No. 20-332

In The
# Supreme Court of the United States

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MAGGY HURCHALLA,

*Petitioner,*

v.

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

*Respondents.*

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**On Petition For Writ Of Certiorari To
The Fourth District Court Of Appeal Of Florida**

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**BRIEF FOR *AMICI CURIAE* BULLSUGAR.ORG, CONSERVATION ALLIANCE OF ST. LUCIE COUNTY, FLORIDA WILDLIFE FEDERATION, FRIENDS OF THE EVERGLADES, MARINE RESOURCE COUNCIL OF EAST FLORIDA, MARTIN COUNTY CONSERVATION ALLIANCE, SMALL WORLD ADVENTURES, LLC, THE PEGASUS FOUNDATION, AND WATERKEEPERS, FLORIDA IN SUPPORT OF THE PETITIONER MAGGIE HURCHALLA**

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## INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amici* respectfully submits this brief *amicus curiae* in support of Petitioner Hurchalla.[1]

**Bullsugar.org** ("Bullsugar") is a Florida non-profit membership organization. Its mission is to educate the public about water quality and related environmental issues, and advocate for policies that further this mission. Bullsugar informs citizens and public officials about threats to clean water, and advocates for policies to improve water quality. It advocates for the governmental protection of wetlands because of the flood protection, water quality, habitat and other functions they provide.

**Waterkeepers**, **Florida** is a not-for-profit organization composed of all 13 Waterkeeper organizations working in Florida to protect and restore water resources across over 45,000 square miles of watershed supporting millions of Floridians. On behalf of its members, Waterkeepers Florida informs the public

[1] Pursuant to Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the *Amicus Curiae's* intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

and communicates with public officials on public policy matters impacting human and ecological health.

**Florida Wildlife Federation, Inc.** ("FWF") is a Florida non-profit corporation, with approximately 60,000 members and supporters in Florida. FWF pursues its mission to conserve the natural resources of the state, advance environmental education, ethical outdoor recreation, and sustainability by advocating before governmental bodies and litigating in state and federal court. FWF and its members often voice opinions as to the environmental impacts of proposed actions. FWF frequently relies on technical and scientific information produced by third parties to support its positions.

**Friends of the Everglades, Inc.** ("Friends") is a Florida non-profit corporation which pursues its mission to preserve, protect, and restore the Everglades by advocating before government bodies, including the courts, for compliance with environmental laws. Friends' members have environmental, recreational, property, economic, health, and aesthetic interests in the outcome of this advocacy. Friends has initiated litigation or intervened at many levels of governmental action and relies on technical and scientific information gleaned from legitimate sources, much of which is disputed and debated.

**Martin County Conservation Alliance** is a Florida not-for-profit organization, which, on behalf of its members, informs the public and communicates with public officials on public policy matters affecting

human and ecological health and the quality of life in their communities.

**Small World Adventures**, **LLC** is a Colorado-based adventure travel company that specializes in whitewater kayaking trips in the United States and Ecuador. SWA is dedicated to the outdoors, to river conservation, and to spreading the love of whitewater kayaking. Access to wild places is crucial to its business model. Through its commitment to 1% for the planet, The Ecuadorian Rivers Institute, American Whitewater, and other non-profit conservation organizations Small World supports and encourages the protection of wild places and supports citizen advocacy in furtherance of that mission.

**The Conservation Alliance of St. Lucie County** has dedicated itself to the preservation and protection of land and water resources, including native Florida ecosystems and habitats, flora and fauna. It advocates for these precious areas to be protected. The Alliance has experienced this chilling effect, related to its public objections to a bridge project in St. Lucie County.

**Marine Resource Council of East Florida** is a Florida non-profit organization dedicated to saving Florida's water quality for public enjoyment. It accomplishes its mission by engaging residents in science, restoration, and education and motivates them to participate in the democratic process.

**Pegasus Foundation** is a not-for-profit Massachusetts corporation with a mission to improve

animal welfare through grant-making and education in the United States, the Caribbean, on Native American lands, and in Africa. In Florida, the Foundation helps homeless and abandoned dogs and cats with medical needs. It advocates for better services for animals and for preserving critical wildlife habitats. The Foundation is currently advocating to stop ongoing pollution that is harming the Indian River Lagoon and its human and animal inhabitants. Participation in environmental policy issues is critical to the goals of the Foundation.

As stakeholders who regularly advance their positions by speaking to and before governmental bodies and courts, all *amici* have substantial experience with, and important perspectives about communications with public officials regarding complex, debatable, and disputed scientific matters like those at issue in this case.

*Amici* represent the very type of civic-minded citizens whose communications to government and about governmental policy will now be stifled by the rulings and reasoning of the court in this matter. They have great interest in preserving the rights of citizens to communicate with their public officials about matters of public policy to protect natural resources and safeguard public health. Their communications with public officials would all but cease if they face legal liability for good faith statements made to government decision-makers about scientific matters. The precedent for tort liability set by the court's decision will effectively silence the voices of citizens

who are exercising their fundamental rights to speak on behalf of a clean, healthy environment.

## SUMMARY OF THE ARGUMENT

The Court should grant certiorari to remedy the court's error in failing to distinguish between debatable statements about scientific conclusions and those concerning objectively verifiable facts. Statements about whether a study is adequate to document a conclusion (in this case whether a proposed mining pit would benefit the environment)[2] are of an inherently different character than those "facts" which are, by their nature, "objectively verifiable."

Statements like the Petitioner's in this case, about a debatable scientific issue, have a unique character. Reflecting analysis that is inherently subject to debate and uncertainty, they are more opinion than objectively verifiable fact. They are often points of good faith debate between citizens, industries, and government. Such debates play out constantly between academics, scientists, and interest groups, as well as before federal, state, and local governments, administrative law judges, and state and federal judges. The judicial branches have recognized the scientific uncertainties inherent to scientific and environmental disputes, and that such disputes are more appropriately resolved in scientific and non-judicial forums, rather than by

[2] This is the "false" statement the court below deemed competent to support the jury award against the Petitioner.

judicial tort litigation. A citizen should not be liable for having uttered an actionable "falsehood" if an agency, law judge, court, or jury "finds" it disagrees with a complex scientific or technical statement the citizen asserts honestly and in good faith while seeking to influence government.

If citizens can be liable for actionable "falsehoods" for their good faith, debatable statements about complex, scientific issues, legitimate citizen input and participation in government environmental and human health decisions will cease. The exercise of First Amendment rights will be unavailable to most citizens.

The Court should grant certiorari to address the state court's rulings that label improper and malicious methods and circumstances of public speech that are common and necessary to the exercise of First Amendment rights relative to such matters. The Court should address whether a citizen with superior knowledge of complex issues acts improperly when asserting her views (but does not explain the other side of the debate) outside of a public hearing to her less informed representatives and urges them to adopt them as their own. Particularly in the context of complex scientific, engineering and environmental conclusions, such caveats and limitations on public speech are unconstitutional.

## ARGUMENT

## I

## THE COURT SHOULD GRANT CERTIORARI TO RECOGNIZE THE INHERENTLY DEBATABLE NATURE OF SCIENTIFIC CONCLUSIONS

### a. The State Court Failed to Recognize the Complex, Opinion-Based Nature of Scientific / Environmental Facts.

The court below found Hurchalla liable for two statements in an email she sent to her elected representatives:

> the [So. Fla. Water Management Dist.] staff continued to suggest some vague storage value but changed the emphasis to the [stormwater treatment area] that would be built on site as the completion of the project in 20 years. A study was to follow that *documented the benefits*. . . . That study has not been provided. [ . . . ]
>
> Neither the storage nor the treatment benefits have been documented.

Cert. Petition, pgs. 7-8.

The court ruled these statements concerning the lack of "documented" project "benefits" are not protected by the First Amendment.[3] The court instead deemed them "competent substantial evidence" that the jury could have believed "clearly and convincingly proved that Hurchalla demonstrated actual malice . . .

[3] Cert. Pet. at p. 13.

by making statements she either knew were false or with reckless disregard as to whether they were false."[4] The court divined that the jury could have found the statements to be "false" because Hurchalla was aware of the existence of a report that concluded environmental benefits would result from the project.[5]

However, Hurchalla testified (and so did an expert) that the preliminary report's conclusion lacked required peer review, and that more study was required to document the claimed benefits.[6] The decision ignored the sentence in the email, where Hurchalla explained, "[t]here does not appear to be any peer review by the CERP team to verify benefits from the rockpit."[7] Hurchalla's explanation giving the context of the statements was irrefutably true.[8]

But even if the issue was whether the storage or treatment had been documented, the very nature of

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[4] Id.

[5] Id.

[6] Cert. Pet. at p. 20.

[7] CERP is the acronym for the Comprehensive Everglades Restoration Plan, established by Congress to protect and restore the Florida Everglades, and administered jointly with the State of Florida. Cert. Pet. Cert at p. 8. The Petition for Certiorari explains that Ms. Hurchalla was referring to a peer reviewed study performed by a team administering CERP, and stating her view (corroborated by an expert witness at trial) that the preliminary, limited analysis done for the mining pit did not document environmental benefits. Cert. Pet. at pp. 3, 8 and 9.

[8] Because an authoritative study of the mining project's benefits that was to be conducted by the CERP team had not been done. Cert. Pet. at pgs. 8, 19-20.

that question is a matter of inherently debatable and subjective judgment, not an objectively verifiable fact.[9] Whether the subject report "documented" environmental "benefits" of the mining pit is a subjective opinion that is protected by the First Amendment. It is not an objectively verifiable fact[10] that can support a tortious falsehood claim.

The statements the court below deemed competent to support a jury's presumed finding that Ms. Hurchalla lied were grounded in the lexicon of this scientific/environmental field generally and the Comprehensive Everglades Restoration Plan (CERP) specifically. Hurchalla's statement, which she reasonably believed to be true, was far more in the nature of an opinion than pure fact. Her assertion that no study "*documented*" the claimed water resource benefits of the mining pit reflected her view that the report submitted by Lake Point was preliminary not peer-reviewed as part of the formal joint federal-state CERP planning process[11] and used selective or flawed

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[9] Cert. Pet. at p. 15.

[10] In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court ruled that the difference between opinion and fact is that the latter is a statement that is provable as false on the basis of objective evidence. *Id.* at 19, 21-22. The Court held that an allegedly defamatory opinion on a matter of public concern is not actionable if the opinion does not contain a provably false factual connotation, at least when a media defendant is involved. *Id.* at 19-20.

[11] *See* Water Resources Development Act (WRDA) of 2000, Pub. L. 106-541, § 601(b), 114 Stat. 2572, 2680-2681 (2000) (approving the Comprehensive Everglades Restoration Plan, a long-term series of existing and future water management

data or analysis In short, Hurchalla's statements on which the court below found her liable were well-reasoned, good faith, debatable statements in the nature of opinion. The court below focused exclusively on the word "documented", and failed to give due regard to the special context in which the word was used, or to Hurchalla's or the expert's reasoning.

By glossing over the nuanced distinction between environmental conclusions and pure, objectively verifiable facts, the state court applied the wrong law, devastating the free speech rights of those concerned with scientific and environmental matters. It ignored the inherently complex, uncertain, and debatable nature of scientific and environmental facts.

The Court should grant certiorari, examine the matter *de novo*,[12] whether the statement was an opinion (or a *debatable* scientific/environmental conclusion), and only if it was not, examine *de novo* whether it was published knowing it was objectively false (and therefore maliciously) or based on an honest, good faith, arguable belief it was accurate.[13] The Court should review the failure of the state court to recognize the distinction between verifiable and non-verifiable

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projects to meet ecosystem restoration, flood control and water supply needs in south Florida, based on project implementation reports and independent scientific review). Programmatic Regulations codified at 33 C.F.R. Part 385 govern the CERP decision-making process.

12 Especially because the jury did not actually make a finding on the disputed issue of what the Lake Point study did document.

13 Cert. Pet. at p. 20.

statements this Court has required to ensure that tort suits do not become "an instrument for the suppression" opposing viewpoints on controversial or complex public policy disputes. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

**b. Due to Their Inherently Uncertain and Debatable Nature, Good Faith Statements Regarding Disputed Scientific Conclusions of Public Concern Cannot Constitute Tortious Falsehoods.**

Because of the inherently debatable, uncertain and imprecise nature of scientific and environmental conclusions, the rule that a party seeking falsehood tort damages must prove that the allegedly offending statements are "provably false" and "objectively verifiable"[14] should rarely, if ever, result in liability for such statements. Whether the issue is the spread, treatment and prevention of COVID 19, the causes of and contributions to climate change, the impacts of fracking on human health, or where a wetland ends and the upland begins,[15] the "facts" about human

[14] "[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 v. Lorain Journal Co.*, 497 U.S. at 20, 22.

[15] For example, the complexity and inherent difficulty of determining whether a parcel of land is a *wetland* is well illustrated by the various opinions issued in this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

health and the environment inherently involve uncertain or debated science.

Science engenders "much debate and disagreement. . . ."[16] Good faith uncertainty and dispute are inherent to the nature of scientific "facts." Courts recognize that scientific conclusions are inherently subject to good faith debate, and that judges are ill suited to resolve these disputes.

The issue this Court addressed in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), of whether new information brought to an agency's attention during a NEPA project review was "significant" is analogous to the question of whether the study in this case adequately documented the environmental benefits of the mining pits. Upholding the agency's determination, the Court recognized the conclusion as one upon which "another decisionmaker might have reached a contrary result. . . ." Id. at 385.

In *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, the D.C. Circuit observed that:

> ***Questions involving the environment are particularly prone to uncertainty.*** [ . . . ] Undoubtedly, certainty is the scientific ideal—

[16] *See, e.g.*, *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202-1203 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985) (holding claims that a doctor was a fraud were protected First Amendment speech because "medical science, is at best an inexact science . . . " and thus speech on such matters is protected "[r]egardless of the merit of [those] opinion[s].").

> **to the extent that even science can be certain of its truth**.

541 F.2d 1, 24-25 (D.C. Cir. 1976) (emphasis added).[17]

In *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 11-12 (D. D.C. 2000), the D.C. Circuit also emphasized the inability of the judicial system to resolve disputes about environmental conclusions, explaining:

> Where the agency decision turns on issues requiring the exercise of technical or scientific judgment, it is essential for judges to "look at the decision not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."

(*citing Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (*en banc*).

The distinction between "simple" facts and those involved in Hurchalla's Certiorari Petition is perhaps most explicitly recognized in *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203 (D. D.C. 2005), where the court observed:

> this court will not second guess an agency decision or question whether the decision made was the best one. **This is particularly**

[17] *See also Lead Indus. Ass'n v. Envtl. Prot. Agency*, 647 F.2d 1130, 1152-1156 (D.C. Cir. 1980); *Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992).

> **the case when the Court is evaluating the Secretary's <u>scientific determinations</u>, <u>as opposed to simple findings of fact</u>.** *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983).

*Id.* at 211-212 (emphasis added).

The court found it "'especially appropriate" to defer to the expertise and experience of the agency charged with "making **difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors**." *Id.* at 212 (*citing Nat'l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 223 (D. D.C. 1990)).

The "scientific determination" the *Oceana* court characterized as involving "evaluations of the relevant quantitative and qualitative factors," as opposed to simple findings of fact, was whether the allowance of certain scallop fishing gear (large steel dredges and trawls that sweep along the ocean floor) would "jeopardize the continued existence" of loggerhead sea turtles. *Oceana, Inc.*, 384 F. Supp. 2d at 212-213. That conclusion is analogous to the one asserted by Hurchalla, *i.e.* that a study had not been done which *documented the benefits* of Lake Point's mining operation to her community's water resources. These are the kinds of conclusions and assertions involved in virtually every public debate about science. They involve a mix of quantitative, qualitative, and policy

considerations. They are not pure facts and cannot form the basis for tortious falsehood liability when a jury subsequently decides otherwise.

Recognition of the complex and inherently debatable nature of scientific conclusions underlies the federal jurisprudence involving challenges to federal agency actions under environmental laws. One example, involving, like the Hurchalla matter, a dispute over the adequacy of a scientific report, is *Friends of Congaree Swamp v. FH*, 786 F. Supp. 2d 1054 (D. S.C. 2011). In that case, the court rejected a claim that a federal agency's "consideration of the potential environmental impacts of the Project lacked the scientific rigor and high quality of analysis required by NEPA." The court stated,

> in evaluating the sufficiency of an agency's scientific analysis . . . courts "grant considerable discretion to agencies on matters 're-quir[ing] a high level of technical expertise.'" *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-659 (9th Cir. 2009) (quoting *Marsh*, 490 U.S. at 377). Thus, although a party challenging an agency's decision . . . "may cite studies that support a conclusion different from the one the [defendant agencies] reached, **it is not our role to weigh competing scientific analyses**." (emphasis added)

786 F. Supp. 2d at 1065 (citations omitted).[18]

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[18] *Accord Ecology Center v. Castaneda*, 574 F.3d 652, 659 (9th Cir. 2009) (finding "it is not our role to weigh competing scientific analyses."); *W. Watersheds Project v. Salazar*, 766

In *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), the court found it improper for the judiciary to "act as a panel of scientists that . . . chooses among scientific studies . . . and orders the agency to explain every possible scientific uncertainty." *Id.* at 988.[19] In *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992), the court ruled,

> To set aside the [agency]'s determination in this case would require us to decide that the views of the [plaintiff]'s experts have more merit than those of the [agency]'s experts, **a position we are unqualified to take**.

14 F.3d at 1333 (emphasis added).

In *Resolute Forest Products, Inc., et al. v. Greenpeace International, et al.* ("*Resolute Forest Products*"),[20] the district court dismissed tortious interference and related claims similar to those in this

F. Supp. 2d 1095, 1105, 1114, 1121 (Dist. Montana 2011) (Holding that "the courts' role is not to weigh in on competing scientific analyses" and upholding, as reasonably based on disputed science, an agency determination that a herd of Yellowstone bison was "viable and genetically diverse" and that the court is "not equipped with the scientific background necessary to evaluate" the validity of a report on the genetics of the bison submitted by the plaintiffs).

[19] *Accord*, *Oregon Natural Desert Ass'n. v. U.S. Forest Serv.*, 957 F.3d 1024, 1036 (9th Cir. 2020).

[20] *Resolute Forest Products et al. v. Greenpeace Int'l, et al.* 2019 U.S. Dist. LEXIS 10263 *; 2019 WL 281370 (U.S. District Court, N. Dist. Cal., Jan. 22, 2019) (Order Granting In Part And Denying In Part Motions To Dismiss And Strike); *Resolute Forest Products et al. v. Greenpeace Int'l, et al.*, 302 F. Supp. 3d 1005 (N. D. Cal. 2017).

case. The court's rulings highlight the reasons why statements reflecting an honestly held understanding of scientific or environmental conclusions should not be actionable as falsehoods.

In *Resolute Forest Products*, a logging company sued multiple organizations, officers, and employees, alleging defamation and tortious interference with prospective and contractual business relations.[21] The company alleged the defendants "had targeted the company with a number of media campaigns designed to reduce [its] profits through false or misleading statements about [its] impacts on the environment and on indigenous communities."[22] Resolute Forest claimed the defendants had published a "false report" accusing it of logging in a forest protected by the Canadian Boreal Forest Agreement, and later admitted that the company had not breached the agreement. The suit also targeted what the plaintiff described as the defendant's alleged campaign referring to Resolute Forest Products as "Resolute Forest Destroyer," in which it fabricated "phony photographic evidence" and misrepresented the location of Resolute's logging.[23]

The company also claimed the defendant's "tactics show that the organization does not 'actually care about . . . real environmental protection,' has no 'genuine interest' in protecting the forest, and that

[21] 302 F. Supp. 3d 1005, 1010 (N. D. Cal. 2017).

[22] *Id*. at 1011 (Internal quotation marks omitted).

[23] *Id.*

'science and truth are not important to Greenpeace.'"[24] It alleged that it lost profits because of the defendant's statements.[25]

Amici recommends to this Court the analysis upon which the district court dismissed the suit as an inappropriate use of tortious interference lawsuits to resolve disputes over public statements about disputed environmental conclusions.

The district court specifically addressed the issue, squarely present here, of statements regarding disputed scientific conclusions, observing, "many of Greenpeace's publications . . . rely on scientific research or fact."[26] The court found that the logging company's submission of two expert declarations contradicting the environmental defendant's statements:

> makes more manifest, not less, the degree to which the challenged statements are protected by the First Amendment. **These declarations illustrate the extent to which the challenged statements (a) concern matters of public importance and (b) are subject to professional debate.**

*Id*. (emphasis added).

The disputed issue concerned the "stewardship" certification of the company's timber harvesting practices. As to the dispute between the parties'

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[24] *Id*. at 1011.

[25] *Id.*

[26] *Id.* at 1021.

opposing expert declarations about whether the company's practices qualified for such certification, the court observed:

> **[t]he academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind**.

*Id*. at 1021 (emphasis added).

The court noted that the disputed statements involved the "complex" and "uncertain" science of "sustainable biodiversity" and "healthy forests,"[27] and that:

> **scientific controversies must be settled by the methods of science rather than by the methods of litigation**.

*Id*.[28]

It added:

> **[C]ourts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context**.

*Id*. (emphasis added).[29]

In its subsequent ruling on the amended complaint, the court dismissed all claims with prejudice

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[27] *Id*. at 1021 n.11.

[28] *Citing Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994).

[29] *Citing Arthur v. Offit*, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010).

except the allegation that the defendants falsely claimed that the company harvested trees in a specifically defined geographic area, which the court deemed "provably false."[30]

The court held the defendants cannot be liable for statements that Resolute "destroyed" the forest, because "the use of the word 'destroy' is hyperbolic opinion describing a loss of forest trees, which did occur."[31] Neither, wrote the court, could the defendants be liable for a statement that the company's logging certificates had been suspended due to "serious shortcomings" that the plaintiff alleged were instead "narrow and idiosyncratic issues." The difference between these phrases, wrote the court, "is one of opinion and not fact."[32]

The statements which the *Resolute* Forest dismissed as being non-actionable are closely analogous to Hurchalla's statement that no study that "documented the benefits" of Lake Point's mining pit had been provided. Whether a "benefit", defined as "something that produces good or helpful results,"[33] has been demonstrated is either a debatable scientific conclusion or an opinion, or both.

The decisions discussed above demonstrate the ill fit between statements made about subjective and

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[30] *Resolute Forest Prods. v. Greenpeace Int'l*, 2019 LEXIS 10263, at *34 (N. D. Cal. Jan. 22, 2019).

[31] *Id*. at 36.

[32] *Id*. at 35.

[33] https://www.merriam-webster.com/dictionary/benefit.

debatable environmental conclusions and tortiously actionable false statements of objectively verifiable fact. In the case of the former, the existence of *any* valid basis for a citizen's claims (as in this case, the supporting opinion of an expert witness) should preclude civil liability when the jury resolves the debate in favor of the opposing view. Statements about environmental and scientific conclusions are policy matters subject to frequent and rigorous debate throughout the country. Citizens, businesses, landowners and advocacy organizations often provide public comment, either verbal or written, to public officials, stating their opinions on such matters. The First Amendment requires that they be free do so.

### c. The Modes of Communication the State Court Deemed Improper Are Wholly Legitimate, Necessary and Protected Methods of Petition Concerning Environmental Conclusions.

The error of the state court's failure to recognize this distinction is manifold and will have dire First Amendment implications for First Amendment rights given the reasoning behind its conclusion that Hurchalla's communications were maliciously false.[34]

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[34] The court reasoned that Hurchalla's superior knowledge about the issue, and the relative lack of knowledge on the part of the elected officials to whom her statements were addressed gave her "significant influence with a majority of the commissioners." Cert. Pet., App. 17a. It deemed improper that Hurchalla, encouraged her elected officials to express her view of the circumstances as their own, and instructed them as to how

The Court should grant Certiorari to review this decision because it violates the First Amendment. To deem it improper to assert environmental conclusions without presenting contrary claims[35] is to squelch citizen engagement on these crucial issues.[36] To deprive the right to petition to a citizen who has done more homework on an issue than her government representatives is unconstitutional. When subject matter experts and knowledgeable, perhaps influential, citizens share their knowledge with their representatives and urge them to adopt their studied views as policy, it means representative democracy is working as intended, not that something "surreptitious" is afoot.

### d. Citizen Speech on Scientific and Environmental Matters is Essential to Adopting and Implementing Public Policy.

Extensive citizen engagement is essential to implementing environmental policy. The legislative history of the 1977 federal law regulating mining

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they should go about achieving the policy outcome she desired. Cert. Pet., App. 17a.

[35] Cert. Pet. at p. 13.

[36] *Amici* share Petitioner's concern that the decision below would require lay and expert speakers alike to meticulously verify all statements and contrary views on environmental conclusions before speaking up, seriously endangering the integrity of our democratic system by effectively precluding them from petitioning their representatives "lest any misstep or inaccuracy expose them to crushing damages awards." Cert. Pet. at p. 27.

includes an important statement about the importance of citizen advocacy that rings true today:

> **The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens**. . . . The [agencies] can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or . . . elicited at a hearing. [] **[C]itizen involvement . . . will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information**. [] Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the **participation of private citizens is a vital factor in the regulatory program**. . . .

Surface Mining Control and Reclamation Act of 1977, Report of the Comm. on Interior and Insular Affairs, House of Rep., Together with Additional, Concurring, Separate and Dissenting Views to Accompany H.R. 2 (Including the Congr. Budget Office Cost Estimate), April 22, 1977, at 88-89 (emphasis added).

The state court's decision ignores the need for extraordinary caution in applying false claims-related liabilities to statements concerning scientific matters. Fundamentally, the "falsehoods" upon which liability was premised were judgment calls over whether the analysis of the claimed environmental restoration

benefits of the company's mining pits had been adequately documented.

In this case, once Hurchalla produced an expert witness who corroborated her view, testifying that the preliminary study did not adequately document storage and treatment benefits of the Lake Point project,[37] the case should have been over. Even if the jury disagreed with Hurchalla's view that the analysis in question failed to document the claimed environmental benefits of the mining pit, the Constitution does not allow financial tort liability against a citizen who asserts one side of a disputed environmental conclusion as they petition their government for redress.[38]

*Amici* share Petitioner's concern that the decision below encourages private actors who are the object of public speech "to wield litigation as a weapon to silence potential critics."[39] The state court's decision threatens the right to petition and seek government redress, and to provide valuable information essential for public debate. No citizen should be financially liable for a statement of opinion about a complex scientific, environmental or engineering study or conclusion simply because a judge or jury decides a contrary statement was more persuasive. Subjecting statements like

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[37] Cert. Pet. at p. 20, fn. 5

[38] Citizens have a First Amendment right to communicate with public officials about matters of public policy. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[39] Cert. Pet. at p. 16.

Hurchalla's to tort liability will effectively end citizen advocacy, causing an appalling and unconstitutional imbalance of speech in government decision making on matters of crucial impact on the public's health, safety and welfare. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

The Court should grant certiorari and announce a rule requiring great caution in applying false claims-related liabilities to statements concerning scientific or engineering conclusions. The First Amendment requires that, when supported by any sound basis, statements made to governmental entities regarding such matters should not constitute "tortious interference" unless they are pure statements of objectively verifiable fact.

## CONCLUSION

For the reasons stated above, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted October 14, 2020.

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