No. _____

In The
Supreme Court of the United States

JOHN TATUM and MARY ANN TATUM,

Petitioners,

v.

THE DALLAS MORNING NEWS, INC.
and STEVE BLOW,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

JOSEPH D. SIBLEY IV
Counsel of Record
CAMARA & SIBLEY LLP
4400 Post Oak Pkwy
Suite 2700
Houston, TX 77027
T: (713) 966-6789
F: (713) 583-1131
sibley@camarasibley.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether this Court's decisions in *Milkovich v. Lorain Journal Co.* and *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund* hold that an otherwise verifiable accusation of dishonesty should be considered Constitutionally protected opinion under the First Amendment because such accusation is made within the framework of an opinion piece.

PARTIES TO THE PROCEEDING

Petitioners are John Tatum ("Mr. Tatum") and Mary Ann Tatum ("Mrs. Tatum" and, together with Mr. Tatum, the "Tatums"). Respondents are The Dallas Morning News, Inc. ("the *News*") and Steve Blow ("Blow" and, together with the *News*, the "Media Defendants").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Tatum and Mary Ann Tatum respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Texas ("SCOTX").

OPINIONS BELOW

The opinions of the SCOTX (App. 1) are published at 554 S.W.3d 614 (Tex. 2018) ("SCOTX Opinion"). The opinion of the Texas Fifth Court of Appeals ("COA", App. 60) is published at *Tatum v. The Dallas Morning News, Inc.*, 493 S.W.3d 646 (Tex. App.–Dallas 2015) ("COA Opinion").

JURISDICTION

The judgment of the SCOTX was entered on May 11, 2018. App. 1. Petitioners moved for rehearing and that was denied by the SCOTX on September 28, 2018. App. 118. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT

I. Overview

Just over twenty-eight years ago, this Court granted certiorari in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) to address diverging state and federal court holdings as to what extent the First Amendment applied to statements of opinion. The *Milkovich* Court held that otherwise verifiable statements of fact do not receive special First Amendment protection simply because those statements are uttered in the context of an opinion. *See id.* at 20-23. Specifically, *Milkovich* endorsed "liar libel" as a viable defamation claim where a plaintiff is accused of an actual instance of dishonesty. *See id.* Thus, *Milkovich* was seen as marking the "demise of the opinion privilege" that, as the Court noted, was a byproduct of misreading dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See Milkovich*, 497 U.S. at 19 *and see also generally* Lisa K. West, Milkovich v. Lorain Journal Co.–*Demise of the Opinion Privilege in Defamation*, 36 VILL. L. REV. 647 (1991).

However, reports of the demise of opinion privilege would prove greatly exaggerated. As one scholarly journal observed, it would be *Milkovich*—not opinion privilege—that would suffer a "slow, quiet, and troubled demise" in the ensuing decades. *See* Leonard Niehoff & Ashley Messenger, Milkovich v. Lorain Journal *Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. MICH. J. L. REFORM 467, 467-68 (2016). Many lower courts have either proceeded "as though *Milkovich* [does] not exist"

or used other creative mechanisms to abrogate its holding. *See id.* at 475, 482-87, 494 (collecting cases).

This ongoing "silent revolt" by lower courts against *Milkovich* has now culminated in the SCOTX Opinion, which turns the holding of *Milkovich* completely on its head. The SCOTX Opinion holds that even though a column published by the Media Defendants (the "Column", App. 50-53) accuses the Tatums of acting deceptively and dishonestly in writing their son's obituary (the "Tatum Obituary"), this accusation of dishonesty—an otherwise verifiable fact—is nonetheless one of opinion because it is contained in the context of a broader opinion piece. App. 38-39, 44-45.

The SCOTX Opinion is so contrary to the core holding of *Milkovich*—which reversed a lower Ohio court making the exact same error—that one would think the SCOTX was oblivious to *Milkovich*'s existence. *Cf.* Niehoff & Messenger, *supra* at 482-85. However, the SCOTX Opinion actually purports to follow *Milkovich*. *See* App. 43-45. This underscores the "deeply and unworkably confused" state of lower courts' efforts to properly construe *Milkovich*. *See* Niehoff & Messenger, *supra* at 468.

Should the Opinion be allowed to stand, *Milkovich* risks dying a "death by a thousand cuts" at the hands of the lower courts bound to follow it. There will continue to be no consistent application in state and federal courts as to what accusations of dishonesty are constitutionally vulnerable unless the Court grants review.

II. Factual Background

Paul Tatum ("Paul") is the son of Mr. and Mrs. Tatum. At seventeen years old, Paul was an excellent and popular student with many interests and friends, and an outstanding athlete. App. 61. By every indication, he was a talented young man with a bright future. *Id.* at 2-3.

On Monday, May 17, 2010, the Tatums were out of town at another son's graduation, and Paul was at home. *Id.* at 61. Later that evening, Paul, driving alone, crashed his parents' vehicle on his way home from a fast-food run, at a dangerous intersection. *Id.* at 3. The vehicle's airbag deployed, and the crash was so severe that investigators later discovered Paul's eyelashes and facial tissue at the scene. *Id.* No one other than Paul was involved or injured in the crash. The crash's cause has never been conclusively established and no evidence suggests that Paul was intoxicated or otherwise under the influence of any substance when the crash occurred. *Id.*

Paul found his way home on foot. *Id.* He began drinking and he called a teenage friend. The phone call indicated to the friend that Paul was behaving erratically. *Id.* The friend, concerned, traveled with her mother to Paul's house to see him in person. *Id.* The friend found Paul at the Tatums' house in a confused state holding one of the Tatum family's firearms. *Id.* He was reportedly "dazed confused, irrational, incoherent and apparently in physical anguish." *Id.* at 62. Paul displayed no awareness of the recent accident and so

his teenage friend, therefore, also remained unaware. The friend left the room where Paul was to report Paul's irrational behavior to her parent, who was waiting in a car outside the Tatums' house. *Id.* at 3. Soon after, the friend heard a gunshot. Paul had killed himself. *Id.* As a result of this witness's presence, his friends and classmates immediately became aware of Paul's suicide.

Paul had no history of any mental illness associated with suicide, such as depression. Paul was optimistic, socially engaged and steady. Therefore, in the days after his death, the Tatums questioned why Paul would have taken his own life so abruptly and unexpectedly.

The Tatums discovered medical literature positing a link between traumatic brain injury and suicide. *Id.* Focusing on the severity of the accident and Paul's uncharacteristic behavior after it, the Tatums concluded that the car accident caused irrational and suicidal ideations in Paul, which in turn led to his death (whether through an irrational failure to appreciate the risks that accompany handling a firearm or through suicidal desires that led to an intentional, suicidal action). *Id.* Paul's mother, a mental health professional, had never noticed any suicidal tendencies in Paul. *Id.* By her account, and by all others, Paul was a normal, healthy, and mentally stable young man. *Id.* at 3-4. For the Tatums, these observations underscored the plausibility of their belief that Paul's car crash generated a brain injury that led to his suicide. *Id.* at 4.

Immediately after Paul's death—and prior to the publication of the Tatum Obituary—sometime between May 18-19, 2010, a reporter for the *News* named Bruce Tomaso ("Tomaso") began to look into the death to see if it was newsworthy. Based on information obtained from unofficial sources, Tomaso learned there was a suicide and ceased any further inquiry because the *News'* policy is not to report on suicide unless it involves a public figure or happens in a public way. Neither Tomaso nor anyone else at the *News* ever had contact with any official sources (*e.g.*, police or medical examiner) regarding Paul's death or the automobile accident and did not gather any documents from them. Tomaso never at any point spoke to Respondent Blow regarding Paul's death.

In addition to establishing a scholarship fund in his name, the Tatums sought to memorialize Paul by writing the Obituary, which they published by purchasing space in the *News*. App. 4. In the Tatum Obituary, published on May 21, 2010, the Tatums chose to focus on why he committed suicide so as to clarify for friends and family (who were already aware of how he died) that Paul's suicide was not—like the vast majority of suicides—caused by mental illness.

Based on their investigation and conclusions regarding the cause of his suicide and the link between head trauma and suicidal behavior, the Tatums stated in his Obituary that Paul "died as a result of injuries sustained in an automobile accident," focusing on the cause of the suicide (*i.e.*, the proximate cause of death) without disclosing morbid details. The Tatums chose

this wording to reflect their conviction that Paul's suicide resulted from suicidal ideation arising from a brain injury rather than from any undiagnosed mental illness. App. 4.

The Tatums were fully aware that many of Paul's friends and classmates knew that Paul had committed suicide. They did not seek to "cover up" the suicide—which would have been a futile effort given it was already common knowledge—and instead provided an answer to the question of "why" Paul took his own life since the connection between the car accident and the suicide was not common knowledge. More than a thousand people attended Paul's funeral. App. 4.

The Tatum Obituary is consistent with expert guidelines on suicide prevention and safe suicide reporting, and also journalistic guidelines—including the *News*'—which recommend not to draw attention to suicide due to the proven risk to the public of suicide contagion or "copycat" suicides.

On May 25, 2010—several days after the Obituary—the medical examiner issued Paul's death certificate. The death certificate listed the immediate cause of Paul's death as a gunshot wound to the head. The manner of death was ruled a suicide. The medical examiners stated that they do not determine why a person commits suicide. Likewise, the police do not determine why someone commits suicide and the official police documents simply stated that Paul committed suicide for "some unknown reason." There was no suicide note. App. 99.

On or about the week of June 14, 2010, one of Blow's friends, Julie Hersh—who holds the view that all suicides are the result of mental illness and should be openly discussed in obituaries—encouraged Blow to criticize the Tatum Obituary published a month earlier. App. 110.

On June 20, 2010—about one month after Paul's suicide—the *News* published the Column, which was entitled "Shrouding Suicide Leaves its Danger Unaddressed." The Column characterized suicide as the "one form of death still considered worthy of deception." App. 4. While it did not refer to the Tatums by name, it quoted directly from the Tatum Obituary and referred to it as "a paid obituary in this newspaper." *Id.* at 4-5. Those who knew the Tatums immediately recognized that the obituary the Column referenced was Paul's. *Id.* at 5.

In the Column, Blow accused the Tatums of dishonesty and deception. After discussing actual cases where family members undeniably fabricated false accounts of death to conceal AIDS or suicide, Blow then lumped the Tatums in the same lot by reporting that they fabricated the role of the car crash as a means to cover up Paul's suicide. Blow claimed in the Column that one of his newsroom "colleagues" had investigated the claims made in the Tatum Obituary, which supported his claim that the Tatums were lying about the connection between the car crash and Paul's death. The reporters Blow identified as his newsroom sources claim they never obtained any documents or

interviews regarding Paul *nor ever even spoke to Blow* regarding the Tatums.[1]

Blow drafted the column without attempting to contact the Tatums and the *News* published it without letting the Tatums know that it was going to print. App. 5. Blow had not obtained any documents from the medical examiner or police, nor interviewed anyone with their offices. Blow had even been advised by suicide experts not to criticize the families of suicide victims for avoiding a discussion of suicide in obituaries, but Blow did so anyway. Blow's own editor would later admit that Blow breached journalistic ethics and the *News'* guidelines by failing to interview the Tatums to understand their intention behind the wording of the Obituary.[2]

The *News* published the Column on Father's Day and both Blow and the *News* say they have no regrets about doing so.

III. Procedural Posture

The Tatums subsequently filed suit against the Media Defendants for libel. App. 60. On July 8, 2014, the trial court granted summary judgment in favor of the Media Defendants. *Id.* at 116-17.

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[1] In fact, Blow's fabrications in this regard, *inter alia*, were cited by the COA as support for its conclusion that there was sufficient evidence of actual malice to survive summary judgment. *See* App. 108-11.

[2] Likewise, the COA found this to be evidence of Blow's purposeful avoidance of the truth. *See* App. 108-11.

The Tatums appealed, and the COA reversed in favor of the Tatums on December 30, 2015, holding *inter alia* that: (1) the Column was capable of defamatory meaning in that it accused the Tatums of deception and dishonesty; (2) the defamatory statements regarding the Tatums were statements of fact and not opinion; (3) the Column was not substantially true as a matter of law; and (4) there was sufficient evidence of actual malice to go to a jury. *See generally id.* at 7.

The Media Defendants sought review from the SCOTX. *Id.* at 7. The SCOTX granted review and reversed the COA in favor of the Media Defendants on May 11, 2018. *Id.* at 50. The SCOTX agreed with the COA that the Column accused the Tatums of dishonesty and deception and that this was categorically defamatory under Texas statute. *Id.* at 38-41. However, the SCOTX nonetheless held that this otherwise "verifiable statement of fact is nonetheless an opinion for purposes of defamation[.]" *Id.* at 45.

The SCOTX based that holding on a reading of *Milkovich* that created a "two-prong" test, which holds that statements that are either (1) not objectively verifiable *or* (2) spoken in the "entire context" of an opinion piece should be deemed non-actionable statements of opinion. *Id.* at 44-45.

The SCOTX did not reach the first "prong" of its self-originated "*Milkovich* test" because it concluded that the Column's use of various versions of opinion-like language such as "I think" and "I understand"

rendered any statements regarding the Tatums as mere opinions as well. *Id.*

The Tatums moved for rehearing of the SCOTX Opinion and that motion was denied by the SCOTX on September 28, 2018. *Id.* at 117.

REASONS FOR GRANTING THE WRIT

The SCOTX Opinion clearly conflicts with *Milkovich*. However, this error is not without good company. So many lower state and federal courts have contravened the plain import of *Milkovich* that it has called into question whether *Milkovich* has "even [had] the narrow effect of persuading lower courts to find accusations of lying to be factual in nature." Niehoff & Messenger, *supra* at 467.

This is because lower courts—at the behest of the very able media defense bar—have utilized language from *Milkovich* that recognizes a "rhetorical hyperbole" exception to defamation to sterilize *Milkovich*'s intended effects. *See* 497 U.S. at 20. This sparse language has provided the foothold from which the SCOTX—and other courts—have fashioned their departure from *Milkovich*. *See* Niehoff & Messenger, *supra* at 475 (noting that "[i]n response to *Milkovich*, media lawyers resorted to the simple expedient of substituting 'rhetorical hyperbole' for 'opinion' in their briefs"). In doing so, they have simply repackaged the "opinion privilege" that *Milkovich* rejected into a "rhetorical hyperbole" privilege that they claim *Milkovich*

endorses, thereby giving blanket protection to statements made in the context of anything that might be labeled as loose, figurative, satirical, or hyperbolic language. *Compare id. with Milkovich*, 497 U.S. at 20.

Because of this divide, "[w]e need criteria for determining when an accusation of lying signals the existence of such facts and when it does not."[3] Niehoff & Messenger, *supra* at 489. This Court's reasoning in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indust. Pension Fund*, 135 S. Ct. 1318 (2015) provides an answer. As discussed in detail below, while *Omnicare* dealt with statements in the context of a Securities Act claim, the Court's rationale that distinguishes between statements of fact and opinion is sound because whether statements are factual or non-factual does not depend on whether it is published in the *News* or in a registration statement for a public offering. Thus, there is no principled reason why *Omnicare* should not also apply to the law of defamation. *See* Niehoff & Messenger, *supra* at 401 (advocating for the *Omnicare* rationale to apply in defamation cases).

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[3] Accusations of dishonesty have a special place in libel and slander jurisprudence because in virtually every jurisdiction, such accusations are considered defamatory. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 73.001 (recognizing a statement is defamatory libel by statute if it "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation").

I. The Division On *Milkovich* And How *Omnicare* Can Help Bridge The Division.

Lower courts around the nation purporting to apply *Milkovich* fall into two categories: (1) those that apply *Milkovich* at face value and treat any accusation of acts of dishonesty as vulnerable to defamation; and (2) those cases that—like the SCOTX Opinion—use the "rhetorical hyperbole" language from *Milkovich* to make an otherwise libelous claim of dishonesty one of "opinion". As discussed below, these latter cases are on an errant course from *Milkovich* and incorporating the *Omnicare* rationale will be a helpful tool in righting the ship.

A. Examples of lower courts closely following *Milkovich.*

Many lower courts have followed the letter and spirit of *Milkovich*, holding that actual accusations of lying and dishonesty are vulnerable to defamation.

For example, in *McNamee v. Clemens*, the federal district court held that, under *Milkovich*, where a baseball player called his former trainer a "liar" in response to the trainer's accusations he injected the player with steroids, such a statement was factual. 762 F. Supp. 2d 584, 599-602 (E.D.N.Y. 2011). This is an example of a straightforward application of the logic of *Milkovich*, which recognizes that accusations of dishonesty are defamatory statements of verifiable fact.

Likewise, in *Overstock.com, Inc. v. Gradient Analytics, Inc.*, a California appeals court recognized that, under *Milkovich*, "statements in the publications do not attain constitutional protection simply because they are sprinkled with words to the effect that something does or does not 'appear' to be thus and so; or because they are framed as being 'in our opinion' or as a matter of 'concern'" in holding that a publication could be read to imply provably false assertions of fact. 151 Cal. App. 4th 688, 703-04, 61 Cal. Rptr. 3d 29, 40-41 (2007).

In addition, in *Swengler v. ITT Corp.*, the Fourth Circuit followed *Milkovich* to hold that statements that were prefaced with "in my opinion" and followed by claims that the plaintiff engaged in acts of dishonesty and fraud were actionable. 993 F.2d 1063, 1071 (4th Cir. 1993).

Many other state and federal cases follow *Milkovich* in similar fashion.[4]

B. Examples of lower courts utilizing the "rhetorical hyperbole" language from *Milkovich* to render accusations of dishonesty as non-actionable.

Several lower state and federal courts have zeroed in on the language in *Milkovich* that recognizes that some statements—such as those that involve loose,

[4] For a cataloguing of additional cases following *Milkovich* in this manner, *see* Robert D. Sack, SACK ON DEFAMATION § 4.2.4 at n.63 (5th ed. 2017).

figurative, satirical, or hyperbolic language—should not be read as actually making factual statements. *Milkovich*, 497 U.S. at 20.

Milkovich recognized that whether a statement should be read to actually assert facts or is instead "rhetorical hyperbole" must be determined by the context. *See id.* at 17, 20. One of the cases *Milkovich* uses to illustrate this point is *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

Hustler held that an "advertisement" was actually a parody and, therefore, could not "reasonably be understood as describing actual facts . . . or events". *See* 485 U.S. at 46. The lampooning advertisement in *Hustler* mocked a liquor ad campaign and portrayed well-known televangelist Jerry Falwell as admitting that his first time having sex was during a drunken and incestuous encounter with his mother in an outhouse. *Id.* at 48. The *Hustler* parody contained, in small print at the bottom of the page, the disclaimer, "ad parody—not to be taken seriously." *Id.*

The other case *Milkovich* points to is *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974). In that case, the Court held that referring to one who crossed a union picket line as a "traitor" was not defamatory because it was used figuratively as an epithet to express contempt for the individual's disregard for a labor union. *See id.* There were no accusations of, for example, Soviet espionage to accompany this claim. *See id.*

So, in other words, *Milkovich* simply requires a court to first interpret what is actually being said and then to determine whether what is actually being said is objectively verifiable, thereby making it vulnerable to defamation. So, by way of example, in *Hustler* there are no facts to verify because, while factual statements are literally recited in the *Hustler* parody, it is clearly a lampoon and thus no actual factual statements are being made. Likewise, in *Letter Carriers*, there is no place to verify whether the plaintiff is actually a "traitor" because that term is used only as a placeholder for an expression of "dislike" by the defendant and thus, again, no factual statement is being made.

This seems simple enough and, based on the spirit of *Milkovich*, seemingly most courts would understand that, just as there is no blanket "opinion privilege", there can likewise be no "rhetorical hyperbole" privilege that allows statements of fact to be insulated from liability because they are included in the broader context of the kind of loose, figurative, satirical, or hyperbolic language used in *Hustler* and *Letter Carriers*.

For example, the Ninth Circuit applied this straightforward thinking in *Unelko Corp. v. Rooney*. Although not a case involving an accusation of dishonesty, the *Rooney* court reversed a district court's pre-*Milkovich* holding where CBS's Andy Rooney ("Rooney") had—in typical Rooney fashion—delivered a satirical opinion piece on the popular television magazine *60 Minutes*. *See generally* 912 F.2d 1049 (9th Cir. 1990). Rooney had criticized the product "Rain-X", claiming, in the midst of Rooney's statements that were "humorous, satirical,

full of ridicule and often to be taken with a grain of salt", that Rain-X "didn't work". *See id.* at 1053-54. The Ninth Circuit held that, regardless of the fact that much of the greater context of the "It didn't work" statement was rightly considered rhetorical hyperbole and opinion, the statement in question was nonetheless a statement of fact and was vulnerable to defamation under *Milkovich*. *See id.*

However, creative media defense lawyers began replacing their now antiquated opinion arguments with "rhetorical hyperbole" in hopes of avoiding the effects of *Milkovich*. *See* Niehoff & Messenger, *supra* at 475, 494.

In *Wood v. Del Giorno*, the plaintiff, an animal rights advocate and educator, appeared on a radio talk show to discuss the topic of "canned hunts". 974 So.2d 95, 97 (La. Ct. App. 2007). The defendant, an avid hunter and outdoorsman, also appeared on the show. *Id.* Things became heated during the show as the two argued their positions back and forth. *Id.* Defendant continuously interrupted and contradicted plaintiff and made several rude comments to and/or about plaintiff including: "The man is a fraud. He is a complete fraud!"; and was "out-and-out lying!" *Id.* The *Wood* court, citing *Milkovich*, held that the statements in question were not capable of defamatory meaning because they were "opinions and hyperbole". *See id.* at 100.

Other courts have similarly construed *Milkovich*. In *Rocker Mgmt. LLC v. John Does 1 Through 20*, the

federal district court held accusations of "lies" and "half-truths" made on Yahoo message boards were, in context, hyperbole and opinion. 2003 U.S. Dist. LEXIS 16277, at *6-*8 (N.D. Cal. May 28, 2003). And in *Lo-Biondo v. Schwartz*, the court held that accusations of "lies and deception" were in the "opinion category of rhetorical hyperbole". *See* 733 A.2d 516, 528 (N.J. Super. Ct. App. Div. 1999).

As such, there are a significant number of courts who have interpreted *Milkovich* as eliminating the doctrine of opinion privilege, but recreating that privilege for rhetorical hyperbole.[5]

C. Incorporating *Omnicare*'s rationale into defamation law will help bridge the divide.

This Court's revisiting of the opinion/fact dichotomy would not happen again until some twenty-five years later in *Omnicare.* However, the Court addressed this issue in the context of a Securities Act claim and whether a securities registration statement contained a statement of material fact. *See* 135 S. Ct. at 1324.

The *Omnicare* Court engaged in a lengthy analysis of when statements constitute and/or imply facts and when they are statements of pure and/or mixed opinion. *See generally id.* at 1325-32. While some of

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[5] For a cataloguing of more cases interpreting *Milkovich* in this manner, *see* Robert D. Sack, SACK ON DEFAMATION § 4.2.4 at n.66 (5th ed. 2017).

this analysis involves issues unique to securities litigation (such as whether the speaker actually held the opinion conveyed (*see id.* at 1326)), there are three main components of the *Omnicare* analysis that are sorely needed to bring order to the *Milkovich* uncertainty.

First, the Court provides guidance on how to recognize a statement of fact. A statement of fact expresses certainty about a thing—it is a "truth claim" about the state of the outside world, whereas a statement of opinion does not make such a claim. *See id.* at 1325. Therefore, under the *Omnicare* rationale, the famous hypothetical from *Milkovich*, "In my opinion, John Jones is a liar" would be considered—standing alone—a statement of opinion, while the statement "John Jones is a liar" would be considered a statement of fact. *See id.* Likewise, statements like "I think John Jones is a liar" or "I believe John Jones is a liar" would be considered—again, standing alone—statements of opinion based on this qualifying language. *See id.*

Second, the Court recognized that some sentences that begin with opinion words like "I believe" contain embedded statements of fact, such as "I believe John Jones is a liar because he was convicted of the crime of perjury." *See id.* at 1327. Such a statement may be read as a mixed-statement of opinion (belief that Jones is a liar) and fact (that Jones was convicted of perjury). *See id.*[6]

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[6] This is essentially the gist of *Milkovich*'s holding as to the famous "In my opinion, John Jones is a liar" hypothetical.

Third, *Omnicare* also recognizes a scenario in which there are statements of pure opinion that create a materially false impression. *See id.* at 1327-28. For example, if, in response to the above accusations, John Jones responds with "I believe my conduct is compliant with all applicable laws regarding perjury", this would clearly give the reader the impression that the factual event of John Jones familiarizing himself with the relevant perjury statutes actually occurred, regardless of the accuracy of Jones' assessment of those statutes' legal effects on him. *See id.*

By incorporating these elements from *Omnicare* with *Milkovich*, the Court can clarify the fact/non-fact dichotomy. The following demonstrates an "order of operations" that lower courts could use to determine whether a statement was vulnerable to defamation:

i. ***Step 1:*** If the complaint is regarding an express statement, taking into consideration the entire context, what is actually being stated *or* if the complaint is regarding an alleged implication, taking into consideration the entire context, what is actually being implied? (*Omnicare* and *Milkovich*)

ii. ***Step 2:*** Is what is being said/implied a truth claim or is it speculative or uncertain about the truth? (*Omnicare*)

Milkovich does not hold that such language is defamation *per se*, but that such prefatory opinion language does not magically insulate it from vulnerability if it creates factual implications. *See Milkovich*, 497 U.S. at 19-20.

iii. ***Step 3:*** If what is being said/implied is a truth claim, can the truth claim be objectively verified as true or false? (*Milkovich*)

Consider the following examples of how incorporating the rationale of these cases would work.

Ex. 1: *John Jones gets away with murder in this town because his father is the mayor.*

Here, we must first determine what the statement means. A normal reader would not believe the statement to mean that John Jones routinely murders other people with impunity. A normal reader would understand this as classic rhetorical exaggeration to demonstrate the truth claim that: John Jones gets special treatment in the town due to having his father serve as mayor.

So the truth claim has three components: (1) that Jones gets special treatment in the town; (2) that his father is the mayor of the town; and (3) that Jones' special treatment is due to his father serving as mayor.

Only the second of these would be objectively verifiable. The first and third—without more—cannot be verified because it is too speculative. What is meant by special? Who gives the special treatment? Is it from authorities or do private citizens tolerate Jones' mischief for fear of reprisal from the mayor? Is the special treatment due to Jones' father or does Jones have other leverages to obtain special treatment?

Now, if there were additional facts presented, such as evidence of crimes committed by Jones and his father's attempts to influence authorities for lighter or no prosecution, then perhaps this would change the analysis. As such, however, there are insufficient facts to objectively verify and the arguably defamatory aspects of those statements would rightly be considered the protected "loose and figurative" language contemplated by *Milkovich*.

Ex. 2: *I just met John Jones. I know a liar when I meet one. John Jones is a liar.*

This example touches on some of the criticisms of *Milkovich*.[7] Does this statement give rise to liability simply because a truth claim regarding honesty "John Jones is a liar" is made? The answer is no, because the truth claim here is that John Jones is a liar, but there is no factual basis from which to objectively verify this.[8] The support for this conclusion is the author's self-proclaimed built-in "liar detector". So although there is a truth claim here, whether John Jones is a liar cannot be verified because it is not tied to a specific

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[7] Professor Niehoff, though critical of *Milkovich*, also recognizes that the limiting principle for "liar libel" should be whether the accusation of dishonesty is tied to actual occurrences and not solely the subjective belief of the speaker. *See* Niehoff & Messenger, *supra* at 489-90.

[8] And "objective" verification is key. Although whether the speaker genuinely believes the veracity of her internal lie detector would be subject to objective verification, the putative defamatory claim—that the internal lie detector has accurately, in fact, sniffed out Jones as a liar—would not be.

factual occurrence. Thus, this is "loose" language in the sense it is not sufficiently tied to facts to verify and excepted from defamation liability under *Milkovich*.

Ex. 3: *John Jones came home last night drunk as a skunk. I told him, "You shouldn't drink and drive in this kind of weather—it's raining cats and dogs outside." In my opinion, Jones is a danger to society.*

Here again, the ordinary reader understands that "raining cats and dogs" does not amount to cats and dogs falling from the sky, but rather, excessive rain. Likewise, no one would believe Jones possessed the physical qualities of a skunk, but rather that he was very intoxicated. In addition, the author makes the speculative/uncertain claim about Jones' danger to society—this is a statement of opinion. Also, the author's statement that Jones "shouldn't drink and drive"—and the opinion purportedly supported by it—clearly implies the factual assertion that Jones did, in fact, drive during his state of intoxication. That would be an objectively verifiable fact and, thus, vulnerable to defamation.

It should be noted that inclusion in the passage of a statement of rhetorical hyperbole and a statement of opinion has absolutely nothing to do with the clear factual implication that Jones drove while intoxicated. No reasonable reader would conflate the aspect of opinion and rhetorical hyperbole with the clearly implied truth claim that Jones drove while intoxicated.

Ex. 4: *In my opinion, drug abuse is society's biggest problem. Thousands of people die every year due to drug overdoses, but families are often too ashamed to discuss it. John Jones' obituary stated that he committed suicide. After a reporter from the newspaper investigated, it turned out that there was a suicide alright, but death came in the emergency room after a drug overdose. I guess the family was ashamed to tell the truth.*

This passage contains a speculative/uncertain claim about society's biggest problem (drug abuse). It contains a truth claim about the numbers of victims of drug overdose and the reluctance of families to discuss it. It contains a truth claim about what was stated in Jones' obituary, a reporter's investigation, and the results of the investigation (drug overdose). Finally, it contains speculation about the family's motives for not telling the truth.

However, the clear and obvious implication is that the author has accused the family members of lying in the obituary to conceal a death by drug overdose. While there may be speculation regarding the family's motive for lying, there is not uncertainty regarding the fact that they did, in fact, lie regarding the circumstances surrounding the death. This is an objectively verifiable fact that would be vulnerable to defamation.

In short, adopting the *Omnicare* analysis would clean up the uncertainty and disparity in outcomes in applying *Milkovich*. When a party expresses certainty about a real-world occurrence—whether the subject is an act of dishonesty or otherwise—that party has

made a truth claim that, assuming verifiability, is vulnerable to defamation. Courts would have clearer guidelines on the language that signals opinion, rhetorical hyperbole, and truth claims, which would result in more consistency in application. Doing so would reaffirm the balance this Court struck in *Milkovich* between the First Amendment's "vital guarantee of free and uninhibited discussion of public issues," and society's "'pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Milkovich*, 497 U.S. at 22 (quoting *Rosenblatt v. Baer*, 383 U.S. 75 (1966)).

II. The SCOTX Committed The Same Error That Warranted Reversal In *Milkovich*.

In sum, the SCOTX seizes opinion from the jaws of fact. It reads the Column to impliedly accuse the Tatums with certainty (*i.e.*, truth claims) of deception and dishonesty in the Obituary, but then claims these otherwise verifiable statements of fact are opinions because the Column "is an opinion piece through and through". App. 45. As discussed below, this Opinion is clear and reversible error because it commits the exact same error that the lower Ohio courts committed in *Milkovich*.

In its discussion of the legal standard, the SCOTX recognized that the "first step" in determining the Column's meaning was to determine "whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains." *Id.* at

11. And—according to the SCOTX—that meaning (in defamation by implication cases such as this) must naturally arise from an objectively reasonable reading of the publication at issue. *Id.* at 24. This was a "judicial task" that "involve[d] 'a single objective inquiry: whether the [publication] can be reasonably understood as stating' the meaning the plaintiff proposes." *Id.* at 26.

In this case, the Tatums alleged that the Column conveyed the impression that the Tatums acted deceptively in publishing the Obituary. *Id.* at 38. The SCOTX agreed.[9] *Id.* Specifically, the SCOTX held:

> Blow holds up the Tatums as an example of the very phenomenon that his column seeks to discourage. Blow would have no reason to mention the Tatums' obituary except to support his point that suicide often goes undiscussed. The objectively reasonable reader seeks to place every word and paragraph in context and to understand the relation that a publication's subparts bear to its whole. **Here, an objectively reasonable reading must end with the conclusion that Blow points to the Tatums as one illustration of his**

[9] To be sure, the SCOTX held—and the Tatums concede correctly so—that the "as-a-whole" gist of the Column was on the broader issues of suicide and openly discussing it. App. 38. However, as the SCOTX also correctly recognized, "the plaintiff may allege that the defamatory meaning arises implicitly from a distinct portion of the article rather than from the article's as-a-whole gist." *Id.* at 19. This is the principle by which the SCOTX determined the defamatory meaning alleged by the Tatums. *See id.*

> **thesis that suicide is often "shrouded in secrecy." Simply put, he had no other reason for including them in the column. For the same reason, we conclude that the publication's text objectively demonstrates an intent to convey that the Tatums were deceptive.**

App. 38-39 (emphasis added).

Thus, the SCOTX Opinion reads that Column as: (1) describing an actual phenomenon of lying to cover up suicide in obituaries; (2) the Tatums are an actual example of this phenomenon; and (3) the Tatums engaged in a specific act of dishonesty. Thus, the SCOTX has read the Column as asserting that the Tatums were actually deceptive and dishonest.

As such, the SCOTX held that Blow does not use "loose, figurative, or hyperbolic language" in accusing the Tatums of dishonesty. *See Milkovich*, 497 U.S. at 20. Specifically, the SCOTX does not read the Column as implying that the Tatums "may have been deceptive", or that "in Blow's opinion they were deceptive", and "does not implicitly accuse the Tatums of being deceptive people in the abstract or by nature." App. 44. Rather, the SCOTX agrees with the Tatums that the Column accuses the Tatums of a "single" and actual "act of deception"—the Obituary. *Id.*

In addition, in what would turn out to be a rather shocking recitation of the law in light of its ultimate holding, the SCOTX recognized that:

> [O]ther courts have taken a third path by suggesting that defamatory implications might presumptively constitute opinion in some contexts. **We reject the view that implications are opinions, either necessarily or presumptively.** Publishers cannot avoid liability for defamatory statements simply by couching their implications within a subjective opinion. Thus, after the U.S. Supreme Court's landmark decision in *Milkovich v. Lorain Journal Co.*, **the opinion inquiry seeks to ascertain whether a statement is "verifiable," not whether it manifests a personal view.** But no court can decide whether a statement is verifiable until the court decides what the statement is—that is, until it conducts an inquiry into the publication's meaning.

App. 32 (citing *Milkovich*, 497 U.S. at 19-20) (other internal citations omitted) (emphasis added).

Once again, the Tatums do not disagree with this analysis. As this passage indicates, the context as a whole determines the meaning of a publication and, should there be implications, whether those implications are opinions or actionable statements of a fact is wholly dependent on whether such implications are objectively verifiable. *See id.* In addition, it is irrelevant to the opinion analysis as to whether the piece contains a "personal view". *See id.*

And so after sixteen pages of discussion of the above-referenced governing law, and after determining that the Column implies the Tatums committed a

specific act of deception,[10] one would think that the next order of business would be simply to determine whether this single act of deception is capable of being proven true or false.[11] The answer would surely be "yes", since cases like *Milkovich*—as the COA recognized—stand for the proposition that mental states are provable as true or false. App. 96-101 (discussing *Milkovich* and other cases—including Texas cases—to conclude accusations of deception against the Tatums were provable as false).[12]

But then, the SCOTX Opinion takes a turn into the *Twilight Zone*.

After purporting to possess a firm grasp of *Milkovich* by acknowledging that the proper "order of operations" is to: (1) determine what the statement is; and then (2) determine whether that statement is verifiable, the SCOTX holds that the accusation of dishonesty lodged at the Tatums is nonetheless one of opinion

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[10] The SCOTX also properly held that this meaning was defamatory of the Tatums. App. 40-41.

[11] That was the exact analysis used by the COA in rejecting the Media Defendants opinion argument. *See* App. 96-101.

[12] And it would be truly bizarre if it were not the case. After all, the element of "actual malice" in defamation cases entirely involves proving the mental state of the defamation defendant—so how can it be "not provable" to prove the mental state of the defamation plaintiff? In addition, Texas sentences a multitude of men and women to death row based on a jury's fact finding of their motive/mental state under a *higher* evidentiary standard. Surely if a human being can forfeit his or her life based on provability of mental state, a journalist can be held accountable for impugning the integrity of a family who lost a child.

without bothering to engage in a verifiability analysis. App. 41-45.

The SCOTX holds specifically that:

> The column's context manifestly discloses that any implied accusation of deception against the Tatums is opinion. **Thus, we need not decide whether the accusation is wholly verifiable [. . .] And [the column] does so using language that conveys a personal viewpoint rather than an objective recitation of fact.**

App. 44-45 (internal citations omitted) (emphasis added).

So after announcing that it rejects other courts' attempts to "decide from the outset whether a statement is an opinion" (App. 32-33) and instead, based on a correct reading of *Milkovich*, acknowledging that "the opinion inquiry seeks to ascertain whether a statement is 'verifiable,'" the SCOTX immediately announces that it will decide "from the outset" whether the accusation of deception is opinion and will perform no inquiry to "ascertain whether that statement" is verifiable. Moreover, despite previously recognizing that the opinion inquiry does not focus on whether the language "manifests a personal viewpoint", the SCOTX uses this exact reasoning to conclude the complained of statement is protected opinion.

Aside from the obvious inconsistency and problem with this analysis, there is another problem. The SCOTX has *already* determined that the Column

implied that the Tatums "acted deceptively in publishing the Obituary." App. 38. Not that Blow thought they did, or had an opinion that they did, but that they *did* act with deception. *Id.* So rather than assess whether this was an objectively verifiable fact—and it surely is—the SCOTX determined that even if it were verifiable, it is nonetheless opinion, based on the SCOTX essentially "eyeballing" the Column as a whole and determining that it is an "opinion piece through and through" since it uses language such as "so I guess", "I think", and "I understand".[13] App. 44-45.

So, in other words, the SCOTX reads the Column to assert a statement expressing certainty (a truth claim about the Tatums), but based on the *context*, the SCOTX determines it must nonetheless be considered opinion even if it were capable of objective verification. And the SCOTX reaches this conclusion after previously acknowledging that *Milkovich* holds that defendants

[13] The SCOTX, however, admits that the Column does "include facts". App. 45. The SCOTX is apparently referring to the discussions of actual cases where family members undeniably fabricated false accounts of death to conceal AIDS or suicide. *See* App. 50-51. Blow then lumped the Tatums in the same lot by reporting that they fabricated the role of the car crash as a means to cover up Paul's suicide. *See id.* When the SCOTX Opinion touts the importance of Blow's alleged "subjective" and "first person" perspective, it neglects to mention that, in the Column, Blow claimed—falsely—that he obtained his information on the Tatums as the result of his colleague at the *News* "inquiring" after the Tatum Obituary "reported" that the death was due to the car crash. *See id.* Thus, Blow introduces a third-party perspective—a news reporter—into the equation, which makes the SCOTX's conclusion that Blow is not stating actual facts about the Tatums a conclusion that defies all reality.

"cannot avoid liability for defamatory statements simply by couching their implications within a subjective opinion." App. 32.

But this is precisely what *Milkovich* held is not the law. *See Milkovich*, 497 U.S. at 19 ("[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'") (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.). The SCOTX rationale was a mirror image of the rationale used by the lower Ohio courts overruled by *Milkovich*.

The lower Ohio courts applied an analysis from the Ohio opinion of *Scott v. News–Herald* that involved four factors to distinguish fact from opinion: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. *See Milkovich*, 497 U.S. at 9 (quoting *Scott v. News–Herald*, 496 N.E.2d 699, 709 (Ohio 1986)). As *Milkovich* noted, the *Scott* court adopted this test from the D.C. Circuit's opinion of *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).[14]

[14] *Ollman* was the gold standard for distinguishing fact from opinion prior to *Milkovich*, and was one of the opinions *Milkovich* disapproved of for creating the "opinion privilege" doctrine based on a misreading of dictum from the *Gertz* opinion. *See Milkovich*, 497 U.S. at 19.

The lower Ohio courts, considering themselves bound to this standard, applied the *Ollman* test (as described by *Milkovich*) as follows:

> The court found that application of the first two factors [meaning and verifiability] to the column militated in favor of deeming the challenged passages actionable assertions of fact. **That potential outcome was trumped, however, by the court's consideration of the third and fourth factors [context].** With respect to the third factor, the general context, the court explained that "[the caption] would indicate to even the most gullible reader that the article was, in fact, opinion." As for the fourth factor, the "broader context," the court reasoned that because the article appeared on a sports page—"a traditional haven for cajoling, invective, and hyperbole"—the article would probably be construed as opinion.

Milkovich, 497 U.S. at 9 (citations omitted) (emphasis added).

As the Court knows, *Milkovich* rejected this "context *uber alles*" rationale from *Ollman*, which gave rise to the now defunct opinion privilege doctrine, and instead focuses only on (1) what the statement means; and (2) whether what it means can be objectively verified. And the SCOTX Opinion demonstrates just how flawed the opinion privilege doctrine was. Just as the lower court did in *Milkovich*, the SCOTX allowed the general context of an opinion piece to "trump" the reality that an objectively verifiable statement of fact was made. In doing so, it embraced what *Milkovich*

eschewed—allowing for "blanket protection" for any statements made in the general context of "opinion".

The most troubling aspect of this is the fact that the SCOTX purported to be following *Milkovich*. The root of this paradox lies in the SCOTX's pronouncement of *Milkovich*'s supposed "two-prong" test for opinion.[15] And this error stems from ambiguous wording in the SCOTX's initial adoption of *Milkovich* in the case of *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002).

The SCOTX's departure from *Milkovich* appears to be literally based on nine words from the *Bentley* opinion, which are the words "and the entire context in which it was made." *See* App. at 43 (citing *Bentley*, 94 S.W.3d at 581). Although the *Bentley* court was apparently summarizing the gist of the *Milkovich* opinion (which, as discussed above, is that context informs as to meaning and verifiability as to whether that meaning is factual in nature), the SCOTX took those nine words and concluded there is a "joint test" requiring courts to look at both verifiability and context to determine whether the statement is opinion.

This is a prime example of how lower courts are utilizing *Milkovich*'s exception of "loose, figurative, or hyperbolic language" (*e.g.*, *Hustler*'s satirical ad parody) to reinvent the opinion privilege disapproved of in *Milkovich*. But *Milkovich* does not hold that a

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[15] The COA also appears oblivious to the supposed "two-prong" *Milkovich* test, instead—after determining the meaning on the Column as it relates to the Tatums—simply focusing on verifiability. *See* App. 96-101.

statement that is read to mean "John Jones lied" can somehow—due to context—have the phrase "In my opinion" interpolated as a preface to that statement simply because it happens to fall within the context of other statements of opinion or because it is stated within a broader opinion piece. To the contrary, *Milkovich* holds that once the meaning of a statement is ascertained—using context—then the only remaining step is to determine objective verifiability.

The SCOTX Opinion correctly holds the Tatums were accused of deception and that this is defamatory. *Milkovich* now mandates that the SCOTX determine verifiability. The SCOTX erred by construing *Milkovich* to hold that a statement can—through its entire context—tell us something actually happened and then, through the exact same context, tell us that whether it actually happened is an "opinion". This Court should grant plenary review to reverse the SCOTX's holding in this regard and remand for further proceedings.

III. The Critical Constitutional Importance.

> Such as it is, the press has become the greatest power within the Western World, more powerful than the legislature, the executive and judiciary. One would like to ask: by whom has it been elected, and to whom is it responsible?
>
> ~ Alexander Solzhenitsyn

In the 1930s in Cleveland, Ohio, two sons of Jewish immigrants who had fled persecution in Europe conceived their vision of the archetype American. Like their families, he was an immigrant fleeing persecution from another world devolving into chaos. His immigrant origin gave him amazing powers that his adoptive father taught him he must always use for "truth, tolerance, and justice".

Given that "truth" is the first word in the motto of *Superman*—the most American of superheroes—it should come as no surprise that his alter ego, Clark Kent, is a journalist. For that is the role of the press—to disseminate the truth to the American people. And the role of the First Amendment is, among other things, to ensure that no state action should impede the press from fulfilling this noble purpose.

Times have changed. As the Court is surely aware, we have gone from a time where journalists were portrayed as American heroes to an age where the press has been portrayed by some as "the enemy of the people".

And the *Milkovich* rationale provides some insight into the source of the tension. As the Court correctly observed, only facts can be true or false—there is no such thing as a false idea. *See Milkovich*, 497 U.S. at 18 (quoting *Gertz*, 418 U.S. at 339-40). Thus, without facts, there is no truth. Without the truth, Americans cannot formulate sound opinions on political candidates, policy issues, and the like.

Most Americans depend on our press to accurately disseminate that truth and, regrettably, there is widespread distrust that the press is accurately reporting the truth (facts). This is why accusations of deception, lies, and dishonesty necessarily carry defamatory meaning. Americans value the truth. They detest liars. Therefore, the fact/opinion dichotomy is the fulcrum on which truth and lies rest.

A person who espouses the opinion that Wally Pipp was a greater baseball player than Lou Gehrig may be viewed as a quack. But a person who alleges that Pipp's headache that kept him out of the starting lineup and opened the door for Gehrig's legendary career was caused by Gehrig poisoning Pipp has told a lie.

And such a lie not only speaks to the dishonest character of the liar, but also tarnishes the reputation of an honorable man. And when the press publishes a lie—bearing the imprimatur of reliability—the lie is all the more devastating to its victim.

In this contentious time, the press has learned first-hand the effects of being accused of lying. Accusations of dishonesty bring with them contempt, ridicule, and sometimes even violence.[16]

While the Tatums have not been victims of violence, they have suffered unimaginably as a result of having one of the nation's largest newspapers accuse

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[16] *See, e.g.*, https://thehill.com/homenews/media/413090-hundreds-of-journalists-sign-letter-condemning-trumps-attacks-on-the-press.

them of lying to cover up the circumstances of their son's death. They were cruelly attacked with no platform or recourse to defend themselves—except the tort of defamation.

While on the one hand holding itself out as a pillar of the American way—charged with the duty of disseminating the truth to the American people—the press now seeks to shield itself from accountability for inaccurate reporting through the safehouse of "opinion".

Blow has a right to his opinion. He does not, however, have a right to lie about the Tatums to support it. This case presents the important question of what is capable of being true or false. The Court should grant plenary review to reaffirm *Milkovich*, incorporate *Omnicare*, and reverse the SCOTX's egregious error of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. SIBLEY IV
Counsel of Record
CAMARA & SIBLEY LLP
4400 Post Oak Pkwy
Suite 2700
Houston, TX 77027
T: (713) 966-6789
F: (713) 583-1131
sibley@camarasibley.com

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