NO. 20-_____

In the Supreme Court of the United States

MICHAEL KONOWICZ A/K/A
MICHAEL PHILLIPS AND ISARITHM, LLC,

Petitioners,

v.

JONATHAN P. CARR, SEVERE NJ,
WEATHER, LLC, AND WEATHER NJ, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should revisit the fifty-year old "actual malice" doctrine of *New York Times Co. v. Sullivan* and its progeny to determine if the "original meaning" of the First and Fourteenth Amendments to the United States Constitution is consistent with Constitutionalizing the common law tort of defamation, and to determine whether the same level of "breathing space" deemed necessary in 1964 continues to be necessary for Twenty-First Century speech.

2. Whether this Court should step in and establish a test for what constitutes "commercial speech" under the Lanham Act, where the Courts of Appeal have applied different standards to define the term.

PARTIES TO THE PROCEEDINGS

Petitioners

- Michael Konowicz,
  also known as Michael Phillips
- isarithm, LLC

Respondents

- Jonathan P. Carr
- Severe NJ Weather, LLC
- Weather NJ, LLC

RULE 29.6 DISCLOSURE

Pursuant to S. Ct. R. 29.6, isarithm, LLC has no parent corporation, and no public company holds 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 20-1238

Michael Konowicz, a/k/a Michael Phillips; isarithim LLC, *Appellants, v.* Jonathan P. Carr; Severe NJ Weather, LLC, d/b/a Weather NJ; Weather NJ, LLC, d/b/a Weather NJ

Date of Final Opinion: December 8, 2020

United States District Court
for the District of New Jersey

Civil Action No. 15-6913 (MAS) (TJB)

Michael Konowicz, a/k/a Michael Phillips; and isarithim LLC, *Plaintiffs, v.* Jonathan P. Carr; Severe NJ Weather, LLC and Weather NJ, LLC, *Defendants.*

Date of Final Opinion: January 7, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENT

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit dated December 8, 2020 is included in the Appendix ("App.") at App.1a. The Memorandum Opinion of the United States District Court for the District of New Jersey Filed Under Seal dated January 7, 2020 is included at App.12a. (Note: this opinion was unsealed) The Opinion and Order of the District Court for the District of New Jersey dated July 31, 2019 is at App.17a and App.31a respectively. The Opinion and Order Granting Defendants' Motion for Summary Judgment dated May 31, 2019 is at App.38a and App.77a respectively.

JURISDICTION

The date of the judgment to be reviewed is December 8, 2020. This Court's Order of Thursday, March 19, 2020 (598 U.S. __) extended the time for all petitions for writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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.

The Lanham Act, 15 U.S.C. § 1125(a)

The Lanham Act, 15 U.S.C. § 1125(a), in relevant part, states:

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the Court of First Instance

The district court had jurisdiction of the case under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The district court's federal question jurisdiction was based on a Lanham Act claim for false advertising.

B. Relevant Facts

Petitioner and Plaintiff, Michael Konowicz a/k/a Michael Phillips (and isarithm, LLC, the entity through which he does business) ("Konowicz"), operates as a professional meteorologist and who appears frequently on television and radio, and in print, on all subjects related to weather and climate. (JA 689-91.) Konowicz also has a large online presence. He operates the website, "www.weatherboy.com," and maintains a popular Twitter account, @theWeatherboy, which has had as many as 104,000 "followers," and a Facebook site, "theWeatherboy," which has received over 270,000 Facebook "likes." (JA 690.) Konowicz uses these sites to provide the public with up-to-date, accurate, weather and climate related information. *Id.* Defendant and

Respondent, Jonathan P. Carr (the Respondents and Defendants are hereinafter collectively referred to as "Carr"), describes himself as a self-taught, amateur meteorologist who operates "WeatherNJ" on Facebook, Twitter, Instagram, and YouTube, and a website, "www.weathernj.com." According to Carr, he has an online following of nearly a quarter of a million people.

1. Carr's Attacks on Konowicz.

Commencing in December 2014, Carr engaged in a campaign against Konowicz to ruin his reputation by publishing false and defamatory statements regarding Konowicz's education, qualifications, and experience. Carr did this for two reasons. First, Carr was embarrassed when Konowicz called attention to Carr's weather-related mistakes. On one occasion, for example, Carr posted a photograph taken during a storm which he incorrectly labeled as "tornado footage." Second, Konowicz is, and was at the time, Carr's biggest competitor. By attacking Konowicz's credibility, and damaging Konowicz's reputation, Carr hoped to increase his online profile and popularity.

On January 1, 2014, Carr published a Facebook post falsely stating that Weatherboy was a child posing as a meteorology service, after which he posted a link to a completely unrelated site hosted by a young boy that had no affiliation to Konowicz. (JA 693, 825-30.) After Konowicz expressly told Carr that this site had no relation to Konowicz's business, he responded by posting the same link, stating "until you prove otherwise, this is you (shame on you for duping public)." (JA 693 ¶ 23).

Again, on December 8, 2014, Carr posted several comments about Konowicz on his Twitter account.

Specifically, Carr stated that Konowicz had "no degree or AMA [sic] record." (JA 693, 825-30.) He also stated that Konowicz had a "fake audience," and accused him of employing certain techniques to artificially inflate the number of Konowicz's followers on Twitter. *Id.*

On February 21, 2015, Carr continued his attack against Konowicz on Twitter, posting:

- "[C]areful of Weatherboy Weather. Total fraud. Have unsettling proof."
- "Not a pro met [meteorologist]. Not a member of AMS."

Interestingly, despite Carr's claim that he had "unsettling proof," no proof was provided. (JA 693 ¶ 24-25, 831-32).

On March 2, 2015, after further posts concerning Konowicz, Carr revealed one of the real motives behind Carr's defaming and harassing Konowicz when Carr posted:

- "For real unparalleled trust and reach see . . . my page"

(JA 693-94 ¶ 27-28, 833-34.) Clearly, Carr was intent on discrediting his competitor, and luring Konowicz's followers to his own online sites.

Soon after Defendant's March 2, 2015 posts, Konowicz demanded a retraction of Carr's defamatory posts. However, Carr refused, and instead "doubled-down" on his malicious attacks. On June 25, 2015, Carr posted an article on his website ("njweather.com") titled *Beware of the Fake Team of Meteorologists*. In the first paragraph of the article, the other reason behind Carr's vitriol toward Konowicz became clear.

Just days before, Konowicz had "called out" Carr—anonymously—for posting an image incorrectly labeled as "tornado footage." Quite simply, Carr was embarrassed, and decided to once again go on the attack. In that June 25, 2015 article, in a section titled, *Who Weatherboy Pretends To Be*, Carr falsely accused Konowicz of being a "fake" with no professional credentials and a fabricated "team of professional meteorologists." (JA 694-95 ¶ 34-36, 837-42). He also accused Konowicz of making up stories about "bogus classroom visits and dishonest campaigns," and stated that "the American Meteorological Society (AMS) currently has zero-evidence of him." *Id.* He goes on to talk about Konowicz's allegedly "fake audience" or "fake likes" on Facebook. *Id.* He concludes the article by stating, "the idea that some people actually believe his story makes me nauseous. It's very dishonest and manipulative." *Id.*

In that same article, Carr includes a section titled, "Who I Am," in which he touts his own credentials and experience. *Id.* This was another attempt by Carr to harm his competitor's reputation while building up his own, all for his own professional and economic benefit. Carr not only posted the article on his website, but he promoted it through his social media sites and encouraged his followers to comment on, and repost it. He even went so far as to purchase advertisement space on Facebook to further promote the article and to increase the number of people who would view the false statements about Konowicz. (JA 635 ¶ 36).

2. Carr's Statements About His Competitor, Konowicz, Were False.

Carr's defamatory publications about Konowicz were easily and demonstrably false, and Carr made them without even a nugatory attempt to ascertain their truth.

a. Konowicz Is a Professional Meteorologist, Contrary to Carr's Statements.

Carr's statements that Konowicz is not a professional or real meteorologist are false statements of fact. The evidence establishes beyond doubt that Konowicz is, and has been for over twenty (20) years, a professional meteorologist.

Konowicz has a Certificate from Mississippi State University commonly used among television meteorologists to establish their professional credentials. (JA 691 ¶ 14, 822.) Mike Masco, who frequently appears on PHILLY FOX 29, for example, does not have a four-year degree in meteorology, but rather a Certificate from Mississippi State University. (JA 691 ¶ 15.) Similarly, the 6ABC website shows that meteorologists, Melissa Magee and Karen Rogers, received the same Certificate from Mississippi State, as did NBC10's Brittany Shipp. *Id.* Interestingly, Carr has not alleged that any of these individuals—who do not compete with Carr—are fake meteorologists or frauds. At his deposition, Carr was specifically asked about Mike Masco, and responded that he considered Masco to be a meteorologist, even though Masco has the same certificate as Konowicz (as opposed to a bachelor's degree). (JA 765-66 (Carr dep., p. 126-130)).

It is evident from Carr's deposition testimony that Carr singled out Konowicz, and purposely sought to discredit him with false accusations. It is also interesting to note that Carr, a self-described amateur weather enthusiast with no degree or certificate in meteorology, or any other formal training, has also been identified as a meteorologist. Carr temporarily worked for THE PRESS of Atlantic City in 2017; that newspaper identified Carr as a "meteorologist." (JA 764-65 (Carr dep., p. 122-126)).

> Q. You indicated that . . . Atlantic City Press had hired you as a meteorologist; is that right?
>
> A. Yes.

(JA 764 (Carr dep., p. 124)).

Konowicz has over twenty years of experience as a broadcast meteorologist. (JA 689). He provided weather forecasts for numerous radio stations over the years including 94.5 PST, Philadelphia's HOT 107, Z100, Q102, and WIRED 96.5. (JA 783-84). He appeared on television programs on The Weather Channel and WBZN-TV. Konowicz was the sole meteorologist for weather content on WBZN-TV for many years. Larry Mendte, a very popular media personality in the Philadelphia market, hosted Konowicz on his program, and referred to Konowicz as "New Jersey's most popular meteorologist."[1]

Konowicz maintains Facebook and Twitter accounts, as well as a website dedicated to providing weather and climate related material. He and other

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[1] *Available at* https://www.youtube.com/watch?v=Zf6DOrmfg20&t=14s.

Weatherboy meteorologists have also made appearances at community events, and have visited local schools to teach students about weather and climate issues. Konowicz has provided weather-related services to the Borough of Spotswood in New Jersey. In fact, the Mayor of Spotswood wrote to Plaintiff: "For almost 10 years, you have provided my administration and the residents of Spotswood with exceptionally accurate weather forecasts and data." (JA 769 (Carr dep., 171-172); JA 692).

Finally, despite Carr's unsubstantiated claims, Konowicz fits squarely within the definition of "meteorologist." Although Konowicz does not have a bachelor's degree in meteorology, he has gained sufficient knowledge both through his studies at Mississippi State, and through professional experience to qualify as a meteorologist. He is also a "professional" meteorologist as he has been paid for providing weather-related services. (JA 773-75, 692).

Carr has been provided with a copy of Konowicz's educational credentials and evidence of his professional experience. Carr no longer disputes that Konowicz has a Certificate in Meteorology from Mississippi State. (JA 753 (Carr dep., p. 29)). Yet Carr has never made any attempt to correct his previous statements and still refuses to print a retraction. (JA 753 (Carr dep., p. 29-31)).

b. Konowicz Is a Member of the AMS, Contrary to Carr's Statements.

As previously mentioned, on December 8, 2014, Carr posted on his Twitter account that Konowicz had "[N]o degree or AMA[sic] record." On February 21, 2015, Carr again posted on Twitter that Konowicz

was "[n]ot a member of AMS." On June 25, 2015, when Carr published his article about Konowicz on his website, he stated, "[t]he American Meteorological Society currently has zero evidence of him." (JA 693 ¶ 23-24, JA 694 ¶ 35).

These posts by Carr are completely and categorically false. Konowicz has been a member of the AMS since his freshman year in college. (JA 691 ¶ 11). Carr finally acknowledged that Konowicz was a member of the AMS at his deposition. (JA 753 (Carr dep., p. 29)). He admitted that he had seen Konowicz's Certificate of Membership from the AMS in approximately July 2015. (JA 753).

Prior to publishing these completely false statements, Carr did not reach out to Konowicz to inquire about Konowicz's AMS Membership, nor to ask him for any verification or proof that he was, in fact, a member of the society. (JA 751-53, 768 (Carr dep., p. 24-28, 31-34, 140)).

Although Carr did not ask Konowicz about the truth or falsity of any of the damaging statements that he was publishing, he did send Konowicz a private message just before publishing the article on June 25, 2015. In that message, Carr merely stated, "This is going to sting but you brought it upon yourself." (JA 767-68 (Carr dep., p. 135, 139)). Carr's feelings of ill will toward Konowicz, and his desire for revenge, are abundantly clear in that message.

Despite seeing incontrovertible, documentary evidence of Konowicz's AMS Membership, and despite Konowicz's requests that he print a retraction, Carr never made any attempt to correct the false information that he disseminated. (JA 753 (Carr dep., p. 29-31).)

c. Carr Admitted He Made No Attempt to Determine the Truth of His Defamatory Statements.

Carr's defamatory posts commenced as early as January 2014 and continued through June 2015. Carr testified at his deposition that he made no attempt to reach out to Konowicz to inquire as the truth or falsity of these statement prior to posting. (JA 768 (Carr Dep., p. 139-140)). Carr made no attempt to contact Konowicz to inquire as to whether Konowicz was a member of AMS, whether Konowicz had any formal education or training in meteorology, and the extent of Konowicz's meteorological experience. *Id.* He made no attempt to verify the information in his posts by reaching out to Konowicz or to third parties where possible. *Id.* By the time Carr published the Answer and Counterclaim on or about November 7, 2016 (JA 56-285), he was fully aware that all of his posts contained false statements of fact. *Id.*

3. Carr's Republication

Konowicz sent Carr two cease and desist letters, one in July 2015 (JA 846-852) and another in February 2016 (JA 854-931), wherein Konowicz provided overwhelming evidence of the falsity of Carr's statements by way of documents as well as video and audio clips of Konowicz actually performing on air as a broadcast meteorologist. (JA 695 ¶ 38, 845-931.) Each cease and desist letter demanded a retraction and the removal of the false statements from Carr's social media. *Id.*

Finally, after Carr was served with Konowicz's Complaint and made aware of all the inaccuracies in his postings through the Complaint and the cease and desist letter of July 2015, he re-published his

Answer with Counterclaim in an online posting on or about November 10, 2015, containing all of the same defamatory statements, online, including his June 25, 2015 *Kaboom* article containing the many false statements described above. (App.79a-93a).

C. Relevant Procedural History and Rulings

Carr refused to retract or to remove his knowingly false statements, and as a result, Konowicz was forced to file this action in District Court seeking damages for Defamation (Count I), Lanham Act Violation (Count II), and Common Law Unfair Competition (Count III). Carr filed an Answer with Counterclaim on or about November 10, 2015, which repeated all of the previously mentioned defamatory statements about Konowicz.

Carr filed a motion for summary judgment, which the District Court decided on May 31, 2019, dismissing Konowicz' claims because there was insufficient evidence the defamatory statements were published with "actual malice." The District Court separately dismissed the Lanham Act claims, ruling Carr's statements were not "commercial speech." After a subsequent motion to correct the judgment filed by Konowicz, decided on January 7, 2020, Konowicz filed an appeal to have the District Court's disposition of his affirmative claims reversed. Konowicz's notice of appeal was timely filed on February 3, 2020. (JA 1240-45.)

On appeal, the Third Circuit Court of Appeals affirmed the District Court's grant of summary judgment against Konowicz on all but one part of his defamation claims, and separately affirmed the District Court on Konowicz's Lanham Act claim.

SUMMARY OF ARGUMENT

Petitioner here respectfully submits that the Court should grant this Petition and revisit the fifty year-old, policy-driven decision of *New York Times v. Sullivan*, 376 U.S. 245 (1964). Indeed, time is of the essence, given the proliferation of "fake news" that is spreading like wild fire over the internet, causing real "harm to our democracy."[2] Doing so would enable the Court to consider whether: (a) such a rule is justified by the original meaning of the Constitution; and (b) even if there is a justification for some Constitutional rule, whether, given the dramatic change in the "public square," the rule should be altered to strike a different balance that recognizes at least some ability to protect a public figure's reputational harm and deter the spread of false speech.

Similarly, this Court should finally step in and announce the standard for "commercial speech" under the Lanham Act's false advertising provision, 15 U.S.C. § 1125(a). The Courts of Appeal have generally adopted a too-flexible set of standards for "commercial speech" under that provision of the Lanham Act, and here, the Third Circuit Court of Appeals found that the statements of Carr disparaging Konowicz were not commercial speech despite: (1) Carr earning $1,000 per month from weather services, (2) Carr's article "perhaps served as an advertisement and referred to Carr's services," and (3) the record contained evidence that Carr paid to promote his articles disparaging

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[2] John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary* 1, 2 (Dec. 2019).

Konowicz on social media. This meets any reasonable definition of commercial speech such that Konowicz's Lanham Act claims should have been addressed on the merits, rather than dismissed on the threshold issue of commercial speech.

REASONS FOR GRANTING THE PETITION

I. *NEW YORK TIMES CO. V. SULLIVAN* AND ITS PROGENY REQUIRES REVISION.

The question of "actual malice" in this public figure defamation case presents the classic problem with the virtually impossible to satisfy standard this Court announced in *New York Times Co. v. Sullivan* over fifty years ago.[3] Here, several of the defamatory statements—collectively accusing the plaintiff of being a professional fraud—were proven to be demonstrably false. The defendant speaker performed virtually no fact-checking or investigation before publishing. He did not even seek to verify his assertions with the defamed plaintiff. Worse, there was evidence of personal animus, and even when presented with the truth, the defendant refused to retract the false statements; in fact, he double-downed by repeating some of them. The lower courts nevertheless found that the plaintiff could not unearth enough "clearly convincing" evidence to rebut the defendant's professed

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[3] *New York Times Co. v. Sullivan*, 376 U.S. 245 (1964); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in judgment) (referring to "actual malice" as "almost impossible" standard to meet.).

subjective "belief" that many of his statements were potentially true. Summary judgment on all but one of the defamatory statements was thus affirmed.

This pattern has been repeated, over and over again, in state and federal courts for the past half-century, resulting in legal scholars calling for reform of what they call an "absolute immunity" defense created by *New York Times*' impossible legal hurdle, one that effectively separates public citizens from their rights to protect themselves from false and reputation-ruining speech.[4] Some, like Justice Clarence Thomas, have recently questioned the Constitutionality of the "actual malice" doctrine, noting that *New York Times* and the Court's decisions extending it "were policy-driven decisions masquerading as constitutional law."[5] Other legal scholars have noted the policy objectives of *New York Times*—protecting the free expression of ideas by "carving out sufficient breathing space"—are no longer relevant in this technologically advanced, "information age," where "thanks to Google, such defamation becomes near-permanent,"[6] and where our society has become "awash

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[4] David A. Logan, *Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 763 (2020) ("Only one conclusion can be drawn from the data: there is now what amounts to an absolute immunity from damages actions for false statements, and this evisceration of the deterrent power of defamation law has facilitated a torrent of false information entering our public square.").

[5] *McKee v. Cosby*, 139 S.Ct. 675, 676 (2019)(Thomas, J., concurring in the denial of certiorari).

[6] Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 478 (2020) ("Where once a defamatory headline on a Tuesday was wrapped around fish by Thursday, now it remains, evergreen, to be recalled whenever

in an unprecedented number of lies—some spewed by foreign enemies targeting our electoral processes, others promoted by our leaders, and millions upon millions spread by shadowy sources on the internet and, especially, via social media."[7]

A. The "Policy-Driven" Justifications for *New York Times* Were Not Tied to History and the Original Meaning of the First Amendment.

In *McKee v. Cosby*, the petitioner, a defamation plaintiff who alleged she was the victim of a sexual assault by a comedic entertainer, brought suit against the entertainer who defamed her by disseminating a "defamatory letter," which she claimed, "deliberately distorted her personal background to 'damage her reputation for truthfulness and honesty.'"[8] The petitioner requested the court to review the lower courts classifying her as a "limited purpose public figure." Although Justice Thomas concurred in the Court denying that petition, he wrote separately "to explain why, in an appropriate case, we should recon-

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the defamed's name is searched."); Logan, 81 OHIO ST. L.J. 759, 760 ("Chief Justice John Roberts recently warned that '[i]n our age . . . social media can instantly spread rumor and false information on a grand scale,' causing harm to our democracy. The internet has become our 'public square,' something beyond the imagination of the Supreme Court when it issued its groundbreaking 1964 decision in *New York Times Co. v. Sullivan*.") (citing John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary* 1, 2 (Dec. 2019), https://www.supremecourt.gov/publicinfor/year-end/2019year-endreport.pdf; *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017)).

[7] Logan, 81 OHIO ST. L.J. 759, 760-61 (citations omitted).

[8] 139 S.Ct. 675.

sider the precedents that require courts to ask it in the first place."[9] Justice Thomas viewed the *New York Times* decision as "policy-driven" and lacking the necessary textual and historical basis in the Constitution. He described the *New York Times* decision thusly: "Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own 'federal rule[s]' by balancing the 'competing values at stake in defamation suits.'"[10]

Justice Thomas' concurring opinion in *McKee* presents a textual, original meaning analysis. "[W]e should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual malice standard in state-law defamation suits, then neither should we."[11] He went on to note that the Court's decisions in *New York Times* and its progeny "made little effort to ground their holdings in the original meaning of the Constitution." Noting the various "policy reasons" cited in the Court's *New York Times* decision for the "newly minted actual-malice rule," Justice Thomas found the Court "made no attempt to base that rule on the original understanding" or the "historical record" that existed at the time the First and Fourteenth Amendments were ratified. In fact, he noted, the Court acknowledged "the rule enunciated in the *New York Times* case is 'largely a judge-made rule of law,' the 'content' of which is

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9 *Id.*

10 *Id.* at 676.

11 *Id.*

'given meaning through the evolutionary process of common-law adjudication.'"[12]

The "historical record," however, is clear. "The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove a 'false written publication that subjected him to hatred, contempt, or ridicule."[13]

Indeed, Justice Thomas' thoughtful review of the historical precedents brought to light that even one of the Justices who concurred with the majority in *New York Times*—Justice Byron White—later "expressed doubts about the soundness of the Court's approach' in *New York Times* 'and about some of the assumptions underlying it.'"[14] Justice White, in his dissenting opinion in *Gertz v. Welch*, "after canvassing historical practice under similar state constitutions, treatises, scholarly commentary, the ratification debates, and our precedent," ultimately concluded that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish

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[12] *Id.* at 677 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501-502 (1984)).

[13] *Id.* at 678 (quoting *Dun & Bradstreet, supra.* at 765 (White, J., concurring in judgment)) (citing 4 W. Blackstone, COMMENTARIES *150 (Blackstone); H. Folkard, Starkie on Slander and Libel *156 (H. Wood ed., 4th Eng. Ed. 1877) (Starkie)).

[14] *Id.* at 680-81 (quoting *Dun & Bradstreet*, 472 U.S. at 767 (White, J.) (concluding that the Court "struck an improvident balance in the *New York Times* case.").

the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers."[15] In the end, Justice Thomas concluded, correctly, that:

> We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.[16]

Petitioner submits Justice Thomas was right, and this Court would do well by following his clarion call in accepting review of this case.

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[15] *Id.* at 680 (quoting *Gertz v. Welch*, 418 U.S. 323, 381 (1974) (White, J. dissent).

[16] *McKee*, 139 S.Ct. 682. Even so-called liberal scholars, such as Cass Sunstein, a Harvard professor and Obama-era appointee, agrees that the constitutional foundations of the *New York Times* case are weak. Commenting on Justice Thomas' concurrence in *McKee,* Prof. Sunstein noted that "Thomas offers considerable evidence that at the time of ratification, those who wrote and ratified the Bill of Rights were comfortable with libel actions—and that they did not mean to impose anything like the "actual malice" standard." Cass R. Sunstein, *Clarence Thomas Has a Point About Free-Speech Law*, BLOOMBERG (Feb. 21, 2019, 11:38 AM), https://www.bloomberg.com/opinion/articles/2019-02-21/clarence-thomas-has-a-point-about-free-speech.

B. The Policy Justifications Espoused by the *New York Times* Court Are Less Relevant in Today's "Information Age".

Apart from Justice Thomas' original meaning analysis, there are strong policy reasons for the Court to revisit *New York Times.* As Justice Roberts noted in his *2019 Year-End Report on the Federal Judiciary*, "[t]he internet has become our 'public square,' something beyond the imagination of the Supreme Court when it issued its groundbreaking 1964 decision in *New York Times Co. v. Sullivan*."[17] As one scholar recently and aptly concluded:

> *New York Times* and its progeny made sense in the 'public square' of an earlier era, but the justices could never have foreseen the dramatic changes in technology and the media environment in the years since, nor predict that by making defamation cases virtually impossible to win they were harming, rather than helping self-government. In part because of *New York Times*, the First Amendment has been weaponized, frustrating a basic requirement of a healthy democracy: the development of a set of broadly agreed-upon facts. Instead, we are subject to waves of falsehoods that swamp the ability of citizens to effectively self-govern. As a result, and despite its iconic status, *New York Times*

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17 John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary* 1, 2 (Dec. 2019).

> needs to be reexamined and retooled to better serve our democracy.[18]

Constitutional scholars have begun to rethink the need for and efficacy of the "actual malice" standard, noting that "*Sullivan* and *Gertz* were concerned with a world where only an exclusive few newspapers or broadcasters could publish information broadly to the public. Today, however, the media has expanded to include web logs ('blogs'), online news and opinion publications, and message boards."[19] What is more, not only has new technology created an influx of increased access to unlimited channels of speech, "[t]he potential damage inflicted by defamatory Internet speech is substantially magnified, as Internet publications are open to a global audience and available for a longer, sometimes permanent duration. Whereas only 394 copies of the TIMES were circulated in Alabama at the time of *Sullivan*, access to TIMES articles is now solely limited by an individual's ability to use a computer or get to a newsstand."[20]

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[18] Logan, 81 OHIO ST. L.J. 759; *see also* Susanna Frederick Fischer, *Rethinking Sullivan: New Approaches in Australia, New Zealand, and England*, 34 Geo. Wash. Int'l L. Rev. 101, 102 (2002)("Serious problems have resulted for U.S. libel litigation, including excess complexity, jury confusion, inconsistency with *Sullivan*'s stated Madisonian rationale, and widespread dissatisfaction with the current state of law."); Benjamin Barron, *A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 89 (2007).

[19] Benjamin Barron, *A Proposal to Rescue New York Times v. Sullivan by Promoting A Responsible Press*, 57 AM. U. L. REV. 73, 89 (2007); Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 480 (2020).

[20] Barron, 57 AM. U. L. REV. 73, 89.

In this regard, it must be remembered that the underlying policy of the *New York Times* decision was somewhat narrow and based on the most pressing problems of the time—the perceived need to protect the speech of major media outlets from defamation lawsuits designed by officials to stifle and deter reporting the events occurring in the South during the Civil Rights movement.[21] It is certainly reasonable to question whether that same rationale—the need to protect the dissemination of news and facts from the danger of libel suits—demands such a massive shift in the common law in light of the dramatic technological advances of this Century. Indeed, with the advent of the internet and technology, where virtually every citizen is capable of spreading news as fast as a thumb moves across a smart phone, the danger of libel suits stifling information dissemination is basically non-existent. Does twenty-first century speech still need the same amount of "breathing space" it may have needed in 1964?

Some scholars have also argued that technological advances have made other policy justifications for continuing the standard of *New York Times* and its

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[21] Logan, 81 OHIO ST. L.J. at 763-64 ("Southern anger at the media prompted another indirect strategy: filing libel lawsuits against national media organizations. Plaintiffs sought millions of dollars in damages from CBS News, the Saturday Evening Post, and Ladies Home Journal, but the primary target was the 'national paper of record,' the *New York Times*."). Justice Hugo Black, in his concurring opinion in *New York Times*, called these libel suits a "technique for harassing and punishing a free press," noting "[t]here is no reason to believe that there are not more such [suits] lurking just around the corner for the Times or any other newspaper which might dare to criticize public officials." 376 U.S. at 294-95 (Black, J., concurring).

progeny no longer relevant. For example, in *Gertz*, where the Court extended the *New York Times* "actual malice" standard from public officials to "public figures," Justice Powell, writing for the majority, noted that one of the justifications for placing a heightened burden on public plaintiffs was that such individuals placed themselves in the public limelight and are subject to public scrutiny, thus assuming the risk of false speech.[22]

But as one scholar points out, "[t]he prevalence of Internet speech undermines the viability of Justice Powell's claims."[23] While it may be arguable that a public plaintiff invites the scrutiny of traditional news outlets "run by professional journalists [which] are businesses that prize their reputations for accuracy," the same cannot be said about public plaintiffs assuming the risk of being "defamed by an anonymous blogger or in a message board posting."[24] The internet blogger clearly does not have the same professional incentives to ensure accuracy. This Court in 1964 simply could not have imagined the phenomenon of the reckless internet blogger or troll, which upends the underlying rationale espoused by Justice Powell in *Gertz.*

Scholars have also argued that the continuing application of the *New York Times* standard—which essentially immunizes the dissemination of false facts—is actually causing more problems than it fixes in this new age of "fake news" and internet speech.

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22 *Gertz*, *supra*. at 344.

23 Barron, 57 AM. U. L. REV. 73, 89.

24 *Id.*

For example, the *New York Times* standard actually provides the speaker with a disincentive to investigate and seek out corroborative facts. The "standard provides reporters with a strong disincentive from investigating news stories beyond the minimum necessary. The more a reporter investigates, the more likely it is that the reporter will discover some information that casts the veracity of the story into doubt, which would increase the likelihood of liability. Simply failing to fully investigate a story, however, constitutes mere negligence for which the reporter cannot be held liable."[25] Similarly, editors and publishers are discouraged from doing their jobs, "publishers are incentivized to do little or no fact-checking, confident that the more slipshod their investigation, the less likely they are to be guilty of 'actual malice.' In short, under an 'actual malice' regime, ignorance is bliss."[26]

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[25] *Id.* at 85-86; *see also* Logan, 81 OHIO ST. L.J. 759, 777-78 ("Because 'actual malice' is a subjective standard, *New York Times* 'immunizes those who publish charges they believe to be true even if the charges turn out to be false, [as well as those] who publish charges they (subjectively) believe to be true even if a reasonable person upon reasonable investigation would (objectively) not believe those charges to be true.' Simply stated, this standard 'incentivizes practices that increase the likelihood that the press will publish injurious falsehoods.'") (quoting Fredrick Schauer, *Slightly Guilty*, 193 U. CHI. LEGAL F. 83, 93 (1993); Barron, 57 AM. U.L. REV. 73, 75.).

[26] Logan, 81 OHIO ST. L.J. 759, 778 (citing Ronald A. Cass, *Weighing Constitutional Anchors: New York Times Co. v. Sullivan and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 409-10 (2014); William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment and Bad Journalism*, 1994 Sup. Ct. Rev. 169, 184 (1994).

A so-called Constitutional doctrine encouraging false fact reporting, combined with citizens being inundated with new and confusing information broadcast over the internet superhighway at an unprecedented rate, has created a social crisis of epic proportions. Indeed, "the Court's sweeping protection of defendants imposes costs beyond the inability to protect reputations: by inadequately deterring false speech, the ability of citizens to effectively self-govern is compromised."[27] As Justice White cogently observed after he became a critique of the doctrine:

> The *New York Times* rule . . . countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods . . . In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.[28]

Recent polling of the American public demonstrates Justice White's concerns over the "pollution" of information have become a reality. Almost two-thirds of U.S. adults report that fake news stories create confusion about current issues and events.[29]

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[27] Logan, 81 OHIO ST. L.J. 759, 780.

[28] *Dun & Bradstreet*, 472 U.S. at 769 (White, J., concurring).

[29] Logan, 81 OHIO ST. L.J. 759, 781 (citing Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News is Sowing Confusion*, Pew Res. Ctr. (Dec. 15, 2016), https://www.jounalism.org/20/16/12/15/many-americans-believe-fake-news-is-sowing-confusion/ [https://perma.cc/UBU3-4WT8].).

According to a recent Associated Press poll, millions of Americans now find it is difficult to know whether the information they encounter is accurate, which creates unprecedented voter confusion and sows division in the Country.[30] "'Actual malice' is no longer a democracy-enhancing doctrine and as a result it should be replaced by an alternative that better balances reputations with the need to deter false statements in our public debate."[31]

C. Solutions to the *New York Times* Problem.

In considering what standard to adopt, the Court has a few alternatives which would be less draconian and would at least provide some incentive for publishers to seek out the truth.

For example, based on Justice Thomas' "original meaning" analysis from *McKee*, the Court may not desire to "meddle" in this area by continuing to Constitutionalize the state common law of defama-

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[30] *Id.* (citing Nicholas Riccardi & Hannah Fingerhut, *AP-NORC/ USAFacts Poll: Americans Struggle to ID True Facts,* Associated Press (Nov. 14, 2019), https://news.yahoo.com/ap-norc-usa-facts-poll-132439294.html [https://perma.cc/F7GK-4JNU] (47% believe it is difficult to know whether the information they encounter is true, and almost 60% say they regularly see conflicting accounts of the same set of facts); Sabrina Tavernise & Aidan Gardnier, *'No One Believes Anything': Voters Worn Out by Fog of Political News*, N.Y. TIMES (Nov. 18, 2019), http://www.nytimes.com/2019/11/18us/polls-media-fake-news.html [https:/perma.cc/7QVP-ZXPR] ("Just when information is needed most, to many Americans it seems the most elusive. The rise of social media; the proliferation of information online, including news designed to deceive; and a flood of partisan news are leading to a general exhaustion with news itself.").

[31] Logan, 81 OHIO ST. L.J. 759, 781.

tion. There are no historical precedents that justify interpreting the First Amendment as a mandate to provide federal immunity for the tort of defamation. Libel was, at the time the Constitution was adopted and the Bill of Rights was ratified, a purely common law tort, and there is zero evidence the Founders anticipated the First Amendment would virtually eviscerate the common law tort. As Justice Thomas concludes, "[t]he States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."[32] In this regard, some States have already adopted their own fault paradigm when permitted to do so under existing *New York Times* doctrine.[33]

Further, should the Court continue to wade into the "policy driven" rationale by continuing to Constitutionalize the defamation tort—and Petitioner is not suggesting the Court should—the Court need look no further than Justice Harlan's plurality opinion in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156 (1967) and his concurring opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971). In *Butts*, the Court addressed a public figure defamation case involving a college athletic director falsely accused of fixing football games. *Butts* was decided three years after the Court decided *New York Times*. In his plurality

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[32] *McKee*, 139 S.Ct. 682.

[33] In New York, for example, the State's highest court has adopted a "grossly irresponsible" standard, consistent with *Gertz's* teaching that allows States to adopt their own fault standard in private figure defamation cases. *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 659, 572 (N.Y. 1975).

opinion, Justice Harlan articulated an objective standard that he argued should be applied to public figures, stating that liability could be found if an "investigation . . . was grossly inadequate in the circumstances."[34] This objective standard was further articulated by Justice Harlan in his concurring opinion in *Rosenbloom*, where Justice Harlan advocated for the adoption of a modified scienter requirement for public figures: "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[35]

Scholars have advocated for altering the "actual malice" standard to a more objective standard such as Harlan's in *Butts* and *Rosenbloom*. The Harlan standard is still higher than a mere negligence standard, but strikes "a better balance between the competing interests at play and lessen[s] the flow of falsehoods into our public debate."[36] Further, the

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[34] *Butts*, 388 U.S. at 156. In *Butts*, four of the nine Justices joined Justice Harlan's plurality decision. Chief Justice Warren wrote his own plurarlity opinion, which refused to backtrack from the "actual malice" *New York Times* standard.

[35] *Rosenbloom*, 403 U.S. at 63 (Harlan, J., concurring). The Court could further decide whether this objective, "substantial departure" standard would only apply to public figures—leaving intact the *New York Times* "actual malice" standard for public officials—or whether it would apply to both public figures and officials.

[36] Logan, 81 OHIO ST. L.J. 759, 784; *see also* Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 480 (2020)(" . . . overturning or tightening *St. Amant*, or applying a "reasonable person" standard for investigating potentially defamatory claims before publication would substantially change the balance of power, and in a way that would be unlikely to raise a fuss.); Barron, 57 AM. U. L. REV.

"reasonable journalistic standard" is something readily understandable by courts and juries a like as it is "widely deployed in tort law."[37]

We live in a society now surrounded by actors publishing false statements on the internet through myriad means and to a dizzying variety of ends. Some of those actors, like Carr in this case, and like Iago in OTHELLO, deploy sly slander to harm others. Iago, however, was correct about one thing: a person's good name has value:

> Good name in man and woman, dear my lord, Is the immediate jewel of their souls.
>
> Who steals my purse steals trash; 'tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name
>
> Robs me of that which not enriches him,
> And makes me poor indeed.

OTHELLO, Act III, scene 3, l. 155-61. Individuals who venture, like Othello, or like Konowicz in this case,

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73, 110 (noting England's " . . . House of Lords created an "elastic" ten-factor balancing test that looks to the public importance of the speech's subject matter and the reasonableness of the speaker's conduct.")

37 Reynolds, 87 TENN. L. REV. 465, 480 ("The 'reasonable person' standard is widely deployed in tort law and should be readily understood by courts and juries. To the extent that standard good practices of journalism help to demonstrate reasonableness, such a change would encourage news organizations to adopt—and adhere to—those sorts of practices, something would redound to the benefit of both journalists and those whom they cover.")

into the public office or enter the arena of public life cannot stop the rapid spread of a lie told about them. The response of the defamed, in a letter to the editor, is just a whisper in a raging storm of lies. It is now literally true that the lie goes around the world before the truth gets out of bed. These individuals, like Konowicz, need a remedy in the form of an effective way to hold liars accountable for launching the lie in the first instance. This is more important now than at any point in our history. The Constitution, as written and framed by the Founders, preserved our rights to our good names. *New York Times v. Sullivan*, like Iago, took those rights away.

II. THIS COURT'S DEFINITION OF COMMERCIAL SPEECH AND THE LANHAM ACT.

The Court of Appeals erred fundamentally in affirming summary judgment on Konowicz's Lanham Act claim on the basis that Carr did not engage in commercial speech. The Third Circuit Court of Appeals, in fact, took two opposing definitions of commercial speech developed among the Circuit Courts and created a false equivalence between them, in a manner that threatens to wipe out the standards this Court has applied to ascertain whether speech is commercial, and erase the Lanham Act's protections for persons attacked by false advertising on the internet or in social media.

This Court has applied various standards to define the term "commercial speech." In one of the seminal cases establishing First Amendment protection for commercial speech, this Court referred to it as speech that did "no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia*

Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Commercial speech has also been defined, in the context of First Amendment challenges, as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).[38] In *Bolger v. Youngs Drug Products Corp.*, this Court recognized the *Virginia State Board of Pharmacy* definition as the core concept of commercial speech, but expanded the definition to include advertisements that refer to a specific product in conjunction with an economic motivation; although, importantly, this Court reserved on whether reference to a particular product or service was a necessary component of commercial speech, and noted that not every element needed to be present. 463 U.S. 60, 66-67, n.14 (1983).

As the legislative history was less than helpful to courts that examined it,[39] and the doctrine of commercial speech has been developed in First Amendment jurisprudence rather than Lanham Act jurisprudence, the Courts of Appeal looked to the test developed in *Bolger* in interpreting the term "commercial speech" in the Lanham Act, while still hearkening back to the "common-sense" definitions this Court has used in other cases. *See Zauderer v. Office of*

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[38] Justices Blackmun and Rhenquist did not join the opinion of the Court, and Justice Stevens in his concurrence declined to accept this definition of commercial speech (or another similar formulation used in this case). 447 U.S. at 573, 579-580, 583.

[39] *See, e.g.*, *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996).

Disciplinary Couns. of Supreme Ct. of Ohio, 471 U.S. 626, 637 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

As a result, the current test could be described as a two-step examination: (1) does the speech propose a direct commercial transaction, or (2) does *Bolger* otherwise bring the statement within the definition of commercial speech, with or without direct reference to a product or service.

The circuits have not applied the two-step, post-*Bolger* test for commercial speech adequately or fairly, as evidenced by Konowicz's claims here. The District Court in this case actually applied the Eleventh Circuit's commercial speech standard, which differs radically from that of the Third Circuit; despite this, the Third Circuit Court of Appeals erroneously affirmed despite *Bolger* plainly applying to the false advertising by Carr. This case presents a unique opportunity for the Court to solidify a definition of commercial speech on social media by reaffirming the concepts in *Bolger*.

The facts of this case were clear on one issue: even as the Court of Appeals examined them, Carr made at least one false statement about a competitor and it was compelled to vacate, and remand for further proceedings on the state-law defamation claim of Konowicz. (App.2a, App.8a-9a). The evidence was unrebutted that Carr earned $1,000 per month from his weather activities, and the Court of Appeals accepted that the statement it found false "appeared within an article that perhaps served as an advertisement and referred to Carr's services." (App.10a). Despite these facts meeting the facial requirements of *Bolger*—economic motivation, advertisement, and mention of a service—the Court of Appeals affirmed

summary judgment on the basis that Carr had not engaged in commercial speech. Furthermore, ignoring the footnote in *Bolger* reserving on the necessity of reference to a product or service, the Court of Appeals found that other statements of Carr ("December 2014, March 2015, and June 2015") could not qualify as commercial speech despite the existence of Carr's advertisements with economic motivation to falsely attack a competitor.

This is ironic, because the Third Circuit Court of Appeals addressed the issue of whether non-traditional commercial speech, an infomercial-like program, met the test for commercial speech under the Lanham Act in *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017, n.6 (3d Cir. 2008). In addressing whether the infomercial-like program was commercial speech, the Third Circuit assessed it using the *Bolger* factors. *Facenda*, 542 F.3d at 1017. *Facenda* presented what the Court of Appeals found to be a novel issue, in that the program in question was a "making of" documentary for a video game, where the speaker (NFL Films) had only an indirect licensing interest in the success of the game. It examined the commercial speech factors and found that a marketing effort that looked like an "infomercial," disparaged earlier products, and the indirect interest in the commercial effort sufficed for commercial speech to be found. *Id.* at 1017-18.

Carr's conduct in this case fits squarely within commercial speech and the "indirect financial motivation" analysis of *Facenda.* Carr actually used the June 2015 "Kaboom" article as advertising—paying for it to appear to readers—thus satisfied the first element. (JA 696 ¶ 36.) Then, instead of promoting a single product for its own market advantage like in *Facenda*,

Carr issued false statements about Konowicz, secure in the knowledge that Carr would benefit by the defamation of a local competitor. This kind of "indirect financial motivation" was sufficient for the Third Circuit to find commercial speech in *Facenda*, and it compels a finding of commercial speech here. Furthermore, this "indirect financial motivation" supplies the third element of the "commercial advertising or promotion" test, as it expands reliance on Carr's services if Carr's local competition suffers from a reputational disability.

The Third Circuit Court of Appeals, however, deviated from the *Bolger* standard and cited to a Fourth Circuit standard, which used the familiar *Bolger* factors but added something not found in *Bolger*, an ambiguous concept proposing that the reviewing court examine: "(4) 'the viewpoint of the listener,' *i.e.* whether the listener would perceive the speech as proposing a transaction." *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 331 (4th Cir. 2015).

This use of a different, out-of-circuit standard, alien to the precepts of *Bolger* also occurred at the District Court in this matter. Using *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 939 (11th Cir. 2017), (hereinafter *Tobinick*), the District Court found Defendants' statements were not commercial speech. Specifically, it found that as the December 2014 and February 2015 statements of Defendants do not refer to a product or service or propose a commercial transaction, but rather disparaged Plaintiffs, they could not meet the test for commercial speech. (App.73a-74a). With respect to the March 2015 statement and June 2015 article, the District Court held that under *Tobinick* neither could be commercial speech (despite

meeting the *Bolger* test). (App74a-75a). The Opinion on the motion to correct the judgment simply reiterated these findings. (App.15a-16a).

Tobinick's analysis of the three factors diverges from the Third Circuit Court of Appeal's teaching from *Facenda*—and thus from *Bolger*. In *Tobinick*, educational articles that mention the different services offered by two physicians, disparaging one, results in a finding of non-commercial speech—contrary to *Facenda*. 848 F.3d at 950-51. There is, therefore, in this one case, evidence of the "wild west" approach to definitions of commercial speech in the Lanham Act context, which requires correction by this Court.

III. A WRIT OF CERTIORARI IS JUSTIFIED UNDER RULE 10(a) AND RULE 10(c).

This Court faces, and will continue to face, the changing landscape of fake news, defamatory statements, and commercial speech in the information age, especially through the use of social media. It is, therefore, respectfully requested that this Court take up consideration of this matter under S. Ct. R. 10(a) and 10(c).

CONCLUSION

For the reasons heretofore given, the writ of certiorari should be granted.

Respectfully submitted,

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