

STATE OF MICHIGAN
IN THE SUPREME COURT

DERITH SMITH,

Plaintiff-Appellant,

vs.

DONALD BARROWS, JOHN STANEK
and NOEL FLOHE

Defendants-Appellees,

and

AN ANONYMOUS JOINT ENTERPRISE
including GEORGE PRESTON, MARY
BARROWS, and THE VILLAGE OF SUTTONS
BAY and CHARLES STEWART,

Defendants.

Supreme Court
Case No. 138456

Court of Appeals
Case Nos. 275297, 275316,
275463

Lenawee County Circuit Court
Case No. 05-6952-CZ

BRIEF OF AMICI CURIAE PRINT, BROADCAST,
AND ELECTRONIC MEDIA

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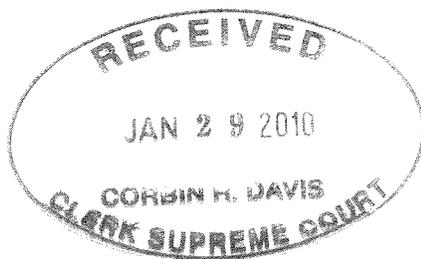


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STATEMENT OF BASIS FOR JURISDICTION

Amici defer to the parties' statements regarding the basis for this Court's jurisdiction over this appeal.

STATEMENT RE STANDARDS OF REVIEW

Amici defer to the parties' statements regarding the proper standard of review in this matter. *Amici* note, however, that this brief includes some discussion of the independent review doctrine applicable in First Amendment cases.

STATEMENT OF QUESTIONS INVOLVED

Amici defer to the parties' statements of the questions involved in this appeal.

STATEMENT OF FACTS

Amici defer to the parties for a statement of facts and proceedings below.

INTEREST OF AMICI CURIAE

Amici are print, broadcast, and electronic media that report on issues of importance to the people of the State of Michigan.¹ Such reporting includes coverage of individuals who qualify as “public officials” or “public figures” under controlling principles of federal constitutional law and who therefore must prove “actual malice” by clear and convincing evidence in order to prevail in a libel case.

The actual malice standard is of critical importance to the media, including *Amici*. It discourages unfounded defamation actions. It facilitates the early dismissal of lawsuits intended to stifle criticism of government officials and others who influence public affairs. It curtails protracted and expensive lawsuits that might not just chill media entities, but destroy them. It prevents hostile juries from punishing speech that is confrontational or unpopular simply because it *is* confrontational or unpopular. It allows room for mistake and accidental falsehood, recognizing that all human endeavors fall short of perfection; that those who criticize, question, and demand accountability from public officials and public figures will therefore sometimes err in what they say; and that a rule threatening liability for any and all misstatements would foster an environment of repression,

¹ *Amici* are The Detroit News, AnnArbor.com, the Bay City Times, the Flint Journal, the Grand Rapids Press, the Jackson Citizen Patriot, the Kalamazoo Gazette, the Muskegon Chronicle, the Saginaw News, and Scripps Media, Inc., as owner and operator of WXYZ-TV.

timidity, and fear. It preserves and advances values fundamental to freedom of expression and, thus, to our democratic system of government.²

Amici write to ensure that this Court has before it a fuller explication of the actual malice doctrine than the parties have had an opportunity to provide in their briefs. It is a doctrine of some complexity and of great breadth and rigor, fashioned to provide the criticism of public officials and public figures with substantial breathing space—including for error. It is indispensable to the free flow of information about the people who govern and influence our democracy. It requires, and it deserves, this Court’s vigilant protection.

ARGUMENT

I. Before *New York Times v Sullivan*, the Supreme Court Viewed All False and Defamatory Statements as Outside the Protection of the First Amendment

Prior to 1964, the United States Supreme Court said very little about the law of defamation. Instead, the Court simply described libel—along with fighting words, obscenity, and profanity—as lying outside the protection of the First

² These considerations explain an off-hand, but often-quoted, remark about the actual malice standard. Shortly after the United States Supreme Court decided *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964) and articulated the rule, a conversation took place between two titans of constitutional scholarship: Harry Kalven, Jr. and Alexander Meiklejohn. (The Supreme Court has to date cited the works of Professors Kalven and Meiklejohn more than seventy-five times.) Kalven asked Meiklejohn what he thought of the *New York Times* decision. Meiklejohn responded: “It is an occasion for dancing in the streets.” Harry Kalven, Jr., *The New York Times Case: A Note on the ‘Central Meaning of the First Amendment,’ in Free Speech and Association: The Supreme Court and the First Amendment* (1975) (Philip B. Kurland, ed), p. 114 n 125.

Amendment. Thus, in *Chaplinsky v New Hampshire*, 315 US 568; 62 S Ct 766; 86 L Ed 1031 (1942), the Court summarily dismissed such “utterances” as playing no “essential” role in “any exposition of ideas” and as being “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 572.³

Unfortunately, the failure to acknowledge the tension between common law libel claims and First Amendment values may have stemmed from the particular—or, more aptly, the particularly bad—facts of the cases that came before the Court. For example, in *Beauharnais v Illinois*, 343 US 250; 72 S Ct 725; 96 L Ed 919 (1952), the Court addressed the constitutionality of an Illinois statute that made it a criminal offense to libel a group of individuals. The speaker was a singularly unappealing person: the president of a white supremacist group. The speech was equally distasteful: Beauharnais had published and distributed a leaflet that protested “Negro aggression and infiltration into all white neighborhoods” and that declared: “If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.” *Id.* at 252. The Court upheld

³ The Court would later revisit and amend its thinking with respect to each of these categories. For example, in *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971), the Court held that the First Amendment protects at least some uses of profane epithets. And the test for obscenity set forth in *Miller v California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973) doubtless excludes a great deal of material that would have been viewed as obscene in 1942.

Beauharnais's conviction under the statute, concluding that libelous statements are not within the purview of constitutionally protected speech. *Id.* at 256.

In a vigorous dissent, Justice Douglas argued that the decision reflected a philosophy at war with the First Amendment. Furthermore, he noted the dangers inherent in allowing the bad facts of a particular case to dictate generally applicable constitutional principles. He wrote:

Today a white man stands convicted for protesting in unseemly language against our decisions invalidating [racially] restrictive covenants [in real estate transactions]. Tomorrow a Negro will be hauled before a court for denouncing lynch law in heated terms.

Id. at 286. As Harry Kalven observed, “Douglas’s words proved prophetic. The next time the Court encountered the libel issue—in *New York Times*—it was in the context of the civil rights movement.”⁴

The Supreme Court decisions prior to *New York Times* thus suffered from several significant failings. First, they addressed the tension between common law defamation claims and First Amendment values—a tension demanding a nuanced and surgical approach—through the blunt instrument of a categorical and absolutist rule: the Constitution affords no protection to false speech, period. Second, the Court’s adoption of this categorical and absolutist rule ignored obviously significant distinctions—for example between speech about political figures and

⁴ Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (1988) (Jamie Kalven, ed.), at 62.

speech about private individuals or between accidental falsehoods and deliberate lies. And, finally, the Court's failure to make such distinctions left open possibilities that could not be squared with the letter, history, or spirit of the First Amendment—for example, the potential for criminal prosecutions of individuals for engaging in “seditious libel” by criticizing government officers. In *New York Times v Sullivan*, the Supreme Court of the United States remedied these grave errors and made a major course correction in the direction of constitutional jurisprudence.

II. In *New York Times v Sullivan*, the Supreme Court Endorsed a Broad and Robust Rule to Give Speech about Public Officials and Public Figures Substantial Breathing Space

The facts of *New York Times v Sullivan* matter to a proper understanding of the Court's decision and so require some attention here.⁵

On March 29, 1960, the New York Times published a full-page advertisement entitled “Heed Their Rising Voices.” The advertisement stated that students engaging in non-violent civil rights demonstrations in the south had been “met by an unprecedented wave of terror.” Succeeding paragraphs illustrated this “wave of terror” by describing several specific events. The text concluded with an appeal for funds to support the student movement, the “struggle for the right to

⁵ See *New York Times*, 376 US at 256-258.

vote,” and the legal defense of Dr. Martin Luther King, Jr. against a perjury indictment pending in Montgomery, Alabama.

Montgomery City Commissioner L.B. Sullivan filed a civil libel action against the New York Times and four African American clergymen who had signed the advertisement.⁶ Although the advertisement did not mention Sullivan by name, he pointed out that his duties included the supervision of the Montgomery police department and that he was therefore defamed by the descriptions of various acts of police misconduct set forth in the piece. In particular, he cited statements claiming that truckloads of heavily armed police had surrounded the Alabama State College campus; that police had padlocked students inside the dining hall to starve them into submission; that police had arrested Dr. King seven times; and that Dr. King’s protests had been met “with intimidation and violence,” including bombing his home, assaulting him, and charging him with

⁶ That the statements appeared in an advertisement made no difference to the Supreme Court’s disposition of the case. The Court noted that the advertisement “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” *Id.* at 266. The Court held: “That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.” *Id.* The Court reasoned that “[a]ny other conclusion would discourage newspapers from carrying ‘editorial advertisements’ of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” *Id.*

perjury. A Montgomery jury awarded Sullivan \$500,000—the full amount claimed—and the Supreme Court of Alabama affirmed.

On its face, Sullivan’s claim had merit under common law standards. Indeed, many of the statements contained in the advertisement were indisputably false. Police came to the campus on several occasions but never “ringed” it as the advertisement stated. Police did not padlock students in the dining hall, let alone do so with the intention of starving them into submission.⁷ Dr. King was arrested four times, not seven, and the evidence around whether an arresting officer had assaulted him was conflicting. The police were never implicated in the bombings aimed at Dr. King. To the contrary, there was evidence that the police attempted to identify the actual perpetrators. If the categorical rule expressed in *Chaplinsky* and *Beauharnais* applied, then the First Amendment afforded no protection whatsoever to the advertisement and the defendants were properly left to the tender mercies of a Montgomery, Alabama jury.

The Supreme Court rejected such an analysis. The Court began by noting that none of its prior decisions had expressly “sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.” *Id.* at 268. Furthermore, the Court observed that a “mere label” of state

⁷ Indeed, one might reasonably question whether the allegation was facially plausible in light of the fact that dining halls typically include access to large quantities of food.

law—in this instance, “libel”—could claim “no talismanic immunity from constitutional limitations.” *Id.* at 269. Like all “other formulae for the repression of expression,” libel “must be measured by standards that satisfy the First Amendment.” *Id.*

After reciting precedent supporting the proposition that the First Amendment expansively protects freedom of expression on public issues, the Court then reframed the question before it:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of [Sullivan]. [*Id.* at 270-271 (citations omitted).]

The Court found that neither falsity nor defamatory content suffices to deprive speech regarding public officials of the protection the First Amendment provides.

With respect to falsity, the Court observed that “erroneous statement is inevitable in free debate.” *Id.* at 271. Accordingly, some false statements “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive.’” *Id.* at 272, quoting *NAACP v Button*, 371 US 415, 433;

83 S Ct 328; 9 L Ed 2d 405 (1963). The Court found defamatory content similarly non-dispositive: after all, the Court reasoned, it makes no sense to suggest that speech falls outside the scope of the First Amendment simply because it succeeds in prompting people to question the honesty, integrity, or competency of those who hold public office. “Criticism of their official conduct does not lose its constitutional protection,” the Court declared, “merely because it is *effective* criticism and hence diminishes their official reputations.” *Id.* at 273 (emphasis supplied).

“If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct,” the Court reasoned, then “the combination of the two elements is no less inadequate.” *Id.* at 273. “This,” the Court observed, “is the lesson to be drawn from the great controversy over the Sedition Act of 1782,” which rendered it a criminal offense to make false, scandalous, malicious, or defamatory statements against the government of the United States, Congress, or the President. *Id.* at 273-274. The Court pointed out that historical consensus has condemned the Sedition Act as a constitutional outrage. *Id.* at 276.⁸

⁸ First Amendment scholar Geoffrey Stone has described the Sedition Act as “perhaps the most grievous assault on free speech in the history of the United States.” Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) at 19. Stone notes that the Sedition Act was adopted by the Federalist Congress for use as a prosecutorial tool

The Court reasoned that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.” *Id.* at 277. The Court noted that, in many respects, the fear of a civil damages award is more inhibiting than the possibility of prosecution under a criminal statute: the damages imposed in this case, for example, were one hundred times greater than the fine provided by the Sedition Act; the safeguards applicable to criminal prosecutions do not apply in civil cases; and the absence of any double jeopardy limitation creates the potential for serial lawsuits and damage awards. *Id.* at 277-278. “Whether or not a newspaper can survive a succession of such judgments,” the Court concluded, “the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.” *Id.* at 278.

Accordingly, the Court held that the First Amendment requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279.⁹ Furthermore, the

against Republicans and the newspapers that supported them. Through this Act, Stone states, the Federalists “declared war on dissent.” *Id.* at 36.

⁹ It may be worth noting that, although the actual malice standard affords substantial protection to defendants in public official libel cases, three members of the Court—Justices Black, Douglas, and Goldberg—would have gone further and

Court held that a public official plaintiff must prove his or her case by “convincing clarity.” *Id.* at 285-286. Absent such a privilege, the Court cautioned, critics of official conduct would be deterred from voicing their views; concerned citizens would tend to make only those statements that steered far wide of the “unlawful zone”; and the “vigor” and “variety of public debate” would be dampened. *Id.* at 279.

The Court then conducted the constitutionally required independent examination of the record before it. *Id.* at 285.¹⁰ The Court held that the question of liability with respect to the individual defendants “require[d] little discussion.” *Id.* at 286. As to those individuals, “there was no evidence whatsoever that they were aware of any erroneous statements or were in any way reckless in that regard.” *Id.*

endorsed the principle that the Constitution affords to the people and press an absolute and unconditional right to criticize government officials and their conduct. *New York Times, supra* at 296 (Black, J., concurring) and 298 (Goldberg, J., concurring).

¹⁰ The Court recognized that in cases where the “line must be drawn” between “speech unconditionally guaranteed” on one hand and “speech which may legitimately be regulated” on the other, the “rule is that [the Court] must examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.” *Id.* at 285 (internal quotation marks omitted). For a more comprehensive discussion of the doctrine of independent review in libel cases, see *Bose Corp v Consumers Union*, 466 US 485; 104 S Ct 1949; 80 L Ed 2d 502 (1984).

With respect to the New York Times, however, the matter was more complicated. Sullivan pointed out that the Times had in its own files news stories that contradicted statements in the advertisement. Thus, he argued, the Times “knew” the advertisement at issue was false. *Id.* at 287.¹¹

The Court rejected this effort at proving actual malice for two primary reasons. First, the Court held that the “mere presence of the stories in the files” did not suffice because “the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having responsibility for the publication of the advertisement.” *Id.* Second, the Court pointed out that the individuals within the Times who *did* have such responsibility had relied on “their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement” and a letter from someone “known to them as a responsible individual” that certified the use of the names was authorized. *Id.* The law did not require the Times employees to doubt what they believed true, to ignore the reputations of individuals they trusted, and to check the allegations in

¹¹ Sullivan also argued that actual malice was demonstrated by the newspaper’s refusal to issue a retraction. The Court rejected this argument, observing that the Times’ response to the request (a) “reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to [Sullivan] at all” and (b) was not a final refusal in any event. *Id.* at 286-287.

the advertisement against the information contained in the newspaper's files.¹² The Court held: "We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id* at 287-288. The Supreme Court therefore reversed and remanded.¹³

The rule that emerged from *New York Times v Sullivan* set a remarkably—and deliberately—high standard for public official libel plaintiffs to meet.¹⁴ In sum, the Court declared that such plaintiffs must prove clearly and convincingly that the defendant intentionally lied or acted recklessly in making the challenged statements. Proof of negligence does not suffice. And courts must conduct an independent review of the record to ensure constitutional protections are preserved. In the four decades that have followed, the Supreme Court has stood by—indeed, has reiterated, reaffirmed, and reinforced—the importance and rigorous demands of this standard.

¹² In the same vein, it can be argued in the case before this Court that the law did not require these defendants to doubt what they believed to be true, to ignore information they trusted, and to conduct a further investigation.

¹³ The Court also concluded that the evidence in the case was "incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' [Sullivan]." *Id.* at 288.

¹⁴ As the Court later observed, "Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Gertz v Robert Welch, Inc.*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

III. In Cases Decided After *New York Times* the Supreme Court has Continued to Endorse a Robust and Expansive Understanding of the Actual Malice Standard

In the years following *New York Times*, the Court has had a number of occasions to discuss the actual malice standard. The first opportunity came later that same year, in *Garrison v Louisiana*, 379 US 64; 85 S Ct 209; 13 L Ed 2d 125 (1964). In that case, the Court held unconstitutional a state criminal libel statute that, among other things, allowed for the punishment of false statements regarding public officials. Relying on *New York Times* and other precedents, the Court held that this did not afford sufficient breathing space to public debate.

The Court stressed that actual malice is not defined by reference to hatred, ill-will, or political motivation:

[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of the truth. Under a rule like the Louisiana rule . . . it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded. Moreover, in the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or

selfish political motives. [*Id.* at 74 (citations and quotation marks omitted).]¹⁵

Rather, the Court insisted, actual malice is defined by a “high degree of awareness of [the] probable falsity” of the statements at issue. *Id.* The Court therefore also emphatically rejected—as it had in *New York Times*—any suggestion that actual malice can be proved by reference to principles like “reasonable belief,” the “ordinarily prudent man,” “ordinary care,” or “negligence.” *Id.* at 79.

In subsequent cases, the Court did not just stand by its ruling in *New York Times*; the Court extended it. Thus, just three years later, the Court ruled that the constitutional privilege also applies to defamatory statements made about public figures. *See Curtis Publishing Co. v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967).

Still, scholars have suggested that “[b]y far the most important Supreme Court explication of the actual malice standard” came four years after *New York Times* in *St. Amant v Thompson*, 390 US 727; 88 S Ct 1323; 20 L Ed 2d 262 (1968). Rodney A. Smolla, *III Smolla and Nimmer on Freedom of Speech* (2009) at 23-14. Indeed, “[t]o this date, the *St. Amant* decision remains the governing law in this area.” *Id.* The importance of *St. Amant* rests primarily in its explication of the concept of “recklessness.”

¹⁵ The Court also emphasized the high stakes at issue here: “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Id.* at 74-75.

In that case, Thompson, a deputy sheriff, alleged he had been defamed by St. Amant, a candidate for public office, when St. Amant repeated statements suggesting Thompson had received payoffs from a union official. The trial court and Louisiana Supreme Court concluded that Thompson had carried his burden of proving actual malice. The Supreme Court of the United States disagreed and reversed.¹⁶

The Louisiana Supreme Court had ruled that St. Amant had made false statements recklessly, but not knowingly. In support of this conclusion, the court pointed to a number of facts, including that St. Amant had no personal knowledge of Thompson's activities; that he relied solely on someone else's statements; that the record was silent as to that individual's reputation for veracity; and that St. Amant had failed to verify the information with people who would have known the facts. *Id.* at 730. The Supreme Court of the United States concluded that these facts did not prove reckless disregard.

Turning to its prior decisions for direction,¹⁷ the Court explained what reckless disregard is—and what it is not—and provided guidance worth quoting at length:

¹⁶ For purposes of its decision, the Court assumed that the statements made charged Thompson with criminal conduct and were false. *Id.* at 730.

¹⁷ In addition to *Garrison*, the Court relied on *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (holding actual malice required an “awareness of probable falsity”).

“Reckless disregard,” it is true, cannot be fully encompassed in one infallible definition . . . Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication . . . These cases are clear that reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies . . . [T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not. [*Id.* at 731-732.]

The Court went on to conclude that St. Amant's “[f]ailure to investigate” did not establish recklessness or, hence, actual malice. *Id.* at 733.

Through four decades, the Court has tenaciously adhered to these definitions of actual malice and recklessness. *See, e.g., Greenbelt Coop Publishing Ass'n Inc v Bresler*, 398 US 6, 10-11; 90 S Ct 1537; 26 L Ed 2d 6 (1970) (citing *New York Times* and *Garrison* and holding that it was “an error of constitutional magnitude” for the trial judge to instruct the jury that actual malice included “spite, hostility, or deliberate intention to harm”); *Time, Inc v Pape*, 401 US 279, 289; 91 S Ct 633; 28 L Ed 2d 45 (1971) (citing *New York Times*, *Garrison*, and *St. Amant* and holding that actual malice could not be proved with respect to a statement that was “one of a number of possible rational interpretations of a document that bristled with ambiguities” because the requisite disregard of falsity could not be shown); *Gertz v Robert Welch, Inc*, 418 US 323, 334 n 6; 94 S Ct 2997; 41 L Ed 2d 789 (1974)) (reciting the actual malice standard and noting that recklessness means “subjective awareness of probable falsity”); *Bose Corp v Consumers Union*, 466 US 485, 502-504; 104 S Ct 1949; 80 L Ed 2d 502 (1984) (applying the constitutional privilege to a product disparagement claim and reiterating the definitions of actual malice and recklessness set forth in *New York Times* and *St. Amant*); and *Masson v New Yorker Magazine, Inc*, 501 US 496, 511; 111 S Ct 2419; 115 L Ed 2d 447 (1991) (citing *New York Times* and *St. Amant* and noting that “[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as evil intent or a motive arising from spite or ill will”).

Indeed, these cases reflect a remarkably consistent and uniformly diligent effort to ensure that the protections afforded by the demanding actual malice standard are preserved and applied.

In that same spirit, the Court has made clear that the actual malice standard plays an important role at the summary disposition stage. The leading case on this issue is *Anderson v Liberty Lobby*, 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986). That case involved a libel claim brought by several public figures who alleged they had been defamed by three articles published by the defendants. The thrust of their claim was that defendants had based their statements on patently unreliable sources. Defendants filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56 and supported it with materials documenting their thorough investigation and research and their reliance on numerous sources.

The District Court granted summary judgment, finding that plaintiffs could not prove by clear and convincing evidence that defendants had acted with actual malice. The Court of Appeals reversed, finding that for purposes of summary judgment the requirement that a libel plaintiff prove actual malice by clear and convincing evidence was irrelevant. The Supreme Court granted review and reversed.

The Court noted that the “the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard

of proof that would apply at the trial on the merits.” *Id.* at 252. Thus, the Court reasoned, “[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*.” *Id.* at 254. “For example,” the Court offered, “there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.” *Id.*

As discussed above, the Supreme Court in *New York Times* concluded that the First Amendment required adoption of the actual malice standard—at least in part—in order to mitigate the fear, timidity, and inhibition of expression that the threat of large civil judgments would otherwise provoke. By recognizing the important role the actual malice standard plays at the summary judgment stage, facilitating the dismissal of claims before trial, *Anderson v Liberty Lobby* significantly advanced that constitutional interest. This explains why the vast majority of lower courts have endorsed a principle or followed a practice favoring summary disposition of actual malice libel cases. See Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (1999) at §§ 16.3.1.1-16.3.1.2.

IV. The Supreme Court's Decision in *Harte-Hanks* Is Completely Consistent with *New York Times* and its Progeny and is Driven by the Highly Unusual Facts of that Case

Appellant here largely ignores this long line of cases and focuses instead on the Supreme Court's decision in *Harte-Hanks v Connaughton*, 491 US 657; 109 S Ct 2678; 105 L Ed 2d 562 (1989). Indeed, Appellant upbraids the Court of Appeals for not citing that decision—"the one United States Supreme Court precedent bearing on the actual malice standard applicable to this case." Appellant's Brief at 36. But Appellant misses the mark in suggesting that *Harte-Hanks* is uniquely important. To the contrary, the singular facts of *Harte-Hanks* make it something of a one-off outlier easily distinguishable from most other cases. And the legal principles discussed in *Harte-Hanks* are perfectly consistent with *New York Times* and its progeny. Indeed, the Court in *Harte-Hanks* went to some pains to make this clear.

Let's start with the remarkable facts of *Harte-Hanks*.¹⁸

In the fall of 1983, James Dolan and Daniel Connaughton were rival candidates for a municipal judgeship in Hamilton, Ohio. Connaughton was a local attorney and Dolan was the incumbent.

In September of 1983, Connaughton decided to follow up on rumors that court personnel who served with Dolan had accepted bribes. The most important

¹⁸ For the factual background of the case, see *Harte-Hanks, supra* at 668-681.

witness to the alleged bribery was one Patsy Stephens. Connaughton conducted a lengthy tape-recorded interview of Stephens, who indicated that on numerous occasions she had made cash payments to the Court Administrator, Billy Joe New, to dispose of minor criminal charges against family members, friends, and her former husband. At the suggestion of the local prosecuting attorney, Connaughton asked Stephens to pass a lie detector test. After Stephens passed the test, Connaughton filed a complaint against New.

Stephens' sister, Alice Thompson, was one of eight people present at the tape-recorded interview and was present when the lie detector test was administered. Thompson had little to say during the taped portion of the interview and declined to submit to a lie detector test herself. She did, however, join Stephens in a number of unrecorded conversations with Connaughton about a variety of subjects.

In October of 1983, New's lawyer, Henry Masana, met with the editorial director and the publisher of the Journal News, a newspaper politically aligned with Dolan. Masana explained that he wanted to arrange for the newspaper to interview Alice Thompson so she could describe the "dirty tricks" Connaughton was using in his campaign. Thereafter, the editorial director and a Journal News reporter met with Thompson in Masana's office and conducted a tape-recorded interview of her.

Thompson told them that Connaughton said he had recorded his interview with Stephens so he could confront New and Dolan with the tape and scare them into resigning. She further indicated that when the tape recorder wasn't running during the interview Connaughton had made numerous promises to her and Stephens. These included promises to keep their identities confidential; to bring Thompson and Stephens along on a three-week vacation to Florida with his family; to open a restaurant for Thompson and Stephens' parents to operate; to employ Thompson and Stevens at the restaurant; to employ Stephens at the courthouse; and to take Thompson and Stephens to a celebratory dinner at an expensive restaurant. In addition, Thompson told the Journal News that she had offered her story to the Cincinnati Enquirer, which declined to print it, and to the local police, who were uninterested. Finally, Thompson indicated that, after Connaughton went public with their names, friends had accused her and her sister of being a "snitch" and a "rat," that this had upset them, and that she opposed Connaughton's candidacy. At one point in the interview Thompson indicated that Stephens would confirm everything she had said, though at a later point she was more equivocal about this.

On October 27, the managing editor of the Journal News assembled a group of reporters and instructed them to interview all of the witnesses to the conversation between Connaughton and Thompson. There was, however, one

notable exception: Patsy Stephens. Accordingly, on October 31 reporters from The Journal News separately interviewed the remaining witnesses.¹⁹

In his interview with the Journal News, Connaughton admitted to having conversations with Thompson but denied all of the most significant of her charges; indeed, he described her account of their meeting as “bizarre.” He categorically denied offering a “quid pro quo for information” and making the promises she described. Importantly, *every single one of the other witnesses interviewed* also denied Thompson’s charges and corroborated Connaughton’s version of the events. Those witnesses included individuals that Journal News reporters would later testify they knew to be credible.

Despite the serious doubt that had been cast on Thompson’s facially incredible story, the Journal News persisted in its decision not to interview Stephens. In addition, no one at the Journal News listened to the tape of the interview between Connaughton and Stephens, which the paper had requested and

¹⁹ On October 30—the day before the Journal News had spoken with anyone other than Thompson about her allegations—the newspaper ran an editorial regarding the election. The editorial noted the charges against New and acknowledged that the controversy had probably taken some votes from Dolan. But it questioned the Cincinnati Enquirer’s coverage of a story critical of Dolan and suggested that “the Connaughton forces have a wealthy, influential link to Enquirer decisionmakers.” It quoted an unidentified person as saying “I resent voting for a person who I later find has been deceitful or dishonest in campaigning”—a curious observation in that it had nothing to do with the accusations against Dolan but a great deal to do with the yet unpublished accusations against Connaughton. And the editorial cautioned that the race was still wide open and implied that an endorsement from the newspaper was forthcoming.

he had provided. Of course, listening to the tape would have shed light on Thompson's description of the interview, including her accusation that Connaughton had turned the recorder on and off and that he had used leading questions to get Stephens to say what he wanted. But the Journal News elected to pay no attention to it.

On November 1, the Journal News ran a front page story describing Thompson's charges that Connaughton had used "dirty tricks" and had offered her and her sister jobs and a trip to Florida "in appreciation" for their help in the bribery investigation. After losing the election on November 8, Connaughton sued for libel. The jury returned a verdict in his favor, awarding him \$5,000 in compensatory damages and \$195,000 in punitive damages. The verdict was affirmed on appeal and the Supreme Court granted review.

The Supreme Court conducted the constitutionally required analysis of the record below. *Id.* at 688. The Court was blunt about the result: "the conclusion that the newspaper acted with actual malice inexorably follows." *Id.* at 691. The Court's analysis was largely driven by the undisputed facts. It was undisputed that Thompson's charges had been denied by Connaughton and five other witnesses with personal knowledge. It was undisputed that Thompson's most serious charge—that Connaughton had taped his interview with Stephens so he could scare Dolan into resigning—was conspicuously inconsistent with Connaughton's

conduct in arranging for a lie detector test and delivering the tapes to the police. It was undisputed that Connaughton made the Stephens interview tapes available to the newspaper but that no one there listened to them—even though she was a key witness and no effort had been made to speak with her independently.²⁰ Based on these undisputed facts, the Court noted that the jury must have dismissed the defendant’s efforts to explain why no one at the newspaper spoke to Stephens or listened to the tapes, as well as the testimony of Journal News employees that they believed Thompson’s bizarre and unsubstantiated allegations were true. *Id.* at 690-692.

In concluding that there was sufficient evidence for the jury to conclude the Journal News had acted with actual malice, the Supreme Court closely followed *New York Times* and its progeny. The Court stressed the critical importance of the “breathing space” afforded to speech by the actual malice standard. *Id.* at 686. It cited the definitions provided by *New York Times*, *Garrison*, and *St. Amant*. *Id.* at 686-688. It noted that the standard requires clear and convincing proof of a high degree of awareness of probable falsity. *Id.* at 688. And it reiterated that actual

²⁰ The Court offered this explanation for the newspaper’s otherwise inexplicable decision not to interview Stephens. “[I]f the Journal News had serious doubts concerning the truth of Thompson’s remarks, but was committed to running the story, there was good reason not to interview Stephens—while denials coming from Connaughton’s supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story.” *Id.* at 682.

malice is not shown by a failure to investigate before publishing—even when a reasonably prudent person would have done so (*Id.* at 688); or by the fact that the subject of the publication vehemently denied the charges—that happens frequently (*Id.* at 691 n 37); or by a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting (*Id.* at 666); or through evidence of ill will or “malice” in the ordinary sense of the term (*Id.* at 666-667). In other words, the Court in *Harte-Hanks* left the law of actual malice undisturbed, and went out of its way to make this plain and explicit.

At bottom, *Harte-Hanks* simply presented an extreme and egregious case where the reasons to doubt the veracity and accuracy of the source were so obvious and compelling that a jury could easily conclude that the defendant *must* have entertained serious subjective doubts about the truth of the publication. *Id.* at 688. Lower court cases decided after *Harte-Hanks* have understood this. Thus, for example, the Sixth Circuit declared in *Perk v Reader’s Digest Ass’n, Inc*, 931 F2d 408, 412 (CA 6, 1991) that *Harte-Hanks* “presented a unique situation in which the newspaper’s own sources indicated that there was a question as to the truth of what they were reporting, and that a readily available additional source would provide proof of whether their story was accurate.”

Amici leave to the parties the question of how, or for that matter whether, *Harte-Hanks* applies to the specific facts of the case before this Court. *Amici* do,

however, wish to note several obvious distinctions. First, this case does not involve the sort of extraordinary facts present in *Harte-Hanks*. *Harte-Hanks* involved a facially implausible story offered by a single unsubstantiated source and denied by six other sources, including some the defendant acknowledged as credible. As the Court has long recognized, the law does not require anyone to take denials at face value or to investigate further that which they subjectively believe to be true. But, under the singular circumstances of *Harte-Hanks*, a decision to turn a blind eye to easily available sources of confirmation or refutation evinces a decision to go forward with publication regardless of a high awareness of probable falsity.

Second, this case comes to the Court in a different posture than *Harte-Hanks*. *Harte-Hanks* entailed the review of a jury verdict. The Supreme Court therefore brought to that case a somewhat different analytical framework than applies here, for example deferring to credibility determinations that the jury could and must have made to decide the case as it did. *Id.* at 688. Appellant's intemperate accusation that the Court of Appeals here engaged in an "inane" analysis of the actual malice requirement misses the point that reviews of summary

judgment decisions and reviews of jury verdicts involve considerations that differ and that, in some instances, those differences matter.²¹

Finally, unlike *Harte-Hanks* this case involves individual defendants. It therefore requires an assessment of the evidence with respect to *several* individual subjective states of mind. As *Amici* note above, it does not appear that any of these individuals engaged in conduct similar to the extreme case presented in *Harte-Hanks*. But it would be stunning indeed if *all* of them did so. In any event, *Amici* fear that this point may get lost amidst Appellant’s collective allegations about “actual malice” and may lead the Court into confusion, error, and misstatement or misapplication of the law.

V. Consistent with *New York Times* and its Progeny, the Decisions of the Michigan Courts Have Extended Substantial Protection to Free Expression through Application of the Actual Malice Standard and Related Principles

For decades, this Court and the Michigan Court of Appeals have vigilantly protected free expression through strict application of the actual malice standard and related principles.²² See, e.g., *In re Chmura*, 464 Mich 58; 626 NW2d 876 (2001) (discussing *New York Times* and the actual malice standard in reversing a decision by the Judicial Tenure Commission that a sitting judge had violated the

²¹ See Plaintiff-Appellant’s Application for Leave to Appeal at 24 (accusing the Court of Appeals of engaging in an “utterly inane statement of the law applicable with respect to the actual malice standard”).

²² Indeed, the Michigan Courts have done so even despite concerns about the breadth of the rule and the consequences of its application. See *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468; 624 NW2d 509 (2001).

Code of Judicial Conduct by statements he made in the course of a campaign); *Rouch v Enquirer & News of Battle Creek*, 440 Mich 238, 258; 487 NW2d 205 (1992) (reversing a jury verdict in a libel case, discussing the importance of independent review in such cases, and noting the concern that “juries may give short shrift to important First Amendment rights”); *Locricchio v Evening News Ass’n*, 438 Mich 84; 476 NW2d 112 (1991) (conducting an independent review of the record and reversing a jury verdict in a libel case);²³ *Battaglieri v Mackinac Center for Public Policy*, 261 Mich App 296; 680 NW2d 915 (2004) (discussing the definition of actual malice and reversing the trial court’s decision denying summary disposition in a false light claim brought by a public figure); *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396; 538 NW2d 24 (1995) (conducting an independent review, finding insufficient evidence of actual malice, and vacating a lower court judgment); and *Garvelink v The Detroit News*, 206 Mich App 604; 522 NW2d 883 (1994) (conducting an independent review of the record and reversing a trial court decision denying summary disposition to a defendant in a public official libel case). Indeed, the Michigan courts, consistent with the thrust of *Anderson v Liberty Lobby*, have long recognized the important

²³ In a concurring opinion, Justice Cavanagh stated that “defendants were entitled to pretrial summary judgment when they so moved in 1982 With the benefit of 20-20 hindsight, this Court, in my view, should have granted leave to appeal in 1984 and should have reversed the Court of Appeals decision [affirming the denial of summary disposition] at that time.” *Locricchio* at 134 and 134 n 1.

role summary disposition plays in libel cases. *See, e.g., See also Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999) (observing that “[s]ummary disposition is an essential tool in the protection of First Amendment rights”); *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998) (same); *Lins v Evening News Ass'n*, 129 Mich App 419, 425; 342 NW2d 573 (1983) (holding that “the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the ‘chilling effect’ on freedom of speech and press”); and *VandenToorn v Bonner*, 129 Mich App 198, 209; 342 NW2d 297 (1983) (noting that “[s]ummary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern”).²⁴

This case certainly presents no occasion for the Court to depart from this admirable history of helping to ensure that debate about public issues and public officials remains—in the storied words of *New York Times*—“uninhibited, robust, and wide-open.” As noted above, *Amici* believe that Appellees have the better argument here and that the decision of the Court of Appeals should be affirmed. But one thing is clear: either Appellees and *Amici* are right, and this case falls within the broad protections of *New York Times* and its progeny; or Appellant is

²⁴ *See also* Richard E. Rassel, James E. Stewart, and Leonard M. Niehoff, *The Michigan Law of Defamation Revisited*, 1994 Det. C.L. Rev. 61, 89-90, 117.

right, and this case involves the sort of rare and extreme facts that dictated the result in *Harte-Hanks*. In either event, nothing about this case requires this Court to destabilize the well-reasoned and longstanding libel jurisprudence of this state. *Amici* therefore respectfully urge the Court to remain mindful of the importance of exercising judicial restraint in deciding cases of constitutional import. Or, as Justice Breyer once remarked, quoting Judge (now Chief Justice) Roberts: “If it is not necessary to decide more, it is necessary not to decide more.” *See Morse v Frederick*, 551 US 393; 127 S Ct 2618; 168 L Ed 2d 290 (2007) (Breyer, J., concurring in part and dissenting in part), quoting *PDK Labs., Inc v Drug Enforcement Admin.*, 362 F3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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