No. _____

IN THE

Supreme Court of the United States

JON BUTCHER,

Petitioner,

v.

CADY VISHNIAC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT ("SJC") OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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At Cambridge, Massachusetts,
This 27th Day of May, 2020

QUESTIONS PRESENTED.

1. Does either the First Amendment or this Court's holding in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) impose *any* limitations upon common law defamation claims in the context of a **private**, non-public figure involved in a matter of "**private** concern"?

2. While the court below reaffirmed the validity of the common law Doctrine of Republication—which permits defamation claims against "republishers" of factually-false representations—in *Yohe* v. *Nugent*, 321 F.3d 35, 43 (1st Cir. 2003), the First Circuit rejected this Doctrine, declining to impose liability where the republisher had "accurately" reiterated the factually-false representations made by a third party; **which of these contradictory and antithetical precedents is correct?**

3. Is Mass. Gen. Laws ch. 41 § 98F, as applied, violative of the Due Process Clause of the United States Constitution, *viz.* Amend. XIV, § 1, or alternatively, does it constitute a legislative bill of attainder, in violation of Art. I, § 10, Cl. 1?

PARTIES TO THE PROCEEDING.

Plaintiff-Petitioner Jon Butcher ("Petitioner" or "Butcher") brought this defamation action in the Suffolk County Superior Court ("trial court") against Defendants Keith Motley, Winston Langley, Patrick Day, James Overton, Donald Baynard, Paul Parlon, Shira Kaminsky, Paul Driskill, Cady Vishniac, Brian Forbes, and the University of Massachusetts ("UMass"). The trial court dismissed all of Butcher's claims on summary judgment.

On appeal, the Massachusetts Appeals Court reversed so much of the trial court's summary judgment as related to Butcher's claims against Defendant Vishniac.

The Supreme Judicial Court of the Commonwealth of Massachusetts ("SJC") thereupon granted further appellate review, but solely as to Butcher's claims against Vishniac.

SUP. CT. R. 29(4)(c) CERTIFICATION.

28 U.S.C. § 2403(b) may apply to this proceeding. The undersigned hereby certifies that this filing has been served on the Attorney General of the Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI.

Plaintiff-Petitioner Jon Butcher ("Petitioner" or "Butcher") hereby respectfully petitions for a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts (hereinafter, "SJC").

OPINIONS BELOW.

The Suffolk Superior Court judgment is unreported. The Massachusetts Appeals Court decision, reversing the Suffolk Superior Court below, is published at *Butcher* v. *Univ. of Mass.*, 94 Mass. App. Ct. 33 (2018). The SJC's decision, affirming the judgment of the Suffolk Superior Court, is published at *Butcher* v. *Univ. of Mass.*, 483 Mass. 742 (2019). The Massachusetts Appeals Court and SJC decisions are reproduced in the Appendix to this Petition ("App.")

JURISDICTION.

The SJC's judgment was entered on December 31, 2019. This Court's jurisdiction is timely invoked pursuant to 28 U.S.C. § 1257(a). The deadline for this filing has been extended "to 150 days from the date of the lower court judgment[]" pursuant to this Court's order dated March 19, 2020 in connection with the ongoing pandemic.

RELEVANT STATUTORY PROVISIONS.

Mass. Gen. Laws ch. 41 § 98F provides as follows: "Each police department and each college or university to which officers have been appointed pursuant to section 63

of chapter 22C shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, **all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records** available without charge to the public during regular business hours and at all other reasonable times; provided, however, that the following entries shall be kept in a separate log and shall not be a public record nor shall such entry be disclosed to the public, or any individual not specified in section 97D: (i) any entry in a log which pertains to a handicapped individual who is physically or mentally incapacitated to the degree that said person is confined to a wheelchair or is bedridden or requires the use of a device designed to provide said person with mobility, (ii) any information concerning responses to reports of domestic violence, rape or sexual assault, (iii) any entry concerning the arrest of a person for assault, assault and battery or violation of a protective order where the victim is a family or household member, as defined in section 1 of chapter 209A, or (iv) any entry concerning the arrest of a person who has not yet reached 18 years of age." (Emphasis supplied).

RELEVANT CONSTITUTIONAL PROVISIONS.

Art. I, § 10, Cl. 1 of the United States Constitution provides as follows: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law

impairing the Obligation of Contracts, or grant any Title of Nobility."

Amend. XIV, § 1 of the United States Constitution provides as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

(a) Preliminary Statement.

In an era wherein the internet has universally transformed society, our free-market economy, our fundamental means of communicating with one another, and the way in which ordinary citizens obtain information about the outside world, the concomitant dangers and consequences of defamation have never been higher. Indeed, the serious harm of defamation was even acknowledged and recognized centuries ago in the days of Sirs Edward Coke and William Blackstone.[1] Ironically, now in 2020—*i.e.*, when the harms of defamation are greater than ever before due to the permanent nature and

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[1] "A third way of destroying or injuring a man's reputation is, by preferring malicious indictments or prosecutions against him; which, **under the *mask* of justice and public spirit, are sometimes made the engines of private spite and enmity.**" (Emphasis supplied) Blackstone, *Commentaries on the Laws of England*, Book III, p. 85 (1768).

the universal accessibility of the internet—courts across the United States appear to trivialize the grave harm that defamation causes to society, while triumphantly extolling the virtues of the First Amendment and unfettered freedom of the press.

Sadly, the instant matter evidences how detrimental and destructive defamatory accusations can be to average, ordinary Americans such as Petitioner due to the pervasiveness and permanency of internet publications. This Court should take this opportunity to re-affirm the validity of common law libel *per se* and defamation torts in the United States, and elucidate how such claims may be asserted in the context of internet publications—*i.e.*, publications which can never be completely retracted, modified, or taken out of public view.

(b) Material Facts.

In March 2013, Plaintiff-Petitioner Jon Butcher ("Petitioner" or "Butcher") worked as a government employee in the employ of the Commonwealth of Massachusetts and the University of Massachusetts ("UMass"), a public institution. App. 3a. In addition, Butcher was a member of an organized labor union, *viz.* the Faculty Staff Union ("FSU" or "the Union"). This Union represents the faculty members, librarians, and staff at UMass.

At the time relevant hereto, the Union was actively encouraging its members to document the numerous safety concerns[2] regarding UMass' private bus contractor, Crystal

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[2] Indeed, as the SJC acknowledges in its December 29, 2019 opinion, approximately one year after the events in question, Crystal Transportation was closed down by the Federal Trade Commission ("FTC") due to a host of safety issues. App. 3a, n.3. These serious issues

Transportation ("Crystal"). Consequently, on or about March 13, 2013, Butcher proceeded to take several photographs of safety violations while riding on one of Crystal's buses to work. App. 3a. All of these safety violations were in "plain view," and the photographs were taken lawfully and in good faith by Butcher on behalf of the labor union.

Shortly thereafter, two Crystal employees retaliated against Butcher for his involvement in the labor dispute by falsely reporting to police officers that they had personally observed a "suspicious male taking photographs of women on the bus." App. 4a. In response to the police complaint, the state police knowingly directed Crystal to provide photographs of this as-yet unidentified "suspicious male" to Mass Media, an internet publication and private corporation. App. 5a. This "suspicious male" who was targeted was, in reality, Butcher. The Massachusetts police willfully and knowingly caused Butcher's photographs to be published online—thereby prematurely punishing Butcher by branding him as a sexual predator and criminal—notwithstanding the fact that Butcher had never been convicted of any offense in this matter, or even arrested, *prior* to the publication of the pictures of him on the internet.

Making matters worse, the Massachusetts police additionally proceeded to subject Butcher to what can only be described as a modern-day pillory. As specifically authorized under Mass. Gen. Laws ch. 41 § 98F, the Massachusetts police thereupon published the erroneous allegations of criminal conduct on its publicly-available online police blotter, which naturally was available for all to view on the internet. Compounding Butcher's harm,

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included, *inter alia*, drunk driving, employees returning to work after failing drug screening tests, reckless driving, and falsified time sheets.

these factually-erroneous allegations of criminal conduct were later foreseeably relied upon by the media, together with Butcher's peers, coworkers, and family members.

Collectively, all of the foregoing actions of the state police violated Butcher's right to privacy, as well as the "presumption of innocence"—a constitutional presumption which has manifestly been disposed of under this Massachusetts statute. Without first according Butcher his right to due process in formal criminal proceedings in a court of law, the Massachusetts police gratuitously punished, denigrated, and defamed Butcher by publicly posting these erroneous allegations of criminal conduct on its online police blotter as being absolute, irrefutable facts. Moreover, these allegations against Butcher were published by the Massachusetts police: (i) prior to any police investigation occurring; (ii) prior to any arrest and/or issuance of an arrest warrant; and (iii) prior to any arraignment. In essence, Mass. Gen. Laws ch. 41 § 98F allowed the police to effectively punish Butcher while completely bypassing and circumventing all of Butcher's fundamental due process rights. Further, the statute authorized the state police to administer such punishment without being impeded by any "presumption of innocence" that Butcher would otherwise have been afforded in court (*i.e.*, in a formal criminal proceeding).

Additionally, and in further violation of Butcher's constitutional "presumption of innocence," the subject police blotter entry—which the Massachusetts police were authorized to publish under Mass. Gen. Laws ch. 41 § 98F —contained uncorroborated hearsay from persons who were not even police officers. These unconfirmed hearsay allegations included, *inter alia*, representations that Butcher was a "suspicious [] male in a black jacket[,]" that "[a] witness stated that [Butcher] did not appear to be a

student[,]" and false claims that Butcher had taken "photographs and video of nearby women." App. 4a. Because Mass. Gen. Laws ch. 41 § 98F unfortunately authorizes the police to publish such harmful and serious allegations of criminal conduct on the internet, in effect, Butcher had already been publicly humiliated and punished by the Massachusetts police without a trial ever occurring—let alone any arrest.

This result is particularly troubling and unacceptable in the case at bar, as the Massachusetts police subsequently discovered that Butcher was, in reality, completely innocent. As the Massachusetts Appeals Court correctly noted, "[e]xamination of the "Micro SD card" from [Butcher's] cell phone did **not** reveal any photographs of women from the day of the incident[,]" and that the only photographs that Butcher had taken "were of buses and bus drivers at the JFK station." (Emphasis supplied) App. 31a.

Sadly, however, Butcher's vindication had arrived too late to prevent the additional harm that would later befall him as a result of the foregoing actions of the police. By this late point in time, because the police had *already* caused Butcher's photograph to be published on the internet (having specifically requested that Mass Media, a private corporation, publish photographs of Butcher online), and because the police had *already* published their uncorroborated hearsay allegations of criminal conduct on its publicly-accessible online blotter, they had mistakenly and wrongfully punished an innocent person for crimes which he did not commit. Naturally, all of the foregoing punishment was administered without affording Butcher any of the constitutional safeguards that he would have otherwise enjoyed in formal criminal proceedings in a court of law.

Unfortunately for Butcher, the harm he suffered as a result of the above-mentioned actions of the state police had only just begun. Relying on the misrepresentations contained in the online blotter of the Massachusetts police—an official, government agency acting under color of state law—two (2) separate defamatory press releases were subsequently published by Defendant-Respondent Cady Vishniac ("Vishniac"), a Mass Media journalist. With a view to publish a sensationalistic news story concerning a supposed "sexual predator" lurking about the UMass campus—a "wolf amongst the sheep," hiding in wait amongst an unsuspecting student body—the two Mass Media articles contained photographs of Butcher himself, and "republished" the factually-false allegations of criminal conduct on the Mass Media website. The primary source of these articles was the official, government-endorsed blotter entry which had originally been published on the internet by the Massachusetts police.

The irreparable harm incurred by Butcher in these circumstances was in no way insignificant. As the SJC correctly noted, in the months following these publications, Butcher was subjected to severe repercussions in the workplace, together with lingering hostility from others around the UMass campus. The resultant ostracization that Butcher was subjected to by his coworkers and peers, both professionally and socially, was so extreme that Butcher was unable to remain employed at UMass. App. 31-32a.

(c) Procedural History.

The instant action commenced upon Butcher's *pro se* filing of a six-count complaint against Mass Media reporter Cady Vishniac and several others for libel *per se* in the

state trial court in January 2014.[3] In May 2015, the trial court entered summary judgment in favor of Defendant Vishniac, finding that the content of the two (2) defamatory press releases which she "republished" from the police blotter were protected by the common-law "fair report" privilege, and that the articles were "substantially accurate" accounts of the police blotter itself (*i.e.*, **not** the underlying events reported therein). The court reasoned that, because the articles "accurately" reiterated the contents of the factually-erroneous police blotter itself, the articles could not possibly be defamatory—notwithstanding the fact that the police blotter's representations, and the underlying allegations therein, were all erroneous and factually false.

On appeal to the Massachusetts Appeals Court in September 2018, the court concluded that the "fair report" privilege did **not** extend to representations contained in police blotters, reversing the trial court's allowance of Vishniac's summary judgment motion. App. 41a.

Following an unusually severe media backlash criticizing the Appeals Court's decision as a purported affront to the First Amendment and freedom of the press, in March 2019, the SJC granted further appellate review limited to Butcher's claims against Mass Media reporter Vishniac. After the SJC itself solicited *amici curiae* briefs from numerous members of the media and press, a brief was filed on behalf of the Associated Press ("AP"),

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[3] Butcher's complaint in the Suffolk County Superior Court also asserted causes of action against Defendants Keith Motley, Winston Langley, Patrick Day, James Overton, Donald Baynard, Paul Parlon, Shira Kaminsky, Paul Driskill, Brian Forbes, and the University of Massachusetts ("UMass"). The trial court dismissed all of Butcher's claims on summary judgment. On appeal to the Massachusetts Appeals Court, only the allowance of summary judgment as to Vishniac was reversed.

GateHouse Media LLC, the New England First Amendment Coalition, and the Reporters' Committee for Freedom of the Press.[4]

On December 31, 2019, the SJC reversed the Massachusetts Appeals Court below, and reinstated the trial court's allowance of Vishniac's summary judgment motion. In its written opinion, the SJC rejected the Appeals Court's rationale, finding instead that, because Vishniac's defamatory articles relied largely on the erroneous allegations contained in the police blotter, and because the publication of the police blotter on the internet is authorized under Massachusetts law pursuant to Mass. Gen. Laws ch. 41 § 98F, Vishniac's false allegations of criminal conduct vis-à-vis Butcher should be protected under the "fair report" privilege and under the First Amendment of the United States Constitution.

(d) Federal Questions Raised.

For purposes of review by the Supreme Court of the United States, it must appear from the record that: (1) a federal question was presented; (2) the disposition of that question was necessary to the determination of the case; and (3) the federal question was actually decided, or that the judgment could not have been rendered without deciding it. *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U.S. 206 (1938); *Raley* v. *Ohio*, 360 U.S. 423, 434–437 (1959).

In the case at bar, there can be no *bona fide* dispute that the SJC's holding invoked constitutional questions under the First Amendment of the United States

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[4] See, *e.g.*, *Butcher* v. *Univ. of Mass.*, Case No. SJC-12698, Doc. #10 (Sep. 9, 2019).

Constitution. Indeed, the SJC unambiguously stated the same in its December 31, 2019 opinion:

> We also are mindful that the fair report privilege implicates competing constitutional concerns. On one side of the scale, the fair report privilege "**clearly partakes of First Amendment values, and it has been suggested that the privilege (in some form) should perhaps be understood as *required* by modern First Amendment principles.**" [Citation omitted] As the United States Supreme Court noted in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), ensuring that the press can report freely on public affairs "requires that we protect some falsehood in order to protect speech that matters." (Emphasis supplied) App. 12a.

This Court has also held that, where a state court decision appears to be interwoven with federal and/or constitutional law (such as the SJC's interpretation of the First Amendment, and of this Court's defamation law precedents), and where the adequacy and independence of any possible state law ground is not clear from the face of the opinion, there is a *rebuttable presumption* that the state court decided the case as it did because it believed that federal law required it to do so. *Michigan* v. *Long*, 463 U.S. 1032 (1983); see *Harris* v. *Reed*, 489 U.S. 255, 261 n.7 (1989).

If a state court wishes to avoid this presumption, it must set forth a plain statement in its judgment or opinion that discussed federal law did not compel the result, and

that state law was dispositive.[5] *Ibid.* Moreover, this Court has further held that a new state rule cannot be invented for the occasion in order to defeat a federal claim. See, *e.g.*, *Ford* v. *Georgia*, 498 U.S. 411, 420–25 (1991).

REASONS FOR GRANTING THE WRIT.

I. In defamation actions throughout the United States, state and federal courts alike *continue* to misunderstand and misapply this Court's definition of what constitutes a matter of "public concern"; the contradictory decisions and confusion amongst the lower courts are highly problematic and unworkable, because the "fair report" privilege can *only* be raised in defamation cases involving matters of "public concern."

a. Because the instant matter pertains solely to a private, non-public figure involved in a matter of private concern, the state court's broad expansion and extension of this Court's holding in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) to cases in this context is erroneous, and sets a dangerous precedent.

In *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) this Court first promulgated its heightened "actual malice" standard for defamation plaintiffs. In the decade that followed this 1964 landmark decision, the Court's "actual

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[5] In the case at bar, there is no such statement in the SJC's opinion; on the contrary, the SJC explained that its interpretation of the "fair report" privilege in this matter was chiefly governed by First Amendment concerns, and also by the binding defamation law precedents of this Court such as *Gertz*.

malice" standard was exclusively limited to public official and/or public figure defamation plaintiffs.

Pursuant to *Sullivan* and its progeny, "*public* figure" defamation plaintiffs are always required to prove "actual malice"—regardless of whether the context of the defamatory representations pertains to a matter of "public concern" or "private concern."

It was not until *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) that this Court expanded the heightened "actual malice" standard to include—for the first time ever—private, non-public figures. However, as this Court is aware, its holding in *Gertz*, *supra*, was limited to a narrow and specific context. The *Gertz* Court held that the heightened "actual malice" standard should apply to "private figure" defamation plaintiffs—but *only* where that "private figure" is involved in a "public concern" or controversy.

Stated differently, even as of the present date, **this Court has <u>never</u> expanded the "actual malice" standard to "private figures" involved in matters of "private concern."** While *Gertz* did indeed mark the Court's first foray into "<u>private</u> figure" defamation cases, the *Gertz* holding was limited to matters of "<u>public</u> concern." This is in direct contrast with the case at bar, which pertains to a **"<u>private</u> figure" plaintiff** involved in a **matter of "<u>private</u> concern."**

Evidencing the foregoing proposition is this Court's subsequent holding in *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749 (1985), a case wherein this Court took the opportunity to thoughtfully clarify and delineate the extent of its previous decision in *Gertz*. In *Dun & Bradstreet*, *supra*, this Court held that the "actual malice" standard does **<u>not</u>** apply to "private figure" plaintiffs involved in matters of "private concern." *Id.* at 763.

Therein, this Court further held that the *Gertz* decision does not apply to those types of defamation cases, and that *Gertz* only addressed "*private* figure" plaintiffs involved in matters of "*public* concern." See *id.* at 757.

b. The state court's finding that defamatory allegations of criminal and/or inappropriate conduct against one individual alone are matters of "public concern" is reversible error, as it directly contradicts this Court's binding precedents in *Snyder* v. *Phelps*, 562 U.S. 443 (2011) and *City of San Diego* v. *Roe*, 543 U.S. 77 (2004), *inter alia*.

In the case at bar, the SJC summarily concluded that the allegations against Butcher (*i.e.*, that he had allegedly taken pictures of women without their consent) in the context of a *private* labor union dispute were a matter of "**public concern**." The SJC arrived at this erroneous and unsupported conclusion *without* performing the required three-prong "content, form, and context" analysis—*i.e.*, the test promulgated by this Court.[6] In point of fact, the three-prong test is not even mentioned once in the SJC's decision.

Making matters worse, the SJC stated the following, without citing to anything of record:

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[6] This Court has consistently required courts to perform this three-prong test when determining whether speech is of "public concern" as opposed to "private concern." See, *e.g.*, *Lane* v. *Franks*, 573 U.S. 228, 241 (2014); *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 398 (2011); *Snyder* v. *Phelps*, 562 U.S. 443, 453-54 (2011); *Rankin* v. *McPherson*, 483 U.S. 378, 385 (1987); *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 761 (1985); *Connick* v. *Myers*, 461 U.S. 138, 147 (1983).

> In this case, we are concerned with "reports of **official** statements" and "reports of **official** action," "both of which are covered by the fair report privilege." (Emphasis supplied) app. 13a.

The undersigned wholeheartedly agrees with the foregoing statement—"official" actions are indeed covered by the fair report privilege. But how does that relate to the facts of this particular action? As set forth herein, *ante*, there were *never* any **"official" statements,** and there was *never* any **"official" government and/or police action.** Neither of the foregoing was even remotely alluded to or mentioned in the police blotter (*i.e.*, the "original publication"), and of course, neither was ever mentioned in either of Vishniac's two (2) articles relating to the defamatory blotter entry (*i.e.*, the "re-publications").

Firstly, the statements contained in the state police blotter—which Vishniac later re-published—were *not* statements made by police officers or by government officials. Indeed, the statements contained therein were merely the uncorroborated hearsay accounts of third-party "witnesses." As we later came to learn, these "witnesses" were, in fact, the very same accusers who had filed the false police report against Butcher in retaliation for his involvement in the labor union dispute. Accordingly, notwithstanding the SJC's misplaced finding to the contrary, the defamatory representations published by both Vishniac and the state police plainly did *not* constitute **"official statements."**

Secondly, there can be no *bona fide* dispute that there was never any **"official action"** here, and for good reason: not only was no formal investigation undertaken by the police, **Butcher was never even arrested.** Under

such circumstances, it is difficult to comprehend the SJC's finding that the defamatory representations in question somehow pertained to "*official* action" (which may then, in turn, give rise to the fair report privilege).

In *City of San Diego* v. *Roe*, 543 U.S. 77 (2004), this Court unambiguously explained which types of issues may qualify as matters of "public concern," and which do not. In *San Diego*, *supra*, the plaintiff, a former police officer, was terminated by the city after making and selling pornographic videotapes which showed the officer engaging in sexually-explicit acts. *Id.* at 78. After granting certiorari, this Court gave a detailed and thoughtful explanation of why a police officer making pornographic videos—and even wearing a police uniform while engaging in various sexual acts—still would not qualify as a matter of "public concern":

> Applying these principles to the instant case, there is no difficulty in concluding that [the police officer's] expression does not qualify as a matter of public concern under any view of the public concern test [. . . .] *Connick* is controlling precedent, but to show why this is not a close case it is instructive to note that even under the view expressed by the dissent in *Connick* from four Members of the Court, the speech here would not come within the definition of a matter of public concern [. . . .] Roe's activities did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor were Roe's activities anything like the private remarks at issue in *Rankin*, where one co-worker commented to another co-worker on an item

> of political news. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image. (Emphasis supplied) *id.* at 84.

The *San Diego* Court could not have been any clearer. If a police officer making pornographic videos in a police uniform is not a matter of "*public* concern"—notwithstanding the fact that the pornographic videos were "widely broadcast" and "linked to his official status as a police officer"—what compelled the state court below to find that a private labor union dispute is somehow a matter of "public concern"? Notwithstanding the equally unusual facts of *San Diego*, *supra*, this Court was "crystal clear" in concluding that it was *not* a matter of "public concern," even stating the following: "this is not a close case."

After *San Diego* was decided in 2004, this Court subsequently clarified in *Snyder* v. *Phelps*, 562 U.S. 443, 453 (2011) that its holding in *San Diego* also applies in the context of defamation cases such as the instant matter:

> The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin* v. *McPherson*, 483 U.S. 378, 387 (1987). Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report "concerns no public issue." 472 U.S. at 762. The content of the report, we explained, "was speech solely in the

> individual interest of the speaker and its specific business audience." *Ibid.* That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. *Ibid.* To cite another example, we concluded in *San Diego* v. *Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation." 543 U.S. at 84.

In other words, the fact that Vishniac's readers may take pleasure and have a prurient interest in reading the uncorroborated hearsay of questionable third parties (*i.e.*, persons who were also involved in the labor union dispute)—and factually-false allegations of sexual deviancy against Butcher—certainly does not render it a matter of "public concern."

Of note, while Vishniac and Mass Media easily could have authored articles solely about the alleged events in question, this is not how they opted to proceed. Instead, they referred to Butcher *personally* in their two (2) publications about the allegations by posting pictures of him on the internet along with the subject publications.

c. Because no matter of "public concern" is present in this defamation action, and because the defense of the "fair report" privilege *only* applies in defamation cases involving matters of "public concern," the lower court's allowance of the defense in this context was erroneous and should be reversed.

Notwithstanding the state court's unprecedented holding to the contrary, it is black letter law that the common-law fair report privilege (as interpreted through the lens of the First Amendment and this Court's binding precedents thereunder) *only* applies to matters of "*public* concern," and it has zero relevance or application vis-à-vis matters of "*private* concern." Accordingly, the "private concern" *vs.* "public concern" analysis is indispensable, and cannot be side-stepped or ignored—as the SJC unfortunately did here, as evidenced by its written decision in this matter. See App. 1, *et seq.*

With regard to § 611 of the Restatement (Second) of Torts—the applicable subsection describing the Massachusetts fair report privilege—the First Circuit has opined on this exact issue in *Riley* v. *Harr*, 292 F.3d 282, 296 (1st Cir. 2002):

> Moreover, under the fair report privilege, "'the publication of defamatory matter concerning another in a report of an official . . . proceeding . . . that deals with a matter of **public concern** [is privileged] if the report is accurate and complete or a fair abridgement of the occurrence reported.'" (Emphasis supplied).

As previously stated, *ante*, there does not appear to be a single precedent in the entire United States wherein a court permitted a defamation defendant to invoke the fair report privilege in the context of a matter of "*private* concern." Unfortunately, by misinterpreting the purported "strictures" of the First Amendment, as well as the binding defamation law precedents heretofore established by this Court, the state court below has needlessly deviated from the traditional application of this common-law rule. Wherefore, this Court should reject the state court's erroneous misapplication of the fair report privilege on purported "First Amendment" grounds.

II. The state court's reliance on the First Circuit's holding in *Yohe* v. *Nugent*, 321 F.3d 35, 43 (1st Cir. 2003) is contradictory and problematic; while the state court below reaffirmed the validity of the common law Doctrine of Republication, in *Nugent*, the First Circuit declined to recognize it.

The Doctrine of Republication can be explained by the following simple hypothetical. A local newspaper in a small town publishes an article containing the following defamatory "republication," or reiteration:

"According to Joe, Sally is a thief."

In reality, Sally—a private, non-public figure—is *not* a thief. Sally, who works as a cashier at a local grocery store, is fired after her employer reads the article. Thereafter, Sally brings an action for libel *per se* against the

newspaper. At common law, can the newspaper be held liable for libel?

In the case at bar, as re-affirmed by the state court below, the answer is undoubtedly "yes." As the court below conceded, under the common law Doctrine of Republication, a third party (such as the newspaper) "republishing" a defamatory representation can indeed be held liable for defamation—even if that third party was not the original source of the defamatory representation.

To return to the foregoing hypothetical, the newspaper *itself* never claimed that Sally was a thief. Indeed, it was Joe who had made the allegation against Sally, and the newspaper thereupon "**accurately**" reiterated what Joe had actually said. However, pursuant to the common law Doctrine of Republication, the newspaper will *still* be held liable for defamation if Sally can prove that, in reality, she is not a thief.

At present, there is a troubling contradiction between the holding of the court below that the Doctrine of Republication is indeed recognized in Massachusetts, and the First Circuit's antithetical and contradictory decision in *Yohe* v. *Nugent*, 321 F.3d 35, 43 (1st Cir. 2003). In *Nugent*, the First Circuit held that third-party republishers (such as the newspaper in the foregoing hypothetical) *cannot* be held liable for defamation if they "**accurately**" republish (*i.e.*, reiterate) the defamatory statement of another. In other words, the First Circuit in *Nugent* rejected the Doctrine of Republication, which imposes defamation liability on the "republisher" *as if* the republisher were the original source of the defamatory statement. However, in the case at bar, the state court held the exact opposite, *i.e.*, that the Doctrine is indeed recognized. This manifest contradiction is clearly untenable, and should be resolved by this Court.

Unfortunately, the case at bar demonstrates why this undesirable contradiction between federal and state court precedents is problematic, unworkable, and illogical. In its preamble, the state court below clearly and unambiguously states the following:

> **It makes no difference that [media defendant] Mass Media *only* republished the allegedly defamatory statements of another. "[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."** Restatement (Second) of Torts § 578 (1981). See *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 36, 478 N.E.2d 721 (1985). In the eyes of the law, "[t]ale-bearers are as bad as the tale-makers." App. 9a (emphasis supplied).

However, in *Nugent*, the First Circuit arrived at the following contradictory conclusion:

> [I]t is *not* necessary that the article provide an accurate recounting of the events that actually transpired. That is, **"accuracy" for fair report purposes refers only to the factual correctness of the events reported and not to the truth about the events that actually transpired**. Indeed, it is well established that **the fair report privilege "should not be forfeited *even if* the party making the report knew the statement to be false."** (Emphasis supplied, citations omitted); *id.* at 44.

These contradictory and antithetical conclusions beg the following indispensable question: what "accurate" information are the media supposed to report to their readers? **Must the media give an "accurate" account of the defamatory statement itself—even when the media knows it to be factually false—or must the media give an "accurate" account of the underlying defamatory representations themselves (*e.g.*, whether or not Sally truly is a thief), as required under the Doctrine of Republication?**

Simply stated, there is a confusing and unworkable contradiction between the "fair report" privilege and the Doctrine of Republication—as evidenced by the conflicting and contradictory decisions on this issue in both federal and state courts. Because the state court below held that it recognizes *both* the "fair report" privilege and also the Doctrine to Republication, it is not just or equitable—both for media defendants as well as for potential defamation plaintiffs—for such a confusing and contradictory question of law to remain unaddressed. What is more, should this Court opt to clarify this nationwide concern, it is respectfully submitted that this would greatly serve the interests of judicial economy, as parties involved in defamation disputes would no longer need to resort to litigation in order to resolve such matters of unsettled law.

III. Mass. Gen. Laws ch. 41 § 98F constitutes a legislative bill of attainder, in violation of Art. I, § 10, Cl. 1, and is also violative of the Due Process Clause of Amend. XIV, § 1 because, as applied, this state statute deprives citizens such as Butcher of: (1) their right to due process prior to the infliction of punishment by the state; (2) the constitutional "presumption of innocence"; and (3) their constitutional right to privacy, and to be free of unwanted governmental intrusions.

Even assuming *arguendo* that Butcher's defamation claims herein are not actionable, *quod non*, the constitutionality of Mass. Gen. Laws ch. 41 § 98F warrants the review of this Court, and for numerous reasons. Indeed, the state court below even acknowledged these serious constitutional concerns vis-à-vis the said statute in its December 29, 2019 opinion. App. 16a. Therein, the state court noted in pertinent part:

> [All Massachusetts] [p]olice departments are required to issue daily reports of three kinds of events: "**responses to valid complaints received**," "crimes reported," and "the names, addresses of persons arrested and the charges against such persons arrested." G. L. c. 41, § 98F [. . . .] When the Legislature first enacted this statute in 1980, it debated how the proposed statute would expand press access to police logs. During those debates, **legislators expressed concerns about the ways in which the statute could expose the lives of private citizens to the public.**

> In urging other members to support the bill, its sponsor emphasized that the legislation would require a public listing only of actual arrests, not of all calls that police receive or all incidents that are reported. More than a decade after G. L. c. 41, § 98F was enacted, in 1991 the Legislature amended this statute to require certain school safety officers to maintain the same types of blotters as other police officers. (Emphasis supplied, citations omitted). *Ibid.*

In the case at bar, the said ch. 41 § 98F was the very statute that purportedly authorized the Massachusetts police to openly publish uncorroborated accusations of criminal conduct and hearsay on its police blotter—a public record which is openly displayed on the internet. Unfortunately, the state court below makes no mention of the obvious potential for misuse and for serious, irreparable harm to innocent persons such as Butcher as a result of the Government's publication of uncorroborated third-party accusations. Even worse, the said accusations are published in the form of "official" reports from an official governmental agency (*i.e.*, the state police).

As applied, ch. 41 § 98F poses serious constitutional concerns. By way of example, any person involved in a labor union dispute (or any other dispute) could simply "call in" a fictitious accusation of criminal conduct to a local police department (*e.g.*, an false accusation alleging that "Jane Doe is a pedophile"). After the call is received by the police—and *before* Jane Doe is even arrested—the Massachusetts police can lawfully publish on its online police blotter (pursuant to ch. 41 § 98F): (1) a picture of Jane Doe herself, together with a physical description; (2)

a written report under the picture, "republishing" the uncorroborated allegations that Jane Doe is suspected of sexually assaulting a minor; and (3) uncorroborated hearsay allegations, which—to any "reasonable person" reading the official police report—clearly convey the message that there is substantial evidence supporting the allegations against Jane Doe (when, in reality, there is no such corroboration and/or supporting evidence).

What is more, as the state court below correctly noted, the Massachusetts legislature expanded the application of ch. 41 § 98F to "school safety officers"—something which can quickly prove to be the worst nightmare of any parent with children studying in the Commonwealth of Massachusetts. As a result of this expansion, if a classmate falsely accuses Jane Doe of certain "unwanted sexual advances," pursuant to ch. 41 § 98F, the Massachusetts are *obligated* to post this false accusation in its police blotter—a public record which is thereupon published online. To add insult to injury, and as a result of the dangerous precedent established by the court below in the instant matter, local newspapers can now lawfully "republish" all of these erroneous allegations in news reports, and can do so while enjoying complete immunity from liability pursuant to the "fair report" privilege. Not only will such erroneous media publications be read by Jane Doe's friends, family, classmates, and teachers, they will undoubtedly impede her ability to find any meaningful employment opportunities upon completing her studies.

(a) Bill of Attainder.

As applied, ch. 41 § 98F plainly constitutes a statutory "bill of attainder,"[7] in violation of Art. I, § 10, Cl. 1, which has been defined as "legislative acts, no matter what their form, that apply either to ***named*** **individuals** or to easily ascertainable members of a group in such a way **as to inflict punishment on them without a judicial trial.**"[8] *United States* v. *Brown*, 381 U.S. 437, 448-49 (1965).

In determining whether a statute constitutes a bill of attainder, courts have employed a three-prong "objective purpose" test which considers the following: (1) whether the statute can be explained *solely* by a remedial purpose; (2) the legislative history, and a historical analysis of the statute; and (3) whether the effects, or "sting," of the statute are so harsh that they constitute punishment. *Artway* v. *Attorney General*, 81 F.3d 1235, 1264-66 (3d Cir. 1996).

The first two (2) prongs of the *Artway* test cannot be satisfied here. Ch. 41 § 98F serves primarily to satisfy the prurient interest of the media vis-à-vis the private affairs of ordinary citizens. As previously noted, *ante*, in enacting

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[7] Of note, these constitutional issues vis-à-vis ch. 41 § 98F are now ripe for review for the first time. As previously explained, *supra*, these "federal questions" were never ripe for review (or even an issue) until the Massachusetts SJC invoked it *sua sponte* in its December 29, 2019 final judgment. Because the state court below erroneously held that ch. 41 § 98F compelled it to bestow the "fair report" privilege upon all media defendants who re-publish factually-erroneous accusations of criminal conduct, this Court should now consider whether the state statute comports with *both* the Bill of Attainder Clause and the Due Process Clause of the Fourteenth Amendment.

this state statute in 1980, "**legislators expressed concerns about the ways in which the statute could expose the lives of private citizens to the public.**" App. 16a.

As to the third prong of the *Artway* test ("whether the effects, or 'sting,' of the statute are so harsh that they constitute punishment"), there can be no *bona fide* dispute that accusations of criminal conduct by a state police agency on the internet—*regardless* of whether those accusations are true or false—certainly constitute a form of "punishment."

(b) Double Jeopardy Clause.

The Double Jeopardy Clause prohibits, *inter alia*, "a second prosecution for the same offense after conviction [. . .] and **multiple punishments for the same offense.**" (Emphasis supplied) *United States* v. *Halper*, 490 U.S. 435, 440 (1989).

Arguendo, had Butcher been subsequently arrested in connection with this matter and properly afforded a trial, *quod non*, this still would not change the fact that he had *already* been severely punished by the Commonwealth of Massachusetts. At the precise moment in time when the Massachusetts police willfully and knowingly portrayed Butcher as a sexual predator and deviant on the internet, Butcher's professional and personal reputations were irreversibly decimated and destroyed in one fell swoop. This horrific result is particularly problematic in the case at bar, as the said ch. 41 § 98F (as applied) authorizes the Massachusetts police to publicly punish, humiliate, and denigrate innocent persons such as Butcher—all done without ever needing to step foot inside a courtroom.

Here, the fact that Butcher was subsequently completely exonerated of the false accusations is of little comfort: he had *already* been punished, and the state police had already irreparably harmed the reputation of an innocent person. Sadly, because the Massachusetts police knowingly continues to publish such accusations on the internet pursuant to ch. 41 § 98F, these factually-erroneous allegations will remain publicly visible on the internet for the remainder of Butcher's natural life. Thus, what good are defendants' "due process" rights if government agencies can simply bypass the judicial system entirely (along with its constitutional safeguards for criminal defendants) and inflict punishment extrajudicially?

(c) Due Process and the "Presumption of Innocence."

The said ch. 41 § 98F, as applied, is also violative of the Due Process Clause of the United States Constitution, *viz.* Amend. XIV, § 1. Due process is a flexible concept determined by application of a three-part balancing test: (1) the private interests affected by the proceeding; (2) the risk of error imposed by the procedure created by the State; and (3) the countervailing interest in using the procedures it adopted. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The close relationship between "due process" and the well-settled "presumption of innocence" is evidenced by this Court's holding in *Taylor* v. *Kentucky*, 436 U.S. 478, 483 (1978), wherein the Court explained that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of

the administration of our criminal law." (Citation omitted) *ibid.*

Pursuant to the three-prong test promulgated by this Court in *Eldridge*, *supra*, the second and third prongs thereof evidence how and why ch. 41 § 98F (as applied) cannot comport with basic, fundamental notions of "due process."

Firstly, "the risk of error imposed by the procedure created by the State" is astronomical, and therefore repugnant to the very notion of "due process." Under "**Hypothesis A**," innocent persons such as Butcher may be irreparably harmed by the application of ch. 41 § 98F without any trial whatsoever. If the police knowingly publish on the internet mere uncorroborated hearsay and rumors erroneously asserting that an innocent person has engaged in criminal conduct, the "risk of error" by inadvertently punishing such innocent persons is unacceptably high. Under "**Hypothesis B**," an innocent person who is later subjected to judicial process and a trial before a jury of his peers will undoubtedly see his or her "due process" rights harmed if the police willfully and knowingly publish defamatory assertions *prior* to the time of trial. Stated differently, in "Hypothesis B," the integrity of the judicial process and criminal proceedings will foreseeably be compromised by such internet publications regarding the matter—none of which will ever be of record.

Secondly, "the countervailing interest[s]" against the internet publication of unverified allegations of criminal conduct by the police—as is now unfortunately authorized pursuant to the said ch. 41 § 98F—are so substantial that even the Massachusetts legislators who enacted this particular statute in 1980 were extremely concerned that it would "expose the lives of private citizens to the public." App. 16a. If the Legislature was concerned

about citizens' privacy rights vis-à-vis this statute in 1980, how concerned would they be about privacy in 2020, when the police have begun posting this information on the internet?

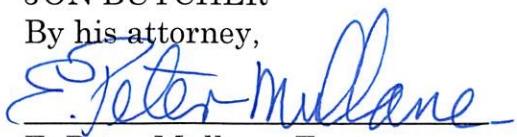
Simply stated, while the decision of the state court below may serve the prurient interest of the media, it certainly does *not* serve the privacy interests of the average American citizen—nor does it serve any legitimate interest of the public as a whole. The weaponization of the media and the internet cannot remain protected by the judiciary under the guise of being a legitimate First Amendment concern, particularly where the general public is foreseeably harmed as a consequence thereof.

CONCLUSION.

Wherefore, on the above-mentioned premises, this Court should grant a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

At Cambridge, Massachusetts,
This 27th Day of May, 2020

Respectfully submitted,
JON BUTCHER
By his attorney,



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