No. _____

In the
Supreme Court of the United States

MICHAEL LEIDIG AND CENTRAL EUROPEAN NEWS LTD.,
Petitioners,

v.

BUZZFEED, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that the First Amendment's guarantee of freedom of the press requires that when a plaintiff sues a media defendant for libel, based on a publication of public concern, it is the plaintiff's burden to prove that the libelous statement is false, supplanting the general common-law rule that falsity of a libel was presumed and truth was an affirmative defense. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775-76, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783 (1986). Does the First Amendment also alter the weight to be accorded a libel plaintiff's evidence, rendering the plaintiff unable, by his or her sworn statement or testimony that he or she has not done the bad thing the libel asserts, to create a question of fact as to whether the libel is true or false?

A panel of the Second Circuit has so held in this case, concluding that language in the earlier opinion in *Celle v. Filipino Reporter Enters. Inc.,* 209 F.3d 163, 188 (2d Cir. 2000) teaches that the First Amendment prevents a libel plaintiff, in this case a journalist labeled by a lengthy BuzzFeed article "The King of Bullsh*t News," from creating an issue of fact as to truth or falsity with his own testimony. That language is: "While a bland, cryptic claim of falsity supported by the credibility of a witness might be sufficient to establish falsity in other civil cases, the First Amendment demands more."

LIST OF RELATED PROCEEDINGS

There are no related proceedings.

CORPORATE DISCLOSURE STATEMENT

Petitioner Central European News Ltd. has no corporate parent, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming a grant of summary judgment to defendant.

OPINIONS BELOW

The Summary Order of the Court of Appeals is reported at 788 Fed. Appx. 76, 2019 U.S. App. LEXIS 37653, and 2019 WL 6918519. That court's decision denying rehearing and rehearing *en banc* is not yet reported. The district court's Decision and Order granting summary judgment is reported at 371 F. Supp.3d 134, 2019 U.S. Dist. LEXIS 55672, and 2019 WL 1522118. An earlier decision of the district court denying plaintiffs' motion for partial summary judgment is reported at 2017 U.S. Dist. LEXIS 76660 and 2017 WL 2303670, and its decision denying reconsideration of that decision is reported at 258 F. Supp.3d 397, 2017 U.S. Dist. LEXIS 93088, and 2017 WL 2779759.

JURISDICTION

Final judgment was entered on March 27, 2019. The judgment was affirmed by the Court of Appeals in a Summary Order entered on December 19, 2019. An Order denying a petition for panel rehearing and rehearing *en banc* was entered on January 31, 2020. This petition is timely, as made within the 150-day period specified in this Court's Order of March 19, 2020. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment 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.

STATEMENT OF THE CASE

Plaintiffs, Michael Leidig, a British journalist who lives and works in Vienna, Austria, and his company, Central European News Ltd. ("CEN"), a news wire service that, in addition to doing original journalism, reports stories from around the world, offering English-language versions to news outlets in England, the United States, and elsewhere, brought this lawsuit alleging they had been libeled by a lengthy story published by defendant, BuzzFeed, Inc., an Internet site for entertainment and news, under the headline "The King of Bullsh*t News" (hereinafter, "the Article"). They alleged that the "gist" or "sting" of the libel was that they knowingly produce and offer to their customers made-up, fake, stories, or add phony quotes to stories to make them more salable, and, as regards Mr. Leidig, that the language in the Article:

> But then the bottom fell out of the business … after 9/11, and it seemingly never recovered.
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> So it appears that Leidig decided to play the online game, as he saw it. He launched websites

> such as the *Austrian Times* and *Croatian Times*. He cast his net far afield to China, India, and Latin America, scouring for images and posts on social networks that he could weave a story around in order to hit up old clients with a new kind of content.

(Complaint, Ex. A, p. 8; D.E. #1.1 p. 8;[1] App. 89-90[2])

was a charge that: "suffering from financial difficulties, plaintiffs decided to go into the business of fabricating and selling fake news stories." (Complaint, ¶ 8; App. 59). That is, that Mr. Leidig was driven by financial difficulties to begin searching the Internet for interesting images around which he could make up and sell fake stories.

The Genesis of the Libel

Plaintiffs' case is that the Article that destroyed their professional reputations and their business was conceived in BuzzFeed's London bureau in 2014, when a small group of journalists found that they believed the same thing about CEN—that its output was too good to be true. When an editor requested that the journalists recall stories that had gone "viral" on the Internet that they considered to be fraudulent, stories that "the internet thought were true but actually weren't true," (JA-2981)[3], one responded "99% of CEN

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[1] "D.E." refers to docket entry in the district court, 16-cv-0542 (SDNY).

[2] "App." refers to the pages in the Appendices hereto.

[3] "JA-" refers to pages in the Joint Appendix filed in the Second Circuit appeal, 19-851.

stories" (JA-2980), and other responses were similar. The journalists decided to do an investigative piece, which one suggested should be called "Inside the viral bullshit factory." (JA-2980).

What those journalists did not know, however, and never learned, was that CEN is not just a wire service located in Vienna, Austria—it had, and has, reporters on its payroll working in countries around the world, including China, India, and Russia. Those reporters regularly do their own stories, and regularly do additional reporting to verify and, in some cases, to enrich with additional facts, stories circulating in the countries they cover. This lack of knowledge led the BuzzFeed journalists to assume that the unique quotes found in some CEN stories must be made up, or that unique stories must be fraudulent. As one internal BuzzFeed memorandum summarized the view of CEN at that time:

> In some cases they take the original information about an image and translate those details into English. In other cases, they fabricate quotes to accompany the basic details of the story, or they will invent a story out of whole cloth to accompany the images.

(JA-3032).

Since the BuzzFeed journalists already knew what they believed to be the truth, their efforts to write the Article involved only collecting evidence that seemed to support their belief, much of it Internet posts by others claiming to "debunk" CEN stories. Although BuzzFeed documents show that they realized that their research

should include investigations, in places like India or China, into the details of CEN stories, they decided not to do that, as too difficult. With the exception of one email exchange between a BuzzFeed journalist who did not speak Russian, and a Russian photographer who did not speak English, little actual journalism was conducted by the BuzzFeed journalists.

Most importantly, any evidence that cut against their presupposition was discounted and ignored. The most prominent example is a story CEN did out of China reporting that a young woman spent days in a 24-hr Kentucky Fried Chicken restaurant after being "dumped" by her boyfriend. Thought to be, by various of the BuzzFeed journalists, "total bollocks," "debunked," and "Confirmed Fake," (JA-3046, 3043, 3032), it was featured prominently in an early draft of the Article, but, when it was discovered that the story was true, and the quotes it contained genuine, all references to it were removed. (JA-2996-97).

The resulting story was published on the BuzzFeed website on April 24, 2015.

This Lawsuit

Plaintiff filed suit in the Southern District of New York on January 25, 2016. The Complaint (App. E, App. 57-111) annexed a copy of the Article (*Id.,* 78-111), and pointed to specific parts of the article alleged to be false and defamatory. Subject-matter jurisdiction was based on diversity of citizenship; plaintiffs are citizens of foreign states, Great Britain and Austria, and BuzzFeed is a citizen of states, New York and Delaware. 28 U.S.C. § 1332(a)(2). (*See* Complaint, App.

E, ¶¶ 14-18; App. 60). BuzzFeed filed an Answer denying that anything in the Article is defamatory of plaintiffs, or false. (D.E. # 8).

Plaintiffs' Unsuccessful Motion for Partial Summary Judgment

Struggling with electronic-discovery difficulties, which ultimately led to minor sanctions that did not figure in the outcome of the case[4], plaintiffs moved for partial summary judgment, seeking judgment: (1) that the Article accuses Mr. Leidig and his company of journalistic fraud—making up fake stories or embellishing stories with fake quotes; (2) that that accusation is libelous; (3) that that accusation is false; and (4) that neither Mr. Leidig nor his company is a "public figure" as that term is used in libel law. (Motion, D.E. # 16).

In support of the motion, Mr. Leidig submitted a declaration (D.E. # 18; JA-77-85) in which he said, upon penalty of perjury, with respect to falsity:

> 2. As will be detailed below, defendant's story charged that my company and I have created and sold fake news stories, falsely portraying them as real, and have added fake

[4] Magistrate Judge Gabriel W. Gorenstein eventually issued an Opinion and Order that plaintiff would be precluded from using dates contained in certain electronic documents with altered metadata, that BuzzFeed could argue that the "destruction of their metadata" showed the documents were not created on particular dates, and that BuzzFeed could show that plaintiffs' shutting down some web sites after the Article was published violated rules against spoliation. (D.E. # 75). *Leidig v. BuzzFeed, Inc.,* 2017 U.S. Dist. LEXIS , 2017 WL 6512353 (S.D.N.Y, Dec. 19, 2017).

> quotations to other stories to make them more attractive to the news media who are our clients. Both these charges are false. I have never created nor knowingly reported a fake news story and sold it as real, nor has, to my knowledge, anyone else connected with CEN done so. Also I have never created a phony quotation to make a story more salable, and I know of no one else at CEN who has done so.

In the same declaration he also said:

> 15. The statement that after "the bottom fell out of the business" I "cast [my] net far and wide … scouring for images and posts on social networks that [I] could weave a story around in order to hit up old clients with a new kind of content" is completely false. I and my company do not "weave stories around" images and posts; we report on newsworthy events and verify all stories independently.

and

> 23. The suggestion that CEN decided to "hit up old clients with a new kind of content" after 9/11 because business fell off is false. We have always done tabloid-type stories alongside serious, in depth news investigations.

With respect to one charge made in the Article, the charge that a story CEN sold concerning two women who posed naked on a sidewalk in a Russian city for a photographer and got into trouble as a result, was "invented" by CEN around photographs that it "took" [in the sense of "stole"] (App. E, Complaint, ¶ 55; App.

68), plaintiffs submitted a declaration from a journalist friend of Mr. Leidig's, Flemming Emil Hansen, who stated that his Internet research revealed that the story had circulated widely on Russian media before CEN reported it, including one of Russia's most popular television talk shows. He stated that the assertion that CEN made up the story is "blatantly false and completely absurd." (Dec., D.E. #19, ¶ 4; JA-86). The declaration attached two screen grabs from Russian media reporting on the story. (Dec., D.E. # 19, ¶ 5, exs. A, B; JA-86, 88-89).

In response to plaintiffs' motion, BuzzFeed submitted no evidence at all relevant to the issue of truth or falsity, pointing only to its Answer to argue that facts were disputed, and requesting discovery, pursuant to Rule 56(d) FRCP. (Response of Defendant BuzzFeed, Inc. to "Plaintiffs' Statement of Facts as to Which There is No Issue," (D.E. # 19) ¶¶ 27-34; JA-315-17).

Agreeing with BuzzFeed, district judge Hon. Victor Marrero denied all aspects of plaintiffs' motion. (Decision and Order filed May 9, 2017; App. C). With respect to falsity, he concluded that BuzzFeed's contesting of facts by referring to its Answer was sufficient to prevent summary judgment. (*Id.,* App. 50-51). With respect to the questions of what the "gist" of the article is and whether it is defamatory, Judge Marrero concluded that it was premature to address them. (*Id.,* App. 52-53).

Plaintiffs' attempt to move for reconsideration of the question of whether and how the Article defamed plaintiffs was denied both for being late and on the

merits. (Decision and Order entered on June 2, 2017, D.E. # 47).[5]

Discovery then continued to conclusion. As part of discovery, Mr. Leidig and four of his CEN journalists, John Feng, a reporter based in Taiwan, Ana Martinez, based in Spain, Shantana Guha Ray, based in India, and Kathryn Michner, who works in the Vienna, Austria head office, were deposed for hundreds of pages of testimony, revealing no evidence of faking stories or quotes, and some explicit denials. For example, asked (on cross-examination by plaintiffs' counsel) if she had ever made up a story or quotes, or knew of anyone at CEN who had, Ms. Martinez testified she had not, and did not. (Dep. pp. 58:25-59:9; JA-2097).

Mr. Ray, whose reporting for Agence France-Press, Time Magazine, and others has won prizes from international organizations such as the Overseas Press Club and Columbia School of Journalism-BBC (*See* Ray Dep. pp. 4:7-15:4, 74:19-75:17; JA-2749-52, 2767),

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[5] The decision is reported at 258 F. Supp.3d 397. The attempt, made by letter from plaintiffs' counsel, had attached a pre-publication email from one of the BuzzFeed journalists to others noting that the Article "will … probably be the end for this guy's business." (D.E. # 48 p. 4). It should be noted that the suggestion in the decision that plaintiff's counsel submitted the BuzzFeed email in violation of the confidentiality order was incorrect, since the letter, sent to the Court and not filed, noted that the attached BuzzFeed document had been designated confidential and should therefore not be filed except under seal, unless the court determined the designation was meritless, as the letter argued. (*Id.,* pp. 2-3). It was Judge Marrero who determined to file the document without filing it under seal, and, in any event, the "confidential" designation, which BuzzFeed applied to virtually all of its production, was completely unjustified.

testified "I have never been called a fiction writer. I deal with news, I live and die with it." (Dep. p. 76:20-21; JA-2767). In addition, he testified about reporting a story out of India, concerning the castration of a would-be rapist by a vigilante mob, in which he did additional reporting and translated witnesses' quotes from Hindi to English, (Dep. pp. 38:2-57:18; JA-2758-62), quotes that the BuzzFeed story had implied were fake because they appeared only in CEN's version of the story. (Complaint, Ex. A, pp. 13-14; D.E. # 1.1, pp. 13-14; App. 98-99).

BuzzFeed's Successful Motion for Summary Judgment

Upon the close of discovery, BuzzFeed moved for summary judgment. It argued that the Article was substantially true, that Mr. Leidig and his company are public figures under First Amendment jurisprudence, and that the Article was published without the "actual malice," (knowledge of falsity or reckless disregard of truth or falsity), that that jurisprudence requires public figures to show before they can recover damages for libel. Plaintiffs opposed all aspects of the motion and included in their papers another request that the court rule on what the gist of the libel is, and on whether the gist is defamatory, arguing that the court could do so pursuant to Rule 56(f)(1) FRCP.[6]

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[6] That section reads:

> After giving notice and a reasonable time to respond, the court may:
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> (1) Grant summary judgment for a nonmovant;

Rejecting plaintiffs' argument that the Article defames them generally as purveyors of fake stories or stories with fake quotes (calling it a "maneuver" (App. 25)) Judge Marrero granted BuzzFeed's motion, ruling only on the issue of falsity, and finding that plaintiffs had failed to submit evidence that the libel was false. (App. B). Relying on a passage from the Second Circuit's decision in *Celle v. Filipino Reporter Enterprises Inc.,* 209 F.3d 163 (2d Cir. 2000)—"While a bland, cryptic claim of falsity supported by the credibility of a witness might be sufficient to establish falsity in other civil cases, the First Amendment demands more." 209 F.3d at 188 (App. 26, 35-36)—he failed to credit any of plaintiffs' evidence.

Plaintiffs' Appeal

Plaintiffs appealed to the Second Circuit. They argued on appeal: (1) that the Article accuses Mr. Leidig and his company of journalistic fraud—making up fake stories or adding fake quotes to stories to make them more likely to sell to CEN's media clients; (2) that the Article is, therefore, libelous of plaintiffs; (3) that the issue of truth or falsity should be for the jury; (4) that they are not "public figures" subject to more rigorous standards to recover[7]; and (5) that the evidence would allow the jury to find that the Article was published with constitutional "actual malice," as well as the common-law "actual malice," ill will, that

[7] The Article describes CEN as a "small news agenc[y] … largely unknown outside certain sections of the media" (App. 79), and the internal BuzzFeed memorandum, discussed *supra* at page 4), describes Mr. Leidig as "someone who is not a well-known journalist." (JA-3037).

could support a claim for punitive damages, and that the Article was published as a result of the "grossly irresponsible" journalism that must be shown under the applicable law, New York's, by a plaintiff who is not a public figure, in order to recover damages for libel.

In addition to the declarations and testimony of Mr. Leidig and his four employees, and the declaration of Mr. Hansen, plaintiffs requested the court to take judicial notice of material on the Internet that plaintiffs argued showed that certain stories the Article claimed were faked by plaintiffs were in fact correctly reported from local sources. As an example, the Article suggests that a story prepared by plaintiff CEN about a Chinese man who got tapeworms from eating sashimi used the image of an x-ray found in a textbook, stating that this has been "debunked" by "the debunking site, Snopes." (App. 91-92). Plaintiffs asked the appellate court to take judicial notice that the story originated in Chinese media and was illustrated by multiple x-rays of the victim. Here is the link to the Chinese story: https://hk.on.cc/cn/bkn/cnt/news/20140922/bkncn-20140922035209453-0922_05011_001.html

Similarly, with respect to the story out of Russia that the Article asserted plaintiffs had "invented," (*see supra,* pp. 7-8), plaintiffs offered not just the declaration of Mr. Hansen and its exhibits, but also a link to the story as it was reported on Russian television. Here is the link: https://www.youtube.com/watch?v=jKaz2TsL3aU

Plaintiffs also argued that there was no evidence of any kind, circumstantial or direct,[8] in the record suggesting that Mr. Leidig had ever made up a fake story or quote,[9] and no direct evidence that anyone else connected with CEN had either.

And, finally, plaintiffs pointed out that BuzzFeed's position taken in this suit that the words "weave story around" in the passage from the Article quoted *supra* at page 3 were not meant to suggest that Mr. Leidig had decided to make up stories around images or posts on the Internet, but only that he decided to use the Internet for story leads, was shown, by documentary evidence, to be an attempt to walk back what BuzzFeed had clearly intended to say about him. (*See,* Reply Brief of Appellants, pp. 4-6).[10]

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[8] The distinction between direct and circumstantial evidence is discussed in 1 McCormick On Evidence (7th Ed.), § 185, pp. 1000-1001 (Thomson Reuters 2013).

[9] Asked at his deposition whether he believed that Michael Leidig is a person who makes up fake news stories, Craig Silverman, one of the three authors of the Article, answered: "I don't know his exact, personal involvement." When asked if Mr. Leidig is a person who adds fake quotes to news stories to make them more saleable, he answered: "I don't know his personal involvement." (Silverman Dep., Wise Dec., D.E. # 114, Ex. 2, 121:7-17)(JA-2630).

[10] As one of its facts submitted in support of summary judgment, BuzzFeed noted that one of the Article's three authors, Alan White, had testified that the intended meaning of the "weave a story around" passage was only that plaintiffs "looked on foreign social media for stories and generated … leads that way." (D.E. # 103, ¶ 187), and, in its brief on appeal, citing that fact and others, BuzzFeed's counsel argued that the Article … "never accuses Plaintiffs of 'fraud' at all." (Appellee's Brief, pp. 48-49). Plaintiffs showed that the passage was introduced in an earlier draft of the

The appellate court, in a short Summary Order, affirmed the district court decision, again ruling only on the question whether plaintiffs had submitted evidence sufficient to raise a jury question as to the Article's truth or falsity. (App. A). It held that its decision in *Celle,* specifically the language quoted *supra* at page 11, permitted it to discount or ignore all of plaintiffs' evidence as "conclusory" and insufficient to raise an issue of fact as to whether Mr. Leidig and his company are perpetrating journalistic fraud. (App. 6-7).

Plaintiffs' petition for a panel rehearing or rehearing *en banc,* (App. F),[11] was denied in an order entered on January 31, 2020. (App. D; App. 55-56).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the decision below creates a new hurdle confronting libel plaintiffs that will make it impossible for many of them to redress the damage to their

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story by the sub-head "CEN Gone Bad," which would have made no sense had the passage been meant to describe only searching the Internet for leads, because that isn't "bad," and, also, that the internal BuzzFeed memorandum asserting that CEN makes up stories around images (*supra,* p. 4) discussed that assertion in a section entitled "When CEN went Bad," all of which evidence strongly suggests that BuzzFeed's current position on the meaning of the language is an after-the-fact construct devised to help defend this lawsuit.

[11] Plaintiffs argued that creating a new First Amendment defense to libel cases misreads *Celle* and conflicts with this Court's First Amendment decisions, and, second, that the circuit court erred in failing to rule on plaintiffs' allegation of what the gist of the libel is before evaluating the evidence as to the truth or falsity of the libel. (App. F).

reputation, and that flies in the face of this Court's decision in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), where the Court held that, other than the need to consider the "clear and convincing" proof standard applicable to some issues when the plaintiff is a public official or public figure, the standard rules for deciding a motion for summary judgment are applicable in a libel case, including the rule that: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. at 255, 106 S.Ct. at 2513. It thus is a decision that decides an important question of federal law in a way that conflicts with relevant decisions of this Court (Supreme Court Rule 10(c)) and in a way that so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's supervisory powers. (Rule 10(a)). Unless promptly reversed, it will cause injury to those victimized by libel that will be impossible to redress, or even measure.

ARGUMENT

Point I

THE DECISION BELOW TIPS THE BALANCE TOO FAR IN FAVOR OF MEDIA DEFENDANTS

A. It deprives plaintiff Michael Leidig of his only defense.

Accused of being a fraud who, having fallen hard times, decided to resort to creating fake stories or stories with fake quotes, Mr. Leidig had only one weapon with which to fight back—his word. In declaring under oath that he has never done those

things, he was testifying to his own knowledge, and there was nothing "conclusory" about this evidence, particularly after he and his employees had been deposed for several hours concerning the activities of Mr. Leidig and his company. To hold, as did the court below, that this is "simply" not competent evidence on this point is to hand the victory to BuzzFeed, even though BuzzFeed, it turns out, has absolutely no evidence supporting the charge against Mr. Leidig. This is unfair, and it is contrary to established rules of evidence. "[A] party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." *Santiago-Ramos v. Centennial P. R. Wireless Corp.,* 217 F.3d 46, 53 (1st Cir. 2000)(quoting *Cadle Co. v. Hayes,* 116 F.3d 957, 961 n. 5 (1st Cir. 1997). "Most affidavits are self-serving, as is most testimony." *Wilson v. McRae's, Inc.,* 413 F.3d 692, 694 (7th Cir. 2005)(Easterbrook, J.).

Mr. Leidig came to the federal courts to invoke the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 773, 106 S.Ct. 1558, 1562, 89 L.Ed.2d 783 (1986)(quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974). His declaration should be given the same effect as would a similar declaration from a party in any other kind of civil suit.

B. It libels plaintiffs anew.

Because the Article is a post on the Internet, Mr. Leidig, should he fail to clear his name in this litigation, will be the "King of Bullshit News" forever. The Article will be there to be seen whenever anyone searches the Internet for his name. Because of the interpretation of *Celle* affirmed in this case, however, he is even worse off for having brought suit. Ignoring his declarations and his testimony, the testimony of his employees, and the Internet evidence of which plaintiffs requested that judicial notice be taken, the circuit court finds he has "simply" presented no evidence in support of his case. (App. 6). Thus, now anyone searching for his name on the web will find not just the Article, but also the district court and circuit court opinions describing him as someone who, obviously guilty as charged but trying to save face it will seem, brought a case with no evidence to support it. BuzzFeed's completely baseless libel of Mr. Leidig thus has now received the imprimatur of four federal judges.

C. It comes at a time when the tort of libel is becoming much worse.

This is not the moment to add a new protection for media libel-suit defendants, a new hurdle for libel plaintiffs to overcome. The media landscape is much different from what it was in the 1960s, 70s, and 80s, when this Court, from its famous decision in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), began to "reshape the common-law landscape" of libel litigation "to conform to the First Amendment." *Hepps, supra,* 475 U.S. at 775, 106 S.Ct.

at 1563. Local newspapers are disappearing, or being bought up by huge national chains, like Gannett and McClatchy.[12] The three original networks are now owned by giant corporations, and major newspapers have been bought by billionaires or hedge funds. Much of the media now has global reach (Mr. Leidig is the King of Bullshit News around the world), and the effect of libel itself is now worse. Formerly, yesterday's newspapers would be thrown away and only available in libraries to researchers, and tapes of newscasts would be similarly filed away, but now, posted on the Internet, a libel is forever.[13] Should Mr. Leidig have

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[12] *See* Clara Hendrickson "How the Gannett/Gatehouse merger could deepen America's local news crisis," Brookings Institute Fixgov blog, Nov. 18, 2019. https://www.brookings.edu/blog/fixgov/2019/11/18/how-the-gannett-gatehouse-merger-could-deepen-Americas-local-news-crisis/

[13] In response, some news organizations are changing practices, such as declining to publish mug shots, or to name offenders in minor crimes, because of the new permanence of Internet publications. *See* Laura Hazard Owen, "Fewer mugshots and less naming and shaming, how editors in Cleveland are trying to build a more compassionate newsroom," Neiman Foundation's Neimanlab, Oct. 18, 2018. https://www.niemanlab.org/2018/10/fewer-mugshots-less-naming-and-shaming-how-editors-in-cleveland-are-trying-to-build-a-more-compassionate-newsroom/. In that piece, the editor of the Cleveland news organization Cleveland.com/ Advance Ohio said:

> [Before the Internet], these stories would go into microfilm; they were findable but it wasn't that easy. Now we're the biggest platform in the state. If we've written about you and someone searches your name, whatever we have pops up first, no matter how old it is.

and also:

great-grandchildren, and they search for information about him, they will find the Article.

BuzzFeed, valued at over a billion and a half dollars when NBCUniversal invested $400 million in it[14], did not need further First Amendment protection to assist it in defending itself in this suit. In a world where many libel plaintiffs will be, like Mr. Leidig, a David facing off against a Goliath, it is not the time to deprive the Davids of their slings.

Point II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW

A. New First Amendment protections for media are not favored.

This Court has expressed its "general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.'" *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 n. 7, 106 S.Ct. 2505, 2514 n.7, 91 L.Ed.2d 202

> Does everything *really* have to be preserved on the internet forever? If you commit a minor, dumb crime when you're young, is it fair for articles about that crime to pop to the top of the Google results when a prospective employer searches your name—for the rest of your life?

[14] Matthew Ingram, "NBCUniversal Continues Its Creeping Takeover of BuzzFeed," Fortune.com, Oct. 21, 2016. https://www.fortune.com/2016/10/21/nbcuniversal-buzzfeed/

(1986) (quoting *Calder v. Jones,* 465 U.S. 783, 790-91, 104 S.Ct. 1482, 1487-88, 79 L.Ed.2d 804 (1984). That general reluctance counsels reversal in this case, to reject a special procedural protection for media libel defendants that will surely strip many libel plaintiffs of the ability to challenge the damage to their reputations.

B. Libel suits should be governed by standard summary-judgment rules.

So powerful was the language from *Celle* that it caused both the district court and the court of appeals to jettison the standard rules for determining a summary-judgment motion. The district judge evaluated Mr. Leidig's testimony as "self-serving and discredited," (App. B, App. 26), and the declaration of Mr. Hansen as "conclusory" and "unreliable." (App. 31). The appellate court echoed the "conclusory" evaluation of plaintiffs' testimonial evidence, and did not even discuss, if only to reject, plaintiffs' request that it take judicial notice of some material available on the Internet that gives the lie to BuzzFeed's assertions of fraud. (App. A., App. 6)[15]. In addition, it also held against plaintiffs a failure to offer "additional" proof of the truth of some individual CEN stories that the court apparently assumed would have had to exist had the stories been true. (*Id.,* App. 7). This weighing of evidence is improper on a motion for summary judgment. In *Anderson, supra,* this Court, while holding that the "clear and convincing" standard of

[15] Such material can be judicially noticed. *See, e.g., Patsy's Italian Rest. Inc., v. Banas,* 575 F. Supp.2d 427, 443 n. 18 (EDNY 2008), *aff'd,* 658 F.3d 254 (2d Cir. 2011).

proof required of a public-figure or public-official plaintiff on the issues of "actual malice" and falsity applies at the summary-judgment stage, made it clear that otherwise the standard rules of summary-judgment jurisprudence apply:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.*

477 U.S. at 255, 106 S.Ct. at 2513 (emphasis added). Indeed, the Court was unanimous on that point—the three dissenters were in accord that these rules apply, dissenting only from the application of the clear-and-convincing-proof standard at the summary-judgment stage.

The decision below is directly contrary to this court's decision in *Anderson,* and should not be allowed to stand.

Point III

THE DECISION BELOW IS AN ERRONEOUS READING OF *CELLE*

A. Other parts of the *Celle* opinion show that this reading is incorrect.

The language from *Celle* that resulted in this wholesale elimination of plaintiffs' evidence related to testimony, at a trial, of a libel plaintiff who alleged that an assertion that his business, a radio station, had been losing listeners and advertisers, was libelous and false. At the trial, he was asked only two questions about this. Asked if the statement was true, he answered "no;" asked whether it was true or false, he answered, "false." A Second Circuit panel, through Senior Eastern-District Judge Jack B. Weinstein, sitting by designation, held that that evidence was insufficient to raise a question as to the truth or falsity of the publication, stating:

> "While a bland, cryptic claim of falsity supported by the credibility of a witness might be sufficient to establish falsity in other civil cases, the First Amendment demands more."

(209 F.3d at 188). Citing this language, BuzzFeed successfully argued below that a libel plaintiff, charged with having done something bad, cannot create an issue of fact for the jury by declaring under penalty of perjury that he or she is not guilty of the charge.

That the interpretation of the language from *Celle* by the courts below is incorrect is demonstrated later in the *Celle* opinion itself, where Judge Weinstein,

ruling that plaintiffs had, through testimony, created an issue of fact as to the truth or falsity of a different libelous charge, wrote:

> With respect to the accusation that "AT & T is reportedly withdrawing is sponsorship of Radyo Pinoy" after having been "shortchanged of its allotted time slot," a reasonable juror evaluating the evidence could find—by both a preponderance of the evidence and by clear and convincing proof—that those statements were false. Celle swore that AT & T was not withdrawing its sponsorship of Radyo Pinoy and that AT & T was not being shortchanged on advertising time. He also testified that AT & T had never complained to Radyo Pinoy that it was being shortchanged. Finally, he testified that AT & T continued advertising with Radyo Pinoy, a matter which was not contested.

209 F.3d at 189.

What accounts for the distinction with which Judge Weinstein treated two aspects of Mr. Celle's testimony? It is that he found the former testimony, the mere answers "No" and "False," were without foundation. He stated:

> Celle's benign denials, in the absence of *at least* foundation testimony or extrinsic evidence, are not sufficient to satisfy the constitutional requirement that a public figure establish falsity.
>
> ***

> At a minimum, Celle should have laid a foundation for his bald assertion of falsity. For example, he could have discussed the advertising trends at Radyo Pinoi. He also could have introduced evidence detailing advertising volume or gross advertising sales for the period leading up to the second article without revealing proprietary information in a damaging way.

(*Id.,* 209 F.3d at 188, 189).

Thus, the holding that the "cryptic" denials were insufficient was a matter of applying standard evidence rules mandating a showing of personal knowledge*, see* Fed. Rules Evid. Rule 602,[16] not a matter of First Amendment law, and was, in any case, limited to suits brought by public figures. The decision below did not reach the question whether plaintiffs are public figures (App. 7), and plaintiffs argue they are not. (*See supra,* p. 11, n. 7).

In this case, Mr. Leidig's denial of the charge that he ever fabricated a story or made up a phony quote is made on his personal knowledge, and the testimony of his journalists regarding their work was similarly upon personal knowledge. This evidence should be afforded the same deference it would receive in every other kind of federal civil lawsuit.

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[16] Rule 602—Need for Personal Knowledge
A witness may testify in a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

B. The stated rationale for the rule cannot withstand scrutiny.

The court below echoes Judge Weinstein's reasoning, stating that to allow plaintiffs' denial of the truth of the libel to count as evidence would improperly shift the burden of proof. (App. 6-7). As discussed above, however, Judge Weinstein was considering evidence that failed to meet the test of Evidence Rule 602, that is, that was not evidence at all. Crediting it to require opposing evidence might be considered burden shifting, but here the testimony of Mr. Leidig and his employee as to whether or not they have falsified stories or quotes is clearly "evidence," because it is testimony made upon personal knowledge. Thus, there is no argument that the burden of proof is being shifted.

Point IV

A SUMMARY REVERSAL IS THE APPROPRIATE REMEDY

A. If not reversed, the decision below will cause irreparable harm.

If taken seriously, the decision below reinstitutes, just in libel cases, the early common-law rule now universally abolished of the disqualification of parties to testify in their own cases. Persons contemplating bringing a libel suit to attempt to clear their names against wealthy and powerful defendants like BuzzFeed already face the daunting prospect of a lengthy, difficult, and expensive lawsuit. The possibility that their own testimony might be discounted as a matter of law will add what may seem

to be an insurmountable obstacle to success even in a case with obvious merit. The cost in reputations, lives, and businesses destroyed, as Mr. Leidig's and his company's have been, will be immeasurable. Upon the abolition of such interested-witness disqualification in the courts of England during the 19th century, one commentary noted the cost of the exclusion of such evidence:

> It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into Court and there wrongly decided in consequence of the exclusion of evidence, but in numberless other cases in which parties silently submitted to wrongs from inability to avail themselves of proof, which, though morally conclusive, was in law inadmissible.

(Second Report of Her Majesty's Commissioners for Inquiry into the Process, Practice and System of Pleading in Superior Courts of Common law 10 (1853), quoted in J. Maguire, J. Weinstein, J. Chadbourn and J. Mansfield, "Evidence, Cases and Materials," pp. 229-30 (Foundation Press, 6th Ed. 1973).

Pursuant to Rule 16(1), this Court can dispose of a case summarily on the merits, and it should summarily reverse and remand in this case, to avoid such irreparable harm.

B. There is no credible contrary argument; BuzzFeed did not make one below.

Summary reversal is also appropriate because there is no credible counterargument. The only argument made on appeal by BuzzFeed in response to plaintiffs' argument that *Celle* had been misinterpreted by the district judge was to argue that plaintiffs' argument was "made up" because Judge Weinstein did not explicitly cite Evidence Rule 602, and to repeat the same quoted language. (Appellee's Brief, p. 36). There is no principled argument that a libel plaintiff's testimony on facts of which he or she has personal knowledge should get less credit on summary judgment than similar testimony by a party in any other kind of case.

C. The decision below is more important than it might appear to be.

At first blush it might appear that the decision below is not worth considering by this Court. It may appear to be a one-off, decided only by a Summary Order, in theory not precedent, whose holding that a libel plaintiff's testimony should be valued less than that of other plaintiffs is so foreign to American law, and perhaps so much the product of the unique factual situation in this case, including plaintiffs for whom the judges may have had (unwarranted) distaste, that it will simply disappear and not be heard of again.

Several facts that suggest the contrary should be noted however. First, the words in question from *Celle* were written by Hon. Jack B. Weinstein, a recognized authority on federal evidence, author of "Weinstein's

Federal Evidence." Second, the decision below explicitly considers and rejects plaintiffs' argument that the passage in *Celle* should not be read as a blanket devaluation of libel plaintiffs' testimony. (App. 6). Third, a member of the panel below is Hon. Dennis Jacobs, who was a member of the panel on *Celle,* dissenting on different grounds. Fourth, by the decision below, the Second Circuit, which includes New York City, the country's publishing and media center, and which is, therefore, perhaps the most important circuit court in the development of First Amendment law, has now interpreted the First Amendment in a way that will have to be considered by anyone contemplating a libel suit against a media defendant headquartered there.

And, finally, the decision below is significant because it fails to give sufficient weight to an important right—the right of a man or woman to protect his or her reputation from false defamation. That right was described by Justice Potter Stewart, concurring in *Rosenblatt v. Baer,* 383 U.S. 75, 92-93, 86 S.Ct. 669, 679-80, 15 L.Ed.2d 597 (1966) as follows:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. … The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for

> vindication or redress the law gives to a man whose reputation has been falsely dishonored.

CONCLUSION

Because the decision below erroneously interprets the decision in *Celle* as providing a new First Amendment defense to media defendants in libel suits, according the testimony of a libel plaintiff denying, upon his own knowledge, that the libel is true no power to create an issue of fact as to the libel's truth or falsity, a defense that conflicts with decisions of this Court, it should be summarily reversed, and the case remanded for reconsideration of BuzzFeed's motion for summary judgment, according plaintiffs' evidence the same consideration it would receive in any other sort of civil case in federal court.

Respectfully submitted,

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