No. _____

In The Supreme Court of the United States

MURPHY J. PAINTER
Petitioner,

v.

SHANE EVANS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The questions presented are:

1. Does the First Amendment to the United States Constitution apply to government speech, such that defamatory government speech constitutes an act in furtherance of of a right to free speech under the United States Constitution?

2. Does government speech become "protected speech" under the First Amendment to the United States Constitution solely on the basis that the target of the defamatory speech is a public figure?

3. If the criteria in *New York Times v. Sullivan* apply to the circumstances of this case such that constitutional protections for speech and press limit the state court's power to award damages in a libel action brought by a public official against a government employee speaking in the course and scope of his government position, does it also divest the public official of any remedy whatsoever, including the right to seek a judgment from the Court that the speech at issue was defamatory?

PARTIES TO THE PROCEEDINGS

Murphy J. Painter is the Petitioner and was the Respondent/Plaintiff in the proceedings below. Shane Evans is the Respondent and the Applicant/Defendant in the proceedings below. Other parties to the action below who are not made parties to this Petition for Writ of Certiorari are The Louisiana Office of Inspector General; Inspector General Stephen Street; Brant Thompson; and Louis Thompson.

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The Louisiana Supreme Court's denial of Petitioner's Application for Writ of Certiorari is unpublished. The Louisiana First Circuit's Decision has not yet been published, and it is unknown whether it will be designated for publication. The 19th Judicial District Court's denial of Respondent's *Special Motion to Strike* is unpublished.

JURISDICTION

On December 26, 2018, the Louisiana First Circuit Court of Appeal issued its decision on Respondent Shane Evans's Application for Supervisory Writ, granting the writ in part and reversing the District Court's denial of his Special Motion to Strike Petitioner Murphy Painter's defamation claim, and dismissing that claim with prejudice. In the same decision, the First Circuit denied the writ application as to the District Court's denial of the Special Motion to Strike Petitioner Murphy Painter's Fourth Amendment and abuse of process claims on the basis that those claims were not subject to a special motion to strike. However, the Court concurrently issued a decision granting Respondent Shane Evans's writ application challenging the District Court's denial of his Exception of No Cause of Action as to those claims, reversing the District Court, and dismissing those claims with prejudice. There are no pending claims against Evans remaining below.

Mr. Painter timely filed an Application for Rehearing on the judgment granting the writ and

dismissing his defamation claim. The Application for Rehearing was denied on January 17, 2019.

Mr. Painter timely filed an Application for Writ of Certiorari with the Louisiana Supreme Court. The decree of the Louisiana Supreme Court denying the writ application and refusing to exercise its discretionary authority over the decision of the Louisiana First Circuit Court of appeal was issued on April 8, 2019.

This Court's jurisdiction is invoked under Article III, Section 2 of the United States Constitution and 28.U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

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

U.S. Const. art. III, §2, cl.1

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

La. Const. art. I, §22

§22. Access to Courts- All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

28 U.S.C. 1257(a)
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

La. Code Civ. P. art. 971(A)(1)
A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.

La. Code Crim. P. art. 162
A. A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.
B. In any application for warrant, an affidavit containing the electronic signature of the applicant shall satisfy the constitutional requirement that the testimony of the applicant be made under oath, provided that such signature is made under penalty of perjury and in compliance with R.S. 9:2603.1(D).

C. A search warrant shall particularly describe the person or place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search or seizure.

LSA-R.S. 49:220.5
Except for the reports of investigations released as provided in R.S. 49:220.24(C)(6), the records prepared or obtained by the inspector general in connection with investigations conducted by the inspector general shall be deemed confidential and protected from disclosure.

LSA-R.S. 49:220.24(F)(3)
The inspector general shall have access to all records, information, data, reports, plans, projections, matters, contracts, memoranda, correspondence, and any other materials of a covered agency . . .

STATEMENT OF THE CASE

Murphy J. Painter seeks review of the Louisiana First Circuit Court of Appeals' decision on application for supervisory writ. The Louisiana First Circuit reversed a district court's denial of Respondent Shane Evans's *Special Motion to Strike* and dismissed Mr. Painter's defamation claim with prejudice.

Mr. Painter's defamation claims against Evans stem from false representations of "fact" Evans made in a warrant application in his capacity as an investigator for the Louisiana Office of Inspector General (OIG). Evans made numerous false statements in a warrant application affidavit that he

presented to the Court, including false statements of criminal conduct by Mr. Painter that he attributed to Ms. Kelli Suire.

The threshold issue in a special motion to strike under Louisiana law requires the court to determine an issue of constitutional law: whether the cause of action arises from an act of the defendant in furtherance of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue. La. Code Civ. Proc. art. 971 (A)(1). Reversing the district court and granting the special motion to strike required the Louisiana First Circuit to ignore United States Supreme Court precedent that when public employees make statements pursuant to their official duties, the employees do *not* enjoy First Amendment protection because they are not speaking as citizens, and that "the Constitution does not insulate their communications." *Garcetti v. Ceballos*, 547 U.S. 410, 421, 426 (2006). Although the Louisiana First Circuit acknowledged that Evans's statements were made in the course and scope of his duty as an OIG Investigator, it held:

> Murphy J. Painter alleged two causes of action arising from statements Shane Evans made in a search warrant application and his Office of Inspector General investigative report ***in furtherance of his First Amendment rights*** and in connection with a public issue… Thus, the burden shifted to Murphy J. Painter to demonstrate likelihood of success on the merits

of these two claims.[1] [Emphasis Supplied]

This case originated after Plaintiff/Applicant Murphy Painter was charged criminally with 42 counts of computer fraud, false statements, and aggravated identity theft following an OIG investigation of Mr. Painter conducted by Evans. Inspector General Stephen Street recently acknowledged under oath that the Justice Department's prosecution of Mr. Painter was based on Evans's OIG investigation. It was not an independent Justice Department investigation.

On the eve of Mr. Painter's federal trial, the Justice Department dismissed ten of the counts because it became clear that Evans falsely stated that Mr. Painter misrepresented the purpose for conducting five different enquires. At the end of the trial, the Court dismissed the aggravated identity theft charges after determining that the statute Mr. Painter was accused of violating did not apply to his alleged conduct on its face. The remaining twenty-nine

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[1] The standard is not "*likelihood* of success on the merits," it is "*a probability* of success on the claim." Even if Evans's statements as a government employee in the course and scope of his duty was protected by the first amendment, requiring Mr. Painter to prove at the pleading stage, before discovery that he is "likely" to prevail unconstitutionally denies Mr. Painter of due process, as the Louisiana Constitution establishes a right to reputation, and guarantees that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, ***for injury to him in his*** person, property, ***reputation***, or other rights." La. Constitution, art. I, §22. Emphasis supplied.

counts went to the jury, and the jury returned a "not guilty" verdict on all counts.

After Mr. Painter was acquitted, he instituted an action against various parties who either orchestrated or were involved in his ordeal. His suit included claims against the Office of Inspector General and Inspector General Street, including claims for defamation based on, *inter alia*, false accusations of criminal conduct both in a warrant application prepared by Evans and in the OIG investigation report.

Mr. Painter added Evans as a defendant in this proceeding, asserting defamation and 42 U.S.C. §1983 claims, after Evans testified in a separate Federal Court proceeding that he had supplied the statements regarding "harassment" and the crime of "staking" that he attributed to Suire in the warrant application. It was not until Evans testified in the Federal proceeding about his investigation and the warrant application in that Mr. Painter began to see the extent of Evans's culpability in the defamation and Mr. Painter's prosecution. Until that time, Mr. Painter had no reason to believe that Ms. Suire had not made the statements attributed to her in the warrant application.

La. Code Crim. P. art. 162 requires that the affidavit for a warrant recite *facts* establishing the cause for the issuance of the warrant. Evans, however, concocted the statements of criminal activity, including those he attributed to Suire. Evans attested, *inter alia*, that the OIG had conducted an

investigation into the crime of "stalking" and computer tampering, referred to "female stalking victims pursued by Mr. Painter," referred to Suire multiple times as the "stalking victim," and represented in the affidavit that Suire provided a statement "that she had been staked and harassed by Painter during and after her employment at ATC."

Additionally, Evans included "sensational" statements that were no statements of "fact," such as referring to Mr. Painter's "continued obsession with [Suire]." Evans also attested in the warrant affidavit that "[i]ndependent interviews conducted with two La. ATC law enforcement officers have substantiated the stalking victim's allegations as to Painter's stalking of the victim . . ."

Evans subsequently admitted under oath in federal court that those representations were false. He testified that Suire never told him that she had been stalked and harassed by Mr. Painter, and that the context of Suire's statement was *not* that she had been stalked and harassed. He specifically testified that Suire was actually very careful *not* to use the words "stalked" or "harassed" during the investigative interviews. He admitted that those false statements of "fact" were his, not Suire's.

Evans also stated in the warrant affidavit that Suire had filed a complaint with the Louisiana Department of Revenue (LDR) but omitted that the investigation report stated that Suire explicitly denied that Mr. Painter had sexually harassed her. Rather, Suire's LDR complaint was about Mr.

Painter's management style.

There were numerous other falsities attested to by Evans, not only in the warrant application affidavit, but also in the warrant return. The warrant application affidavit was submitted on Monday, August 16, 2010. In the application, Evans informed the Court that the OIG had conducted an investigation into the crime of stalking and computer tampering, and he provided specific confidential details of the investigation and contents of the OIG's records of the investigation in the application. Evans attested that probable cause existed for the issuance of a search warrant for Mr. Painter's former office and the seizure of certain equipment specifically identified as state property, including the laptop computer, desktop computer, blackberry, and vehicle. Evans described Mr. Painter's former office as the location "where the evidence of the crime of Stalking and Computer Tampering as defined in La. R.S. 14:40.2 and 14:73.7 is located . . ." Those representations were false. As the following timeline indicates, Evans knew at the time that he executed the warrant affidavit that all the items listed were already in the possession or control of the OIG and the State Police.

On August 4, 2010, Mr. Painter sent ATC employee Mr. Brant Thompson a letter of reprimand associated with leaving his post of duty in July of 2010. That same day, Suire, who was close with Thompson, filed a complaint with the OIG.[2] On

[2] The actions leading up to the complaint to the OIG, and after,

August 9, 2010, Suire met with an OIG auditor and provided further detail about her complaints. Evans was assigned to investigate her complaint on August 10, 2010. Evans and the Chief OIG Investigator, Greg Phares, met with Thompson, on August 11, 2010. On August 12, 2010, he advised Inspector General Street of his "findings."

On Friday, August 13, 2010, Mr. Painter was summoned to the Governor's Office, where he met with the Governor's Executive Counsel, the head of the Louisiana State Police, and another member of the Governor's Executive Counsel Staff. Mr. Painter was informed that an unidentified law enforcement agency (now known to be the OIG) was investigating him for alleged criminal wrongdoing, and that the Governor was asking for his resignation as Commissioner of the Louisiana Office of Alcohol and Tobacco Control. Mr. Painter refused to resign and was terminated.

Mr. Painter was prohibited from returning to his office and he was not permitted to remove any personal materials that he had in his office at ATC. He was required to turn over the keys to his state-owned Dodge Charger and was forced to find alternate transportation home. The State Police took possession of the keys, vehicle, laptop computer, Blackberry, and other state-owned items that were assigned to Mr. Painter.

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were not merely coincidental. However, for purposes of this Petition for Writ, the facts involving the collusive efforts of the individual involved, including Evans, are not material.

Evans proceeded to Mr. Painter's office, where he removed the desktop computer assigned to Mr. Painter from the ATC building that evening, sealed Mr. Painter's office, and transported the desktop computer to his own office. *Three days later*, Evans filed the warrant application affidavit specifically enumerating the seizure of the laptop computer, desktop computer, blackberry, and vehicle . . . *all of which had already been seized*. His affidavit, however, stated that this "evidence" was at Mr. Painter's office. Evans subsequently executed a return on the warrant and filed it with the Court, falsely attesting that those items were seized from Mr. Painter's office in accordance with the warrant on August 16, 2010.

The Application for Warrant was gratuitous and unnecessary because the equipment and locations sought to be searched were the property of the State of Louisiana, not Mr. Painter's. By statute, the inspector general has access to all records, information, data, reports, plans, projections, matters, contracts, memoranda, correspondence, and any other materials of a covered agency. LSA-R.S. 49:220.24(F)(3). The OIG not only had full and complete access to the items and information sought in the warrant application by operation of law, but also already had physical possession or control of the enumerated items.

By law, OIG investigations and the information gathered during such investigations is confidential, except for the reports of investigations released at the completion of the investigation. LSA-R.S. 49:220.5.

The result of seeking and obtaining this unnecessary warrant was that details regarding the investigation, which by law are required to remain confidential, became public. Not coincidentally, the news media was "tipped off" to the filing of the warrant application, obtained a copy from the court records, and immediately reported the salacious, defamatory, details of the warrant application.

The circumstances surrounding the issuance of the warrant based on Evans's false affidavit are significant to the substance of this Petition. Mr. Painter discusses, *infra*, the applicability of the "qualified privilege" analysis to this case. By no means does the outcome of the analysis apply only to the specific circumstances of this case. However, as "actual malice" and "qualified privilege" are often conflated, the circumstances of this case serve to highlight why "qualified immunity" as a defense is the appropriate standard where defamatory speech by a public employee is not protected by the First Amendment.

Mr. Painter raised the due process issues at every level of the state proceedings below.

Evans filed multiple exceptions of no cause of action, alleging that under the facts alleged in his petition, Mr. Painter had not stated a cause of action for defamation because those facts, if taken as true, do not establish "actual malice" as required by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In response to each of those exceptions (and in response to motions and exceptions filed by the OIG

prior to Evans being added as a defendant), as well as in response to each of the various writ applications filed by Evans and in support of Mr. Painter's applications for writs to the Louisiana Supreme Court, Mr. Painter addressed in detail this Court's holding in *Garcetti v Ceballos* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."

In addressing the various exceptions and writ applications, Mr. Painter addressed the impact of *Garcetti v. Ceballos* and other decisions on applicability of the "actual malice" standard; that is, absent a defendant's exercise of a First Amendment right, *New York Times's* requirement that the plaintiff in a defamation case must prove "actual malice" does not apply. Rather, the Defendant must assert a defense of "qualified privilege." Only after the defense is properly and adequately raised would the burden shift to Mr. Painter to establish abuse of the privilege.

Mr. Painter further raised the issue that even if the *New York Times* "actual malice" standard does apply, it only addresses that standard as it applies to the state's ability to impose monetary damages. It does not prohibit access to the courts to obtain a judgment vindicating a plaintiff's reputation. Mr. Painter argued that this is particularly true when, as is here, the State Constitution guarantees access to the Courts and adequate remedy for damage to reputation.

Despite Mr. Painter consistently raising the

argument, the courts would not address the issue. The district court ruled without addressing the argument, instead applying the "actual malice" standard. Twice the district court granted the exception but ordered the petition amended to meet the "actual malice" standard. The third time, the district court denied Evans's exception, ruling that Mr. Painter had stated a cause of action based on the "actual malice" standard.

Evans then filed an application for supervisory writ with the Louisiana First Circuit, arguing that Mr. Painter did not meet the standard for stating a cause of action under the "actual malice" standard. Mr. Painter raised the First Amendment issue as it relates to the "actual malice" standard. The Court granted the writ, reversed the district court, granted the exception, and dismissed the claim, applying the "actual malice" standard. The First Circuit did not address the First Amendment issue in its ruling.

Mr. Painter filed a writ application with the Louisiana Supreme Court, again raising the First Amendment issue. The Louisiana Supreme Court granted the writ and reversed the First Circuit. The reversal, however, was on the basis that Mr. Painter should have been afforded the opportunity to again amend his petition to state a cause of action under the "actual malice" standard. The Louisiana Supreme Court did not address the First Amendment issue.

On remand, Mr. Painter amended his petition yet again. In an attempt to have the courts cease ignoring the First Amendment issue, Mr. Painter pointed out

to the Court that if Evans believed he was exercising his First Amendment right, he would have filed a special motion to strike rather than an exception of no cause of action. Evans responded by filing his *Special Motion to Strike*. That Special Motion to Strike is the motion that ultimately resulted in the dismissal of Mr. Painter's claims and that is the subject of this petition.

On the hearing of the *Special Motion to Strike*, Mr. Painter again addressed in detail the holdings of this Court related to the First Amendment and government employees speaking in the course and scope of their employment. The District Court did not rule on the issue, instead ruling that Mr. Painter established a probability of success on the merits. Appendix A. Evans sought a writ, which was granted and which reversed the district court, granting the Special Motion to Strike and dismissing Mr. Painter's claim with prejudice. Appendix C. Mr. Painter raised cited *Garcetti*, but the First Circuit nonetheless ruled Evans was exercising a First Amendment right. Mr. Painter raised the issue in detain both in his request for rehearing, which was denied (Appendix D) and in his application for supervisory writ to the Louisiana Supreme Court, which was also denied (Appendix E).

REASONS FOR GRANTING THE PETITION

> *"We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."*

This opening line from *New York Times v. Sullivan* set the scope of the question regarding the relationship between the First Amendment and defamation actions. It forms the basis for each analysis by this Court on defamation since. Significantly, the Constitutional restriction recognized in the question and, ultimately, in this Court's answer to the question, was under what circumstances, if any, a State could impose monetary damages for defamation against a public official. The exercise of the First Amendment right to free speech was the basis for the question. It was not a fact irrelevant to the issue.

In *Starr v. Boudreaux,* 978 So.2d 384 (La. App. 1 Cir. 2007), the Louisiana First Circuit similarly framed the issue, prefacing its analysis by stating "[i]n cases involving statements made about a public figure, ***where constitutional limitations are implicated***, a plaintiff must prove actual malice . . ." Acknowledging this Court's precedent on the issue, the Louisiana First Circuit went on to say:

> Particularly, Starr contends that these five statements are defamatory *per se*, and therefore, he does not need to establish falsity, malice or injury, as those elements are presumed. However, the Louisiana Supreme Court has recognized that the legacy of United States Supreme Court decisions regarding defamation is that '***the protections afforded by the First Amendment supersede the common law presumptions of [malice],***

> ***falsity, and damages with respect to speech involving matters of public concern, at least insofar as media defendants are concerned***.' *Kennedy*, 05-1418 at p. 8, 935 So.2d at 677 (referring to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Starr, 978 So.2d at 390 (emphasis supplied).

That analysis of United States Supreme Court and Louisiana Supreme Court precedent held firm; that is, until Mr. Painter, in a case with extensive political implications, pointed out to the Court that this is not a case "where constitutional limitations are implicated" because Evans was speaking as a government employee in the course and scope of his government duties. Now, the Louisiana courts either fail to grasp the significance of this Court's precedent established in *Garcetti v. Ceballos* or choose to ignore that binding precedent.

The issues in this case do not just impact Mr. Painter. They have profound national significance. Mr. Painter does not call for a dismantling or rejection of *New York Times v. Sullivan* or its progeny, but rather a clarification or limitation on the unfettered expansion of its premise. Rulings by this Court intended to prevent the chilling of free speech by public officials with power and influence are being turned on

their head. Anti-SLAPP laws intended as a shield, such as Louisiana's *Special Motion to Strike*, are increasingly being used as a weapon, particularly by those with power and influence against "public figures" without such power and influence.

1. *Statements by government employees made pursuant to their official duties do not enjoy First Amendment protection because the government employees are not speaking as citizens. Such speech therefore does not constitute an act in furtherance of a First Amendment right to free speech.*

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court was faced with determining whether a public employee was improperly disciplined in violation of his First Amendment right to free speech. In a slight twist of irony, the speech at issue was the employee's memorandum to his supervisor conveying his concern over misrepresentations in an affidavit used to obtain a search warrant.

This Court held that two inquiries guide interpretation of the constitutional protections accorded public employee speech. The threshold inquiry requires determining whether the employee spoke as a citizen on a matter of public concern. *Id.* at 418, *citing Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*., 391 U. S. 563, 568. If the answer to the threshold inquiry is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. *Id.*, *citing Connick v. Myers*, 461 U. S. 138, 147. If the answer to the

threshold inquiry is yes, the possibility of a First Amendment claim arises, and the analysis moves to the second question, which in *Garcetti* was whether the government employer had adequate justification for treating the employee differently from any other member of the general public. *Id.*

This Court did not get beyond the threshold inquiry. It held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the employee's expressions at issue were made pursuant to his duties as a prosecutor. *Id.* at 421.

The Louisiana Special Motion to Strike likewise entails making a threshold inquiry of whether the mover was exercising a Constitutional right to free speech. If the answer is no, the inquiry ends there and the special motion to strike must be denied. If the answer is yes, the analysis moves to the second question, which is whether the plaintiff has established a probability of success on the claim.

The threshold issue is the same in this case as it was in *Garcetti*: when public employees make statements pursuant to their official duties, are they speaking as citizens for First Amendment purposes? Evans argues in the proceedings below that *Garcetti* was not applicable because it was not a defamation case. However, because the First Amendment question is a *threshold* inquiry in both instances, the nature of the action (or the inquiry to follow) makes no difference. The answer to the question in either case

is the same: when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.

Regarding why this Court should grant the petition for writ, clarifying the First Amendment issues in this case has great significance beyond Mr. Painter's case and beyond special motions to strike or other anti-SLAPP actions. As the judgments on the various exceptions of no cause of action exceptions prior to the judgment on the special motion to strike bear out, absent a clarification of *New York Times* and its progeny, public figure plaintiffs who have been defamed by government employees or the government itself improperly have the burden shifted to them to prove "actual malice" at the petitioning stage and, if the plaintiff survives a no cause of action or special motion to strike, during the following proceedings.

At one point the Louisiana Supreme Court was came close to recognizing the issue, and had the issue been raised, the analysis might have been different. In *Kennedy v. East Baton Rouge Parish Sheriff's Office*, 935 So. 2d 669 (La. 2006), a landmark defamation case in Louisiana, the Louisiana Supreme Court quoted from its analysis in *Trentecosta v. Beck*, 703 So. 2d 552 (La. 1997), stating:

> In the course of our examination, we noted that the constitutional restraints imposed on the tort of defamation by virtue of the *New York Times* decision have called into question the continued viability of the conditional or qualified privilege . . . Arguably, conditional

> [qualified] privileges have lost their significance under the current state of the law which requires the offended person to prove the publisher's fault with regard to the falsity of the statement . . .

This case establishes that qualified privileges have *not* lost their significance in defamation actions against government employees speaking in the course of their duties, as they have no First Amendment protection. The Louisiana Supreme Court's statement in that regard was colored by its misinterpretation that the only factor in a defamation case under *New York Times* is whether the plaintiff is a "public figure," apparently assuming all speech has First Amendment protection.

Not every defamation case involves the exercise of First Amendment rights, however. The "constitutional restraints imposed on the tort of defamation by virtue of the *New York Times* decision" do not apply to public employees whose statements are not afforded First Amendment protection, and under this Court's ruling in *Garcetti*, there are no First Amendment rights implicated in this case.

Far from extending First Amendment protection to government speech and eliminating conditional privilege as a defense, in *New York Times* this Court described its ruling as "appropriately analogous" to the privilege afforded to public officials when sued for defamation. The "qualified privilege" privilege defense is alive and has not lost its significance, and Mr. Painter's defamation claim should likewise be alive.

Qualified privilege is a *defense* that must be pleaded. Once the defense is properly pleaded, the plaintiff must establish the defendant's abuse of the privilege. *Trentecosta v. Beck*, 703 So. 2d This is an extremely important distinction, in that defamation suits against public officials are not subject to Anti-SLAPP statutes such as Louisiana Code Civ. Proc. art 971.

2. *Government speech does not become "protected speech" under the First Amendment to the United States Constitution simply because the target of the speech is a public figure.*

In the hearing on the special motion to strike and in its writ application, Evans focused on Mr. Painter's status as a former public official, asserting that status alone requires application of *Sullivan* and the burden to prove "actual malice." To the extent that was the basis of the First Circuit's ruling, not only does the first sentence of the opinion in *Sullivan* refute that contention, but this Court specifically rejected the same argument in *Garcetti*.

In reversing the United States Ninth Circuit in *Garcetti*, this Court focused on the Ninth Circuit's conclusion that the subject of the public employee's memo was "inherently a matter of public concern." This Court ruled that the Ninth Circuit erred in reaching that conclusion because it did not first "consider whether the speech was made in [the public employee's] capacity as a citizen." *Garcetti*, 547 U.S. at 416 Noting that Supreme Court precedent "instructs courts to begin by considering whether the expressions

in question were made by the speaker 'as a ***citizen*** upon matters of public concern,'" this Court specifically addressed the fact that the Ninth Circuit ignored Supreme Court precedent and instead relied on its own precedent that rejected the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.* at 415-16; *citing Connick v. Myers*, 461 U. S. at 146-47.

The Louisiana First Circuit's conclusion that Evans's statements in his capacity as a government employee are "in furtherance of his First Amendment rights" conflicts with the clear binding precedent of this Court. Although there are Louisiana cases in which the burden of proving "actual malice" has been placed on "public figure plaintiffs" in actions against government defendants, the issue that government defendants have no First Amendment protection has never been raised and addressed in *any* of those cases.

It is absurd to conclude that Mr. Painter is prohibited from raising the issue, and the courts prohibited from addressing the issue, merely because attorneys on earlier cases failed to recognize and raise the issue. This is particularly absurd in civil law, under which Louisiana operates. Such a conclusion not only fails under the principle of *stare decisis*, which does not apply in Louisiana, but fails miserably and tears at the heart of the principles of civil law and *jurisprudence constante*, which supposedly is the keystone of Louisiana law.

3. *This Court has not changed the elements constituting defamation.*

Under no interpretation of *New York Times v. Sullivan* or its progeny can this Court be said to have changed the elements of the tort of libel, or defamation. Rather, this Court has defined the parameters under which a state court can award *damages* in an action brought by a public official against critics of his official conduct. This is a distinction *with* a difference.[3]

In defamation actions brought by public officials or public figures, state courts have had a tendency to lazily and sloppily equate this Court's holding that the Constitution limits a State's power to award monetary damages in certain situations with a conclusion that this Court has changed the elements of defamation to include "actual malice." Rather, it limited the circumstances in which a public figure plaintiff can recover monetary damages for defamation due to Constitutional restrictions on punishing free speech.

Under *New York Times* and its progeny, the elements of defamation have not changed, but the bar was raised ***for recovery of monetary damages*** by public officials who have been defamed when First Amendment rights are implicated. As stated by Justice Stewart in his concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National*

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[3] As opposed to a distinction without a difference, which is a type of logical fallacy where an author or speaker attempts to describe a distinction between two things where no discernible difference exists.

Committee, 412 U.S. 94, (1973), "the First Amendment protects the press from government, but that "it confers no analogous protection on the Government." As explained in n.7, "Government is not restrained by the First Amendment from controlling its own expression."

4. *This Court did not divest public officials or public figures of the right to seek a ruling from the courts that the speech at issue was defamatory.*

The issue before this Court in *New York Times* was "the extent to which the constitutional protections for speech and press ***limit a State's power to award damages*** in a libel action brought by a public official against critics of his official conduct." *New York Times*, 376 U.S. at 279-80 (emphasis supplied). This Court concluded that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official ***from recovering damages*** for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice." *New York Times*, 376 U.S. at 279-80 (emphasis supplied).

The unanswered question is whether a public official must be allowed to proceed in the hopes of obtaining at least a non-monetary remedy, such as a judgment protecting his reputation. This is particularly significant in a state such as Louisiana, where the State Constitution establishes a right to access to the Courts to protect one's reputation.

La. Const. art. I, §22 guarantees access to the

courts, providing that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." This Court's ruling in *New York Times* and subsequent rulings do not appear to foreclose pursuit of such remedies.

Further, this Court has not addressed the issue of whether such right under a State Constitution to protect one's reputation affects the ability of the State to impose monetary damages for defamation.

CONCLUSION

For the reasons stated above, Mr. Painter's Petition for a Writ of Certiorari should be granted.

APPENDIX A

Minute Entry with Ruling from the Court

No. 604-308
Murphy J. Painter vs. State of La. et al.

This matter came before the Court for Shane Evans' Special Motion to Strike. Present in Court: Robert Aguiluz, counsel for plaintiff, Neshira Millender, counsel for the Louisiana Inspector General, Shane Evans; Carolyn Cole, counsel for Brant Thompson. The matter was argued by counsel and the matter was submitted to the Court.

Whereupon, the Court took this matter under advisement

"The Court is of the opinion that the probability of success has been demonstrated by plaintiff which the Court finds that he must demonstrate which is merely that the complaint is both legally sufficient and supported by sufficient prima facie showing of facts to sustain a favorable judgment. Consequently, the Court denies the Special Motion to Strike. Ten days to take writs. Notify Counsel."

(Lori Achee, Monday, May 21, 2018)

APPENDIX B
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

MURPHY J. PAINTER **NO. 604,308**

VERSUS

STATE OF LOUISIANA, ET AL **DIVISION D**

JUDGMENT

The matter came before the Court on May 21, 2018 on a Special Motion to Strike filed on behalf of Shane Evans ("Mr. Evans"). Present in court were Robert N. Aguiluz, appearing on behalf of Murphy J. Painter ("Mr. Painter"): Ne'Shira D. Millender and Katie D. Bowman, appearing on behalf of Shane Evans ("Mr. Evans"): and Carolyn Cole, appearing on behalf of Brant Thompson. The Court took the matter under advisement. On May 21, 2018, the Court issued a written ruling denying Shane Evans' Special Motion to Strike.

CONSIDERING the applicable law, the pleadings filed by the parties, the memoranda in support of same, and the arguments of all counsel present, and in accordance with the written ruling issued by this Honorable Court on May 21, 2018:

IT IS ORDERED, ADJUDGED, AND DECREED that Shane Evans' Special Motion to Strike is DENIED.

JUDGMENT RENDERED on May 21, 2018, and READ and SIGNED at Baton Rouge, Louisiana, this 22 day of Aug, 2018.

/s/: Janice Clark
JUDGE JANICE CLARK
19th JUDICIAL DISTRICT COURT

APPENDIX C

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

MURPHY J. PAINTER NO. 2018 CW 1289

VERSUS

STATE OF LOUISIANA, THROUGH THE OFFICE OF THE GOVERNOR, THE DEPARTMENT OF REVENUE AND TAXATION, ALCOHOL TOBACCO CONTROL COMMISSION, CYNTHIA BRIDGES, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, THE OFFICE OF STATE INSPECTOR GENERAL, AND STEPHEN STREET, IN HIS OFFICIAL CAPACITY AS STATE INSPECTOR GENERAL

DEC 26 2018

In Re: Shane Evans, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 604308.

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

WRIT GRANTED IN PART WITH ORDER; DENIED IN PART. The district court's May 21, 2018, judgment denying Shane Evans' Special Motion to Strike is hereby reversed in part. "A cause of action

against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim." La. Code Civ. P. art. 971(A)(1). If the mover on a special motion to strike makes a prima facie showing that his comments were constitutionally protected and in connection with a public issue, the burden shifts to the plaintiff to demonstrate a probability of success on the claim. **Shelton v. Pavon**, 2017-0482 (La. 10/ 18/ 17), 236 So. 3d 1233, 1237. Murphy J. Painter alleged two causes of action arising from statements Shane Evans made in a search warrant application and his Office of Inspector General investigative report in furtherance of his First Amendment rights and in connection with a public issue: defamation and deprivation of a Fourteenth Amendment right. Thus, the burden shifted to Murphy J. Painter to demonstrate likelihood of success on the merits of these two claims. In his opposition to Shane Evans' Special Motion to Strike, Murphy J. Painter failed to timely submit any evidence in support of his Opposition to Shane Evans' Special Motion to Strike. Argument of counsel and briefs, no matter how artful, are not evidence." **Regan v. Caldwell**, 2016- 0659 (La. App. lst Cir. 4/ 7/ 17), 218 So. 3d 121, 128, writ denied, 2017- 0963 (La. 4/ 6/ 18), 239 So. 3d 827. Failure to produce supporting affidavits or otherwise competent evidence is insufficient to overcome a special motion to strike. Id. Therefore, Murphy J. Painter failed to demonstrate a likelihood of success on the merits as to his

defamation and Fourteenth Amendment claims against Shane Evans. As such, Shane Evans' Special Motion to Strike is hereby granted as to these claims, and they are dismissed with prejudice. Murphy J. Painter' s Fourth Amendment and abuse of process claims do not arise from any act of Shane Evans in furtherance of his right of petition or free speech and therefore are not subject to a special motion to strike. Shane Evans' Special Motion to Strike is therefore denied as to these claims.

Louisiana Code of Civil Procedure article 971(B) provides that a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs. This matter is remanded to the district court for a determination of the amount of reasonable attorney fees and costs to be awarded to defendant, Shane Evans.

JMG
MRT
AHP

APPENDIX D

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

MURPHY J. PAINTER NO. 2018 CW 1289

VERSUS

STATE OF LOUISIANA, THROUGH THE OFFICEOF THE GOVERNOR, THE DEPARTMENT OF REVENUE AND TAXATION, ALCOHOL TOBACCO CONTROL COMMISSION, CYNTHIA BRIDGES, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, THE OFFICE OF STATE INSPECTOR GENERAL, AND STEPHEN STREET, IN HIS OFFICIAL CAPACITY AS STATE INSPECTOR GENERAL

JANUARY 17, 2019

In Re: Murphy J. Painter, applying for rehearing, 19th Judicial District Court, Parish of East Baton Rouge,
No. 604308.

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

APPLICATION FOR REHEARING DENIED

JMG

MRT

AHP

APPENDIX E

THE SUPREME COURT OF THE STATE OF LOUISIANA

MURPHY J. PAINTER NO. 2019 CC 0283

VERSUS

STATE OF LOUISIANA, THROUGH THE OFFICE OF THE GOVERNOR, THE DEPARTMENT OF REVENUE AND TAXATION, ALCOHOL TOBACCO CONTROL COMMISSION, CYNTHIA BRIDGES, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, THE OFFICE OF STATE INSPECTOR GENERAL, AND STEPHEN STREET, IN HIS OFFICIAL CAPACITY AS STATE INSPECTOR GENERAL

IN RE: Murphy J. Painter- Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court, No. 604,308, to the Court of Appeal, First Circuit, No. 2018 CW 1289;

April 8, 2019
Denied

JLW
BJJ
GGG
MRC
SJC
JTG

HUGHES, J., would grant.