Nos. 18-1451 & 18-1477

In The
Supreme Court of the United States

NATIONAL REVIEW, INC.

Petitioner,

v.

MICHAEL E. MANN,

Respondent.

COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG,

Petitioners,

v.

MICHAEL E. MANN,

Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or amicus, *e.g.*, *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to freedom of speech.

SUMMARY OF ARGUMENT

The court below embraced a standard for defamation liability under the First Amendment that would open up to litigation and legal liability a broad swath of political and social invective common today. The importance of that step, and of the constitutional question whether the First Amendment permits such liability, warrants review by this Court.

ARGUMENT

What a wonderful world it would be if all debates were conducted with charity and respect! The accusations of all sorts of character deficiencies, deception, and misconduct so rampant in modern

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent for its filing. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

discourse represent a regrettable aspect of public debate, even if one unsurprising to the Founders:

> As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571.

New York Times v. Sullivan, 376 U.S. 254, 271 (1964). *Accord Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974). That said, the government, through its courts, is decidedly *not* the proper arbiter of manners or of the virtuous conduct of arguments. Under the First Amendment, government officials are not empowered to wield the law, criminal or civil, to weed out intemperate or unkind verbiage. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), likewise no official can prescribe what shall be acceptable rhetoric or hyperbole. *Cf. Greenbelt Cooperative Pub. Ass'n v. Bressler*, 398 U.S. 6, 14 (1970) (First Amendment bars defamation action targeting "rhetorical hyperbole, a vigorous epithet used by those who considered [someone's] position extremely unreasonable"). The contrary decision of the court below warrants this Court's review.

In this defamation suit arising from the debate over climate change and its causes – a matter of public concern if ever there was one – the District of Columbia Court of Appeals held that statements can trigger jury trial and tort liability under the following standard:

> [D]efamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply as fact that [someone] engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable.

Pet. App. 50a. The court below ruled that under this standard, it would suffice to accuse a person of such things as "wrongdoing," "deceptions," "data manipulation," and "academic and scientific misconduct," because "[a] jury *could* find that [such language] accuses [the plaintiff] of engaging in *specific* acts of academic and scientific misconduct in the manipulation of data, and thus conveys a defamatory meaning." Pet. App. 52a (emphasis added).

This is quite a loosey-goosey standard. Indeed, it is hard to imagine any *pejorative* description of academic studies or statistical assertions that could not be read at least in theory to imply some "specific acts of academic and scientific misconduct in the manipulation of data." As a consequence, the decision below places into the legal crosshairs a huge set of contemporary statements about matters of public

concern, including everything from immigration[2] to abortion[3] to a miscellany of other topics.[4]

A supposed limitation of this standard to charges launched against *academic or scientific* studies

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[2]*Compare* Wayne A. Cornelius, "Immigration study misleading, negative," *San Diego Union Tribune* (Dec. 16, 2007), *with* Center for Immigration Studies, "New Report Offers Deceptive Assessment of Immigration Enforcement" (Jan. 10, 2013) (criticizing report as "riddled with false statements, cherry-picked statistics, and inappropriate comparisons [and containing a] compilation of bogus findings").

[3]*Compare* David A. Grimes, "Hush: the Documentary – Hubris and Hypocrisy about Abortion," *Huffington Post* (Sept. 2, 2016) (particular individuals accused variously of "pseudoscience," "cherry-picking . . . citations," "poor credentials and discredited science," "overwhelming bias," "suspect" credentials, "discredited" publications, "misrepresent[ing] medical knowledge," "violat[ing] ethical principles," and "deception"), *with* Carole Novielli, "Still lying: Planned Parenthood repeats (and repeats) debunked claim on illegal abortion deaths," Live Action (Apr. 4, 2019).

[4]*See, e.g.,* Denise Grady, "Medical Journal Cites Misleading Drug Research," *New York Times* (Nov. 10, 1999) (accusations of exaggeration and misinformation as well as questioning "the honesty of the people doing [peer review]"); "Sugar Industry Funded Misleading Studies on Heart Disease," *Health Fitness Revolution* (Sept. 12, 2016); "Science Review Offers False Accusations about Chloroquine Resistance," *Evolution News* (Feb. 14, 2019) (accusing of "misrepresentations" those who themselves launched accusations of "misrepresent[ation]s" and "ignor[ing] evidence"); American College of Pediatricians, "Research on Disciplinary Spanking is Misleading" (Jan. 2017); Carolyn Moynihan, "Misleading Research on Teen Sex," *Crisis* (July 1, 2011).

provides no salve. Why should a different standard apply to researchers and professors? Is concern for their reputations to be privileged over the concerns of attorneys, athletes, artists, shopkeepers, gardeners, plumbers, or anyone else? Are not all citizens equal under the First Amendment?

Likewise, a limitation to academic *research* is of little consolation. Academic studies play a key role in countless hot-button public policy debates: the economic implications of minimum wage laws; the costs and benefits of environmental protection measures; the deterrent value of capital punishment; the safety of abortion practices; the status and future prospects of endangered animal species; the efficacy of particular vaccines versus their risks; etc., etc., etc. The decision below thus threatens to cast a pall over many different public debates of immense importance.

The threat of potential defamation liability – or at a minimum, the huge costs of simply defending such a lawsuit – naturally will both chill public discourse and incentivize political opponents to resort to defamation lawfare to silence dissent. Given these truly enormous practical implications for public discourse, this Court should grant certiorari.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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