No. 18-1477

In The
Supreme Court of the United States

COMPETITIVE ENTERPRISE INSTITUTE, ET AL.,

Petitioners,

v.

MICHAEL E. MANN,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, Southeastern Legal Foundation (SLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of the Petition. Petitioners have consented to the filing of this *amicus curiae* brief. Respondent Michael Mann has withheld consent to the filing of this *amicus curiae* brief. Accordingly, this motion for leave to file is necessary.

SLF is a nonprofit, public interest law firm and policy center founded in 1976 and organized under the laws of the State of Georgia. SLF is dedicated to bringing before the courts issues vital to the preservation of private property rights, individual liberties, limited government, and the free enterprise system.

SLF regularly appears as *amicus curiae* before this and other federal courts to defend the U.S. Constitution and the individual right to the freedom of speech on political and public interest issues. *See Common Cause v. Schmitt*, 455 U.S. 129 (1982) and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). SLF has also participated both as a party and as *amicus* in landmark global warming cases such as *West Virginia, et al. v. EPA, et al.*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015) (*amicus*); *Util. Air Regulatory Grp., et al. v. EPA*, 134 S. Ct. 2427 (2014) (party); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*amicus*); *Am. Mun. Power v. EPA*, 137 S. Ct. 2296 (2017) (*amicus*).

SLF agrees that this Court should grant the Petition to clarify and if necessary reformulate the boundary between protected expression and actionable defamation to prevent and rectify the infringement on First Amendment freedoms like that of the court below. SLF will not repeat arguments made in the Petition in its brief. Rather, SLF writes separately to address the chilling effect and suppression of free discussion and debate on public issues that results from the lower court opinion. Further, SLF will discuss how the nature of the debates over climate science and policy in general demonstrate that the opinion commentary at issue here was common and echoed by many other respectable and scientifically well-informed participants in the debate. As a result, it should be viewed, as a matter of law, as well within the rough-and-tumble parameters of debate in a very loud and boisterous corner of the public square.

SLF believes that the arguments set forth in its brief will assist the Court in resolving the issues presented by the Petition. SLF has no direct interest, financial or otherwise, in the outcome of the case. Because of its lack of a direct interest, SLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, SLF respectfully requests that this Court grant leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Under the First Amendment, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Applying that principle, practically every lower court to consider the issue has recognized that the First Amendment shields from defamation liability subjective commentary on the facts of a matter of public concern. The D.C. Court of Appeals split from that consensus to hold that that rule is limited to things like book reviews and does not protect speech opining on public controversies like the debate over climate science. Such commentary, it held, may be subject to defamation liability whenever a jury could conceivably find it to be false, even when the underlying facts are undisputedly true. Accordingly, the questions presented are:

1. Whether the First Amendment permits defamation liability for subjective commentary on true facts concerning a matter of public concern.

2. Whether the determination of whether a challenged statement contains a provably false factual connotation is a question of law for the court or a question of fact for the jury.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See*, *e.g.*, *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

SLF has also participated both as a party and as *amicus* in landmark global warming cases such as *West Virginia, et al. v. EPA, et al.*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015) (*amicus*); *Util. Air Regulatory Grp., et al. v. EPA*, 134 S. Ct. 2427 (2014) (party); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*amicus*); *Am. Mun. Power v. EPA*, 137 S. Ct. 2296 (2017) (*amicus*).

[1] Rule 37 statement: Consent to file this brief was requested of the parties but refused by the Respondent. Therefore, this brief is accompanied by a motion for leave to file. *See* Sup. Ct. R. 37.2(b). No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6. The parties received timely notice of this filing.

SUMMARY OF ARGUMENT

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court set forth guidelines for lower courts to determine the boundaries beyond which expressions of opinion lose their First Amendment protection. The ensuing years, and particularly this case, show that further clarification is necessary to give adequate "breathing room" for vigorous public debate on climate science and policy, hotly contested and highly consequential matters of utmost public concern.

Following *Milkovich*, most federal circuit courts and several state courts continued by other means to distinguish and immunize commentary about facts as opposed to defamatory statements of underlying facts. These approaches generally protect subjective, hyperbolic, and even vituperative commentary and statements of opinion about "true facts" because such commentary cannot be proved false, while at the same time, permitting claims arising from provably false and defamatory statements of fact.

These approaches sometimes rest on rather fine distinctions between statements of opinion and "actual facts" capable of being proven false. For example, a polemical accusation of "fraud" about a stage play in *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724 (1st Cir. 1992) and a speculative conjecture that the plaintiff was a murderer in *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997) were both protected on this basis. In some cases, protection turns on the genre of expression, with genre-specific dispensations crafted on

a case-by-case basis where scathing commentary is the norm.

This improvised regime of barely perceptible distinctions yields inconsistent results, imposes burdens of proof on defendants that are too onerous, and offers insufficient shelter to vigorous public discourse on matters of great public concern. This Court should grant the Petition to clarify and if necessary reformulate the boundary between protected expression and actionable defamation, to prevent and rectify the infringement on First Amendment freedoms like that of the court below.

ARGUMENT

I. Debate over extremely contentious and consequential issues of great public concern enjoys the highest possible level of constitutional protection.

Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, Cato's Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988). The First Amendment "was understood as a response to the repression of speech and the press that had existed in England." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to

ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

A major purpose of the First Amendment was to protect public discourse, broadly defined. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)). "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)). "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id*. (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This free discussion necessarily "includes discussions of candidates, structures and forms of

government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218-19.

When a law or judgment burdens political or public issue speech, this Court applies the most exacting scrutiny and upholds such restrictions only if they are narrowly tailored to serve a compelling government interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *see also Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540-41 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

John Adams' *A Dissertation on the Canon and Feudal Law*, written in 1765, argues that a free press is essential to the preservation of liberty. Adams paid particular attention to the means and methods of disseminating knowledge to an informed yeoman citizenry to preserve liberty – the printing press in his day and the internet in ours:

> Care has been taken that the art of printing should be encouraged, and that it should be easy and cheap and safe for any person to communicate his thoughts to the public. And you, Messieurs printers, whatever the tyrants of the earth may say of your paper, have done important service to your country by your readiness and freedom in publishing the speculations of the curious. The stale, impudent insinuations of slander and sedition, with which the gormandizers of power have endeavored to discredit your paper, are so much the more to your honor; for the jaws of power

> are always opened to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking, and writing. And if the public interest, liberty, and happiness have been in danger from the ambition or avarice of any great man, whatever may be his politeness, address, learning, ingenuity, and, in other respects, integrity and humanity, you have done yourselves honor and your country service by publishing and pointing out that avarice and ambition.

John Adams, *A Dissertation on the Canon and Feudal Law* 7-8, The Federalist Papers Project.[2] Adams' tribute to the printers of his day applies with equal force to the defendants,[3] who have been persecuted over six years of litigation – and counting – for pointing out that the emperor has no clothes.

The familiar principles outlined above drove the seminal overhaul of defamation law in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the Court's subsequent enduring vigilance in protecting vigorous discourse on matters of public concern.

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[2] Available at https://thefederalistpapers.org/wp-content/uploads/2013/01/John-Adams-A-Dissertation-on-Canon-and-Feudal-Law.pdf, p. 7-8 (last visited June 11, 2019).

[3] "Defendants" as used in this *amicus curiae* brief refers to the defendants in the consolidated cases Nos. 14-cv-101 and 14-cv-126 before the D.C. Court of Appeals: National Review, Rand Simberg, and Competitive Enterprise Institute.

II. Climate science and policy are highly contentious, highly polarized, and extremely consequential matters of public concern.

Climate science and policy are of great public importance and concern. From seemingly authoritative sources we hear a constant drumbeat warning that human-caused climate change poses an imminent and serious if not existential threat to humanity, such that we must take urgent and decisive action before it is too late. The science on which such exhortations are based is said to be settled beyond honest dispute. Those skeptical of these claims are assailed as deniers and corrupt frauds, including by the plaintiff here. To avert the climate apocalypse, policies and programs are offered to restructure fundamentally the global economy away from fossil fuels. In this view, literally nothing could be more important.

These are radical claims. In a free society any demand for such a radical restructuring naturally provokes skepticism and resistance. Climate skepticism exists and thrives in part because of the trenchancy of the scientific critiques that are mounted, including the jarring mismatch between climate models and observations,[4] and in part by the sometimes risible nature

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[4] Ross McKitrick & John Christy, *A Test of the Tropical 200- to 300-hPa Warming Rate in Climate Models*, Earth & Space Science 5, 529–36 (2018), https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2018EA000401 ("[W]e observe a discrepancy across all runs of all models, taking the form of a warming bias at a sufficiently strong rate as to reject the hypothesis that the models are realistic. Our interpretation of the results is that the major hypothesis in contemporary climate models, namely, the

of hysterical claims that all manner of unpleasant developments, from kidney stones[5] to the loss of feminine virtue,[6] and every type of bad weather,[7] are caused or

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theoretically based negative lapse rate feedback response to increasing greenhouse gases in the tropical troposphere, is incorrect.").

[5] *Global warming could cause rise in kidney stones: study*, The Canadian Press (July 15, 2008), https://www.cbc.ca/news/technology/global-warming-could-cause-rise-in-kidney-stones-study-1.734262.

[6] Muneeb Kazi, *Global Warming May Cause Women To Become Prostitutes, Says Rep. Barbara Lee*, The Science Times (Mar. 27, 2015), https://www.sciencetimes.com/articles/4906/20150327/global-warming-may-cause-women-to-become-prostitutes-says-rep-barbara-lee.htm.

[7] EPA's Endangerment Finding for Greenhouse Gases projects rising GHG concentrations will lead to loss of Arctic ice, sea level increases, more frequent and severe storms, floods, and droughts. *See* Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (Dec. 7, 2009) (TSD), at ES-4, https://www.epa.gov/sites/production/files/2016-08/documents/endangerment_tsd.pdf ("Sea ice extent is projected to shrink in the Arctic under all IPCC emissions scenarios"); ("It is very likely that heat waves will become more intense, more frequent, and longer lasting in a future warm climate, whereas cold episodes are projected to decrease significantly."); ("It is likely that hurricanes will become more intense"); ("Intensity of precipitation events is projected to increase in the United States and other regions of the world. More intense precipitation is expected to increase the risk of flooding."); ("Reduced snowpack, earlier spring snowmelt, and increased likelihood of seasonal summer droughts are projected in the Northeast, Northwest, and Alaska. More severe, sustained droughts and water scarcity are projected in the Southeast, Great Plains, and Southwest.").

made worse by "climate change." Observations simply do not match and indeed refute these claims.[8]

This Court has wisely avoided taking a position on the thorny issues of climate science. In *American Electric Power Co.*, the Court described the findings of the EPA on human-caused global warming, but carefully noted the existence of reputable views to the contrary:

> For views opposing EPA's, *see*, *e.g.*, Dawidoff, *The Civil Heretic*, N. Y. Times Magazine 32 (March 29, 2009). **The Court, we caution, endorses no particular view of the complicated issues related to carbon dioxide emissions and climate change**.

564 U.S. at 417 n.2 (emphasis added) (citing an article profiling the famous physicist Freeman Dyson and his skepticism towards human-caused global warming).

The significance of the public policy issues arising from the claims of climate science can hardly be overstated. Many politicians have declared global warming to be a crisis, an emergency, or an "existential threat."[9]

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[8] *See* IPCC Fifth Assessment Report (2013), § 10.6.1.3, at 913 (insufficient evidence to detect or attribute any trend in droughts); *id.*, Technical Summary at 112 (no trend in floods); *id.*, § 2.6.3 (low confidence there is any trend in tropical cyclones). *See also* Roger Pielke, Jr., *The Rightful Place of Science: Disasters & Climate Change* (2018 Consortium for Science, Policy & Outcomes); Joseph D'Aleo, *Alarmist Claim Rebuttals*, ACResearch (May 20, 2019), https://alarmistclaimresearch.wordpress.com/2019/05/20/alarmist-claim-fact-check-update/ (rebutting 10 common alarmist claims).

[9] *See How 18 Democratic Candidates Responded to a Climate Policy Survey*, The New York Times (Apr. 18, 2019),

Some have endorsed a radical but amorphous agenda labeled the "Green New Deal."[10] There is a U.S. House Select Committee on the "Climate Crisis."[11] By contrast, President Trump is on record saying global warming is a "hoax."[12]

The policy proposals to solve global warming generally call for the partial or complete elimination of fossil fuels. This outcome is urgently sought despite the miraculous improvements in the material quality of human health and welfare that have ensued from the widespread exploitation of fossil fuels.[13] Modern civilization unquestionably depends on fossil fuels.

Some advocates of radical policies to "fight" "climate change" have at times made no secret of their actual political agenda. Former co-chair of IPCC Working

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https://www.nytimes.com/2019/04/18/us/politics/climate-change-2020-democratic-candidates.html.

[10] *See* Jeff Brady, *Despite Few Details And Much Doubt, The Green New Deal Generates Enthusiasm*, NPR (Feb. 8, 2019), https://www.npr.org/2019/02/08/692508990/despite-few-details-and-much-doubt-the-green-new-deal-generates-enthusiasm.

[11] *See* House Select Committee on the Climate Crisis, https://climatecrisis.house.gov (last visited June 9, 2019).

[12] *See* Louis Jacobson, *Yes, Donald Trump did call climate change a Chinese hoax*, Politifact (June 3, 2016), https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/.

[13] *See* Hannah Ritchie & Max Roser, *Our World in Data: CO_2 Emissions and Prosperity*, Our World in Data (May 2017), https://ourworldindata.org/co2-and-other-greenhouse-gas-emissions#co2-emissions-and-prosperity.

Group 3, Ottmar Edenhofer, gave an interview in which he said:

> The climate summit in Cancun at the end of the month is not a climate conference, but one of the largest economic conferences since the Second World War. . . . But one must say clearly that we redistribute de facto the world's wealth by climate policy. Obviously, the owners of coal and oil will not be enthusiastic about this. One has to free oneself from the illusion that international climate policy is environmental policy. This has almost nothing to do with environmental policy anymore, with problems such as deforestation or the ozone hole.[14]

Similar quotes showing a clear intent to destroy capitalism in the name of saving the planet from global warming can be collected from such figures as Maurice Strong, founder of the United Nations Framework on Climate Change,[15] or Christina Figueres, a recent head

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[14] *See* Interview by Neue Zürcher Zeitung with Ottmar Edenhofer, *"IPCC Official: 'Climate Policy Is Redistributing The World's Wealth'"*, The Global Warming Policy Forum (Nov. 14, 2010), https://www.thegwpf.com/ipcc-official-climate-policy-is-redistributing-the-worlds-wealth/, translating from original German publication https://www.nzz.ch/klimapolitik_verteilt_das_weltvermoegen_neu-1.8373227 (last visited June 10, 2019).

[15] Larry Bell, Climate of Corruption, Politics and Power Behind the Global Warming Hoax 226 (2001) ("We may get to the point where the only way of saving the world will be for industrialized civilization to collapse.").

of that same organization,[16] or from Hugo Chavez, the late communist dictator of Venezuela.[17] While not every advocate of aggressive climate change policy holds such views, remarks of this nature are widely known to skeptics and are enough in and of themselves to provoke vigorous, completely legitimate, and constitutionally protected opposition from those who, reviewing the bloody and tyrannical record of collectivism, independently conclude that the cure must be worse the disease.

In the end, policies to "fight" "climate change" rest on the claims of climate science. As a result, disputes about climate science and climate policy are inextricably intertwined. Whether climate science is wrong in some significant respect is thus a matter of intense importance and public interest.

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[16] Editorial, *U.N. Official Reveals Real Reason Behind Warming Scare*, Investor's Business Daily (Feb. 10, 2015) ("This is probably the most difficult task we have ever given ourselves, which is to intentionally transform the economic development model for the first time in human history."), https://www.investors.com/politics/editorials/climate-change-scare-tool-to-destroy-capitalism/.

[17] Lenore Taylor, *Penny Wong jeered, Hugo Chavez cheered*, The Australian (Dec. 17, 2009) ("Our revolution seeks to help all people . . . socialism, the other ghost that is probably wandering around this room, that's the way to save the planet, capitalism is the road to hell . . . let's fight against capitalism and make it obey us."), http://www.theaustralian.com.au/politics/penny-wong-jeered-hugo-chavez-cheered/story-e6frgczf-1225811179614.

III. Plaintiff Michael Mann's work and advocacy in climate science and policy are hotly disputed and highly polarized.

Plaintiff Michael Mann is both a climate scientist and an impassioned advocate for very aggressive climate policies. He is also a vituperative critic of those with whom he disagrees.

His rhetoric on both science and policy issues is equally if not more scathing and pejorative than the comments about which he complains in this lawsuit. He often accuses those with whom he has scientific disputes of fraud[18] and those with whom he has policy disagreements of corruption.[19] This type of rhetoric is par for the course in the highly polarized and politicized debates over climate science and policy.

One reason for the intensity of the disputes over Mann's work arises from its importance to determining whether humans are the cause of observed warming, one of the most fundamental issues in climate science. His work, as relevant to this case, relates to reconstruction of temperature trends in periods before there were thermometers. This field, broadly called

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[18] *See* Stephen McIntyre, *Correspondence with the University of Virginia*, Climate Audit (May 3, 2010, 11:03 AM), https://climateaudit.org/2010/05/03/correspondence-with-the-university-of-virginia/; E-mail from Michael E. Mann to Phil Jones (Dec. 30, 2004, 09:22:02), http://www.climateaudit.info/data/CG1/1104855751.txt; E. Kancler, Mother Jones (Apr. 18, 2005), archive.is/zw6j2.

[19] *See* M. Crok, N&T (Feb. 16, 2005), archive.is/XD7fe.

paleoclimatology, relies on indirect historical indicia of temperatures, called proxies, preserved to varying degrees in such things as tree rings, fossils, and the isotopic composition of air bubbles buried in ice sheets. Analysis of proxy data is highly sensitive to the particular proxy data selected – some is better than others. It is also sensitive to the statistical methods employed, as the data, especially tree rings, often has many infirmities, such as weak signal-to-noise ratios, multiple confounding factors, poor temporal resolution, patchy and limited spatial coverage, or all of these.

Mann's work was an important building block for the argument that observed warming can be attributed to human emissions of greenhouse gases. His Hockey Stick graph first appeared in his 1998 paper, Michael E. Mann, et al., *Global-Scale Temperature Patterns and Climate Forcing over the Past Six Centuries*, 392 Nature 6678 (1998). The Hockey Stick graph showed a long flat handle, and a very sharp uptick in the 20th century, the blade.

The importance of the Hockey Stick graph to the attribution debate can hardly be overstated. Attribution analysis requires a determination of the scope of natural variability and whether modern temperatures exceed that scope and thus support an inference of human causation. The Hockey Stick was a great boon to that inference because it showed minimal natural variability over a long period, and a sharp upward excursion from that range in recent years.

The Hockey Stick contradicted the then-prevalent consensus, supported by the Intergovernmental Panel on Climate Change (IPCC), that there had been a Medieval Warm Period and a Little Ice Age.[20] Yet the Hockey Stick, in various iterations, quickly became world-famous iconic proof of dangerous man-made global warming. A version of the Hockey Stick appeared on the cover of the World Meteorology Organization's 1999 annual report and was also relied upon in the 2001 IPCC Third Assessment Report, Working Group 1, Chapter 2 at 134, Figures 2.20 and 2.21.

Given the pivotal importance of Mann's work to the argument for attribution, and its contradiction of the prior consensus, it was inevitably subjected to intense scrutiny. Controversy over the validity of his data and methods raged for years in the scientific literature and in online forums for the discussion of climate science.[21]

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[20] *See* IPCC, First Assessment Report (1990), Fig. 7.1.

[21] *See* Stephen McIntyre & Ross McKitrick, *Corrections to the Mann et al. (1998) Proxy Data Base And Northern Hemispheric Average Temperature Series*, 14 Energy & Environment, No. 6 at 751 (2003); Stephen McIntyre & Ross McKitrick, *Hockey Sticks, Principal Components, and Spurious Significance*, 32 Geophysical Research Letters (2005); Stephen McIntyre & Ross McKitrick, *The M&M Critique Of The MBH98 Northern Hemisphere Climate Index: Update And Implications*, 16 Energy & Environment, No. 1 at 69 (2005); Stephen McIntyre & Ross McKitrick, *Reply to comment by von Storch and Zorita on "Hockey sticks, principal components, and spurious significance,"* 32 Geophysical Research Letters (2005); Stephen McIntyre & Ross McKitrick, *Reply to comment by Huybers on "Hockey sticks, principal components, and spurious significance,"* 32 Geophysical Research Letters

Several very serious problems were identified in Mann's work. The major points of contention included but were not limited to the following:[22]

> 1. The use of a statistical method that would show a hockey stick when applied to data that had no such actual trend.[23]
>
> 2. Failure to disclose adverse verification statistics for the analysis used in the 1998 paper.[24]
>
> 3. Deletion of a portion of a proxy reconstruction that declined instead of going up, famous in climate circles as "Hiding the Decline."[25]
>
> 4. Undisclosed grafting of instrumental data onto a proxy reconstruction after having denied this was ever done.[26]

(2005); Edward J. Wegman, *et al.*, *Ad hoc Committee Report on the 'Hockey Stick' Global Climate Reconstruction* (Apr. 26, 2010) (Wegman Report), http://scienceandpublicpolicy.org/wp-content/uploads/2010/07/ad_hoc_report.pdf.

[22] This compilation in n.21 and in n.23-26 is taken from the amicus brief filed in the court below by Stephen McIntyre.

[23] *See* authorities cited in n.21.

[24] *The M&M Critique Of The MBH98 Northern Hemisphere Climate Index: Update And Implications*.

[25] *See* Stephen McIntyre, *IPCC and the "Trick,"* Climate Audit (Dec. 10, 2009), archive.is/TkfA; *see also* Stephen McIntyre *"Climategate: A Battlefield Perspective"* (May 16, 2010), tinyurl.com/237sbba (both last visited June 9, 2019).

[26] *See* Stephen McIntyre, *Correspondence with the University of Virginia*, Climate Audit (May 3, 2010, 11:03 AM).

The first of these points, that the statistical method used in the 1998 paper would produce a spurious hockey stick, was first shown by Stephen McIntyre & Ross McKitrick in 2003.[27] This finding was later confirmed three separate times: (1) by an ad hoc panel, chaired by the President of the American Statistical Association, convened by a Congressional Committee;[28] (2) by a panel of the National Research Council;[29] and (3) in an important paper by Blakeley B. McShane and Abraham J. Wyner.[30]

As a result of the fundamental problems with the merits of Mann's work, EPA gave it a wide berth when it promulgated the 2009 Endangerment Finding. In responding to a commenters' criticism of the Hockey Stick, EPA replied: "[W]e we note that the TSD

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[27] *See* first cited paper in n.21 above.

[28] *See* Wegman Report at 4 ("In general, we found MBH98 and MBH99 to be somewhat obscure and incomplete and the criticisms of MM03/05a/05b to be valid and compelling.").

[29] National Research Council, Surface Temperature Reconstructions for the Last 2,000 Years (2006), Chapter 9 Statistical Background, p. 90, https://www.nap.edu/read/11676/chapter/12 ("McIntyre and McKitrick (2003) demonstrated that under some conditions the leading principal component can exhibit a spurious trendlike appearance, which could then lead to a spurious trend in the proxy-based reconstruction.").

[30] Blakeley B. McShane & Abraham J. Wyner, *A Statistical Analysis of Multiple Temperature Proxies: Are Reconstructions of Surface Temperatures Over the Last 1000 Years Reliable?*, 5 Annals of Applied Statistics, 5-44 (2011) ("[W]e conclude unequivocally that the evidence for a 'long-handled' hockey stick (where the shaft of the hockey stick extends to the year 1000 AD) is lacking in the data.").

[Technical Support Document] does not include nor discuss the 'hockey-stick' graph in (Mann *et al.*, 1998), nor [the] treatment of this issue in IPCC 2001."[31]

These controversies were turbocharged with the publication of the Climategate emails in 2009. The emails showed, among other things, that Mann conspired to exclude skeptical papers from scientific journals, ostracize the scientists who wrote them and the editors who published them,[32] and relayed a request for the destruction of emails subject to Freedom of Information Act requests from a scientist in England to a scientist in the U.S.[33]

This touched off a firestorm of negative publicity for climate scientists, including Mann. A.W. Montford wrote two books detailing the controversies and scientific misconduct in the Hockey Stick saga. *See* A.W. Montford, The Hockey Stick Illusion: Climategate and the Corruption of Science (2010) and A.W. Montford,

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[31] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments, Vol. 2, Response (2-65) at 46.

[32] *See* Patrick J. Michaels, *How to Manufacture a Climate Consensus*, CATO Institute (Dec. 18, 2009), https://www.cato.org/publications/commentary/how-manufacture-climate-consensus.

[33] *See* The Guardian, "*The five key leaked emails from UEA's Climatic Research Unit*" (July 7, 2010), https://www.theguardian.com/environment/2010/jul/07/hacked-climate-emails-analysis; Stephen McIntyre, *New Light on "Delete Any Emails,"* Climate Audit (Feb. 23, 2011 at 5:32 PM), https://climateaudit.org/2011/02/23/new-light-on-delete-any-emails/.

Hiding the Decline: A History of the Climategate Affair (2012).

In the ensuing uproar, various bodies undertook investigations. The District of Columbia Court of Appeals relies heavily on four of these "investigations" to conclude that any commentary by defendants to the effect that Mann had engaged in academic misconduct or fraud was provably false and therefore defendants' commentary presented a jury question on defamation.

The record below, however, demonstrates that these reports simply do not support the propositions for which they were cited by the District of Columbia Court of Appeals. A Parliamentary Committee Report cited by the court below as having exonerated Mann never even examined his conduct. The Muir Russell inquiry, also cited as having exonerated Mann, found the exact opposite – that "[i]n relation to 'hide the decline' we find that, given its subsequent iconic significance (not least the use of a similar figure in the TAR), the figure supplied for the WMO Report was misleading. . . ."[34] A National Science Foundation Inspector General Report – relied on as well by the court below – criticized the Penn State investigation, also relied on by the court below, for having interviewed only one

[34] The Independent Climate Change E-mails Review at 60 ¶ 26 (July 2010) (Muir Russell Report), at 13 ¶ 23, http://www.cce-review.org/pdf/FINAL%20REPORT.pdf.

witness, Michael Mann himself, who was in the "unique position" of "say[ing] [he] didn't do it."[35]

Critics, even some who could in no sense be considered climate skeptics, mocked and assailed these investigations as obvious whitewashes.[36] The court below, however, held these investigations exonerated Mann and created a question of fact whether defendant could be shown by clear and convincing evidence to have acted with actual malice in satirically mocking Mann and his claims of exoneration. Contrary to the decision below, strong ridicule of these investigations was a widely circulated and well-supported opinion. That defendants should be forced to bear the burden of trial in a defamation action under these circumstances repudiates First Amendment law since *New York Times Co. v. Sullivan*.

The nature of online discussion regarding plaintiff before the allegedly libelous statements in this case were first published on July 13, 2012, is evident from the results of a Google search for "Michael Mann fraud," limited to occurrences before July 11, 2012, which yields approximately 62,400 results.[37] As far as Mann was concerned, the comments made by the

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[35] Quotes.net, *My Cousin Vinny* (1992), arraignment scene, https://www.quotes.net/mquote/65622 (last visited June 10, 2019).

[36] *See* Clive Crook, *Climategate and the Big Green Lie*, The Atlantic (July 14, 2010), archive.is/ym3WZ (describing the Penn State investigations as "difficult to parody.").

[37] Google.com, https://tinyurl.com/yxhqolpo (last visited June 3, 2019).

writers and reporters here were a pair of raindrops in a hurricane.

That the challenged commentary in this case falls into a constitutionally protected zone is further demonstrated by what other scientists have said about Mann and his work. One of the defendants below, opinion columnist Mark Steyn, edited and compiled a 300-page volume of statements by other scientists denouncing Michael Mann's work in particular, or climate science in general. *See* A Disgrace to the Profession: The World's Scientists in Their Own Words on Michael Mann, His Hockey Stick, and Their Damage to Science, Vol. 1 (Mark Steyn ed. 2015). Four scientists described Mann's work as "fraud" or "fraudulent."[38] A number of others described it as "dishonest" or "misleading."[39] The rest were only slightly less harsh.

The rule for defamation of politicians should apply no less to climate scientists: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15. " 'Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at

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[38] *See* Steyn, Disgrace to the Profession, at 1, 118, 146, 285-86.

[39] *See id*. at 78, 104, 161-62, 199-200, 201-02, 215-16.

the edges.'" *Republican Party v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)) (internal quotations omitted).

IV. The District of Columbia Court of Appeals' opinion demonstrates that existing rules fail to sufficiently protect the speech at issue in this case.

The foregoing review of the nature of the debates over climate science and policy in general, and the plaintiff in particular, is not offered to win the debate for the skeptic side. It is instead offered to show that the opinion commentary at issue here had ample foundation in fact, and was echoed by many other respectable and scientifically well-informed participants in the debate. As a result, it should be viewed, as a matter of law, as well within the rough-and-tumble parameters of debate in a very loud and boisterous corner of the public square.

The court below would subject the defendants to the burden of proving the unprovable – that their pejorative opinions, metaphors, similes and analogies regarding Mann's work and the flawed investigations that exonerated him are in fact true. In *New York Times Co. v. Sullivan*, the Court held that the burden of requiring defendants to prove their statements were true violated the Constitution:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual

> assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-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. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

New York Times Co., 376 U.S. at 278-79 (internal citations omitted). The same rationale applied here should have the same result.

In the wake of *Milkovich*, the diversity of judicial approaches to claims of defamation arising from commentary and opinion concerning matters of public concern described in the Petition is too complicated, too uncertain, too burdensome, and yields too many fundamentally inconsistent results. This Court should clarify or modify the rule to protect defendants' speech and carry out the higher purposes of vigorous debate of important public issues. That CEI, National Review, and

the individual reporters and writers here should have to go to trial to defend themselves is as great an affront to the First Amendment as the libel judgments in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*. The Court should grant the writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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