No. 17-1576

In the Supreme Court of the United States

ALFONSO IGNACIO VIGGERS,
Petitioner,
v.

AL-AZHAR PACHA, *et al.*,
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Michigan

REPLY BRIEF

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REPLY BRIEF

Pursuant to S.Ct.R. 15.6, Petitioner Viggers addresses the new issues raised in the opposition brief. *Inter alia*, Respondent's surprising remark in regard to the clarificatory affidavit requested of him reinforces the merits of this Petition.

Amid the obfuscation of issues that is palpable from the opposition brief, Respondent Pacha simply cannot overcome the fact that this Court has extensively reviewed defamation cases that were litigated in state courts. For instance, see *New York Times Co. v. Sullivan* 376 U.S. 254,292 (1964) (reversing the judgement of the Supreme Court of Alabama in a defamation case).

Nor is Pacha able to articulate what improprieties allegedly arise from the reality that "*[t]he right of a man to the protection of his own reputation from unjustified invasion [...] is entitled to [...] recognition by this Court as a basic of our constitutional system*", *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 402 (1974) (citations omitted) [Petn.2]. This recognition is a remarkable consensus between the opinion of the Court and Justice White's dissent, *Id. at 402.*

The consensus in *Gertz*, and the Court's history of granting certiorari to defamation cases clearly defeat Pacha's jurisdictional objections.

Pacha's reliance on his misstated version of S.Ct.R. 10 [Opp.Br.18] is stricken as well, for the Rule clarifies that the character of reasons listed therein are *neither controlling nor fully measuring the Court's discretion* in granting a petition for writ of certiorari.

I. Pacha's Attacks on This Court's Jurisdiction Are Unavailing Because Viggers Does Not Dispute (and Would Not Need to Dispute) the Constitutionality of State Legislature.

Pacha --out of nowhere-- pretends that "*[T]he Petition appears to rely on 28 U.S.C. § 1257(a) as the basis for this Court's jurisdiction*" [Opp.Br.1], and he subsequently defeats his own inaccuracy by admitting that Viggers does not question the constitutional validity of Michigan law [Opp.Br.2]. Pacha then alleges that "*[a]rguing that a state statute violates the state constitution is simply not the same as arguing that a state statute is invalid under the U.S. Constitution*" [Opp.Br.17-18]. Pacha expects to see "*any U.S. Supreme Court case interpreting the Michigan statutes [Viggers] relied upon in state court proceedings*" [Opp.Br.18] at the same time that Pacha purports to prohibit this Court to intervene in such cases [Opp.Br.19].

But Pacha's zigzag of allegations is devoid of any merit. Pacha does not even attempt to substantiate whatsoever how any of the multitude of decisions from Michigan, this Court, and elsewhere that Viggers cited in the Petition allegedly would be incompatible with the Michigan statutes at issue. More important, under an *equal protection analysis*, Pacha's expectations of formulaic briefing go astray.

This Court has explained that "*[t]he purpose of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether*

occasioned by express terms of a statute or by its ***improper execution through duly constituted agents.***", *Village of Willowbrock v. Olech*, 528 U.S. 562, 564 (2000) (emphasis added, citations omitted). The portion in bold conclusively strikes Pacha's objections, because the Michigan judges involved in the instant case are *duly constituted agents* who *intentionally and arbitrarily* deprived Viggers of his rights under the Michigan statutes. For instance, the state court's suppression of statute MCL 423.452 is undeniably the extreme form of *improper execution* of the terms of a statute. [Petn.23-25].

The rulings and opinions of the courts below are devoid of any consideration of MCL 423.452 (prescribing the requisite conditions for employer's immunity from liability for his false and defamatory disclosures). Instead, the trial court lectured Viggers that "*The State loves employers [...] and it loves anybody who's powerful*" and that Viggers has to *stay out of the way* if he is "*not in those groups*". [Petn.16-17]. The Michigan courts systematically accommodated Pacha's explicit opposition to the application of MCL 423.452.

Contrary to Pacha's fiction that "*[Viggers] simply claims that the Michigan courts did not interpret [statutes] correctly*" [Opp.Br.2], there is no cognizable *statutory interpretation* in the state judge's appalling manifesto of the Michigan judiciary. That manifesto only epitomizes the entirety of the proceedings below, and such judicial approach by the Michigan court is "*wholly unrelated to any legitimate state objective*", *Olech*

v. Village of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998, affirmed).

The appellate court ignored the same statute, MCL 423.452, thereby disregarding Michigan top court's decision that comprehensive and detailed legislation "*will be found to have intended that the statute supersede and replace the common law dealing with the subject matter*", *Hoerstman Gen Contracting, Inc. v. Hahn*, 474 Mich. 66, 74 (2006) [Petn.23-24]. Instead, the appellate court adopted the blurry and deprecated common-law qualified privilege notwithstanding that it abided by the *Hoerstman* authority in an unrelated case while the instant case was pending appellate review. See *Planet Bingo, LLC v. VKGS, LLC*, 319 Mich.App.308; 900 N.W.2d 680, 687 (2017).

The appellate court has no legitimate excuse to suppress *Hoerstman* and MCL 423.452 in the instant case: Viggers properly directed the appellate court's attention to *Planet Bingo* in one of his Letters of Supplemental Authority that Pacha deems worthy of mention. [Opp.Br.9].

Also wholly unrelated to any *legitimate state objective* is the Michigan court's non-reversal of Pacha's cross-motions for partial summary disposition despite its acknowledgement that a genuine issue of material fact remains. [Petn.17].

Another important instance where the Michigan courts contravene the Equal Protection clause of the Fourteenth Amendment is their inconsistent approach toward MCL 408.478 and .481. In *Murphy v. Sears*, 190 Mich.App. 384, 386 (1991), the Michigan court concluded that

exhaustion of administrative remedies was *not required* for wrongful terminated because the language of MCL 408.481(1) is *permissive*, not mandatory. See Petn.37 (citing a similar construction and ruling by federal court). But to force the ruling that Viggers had a duty to exhaust remedies in the instant case, the Michigan court adopted a decision from a case regarding *tip-collecting policy* that has nothing to do with wrongful termination.

Michigan case law serves to highlight the state court's inconsistency also when it comes to public policy of the at-will employment doctrine. The *Suchodolski* decision [Petn.37] addresses the issue of pretextual and retaliatory discharges, whereas the courts below in the instant case took Pacha's incoherent and belated pretexts at face value.

II. Pacha's Allegations Cannot Survive The Purpose and Striking Similarity of Provisions in The Constitutions of Michigan and of The United States.

Pacha's pretext to negate the preservation of the Ninth and Fourteenth Amendments of the U.S. Constitution is that Viggers formerly referred to these provisions only by their label as provided in the Constitution of Michigan [Opp.Br.15-16]. But Pacha fails to articulate --and he cannot reasonably articulate-- why switching from the Michigan label to the federal label of indistinguishable constitutional provisions should preclude review by this Court.

There are limits to how much a state court's *jus dire* may depart from interpretations reached

by this Court: The greater the similarity between state and federal statutory languages, the lesser the permissible discrepancy. Otherwise, every redundancy between state and federal provisions would afford to state courts the opportunity to fabricate rogue interpretations for the sake of catering to interests that are *circumstantially* convenient albeit not legally cognizable.

Pacha further attempts to get the U.S. Constitution barred from the instant case by quoting Viggers in: "*when I mention Constitution, I don't mean the federal Constitution, I mean the State Constitution*" [Opp.Br.15]. However, Viggers's remark does not suppress the Constitution of the U.S. Instead, Viggers's phrase emphasizes --for the benefit of the state judge-- that the constitutional provision at issue is explicitly stated *also* in the judge's own jurisdiction. Viggers's remark was his response to the judge's own formulation of the decomposed state of affairs among Michigan courts.

Viggers has been preserving the constitutional issues since the case was in Michigan trial court [Petn.2]. The record of the case reflects that the Michigan court grasped Viggers's constitutional claim insofar as (1) the trial judge explicitly disavowed the Constitution during her lecture ("*And it doesn't say that in our Constitution. But if you are not in those groups [...]*", Petn.17-18), and (2) the judge reiterated few seconds later "*Well, and I won't apologize for the State on that.*" [Opp.Br.Appx.6a] when Viggers's made his emphasis on the Constitution. The Michigan court

evidently *understood the issue put before it* when it enunciated its judicial policy for this case. *Jones v. United States*, 527 U.S. 373, 404-405 (1999).

The Michigan court made its appalling formulation as Viggers was arguing Pacha's equitable duty to issue a proper retraction of Pacha's disproved and defamatory falsehoods. Therefore, the record is *sufficiently developed* for review by this Court and below. Michigan upper courts' choice to ignore the constitutional implications that Viggers materially briefed on appeal does not change the fact that Viggers preserved his constitutional claims during the proceedings in state court.

Pacha protests that the questions Viggers presented in state court do not label or recite the Amendments of the U.S. Constitution. However, such demand for formulaic phrasing is vexatious. See *Jones, supra at 404* ("*there is no federal requirement that state courts adopt 'a particular indication' before their review for harmless error will pass scrutiny*", citations omitted).

The questions presented in Michigan courts are clearly centered on the issues of unjustified defamation that have been hurting Viggers's good name and good reputation. And the instant Petition begins with citation of authorities where this Court asserts that the right to the protection of a man's own reputation from unjustified and wrongful hurt is encompassed in the Ninth Amendment. [Petn.1, 2]. Thus, Pacha's objection is irrelevant insofar as the materiality and U.S. constitutional implications vastly subsist in the

terms Viggers employed for his questions and arguments before the Michigan courts.

Even if Pacha's allegations were extended to Michigan court's *differing interpretation* of case law, his position would also fall on its face. In the instant Petition and in the proceedings below, Viggers developed many of his arguments on the basis of Michigan authorities, many of which adopt views from other jurisdictions as well as from this Court. This is evident, for instance, in *Lakin v. Rund (on remand)*, 318 Mich.App. 127; 896 N.W.2d 76, 83 (2016) [Petn.22-23]. Thus, it is arbitrary for the Michigan court to disregard its own precedents when adjudging the instant case.

III. Pacha Makes a False and Self-Defeating Characterization of the Clarificatory Affidavit that Viggers Requests of Him.

Pacha's reference to the affidavit requested of him as "*in essence admitting defamation*" [Opp.Br.14] is notoriously contradictory and self-defeating. Pacha's novel allegation is his latest attempt to obfuscate the matters at issue, and it reflects the extent of Pacha's *reckless disregard* of the falsity of his defamatory statements.

It is entirely false that the requested affidavit requires Pacha to "*admitting defamation*". In fact, the substance and literal terms of the proposed affidavit give Pacha the opportunity to *deny* that he imputed the *statements of threat* [Petn.9] that all three University witnesses testified under oath that Pacha imputed to Viggers during their meeting [Petn.App.22a-23a]. A defendant's *denial*

that he made a defamatory statement is the *exact opposite* of asking him to *admit* defamation. The proposed affidavit reflects (with attached excerpts of) Pacha's testimony that is relevant to the matter at issue, whence Pacha's renewed inconsistency prompts the inquiry of whether he committed perjury by testifying that he "does not recollect" imputing to Viggers the *statement(s) of threat* [Petn.14, 16, 32].

Whether Pacha produces the clarificatory affidavit or he insists on his refusal to produce it, the matter has utmost important implications in both petitions Viggers has filed in this Court (17-1560 and 17-1576). But *negation* of actual malice is not one of them. While Pacha's retraction is overdue in equity, its patent *belatedness* strikes any relevance thereof as to "good faith". See *Henry v. Media General Operations, Inc.*, C.A. No. PC-2014-2837 (Apr. 4, 2018) (it is *promptness* of a retraction what evidences a lack of actual malice).

Were Pacha to produce the sworn clarification, it would indicate that the three employees of the University of Michigan perjured in their depositions when testifying what Pacha told them in regard to Viggers: the falsely imputed *statements of threat* [Petn.9]. Moreover, the striking similarity in the specific testimony of the three University employees (regarding the falsely imputed *statement of threat*) would constitute evidence of witness tampering by the University.

In the alternative, Pacha's unreasonable refusal to retract his disproved and defamatory falsehoods again reinforces the evidence of Pacha's

actual malice. In a defamation case, a defendant testifying (under oath) that he "does not recollect" [Petn.14, 16, 32] making a defamatory falsehood would be eager to produce an affidavit *denying* that he stated such falsehood, even if only to elude liability in court. But here, Pacha's systematic dismissal of the *opportunity to deny* indicates that he falsely imputed to Viggers the *statement of threat*. See *White v. Taylor*, 753 N.W.2d 591, 595 (2008) ("*We do not assess defendant's credibility. But, under legal and factual circumstances, we do not ignore the inconsistencies in defendant's statements*", quotation marks omitted). And because Pacha fabricated his not-yet-retracted narrative despite knowing it to be false (for he read Viggers's emails of June 20 and July 1, 2015), the law leads to the conclusion that Pacha defamed with *actual malice*.

Pacha's authorship of the sworn, concise retraction is indispensable because the record of the case indicates that (1) the University believed Pacha without conducting any scrutiny; (2) the University never gave Viggers an opportunity to disprove Pacha's falsehoods [Petn.36]; (3) witness Loveless testified at deposition that Viggers's letter [requesting Pacha to retract his falsehoods] prompted no reaction in the University; (4) Loveless "*gave this a cursory reading at most*", in reference to Viggers's letter (see page 6 of the record listed in Petn.App.34a#47); and (5) the University would have difficulties digesting the transcript of Pacha's deposition because of the constant and lengthy disruptions by his attorney.

Now Pacha is at the spotlight in this Court, and yet he insists to recklessly disregard the undue harm he has caused to Viggers's reputation. Unlike the Michigan courts tolerating Pacha's untenable course of conduct, any court with a minimum of integrity would take note of the inconsistencies and determine that Pacha undeniably defamed with *actual malice*.

IV. Pacha's Opposition Brief Continues Eluding The Core Matters Brought Before This Court and Below.

The opposition brief reflects Pacha's ongoing evasion of the core issues that Viggers briefed in the instant Petition and below. For instance, Pacha limits himself to briefing his alleged "***concern*** *that Viggers* ***might*** *take steps to negatively impact ALPAC's business with the University*" [Opp.Br.6]. But the instant case does not arise from Pacha's alleged and speculative concerns; it arises from the *statements of threat* which Pacha falsely imputed to Viggers, and from falsely accusing Viggers of an *infamous crime*, *Lakin, supra at 83*: to wit, the attempt to violate U.S. immigration law. [Petn.8, 18, 19, 22].

Pacha never explains why he chose a bizarre timing for desisting from his alleged *careful consideration* to defame Viggers[Opp.Br.6]: within six hours from the PPO being served upon the stepmother who repeatedly sought to contact Pacha [Petn.27]. Because Pacha and Viggers had not interacted for several days (indeed weeks), Pacha's delay is inconsistent with the alarming

and scandalous language he employed to abruptly calumniate Viggers [Petn.27, 29, 31].

Pacha's brief eludes his multiple instances of *silent fraud* despite his legal and equitable duty of disclosure per Viggers's direct, particularized inquiries. Pacha fails to distinguish between the mental states of *silent fraud* and *actual malice.*

Pacha's brief [Opp.Br.5-7] patently reflects his ongoing suppression of the legal resource that Viggers brought to his attention during the green card negotiations. Pacha cannot overcome the legal precedent that establishes that *purposeful avoidance of the truth* proves *actual malice.* [Petn.34]. Pacha's *purposeful avoidance of the truth* is material to his omission and juxtaposition of facts when he defamed Viggers.

In his attempt to continue profiting from a public university, Pacha engaged in conduct that is repugnant to the Constitution and to the morals. Pacha's defamatory statements with actual malice render him liable to Viggers in equity and at law.

CONCLUSION

Pacha advances absolutely no cognizable argument to support his position. Therefore, the instant Petition should be granted.

Respectfully submitted,

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