Nos. 14-CV-101 / 14-CV-126

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*,

Defendants-Appellants,

and

NATIONAL REVIEW, INC.,

Defendant-Appellant,

v.

MICHAEL E. MANN, PH.D,

Plaintiff-Appellee.

On Appeal from the Superior Court of the District of Columbia

Civil Division, No. 2012 CA 008263 B

BRIEF *AMICI CURIAE* OF THE CATO INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND GOLDWATER INSTITUTE SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici Cato Institute, Reason Foundation, Individual Rights Foundation, and Goldwater Institute submit this brief in support of appellants and supporting reversal of the decision below.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and

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[1] All parties have consented to the filing of this brief. Pursuant to D.C. App. R. 28(a)(2)(B), *amici* each certify that they have no parent corporation or subsidiaries, and no publicly held corporation holds 10% or more of their stock.

nonpartisan organization. The IRF is dedicated to supporting litigation involving civil rights, protection of speech and associational rights, and the core principles of free societies, and it participates in educating the public about the importance of personal liberty, limited government, and constitutional rights. To further its goals, IRF attorneys appear in litigation and file amicus curiae briefs in appellate cases involving significant constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, or speech or associational rights—all of which are fundamental components of individual rights in a free and diverse society.

The Goldwater Institute is a tax-exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. Goldwater advances public policies that further the principles of limited government, economic freedom, and individual responsibility. The mission of Goldwater's Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including, but not limited to, the First Amendment, the doctrine of separation of powers, and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

Amici are concerned with the implications of the lower court's decision, which chills speech at the juncture of political commentary and academic debate. Declaring "truth" or "falsity" in the midst of an ongoing scientific dispute not only infringes the freedom of speech on important matters of public policy, it threatens academic independence and chills scientific progress. *Amici* believe that their public policy experience will assist this Court in its consideration of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is a core First Amendment principle that courts grant maximum protection to speech about matters of public concern—all the more so when the subject of the speech is a public figure. In this case, defendants' speech criticized the scientific method used by Dr. Mann, a very public figure whose scientific work has played a role in causing massive policy changes in government.

This is not only the paradigm for how the marketplace of ideas is supposed to work, it represents the essence of the scientific method. Scientists of all stripes develop hypotheses, test them, and publish their work for fellow scientists and the public to review. Sometimes the review is not civil. Sometimes it is brutal. That is to be expected, particularly where, as here, the scientific issues have led to huge changes in government policy and there is a substantial body of commentary raising questions about Dr. Mann's methods.

The point in this appeal is that courts should not be coming up with new terms like "scientific fraud" to squeeze debate over scientific issues impacting government policy into ordinary libel law. Dr. Mann is not like a corner butcher falsely accused of putting his thumb on the scale or mixing horsemeat into the ground beef. He is a vocal leader in a school of scientific thought that has had major impact on government policies. Public figures like Dr. Mann must not be allowed use the courts to muzzle their critics when they face sharp criticism. Instead, as the U.S. Supreme Court has repeatedly taught, the marketplace of ideas resolves the dispute. Courts have a checkered history when they have waded into scientific disputes. This Court should let the debate continue, outside the judicial system.

ARGUMENT

I. The First Amendment Requires That Debate On Public Issues Be Settled By Counterspeech And Competition In The Marketplace Of Ideas

The nature, cause, and extent of climate change[2] and what to do about it are all matters of intense political and scientific debate with enormous and immediate public policy implications. Accordingly, there is an intense need for robust speech about these matters in the marketplace of ideas. Unlike a scientific debate where the public policy impact may not be felt for decades, the government is today spending billions of dollars and reorganizing entire industries based in no small part on the very studies at issue in this case. *See, e.g.*, Office of Management and Budget, *Federal Climate Change Expenditures Report to Congress* 3 (August 2013) ("The President's 2014 Budget proposes over $21.4 billion for climate change activities."); [3] Congressional Budget Office, *Federal Climate Change Programs: Funding History and Policy Issues* 1 (March 2010) ("From 1998 to 2009, appropriations for [federal] agencies' work related to climate change totaled about $99 billion (in 2009 dollars).").[4] Speech on such public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (internal quotation

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[2] Until the last few years, the movement with which Dr. Mann is associated used the term "global warming" to describe the phenomenon that required urgent government action. We will use here the movement's new and far more general term, "climate change."

[3] Available at http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fcce-report-to-congress.pdf.

[4] Available at https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/112xx/doc11224/03-26-climatechange.pdf.

marks and citation omitted); *see also, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").

The Supreme Court's precedents teach that Dr. Mann's remedy lies not in a judicial declaration of "truth" or through "exoneration" by the government, but through counterspeech in the crucible of public debate. The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This commitment requires that hotly contested matters be settled by competition in the marketplace of ideas, not judicial refereeing.

The Supreme Court recently emphasized the importance of counterspeech and refutation in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), where it explained: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *Id.* at 2550 (plurality opinion). Put simply, "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

Accordingly, academics like Dr. Mann—who stake out bold scientific positions on matters leading to massive policy change—must rebut and refute criticism and compete for public acceptance of their ideas. *See Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) ("[J]udges are not well equipped to resolve academic controversies . . . and scholars have their own remedies for unfair criticisms of their

work—the publication of a rebuttal."); *accord Lott v. Levitt*, 556 F.3d 564, 570 (7th Cir. 2009). It is anathema to core First Amendment principles to allow such public figures to enlist the courts to muzzle their adversaries.

II. Courts Must Afford Sufficient Breathing Space To Avoid Stifling Academic And Scientific Progress

The lower court's decision threatens the vitality of speech at the juncture of political commentary and academic debate. Courts must afford sufficient "breathing space" to avoid suffocating First Amendment rights, *NAACP v. Button*, 371 U.S. 415, 433 (1963), and declaring "truth" or "falsity" in a scientific dispute not only infringes the freedom of speech on an important matter of public policy, it threatens academic independence and chills scientific progress. The protection of academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents of Univ. of New York*, 385 U.S. 589, 603 (1967); *accord Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485, 511 (1952) (academic freedom is central to "the pursuit of truth which the First Amendment was designed to protect") (Douglas, J., dissenting).[5]

The Supreme Court has likewise recognized that unfettered scientific inquiry is essential to societal progress. *E.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596-97 (1993) (recognizing that "open debate is an essential part" of scientific analysis, and that "[s]cientific conclusions are subject to perpetual revision."). In a related context, Justice Frankfurter observed:

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[5] *See also McMillan v. Togus Reg'l Office, Dep't of Veterans Affairs*, 294 F.Supp.2d 305, 316-20 (E.D.N.Y. 2003) (discussing chilling effect of litigation on scientific inquiry and the Academy).

> Insights into the mysteries of nature are born of hypothesis and speculation. . . . For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.

Sweezy v. New Hampshire, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring in result).

Implicit in this is an understanding that science, by its very nature, is a matter of trial-and-error—and that error itself represents progress. "The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance." *Daubert*, 509 U.S. at 597. To ensure progress, Courts must afford sufficient breathing space to allow for experimentation and failure.

The consequences of the ruling below are particularly acute for *amici* and other think tanks that exist to engage in policy debates, often about matters on which they conduct social science research. By allowing Dr. Mann's suit to proceed, the Superior Court has declared open season for political opponents to drag public policy organizations into costly, time-consuming legal battles—diverting resources that would be better used to further public debate.

III. Courts Are Ill-Suited To Officiate Scientific Debate To Determine "Truth" Or "Falsity"

Courts have routinely held that scientific and academic controversies are better resolved by open debate rather than in the dusty confines of the courtroom. In *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994), Judge Easterbrook explained: "Scientific controversies must be settled by the methods of science rather than by the methods

of litigation. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us." *Id.* at 736 (7th Cir.1994). *Accord Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) ("[S]cientific disputes must be resolved by scientific means.").

The Second Circuit also recently detailed why courts should stay out of the fray when asked to step in to a scientific debate:

> Scientific academic discourse poses several problems for the fact-opinion paradigm of First Amendment jurisprudence. Most conclusions contained in a scientific journal article are, in principle, capable of verification or refutation by means of objective proof. Indeed, it is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe. At the same time, however, it is the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation. … In a sufficiently novel area of research, propositions of empirical "fact" advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts.

ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496-97 (2d Cir. 2013). The court concluded: "Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury." *Id.* at 497.[6]

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[6] The Second Circuit held that "while statements about contested and contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable 'fact,' for purposes of the First Amendment and the laws relating to fair competition and defamation, they are more closely akin to matters of opinion, and are so understood by the relevant scientific communities." *ONY*, 720 F.3d at 497.

The Second and Seventh Circuits are among a legion of courts that have refused to call winners or losers in the midst of ongoing scientific debate, preferring instead to allow competition in the marketplace of ideas rather than risk stifling progress. In *Reuber v. Food Chemical News, Inc.*, for example, the Fourth Circuit highlighted this risk when rejecting a claim against an industry publication over its reporting about a scientist's qualifications and research. 925 F.2d 703 (4th Cir. 1991) (dispute between scientist and industry publication regarding the carcinogenic properties of pesticides). Recognizing that "[i]n the hurly burly of political and scientific debate, some false (or arguably false) allegations fly," *id.* at 717, the *Reuber* court—like the Second and Seventh Circuits—stressed deference to scientific processes and academic debate:

> We reject the attempt to silence one's adversaries in a public controversy by suing organizations attempting to inform the public about questions raised as to the research of every putative defamation plaintiff. Upholding this judgment would have the ironic effect of stifling debate within the community of scientists at a time when the implications of scientific research are ever more far reaching and when the public's understanding of professional credentials and conclusions must be correspondingly enhanced.

Id. at 718.

A district court reached a similar conclusion in a recent dispute between competing sides of the anti-vaccine movement. Because of the "prospect of litigation over unresolved—and perhaps unresolvable—scientific arguments . . . . Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context." *Arthur v. Offit*, 2010 WL 883745, *6 (E.D. Va. 2010). "These . . . are academic questions that are not the sort of thing

that courts or juries resolve in the context of a defamation action." *Id.*[7]

Other courts have emphasized the importance of context when analyzing statements made in the course of academic and scientific criticism—an area where critical and often impertinent rhetoric is expected:

> Criticism of the work of scholars is generally commonplace and acceptable in academic circles. Thus, statements that may appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting. This is so because an academic audience will often be able to recognize the "subjective character" of the statements and "discount them accordingly." Not only should this sort of "imaginative expression" not be discouraged by defamation claims, it is often valuable to discourse and at times should be encouraged.

Fikes v. Furst, 81 P.3d 545, 551 (N.M. 2003) (academic dispute between anthropologists). *See also Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995) ("[T]he audience to a discussion" on a "highly controversial subject" "would expect emphatic language on both sides.") (criticism of psychologist's qualifications and methods); *Faltas v. State Newspaper*, 928 F.Supp. 637, 648 (D.S.C. 1996), *aff'd*, 155 F.3d 557 (4th Cir.1998) (claim that doctor is a "liar" and "lie[s]" not defamatory in "the context of challenging plaintiff's position on a given controversial subject as to which 'experts' obviously disagree, often in less than collegial tones.") (academic dispute over homosexual behavior); *Freyd v.*

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[7] *See also Ex rel. Haight v. Catholic Healthcare W.*, 2007 WL 2330790, *3 (D. Ariz. 2007) ("[E]xpressions of scientific opinion or judgment about which reasonable minds may differ cannot be false."); *Oxycal Labs., Inc. v. Jeffers*, 909 F.Supp. 719, 724 (S.D. Cal. 1995) (holding that "[t]he Court cannot [inquire] into the validity of . . . scientific theories, nor should it.") (dispute over scientist's claim that vitamin contained cancer-causing agent).

Whitfield, 972 F.Supp. 940, 946 (D. Md. 1997) (noting that scholarly criticism is "particularly appropriate, and expected, in the broader social context of an academic lecture.") (dispute over psychologist's theory of repressed memory and child sexual abuse).[8]

The upshot of these decisions is that courts are ill-suited to referee scientific or academic controversies. The nation's understanding of climate change—the extent to which it exists and its causes—is a paradigmatic example of how scientific progress is spurred by uninhibited debate: Two opposing ideas vying for public acceptance within the scientific community, with each side narrowing the grounds for dispute through experimentation, verification and revision—and argument. At least it should be.

Concern over global warming and climate change is a relatively recent phenomenon, first gaining popular attention in the late 1980s.[9] *See, e.g.*, Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. Times, June 24, 1998, at A14; Richard S. Lindzen, *Global Warming: The Origin and Nature of the Alleged Scientific Consensus*,

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[8] To that end, referring to Dr. Mann as "the very ringleader of the tree-ring circus" is the sort of imaginative hyperbole that serves as a sure tip-off to readers of *National Review* that Steyn was offering his opinion on the ongoing controversy over Mann's methods, data, and analysis. Likewise, the statements here cannot be divorced from their greater context. Wide-open debate is essential in the nation's capital, where vigorous (sometimes vicious) language is a regular feature in the perpetual debate over politics and policy.

[9] Just a few years before the so-called scientific "consensus" about global warming emerged, some scientists were clamoring about the impending doom arising from a different threat: global cooling. *E.g.*, Peter Gwynne, *The Cooling World*, Newsweek, Apr. 28, 1975, at 64; *Another Ice Age*, Time, June 24, 1974, at 86; Walter Sullivan, *Scientists Ask Why World Climate Is Changing; Major Cooling May Be Ahead*, N.Y. Times, May 21, 1975, at 92; Victor Cohn, U.*S. Scientist Sees New Ice Age Coming*, Wash. Post, July 9, 1971, at A4.

Regulation, Spring 1992. And as long as experts have been sounding the alarm about the dangers of man-made climate change, opposing experts, countering with their own research, have argued that the fears are exaggerated or overblown. Those who deign to call into question the prevailing scientific view are derided as "deniers" and "skeptics," but these so-called skeptics play an indispensible role in checking the scientific consensus and advancing research. *See* Richard McNider and John Christy, Op-Ed., *Why Kerry Is Flat Wrong on Climate Change*, Wall St. J., Feb. 19, 2014; Steven F. Hayward, *Climate Cultists*, The Weekly Standard, June 16, 2014.

The symbiotic relationship between those on opposite sides of scientific debate underscores why, in a case such as this, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Science is a messy, collaborative process, and the scientific community must be free to question and test each other's methods and conclusions.

IV. The Evolution of Scientific Thought Over Time Highlights The Danger Of Courts Determining "Truth" In Public Debate

These cases also highlight another fundamental prudential reason for courts to be cautious when asked to weigh the "truth" of competing scientific claims: "Scientific truth is elusive." *Underwager*, 22 F.3d at 735. Indeed, the Supreme Court's observation that "[s]cientific conclusions are subject to perpetual revision," *Daubert*, 509 U.S. at 597, underscores the peril associated with any notion that a judge or jury can dispense justice by determining scientific "truth." It should be telling in this regard that the previously-routine label of "global warming" has now been nearly expunged from one side of the

political (if not scientific) lexicon in favor of the more general term "climate change."[10]

Everyday experience demonstrates the uncertainty and malleability of scientific conclusions. One palatable example close to home is the ever-changing frontier of nutrition, and the government's role in prescribing and institutionalizing dietary norms. There is a familiar struggle for the dieter who seeks the best way to shed a few pounds and get healthy. Should I adopt a strict, low-fat diet?[11] Would the Paleo Diet be better?[12] Maybe I need to eat fewer eggs?[13] Or I could give one of Dr. Oz's miracle products a shot.[14] And if none of that works, there's always fasting.[15]

Even the USDA's familiar food pyramid—which was originally a wheel—was retired in 2011, replaced by a plate.[16] And just this

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[10] *See* Yale Project on Climate Change Communication & George Mason Univ. Ctr. for Climate Change Communication, *What's In A Name? Global Warming Versus Climate Change* (May 2014).

[11] Maybe not. *See* Melinda Wenner Moyer, *Carbs against Cardio: More Evidence that Refined Carbohydrates, not Fats, Threaten the Heart*, Scientific American, Apr. 1, 2010.

[12] It seems to be working well for Matthew McConaughey. Justina Coehlho, *Ten Famous People on the Paleo Diet*, LA Weekly, Jan. 16, 2014.

[13] On the other hand, a few more eggs may not be so bad. *See* Janet Raloff*, Reevaluating Eggs' Cholesterol Risks*, Science News, May 2, 2006. New research has called into question the decades-long received wisdom that saturated fat and dietary cholesterol are the prime cause of heart disease. *See* Nina Teicholz, Essay, *The Questionable Link Between Saturated Fat and Heart Disease*, Wall St. J., May 6, 2014.

[14] Careful. James Hamblin, *Senators to Dr. Oz: Stop Promising Weight-Loss Miracles*, The Atlantic, June 18, 2014.

[15] *See* David Stipp, *How Intermittent Fasting Might Help You Live a Longer and Healthier Life*, Scientific American, Dec. 18, 2012.

[16] U.S. Dep't of Agriculture Ctr. for Nutrition Policy and Promotion, A

summer, butter is making a resurgence: A *Time* magazine cover story promises to exonerate it after three decades in the wilderness.[17] Judicial humility must be the rule when a court is asked to referee a scientific debate—whether the dispute is over climate change or the efficacy of an all-Twinkie diet.[18]

The steady advance of modern medicine teaches a similar lesson. Take a few examples:

- Physicians prescribed pipe-smoking to treat President Andrew Jackson's wife's phthisis—a respiratory condition similar to tuberculosis.[19]
- In 1881, President James Garfield died of an infection because his treating physicians did not yet accept the principles of antiseptic surgery.[20]
- Before the advent of antipsychotic drugs, the lobotomy and other methods of invasive psychosurgery were used to treat mental disorders in the 1930s and '40s, peaking with Egas Moniz's receipt of the 1940 Nobel Prize in Medicine or Physiology.[21]

Brief History of USDA Food Guides (June 2011), available at http://www.choosemyplate.gov/food-groups/downloads/myplate/abriefhistoryofusdafoodguides.pdf.

[17] Bryan Walsh, *Ending the War on Fat*, Time, June 12, 2014.

[18] The "Twinkie Diet" is a bit of a misnomer; adherents are allowed to eat all manner of junk food. *See* Madison Park, *Twinkie Diet Helps Nutrition Professor Lose 27 Pounds*, CNN, Nov. 8, 2010. It's also no relation to the "Twinkie defense."

[19] Robert V. Remini, The Life of Andrew Jackson: Vol. 2 The Course of American Freedom 8 (1981).

[20] *See* Candice Millard, Destiny of the Republic: A Tale of Madness, Medicine, and the Murder of a President (Doubleday 2011).

[21] George A. Mashour et al., *Pyschosurgery: Past, Present, and Future*, 48 Brain Research Reviews 409, 411-12 (2005).

- The American Psychiatric Association listed homosexuality as a mental disorder in its Diagnostic and Statistical Manual of Mental Disorders (DSM-II) until 1973.[22]

The point is not simply to note that science has been wrong before, but rather to emphasize that scientific theories are best left to evolve and advance organically, without interference. Science is a long game; it is trial, error, and public scrutiny that separate modern medicine from phrenology.

We have seen the often-pernicious result of courts imbuing prevailing socio-scientific views with the force of law. In the most notorious instance of scientific debate invading the courtroom, John Thomas Scopes was convicted of teaching the theory of evolution. Two years later, relying on the "science" of eugenics, Justice Holmes told us that "[t]hree generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927). And that's not all. *See*, *e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[H]istory discloses the fact that woman has always been dependent upon man."); *People v. Hall*, 4 Cal. 399, 404-05 (Cal. 1854) (upholding prohibition on Chinese testifying against white people because the Chinese were "a race of people whom nature has marked as inferior" and who are "incapable of progress or intellectual development beyond a certain point"); *Scott v. State*, 39 Ga. 321, 323 (Ga. 1869) (interracial marriage is "unnatural" and "always productive of deplorable results"; "the offspring of these unnatural connections are generally sickly and effeminate"); *see also Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

These decisions counsel against meddling in scientific debate. As

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[22] Rick Mayes and Allan V. Horwitz, *DSM-III and the Revolution in the Classification of Mental Illness*, 41 Journal of the History of Behavioral Sciences 249, 258-59 (2005).

the second Justice Harlan observed:

> In many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. The marketplace of ideas where it functions still remains the best testing ground for truth.

Time Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

CONCLUSION

For the foregoing reasons, and for those stated by the appellants, the Superior Court's order should be reversed, and appellants' special motions to dismiss should be granted.

DATED: August 11, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2014, I caused a copy of the foregoing Brief *Amici Curiae* of the Cato Institute, Reason Foundation, Individual Rights Foundation, and Goldwater Institute to be served by first-class mail, postage prepaid, upon:

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