No. _____

In the Supreme Court of the United States

ANGELA ENGLE HORNE,
Petitioner,

v.

WTVR, LLC, d/b/a CBS6,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule *New York Times v. Sullivan*, 376 U.S. 254 (1964).

2. Whether even if this Court elects not overrule *Sullivan* in its entirety, it should revise *Sullivan*'s "actual malice" rule so that this exacting standard does not apply to awards of actual damages in defamation cases brought by public officials or public figures and, instead, only applies to awards of punitive and presumed damages in such cases.

3. Whether an unelected local public-school budget/finance director with no access to the public purse or public funds, no policy-making responsibilities, and no media duties, should have to forfeit substantial common law protections as to her individual reputation by being designated as a "public official" under the status prong of *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellant below, is Angela Engle Horne. Respondent, defendant-appellee below, is WTVR, LLC d/b/a CBS6 ("WTVR").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Engle Horne respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's decision is published and is reported at 893 F.3d 201. It is reproduced in the Appendix ("App") at 1-22. The District Court's final order granting WTVR's motion for judgment as a matter of law under Fed.R.Civ.P. 50(a) is unreported and is reproduced at App. at 23-24. The District Court's order granting in part and denying WTVR's motion for summary judgment as to Horne's status as a "public official" and the application of the "actual malice" standard to the factual record also is unreported and is reproduced at App. at 39-40.[1] And the District Court's opinion supporting its summary judgment order is unreported and is reproduced at App. at 25-38.

JURISDICTION

The Fourth Circuit entered its opinion on June 18, 2018. On September 12, 2018, the Chief Justice granted an extension to November 1, 2018 to file this petition for writ of certiorari. Dkt. No. 18A260. This

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[1] In this same order, the District Court also denied WTVR's motion for summary judgment as to (i) whether the news story at issue was actually capable of defamatory meaning (App. at 30-32) and (ii) the application of the "fair report privilege" to the news story (App. at 36-37). Neither of these issues, however, is before the Court as part of this Petition.

Petition is timely filed within this extended deadline, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

INTRODUCTION

When Angela Engle Horne applied to be the Director of Budget & Finance for the local school system in Prince George County, Virginia, a rural county of roughly 35,000 people[2], she could never have imagined that in doing so, she would forfeit a substantial portion of her rights to protect her personal reputation under Virginia's common law of defamation. Indeed, the unelected position was not high-profile in nature (like that of a school superintendent or school board member); it did not come with any media responsibilities; it did not require Horne to award contracts or bids, or even handle public funds; and it entailed no policy-making responsibilities whatsoever. Essentially, Horne was a glorified bookkeeper who was paid with public funds.

But like so many thousands of unwitting government employees before her, Horne was deemed a "public official" under *Rosenblatt v. Baer*, 383 U.S. 75 (1966), when she brought a defamation lawsuit against

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[2] https://en.wikipedia.org/wiki/Prince_George_County,_Virginia (visited on October 31, 2018)

WTVR, a local television station which aired a false news story about her. This designation, then, forced Horne to meet the demanding "actual malice" standard from *New York Times v. Sullivan*, 376 U.S. 254 (1964), in order to prevail on the merits of her claim -- that is, she had to show that WTVR aired its defamatory news story "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. When both the District Court and the Fourth Circuit concluded she could not meet this standard, they slammed the courthouse doors shut on Horne's claim.

The law of defamation should not be so unforgiving. This Court's decisions in *Sullivan* and *Rosenblatt*, whether intentionally or not, have created a "'virtually impermeable envelope of protection' for the media in suits brought by public persons." David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria – A Proposal for Revivification: Two Decades after New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 580 (1984) (quoting *Gulf Publishing Co. v. Lee*, 434 So.2d 687, 695 (Miss. 1983)). Such protection has resulted in the vast majority of public employees such as Horne failing – especially at the summary judgment stage, before any trial ever takes place -- in their efforts to vindicate their reputations after they have been defamed.[3] Even the District Court

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[3] *See, e.g.,* John Dean, *Justice Scalia's Thoughts, And A Few Of My Own, on New York Times v. Sullivan*, Findlaw (Dec. 2, 2005); https://supreme.findlaw.com/legal-commentary/justice-scalias-thoughts-and-a-few-of-my-own-on-new-york-times-v-sullivan.html (visited on October 31, 2018) ("In practice, the 'actual malice' standard means that the plaintiff usually loses."); Martin B. Louis, Summary Judgment and the Actual Malice Controversy In

below lamented its decision when, after describing WTVR's journalistic practices in the case as "probably not first class reporting," it granted WTVR's Rule 50 motion for judgment as a matter of law:

> I am very sorry, Ms. Horne, but this is a tough case in the way the law works in our country. It is designed to protect the press so they than [sic] can feel – that they can bring to us the truth no matter how popular or unpopular it is. And you have heard our current president talk about how he doesn't think the liable [sic] laws are fair to people in his shoes, and you may join him in that sentiment after this. But am I very sorry. I am going to grant the motion.

Id. at 872-873.[4]

It is time for this Court to do a course correction on *Sullivan* and its progeny. In a powerful concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Justice White noted that "the Court struck an improvident balance in the New York Times case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." 472 U.S. 749, 767

Constitutional Defamation Cases, 57 S. CAL. L. REV. 707, 711 n. 29 (1984) (noting that three-quarters of defendants' summary judgment motions on the actual malice issue are granted). *See also Herbert v. Oklahoma Christian Coalition,* 992 P.2d 322, 328 & n.6 (Okla., 1999) (citing Louis, *supra*, and explaining that the "actual malice" standard is a "formidable one").

[4] "JA" refers to the Joint Appendix filed in the Fourth Circuit.

(1985) (White, J., concurring). He is right. For reasons that are deeply rooted in the civil rights movement that was the obvious driving force behind the decision, this Court in *Sullivan* tipped the balance of interests heavily in favor of First Amendment protections at the expense the individual's right to protect their personal reputations using the common law. However, "[n]ow that the exigencies of the immediate case and of the segregation crisis that brought it to the fore have passed, the sensible constitutional conclusion is to abandon the actual malice rule" from *Sullivan*. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 783, 817-818 (1986).

This Petition asks this Court to restore the balance of interests in favor of the pre-*Sullivan* common law standards for defamation cases – regardless of whether they are brought by public or private individuals – or at the very least, to jettison the "actual malice" standard for proving liability and actual damages in defamation cases brought by public officials and public figures. This Petition alternatively asks this Court re-examine its "public official" jurisprudence under *Rosenblatt v. Baer*, 383 U.S. 75 (1966), especially as it applies to persons such as Horne who are in unelected, non-policy-making governmental positions. In short, persons such as Horne should not have to suffer reputational damage without recourse. The Petition should be granted.

STATEMENT OF THE CASE

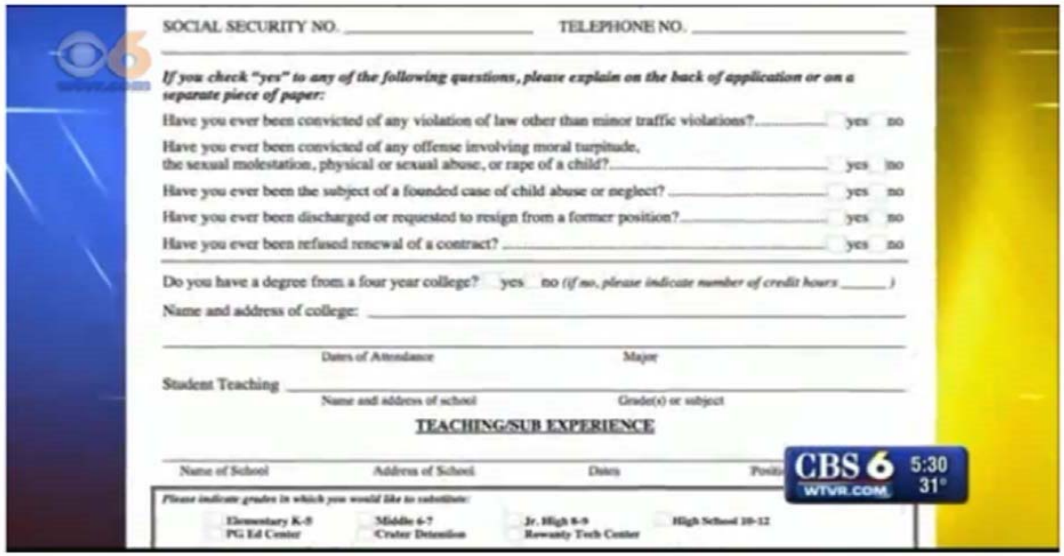
A. WTVR Defames Horne

On February 13, 2015, as the lead story for its 5:30 p.m. newscast, WTVR, the largest local television station in central Virginia, aired a two-minute-21-second story entitled "Source: Convicted felon worked at school board office in Central Va." Ostensibly, the story was about how a local school system had hired a felon in violation of Virginia law. However, the story directly implied that the felon had lied about the prior felony conviction on her job application, thereby committing a separate Class 1 misdemeanor, and that this lie was the reason she was able to get the job. Thus, the story's unmistakable message was that the employee unlawfully hid her prior felony conviction in order to get a public-school job and that she was fired after her ruse was discovered. In other words, a one-time criminal committed additional criminal conduct in order to get a public job in violation of Virginia law. She was a double criminal.

This message was conveyed not only by the words of the reporter who reported the story, but also by the video images that were prepared and published by WTVR. The following screen shot, for example, highlights the "Felon Hired, Then Fired" theme that permeated the story and indicates that such an unlawful hiring could have been "prevent[ed]" except for the mendacity of the felon.

Later images too perpetuated the misleading message of the story. The following screen shot of a sample job application, for example, highlights the initial part of the hiring process and implies (again) that the reason that the felon got hired was because she falsely answered questions such as the ones shown. Indeed, the "yes"/"no" format – especially for the questions that say: "Have you ever been convicted of any violation of law other than minor traffic violation?" and "Have you ever been convicted of any offense involving moral turpitude, the sexual molestation, physical or sexual abuse, or rape of a child?" – clearly implies that the felon at issue lied about one or both of those questions.

story to see when it was last updated.



SOCIAL SECURITY NO. _____ TELEPHONE NO. _____

If you check "yes" to any of the following questions, please explain on the back of application or on a separate piece of paper:

Have you ever been convicted of any violation of law other than minor traffic violations? ____ yes no

Have you ever been convicted of any offense involving moral turpitude, the sexual molestation, physical or sexual abuse, or rape of a child? ____ yes no

Have you ever been the subject of a founded case of child abuse or neglect? ____ yes no

Have you ever been discharged or requested to resign from a former position? ____ yes no

Have you ever been refused renewal of a contract? ____ yes no

Do you have a degree from a four year college? yes no *(if no, please indicate number of credit hours _____)*

Name and address of college: _____

Dates of Attendance Major

Student Teaching _____

Name and address of school Grade(s) or subject

TEACHING/SUB EXPERIENCE

Name of School Address of School Dates Positi

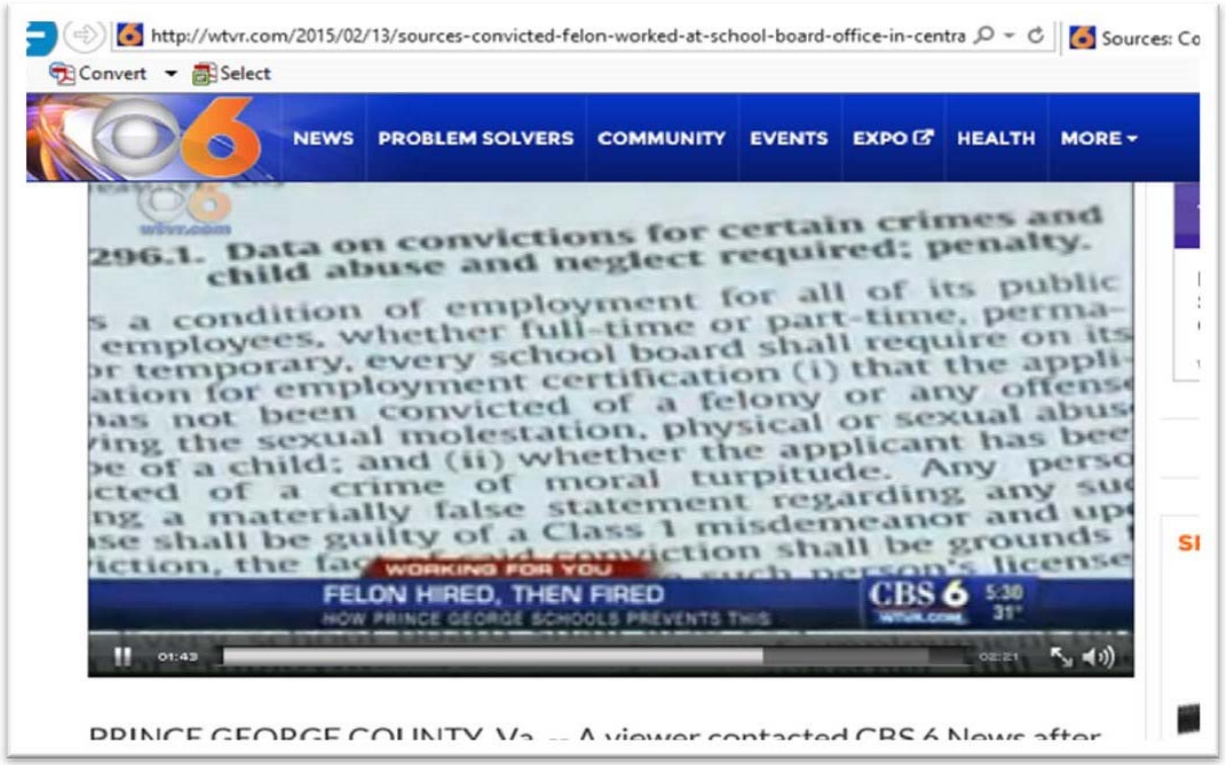
Please indicate grades in which you would like to substitute:

Elementary K-5 Middle 6-7 Jr. High 8-9 High School 10-12
PG Ed Center Crater Detention Rowanty Tech Center

CBS 6 WTVR.COM 5:30 31°

Importantly, the felon's actual job application is not shown at any time by WTVR.

And perhaps most damning of all, towards the end of the story, WTVR published a portion of the language of Va. Code § 22.1-296.1, the code provision that criminalizes making false statements about a person's prior felonies on a public-school job application. This image zeros in on the "guilty of a misdemeanor" language of the statute. The statutory text also appears at the same time as the "Felon Hired, Then Fired" language (again, used throughout the broadcast) at the bottom of the screen. This image, then, directly connects the felon at issue with the commission of a Class 1 misdemeanor under the statute.



PRINCE GEORGE COUNTY, Va. -- A viewer contacted CBS 6 News after

The entire narrative presented by WTVR's news story (with all of the images, the superimposed "Felon Hired, Then Fired" language that continuously runs at the bottom of the screen, and the accompanying test) is false. Contrary to the story's implications, Horne, the felon referenced in the story, did not fail to disclose, or lie about, her prior felony conviction when she applied for her public-school job. To the contrary, it is undisputed that Horne was fully forthcoming about her prior criminal conviction when she filled out her application, and that at all times the school system knew about her felony and hired her anyway. In other words, Horne made no misrepresentations and committed no criminal conduct in connection with the submission of her job application.

Despite its falsity, the story is still available on WTVR's website and can be found at http://wtvr.com/2015/02/13/sources-convicted-felon-worked-at-school-board-office-in-central-va/

B. The Seriously Flawed Editorial Process That Preceded WTVR's Defamatory News Story

The "Felon Hired, Then Fired" story was the end-result of a completely flawed editorial process. The story arose when a confidential source of the reporter who reported the story – Wayne Covil – contacted him and advised him that a felon had been hired and then fired from the local school system in Prince George County. JA801-802. Covil then set up an interview with the school system's superintendent, Dr. Bobby Browder, to ask him about whether a felon had, in fact, been hired by the school system and more specifically,

how the felon had gotten hired in the first place. JA755, 801, 162.

At that interview, Dr. Browder refused to go into the specifics of whether a felon had been hired or fired from the School System. He did, however, describe (i) the application process (including a question on the application about prior criminal convictions); (ii) the background check process that follows the initial application; and (iii) how prior criminal convictions are sometimes discovered *after* the initial hiring of an employee (as part of a post-employment criminal background check) despite the language of the initial application. JA804-805.

From listening to Dr. Browder's interview statements, Covil believed that Dr. Browder's indirect information about the hiring process signaled that Horne had, in fact, lied on her application by failing to properly disclose her prior felony. JA804-05. Indeed, at trial, he said that "in the interviewing Browder [sic] it was our belief that the person [the applicant] had not been truthful." JA804 (emphasis added). Covil also believed that Dr. Browder's failure to expressly deny his assertion that a felon had been hired and fired by the School System was a tacit admission that a felon had, in fact, been hired and fired by the School System. JA808. Covil formed these beliefs, however, even though he *never asked* Dr. Browder whether the felon at issue had made any misrepresentations on her application, JA766, and he did *absolutely nothing* to determine whether Dr. Browder was telling the truth. JA808-11; JA836.

Covil's lack of any further investigation was all the more remarkable given what occurred soon after he

completed his interview of Dr. Browder. Specifically, almost immediately after Covil returned to the WTVR office, he received an unsolicited anonymous e-mail about the School System's hiring of a felon. JA910-911. The e-mail, sent at 11:48 a.m. from the username "ssss smith" and the address "sssssmith869@yahoo.com," said:

> I am a Prince George county resident. On Monday, I anonymously sent letters to each of the school board members informing them that a convicted felon was hired by the school board office. I know this because this person also lives in Prince George and I know they are a felon. I also know they work as a Director at the Prince George School Board Office. My concern is, how did this happen? Any state employee must have a background check when hired so how was this overlooked? Who allowed this to happen? Shouldn't someone take responsibility? Who at the School Board gave the OK to hire a felon. Virginia law states that a school division can not hire a convicted felon. This also happens at the same time the Superintendent gets a $10,000.00 raise. Is he really doing his job.

JA910-911.

At trial, Covil conceded that the e-mail was critical of Dr. Browder and that it pointed fingers at both Dr. Browder and the School Board for allowing a felon to get hired by the School System. JA819; JA841. WTVR's News Director too testified at trial that the email's substance raised "red flags," and that, as such, she e-mailed Covil and told him "we need to pursue" and try to find out the name of the alleged felon. JA910.

Covil, however, *never followed this directive*. Indeed, after he received the e-mail, Covil (i) never made a second call to Dr. Browder about the e-mail; (ii) never FOIA'd Horne's employment application; and (iii) never called any members of the School System's school board to inquire about the e-mail or the information it contained. JA818-20; JA778-79. He failed to do this even though the telephone numbers for the individual Prince George County School Board members were publicly posted on the School System's website. JA781.

C. And All This Just To Falsely Accuse An Unelected Public Employee Of Lying On Her Job Application

What all of these machinations ultimately meant was that WTVR aired a false news story about an unelected public employee of a local school system. Horne was not the School Superintendent, an Assistant Superintendent, a School Board member, or even the head of any of the schools in the system. Instead, she was a "numbers" person who basically kept the books. In her position, Horne (i) had no access to the public purse; (ii) did not handle public funds (including not collecting or disbursing such funds); (iii) had no power to make contracts for the school system, or to bind the school system for any contracts or bids; (iv) did not pay bills or invoices or approve purchases for the school system; (v) did not decide which line items stayed or went on the budget; (vi) did not decide whether to increase or decrease school salaries; (vii) did not have any media duties; and (vii) had no policymaking responsibilities at all regarding the budget or the finances of the school system. JA365-68; JA385-3-JA385-5; JA837.

And, of course, WTVR never even focused on such duties as part of its reporting. Its news story was not about whether the school system's Budget & Finance Director had mismanaged funds or created a public outcry by proposed a budget that eliminated teachers or closed down schools. Rather, it was about the job application requirements that applied equally to *each and every* school system employee – from the high-profile Superintendent at the top to the night watchman or school custodian at the so-called bottom. Nothing about the fact that Virginia law prohibits public school systems from employing felons was in any way unique to Horne's position or job duties.

D. The Underlying Litigation

After its false broadcast about her, Horne sued WTVR for defamation. She was unable to prevail in her suit, however, under this Court's *Sullivan* jurisprudence. First, she was declared to be a "public official" under *Rosenblatt v. Baer*. And second, she was held to have failed to provide sufficient evidence to meet the "actual malice" standard of *New York Times v. Sullivan*. The District Court made these holdings, *even though* it held that WTVR's broadcast was reasonably capable of defamatory meaning because it was "reasonably capable of conveying that the School System fired [her] because she lied about her conviction when filling out her application." App. at 32.

On appeal, the Fourth Circuit affirmed these two rulings. Its published opinion, however, applied an expansive notion of "public officials" under *Rosenblatt*. Relying on the notion of "apparent substantial responsibility" and resting on her "title and job description," the Court of Appeals held that the mere

appearance of responsibility was enough to make Horne a "public official" and therefore subject to the "actual malice" standard. App. at 11-13.

REASONS FOR GRANTING THE WRIT

I. *New York Times v. Sullivan* Should Be Overruled

A. Prior to *Sullivan*, State Defamation Law Operated Unremarkably

Prior to *Sullivan,* defamation claims – even those brought by public officials or public figures -- were unremarkably governed by state common law. Epstein, *supra*, at 789 ("Before the case [*Sullivan*] there was a quiet satisfaction with the basic common law rules of defamation."). Within this landscape, "only ten states applied an actual malice test to conditional or qualified privilege cases" – that is, "those in which the privilege may be over-ridden or foreclosed." John Lewis Smith; Bruce L. Ottley, New York Times v. Sullivan *at 50; Despite Criticism, The Actual Malice Standard Still Provides "Breathing Space" For Communications In The Public Interest*, 64 DEPAUL LAW REV. 1, 22 (2014).[5] And even then, this test was "usually restricted" to "defamation cases involving candidates for political office or public officials," rather than simply public employees. *Id.* at 24. Finally, the pre-*Sullivan* "actual malice" test involved the lower threshold standard for "common law" malice rather than the subjective inquiry involved in *Sullivan's* "actual malice" test. *Id.*

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[5] *See* Epstein, *supra*, at 795 ("The [actual malice] proposition stands in very sharp opposition to the majority common law proposition on the same question.").

at 26-27. Simply stated, prior to *Sullivan*, state common law in the United States imposed nothing remotely comparable to this Court's "actual malice" test from *Sullivan* as a barrier or impediment to a public employee's defamation lawsuit.

B. *Sullivan* Arose From Extraordinary And Unique Factual, Social, and Societal Circumstances

All of this changed, of course, with *Sullivan*. The extraordinary factual, social, and societal context in which the case arose, however, cannot be divorced from either its outcome or its holding. *Sullivan* was no ordinary libel case. It sprang from the New York Times' decision in 1960 to run a full-page advertisement, titled "Heed Their Rising Voices," sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Sullivan*, 376 U.S. at 256-257. The ad detailed alleged efforts by "Southern violators of the Constitution," including police officers, to subvert the civil rights movement. *Id.* L.B. Sullivan, an *elected* commissioner of Montgomery, Alabama, in charge of supervising the city's police department, sued the New York Times for libel, and an all-white Alabama jury awarded him damages of $500,000. *Id. See also* Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197, 200 (1993) (describing how the case was tried to an all-white jury).

The summary of facts in this Court's opinion in *Sullivan*, however, does not do justice to the racially toxic environment in which the Times tried to defend itself in 1960's Alabama. The courtroom where the case was tried was segregated, not a single Montgomery

lawyer would represent the Times in the case, and local newspapers vilified the Times' advertisement for its "crude slanders against Montgomery." Kagan, *supra*, at 200.

Not only that, but the judge who presided over the case had previously made his feelings about segregation clear in a companion case to *Sullivan*. He stated:

> Much has been said at the Bar, and out of the hearing of the trial jury, as to the supposed requirements of the XIV Amendment directing the Trial Judge of the Court of a sovereign state how he will conduct a trial before a jury in the courts of Alabama.
>
> I would like to say for those here present, and for those who may come here to litigate in the future, that the XIV Amendment has no standing whatsoever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the Court . . . shall be conducted.
>
> . . .
>
> We will now continue with the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that the white man's justice . . . will give the parties at the Bar of this Court, regardless of race or color, equal justice under the law.

Lewis & Ottley, *supra*, at 12-13 (citations omitted).

And it must also be remembered that "the *Sullivan* trial was merely the first salvo in a concerted campaign against the northern establishment by southern public officials and opinion makers – a campaign which intended to curtail media coverage of the civil rights struggle and threatened to succeed in this defined." Kagan, *supra*, at 200. By the time this Court decided *Sullivan*, "southern officials had brought nearly $300 million in libel actions against the press." *Id.* As one of Montgomery's local newspapers put it at the time: "State Finds Formidable Legal Club to Swing at Out-of-State Press." *Id.*

C. This Court's Decision In *Sullivan* Went Far Beyond That Which Was Necessary To Address The Infirmities Of The Alabama Jury's Verdict

Within this highly charged context, this Court went far beyond the discrete infirmities in the Alabama jury's verdict, of which there were many, when it issued its decision. Instead, in expansive terms, it held for the very first time that the First Amendment imposes Constitutional requirements on the common law of defamation such that it 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." *Sullivan*, 376 U.S. at 279-80. It is no understatement to say that in *Sullivan*, this Court "revolutionized the law of defamation in . . . every . . . jurisdiction in the country." *Miami Herald Pub. Co. v. Ane*, 423 So.2d 376, 382-383 (Fla. App. 1982).

This expansive view of the First Amendment was unnecessary. As one commentator has noted: "My sense is that tried anywhere outside the deep South, the plaintiff [in *Sullivan*] would have been sent home packing. The common law was sound; its application was not." Epstein, *supra*, at 790. It was also without a solid Constitutional foundation. As Justice Blackmun candidly stated in *Webster v. Reproductive Health Services*, "[t]he Constitution makes no mention, for example, of the First Amendment's 'actual malice' standard for proving certain libels." 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part and dissenting in part). Rather, it is a "judge-made method[] for evaluating and measuring the strength and scope of constitutional rights." *Id.*

D. Sullivan Struck An Improvident Balance Between The Public's Interest In Being Fully Informed About Public Officials And The Competing Interest Of Protecting One's Reputation

With all of this said, *Sullivan* went too far in favoring the public's First Amendment interests to the detriment of an individual's ability to vindicate his personal reputation. As has been stated: "[i]t is one thing to condemn the common law of defamation as it was applied in a single case, and it is quite a different thing to condemn the basic set of common law principles in their entirety." Epstein, *supra* at 817.

Justice White said it best in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In powerful and compelling language, he said he had "become convinced that the Court struck an ***improvident balance*** in the New

York Times case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." 472 U.S. at 767 (White, J., concurring) (emphasis added). He continued:

> In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S., at 340, 94 S.Ct., at 3007. Yet in New York Times cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly

> false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment.

Id. at 767-769.

Other members of the Court foreshadowed Justice White's sentiments many years before. In *Rosenblatt*, for example, Justice Stewart emphasized that the First Amendment is not the "only guidepost in the area of state defamation laws." 383 U.S. at 92 (Stewart, J., concurring). Instead, he explained that:

> 'important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.'

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself is left primarily to the individual States . . . . But ***this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.***

Id. (emphasis added).

Other members have emphasized that the First Amendment is not an absolute shield that trumps an individual's reputational rights. As Chief Justice Warren explained in his concurring opinion in *Curtis Publishing Co. v. Butts*: "[f]reedom of the press under the First Amendment does not include absolute license to destroy lives or careers." 388 U.S. 130, 170 (1967) (Warren, C.J., concurring). And as Justice Fortas made clear, albeit in dissent, just a year before in *St. Amant v. Thompson*:

> The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's

> membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. New York Times does not preclude this minimal standard of civilized living.

390 U.S. 727, 734 (1968) (Fortas, J., dissenting)

Even a current member of this Court has recognized the "obvious dark side" of *Sullivan*'s "actual malice" standard – that is, "that it allows grievous reputational damage to occur without monetary compensation or any other effective remedy." Kagan, *supra* at 205 (1993). This dark side has likely led to a "general tendency to sensationalize political discourse" and to the "'tabloidization' of the mainstream press." *Id.* at 207. It is also encouraging an arrogance of the press, to wit:

> [t]oday's press engages in far less examination of journalistic standards and their relation to legal rules. Rather than asking whether some kinds of accountability may in the long term benefit journalism, the press reflexively asserts constitutional insultation from any and all norms of conduct."

Id. at 207.

Finally, in the years preceding his passing, Justice Scalia repeatedly expressed his open support for overturning *Sullivan*, not just because of its reputational costs but also as lacking proper Constitutional foundation. *See, e.g.,* NORMAN PEARLSTEIN, OFF THE RECORD: THE PRESS, THE

GOVERNMENT AND THE WAR OVER ANONYMOUS SOURCES 77 (2007). As he explained in particularly blunt language,

> you can libel public figures without liability so long as you are relying on some statement from a reliable source, whether it's true or not.
>
> Now the old libel law used to be (that) you're responsible, you say something false that harms somebody's reputation, we don't care if it was told to you by nine bishops, you are liable. . . . *New York Times v. Sullivan* just cast [the old libel law] aside because the Court thought in modern society, it'd be a good idea if the press could say a lot of stuff about public figures without having to worry."

Ken Paulson, *Justice Scalia: Reflections on* New York Times v. Sullivan, FIRST AMENDMENT CENTER (Oct. 11, 2011, 10:37 AM), http://www.firstamendmentcenter.org/justice-scalia-reflections-on-new-york-times-v-sullivan.

The point of these thoughtful, compelling, and cogent statements is that *Sullivan* strikes the wrong balance between the First Amendment and the common law of defamation. Professor Epstein succinctly summarized the negative societal impact of this imbalance as follows:

> The greatest cost of the present system is that it makes no provision for determining truth. When a defendant wins a case on actual malice, there is no correction of past errors, and no sense of vindication for the plaintiff who can complain bitterly that he lost on a technicality

> that was of no concern to him. Indeed, it is not surprising that the plaintiff's level of frustration is so great in defamation cases precisely because the frequency with which the defendant avoids the only issue that matters to the plaintiff – falsehood, which could allow rehabilitation of the plaintiff's reputation.

Epstein, *supra* at 813-814. He then continued:

> The public, too, is a loser because the present system places systematic roadblocks against the correction of error. If it is important to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press. The centrality of the truth is of critical importance to any overall assessment of the system. Even if a system that turned on truth were more expensive to operate than one which rested upon actual malice, which is far from obvious, it would still provide information of far greater social value. More cases might be brought, but they would serve an important public purpose.

Id. at 814.

Professor Epstein then concluded with exactly what Horne, as the victim of the "dark side" of *Sullivan*, submits is the proper course of action for this Court to take:

> On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of

> individual reputation than does the *New York Times* rule that has replaced it.

Id. at 817-818.

II. Even If This Court Chooses Not To Overrule *New York Times v. Sullivan* In Its Entirety, It Should Revise Its "Actual Malice" Rule Of Law

Separately, even if this Court elects not to overrule *Sullivan* in its entirety, it should revise its "actual malice" rule of law so that it only applies to awards of punitive or presumed damages and not to the issue of liability or the award of actual damages. While this is not Horne's preferred course of action, it would nevertheless promote the reputational interests and values discussed in the section above and would, at the least, recalibrate the balance between the First Amendment interests and the interests of public officials and public figures in trying to vindicate their rights to their reputation through state common law.

III. Alternatively, This Court Should Revise Its "Public Official" Jurisprudence So That Unelected Public Officials Such As Horne Are Not Subjected To *Sullivan's* "Actual Malice" Standard

Additionally, and alternatively, this Court should examine and revise its "public official" jurisprudence so that unelected public officials such as Horne are not subjected the *Sullivan's* exacting "actual malice" standard. Indeed, to say that this jurisprudence needs to be clarified is an understatement. As has been explained, "[t]he public official requirement has been blurred beyond recognition by [this] Court's failure to

promulgate a workable standard for differentiating between the President from the White House kitchen worker, and by the lower courts' failure to resist the temptation to hold lower-level government employees like that White House kitchen worker to the exacting actual malice standard." David Finkelson, *Note: The Status/Conduct Continuum: Injecting Rhyme And Reason Into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871, 872 (1998).

Here, the Fourth Circuit essentially created a *per se* rule that says, based solely on their job titles and job descriptions, all public-school budget & finance directors in Virginia are "public officials" under *Rosenblatt*. App. at 10-14. In doing so, the Court of Appeals in one fell swoop stripped roughly 133[6] persons of the ability to bring ordinary common law defamation lawsuits to protect their personal reputations. Instead, such persons – *regardless* of the actual duties they engage in on a day-to-day basis and *regardless* of their interactions with the local public or the media – must now surmount the "actual malice" hurdle under *Sullivan*.

The Fourth Circuit's "public official" ruling also almost certainly has larger and broader implications for other public employees. Specifically, by resting its determination so heavily on the *appearance* of substantial responsibility and control over public affairs, as opposed to the *actual* responsibility and control over public affairs, the Court of Appeals all but

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[6] Virginia has 95 counties and 38 independent cities (which are considered county equivalents), each of which presumably has a budget director for its public-school system.

extinguished the two-part inquiry from *Rosenblatt*. It is now simply collapsed into one superficial inquiry of whether a public employee merely *looks like* they have responsibility and control -- rather than whether they actually do. This test casts far too broad a net.

And finally, the Fourth Circuit's surface-based test is at odds with the most fundamental purpose behind designating persons as "public officials" – that is, that public officials, by virtue of the status and importance of their public position, can defend themselves against defamation with their own public counter-statements. As this Court made clear in *Gertz v. Robert Welch, Inc.*:

> Public officials . . . usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

418 U.S. 323, 344 (1974). The Fourth Circuit's test, however, leaves no room to inquire whether a public employee – even one who holds a lofty title or has a gilded job description – can protect their reputations by using communication channels to publicly counteract false statements.

In any event, this issue warrants review by this Court. As one court rightly observed, this "Court has consistently sidestepped opportunities to define the term [of public official]." *Lacey v. Judge*, 2012 Ohio Misc. LEXIS 6290 at *5-6 (Franklin Cnty. Ct. of Common Pleas Nov. 2, 2012). Such sidestepping should

stop. The time is now to address the public official issue and to address how such persons, especially unelected public employees who have no means of self-help such as Horne, can protect their reputations in today's rough-and-tumble world.

CONCLUSION

In the end, no better or more succinct words explain why certiorari should be granted in this case than the following:

> The constitutional law of defamation is a disaster. It is nearly incomprehensible. It is unfair. It is unjust. And it is long overdue for a correction.

Dean, *supra*, *Justice Scalia's Thoughts, And A Few Of My Own, on New York Times v. Sullivan*, Findlaw (Dec. 2, 2005). Such correction should begin now. The petition should be granted.

Respectfully submitted,

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