No. 18-____

IN THE

Supreme Court of the United States

NATIONAL REVIEW, INC.,

Petitioner,

v.

MICHAEL E. MANN,

Respondent,

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
20001-2113
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioner

QUESTIONS PRESENTED

Under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), a plaintiff seeking to impose defamation liability for a statement on a matter of public concern must prove that the statement is false, and thus cannot sue unless the statement contains a "provably false" factual connotation. The questions presented in this case are:

1. Is the question whether a statement contains a "provably false" factual connotation a question of law for the court (as most federal circuit courts hold), or is that a question of fact for the jury when the statement is ambiguous (as many state high courts hold)?

2. Does the First Amendment permit defamation liability for expressing a subjective opinion about a matter of scientific or political controversy, such as characterizing a statistical model about climate change as "deceptive" and calling its creation a form of "scientific misconduct"?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Appellants in the D.C. Court of Appeals proceeding below were National Review, Inc., Competitive Enterprise Institute, and Rand Simberg. Appellee in the proceeding below was Michael Mann.

Pursuant to Supreme Court Rule 29.6, Petitioner National Review, Inc. discloses that it is a privately held company that has as its parent corporation the National Review Institute.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

For many years, Americans have hotly debated the topic of global warming: How bad really is it? What are its true causes? Should we take drastic action to remedy it? A wide range of viewpoints has enriched the public discussion. That is as it should be. The First Amendment guarantees no less.

Yet, in this case, the D.C. Court of Appeals held that a jury could impose defamation liability on a conservative media outlet for opining that the risks of climate change were being overhyped by misleading statistical analyses. Petitioner National Review, Inc. published a blog post that criticized the so-called "hockey stick" graph created by Respondent Dr. Michael Mann, a scientist who is a leading voice in the climate-change debate. The validity of the graph has itself been the focus of intense argument, with its opponents objecting to its cherry-picking of data and apples-to-oranges comparisons. The blog post at issue decried the graph as "deceptive" and "fraudulent," calling its creation "wrongdoing" and "misconduct."

Remarkably, the Court of Appeals concluded that a jury could treat those statements as "provably false" representations of fact and impose liability, without offending the First Amendment. In that court's view, a reasonable jury "could" construe the statements as conveying not only a subjective and non-falsifiable value judgment about the graph's legitimacy, but also some (never-specified) objective, verifiable fact about Mann's conduct or his "integrity." In view of that supposed possible construction, the court remanded the defamation case for discovery and trial.

In so doing, the Court of Appeals made two errors of law that threaten robust public debate and warrant this Court's review. *First*, the court fundamentally erred by framing the question before it as whether a jury *could* construe the statements as expressing verifiable facts. Most federal courts have correctly held that distinguishing verifiable facts from non-verifiable opinions presents a question of law for the court—and that ambiguity in that regard *precludes* liability, because it renders the statement non-falsifiable. Yet a number of state courts of last resort, now joined by the court below, have instead held that ambiguity as to whether the statement conveys facts or mere opinion requires a jury to determine the statement's true nature. That conflict in authority—recognized by leading libel treatises—justifies this Court's intervention.

Second, regardless of who decides the fact-versus-opinion question, the court below gravely erred by concluding that a subjective, value-laden critique on a matter of public concern can be construed as a provably false fact. Courts across the country have long held that generalized accusations of misconduct, deception, or wrongdoing, especially in the context of public debate over matters of public concern, cannot be understood as representations of verifiable fact. At some level, it is always possible to read "misleading" as a claim of perjury, or "misconduct" as an accusation of criminal conduct. But unless those allegations are made *clearly* and *specifically*, with reference to particular acts and objective standards, the law cannot impute them to the speaker, thereby rendering him liable for "factual" assertions never made.

The dangers of the decision below are as obvious as they are profound, and they demand this Court's immediate attention. There is no public-policy debate that is not replete with accusations of deception, dishonesty, bad faith, and misconduct by both sides. For every *National Review* post that calls one side misleading, there is a *Slate* column that calls the other side liars. For every *Wall Street Journal* editorial that calls a liberal a hypocrite, there is a *New York Times* editorial that calls a conservative a bigot. For every Republican who says that Hillary Clinton committed wrongdoing respecting her emails, there is a Democrat who says that Donald Trump committed misconduct with Russia. The opinion below invites defamation lawsuits over each of those subjective opinions by authorizing juries—who necessarily bring their own political biases to the table—to "construe" them as implying objective, provably false factual claims. The result would be to insert courts and juries into every hot-button political and scientific dispute, to allow politicians to sue their critics at will, and ultimately to chill and deter the robust debate that is the lifeblood of our republic. It is no exaggeration to say that the legal rules embraced below—in the nation's capital, no less—pose an existential threat to the First Amendment.

OPINIONS BELOW

The D.C. Court of Appeals opinion affirming in part, reversing in part, and remanding (Pet.App.1a) is reported at 150 A.3d 1213. The D.C. Superior Court opinions denying Petitioners' motions to dismiss the original and amended complaints (Pet.App.115a, 103a) are unreported.

JURISDICTION

The Court of Appeals issued an initial opinion on December 22, 2016; then, in response to a petition for rehearing en banc, amended the opinion on December 13, 2018; and finally denied a second, timely petition for rehearing en banc on March 1, 2019. Pet.App.1a n.*, 185a. This Court has jurisdiction under 28 U.S.C. § 1257, as "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds," and "reversal of the state court on the federal issue would be preclusive of any further litigation." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

STATEMENT

A. The "Hockey Stick" and Its Critics.

1. Respondent Mann is a professor of meteorology at Pennsylvania State University. His claim to fame is a set of papers, published in the late 1990s, that purport to show relatively stable global temperatures for hundreds of years, followed by a sharp increase in the twentieth century. Pet.App.6a. Represented as a graph, the trend line resembles a hockey stick, and has become known as the "hockey stick graph." *Id.* This graph "became the foundation for the conclusion" that global warming is "generated by human activity initiated by the industrial age." It has also become "a rallying point, and a target, in the subsequent debate over…global warming and what, if anything, should be done about it." *Id.*

The hockey stick has stoked controversy virtually since its initial publication. Its critics, including many prominent scientists, have contended that it

reflects "bad data and flawed statistical analysis." Pet.App.7a. In particular, the hockey stick relies on so-called "proxy" data—such as "growth rings of ancient trees and corals, sediment cores from ocean and lake bottoms, ice cores from glaciers, and cave sediment cores"—to "reconstruct" temperatures for years before thermometers became widespread. Pet.App.5a. Many critics argue that these proxy data are unreliable, rendering the hockey stick fundamentally misleading. Others argue that the hockey stick relies on flawed statistical techniques, including a skewed Principal Components Analysis, which produces an erroneous, misleading interpretation of the underlying data. Pet.App.244a.

Controversy intensified in late 2009, when emails from the Climate Research Unit of the University of East Anglia were leaked in an episode that became known as "Climategate." The emails highlighted the fact that the hockey stick relied on proxy data for early years but switched to thermometer readings for more recent decades. Notably, using all proxy data for the entire period would have suggested a recent *decline* in temperatures, disfiguring the hockey stick and (more fundamentally) calling into question the reliability of the proxy data altogether. Pet.App.265-69a. In one telling e-mail, a scientist wrote that he had deployed Mann's "trick" of splicing data sets "to hide the decline." Pet.App.9a n.9. "The emails led to public questioning of the validity of the research leading to the hockey stick graph and to calls for evaluation of the soundness of its statistical analysis and the conduct of the scientists involved in the research, including, specifically, Dr. Mann." Pet.App.8a.

Investigations ensued. A Penn State committee concluded that Mann had not engaged in "research misconduct" as defined by Penn State's Research Administration Policy, meaning he did not "seriously deviate[] from accepted practices within the academic community." Pet.App.77a n.55. An inquiry by the University of East Anglia concluded the hockey stick was "misleading" in failing to explain how data had been "splice[d]," but did not question the "rigour and honesty" of the scientists who created and used the misleading graph to promote their theories of climate change. *Id.* 81a-82a. Not surprisingly, critics took a more jaundiced view. *Id.* 243a, 265-69a, 316a.

Importantly, nobody ever claimed that Mann had *altered* data by, *e.g.*, changing a "3" to a "7." Rather, the controversy concerned whether Mann's use and presentation of the data was misleading.

2. This case concerns statements initially made on a blog published by the Competitive Enterprise Institute ("CEI"). *See* Pet.App.94a.

Commenting on Penn State's response to sexual-abuse complaints against football coach Jerry Sandusky, Rand Simberg wrote that Penn State had also "covered up wrongdoing" by Mann. Employing a crude analogy, he characterized Mann as the "Jerry Sandusky of climate science," because he had "molested and tortured data in service of politicized science," in the form of "hockey-stick deceptions." Simberg elaborated that the leaked emails exposed Mann's "data manipulation to keep the blade on his famous hockey-stick graph," and he called for a "truly independent investigation" into potential "academic and scientific misconduct." Pet.App.94-97a.

Two days later, Mark Steyn published a separate post on *The Corner*, a blog hosted by National Review Online ("NRO"). NRO is the website of Petitioner National Review, which also publishes a conservative opinion magazine. Steyn's post, entitled "Football and Hockey," quoted a portion of Simberg's commentary and concluded that, while Steyn would not have "extended the metaphor all the way into the locker-room showers," Simberg "ha[d] a point" about Mann. Steyn called Mann "the man behind the fraudulent climate-change 'hockey-stick' graph," and suggested that Penn State's "investigation," which "declined to find one of its star names guilty of any wrongdoing," was a "cover up." Pet.App.99-100a, 129a.

After Mann threatened suit, NRO published an editorial by editor Richard Lowry that refused to retract Steyn's statements, but clarified that, "[i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." Pet.App.101-02a.

3. Public debate on these issues has not been one-sided. Mann has accused his critics of "fraudulent" science and claimed they have taken "corporate payoffs for knowingly lying about the threat" of climate change. Michael Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* 249 (2012). He has contended that his opponents in the debate are not acting in "good-faith." Michael Mann, *Get the Anti-Science Bent Out of Politics*, WASH. POST (Oct. 8, 2010). And he has asserted that Fox News "sought to mislead its viewers" by focusing attention on a "deceptive" report. Michael Mann, *The IPCC, Climate Change and Bad Faith Attacks on Science*, HUFFINGTON POST (Sept. 27, 2013).

B. The Lawsuit and Proceedings Below.

1. Mann filed a complaint in D.C. Superior Court against Simberg, Steyn, CEI, and National Review. Pet.App.190a. Asserting five counts of libel, Mann objected that Defendants had "attempt[ed] to discredit consistently validated scientific research," and cited the EPA and National Science Foundation as having "laid to rest" any doubts about the hockey stick. *Id*. 191a, 200a. The complaint focused on Simberg's statements that Mann had "molested and tortured data," engaged in "data manipulation," and committed "misconduct"; Steyn's statements that the hockey stick graph was "fraudulent"; and National Review's comment that Mann's work was "intellectually bogus and wrong." *Id*. 200-05a, 227a.

Defendants moved to dismiss the complaint under both the ordinary rules of civil procedure as well as D.C.'s Anti-SLAPP Act, which compels dismissal unless the plaintiff shows he is "likely to succeed on the merits." D.C. Code § 16-5502(b).

Judge Combs-Greene denied the motions. Pet.App.125a. She "disagree[d]" that the statements at issue "can only clearly be viewed as an opinion." *Id*. 140-41a. Rather, Defendants had crossed the line because they had "question[ed] facts." *Id*. Their claims of data manipulation were an "interpretation of facts." *Id*. 141a. By characterizing the hockey stick as "fraudulent," Steyn went beyond "honest commentary—particularly when investigations have found otherwise." *Id*. 142a. Even "intellectually bogus" was "tantamount to an accusation of fraud." *Id*. 142-43a. To the judge, the statements asserted a provably false claim: Mann "is a fraud." *Id*. 145a.

In sum, the court concluded that the statements were "conclusions based on facts." And those facts were "provably false" because "several bodies (including the EPA)" have "determined that [Mann's] research and conclusions are sound and not based on misleading information." Pet.App.142a. For similar reasons—because "Plaintiff has been investigated several times and his work has been found to be accurate"—"it is fair to say that [Defendants] continue to criticize Plaintiff due to a reckless disregard for truth." Pet.App.149a. Mann's libel claims were thus deemed likely to succeed.

Denying reconsideration, the judge reiterated that the statements at issue were "essentially an allegation of fraud." Pet.App.119a.[1]

After Mann amended his complaint to add one new count, Defendants renewed their motions to dismiss. A new presiding judge, Judge Weisberg, denied them, holding that the statements "contain what could reasonably be understood as assertions of fact," *viz.*, "[a]ccusing a scientist of conducting his research fraudulently." Pet.App.106a. Likewise, saying that Mann "molested" data "could easily be interpreted to mean that [he] distorted, manipulated, or misrepresented his data." Pet.App.107a. The judge therefore agreed that Mann's defamation claims should be tried to a jury. Pet.App.109a.

---

[1] Although it is no longer at issue, the Superior Court also sustained Mann's claim for intentional infliction of emotional distress. The judge held that "[t]o place Plaintiff's name in the same sentence with Sandusky (a convicted pedophile) is clearly outrageous," and that National Review's "persistence despite the findings of the investigative bodies could be likened to a witch hunt." Pet.App.122-23a.

2. Under the D.C. Anti-SLAPP statute, the denial of Defendants' motions to dismiss was immediately appealable. Pet.App.3a. National Review, CEI, and Simberg pursued appeals. *Id.*

The Court of Appeals analyzed "de novo" whether the record "could support, with the clarity required by First Amendment principles, a jury verdict in [Mann's] favor." Pet.App.45-46a. The court recognized that climate change is "a matter of widespread public concern" and that the statements "were made in the context of a broad disagreement between the parties about the existence and cause of global warming, a disagreement that reached a high level of intensity and rhetoric." Pet.App.49a. The court also acknowledged that "tak[ing] issue with the soundness of Dr. Mann's methodology and conclusions" is "protected by the First Amendment." Pet.App.50a. As such, Defendants "are entitled to their opinions on the subject" of the hockey stick "and to express them without risk of incurring liability." Pet.App.74a.

Nevertheless, the court concluded that a jury could impose liability. Pet.App.51-66a. The court conceded that, under the First Amendment, defamation liability may be imposed only for "provably false statements of fact." Pet.App.49a. But the court said the claim should proceed if "a reasonable jury *could find*" that the statements conveyed verifiably false facts. Pet.App.65a n.46. The court rejected Petitioner's position that it should measure "verifiability as a matter of law" and permit the claim only if "*no reasonable person could find*" that the statement was merely opinion. *Id.*

Applying that standard, the court held that "[a] jury *could find* that [Simberg's] article accuses Dr. Mann of engaging in specific acts of academic and scientific misconduct," and was not just "a criticism of the hockey stick graph." Pet.App.52-53a (emphasis added). "[D]eception," "misconduct," and "data manipulation," the court declared, are "pointed accusations of personal wrongdoing by Dr. Mann, not simply critiques of methodology of his well-known published scientific research." Pet.App.54a. And these claims "can fairly be read" as provably false factual assertions, because the notion that Mann committed misconduct "actually has been proved to be false by four separate investigations." Pet.App.56a-57a. The court never identified any specific acts of alleged wrongdoing, or any objective standards for judging whether Mann committed "misconduct."

Similarly, the court held that "a reader *could take*" Steyn's comments on NRO "to be an assertion of a true fact." Pet.App.65a (emphasis added). By characterizing Mann's work as "deceptions" and "wrongdoing," the statements supposedly could be read not merely as "rhetorical" attacks on a "policy opponent," but as "impugn[ing] Dr. Mann's scientific integrity" and accusing him of "reprehensible conduct." Pet.App.63-64a. Again, the court never identified any particular acts of "reprehensible conduct" that were alleged, but maintained that the accusations were "capable of being verified or discredited." Pet.App.66a.

The court then analyzed the other elements of defamation. Of special note, the court reasoned that a jury could infer actual malice based on reports by

"credentialed academics" at "investigatory bodies in academia and government" that found Mann did not engage in "misconduct, fraud, and deception." Pet.App.75-77a, 80a, 90a. In the court's view, the reports "definitively discredited" Mann's critics. *Id.* 90a. While one report deemed the hockey stick "misleading," the court dismissed that as "not an indictment of the deceptive use of data, but a comment on how the graph could and should have been presented to be more transparent." *Id.* 82a. (The court did not explain why Defendants' statements should not be similarly construed.) The court also discerned actual malice because National Review, CEI, and Steyn "are deeply invested in one side of the global warming debate," giving them "a motive to defame" the other side. *Id.* 87a.

Accordingly, the Court of Appeals affirmed the denial of the motions to dismiss in relevant part, and remanded.[2]

National Review sought rehearing. Nearly two years later, the court issued an amended opinion that added one footnote and revised another. *See* Pet.App.1a n.*. In view of the revisions, the court denied the rehearing petition without prejudice to refiling. Pet.App.187-88a. National Review filed a second rehearing petition, which the court denied on March 1, 2019. *See* Pet.App.185-86a.

---

[2] The court agreed that Lowry's editorial, which interpreted Steyn's use of the word "fraudulent" as calling Mann's work "intellectually bogus and wrong," was not provably false and was thus protected (as was the word "fraudulent" in isolation, if unaccompanied by other pejorative characterizations). Pet.App.66a, 62a. The court also dismissed Mann's intentional-infliction-of-emotional-distress claim. Pet.App.90-93a.

REASONS FOR GRANTING THE PETITION

This Court has long held that only "provably false" statements may be subjected to defamation liability. Expressions of opinion that do not convey verifiably false facts are thus not actionable. That constitutional rule is critical to ensuring free public debate. Without it, every hot-button policy dispute would devolve into a libel suit, with each side asking juries to punish the other side for calling it "wrong," "unjust," "misleading," "dishonest," or "bad." If courts do not strictly police the boundaries of provably false speech, they invite the "real danger" that defamation suits will become "an instrument for the suppression of" opposing viewpoints. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

In the decision below, the D.C. Court of Appeals undermined the "provably false" rule in two respects, each worthy of this Court's review. *First*, it adopted the minority position in a well-recognized conflict by holding that the role of the judge is merely to ask whether a jury *could* understand the statement as conveying provably false facts, in which case the matter becomes a question for the jury. Most federal courts have properly held, consistent with this Court's First Amendment jurisprudence, that judges must undertake their own review to determine *as a matter of law* whether the statement is provably false. And ambiguity in that regard does not create a jury question. To the contrary, if one reasonable interpretation of the statement is that it is not a provably false factual assertion, then it does not lose its protected status and cannot be penalized under the First Amendment.

Second, the court treated subjective criticisms on matters of public concern as verifiable facts, even without reference to any concrete events or objective standards. Thus, a jury could impose liability on National Review for calling Mann's hockey stick "misleading" and "wrongdoing"—since those words supposedly could be read to imply Mann's violation of (unspecified) objective standards of conduct through (unspecified) acts. The court's ready willingness to impute assertions of defamatory fact to generic, value-laden criticisms in the context of a heated public-policy debate grossly offends the First Amendment and creates a stark split in authority with a host of federal and state courts.

The decision below is chilling in its implications. If the mere possibility that a jury *could* read criticisms like these as "facts" suffices to require a trial, then the "truth" in every matter of political and scientific controversy will be dictated by juries and enforced through monetary damages—not, as the First Amendment contemplates, resolved through the free and open exchange of ideas. In this case, for example, any trial would inevitably turn on clashing opinions about global warming, and the accuracy and ethics of Mann's research. It is all too easy to imagine similar suits in virtually every other public debate—by economists accused of "lying" about tax reform, editorialists accused of "misconduct" for deploying deceptive statistics, and politicians alleged to be "defrauding" the public about policy proposals. To protect the vigorous debate our nation depends on, this Court's review is urgently needed.

I. COURTS MUST DETERMINE, AS A MATTER OF LAW, WHETHER A STATEMENT CONTAINS ANY "PROVABLY FALSE" FACTS.

Among the most important "constitutional limits" on defamation actions is the rule that "statement[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 16, 20, 22. Most courts correctly treat this as an issue of law, consistent with other First Amendment protections, and resolve any ambiguity against liability. But here, the Court of Appeals committed threshold legal error by not analyzing for itself whether the challenged statements are protected opinions or disprovable factual assertions, but instead limiting its inquiry to whether a jury *could* view the challenged statements as "provably false." Because this is an important legal question that divides federal and state courts, this Court should grant review.

A. Courts Are Divided Over Whether the "Provably False" Standard Presents a Question of Law or Fact.

Both leading libel treatises recognize a split over whether the "provably false" standard presents a question of law or fact. "[A]ll of the federal circuits[] agree that whether a statement is fact or opinion is a matter of law for the court to decide," but "[s]ome state courts take the position" that if the statement "could be determined either as fact or opinion," that creates "a triable issue of fact for the jury." 1 *Sack on Defamation*, § 4.3.7 (5th ed. 2018); *accord* Rodney A. Smolla, *Law of Defamation*, §§ 6.61, 6.62, 6.63 (2d ed.

2018) (describing "division in the case law regarding the respective roles of the judge and the jury in applying the fact versus opinion determination," with the "majority position" holding this is "a question of law" and the "minority position" directing that it "should be submitted to the jury" if "the average reader could reasonably understand the statement as either fact or opinion"). In the decision below, the D.C. Court of Appeals aligned itself with the minority view favored by some state courts.

1. The federal rule is straightforward: "Whether a communication is actionable because it contained a provably false statement of fact is a question of law." *Chambers v. Travelers Cos., Inc.*, 668 F.3d 559, 564 (8th Cir. 2012); *see also Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("The judgment as to whether a challenged statement asserts actionable facts or implies such facts is a question of law for the court to determine as a threshold matter."); *Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008) ("Whether a statement is an opinion or fact is a question of law."); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) ("labeling a statement as verifiable fact or as opinion" is "decided by judges as a matter of law"); *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985) ("whether a statement is opinion ... as opposed to a factual representation is a question of law for the court"); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.12 (4th Cir. 1987) ("Whether a statement constitutes fact or opinion is a question of law for the trial court to decide."); *Hyland v. Raytheon Tech. Servs. Co.*, 670 S.E.2d 746, 751 (Va. 2009) ("legal question to be decided by a trial judge").

Federal courts further hold that, if a statement is ambiguous as to whether it conveys facts or mere opinion, that *forecloses* liability, as the statement cannot be proved false. Thus, the First Circuit has held that words that "admit of numerous interpretations" are "unprovable" by definition. *Phantom Touring Inc. v. Affiliated Pubs.*, 953 F.2d 724, 728 (1st Cir. 1992); *see also McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (statement that means "different things to different people" is "incapable of being proven true or false"); *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 112-13 (1st Cir. 2000) ("Defamation liability should not be premised on statements of such uncertain meaning.").

Other circuits agree, dismissing defamation claims as a matter of law where the statements were open to non-factual interpretations. *See, e.g.*, *Campbell v. Citizens for an Honest Gov't, Inc.*, 255 F.3d 560, 567-68 (8th Cir. 2001) ("A plaintiff cannot choose what meanings to attach to ... statements where several are available."); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (because "the term 'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception,'" plaintiff "failed to show" that using that term had "implie[d] a verifiable assertion of perjury"); *Gilbrook v. City of Westminster*, 177 F.3d 839, 863 (9th Cir. 1999) (calling someone a "Jimmy Hoffa" not actionable, as "not all reasonable people associate the name and persona of Jimmy Hoffa with *criminal* activity"). As the Sixth Circuit put it, if a statement "is not so much false as it is ambiguous," then it is "protected by the First Amendment." *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995).

2. Some courts, particularly state high courts, have taken a different approach. As they see it, if a statement is ambiguous, deciding whether it is "provably false" is a question of *fact* for the *jury*. On this view, the only question for the court is whether a reasonable jury *could* impute a factual claim to the statement. Any ambiguity thus cuts *in the plaintiff's favor*, allowing the suit to proceed.

The California courts take this latter approach, for example. *See Good Gov't Grp. of Seal Beach, Inc. v. Superior Ct.*, 586 P.2d 572, 576 (Cal. 1978) ("In our view the article is ambiguous, and we cannot as a matter of law characterize it as either stating a fact or an opinion. In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion ...."); *Campanelli v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 572, 578 (Cal. Ct. App. 1996) ("If the court concludes the statement could reasonably be construed as either fact or opinion, the issue should be resolved by a jury.").

So too in Massachusetts, Maine, Nevada, South Carolina, and others. *See, e.g., Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794, 797 (Mass. 2014) ("[I]f a statement is susceptible of being read by a reasonable person as either a factual statement or an opinion, it is for the jury to determine."); *Caron v. Bangor Publ'g Co.*, 470 A.2d 782, 784 (Me. 1984) ("If the average reader could reasonably understand the statement as either fact or opinion, the question … will be submitted to the jury."); *Ballard v. Wagner*, 877 A.2d 1083, 1087-88 (Me. 2005) (repeating this rule and holding that determination by factfinder "is subject to review for clear error" only); *Wynn v.*

Smith, 16 P.3d 424, 431 (Nev. 2001) ("Although ordinarily the fact-versus-opinion issue is a question of law for the court, where the statement is ambiguous, the issue must be left to the jury's determination."); *Posadas v. City of Reno*, 851 P.2d 438, 442 (Nev. 1993) ("We find the wording of the press release to be ambiguous and susceptible to the false impression that Posadas had perjured himself."); *Holtzscheiter v. Thomson Newspapers, Inc.*, 411 S.E.2d 664, 666 (S.C. 1991), *overruled on other grounds by* 506 S.E.2d 497 (S.C. 1998) ("Although ambiguous, the newspaper article could be read ... to charge Holtzscheiter with failing to support her daughter," and so court "erred in refusing to submit defamation to the jury"); *see also 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 a statement or implication of fact").

3. In this case, the D.C. Court of Appeals followed the minority state-court approach and rejected the federal rule. It held that Mann's claims are viable because "[a] jury *could find* that the [Simberg] article accuses Dr. Mann of engaging in specific acts of academic and scientific misconduct"; "a jury *could find* that by calling Dr. Mann 'the [Jerry] Sandusky of climate science,' the article implied that Dr. Mann's manipulation of data was seriously deviant"; and a jury "*could take*" the Steyn article as "an assertion of a true fact," that Mann engaged in "reprehensible conduct." Pet.App.52-53a, 65a (emphases added).

The Court of Appeals did not (and could not) deny that a reasonable reader could view the statements as nothing more than opinionated criticism of Mann for creating and promoting the hockey stick, which (in the writers' opinion) is unreliable and misleading. After all, the statements appeared on blogs that purvey political commentary. They came in the context of a heated public debate, with Mann himself accusing his critics of fraud and deception. *See supra* pp. 7-8. And there is no factual dispute that Mann combined two data sets; the only dispute is over whether this is a legitimate statistical technique or a misleading trick. All of this underscores that, at minimum, a reasonable reader could construe the statements as non-verifiable *interpretations* of undisputed facts. *Accord* Pet.App.141a.

Yet that was not enough for the Court of Appeals. In finding it sufficient that "a reader *could take*" the statements as "an assertion of a true fact," the court expressly "reject[ed] appellants' argument that 'the correct measure of the challenged statements' verifiability is whether *no reasonable person could find*" them to be mere "interpretations" of the facts. Pet.App.65a & n.46 (first emphasis added). It did so even as it admitted that the D.C. Circuit adopted the opposite rule in *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994). Pet.App.65a n.46.[3]

---

[3] The Court tried to distinguish *Moldea* because it involved "critiques of a work" rather than the "character of a person." Pet.App.65a n.46. Of course, that distinction is illusory: Every criticism of a person's work *could be* taken as a criticism of his character. Calling a book dishonest is no better than calling its author unethical, just as (in this case) calling a graph deceptive is no better than saying that its creator engaged in deception.

B. Allowing a Jury To Impose Liability for Ambiguous Statements Offends the First Amendment and This Court's Decisions.

The minority position adopted below is wrong. Unlike the question whether a statement is *false* (which turns on historical fact) and even the question whether a statement is *defamatory* (which turns on whether it tarnishes the plaintiff's reputation), the question whether a statement contains a provably false factual assertion is a question of law for the court. It asks about the ordinary meaning, in context, of the statement. That is a classic legal inquiry. And it serves to implement the First Amendment's guarantee of free speech—which this Court has long held requires an independent judicial evaluation.

1. Under *Milkovich*, the plaintiff must identify an assertion that is "susceptible of being proved true or false." 497 U.S. at 21. Whether the assertion *is* true or false presents a question of fact for the jury: Did the plaintiff truly commit the bad act of which he was accused? But the antecedent question, whether the assertion is *capable* of being proved "false," is not a factual one. It requires asking what the statement is fairly construed to assert and whether that assertion is the type of objective fact that can properly be put to a jury for verification. Those are traditional legal inquiries. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290, slip op. at 16–17 (U.S. May 20, 2019*)* ("Judges are experienced in the construction of written instruments," and subsidiary "factual questions" are "subsumed" within "circumscribed legal analysis"); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (examining for itself whether statements "carry a threat of clear and present danger").

Of course, language is sometimes ambiguous, and juries sometimes "resolve" ambiguity by determining which of two possible meanings was *intended* by the speaker. *E.g.*, *Great N. Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 292-93 (1922). Where the question, however, is not what any person *subjectively meant*, but rather what the language *objectively means*, courts resolve the ambiguity as a "purely legal question," using contextual clues, canons of construction, or clear-statement rules. *Muscarello v. United States*, 524 U.S. 125, 132 (1998). That is the scenario here, because the question of whether an assertion is provably false calls for an objective inquiry into what the statement *conveys*, not a subjective inquiry into what the speaker *intended*. Indeed, the standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," in order to "resolve disputes quickly without chilling speech through the threat of burdensome litigation." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J.). That being so, the court is in just as good a position to interpret the assertion at the threshold, as the jury will be after trial.

2. That conclusion is further buttressed by the constitutional context. When it comes to identifying constitutionally protected speech, this Court has long held that independent judicial review is needed, and that deferring to triers of fact is inadequate.

As this Court explained in *Bose Corp. v. Consumers Union of U.S., Inc.*, "the unprotected character of particular communications" has been "determined by the judicial evaluation of special facts that have been deemed to have constitutional significance." 466 U.S. 485, 505 (1984). "In such cases, the Court has regularly conducted an independent review … both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* This is necessary because "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.*

Thus, whether the issue is libel, fighting words, or incitement, courts have "the obligation ... to review the facts to insure that the speech involved is not protected under federal law," *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974), and the First Amendment must be enforced by courts "as a matter of constitutional law," *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). This is why the leading libel treatise describes the majority, federal rule discussed above as "consistent with the view that opinion is protected as a matter of constitutional law," obliging courts to "examine for themselves the statements in issue" to determine constitutional protection. 1 *Sack on Defamation*, § 4.3.7 (5th ed. 2018).

It is true that *Milkovich* refers, in passing, to what a "reasonable factfinder could conclude." 497 U.S. at 21. But that was after the Court had twice cited *Bose* with approval and repeated its admonition about the need for "independent" judicial examination to ensure that a defamation claim does not work a "forbidden intrusion on the field of free expression." *Id.* at 17; *see also id.* at 21. And, in *Milkovich*, the Court found the statement to be "clear," *id.*, so how to treat ambiguous statements was not presented. Since the statement clearly was "provably false," liability was permissible unless the context somehow "negate[d] the impression that the writer was seriously maintaining that the petitioner committed the crime of perjury." *Id.* Since a "reasonable jury could conclude" that the "clear" and "provably false" assertion meant what it said, liability could be imposed. *Id.*

By using the term "could" instead of "would," the Court did not hold that the "provably false" standard uniquely presents a question of fact. Indeed, the dissent and the majority "agree[d]" that the dispositive legal issue was "what a reasonable reader *would have* understood the author to have said." *Id.* at 24 (Brennan, J., dissenting) (emphasis added). That explains why, as set forth above, most courts after *Milkovich* continue to recognize that whether a statement is actionable under the First Amendment is a question of law for the court. But to the extent that *Milkovich* could be understood to support the erroneous minority view embraced below, that is all the more reason to grant review and correct this misunderstanding.

3. The First Amendment also compels the rule that ambiguity, far from justifying a jury trial, actually forecloses one. Because courts "must give the benefit of any doubt to protecting rather than stifling speech," speech can be punished only if it "is susceptible of no reasonable interpretation" that would be protected. *Wisc. Right to Life, Inc.*, 551 U.S. at 469-70 (Roberts, C.J.). If a court is to take the extraordinary and dangerous step of stripping public-policy speech of the nearly axiomatic protection of the First Amendment, it must be "*sure* that the speech in question *actually* falls within" the exceedingly narrow "category" of speech that is "unprotected," because such certainty is necessary to "*ensure* that protected expression will not be inhibited." *Bose*, 466 U.S. at 505 (emphasis added). Thus, speech cannot be punished because it *might* be unprotected, just as a citizen cannot be criminally punished because he *might* be guilty. Stripping protection from speech that could be unprotected obviously would not "confine the perimeters of any unprotected category within acceptably narrow limits" and thus assuredly would chill "protected expression." *Id*. If a Sword of Damocles hangs over speakers for speech that *could be construed* as unprotected, this will drastically curtail public debate by eliminating the "breathing space" that "'[f]reedoms of expression require in order to survive." *Milkovich*, 497 U.S. at 19.

Indeed, if ambiguous speech is subjected to litigation and intrusive discovery, it will be effectively punished even if it is ultimately found to be protected. The burden of defending a lawsuit imposes its own form of punishment, regardless of whether the speaker must ultimately pay damages. Even

worse, the mere *threat* of such litigation casts a chill on public debate. If speakers are not "assured freedom from the harassment of lawsuits, they will tend to become self-censors," and public discourse "will become less uninhibited, less robust, and less wide-open." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). That is why the First Amendment must protect speakers "'not only from the consequences of litigation's results but also from the burden of defending themselves." *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979).

Consequently, as *Hepps* observed, "where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech." 475 U.S. at 776. Accordingly, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988) (Bork, J.). That principle applies *a fortiori* to the antecedent question whether a statement is "susceptible of being verified as true or false." *Partington v. Bugliosi*, 56 F.3d 1147, 1158-59 (9th Cir. 1995) (Reinhardt, J.). Thus, a statement on a matter of public concern cannot be actionable unless it is *unambiguously* factual. This Court should grant review to so hold.

II. DEFAMATION LIABILITY MAY NOT BE IMPOSED FOR SUBJECTIVE, VALUE-LADEN CRITICISMS ON MATTERS OF PUBLIC CONCERN.

The D.C. Court of Appeals also erred, egregiously, by crediting the notion that the statements at issue here—generalized and subjective criticism of Mann's work in creating the hockey-stick graph—could fairly

be understood as falsifiable facts. In the context of a political or scientific controversy, calling one side "wrong," "misleading," "fraudulent," or the like must be understood as the speaker's value-laden *opinion*, not as an accusation of some objective, verifiable act of misconduct. Following this Court's lead, numerous courts have so recognized. By holding otherwise, the court here exposed every editorial page, political activist, and social-media pundit to a libel suit—with the predictable chilling effect. It has done so in the nation's capital, no less. For this reason too, this Court's intervention is badly needed.

A. The D.C. Court Created a Conflict By Imputing Verifiable Factual Claims to Expressions of Opinions on Hot-Button Matters of Public Concern.

For as long as there has been heated political debate, speakers have tried to use courts to silence their critics. To their credit, courts have virtually always refused, putting aside their own biases to distinguish legitimate First Amendment expression from defamatory factual falsehoods. In this case, however, the D.C. Court of Appeals took vague, subjective language, in the context of opinion blogs discussing a controversial matter, and declared it to be sufficiently falsifiable to be actionable—based in large part on the notion that reports by "academia and government" had "definitively discredited" Petitioners' views about the hockey stick and climate change. Pet.App.80a, 90a. This legal rule is intolerable.

1. Many courts have analyzed criticisms nearly identical to those in this case, and determined that

they are protected by the First Amendment because they are too subjective, vague, or ambiguous to be provably false. These courts recognize the difference between *subjective characterizations* and *falsifiable assertions*, refusing to read the latter into the former.

Claims of Deception: While a specific accusation of perjury may be objectively verifiable, *see Milkovich*, 497 U.S. at 21-22, courts have repeatedly held that generic accusations of a person being "misleading" or "deceptive," particularly in the context of a public controversy, are not verifiable as true or false. *See Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995) (characterizing conspiracy theorists as "misleading the American public" is "obviously a statement of opinion that could not be reasonably be seen as stating or implying provable facts"); *Phantom Touring*, 953 F.2d at 728 n.7 (no claim for describing plaintiff as "blatantly misleading the public"); *Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 727 (R.I. 2000) (no claim for saying appraiser's analysis was so "misleading" as to be "considered fraudulent").

Indeed, even the more damaging accusation of "lying" is protected, particularly for speech about matters of public concern. *See Underwager*, 69 F.3d at 367 (accusation of "lying" in debate over "highly controversial subject" not actionable, since "lying" includes "partial truths," "misinterpretation," and "deception"); *Gardner v. Martino*, 563 F.3d 981, 987-88 (9th Cir. 2009) ("lying" is "nonactionable opinion"); *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1136 (10th Cir. 2017) (claiming someone "not telling the truth" was "protected opinion"); *Piersall v. SportsVision of Chi.*, 595 N.E.2d 103, 107 (Ill. Ct. App. 1992) ("[T]he general statement

that someone is a liar ... is merely opinion."); *Faltas v. The State Newspaper*, 928 F. Supp. 637, 640-42 (D.S.C. 1996), *aff'd*, 155 F.3d 557 (4th Cir. 1998) (no claim for saying plaintiff "lie[d] to suit her agenda" in "the context of ... a given controversial subject").

Generic Assertions of Misconduct. To be sure, accusing someone of a concrete act of professional misconduct (like stealing from a client or operating without a license) is factual and actionable. But courts reject claims based on generalized accusations of "misconduct" that do not reference particular actions or standards that were violated. *See McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 849-50, 853 (8th Cir. 2000) (rejecting claim based on non-specific accusations of "conduct unacceptable by any business standard"); *Hogan v. Winder*, 762 F.3d 1096, 1107-08 (10th Cir. 2014) (no claim for saying plaintiff was terminated for "performance issues," because "too nonspecific" to imply factual assertion); *Hupp v. Sasser*, 490 S.E.2d 880, 887 (W. Va. 1997) (accusations of "unacceptable" and "unprofessional" behavior are "clearly not provably false," but rather are "subjective conclusions"); *Leddy v. Narragansett Television, L.P.*, 843 A.2d 481, 489 (R.I. 2004) ("[C]ertain words—and 'wrong' is one of them—are too imprecise and vague to be verifiable as either true or false").

Comparisons to Odious Figures. Likewise, courts reject the notion that analogizing someone to a disreputable figure is objectively verifiable and thus actionable. *See Crowe v. Cty. of San Diego*, 608 F.3d 406, 445 (9th Cir. 2010) ("Charles Manson comparison ... [is] rhetoric that reasonable minds would not take to be factual"); *U.S. Steel, LLC, v.*

Tieco, Inc., 261 F.3d 1275, 1293-94 (11th Cir. 2001) (no claim for comparing plaintiff to "Jeffrey Dahmer, the convicted mass murderer," which was merely a "distasteful metaphor"); *Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008) (rejecting claim for comparing plaintiff to Marie Antoinette and suggesting he was "leading the [t]own…to destruction"); *Gilbrook*, 177 F.3d at 862-63 (comparison to Jimmy Hoffa is "not sufficiently susceptible of being proved true or false"); *Koch v. Goldway*, 817 F.2d 507, 509-10 (9th Cir. 1987) (comparison to Hitler and other Nazis not actionable; it was "a slur against a political opponent," not a "statement of fact").

2. Here, the D.C. court ruled otherwise. It took statements just like those discussed above—leveling generic claims of deception and misconduct, with the help of a "distasteful metaphor," all in the context of an important public debate over climate change—and held that a jury could find Defendants liable.

Specifically, the court held that calling the hockey stick a "deception" was "not simply a matter of opinion." Pet.App.57a. But since there is no dispute over what Mann did—only about whether his presentation was misleading—this "deception" claim is *necessarily* an opinion about the propriety of Mann's statistical methods, and thus incapable of objective verification or disproof. *See Underwager*, 69 F.3d at 367; *Groden*, 61 F.3d at 1051. A jury cannot resolve the "truth" of whether Mann's portrayal of global warming was deceptive. It can only offer *its* opinion on the controversies underlying the hockey-stick debate, which even the D.C. court appeared to recognize were not justiciable. Pet.App.74a.

The D.C. court further harped on the statement that Mann engaged in "academic and scientific misconduct." Pet.App.55a. But, again, the dispute is over the *characterization* of Mann's use of proxy data and his splicing it together with other data. That characterization—like calling conduct "unacceptable by any business standard," *McClure*, 223 F.3d at 851, or "unprofessional," *Hupp*, 490 S.E.2d at 883—is plainly opinion. Indeed, the court acknowledged that determining the "truth" of these criticisms "requires the exercise of judgment" on "ethical" questions," yet denied that this renders them "incapable of verification." Pet.App84a. But, of course, no objective evidence can disprove an "ethical" judgment.

Insofar as the court viewed "noxious comparisons" of Mann "to notorious persons" as factual assertions, Pet.App.53a, 61a, that too contradicts other courts. *Crowe*, 608 F.3d at 445; *U.S. Steel*, 261 F.3d at 1293-94; *Abel*, 885 N.E.2d at 884; *Gilbrook*, 177 F.3d at 862-63; *Koch*, 817 F.2d at 509-10. Calling Mann the "Jerry Sandusky of climate change" because he "molested data" is the archetype of "rhetorical hyperbole" and "vigorous epithet[]" that the Constitution protects. *Greenbelt Coop.*, 398 U.S. at 14. Since data, unlike children, *cannot* be literally "molested," these statements *had to be* rhetorical hyperbole.

Trying to justify its aggressive holding, the court acknowledged that the First Amendment guarantees the right to "take issue with the soundness of Dr. Mann's methodology and conclusions," but claimed that Defendants had instead engaged in "personal attacks on [his] honesty and integrity." Pet.App.50a. Of course, one's opinions about a person's "honesty

and integrity" are just as constitutionally protected as opinions about that person's work, so long as they do not include any provably false facts (like claiming that Mann actually falsified data). Regardless, the court's distinction is wholly illusory, because Defendants' supposed attacks on Mann's "honesty and integrity" were premised on opposition to his "methodology and conclusions." To say that Defendants can criticize Mann's hockey stick as being "misleading" but cannot call Mann "deceptive" is like saying that one can call President Trump's immigration policy "inhumane" but cannot call the President himself "cruel." There is no support in the law or in common sense for this artificial distinction.

The court further declared the statements unprotected because they did "not comment on the specifics of Dr. Mann's methodology." Pet.App.53a. That is actually false; as the court elsewhere admitted, Simberg linked to articles "criticiz[ing] the methodology and statistical analysis that led to the hockey stick." Pet.App.51a n.35. Even the trial court recognized the statements as an "interpretation of facts." Pet.App.141a. In any event, far from supporting liability, the absence of specificity *defeats* liability. General "characterizations" are "not sufficiently precise or verifiable to support a claim of defamation." *McClure*, 223 F.3d at 853. As other courts recognize, the "lack of precision makes the assertion[s] ... incapable of being proven true or false." *McCabe*, 814 F.2d at 842. Again, the D.C. court turned the law on its head.

B. The Opinion Below Invites Defamation Suits by Both Sides of Every Major Public-Policy Debate.

The consequences of the decision below are serious and far-reaching. In virtually all public debates, each side accuses the other of being deceptive, misleading, dishonest, or otherwise engaged in misconduct. Under the decision here, those ubiquitous criticisms constitute "personal attacks" that a jury could construe as factual—and so form the basis for defamation suits. That would put juries in charge of determining "truth" and "falsity" for every political and scientific controversy. It is hard to imagine a result more offensive to the First Amendment.

Take this case. Determining whether Defendants "lied" by calling the hockey stick "deceptive" and by accusing Mann of "misconduct" and "wrongdoing" will necessarily require the jury to evaluate the truth about global warming, the scientific evidence of its trend lines, and the research ethics of splicing two data sets without clearly signifying it. That is plainly absurd, considering how all of this remains an issue of scientific, academic, and political dispute.

Moreover, climate change is a polarizing political issue. At least in D.C., the views expressed by Defendants are likely to be unpopular. That creates the manifest risk that a verdict for Mann would reflect, not a finding of factual falsity, but mere disagreement with National Review's opinion on this hot-button issue. There is a serious "danger," in these contexts, "that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 466 U.S. at 505. A jury may decide to "impose liability on the

basis of the jurors' 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). That is why it is so critical for courts to vigorously enforce the boundary between protected opinion and provably false defamation.

Needless to say, the danger is bipartisan. Wealthy energy producers on the other side of the debate could easily ask a jury in Texas or Oklahoma to bankrupt Mann and his allies through defamation awards for calling them "fraudulent" and "deceptive" deniers of climate change. *Supra* at 7-8. Or the Koch brothers could sue Greenpeace for saying that they funded a "deceptive" "junk study" that is "loaded with lies and misrepresentations of actual climate change science." Connor Gibson, *Koch Brothers Produce Counterfeit Climate Report to Deceive Congress*, GREENPEACE.ORG (Oct. 22, 2012). Even public officials, particularly controversial ones, could bring defamation suits literally every day to punish and silence their critics. *See, e.g.,* Matthew Yglesias, *House Speaker Paul Ryan was the biggest fraud in American politics*, Vox (Apr. 11, 2018); Susan B. Glasser, *It's True: Trump Is Lying More, and He's Doing It on Purpose*, NEW YORKER (Aug. 3, 2018).

The parade of horribles is boundless, as virtually every public debate—from illegal immigration to taxes, crime, and employment rates—involves each side routinely accusing the other of deceptively manipulating statistics. *See, e.g.*, Matt Ford, *Trump Is Distorting Statistics to Demonize Immigrants*, THE NEW REPUBLIC (Jan. 17, 2018); Josh Saul, *Jeff Sessions Misrepresented Crime Statistics from His Own Department's Report*, NEWSWEEK (Dec. 13,

2017); Steven Benen, *The most outrageous of Donald Trump's bogus employment statistics*, MSNBC (Mar. 1, 2017); Walt Hickey, *Exposed: Here Are The Tricks That Fox News Uses To Manipulate Statistics On Its Graphics*, BUSINESS INSIDER (Nov. 28, 2012).

If the decision below is right that such subjective characterizations on matters of public concern can be read as provably false factual assertions, libel lawyers will be in hot demand, but public debate will dry up. *See Partington*, 56 F.3d at 1158-59 (writers must be able to "criticize and interpret the actions and decisions of those involved in a public controversy," or "public dialogue" will be "stifled"). Of course, the decision below is wrong. These critiques are protected because they cannot be verified or disproved by objective evidence. This Court should grant review to so hold, and to preserve the robust public debate that our nation depends upon.

CONCLUSION

The Court should grant the petition.

MAY 2019

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioner