms. Hurchalla's good-faith belief.

Under the First Amendment, the speaker's attitude toward the truth or falsity of her statement is central. There is actual malice only if the speaker "*in fact*

entertained serious doubts as to the truth of" her statement, "or acted with a high degree of *awareness* of … probable falsity." *Masson*, 501 U.S. at 510 (quotation marks omitted; emphasis added). Thus, "[t]he burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant *realized* … his statement was false or that he *subjectively entertained* serious doubt[s] as to the truth of his statement." *Bose*, 466 U.S. at 511 n.30 (emphasis added).[9]

The uncontroverted evidence at trial showed that Ms. Hurchalla *believed* that the preliminary study did not "document" the project's treatment benefits. As she explained in her testimony, her view was that the preliminary study of which she was aware was insufficient because it did not consider the "cost benefit ratio" of alternative approaches, it had not been subject to CERP peer review, and it said "other studies would need to be done." Tr.1551; *see supra* p.9, 19.

Even if Ms. Hurchalla's view was mistaken, or even if her use of "documented" was idiosyncratic, her good-faith belief in the truth of her statement was a complete defense to tort liability. The First Amendment's "broad protective umbrella" encompasses idiosyncratic expression, even "malapropism[s]," in order to "eliminate the risk of undue self-censorship and the suppression of truthful material," *Bose*, 466 U.S. at 513 (quotation marks omitted). Thus, this Court held in *Bose* that even where a defendant's word choice "reflect[ed] a

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[9] *See also Manzari* v. *Associated Newspapers Ltd.*, 830 F.3d 881, 892 (9th Cir. 2016); *Celle* v. *Filipino Reporter Enters. Inc.*, 209 F.3d 163, 182-183 (2d Cir. 2000); *Dunn* v. *Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 (11th Cir. 1999); *Levinsky's, Inc.* v. *Wal-Mart Stores, Inc.*, 127 F.3d 122, 130 (1st Cir. 1997).

misconception," the statement was nonetheless protected where the speaker "did not realize his folly at the time." *Id.* Similarly, the worst that could be said of Ms. Hurchalla is that she did not realize her statement would be construed as an absolute declaration that no study had ever addressed any aspect of the project's benefits, and therefore she did not speak with actual malice.

The approach embraced by the decision below will require speakers to meticulously verify in advance their every utterance. That will seriously endanger the integrity of our democratic system. Ordinary citizens who wish to petition their representatives about matters of the day will be afraid to do so, lest any misstep or inaccuracy expose them to crushing damages awards.

II. THE FIRST AMENDMENT PROTECTS MS. HURCHALLA'S STATEMENT BECAUSE IT HAD NO CAUSAL CONNECTION TO THE COUNTY'S ALLEGED CONTRACT BREACHES

The court below also erred in affirming the judgment without any evidence of a causal link between the supposed falsity of Ms. Hurchalla's January 4 email and the County's alleged breaches of the Interlocal Agreement.

Although tort law (including tortious interference with a contract) includes a causation element, "[o]ne of the most powerful themes in modern First Amendment jurisprudence … is that the causal nexus between speech and [harm] must be extremely tight and compellingly obvious before liability for the speech may be imposed." 2 Smolla, *Law of Defamation* § 11:50 (2d ed. 2018); *see, e.g.*, *Masson*, 501 U.S. at 516-517. This First Amendment overlay is necessary to ensure that civil or

criminal liability is not used to suppress speech. Thus, "more than mere falsity [is required] to establish actual malice: The falsity must be "'material." *Air Wis. Airlines*, 571 U.S. at 247 (quotation marks omitted). To meet this standard, a plaintiff must prove that the supposedly false statement "would have a different effect on the mind of the reader or listener from that which the truth would have produced." *Id.* at 250 (quotation marks omitted).

Here, however, the undisputed evidence shows that the County's alleged contract breaches—(1) issuing the NOVs; (2) not terminating the Development Order; and (3) not accepting a contribution check from Lake Point—were unrelated to and independent of Ms. Hurchalla's supposedly false statement that the project's "benefits" had not been "documented." Indeed, County staff testified at trial that their actions were *not* influenced by Ms. Hurchalla. Tr.1021, 1024, 1032.

The County issued the NOVs because of Lake Point's code violations, primarily mining outside permissible boundaries under the Development Order. C.A.R.7003-7013. Those code violations had nothing to do with whether the project's benefits had been "documented," and the NOVs neither said nor implied anything about the benefits of the project. Moreover, the undisputed evidence showed that the County's decision to issue the NOVs was entirely independent of any influence by Ms. Hurchalla's supposedly false statement about the lack of "documented" project benefits. The NOVs were the result of an investigation by County staff that began before Ms. Hurchalla's supposedly false January 4 email. *See* Tr.1020; C.A.R.5974-5980, 7939-7944; *supra* pp.6-7. From there, the County's investigation and decisionmaking process continued without regard to the email. *See supra* pp.9-10. In a

Board meeting held four days after Ms. Hurchalla sent the allegedly false email, the Board focused on the code violations identified by County staff without mentioning whether the project's benefits had not been "documented." C.A.R.7759-7763, 7668-7669; Tr.505-519. Ms. Hurchalla did not know about the NOVs until after they were issued. Tr.1558.

Additionally, the County declined to vacate the Development Order and to accept Lake Point's contribution check because Lake Point refused to provide documentation that it had transferred the Property to the District. C.A.R.7690-7691; Tr.1538; *see* C.A.R.5976. Whether the County's actions were on firm ground is irrelevant here. What matters is that, again, those actions had nothing to do with the project's benefits or Ms. Hurchalla's supposedly false statement about them.

In sum, Lake Point utterly failed to adduce evidence showing that Ms. Hurchalla's supposedly false statement that the project's benefits had not been "documented" would have affected the relevant County officials. The First Amendment does not permit tort liability on such a record. *See Kassel* v. *Gannett Co.*, 875 F.2d 935, 949 (1st Cir. 1989) (First Amendment "requires that unbounded speculation by juries be discouraged, lest other speakers be chilled"). If the actions that supposedly breached the Interlocal Agreement were predicated on false information provided by Ms. Hurchalla, Lake Point surely could have sought to invalidate them through ordinary administrative and judicial review procedures on that ground, but Lake Point never tried.

III. THE QUESTION PRESENTED IS IMPORTANT

The gravity of this case cannot be overstated. Recall the circumstances: After an independent administrative process, County officials took adverse actions that Lake Point never sought to invalidate. Instead, Lake Point sued Ms. Hurchalla, and she was held tortiously liable—to the tune of $4.4 million—for the County's actions. Yet those actions had nothing to do with the substance of the supposedly false email Ms. Hurchalla sent to County commissioners about the lack of "documented" project benefits, and the commissioners who received that email had only a glancing role in the process that yielded the County's adverse actions. On top of that, Ms. Hurchalla's statement was at least arguably either a verifiable *and true* assertion or an unverifiable opinion that there was no comprehensive, reliable study substantiating the project's overall benefits. And Ms. Hurchalla genuinely believed her statement to be true when she wrote it. In affirming the judgment, the court misconstrued Ms. Hurchalla's statement by stripping out and disregarding its immediate context and ignoring its broader context, by inserting words into Ms. Hurchalla's mouth, and by treating the statement exclusively as a verifiable but false assertion. And the court required no proof of any causal connection between the statement and the County's alleged contract breaches.

This egregious collection of errors resulted in a decision that sends a clear message to citizens that they can be exposed to ruinous civil liability—not to mention the expense and stress of litigation—merely by speaking to their representatives on matters of public concern in ways that might adversely affect others. That message fundamentally jeopardizes the integrity of our democracy and undermines the force of the First

Amendment. Virtually every governmental action elicits debate. And virtually every governmental action benefits some people and harms others. The former is an ingredient of a pluralistic democracy, guaranteed by the constitutional rights to speak freely and to petition the government; the latter is the unavoidable consequence. A person harmed by a governmental action must not be permitted to use tort law to punish any debate that might have led to the adverse action—particularly when the speech or petition could reasonably be understood to be true, an opinion, or an expression of a good-faith belief. Hyperbole and ambiguity are integral features of ordinary language. Citizens should not be required to speak with lawyerly precision and measure when engaging in public discourse. If the failure to do so carries the possibility of massive tort liability, citizens simply will not speak. The decision below will not *chill* speech; it will *freeze* it.

Under the decision below, entities intolerant of speech they dislike would be able to weaponize tort law to punish the speakers. Consider a parade of all-too-likely horribles. A company submits a comment on a proposed environmental regulation stating there is "no evidence" the regulation would prevent the environmental and health harms it targets. Citing the company's comment (or not), the agency declines to adopt the regulation. A class of people who suffered the type of health harm the proposal had targeted then sues the company for tortiously causing the harm, arguing that the comment was deliberately false based on evidence that the company was aware of a study—possibly produced by a partisan organization—showing the potential for the proposed regulation to reduce the chances of the health harm in some circumstances. In defense, the company argues that it merely meant that that study

was weak, limited, and unpersuasive. Under the decision below, the company would lose and be held liable for the harm.

Or suppose that at a legislative hearing on a bill that would ban a type of firearm, a witness testifies about an analysis showing that the ban would reduce the risk of injury by a certain percentage, given certain assumptions. Then the head of an influential opposing advocacy organization testifies that there is "no basis" to believe the proposed ban would prevent gun violence. The legislature rejects the bill. Subsequently, a person is killed by someone wielding that type of firearm, and the victim's family sues the advocacy organization and its head for wrongful death. Under the decision below, the advocacy organization and its head would not have a valid First Amendment defense.

There is already a proper mechanism for obtaining relief from adverse governmental action that was based on false information: administrative and judicial review of the governmental action. The decision below diverts those challenges instead into tort actions against private speakers. Licensing the bullying tactic used by Lake Point here is extremely dangerous. It will invite judges and juries to "impose liability on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988); *see also Bose*, 466 U.S. at 505 (observing the "danger that decisions by triers of fact may inhibit the expression of protected ideas"). That risk of liability—not to mention the risk of costly and protracted trials—will vastly over-deter critical engagement in public discourse. *See Helstoki* v. *Meanor*, 442 U.S. 500, 508 (1979) (First Amendment protects speakers "not only from the consequences of

litigation's results but also from the burden of defending themselves").

The decision below must be corrected, not only to vindicate Ms. Hurchalla's constitutional rights but to reaffirm the foundational First Amendment principles that protect the open and robust public discourse that is vital to our system of self-governance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES