No. ____

IN THE
Supreme Court of the United States

ANGELA ENGLE HORNE,

Applicant,

v.

WTVR, LLC, D/B/A CBS6,

Respondent.

APPLICATION FOR AN EXTENTION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, applicant Angela Engle Horne respectfully requests a 45-day extension of time, up to and including Thursday, November 1, 2018, to file a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review of that court's judgment in this case.

2. The Fourth Circuit entered its judgment on June 18, 2018. Copies of the Fourth Circuit's opinion and judgment order are attached as **Exhibits A** and **B**.

Horne did not seek panel rehearing or rehearing en banc. As such, unless extended, the time to file a petition for certiorari will expire on September 17, 2018.[1] Pursuant to Supreme Court Rule 13.5, this application is being filed more than ten days before a petition for certiorari would otherwise be due. The jurisdiction of this Court will be invoked under 28 U.S.C.§ 1254(1).

3. This case raises two exceptionally important First Amendment issues. First, it raises the question whether an unelected local school budget/finance director who (i) has no access to the public purse; (ii) does not handle school system funds; (iii) has no power to bind her local school system for its contracts or bids; (iv) does not decide which budgetary line items should stay or go in the local system's budget; (v) does not have the power to change such line items; (vi) does not decide whether to increase or decrease salaries; (vii) has no policy-making responsibilities regarding the budget or the finances of the local system; (viii) has no media-related duties or duties that require her to speak to the public; and (ix) has no access to channels of effective communication to the public, should have to forfeit substantial common law protections as to her individual reputation by being designated as a "public official" under *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

[1] Pursuant to Supreme Court Rule 30.1, one day has been added to this calculation to move the due date from Sunday, September 16, 2018 to the "next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed," namely September 17, 2018.

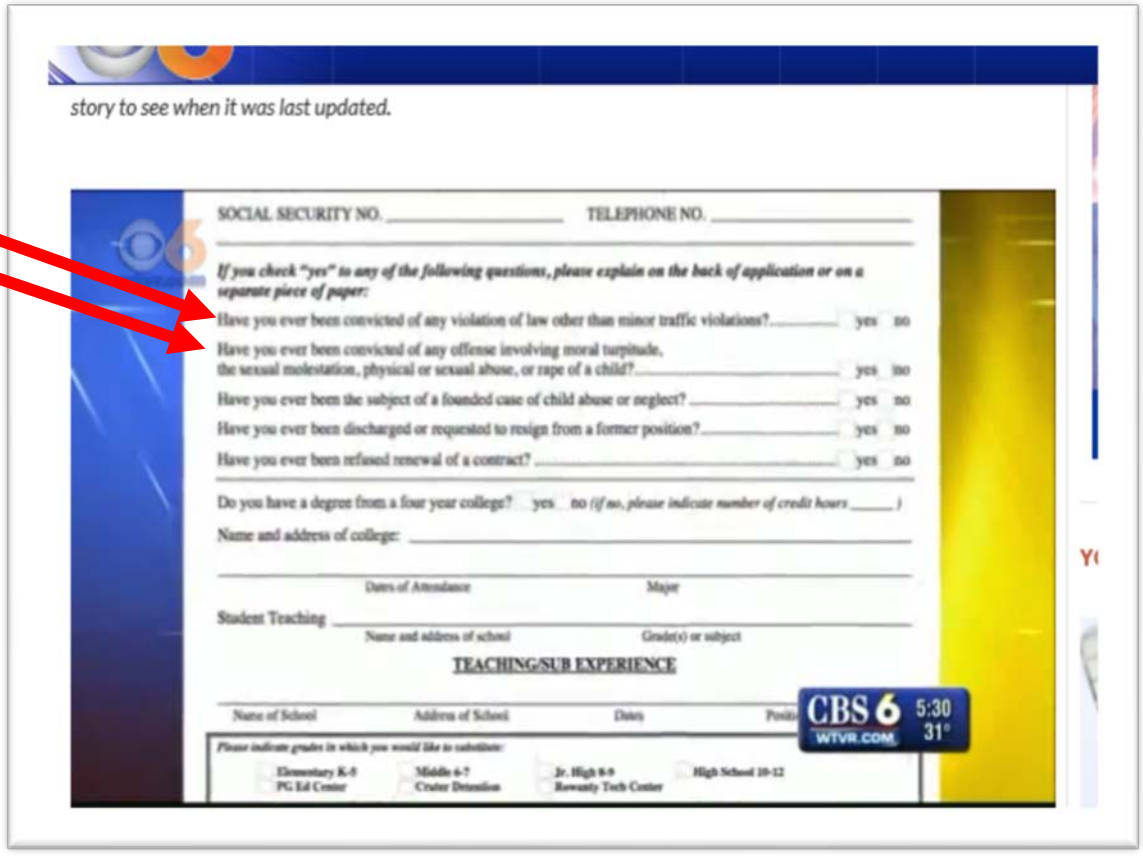
4. Second, it raises the question whether this Court should eliminate (or substantially weaken) the "actual malice" standard from *New York Times v. Sullivan*, 376 U.S. 254 (1964), because it places far too great a burden on public officials who seek to vindicate their reputations after they have been defamed by the media. Under the standard as it currently stands, a public official cannot establish liability in a defamation case unless she shows that the statement at issue was published "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The standard focuses on the defendant's subjective state of mind and requires a plaintiff to prove (i) that the defendant published the defamatory statement at issue "with [a] high degree of awareness of its probable falsity," *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964), or (ii) that the "defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

5. Here, as the lead story for its 5:30 p.m. newscast on February 13, 2015, 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 clearly 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 engaged in *additional* criminal conduct in order to get a public job in violation of Virginia law. She was a double criminal.

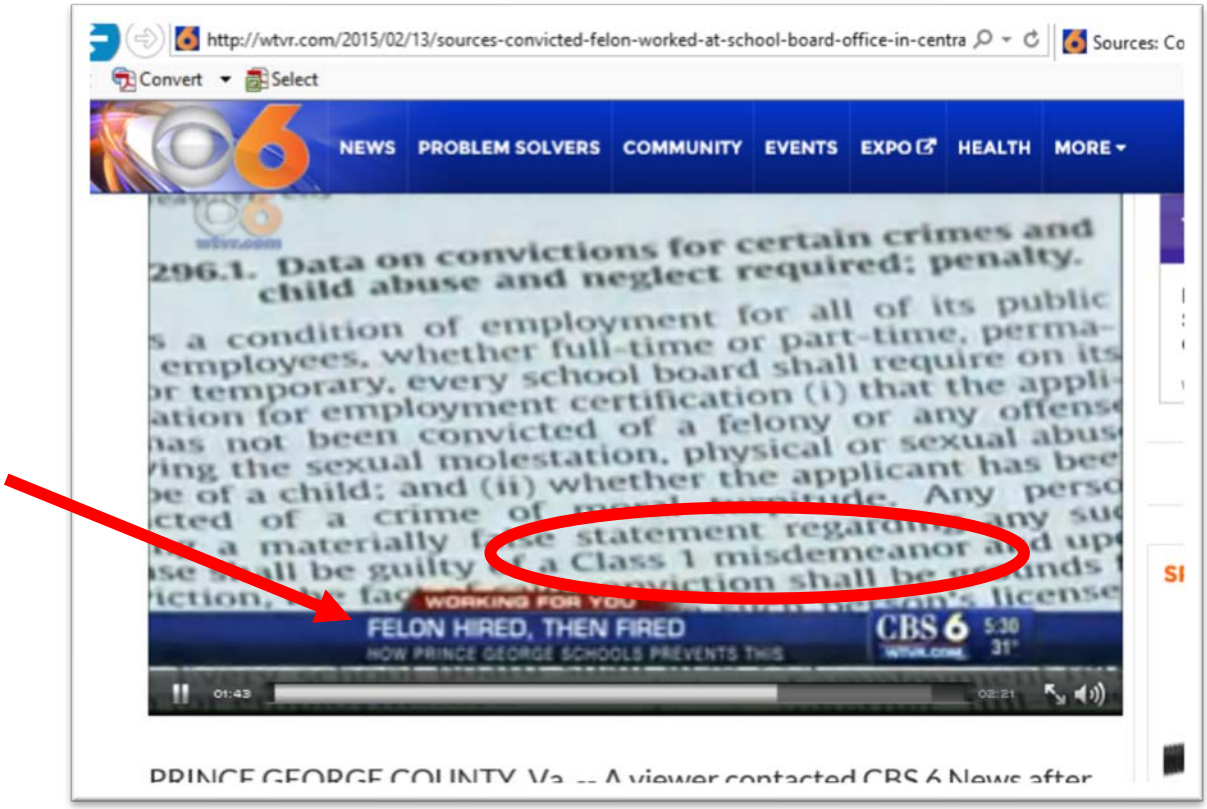
6. This message was conveyed not only by the words of the reporter who reported the story, but also by the video images that were prepared and published by WTVR. The following screen shot, for example, highlights the "Felon Hired, Then Fired" theme that permeated the story and indicates that such an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

7. Later images too perpetuate 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 (highlighted with red arrows) 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.



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

9. 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. As the circled language shows, 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.



10. These are but a few of the problems with the news story in this case. All of them will be set forth in Horne's forthcoming petition for certiorari. In the meantime, 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/

11. 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.

12. Horne, however, was unable to prevail in her defamation suit against WTVR. 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" test of *New York Times v. Sullivan*. It is the Fourth Circuit's rulings on these two issues that demands review by this Court.

13. Regarding the first issue -- the "public official" question -- 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*. *Horne v. WTVR, LLC,* No. 17-1483, at 12-13 (4th Cir. June 18, 2018). In doing so, the Court of Appeals in one fell swoop stripped roughly 133[2] persons of the ability to bring 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 *New York Times v. Sullivan.*

14. 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 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.

[22] 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.

15. 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.

16. The panel below did not necessarily *want* to reach its "public official" ruling, but it felt compelled to do so by this Court's precedent. As Judge Wynn candidly explained at oral argument, "when I first looked at it, I would have said 'no' [but] when you look at the law and the cases out there, there are a lot of factual patterns that fit that say your client is a public official." *See* Oral Argument at 1:45-1:53.[3]

[3] Angela Horne v. WTVR, LLC, No. 17-1483 (4th Cir. Argued March 21, 2018), http://coop.ca4.uscourts.gov/OAarchive/mp3/17-1482-20180321.mp3.

17. 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 Canty. 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 can protect their reputations in today's rough-and-tumble world.

18. As for the second issue – the "actual malice" -- it is long overdue for this Court to scale back, if not eliminate, its exceptionally broad – and high – liability standard from *New York Times v. Sullivan*. In the more than fifty years since *Sullivan*, the media has greatly expanded and consolidated and, in doing so, has become stronger and far more powerful than ever before. *See Gertz*, 617 U.S. at 390 ("The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home.") (White, J., dissenting).

19. Moreover, the media has become far more emboldened – some might even say arrogant – in exalting their protections under *Sullivan* at the expense of persons whose reputations they malign. Presaging the era of the world wide web, internet live streaming, YouTube and Facebook, Judge MacKinnon of the D.C. Circuit stated in 1974:

> The news media has been quick to take advantage of this new-found freedom [from *New York Times* and its progeny] and since the decision

> in *New York Times, supra,* the nation has witnessed an enormous expansion in the publication of articles and statements that under prior law would have subjected the publishers to liability for libelous defamation. This development in the law also comes at a time when the speed of electronic communication has greatly increased and a growing concentration has developed in the ownership, power and influence of the news media. This, coupled with the existence of widespread electronic communication networks, vests a relatively small number of people with the ability within a few minutes to blanket the nation with statements that for the prior 200 years were held to be actionable libel.

Carey v. Hume, 492 F.2d 631, 640 (D.C. Cir. 1974). He stated: "[t]his is an enormous power." *Id.*

20. Members of this Court too have expressed concern that *Sullivan*'s "actual malice" encroaches too far on the common law of defamation. In a powerful concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Justice White 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. 749, 767 (1985) (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.

21. In similar fashion, in the years preceding his death, Justice Scalia repeatedly expressed his open support for overturning *Sullivan*. *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, "*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.

22. Even a current member of this Court has noted 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." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197, 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

23. The dark side of *Sullivan* reared its ugly head here. Making almost no effort to verify the allegations it was making against Horne, WTVR charged ahead and falsely accused her of criminal conduct. Even the District Court called WTVR's journalistic behavior "probably not first class reporting." JA872.[4] However, as the District Court lamented when it granted WTVR's Rule 50 motion:

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

> 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. With all due respect, persons such as Horne should not have to suffer such reputational damage without recourse.

24. In sum, in this age of Fake News, where people seem to routinely get their "facts" from Twitter and Facebook, where sensationalism is the rule not the exception, and where it is virtually impossible to put the defamatory genie back into the bottle once it escapes, this case presents a strong candidate for certiorari.

25. Given the complexity of the legal issues in this case, Horne respectfully requests a 45-day extension of time, up to and including Thursday, November 1, 2018, to file a petition for a writ of certiorari. A 45-day extension will allow counsel sufficient time (i) to fully survey and analyze the vast array of decisional law, much of it conflicting, on the application of *Rosenblatt* in determining who are and are not "public officials" and (ii) to thoroughly research the basis for overturning *New York Times v. Sullivan*'s "actual malice" standard. In addition, undersigned counsel has a number of other pending matters, including a Reply Brief in the Fourth Circuit that is due on September 10, 2018, that will interfere with counsel's ability to file the petition on or before September 17, 2018.

WHEREFORE, for the reasons stated above, Horne requests that an order be entered extending the time to file a petition for a writ of certiorari to November 1, 2018.

Dated: September 6, 2018

Respectfully submitted,

By: /s/ Richard F. Hawkins, III____

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