No. 20-332

IN THE

Supreme Court of the United States

MAGGY HURCHALLA,

Petitioner,

v.

LAKE POINT PHASE I, LLC & LAKE POINT PHASE II, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' brief overcomplicates this case with numerous false and irrelevant contentions—far too many to correct in this brief—but offers no sound reason to deny the petition. This case involves a single allegedly false statement: that the "benefits" of respondents' project were not "documented." The atmospherics respondents rely on extensively—that Ms. Hurchalla supposedly tried to "kill" the project through "clandestine" directives she sent to compliant County commissioners—would fail to support the decision below even if they were true.

In judging Ms. Hurchalla's statement constitutionally unprotected, the court below violated fundamental First Amendment principles: it ignored essential context, mistakenly treated the statement at issue as verifiably false, ignored uncontroverted evidence that Ms. Hurchalla believed her statement, and required no causal connection between the statement and the alleged breaches. The decision presents a grave danger to the citizenry's freedom to speak to government officials on matters of public concern. This Court's review is imperative, and it has jurisdiction to review because Ms. Hurchalla's challenge to the conclusion that she forfeited her First Amendment privilege was pressed and passed upon below.

ARGUMENT

I. THE COURT HAS JURISDICTION

Respondents argue (Opp.22) that this Court "lacks jurisdiction to consider Hurchalla's petition" because Ms. Hurchalla "never proposed a jury instruction using an 'actual malice' test under a 'clear and convincing evidence standard.'" That is irrelevant.

In the court below, Ms. Hurchalla presented two First Amendment challenges to the verdict: the jury instructions did not comply with the First Amendment, and the record did not contain "sufficient clear and convincing evidence to refute Hurchalla's First Amendment privilege." Pet.App.10a, 12a. The court concluded (erroneously) that she had waived her instructional challenge. Pet.App.9a-10a. However, the court *separately* addressed her challenge to the sufficiency of the evidence, in recognition of its "'obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Pet.App.10a (quoting *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984)) (internal quotation marks omitted).

Ms. Hurchalla's certiorari petition addresses *only* the court's review of the sufficiency of the evidence. The question presented, therefore, was pressed and passed upon below, and this Court has jurisdiction to consider it. *See also* Pet.12-14.

II. THIS CASE IS A GOOD VEHICLE TO REINFORCE IMPORTANT FIRST AMENDMENT PRINCIPLES

Respondents argue (Opp.2, 36-37) that this case is a "poor vehicle" because of its "unique facts." They paint Ms. Hurchalla as a nemesis secretly pulling the County commissioners' strings through various directives and false statements. *See* Opp.8-10, 14-16, 30-33, 37. As elaborated in the petition and here, their story is false and irrelevant. In fact, respondents' story reveals that their lawsuit against Ms. Hurchalla was merely retaliation for not getting their way with the County—and thus confirms that this Court should intervene to correct the lower court's erroneous validation of that retaliation.

Once that brush is cleared away, it becomes clear that this case involves ordinary circumstances. A concerned citizen tried to persuade her elected officials to examine a public-private project to promote the public good. Responsible government officials independently investigated the project and took adverse actions against the private developer, but instead of contesting those actions through ordinary review procedures, the developer blamed the concerned citizen and sued her in tort. Similar circumstances arise whenever an advocacy organization lobbies an elected official, a company submits a comment on a proposed regulation, or—as here—a citizen expresses her views to her elected officials.

What is unusual—indeed, extraordinary—about this case is that Ms. Hurchalla was found liable for $4.4 million in damages for making a single statement (among many) to government officials that was (1) true, an unverifiable opinion, or (at worst) ambiguously false, (2) genuinely believed by her, and (3) immaterial to the alleged contract breaches.

The amicus briefs filed by many organizations with diverse interests underscore the grave chilling effect that the decision below will have. If the decision stands, then tort litigation could be weaponized widely against others who seek to shape government policies and actions. As amici attest, the decision below exposes speakers of all stripes to the risk of crushing tort liability at the hands of powerful interests.

In short, the lower court's decision will deter the open and vigorous debate upon which our civic health depends. That is an extraordinary threat to our cherished First Amendment principles and demands this Court's review.

III. THE DECISION CONTRADICTS THE FIRST AMENDMENT

The court concluded that the First Amendment did not protect Ms. Hurchalla's statement that "[n]either the storage nor the treatment benefits have been documented." As explained (Pet.14-15, 27-28), to overcome her First Amendment privilege respondents had to prove by clear and convincing evidence that she made a statement (1) that was "objectively verifiable" and false, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 16, 20, 22 (1990); (2) "with knowledge that it was false or with reckless disregard of whether it was false," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964); *Bose*, 466 U.S. at 511 n.30; and (3) whose falsity was "material" to the injury, *Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 246-247 (2014). Together, these requirements express the concept of "actual malice." *See, e.g.*, *id.* ("we have long held that actual malice requires material falsity"). The court committed serious errors with respect to each.[1]

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[1] Respondents repeatedly fall back (Opp.31-33, 35) on Ms. Hurchalla's separate statements about the destruction of "wetlands." The court below, however, did not address those statements or even mention "wetlands." In any event, respondents' reliance on those statements fails for much the same reasons. The record showed those statements were true or expressed an unverifiable judgment. Contrary to respondents' assertion (Opp.31), there is no record of her telling the commissioners that respondents "had destroyed *all* of the wetlands on the Property"; she claimed only that a specific portion were destroyed, *see, e.g.*, C.A.R.3297, 7185. Moreover, Ms. Hurchalla explicitly based her statements on a permit granted to respondents by the U.S. Army Corps of Engineers, which expressly deemed the area "wetlands" under the federal standard and allowed for their "excavation" or "fill[ing]"—and her view was corroborated by expert testimony. *See* C.A.R.3297, 6765, 6786; Tr.885-891, 1210-1214; C.A.Reply.14-15. That those areas may not be "wetlands" under a different

A. The Court Ignored Critical Context Showing Ms. Hurchalla's Statement Was True

The petition explained (at 16-20) how the court disregarded context showing that Ms. Hurchalla's statement truthfully referred to the lack of a peer-review CERP study. Respondents' attempt to reshape the context does not salvage the decision.

1. According to respondents (Opp.27-28), Ms. Hurchalla's remark that "[t]here does not appear to be any peer review by the CERP team to verify benefits from the rockpit" is not part of the context because it was separated from her statement about the lack of "documented" "benefits" by discussion of "several different intervening topics." But context does not automatically end when the topic changes. Respondents' effort to read the key sentence in isolation is rejected by their own precedent. *Celle* v. *Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) ("Challenged statements are not to be read in isolation, but must be perused as the average reader would against the whole apparent scope and intent of the writing." (quotation marks omitted)), *cited in* Opp.28.

The whole email was a discussion of Ms. Hurchalla's concerns about the project. The statement about the lack of "documented" "benefits" was one of three bullet points summarizing the email to that point. *See* Pet.App.27a-29a. Specifically, the bullet point corresponded to—and thus is informed by—the earlier dis-

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standard does not make her statements knowingly or recklessly false. Moreover, there was no causal connection between her "wetlands" statements and the alleged breaches—indeed, as respondents point out (Opp.9, 13, 15), County staff expressly disagreed with it.

cussion containing the disregarded statement that there was no CERP peer review "to verify benefits."

2. Reversing course, respondents over-expand the context to include the commissioners' supposed lack of knowledge about the project. Opp.27-28. But even without such knowledge, an ordinary reader would understand that Ms. Hurchalla's bullet point about the lack of "documented" "benefits" referred to the preceding discussion of the missing CERP study.

Respondents also point to a separate email Ms. Hurchalla had sent a commissioner in September 2012. The court below, however, did not mention that email. Moreover, respondents fail to explain how the email—which, as respondents note, "insisted merely that the Lake Point project could not function as a reservoir," Opp.28; *see* Opp.App.19a-21a—illuminates the meaning of the statement at issue.

B. Alternatively, The Court Failed To Credit That Ms. Hurchalla's Statement Was Unverifiable Or Ambiguous

The petition explained (at 20-25) that, even if not verifiably true, Ms. Hurchalla's statement about the lack of "documented" "benefits" was constitutionally protected because it either (i) was an unverifiable expression of her judgment that the evidence she had seen was insufficient to prove the project's benefits or (ii) was ambiguous as to whether it was expressing the false proposition that categorically there were no documents addressing any possible benefits. Respondents' answers are meritless.

1. Respondents recognize (Opp.24-25) that the word "documented" has multiple relevant meanings, including as an expression of a judgment about the suf-

ficiency of evidence. That alone confirms that Ms. Hurchalla's statement was, at worst, ambiguously false and therefore privileged. *See* Pet.23-25.

Respondents say (Opp.26) the petition claims "it is a minority view for an appellate court to treat a jury's finding of fact that a statement is false as a finding." That incoherent description is inaccurate. The petition argues (at 24) that a minority of courts incorrectly permit tort liability based on a statement that is ambiguously false. Respondents cite no authority to dispel *that* description of the cases, let alone to defend the minority approach, which the court below in effect embraced. They cite (Opp.26) *Celle* and *Tavoulareas* v. *Piro*, 817 F.2d 762, 788 (D.C. Cir. 1987), but neither supports them because neither involved a statement claimed to be ambiguously false. *See Celle*, 209 F.3d at 189; *Tavoulareas*, 817 F.2d at 788. And had those cases allowed liability for such a statement, that would only underscore the need for this Court's review.

2. Trying a different tack, respondents contend (Opp.25) that Ms. Hurchalla's statement about the lack of "documented" "benefits" was false even under Ms. Hurchalla's interpretation of the word. That is incorrect. Interpreted to express her judgment that the evidence she had seen was insufficient to prove the project's benefits, Ms. Hurchalla's statement would be unverifiable. It is impossible to show objectively that the study of which she was aware persuasively proved the project's benefits to her. Respondents counter (Opp.34) that Ms. Hurchalla conceded her statement is verifiable by arguing at trial that it was "'true'" (quoting Tr.1796). Indeed, she believed her statement—and as discussed below, the lower court's disregard of that fact is an independent error. *See infra* p.9. In any event, Ms. Hurchalla's contention that her statement was true (*see*

supra pp.5-6) does not preclude her from arguing in the alternative that her statement expressed an unverifiable judgment.

Respondents also say (Opp.25) Ms. Hurchalla "admitted at trial that she agreed with the studies she had reviewed that the Project would reduce harmful phosphorus levels in water." That hardly shows that her expression of judgment was false. As explained (Pet.9, 19-20), in her view the single study of phosphorus removal she saw was insufficient to establish the project's benefits because it was preliminary, too narrow, and not subject to CERP peer review.

Citing *Milkovich*, respondents argue (Opp.33) that Ms. Hurchalla's argument rests on a constitutionally dubious distinction between statements of "opinion" and statements of "fact." True, *Milkovich* did not adopt a "wholesale defamation exemption for anything that might be labeled an opinion." 497 U.S. at 18, 21. But the petition does *not* rest on the "opinion" label. Rather, the petition argues that Ms. Hurchalla's statement is protected because (*inter alia*) it expressed a judgment that is not "provably false." *Id.* at 20. Her statement is therefore entitled to "full constitutional protection." *Id.*; *see* Pet.20-21.

Respondents fail in distinguishing (Opp.34) the other cases cited in the petition (*see* Pet.21) as involving a "word or phrase [that] was so unclear that no reasonable fact-finder could find it to be verifiably false." That is not how those courts analyzed the statements at issue. Rather, they decided for themselves whether the statements were sufficiently verifiable to be actionable. *See* Pet.23 &n.7; *see also Price* v. *Viking Penguin, Inc.*, 881 F.2d 1426, 1444 (8th Cir. 1989) (statement's meaning too uncertain to support claim).

C. The Court Disregarded Uncontroverted Evidence That Ms. Hurchalla Believed Her Statement

The petition showed (at 25-27) that, even if Ms. Hurchalla's statement about the lack of "documented" "benefits" were verifiably false, the court would still have erred because it disregarded uncontroverted evidence that she believed her statement in good faith. Respondents fail to refute this.

1. Respondents dwell (Opp.28-29) on Ms. Hurchalla's admission that she was aware of a study finding that the project would reduce phosphorus. But as explained (Pet.9, 19-20, 26), the evidence showed she genuinely believed her statement about the lack of "documented" "benefits" was true *despite* that study. *See supra* p.8.

2. Respondents serve (Opp.29-32) a smorgasbord of "circumstantial evidence" they claim shows Ms. Hurchalla's intentional or reckless disregard for the truth. None of that evidence is relevant.

First, respondents point (Opp.30) to Ms. Hurchalla's "clandestine communications with ignorant commissioners." But the audience's ignorance does not reveal the speaker's attitude toward the truth. Nor does First Amendment protection depend on whether the communication was public or private. Using commissioners' personal email addresses is no more suspicious than the innumerable conversations between government officials and constituents (or their agents) that commonly occur in social settings and on the telephone.

Second, respondents complain (Opp.30-31) that Ms. Hurchalla harbored "ill will" toward them: that she had lain in wait "for several years" until the opportunity to

"kill the contract" arose, at which point she "instructed" commissioners to "'[g]et the contract cancelled.'" But as this Court has long recognized, "Ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 264, 281 (1974) (brackets omitted); *see also Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 666 (1989). Indeed, First Amendment protection is not lost just because the citizen "directly intended … that [plaintiff] would sustain … injury as a result of" her speech and petitioning activity. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Moreover, respondents' story is false: Ms. Hurchalla was initially open to the project but became concerned in late 2012 upon seeing media reports that respondents were secretly planning to convert the project into one that supplied water for consumptive use (when County staff independently became concerned). *See* Pet.6-8.

Third, respondents see (Opp.30-31) something nefarious in Ms. Hurchalla's urging the commissioners to take certain actions. But the very core of the Free Speech and Petition Clauses is to protect efforts to influence the views and actions of others, especially government officials. If actual malice could be inferred from such efforts, the First Amendment's protection would be worthless.

Fourth, respondents assert (Opp.30) that, "[a]fter the litigation commenced, Hurchalla deleted key emails" she had sent the commissioners. This misleading and inflammatory assertion is irrelevant because respondents offer no explanation as to how those deleted emails would show that Ms. Hurchalla realized her statement was false. This case is nothing like *Brown & Williamson Tobacco Corp.* v. *Jacobson*, where the de-

fendant destroyed materials that contemporaneously contradicted his own libelous statement. 827 F.2d 1119, 1134 (7th Cir. 1987), *cited in* Opp.30.[2]

D. There Is No Evidence That Ms. Hurchalla's Statement Caused The Alleged Breaches

The petition showed (at 27-29) that there is no evidence that Ms. Hurchalla's allegedly false statement about the lack of "documented" "benefits" caused the County's alleged contract breaches. Respondents' answer disregards the law and makes up the facts.

First, respondents assert (Opp.34-35) that causation is a "state law issue for a jury." But again, the *First Amendment* requires clear and convincing proof that the falsity was "material" to the injury, i.e., that it *caused* the injury. *Supra* p.4; Pet.27-28.

Second, respondents argue (Opp.35-36) that Ms. Hurchalla's allegedly false statement caused the alleged breaches because her emails were "[t]he only thing that a majority of [the Board] did read before breaching the Interlocal Agreement." But again, the County's alleged breaches were unrelated to Ms. Hurchalla's statement. Pet.6, 28-29. The County's actions were driven by independent County staff, not the

[2] Ms. Hurchalla explained that she deleted emails only when her email service alerted her that she was running out of storage. Tr.1616; *see* Tr.1600-1603, 1638-1639. The only relevant emails she deleted after the lawsuit commenced were ones she had already provided to her lawyers and that her lawyers provided to respondents. *See* Tr.1566, 1576. As respondents implicitly acknowledge (Opp.30), respondents obtained nearly all deleted emails of interest, whether from Ms. Hurchalla or from the direct or indirect recipients of those emails. Respondents never adduced anything beyond speculation that deleted and unproduced emails were material.

Board. Staff testified without contradiction that they were not influenced by Ms. Hurchalla. Pet.28. Further, the Board was not dependent on Ms. Hurchalla's emails; it was informed about regulatory issues with the project by County staff's written and oral reports and notices. Pet.6-7, 9-10. Respondents fixate (Opp.35-36) on Ms. Hurchalla's direction that the County "void" the contract, but the County did *not* void the contract. *See* Opp.10 (describing alleged breaches).

Finally, respondents claim (Opp.36) that the County would not have settled but for "Hurchalla's behind the scenes interference." That claim is baseless and tellingly made without record citation. The County neither admitted liability nor blamed Ms. Hurchalla for its actions. C.A.R.8282-8309.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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