No. 19-731

In the
Supreme Court of the United States

PANCHO'S LLC,

Petitioner,

v.

JAMES T. HUGHES, MARGARET RITCHIE, JOYCE ROBINSON, TERRI RANSON, JAMES MCCOY, MARSHA GEYER, KEITH KING, JUDITH MILLER, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES AS MEMBERS OF THE JACKSON COUNTY BOARD OF HEALTH, JONATHAN GRAZIANI, INSPECTOR FOR THE JACKSON COUNTY HEALTH DEPARTMENT, SUSAN HOSAFLOOK, ADMINISTRATOR OF THE JACKSON COUNTY HEALTH DEPARTMENT, JACKSON COUNTY BOARD OF HEALTH, BY CORPORATE AND POLITIC, JOHN DOE #1, IN INDIVIDUAL AND OFFICIAL CAPACITY, AND JOHN DOE #2, IN INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

1. Did the Supreme Court of Appeals of West Virginia err when it applied the well-established standard of *Paul v. Davis*, 424 U.S. 693 (1976) and held that the 2005 FDA Model Food Code, adopted by the State of West Virginia for health inspections of establishments serving food, does not create a present enjoyment of reputation or entitlement to goodwill as the "more tangible interest" necessary to trigger the protections of the Due Process Clause of the Fourteenth Amendment?

CORPORATE DISCLOSURE STATEMENT

Respondents, the Jackson County Board of Health and the Jackson County Health Department, are governmental entities and are not private corporate entities. The individual Respondents are employees or members of the Board of Directors for those two governmental entities.

STATEMENT OF RELATED PROCEEDINGS

In the Circuit Court of Jackson County, West Virginia:
Civil Action No. 13-C-98
PANCHO'S LLC, Plaintiff, v. JAMES T. HUGHES, MARGARET RITCHIE, JOYCE ROBINSON, TERRI RANSON, JAMES MCCOY, MARSHA GEYER, KEITH KING, JUDITH MILLER, in Their Official and Individual Capacities as Members of the Jackson County Board of Health, JONATHAN GRAZIANI, Inspector for the Jackson County Health Department, SUSAN HOSAFLOOK, Administrator of the Jackson County Health Department, JACKSON COUNTY BOARD OF HEALTH, by Corporate and Politic, John Doe #1, in Individual and Official Capacity, and John Doe #2, in Individual and Official Capacity, Defendants.
DECISION - December 4, 2017

In the Supreme Court of Appeals of West Virginia:
Docket No. 17-1146
PANCHO'S LLC, Petitioner, v. JAMES T. HUGHES, MARGARET RITCHIE, JOYCE ROBINSON, TERRI RANSON, JAMES MCCOY, MARSHA GEYER, KEITH KING, JUDITH MILLER, in Their Official and

Individual Capacities as Members of the Jackson County Board of Health, JONATHAN GRAZIANI, Inspector for the Jackson County Health Department, SUSAN HOSAFLOOK, Administrator of the Jackson County Health Department, JACKSON COUNTY BOARD OF HEALTH, by Corporate and Politic, John Doe #1, in Individual and Official Capacity, and John Doe #2, in Individual and Official Capacity, Respondents.
DECISION - September 9, 2019

There are no additional proceedings in any court that are directly related to this case.

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The opinion of the Supreme Court of Appeals of West Virginia was an unpublished opinion in the form of a Memorandum Decision. The unpublished opinion below was docketed as 17-1146 and is available on Westlaw at 2019 WL 4257286. The opinion of the trial court below, the Circuit Court of Jackson County, West Virginia, likewise was not published. Both opinions were included in the Petition as Appendix A and Appendix B, respectively.

ARGUMENT
REASONS FOR DENYING THE PETITION

The Petition for writ of certiorari should be denied because: (A) *Paul v. Davis*, 424 U.S. 693 (1976) is the well-settled, controlling law on the issue of Section 1983 claims for damage to reputation, and clearly should remain the well-settled controlling law relating to the Section 1983 claims asserted by the Petitioner below; (B) there is neither a split among the Circuit Courts of Appeal nor a conflict in the application among the Circuit Courts of Appeal relating to the holding of *Paul, supra*, to warrant granting certiorari in this case; (C) the Supreme Court of Appeals of West Virginia accurately applied the holding of *Paul*, *supra*, in its unanimous decision; and (D) the ruling sought by the Petitioner would result in overwhelming the case load of the judicial system and would chill the free and open dissemination of public information regarding health department inspections of food establishments.

A. *Paul v. Davis* Is the Well-Settled, Controlling Law Relating to the Petitioner's Failed Section 1983 Claims for Damage to Reputation and It Should Remain the Well-Settled, Controlling Law Relating to Such Claims

The Petition for Writ of Certiorari (hereafter "the Petition") should be denied because this Court has unequivocally held that harm to one's reputation, no matter how severe, alone does not give rise to a Section 1983 cause of action for denial of due process. In short, the law relating to Section 1983 violations of due process claims for damage to reputation is well-settled by this Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976). More specifically, this Court clearly held:

> any harm or injury to that interest [in reputation], even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. **For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.**

See Paul v. Davis, 424 U.S. 693, 712 (1976)(emphasis added).

In *Paul v. Davis*, *supra*, this Court addressed the issue of whether the plaintiff therein had a claim for relief under Section 1983 for violation of his due process rights where law enforcement agencies published and distributed to 800 local businesses a "flyer" which contained the photograph and name of individuals who had been arrested for shoplifting, including the plaintiff. *See Id.* at 694-95. The "flyer" not only contained the photograph and name of the plaintiff and other individuals, but it also utilized terms such as "active shoplifters," "shoplifting activity," and "subjects known to be active in this criminal field." *Id.* In addition, the "flyer" advised the businesses to "inform your security personnel to watch for these subjects." *Id.* In essence, the plaintiff, through his name and mug shot photograph, had been labeled as an "active shoplifter" and a "criminal" and this information was published and widely distributed to 800 businesses in the area. *Id.* The plaintiff's labeling as an "active shoplifter" and "criminal" was based strictly on his shoplifting arrest and not on the basis of any conviction. *See Paul v. Davis*, 424 U.S. 693, 694-95 (1976). In fact, the shoplifting charges against the plaintiff were ultimately dismissed after the flyer had already been published and widely distributed by law enforcement agencies. *Id.* After the shoplifting charges were dismissed, the plaintiff brought his suit against the law enforcement agencies which published and distributed the "flyers" based upon a Section 1983 and Fourteenth Amendment denial of due process rights for the law enforcement agencies publishing this "flyer" without notice and opportunity to be heard being first afforded to the plaintiff. *Id.*

The *Paul* Court further explained:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, **this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause**.

See Paul v. Davis, 424 U.S. 693, 701 (1976)(emphasis added).

The *Paul* Court summarized its holding by stating that it "granted certiorari in this case to consider **whether [the plaintiff's] charge that [the States's] defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not**." *See Paul v. Davis*, 424 U.S. 693, 694 (1976)(emphasis added). In reaching this holding, the *Paul* Court reasoned that a federally recognized liberty or property interest is only implicated when

reputation is stigmatized in connection with the denial of a specific constitutional guarantee or some "more tangible" interest. *Id.* at 700-01; *see also Marrero v. City of Hialeah*, 625 F.2d 499, 512-13 (5th Cir. 1980)(citing *Paul v. Davis, supra).*

Consequently, it is well-settled that this Court's holding in *Paul v. Davis, supra*, is the controlling law for Section 1983 cases asserting claims of a deprivation of constitutional due process rights relating to damage to reputation.

The Petitioner appears to contend that this Court should overturn or modify its well-settled holding in *Paul v. Davis, supra,* by either following the Fifth Circuit's "interpretation" of *Paul*, *supra*, or by adopting the "easier" standard purportedly set forth in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). *See Petition* at pg. 8, ¶ 3. However, both of these apparent contentions by the Petitioner are erroneous.

First, contrary to the Petitioner's arguments, the Fifth Circuit has not applied an "interpretation" of *Paul, supra,* that deviates in any manner from the clear holding in *Paul, supra,* described above. The Petitioner contends that, in *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), the "Fifth Circuit Court of Appeals takes a different approach to 'stigma to reputation' cases than does the West Virginia state courts and the other federal circuit courts mentioned above." *See Petition* at pg. 8, ¶ 3. However, the Petitioner's contention that *Marrero* takes a "different approach" is simply erroneous. Instead, the *Marrero*

Court not only quotes *Paul v. Davis, supra*, throughout the decision, it clearly applies the holding of *Paul v. Davis* in the exact same fashion as the *Paul* Court did, as well as in the same fashion the other Circuit Courts of Appeal and the Supreme Court of Appeals of West Virginia all apply *Paul*. More specifically, in applying its holding that reputation alone is insufficient to invoke due process protections, the *Paul* Court found no other specific constitutional guarantees or some "more tangible" interest to be implicated in order to trigger due process protections. *See Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Specifically, the *Paul* Court held that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." *Id.*

The Fifth Circuit's *Marrero* Court likewise quoted and applied in the exact same fashion the holding in *Paul, supra*, that a federally recognized liberty or property interest is only implicated when reputation is stigmatized in connection with the denial of a specific constitutional guarantee or some "more tangible" interest. *See Marrero v. City of Hialeah*, 625 F.2d 499, 512-13 (5th Cir. 1980)(citing *Paul v. Davis*, 424 U.S. 693, 700-01 (1976)). Contrary to the Petitioner's contentions, the difference between *Marrero* and *Paul* was a factual difference and not a difference in approach or difference in application of the controlling law on this issue. Unlike *Paul*, in *Marrero* the

claimant had also suffered a violation of its Fourth Amendment constitutional protections, which is clearly a specific constitutional guarantee. *See Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980). In addition, unlike *Paul*, in *Marrero* the law in the state of Florida specifically recognizes business goodwill as a property interest protected by due process. *Id.* at 514. Thus, the Fifth Circuit's *Marrero* Court does not take a "different approach" in applying the clear and unambiguous holding in *Paul*; instead, the presence of both a violation of Fourth Amendment rights and Florida law recognizing business goodwill as a property interest in *Marrero* is what warranted a different outcome between *Paul* and *Marrero*.

Consequently, there is clearly neither a "different approach" applied in *Marrero* nor a need for this Court to overturn, expand, modify or otherwise deviate in any manner from the clear, well-settled holding in *Paul v. Davis, supra.* Therefore, this Court should deny the Petition.

In addition, the Petitioner alternatively suggests that this Court "return to the easily understood standard fixed by *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950)." *See Petition for Writ of Certiorari* at pg. 6, ¶ 3. The Petitioner's contention is once again erroneous. *Mullane*, *supra*, is wholly distinguishable and inapplicable to the issues at hand in the present case. More specifically, *Mullane* neither involves a claim for damage to reputation nor does it involve a Section 1983 claim. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). Instead, while *Mullane* does

address due process rights to notice and opportunity to be heard, *Mullane* solely addresses the constitutional sufficiency of the manner in which notice of the opportunity to be heard was served. *Id.* More specifically, *Mullane* solely addresses the constitutional sufficiency of the New York statutory notice to beneficiaries by publication of judicial settlement of accounts by the trustee of a common trust fund established under New York banking law. *Id.* *Mullane*, does not, however, address in any manner whatsoever the issue of whether reputation alone is a liberty or property interest subject to due process protections. *Id.* Further, *Mullane* does not set forth any general discussion or rationale as to how a court should determine if a liberty or property interest is at stake to warrant due process protections. *Id.* Instead, *Mullane* solely addresses the fact that judicial settlement of a trust account could result in a deprivation of property in the form of trust assets, and then specifically addresses the central issue of whether newspaper publication of notice of the opportunity to be heard was adequate notice to satisfy due process protections. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). In short, *Mullane* is clearly inapplicable to the issues in the present case and clearly does not set forth an "easily understood standard" relating to whether reputation is a property or liberty interest subject to due process protections. Instead, *Mullane* only sets forth a standard relating to the service of notice of an opportunity to be heard when due process rights are actually implicated. *Id.*

Consequently, contrary to the Petitioner's contention, the holding in *Mullane, supra*, is

inapplicable and would not provide a better standard by which Section 1983 cases for damage to reputation are determined. For these reasons, the Petitioner clearly fails to satisfy its burden of providing legitimate, substantive reasons for this Court to overrule or otherwise modify this Court's well-settled precedent in *Paul v. Davis, supra.* Therefore, the Court should deny the Petition.

B. There Is Neither a Split Among the Circuits Nor a Conflict in Application Among the Circuits Relating to the Well-Established Precedent in *Paul v. Davis*

The Petitioner contends that there is either a split or a "conflict" among the Circuits and state courts in how *Paul v. Davis,* 424 U.S. 693 (1976) is applied. Further, the Petitioner argues that state and federal appellate courts use additional more narrow standards when applying the *Paul v. Davis* holding. As demonstrated below, neither of these contentions have merit. In fact, when reviewing each of the cases cited in the Petition, it is abundantly clear that all of the cases upon which the Petitioner relies do, in fact, apply the holding of *Paul v. Davis* in the same manner as applied by the *Paul* Court. In addition, a review of each of the cases cited by the Petitioner further demonstrates that these decisions do not add elements to, or narrow, the standard set forth in *Paul.* Instead, the cases cited by the Petitioner merely categorize the *Paul* standard into "elements" when applying the same principles in the same manner as applied by the *Paul* Court.

The Petitioner first cites the Second Circuit case of *Segal v. City of N.Y.*, 459 F.3d 207, 212 (2nd Cir. 2006). A review of *Segal* clearly shows that the Second Circuit simply follows the well-established principles of *Paul v. Davis*. More specifically, the *Segal* Court states that "[w]e have recognized that a probationary employee can 'invoke the protections of the Due Process Clause' where that employee has suffered a loss of reputation 'coupled with the deprivation of a more tangible interest, such as government employment.'" *Segal v. City of N.Y.*, 459 F.3d 207, 212 (2nd Cir. 2006)(quoting *Patterson v. City of Utica, 370 F.3d 322, 330 (2nd Cir.* 2004)). Clearly, the *Segal* Court is simply applying the well-established standard requiring a damage to reputation plus the deprivation of a "more tangible interest[] such as employment" set forth in *Paul*. *See Paul v. Davis*, 424 U.S. 693, 701 (1976).

The Petitioner next cites the Fourth Circuit Case of *Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007). Once again, the *Sciolino* Court simply follows the well-established principles of *Paul v. Davis*. More specifically, the *Sciolino* Court clearly quotes and relies upon the holding in *Paul* "that an individual's liberty interest in his reputation is only sufficient 'to invoke the procedural protection of the Due Process Clause' if combined with 'some more tangible interest[] such as employment.'" *See Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007)(quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Once again, it is abundantly clear that the *Sciolino* Court is simply applying the well-established standard set forth in *Paul*.

The Petitioner then cites the Fifth Circuit case of *White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981). Once again, in addressing Mr. White's "claims that his dismissal violated due process because he was deprived of a constitutionally protected liberty interest without a proper notice or hearing" the *Thomas* Court cited *Paul v. Davis* when holding that "[r]eputation alone is not a constitutionally protected interest although state law may create a right to damages for defamation." *See White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981)*(*citing *Paul v. Davis*, 424 U.S. 693 (1976)). The *Thomas* Court further stated that "[a] constitutionally protected liberty interest is implicated only if an employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities." *See White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981)*(*citing *Paul v. Davis*, 424 U.S. 693, 706 (1976)). Hence, the *Thomas* Court is likewise simply employing the well-established standard of *Paul v. Davis* in reaching its decision. Furthermore, the Fifth Circuit Court's decision in *Marrero* is discussed in detail above to demonstrate that the Fifth Circuit again simply applies the well-established *Paul v. Davis* standard in reaching its decision in *Marrero* as well.

Finally, the Petitioner cites the First Circuit case of *Wojcik v. Mass. Lottery Comm'n*, 300 F.3d 92, 103 (1st Cir. 2002). Just as in all the other cases cited by the Petitioner, the *Wojcik* Court once again relies upon the well-established principles of *Paul v. Davis* in reaching its First Circuit decision. The *Wojcik* Court states that "[i]t is beyond cavil that 'defamation, even

from the lips of a government actor, does not in and of itself transgress constitutionally assured rights.'" *See Wojcik v. Mass. Lottery Comm'n*, 300 F.3d 92, 103 (1st Cir. 2002)(citing *Paul v. Davis*, 424 U.S. 693, 700-01 (1976)(other citations omitted). In its reliance upon *Paul*, the *Wojcik* Court goes on to state that an exception to this general rule exists when a government employer creates and disseminates false and defamatory impressions about an employee in connection with the employee's discharge from government employment thereby also implicating a "more tangible interest" required by *Paul v. Davis*. *See Wojcik v. Mass. Lottery Comm'n*, 300 F.3d 92, 103 (1st Cir. 2002). Thus, once again, in reaching its decision the First Circuit likewise follows the well-established standard of *Paul v. Davis* that a "more tangible interest," such as employment, must be implicated in connection to the injury to reputation to trigger due process protections.

Clearly, each and every case cited by the Petitioner relies upon and applies the well-established principles set forth in *Paul v. Davis*, *supra*. Furthermore, contrary to the Petitioner's contention, the "additional elements," if any, set forth in each of the cases cited above are merely categorized iterations of the components of the well-established standard provided by this Court in *Paul v. Davis*.

Quite simply, there is clearly no split or conflict among the Circuit Courts of Appeal or the state courts in applying the well-settled law of *Paul v. Davis, supra,* to warrant this Court granting certiorari in this case. As demonstrated above, **all** of the cases cited by

the Petitioner are applying the principles set forth in *Paul* in the same substantive manner in which those principles were applied by the *Paul* Court. Even *Marrero*, upon which the Petitioner relies heavily, applies the principles of *Paul* in the same manner as the *Paul* Court. The only difference between *Marrero* and *Paul* is the different factual situation in *Marrero* (i.e. the existence of a separate Fourth Amendment violation and a Florida state law recognizing a property interest in goodwill) which justifies the different outcomes between the two cases despite the same application of legal principles. Therefore, given the clear absence of any split or conflict among the Circuit Courts of Appeal or state appellate courts, this Court should deny the Petition.

C. The State Court Below Accurately Applied the Well-Settled Law of *Paul v. Davis* When It Unanimously Held That the 2005 FDA Model Food Code Adopted By the State of West Virginia Does Not Grant Any Legal Guarantee of Present Enjoyment of Reputation or Goodwill

Paul v. Davis, supra, provides the well-settled law that "a federally recognized liberty or property interest is only implicated when reputation is stigmatized in connection with the denial of a specific constitutional guarantee or some "more tangible" interest. *See Paul v. Davis*, 424 U.S. 693, 700-01 (1976). The Petitioner has never alleged at any point in this case that it's reputation was stigmatized in connection with the denial of any specific constitutional guarantee, such as First Amendment or Fourth Amendment

constitutional guarantees. Instead, the Petitioner has always relied solely upon the 2005 FDA Model Food Code, adopted by the State of West Virginia, as its source of "some more tangible interest" as required by *Paul* to support its meritless Section 1983 claim for damage to reputation. The Supreme Court of Appeals of West Virginia clearly held in its decision below that the 2005 FDA Model Food Code, as adopted by the State of West Virginia, does not provide the "more tangible" interest required by *Paul* to sustain the Petitioner's denial of due process claim. *See Memorandum Decision* of W.Va. Sup. Ct. below, dated September 9, 2019, Appendix A to Petition.

The Supreme Court of Appeals of West Virginia clearly quoted and applied the well-established, controlling legal principles set forth in *Paul v. Davis* in rendering its decision below. Further, the Supreme Court of Appeals of West Virginia accurately applied the holding of *Paul* in its decision below "that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *See Memorandum Decision* of W.Va. Sup. Ct. below, dated September 9, 2019, Appendix A to Petition, at pg. 7a (quoting *Paul v. Davis*, 424 U.S. 693, 712 (1976)).

The Court below then moved on to the issue of whether the 2005 FDA Model Food Code, as adopted by the State of West Virginia, provides the state law extension to the Petitioner of any legal guarantee of present enjoyment of reputation as required by *Paul, supra.* The Supreme Court of Appeals of West Virginia clearly and unanimously held below that it does not.

Id. at 8a. In considering this issue, the court below stated that "[Petitioner would distinguish its case from *Paul* on the ground that *Paul* involved an application of Kentucky law, and that [West Virginia] jurisprudence provides rights that Kentucky law does not." *Id.* The lower court went on to state that "[t]he Supreme Court [of the United States] explained that 'Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions." *See Id.* at 8a (quoting *Paul v. Davis*, 424 U.S. 693, 711-12 (1976)). The court below further stated that "[Petitioner] argues that it finds itself in a different situation because the [] food code language [Petitioner relies upon] imbues it with the right of protection of its business goodwill . . . ." *See Id.* at 8a.

Ultimately, the Supreme Court of Appeals of West Virginia unanimously held below that:

> [t]he **food code** language cited by [Petitioner] **does not create an entitlement to goodwill**. Though it generally assures the just application of remedies according to law, **it, like the Kentucky jurisprudence discussed by the *Paul* Court, offers no "legal guarantee of present enjoyment of reputation** . . . ." We therefore find the legal principles indistinct from *Paul*, and find that the circuit court did not err in this regard.

See Memorandum Decision of W.Va. Sup. Ct. below, dated September 9, 2019, Appendix A to Petition, at pg. 9a (quoting *Paul v. Davis*, 424 U.S. 693, 711-12

(1976)(emphasis added).

The court below accurately applied the principles of *Paul v. Davis, supra*, when concluded that the Petitioner has no valid claim for denial of due process rights in this matter. Further, the Supreme Court of Appeals of West Virginia clearly held that West Virginia recognizes no legal guarantee to present enjoyment of reputation or goodwill. In fact, the Petitioner has admitted that the courts in West Virginia "**have required proof of a protected interest in reputation, which apparently does not exist in West Virginia**." *See* Petition at pg. 8, ¶ 2 (emphasis added). More specifically, the Supreme Court of Appeals of West Virginia accurately concluded that the 2005 FDA Model Food Code, adopted by the State of West Virginia, upon which the Petitioner solely relies in support of its claim does not provide the legal guarantee of present enjoyment of reputation required by *Paul* as the "more tangible interest" necessary to sustain a Section 1983 claim for damage to reputation.

Consequently, the highest court in West Virginia, has clearly, unambiguously and unanimously confirmed that West Virginia law provides no "legal guarantee of present enjoyment of reputation" as required by *Paul v. Davis, supra.* The issues in this case have already been fully addressed by this Court in *Paul v. Davis* and the lower court accurately applied *Paul v. Davis* in reaching its decision. Therefore, this Court should deny the Petition because the decision below accurately applied the well-settled principles of *Paul v. Davis*.

D. The Ruling Sought By Petitioner Would Result in Overwhelming the Case Load of the Judicial System and Would Chill the Free and Open Dissemination of Public Information Regarding Health Department Inspections of Food Establishments

The Petitioner ultimately seeks from this Court the creation of a legal requirement that all food establishments be provided procedural due process in the form of notice and an opportunity to be heard **prior to any publication of food establishment inspection results.** In other words, Petitioner seeks a ruling that, after a food establishment inspection has occurred, the inspecting government entity shall provide to each establishment inspected notice and opportunity to be heard **before** the inspecting agency may disseminate that information to the public through publication in any format despite the undisputed fact that the inspection results are openly public information anyway. The implementation of any such legal requirement would clearly be devastating to the judicial system not only in West Virginia, but now nationwide with such a ruling from this Court. More specifically, the already overwhelmed judicial system would be further overwhelmed exponentially by the necessity of conducting hearings on food inspection results before the results could be published. It is unimaginable how much more overwhelmed the judicial system would be if every person or entity subject to food inspection powers is now entitled to a hearing for each food inspection before the results may be published.

For example, the subject publication in the present case for Jackson County alone (a sparsely populated, rural West Virginia county) would have potentially generated eighty-three (83) initial hearings solely for the months of April, May, June and July of 2011 during the time frame and the newspaper publication at issue in this case. Then, of course, each of those eighty-three (83) initial hearings would be subject to potentially eighty-three (83) appeal hearings to the county circuit court. Further, each such hearing would then potentially lead to eighty-three (83) appeals to the Supreme Court of Appeals of West Virginia – all of which statistics are just for Jackson County during a period of four (4) months in 2011. The statewide and national increase in judicial activity related to hearings on the publication of food inspection scores would be astronomical on an annual basis, particularly when considering the more densely populated areas of the state of West Virginia as well as the much more heavily populated states across the nation.

In addition, public policy not only favors free dissemination of public information, particularly food inspection results for the establishments where the general public eats, but it also favors the timely dissemination of such valuable information. Ironically, the Petitioner complained in this case that it took four (4) months for the subject food inspection results to be published. Nevertheless, the Petitioner contends that the publication of food inspection results should further be delayed by notice, hearing and the exhaustion of the judicial process before the results may be published. The public has a right to know the food inspection results for the establishments from

which the public consumes its food, and it has a right to know those results in a timely fashion so that they can timely make informed decisions about where or where not to consume their food. Thus, the public policy favoring the timely dissemination of food inspection results would clearly be thwarted by potentially months, if not years, of delay between the inspection and the publication of the results resulting from the full exhaustion of the judicial remedies the Petitioner seeks in this case.

Moreover, the public policy of widely disseminating public information, such as food inspection results, would likely also be thwarted altogether if the Petitioner prevails in this case. More specifically, it is likely that most county health departments would simply decide to cease their practice of publishing food inspection results if the publication could only occur after each entity had notice and opportunity to be heard (as well as exhaustion of the appellate process) before the results could be published. In other words, most health departments would determine that it is just easier to stop publishing food inspection results rather than comply with newly created requirements of notice and a hearing before the results may be published. Most health departments would further be inclined to cease publishing food inspection results because the results would be stale by the time such requirements had been satisfied to permit publication. In short, the judicial system would be overwhelmed by hearings on the publication of food inspection results, and/or the inspection results would simply no longer be published if the Petitioner prevails in this case. For this Court to hold, as the Petitioner ultimately asks

this Court to do, that notice and opportunity to be heard must first occur before such **public** information may be published would further overwhelm an already overwhelmed judicial system and would also place a chilling effect on the dissemination of public information to the populace. Therefore, this Court should deny the Petition.

E. Perceived Misstatements of Fact or Law

In order to avoid waiver of this issue, the Respondents object to the second Question Presented set forth in the Petition on the grounds that it contains a perceived misstatement of fact and/or law. More specifically, the second Question Presented in the Petition erroneously refers to the 2005 FDA Model Food Code as a "federal regulation." The Respondents likewise object to all instances throughout the Petition in which the Petitioner erroneously refers to the 2005 FDA Model Food Code as a "federal regulation" on the grounds that it contains a perceived misstatement of fact and/or law. The 2005 FDA Model Food Code, which was adopted by the State of West Virginia, is quite simply not a federal regulation as represented by the Petitioner. Instead, the 2005 FDA Model Food Code is merely a model set of guidelines prepared by the FDA. In fact, the 2005 FDA Model Food Code relied upon by the Petition clearly states that "**[t]he model Food Code is *neither federal law nor federal regulation*** and is not preemptive. Rather, it represents ***FDA's best advice*** for a uniform system of regulation to ensure that food at retail is safe and properly protected and presented." *See 2005 FDA Model Food Code* at Preface pg. iii, 2(A) History and

Purpose (emphasis added) (the 2005 FDA Model Food Code is available at https://www.fda.gov/food/fda-food-code/food-code-2005).

Thus, the Petitioner's contention that the 2005 FDA Model Food Code is "a federal regulation" or that it establishes due process rights is quite simply erroneous and a misstatement of fact and law. The adoption of the 2005 FDA Model Food Code by the State of West Virginia does not transform the model guidelines into a "federal regulation" by any means. Therefore, the Respondents object to the Petitioner's erroneous representations that the 2005 FDA Model Food Code is "a federal regulation" which establishes due process rights in the second Question Presented as well as at all other locations within the Petition on the grounds that such representations are a misstatement of fact and/or law.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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