No. _____

In the
Supreme Court of the United States

JUDSON A. LOVINGOOD,
Petitioner,

v.

DISCOVERY COMMUNICATIONS, INC., et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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April 20, 2020

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QUESTIONS PRESENTED

In *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) this Court announced that in defamation cases involving a public official/public figure, the Plaintiff must present clear and convincing evidence that the false, defamatory statements were made with actual malice. This standard has been further explained to be: "There must be sufficient evidence to permit the conclusion 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), or that he acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). However, N.Y. Times did not address whether First Amendment protection is given to a Defendant who publishes and alters prior sworn testimony in a defamatory manner for entertainment purposes. Thus the questions presented are:

1. Whether the publication of totally false and fabricated testimony of a public official testifying under oath to produce an entertaining, dramatic effect in a movie is "speech that matters" and deserves elevated protection by the *N.Y. Times* standard requiring actual malice rather than treating all sworn witnesses the same?

2. Whether defamation actions regarding false publishing of the sworn testimony of a witness should require proof of actual malice if the witness is a public official rather than recognizing there is no appropriate distinction in the identity of the witness under such circumstances?

3. Whether sufficient evidence of willful blindness may be used to satisfy the requirement of actual malice in a defamation action involving the fabrication/alteration of actual sworn testimony?

PARTIES TO THE PROCEEDING

Petitioner Judson Lovingood, was the Plaintiff and Appellant in the proceedings below.

Respondents Discovery Communications, Inc. and Discovery Communications, LLC. were the Defendants and Appellees below.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Discovery Communications Holdings, LLC is the parent corporation of Discovery Communication, LLC.

Prior Defendants dismissed and not parties to this proceeding were: British Broadcasting Company (BBC); Kate Gartside, an individual citizen of Great Britain, and The Open University in London.

RULE 14.1(b)(iii) STATEMENT

The proceedings in federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Judson Lovingood v. Discovery Communications, Inc. and Discovery Communications, LLC, Civil Action Number 5:14-CV-00684-MHH (N.D. Ala.). The Northern District of Alabama entered summary judgment for the Defendants in this matter and disposing of the entire case after denying Plaintiff's Rule 59 Motion to Alter, Amend or Vacate the Summary Judgment Order on July 9, 2018.

Judson Lovingood v. Discovery Communications, Inc. and Discovery Communications, LLC: Case No. 18-12999 (11th Cir.) The Eleventh Circuit entered judgment affirming the trial court on February 7, 2020.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTE

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The United States District Court for the Northern District of Alabama, Northeastern Division, granting summary judgment is reported at 275 F.Supp.3d 1301 (N.D. Ala. 2017). The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court is reported at 2020 U.S. App. Lexis 3778 (2020).

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

REQUEST FOR PETITION FOR WRIT OF CERTIORARI

Petitioner Judson Lovingood (hereinafter "Lovingood" or "Petitioner") respectfully petitions for a *writ of certiorari* to review the judgment of The United States Court of Appeals for the Eleventh Circuit in the case below which affirmed with opinion the Judgment of the United States District Court for the Northern

District of Alabama, Northeastern Division and the Eleventh Circuit Court of Appeals.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves the publication of sworn testimony that was totally false and fabricated for purported "dramatic effect" in a movie announced as a "true story" regarding the Challenger space shuttle explosion that took the lives of seven astronauts on January 28, 1986. The Plaintiff below is Dr. Judson Lovingood, a former deputy manager of the space shuttle projects office at NASA's Marshall Space Flight Center in Huntsville, Alabama. Dr. Lovingood had testified before the Presidential Commission convened by President Reagan to investigate the cause of this disaster and recommend corrective action. In 2012, the Defendants, Discovery Communications, Inc. and Discovery Communications, LLC (hereinafter "Discovery") and the British Broadcasting Company ("BBC") co-produced a made for TV movie titled "The Challenger Disaster." Discovery broadcasted the United States version of the film on the Discovery Channel and the Science Channel on November 16, 2013, with over 5 million viewers.

The film itself begins with the written declaration: "This is a true story." In the pivotal climax scene of this film, Dr. Lovingood is shown and identified by name as testifying before the presidential commission (shown being sworn by oath) with a script that is totally fabricated, fake and at dramatic odds from his actual and recorded testimony. Dr. Lovingood was portrayed as an active participant in an effort by NASA to

suppress the truth of calculated risks of the shuttle program that led to this tragedy even though it required the publisher to create false, sworn testimony to lead the viewers to that desired impression. There is no dispute that the movie put personal, sworn and false testimony in the specifically represented mouth of Dr. Lovingood that made it appear that he and NASA management had recklessly ignored calculations of failure probability that are now admitted never took place. Indeed, the trial court conclude that the facts showed: "It is undisputed that there never was such a calculation, and Dr. Lovingood never gave such testimony before the Presidential Commission . . . . both scenes are fabrication . . . a jury potentially could infer from the evidence that Discovery Channel willfully avoided the opportunity . . . ." to know of this false depiction. (App. 88). However, the trial court granted the Defendants' motion for summary judgment finding that Dr. Lovingood was a public official and there was insufficient evidence to meet the required standard of "actual malice" under *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. (See, *Lovingood v. Discovery Communications, Inc.*, 275 F.Supp.3d 1301 (N.D. Ala. 2017)). The Eleventh Circuit Court of Appeals affirmed that decision on similar grounds. (See, *Lovingood v. Discovery Communications, Inc.*, 2020 U.S. App. Lexis 3778 (11th Cir. 2020)).

It is important that this Court understand the established facts underlying this movie broadcast. The movie begins with three rolling title cards in this order:

A) "This is a true story"

B) "Based on the book "What Do You Care What Other People Think" by Richard and Gweneth Feynman and Ralph Leighton and interviews with key individuals."

C) "Some scenes have been created for dramatic purposes."

There is no reference to the official, recorded and available transcript of the Presidential Commission and no evidence that it was ever reviewed. Yet, the critical scene was spotlighted as specific and quoted sworn testimony given by Dr. Lovingood before this Commission.

In the book by Dr. Feynman, there is a scene that takes place at the Marshall Space Flight Center where Dr. Lovingood gave a private briefing to Dr. Feynman (a Commission member) on the main engine of the shuttle vehicle. The book describes this meeting with Dr. Lovingood and three other engineers as follows:

> "(Feynman) all right" I said, here's a piece of paper each. Please write on your paper the answers to this question: <u>What do you think is the probability that a flight would be uncompleted due to a failure in this engine</u>? They write down their answers and hand in their papers. One guy wrote 99.44% pure: (copying the Ivory Soap slogan) measuring about 1 in 200. Another guy wrote something very technical and highly quantitative in the standard statistical way, carefully defining everything that I had to do to

translate – which also meant about 1 in 200. The third guy wrote, simply, "1 in 300" Mr. Lovingood's paper, however, said, cannot quantify quality control in manufacturing, engineering judgment.

"Well," I said, "I've got four answers and one of them weaseled" I turned to Mr. Lovingood: "I think you weaseled."

"I don't think I weaseled"

"You didn't tell me what your confidence was sir, you told me how you determined it, what was it?"

"He says" 100 percent" – the engineers' jaws drop, my jaws drop; I look at him, everybody looks at him – "uh, uh, minus epsilon"

"So, I say, "Well, yes; that's fine. Now the only problem is, WHAT IS EPSILON?"

"He said "10^{-5}." It was the same number that Mr. Ulian had told us about: 1 in 100,000."

I showed Mr. Lovingood the other answers and said, "You'll be interested to know that there is a difference between engineers and management here – a factor of more than 300."

He says, "Sir, I'll be glad to send you the document that contains this estimate, so you can understand it."

(Richard Feynman, "What Do You Care What Other People Think": Further Adventures of a Curious Character 181-83 (1988)) (emphasis added) (App. 97-98)

Dr. Feynman had asked a very specific engineering question to these men: "What do you think is the probability that a flight would be uncompleted due to a failure in this (main) engine?" The question was limited to the main engine. It only asked the probability that a failure of this main engine would cause a flight to be "uncompleted" which would include aborting this manned flight at any point (before launch or thereafter) and allowing it to return to earth with no damages using alternative engines. The answer to that specific question had, in fact, been determined by the engineers at Marshall to be 1 in 100,000 because this was a manned flight with alternative engine systems and redundancies. In fact, Dr. Feynman admitted in his book that he was wrong to initially believe the problem with the Challenger was its "main engine" and that the evidence showed it had shut down and worked perfectly on the occasion of this disaster and had nothing to do with the Challenger tragedy. (App. 100. Dr. Lovingood did give him the promised official report showing the calculation he recited. The explosion was ultimately shown to have been caused by the exposure of O-rings to low temperature at launch that became brittle and failed – not a part of the main engine.

In the movie, the scene is the actual Commission hearing and Dr. Lovingood is shown being given the oath.

Dr. Feynman asks a totally different and fabricated question from that set forth above as taken from the book:

> "I have a question. Can you remind me what NASA calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and the deaths of the engine crew? Dr. Lovingood?
>
> LOVINGOOD: "Certainly. Uh, that would be – one in ten to the power of five."
>
> FEYNMAN: "Really, would you explain that?
>
> LOVINGOOD: "Yes, that the probability of mission success is one hundred percent. Minus epsilon."
>
> FEYNMAN: "Epsilon, that's a pretty fancy word.
>
> Well, let's put all that you've said there into English. So that's um, that's one failure in every 100,000 flights. So you claim that the shuttle would fly every day for 300 years before there would be a single failure. That's crazy, I mean how could you ever even test that?
>
> LOVINGOOD: "NASA arrived at that figure because it was a manned flight."
>
> FEYNMAN: "Because there were people on board. But that's not a scientific calculation; that's – that's – a wish. And

> interesting that the figure is very different from that of NASA's own engineers. Based on their direct experience and observation of many known component problems, some of NASA's engineers calculate the probability of success as only 99.4 percent. In other words, that's roughly one flight in every 200 will fail."
>
> SALLY RIDE (astronaut and commission member): "One in two hundred. Wow. Not what the astronauts are aware of – that's a potential disaster every three and a half years."

(App. 5-6).

The question has changed from the calculation of specific main engine failure causing an "uncompleted mission" to NASA's calculation of the probability of any failure "of many known component problems . . . meaning the loss of the vehicle and the deaths of the entire crew." The film took the 1 in 100,000 calculation that NASA had made for the probability of engine failure resulting in an "uncompleted mission" and made it a calculation presented by Dr. Lovingood as being the probability of a disaster and death of the entire crew. It is undisputed that no such calculation had ever been made by NASA. It is undisputed that no engineers at NASA ever said it was really 1 in 200. It is undisputed that NASA management had never ignored or disagreed with its own engineers on this fabricated and dramatic calculation because it had never taken place. This would have been false and

perjurious testimony if Dr. Lovingood had actually said under oath what he is shown to be testifying under oath. Discovery's own expert witness acknowledged this in his deposition:

> "Q. Well, it is obvious the question was changed from main engine failure to total loss of mission and death of the entire crew, wasn't it?
>
> A. There is no question the wording was changed.
>
> * * * *
>
> "Q. Well, let us look at the circumstances. The scene that we are about in this case was Dr. Lovingood testifying under oath before the Commission, depicts his testifying under oath, doesn't it?
>
> A. It does.
>
> Q. It puts words in his mouth under oath, doesn't it?
>
> A. It does.
>
> Q. That testimony, in fact, never occurred, did it?
>
> A. That testimony did not occur. That distinction is important in my opinion."
>
> * * * *
>
> Q. Did anyone from NASA ever make a report or statement that they had

> calculated the probability of shuttle mission failure with loss of vehicle and death to the entire crew to be 1 in 100,000?
>
> A. Not to my knowledge.
>
> Q. Yet the movie shows Dr. Lovingood testifying to that, doesn't it?
>
> A. Yes, it does."

(Defendant's expert, James G. Hirsch) (App. 108-10).

This fabricated transposition of sworn testimony was successfully used to portray a non-existent cover up by the management of NASA and Dr. Lovingood that was at dramatic, exponential odds with its own engineers. This demonization was obviously felt to be necessary to give a nefarious depiction that would entertain the audience and feed their "cynicism" about managers such as Dr. Lovingood at the expense of the truth. Indeed, evidence produced in discovery showed a joint plan by Discovery and BBC to show NASA was "covering up their actions" and the focus of the movie would be "building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." (App. 120). The District Court and the Eleventh Circuit allowed the public official status of Dr. Lovingood to give a shield to Discovery for such efforts under the principle of requiring clear and convincing proof of actual malice. It is this unsettling and unjust construction of defamation law that is the focus of this Petition.

Discovery has taken the position that it passively relied upon BBC for accuracy and truth in the film. However, Discovery voluntarily assumed duties for the broadcast in the United States through its joint purpose contract with BBC. This contract placed obligations upon Discovery not to specifically authorize or use the film if it were defamatory or invaded the privacy of any person. Discovery's Executive Producer testified that it was his obligation to "double check, remind them (BBC), look for hints that they might not be doing their job . . . ." (App. 105-06). Ten months before the film was broadcast in the United States, the Executive Producer wrote an email to BBC after watching their version of the film and asking to see their actual notes on research supporting the script. The email stated: "I feel like a backseat driver without a map." (App. 106). He never received a response to his request for these notes and never followed up to see this requested "map." Moreover, he actually wrote BBC to "be very careful not to fictionalize an accusation against NASA" (App. 90, 107) but never read any portion of the official transcript of the Commission hearing to see if this had been fictionalized. In retrospect, he admitted there was a "disconnect" between the scenes in Dr. Feynman's book and the scenes that were created for the movie. He agreed that the difference in questions that Dr. Feynman asked of the engineers at NASA regarding probability failure of the main engine causing a mission to be "uncompleted" were <u>not</u> "interchangeable" with the question in the film of calculation on the probability of any component failure and resulting loss of the vehicle and death of the entire crew (App. 132, 134). This scene was a clear false indictment of the truthfulness and carelessness of Dr.

Lovingood and his NASA management colleagues. This is precisely what Discovery and BBC desired and planned by "building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." The irony is that Discovery created this fictionalized version of sworn testimony to suppress the sworn truth not Dr. Lovingood and his NASA management colleagues. Dr. Lovingood was the face and name they chose to vilify as the poster boy of this falsehood for "dramatic effect."

REASONS FOR GRANTING THE PETITION

I. THE "WITNESS" IDENTITY SUPPLANTS A "PUBLIC OFFICIAL" IDENTITY FOR PURPOSES OF DEFAMATION ACTIONS FABRICATING FALSE TESTIMONY

This petition should be granted because the law of libel regarding public officials who are vilified by the creation of their having spoken false, sworn testimony must be clarified to relieve them of the obligation/burden of proving actual malice by clear and convincing evidence. A public official who is testifying under oath is simply a witness like any other citizen providing sworn testimony and this recognition must afford him/her protection from publication of false testimony that was never given. This Court has recognized the clear distinction between a public official pursuing his/her normal duties as opposed to testifying under oath. In *Lane v. Franks*, 573 U.S. 228, 134 S.Ct. 2369, 189 L.Ed. 312 (2014), this Court stated:

"Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."

* * * *

"Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation to the court and society at large, to tell the truth. (Citations omitted.) When the person testifying is a public employee, he may bear separate obligations to his employer - for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee."

* * * *

"Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the

> witness that his or her statements will be the basis for official government action, action that often affects the rights and liberties of others."

(573 U.S. at 238-39, 241) (Emphasis added). (*See also*, United States v. Alvarez, 567 U.S. 709, 732 (2012)).

Lane involved a claim for retaliatory termination for testimony given by the employee. The Fifth Circuit explained the tension involved where a public employee must give sworn testimony on a matter of public concern:

> "When an employee testifies before an official government adjudicatory or fact finding body he speaks in a context that is inherently of public concern. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. If employers were free to retaliate against employees who provide truthful, but damaging testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security . . . ."

Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1577-78 (5th Cir. 1989).

In a similar vein, this Court has recognized how the oath and sworn testimony of a prosecutor can affect her immunity privileges: "Even when the person who makes the constitutionally required "oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997) [emphasis added]. The Court went on to explain that in determining immunity, "we examine the nature of the function performed, not the identity of the actor who performed it." (*Id*. at 127) [emphasis added].

The law protecting the sanctity of sworn testimony for public officials in retaliation claims should be no different when such testimony is the subject of a defamation claim where the sworn testimony is falsified in a publication that vilifies the witness, on a matter of inherent public concern. Your petitioner expressly raised this concern in pleadings before the trial court:

> "His (Lovingood) day to day job is not under oath but can be under the opinionated scrutiny of the media or the public at large in an open ended, constitutionally protected expression. The oath and his sworn testimony is elevated outside the performance of his duties of employment/office. He is now sworn to an oath to tell the truth on any matters examined. This makes him an ordinary citizen in this forum regardless of his

> status as an official or public figure. He is now simply a WITNESS. No witness can be exposed to having fabricated/fake testimony, that did not take place, put in his mouth when it did not occur in the actual transcript. There are no levels of status that alter that indisputable duty to any citizen testifying under oath."

(App. 129-30) (Emphasis added).

On appeal, the Eleventh Circuit rejected this argument that Dr. Lovingood's status as a public official was altered to that of a simple citizen witness when it came to the fabrication of his sworn testimony. The Court stated:

> "Lovingood invites us to create an exception to the well-established New York Times standard for situations involving the fictionalization of sworn testimony. He urges us, in view of the sanctity of the testimonial oath and its centrality to our legal system, to find that the 'actual malice' standard articulated by the Supreme Court does not apply in the context of depictions of perjury.
>
> We are not free to accept Lovingood's invitation. As the Supreme Court has instructed, "If a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its

> own decision." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 494 (1989). And indeed that Court has steadfastly refused to create new exceptions in defamation law for the last fifty years."

(App. 11).

The Court of Appeals noted that the law of Alabama generally allows a plaintiff to recover damages for defamation against a publisher who negligently publishes a false and defamatory statement about the plaintiff. *Nelson v. Lapeyrouse Grain Corp*, 534 So.2d 1085, 1091 (Ala. 1988). However, when the plaintiff is a public official, that plaintiff must overcome the First Amendment by proving "that a false statement relating to his official conduct was made with actual malice – that is with knowledge that it was false or with reckless disregard of whether it was false or not. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (11th Cir. Opinion at p. 9-10).

Rule 10 of this Court provides for the granting of Petition for Certiorari when "a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ." This Court has also recognized that it plays an important role in "clarifying rights." *Camreta v. Greene*, 563 U.S. 692, 708, 131 S.Ct. 2020, 179 L.Ed. 2d 1118 (2011). This case involves the reluctance of the Court of Appeals to recognize the important clarification that needs to be made regarding falsifying sworn testimony by a public official on a matter of public concern that defames and vilifies that person. If

such a clarification is not recognized by this Court on this narrow but definite scenario any witness who happens to also be a public official will be threatened to be open for false depictions of his/her sworn testimony for any purpose desired by the media. Such a concept is irreconcilable with our system of law and presents a clear and present danger to both the sanctity of the oath and the character of that citizen testifying under that burden for expressing the truth. Any citizen witness under oath, whether private individual or public official, should be protected from defamation involving fabrication of sworn testimony under the same standard of the state law governing libel actions. The oath is the leveling factor that recognizes no distinction or class of the witness as public official or private citizen. As this Court stated in *Kalina v. Fletcher*, 522 U.S. 118 (1997), the focus should be on the function of the witness's oath "not the identity of the actor." (*Id*. at 127). The identity of a public official is not the controlling factor, it is the sanctity of the oath for any witness.

Indeed, public officials who are put under oath to testify on matters of public concern are the most vulnerable to falsified vilification by creation of fabricated and false testimony. As Justice Thomas wrote in his concurring opinion in *McKee v. Cosby*, ___ U.S. ___, 139 S.Ct. 675, 203 L.Ed. 2d 247 (2019): ". . . the common law deemed libels against public figures to be, if anything, more serious and injurious than when spoken of a private man." (*Id*. at 679) . . . "We should reconsider our jurisprudence in this area." (*Id*. at 682).

Petitioner does not seek any wholesale or expansive reconsideration of the law regarding the burden of proof for public officials in defamation actions. However, the specific issue regarding the false depiction of actual sworn testimony cries out for the relief sought by your Petitioner to recognize that any witness under oath who is defamed or vilified by creating false testimony which was never given need not be required to present clear and convincing evidence of actual malice.

The Court has stated that "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974) [emphasis added]. The *Gertz* Court recognized, however, that the need to avoid self-censorship by the news media was not the only societal issue because "absolute protection for the communications media requires a total sacrifice of the competing value served by the laws of defamation" and this Court was unwilling to go to that extreme. (*Id*. at 341). Sworn testimony is required to be treated differently than other speech. Witnesses and lawyers have always been absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings. *Burns v. Reed*, 500 U.S. 478, 489-90 (1991). This immunity respected no disparate identity of the actor testifying:

> "The common law immunity that protected witnesses as well as other participants in the judicial process drew no distinction between public officials and private citizens. (citations omitted) The

> general purposes underlying witness immunity at common law applied equally to official and private witnesses. Both types of witness took the stand and testified under oath in response to the questions of counsel."

Briscoe v. Lahue, 460 U.S. 325, fn.15 (1983).

Once again, we see that this Court has recognized sworn testimony given under oath to be the focus of leveling public officials with private citizens and becoming simply WITNESSES. This leveling effect should, under this scenario, remove the elevated, enhanced burden of proving actual malice by a public official who has his sworn testimony falsified and made-up for entertainment purposes. This is not "speech that matters." It is actually creating perjury in the fabrication. This activity should not be the subject of special protection of the publisher. If anything, such cavalier treatment of sworn testimony should be the subject of more strict scrutiny.

II. WILLFUL BLINDNESS SHOULD APPLY TO DEFAMATION ACTIONS REQUIRING ACTUAL MALICE

This case also involves the issue of whether willful blindness would apply to the burden of proof for actual malice if that standard were retained. The evidence presented in the introduction to this petition clearly shows willful blindness by Discovery in not fulfilling its obligation to "double check" The BBC in its research – which was shown to have been avoided when the producer wrote that he felt "like a back seat driver with

no map" and failed to insist on getting the actual research notes he had requested from The BBC. The Eleventh Circuit refused to address this issue and stated:

> "The doctrine of willful blindness which provides culpability equivalent to actual knowledge is well established in criminal law. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). But neither the Supreme Court nor our Circuit has ever applied that doctrine in the civil context of defamation, and Lovingood cites no case doing so."

(App. 20).

Petitioner believes that this issue should also be considered as a reason for granting this Petition to clarify the law in the specific context of this unique case. Willful blindness should be capable of being considered for actual malice. Willful blindness is the legal equivalent of "recklessness." This Court recognized "recklessness" as being proof of actual malice in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) where it stated:

> "We think the evidence against the *Times* supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

* * * *

> ". . . with actual knowledge that it was false or with reckless disregard of whether it was false or not."
>
> * * * *
>
> "Indeed, as *Smith* recognizes, this Court has used the very term 'actual malice' in the defamation context to refer to a recklessness standard."

376 U.S. at 280, 288. (Emphasis added); *Smith v. Wade*, 461 U.S. 30, F.N.6 (1983) (Emphasis added).

While this Court adopted the use of willful blindness in civil actions in *Global Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), that was an action governed by statutory law regarding patent infringement. Therefore, this Court's comments in that opinion stating that the statutory context would require more than recklessness and negligence would not apply to common law actions for defamation. Indeed, this Court has embraced "recklessness" as being sufficient for proving actual malice in this context as quoted above. Moreover, this Court has described willful blindness as: "That risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Bullock v. Bank Champaign, N.A.*, 569 U.S. 267, 274 (2013) (Quoting from the Model Penal Code) [emphasis in the original]. If that definition is good

enough for criminal law, it should certainly apply in this context.

The evidence of willful blindness was shown in this case by the Executive Producer acknowledging he had sent an email to the BBC to get their research notes supporting the accuracy of the script. "I feel like a backseat driver without a map." (App. 106) He knew he had an obligation to "double check" the BBC but never received the requested notes and never followed up. This is the same executive who had earlier informed BBC "be very careful not to fictionalize an accusation against NASA" (App. 90, 107) He never read any part of the Commission hearing transcript and admitted the movie had a "disconnect" from reality in the scene at issue. The movie clearly did fictionalize an accusation against Dr. Lovingood and his NASA management colleagues as ignoring calculations of loss of the crew that never took place. Defendants knew of this danger and recklessly avoided that knowledge of falsity by willful blindness.

III. SEEKING TO INFLUENCE THE COURT OF PUBLIC OPINION BY FALSELY CREATING SWORN TESTIMONY THAT IS ABSENT FROM THE READILY AVAILABLE OFFICIAL TRANSCRIPT IS INCOMPATIBLE WITH ENHANCED FIRST AMENDMENT PROTECTION INVOLVING A PUBLIC OFFICIAL WITNESS

The law regarding defamation of a public figure or public official has been well settled by *N.Y. Times v. Sullivan* and its progeny. Who could have ever envisioned that a publisher of a movie would seek to falsify and fabricate sworn testimony by a public official on a disaster like the Challenger explosion to create a dramatic effect for its audience and to plan in advance an effort towards "building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." Dr. Lovingood was the face and voice of this created falsehood in testimony to build this "malevolent intent" on the part of himself and his NASA management colleagues. The bottom line is this: Is the media or any publisher free to alter/falsify a public official's sworn testimony for any purpose – entertainment, drama or critical review – under the cloak of the First Amendment? This Court has previously stated: "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas and are of such slight social value as a step to the truth that any benefit that may

be derived from them is clearly outweighed by the social interest in order and morality." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). The weight of that value comparison is even more drastic where sworn testimony is falsified to vilify a public official to make him appear (for entertainment purposes) a malevolent suppressor of truth when, in fact, he testified on the record truthfully. It puts perjury in the mouth of the witness. If an exception to the "actual malice" standard is not made for all witnesses under oath (public official or private) the sanctity of the oath, the purpose and goal of our legal system and the vulnerability of such a public official may be exploited and damaged with virtual impunity to a degree never envisioned or intended by the First Amendment. This is not a case involving the mixing of opinion and fact or altering notes from an informal interview. It is the intentional creation of specifically quoted sworn testimony given in a proceeding examining an issue of profound public concern that never took place. A media publisher cannot be allowed to create false testimony in a court or adjudicatory body so that he can fabricate it to influence the different and distinct court of public opinion — at the expense of altering what actually transpired in sworn testimony. This Court has held that a criminal defense attorney may use "lawful strategies . . . including an attempt to demonstrate in the court of public opinion that his client does not deserve to be tried." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991). There should not be any allowable temptation for a media outlet to use the unlawful manipulation and fabrication of sworn/recorded testimony as a means to influence or excite the court of public opinion (audience) to perceive

the public official as a villain where the means used are false and defamatory. Any such indulgence surrenders the sanctity and integrity of the oath in the legal system to the whims of any publisher who wishes to transport his false depictions out into the court of public opinion. This is anathema to the First Amendment not expression to be protected by it. As the Court noted in *Skakel v. Grace*, 5 F.Supp.3d 199 (D.C. Conn. 2014):

> "In a defamation case the forum is the court of public opinion, that is, the focal point is public sentiment and not a legal principle."

(*Id*. at 213).

What happens in Court, under oath, does not stay in Court. It is open to the public. However, what happens in Court under oath, cannot be allowed to be falsely altered in an effort to entertain or dramatize false images of the witness who has performed his civic duty by taking the oath. Once that witness has properly performed this duty under oath, the legal system and courts must perform their duty to protect that witness from having his testimony contaminated or corrupted for entertainment, attempts to induce perjury prior to or during testimony are criminal. Changing testimony after it is honestly and dutifully given is no less reprehensible. The civil law on defamation must be clarified to address this conduct to preserve and respect the sanctity of the oath for any and all witnesses without classification.

This case involves the testimony given under oath by Dr. Judson Lovingood at the Presidential Commission hearing regarding the space shuttle Challenger explosion disaster in 1986. There is no dispute that while Petitioner did, in fact, testify under oath before the Commission, the Defendants fabricated false and incriminating testimony put in the mouth of Petitioner that never took place. Petitioner was shown in a movie to be giving sworn testimony that was false, defamatory and virtually the opposite of his actual and recorded testimony in an effort to convey an admitted plan of "building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs" to show that Petitioner and his NASA management colleagues were "covering up their actions." The essential and important issue raised by this unique case is whether this Court should recognize that a public official testifying under oath before an adjudicatory body is simply a witness and that all sworn witnesses, public official or private, must be subject to the same standard in defamation actions where a Defendant published fabricated and false testimony that never took place. The oath is a burden of the highest moral value that is draped over the testimony of every witness – public or private – and its sanctity/integrity does not change with the identity of the witness. Sworn testimony "has greater value because of the witness's oath and the obligations and penalties attendant to it." *United States v. Dunnigan*, 507 U.S. 87, 97 (1993). This consistent function of the oath should also be consistently applied in defamation cases where sworn, recorded testimony has been fabricated and manipulated for entertainment

purposes to harm any witness, public or private, under traditional state libel law.

CONCLUSION

The petition for a *writ of certiorari* should be granted so that this Court may address the clarification of the law of defamation presented by this unique and important case.

Respectfully submitted,

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