No. _____

In The

Supreme Court of the United States

CARTER PAGE,

Petitioner,

v.

OATH INC.,

Respondent.

On Petition For Writ Of Certiorari To The Delaware Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does couching factual claims in qualified language and in the passive voice suffice to render them "true or substantially true" under the First Amendment relevant to defamation claims?

2. Does the First Amendment require that the burden of proof to establish that statements are "false" be placed on a public-figure plaintiff in a defamation suit?

LIST OF PARTIES

The Petitioner is Carter Page, an individual and citizen of the United States. The Respondent is Oath Inc., a corporation organized under the laws of the State of Delaware.

STATEMENT OF RELATED CASES

- *Page v. Oath Inc.*, No. S20C-07-030 CAK, Superior Court of the State of Delaware, Sussex. Judgment Entered February 11, 2021.
- *Page v. Oath Inc.*, No. 79, 2021, Supreme Court of the State of Delaware. Judgment Entered January 19, 2022.

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STATEMENT OF JURISDICTION

The judgment of the Supreme Court of the State of Delaware was entered on January 19, 2022. This Petition is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AT ISSUE

The First Amendment to the Constitution of the United States provides:

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

STATEMENT OF THE CASE

In September, 2016, Yahoo! News published on its website an article written by its Chief Investigative Correspondent, Michael Isikoff (the "Isikoff Article"). The article, headlined "U.S. Intel Officials Probe Ties Between Trump Adviser and Kremlin," described an ongoing investigation by U.S. government agencies into alleged secret communications between the Trump campaign and Russian officials.

In one key part, the Isikoff Article conveyed what the Petitioner alleged to be a falsehood, and that two subsequent government investigations concluded to be a falsehood: that Carter Page, an adviser to the Trump campaign, had secretly met with sanctioned Russian officials and a report of this meeting, allegedly made by highly placed Western intelligence sources, was the source of an ongoing and concerning governmental investigation. The Isikoff Article couched those claims in the passive voice, masking his knowledge of the falsity of those reports and his role in publicizing them.

> But U.S. officials have since received intelligence reports that during that same three-day trip, Page met with Igor Sechin, a longtime Putin associate and former Russian deputy prime minister who is now the excecutive chairman of Rosneft, Russia's leading oil company, a well-placed Western intelligence source tells Yahoo News.

The "gist" or overall implication of this statement, and others like it in the Isikoff Article, is not true or substantially true; it is defamatory falsehood. Isikoff knew

the factual claims in his article were false when he wrote it. In another similar passage, Isikoff writes:

> That meeting, if confirmed, is viewed as especially problematic by U.S. officials because the Treasury Department in August 2014 named Sechin to a list of Russian officials and businessmen sanctioned over Russia's "illegitimate and unlawful actions in the Ukraine."

Contrary to the contrived and couched representations in the Isikoff Article, Page did not meet with Russian operatives; Page did not refuse to cooperate with a government investigation; Page was not the subject of an "intelligence report"; no "intelligence report" had been filed with the FBI; Page was not, most fundamentally, acting in Russian interests and contrary to the interests of the United States; Page was not seeking to corrupt a presidential election. Ironically, it was Isikoff who participated in a scheme to corrupt the presidential election by knowingly and maliciously describing what he knew was a fabricated "report" from a source Isikoff knew was not an "intelligence" source, and that no reasonable person would regard as such. The Isikoff Article was false, and Isikoff and Oath knew it was false when they published it.

There is no doubt how this article was understood by the "average lay reader," which is the gravamen of defamation liability. Its publication, coupled with the contrived "Steele Dossier" that Steele sent to the FBI, motivated the FBI to seek FISA warrants against Page. The FISA warrants expressly referenced the Isikoff Article. The subsequent investigation by the

Inspector General concluded that the investigation into Page, including the FISA warrants, were a direct result of the Isikoff Article. I.G. Report at 387. More broadly, Isikoff's false reporting fueled national debate and media coverage that, to this day, continues to unravel the complex hoax that constitutes the story of the fabricated Russian involvement with the Trump campaign.

REASONS FOR GRANTING THE WRIT

Under state law, including the law of Delaware, "truth" has historically provided a defense to defamation. *E.g.*, *Barker v. Huang*, 610 A.2d 1341, 1350 (Del. 1992). Because truth constituted an affirmative defense, the burden of proving the truth of the statement fell on the defendant asserting the defense. Following this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), however, it became unclear which party had the burden of proving falsity in defamation cases.

The *Sullivan* opinion foreshadowed the negation of long-standing state common law. *Id.* at 279-80 ("[A] public official [is prohibited from] recovering damages for a defamatory falsehood . . . unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."). This Court resolved that issue in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), holding that "[the]

plaintiff must show the falsity of the statement at issue in order to prevail in a suit for defamation." This Court subsequently adopted an expanded notion of "truth" in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991), ruling that the plaintiff in a defamation case must prove the publication is not true nor "substantially true."

A. Merely Couching Defamatory Facts in Qualifying Language or Hiding the Subject by Using the Passive Voice Does Not Render False Statements True or Substantially True

Under federal constitutional precedents, the "public" plaintiff in a defamation case must prove, in addition to the elements established by state law, that the statements were "false" and were made with "actual malice." Of these two added federal elements, only the first is at issue here. The Delaware Supreme Court affirmed the Superior Court's ruling that the Isikoff Article was true or substantially true. App. 3, 25-28.

The Isikoff Article made the following statements, all couched in qualifying syntax and passive-voice constructions:

- Page met with Russian officials Sechin and Diveykin in the Kremlin;
- U.S. officials had received intelligence reports of those meetings; and

- A well-placed Western intelligence source had told Yahoo! News that U.S. officials had received these reports.

App. 104.[1] None of these statements were true. Michael Isikoff, the author of the article, knew these statements were false or probably false. These "intelligence reports" were in fact "opposition research" conducted by Christopher Steele, a biased and unreliable private foreign national with no first-hand knowledge who was paid by Clinton campaign operatives. The Amended Complaint provides substantial evidence that Isikoff knew this. Am. Compl. ¶¶ 9, 106-110, 116.

Nonetheless, the Isikoff Article created a deceitful implication that the documents referred to were actual intelligence reports. Concerning the claims of a clandestine meeting, Isikoff knew (and Respondent concurs) that these alleged meetings never took place. Never in his life has Page met with these Russian officials nor with their agents or representatives. As for the contrived Steele Dossier as constituting an "intelligence report" from a "highly placed" Western intelligence source, the court below defined an "intelligence report" as a "report of information relevant to an investigation." This definition would mean that any report, from whatever source and of whatever merit,

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[1] The Isikoff Article states, "[b]ut U.S. officials have since received intelligence reports that during that same three-day trip, Page met with Igor Sechin, a longtime Putin associate and former Russian deputy prime minister who is now the executive chairman of Rosneft, Russia's leading oil company, a well-placed Western intelligence source tells Yahoo News."

constitutes an "intelligence report" if it is used by intelligence officials. This circular definition renders the term "intelligence report" as truthful *per se*. No plaintiff could meet the burden of establishing that the claim of "intelligence report" is false. At oral argument before the Supreme Court of Delaware, Respondent's counsel defended this assertion, arguing that any report, even information about the "daily weather," constitutes an "intelligence report" if it were given to an intelligence agency.[2]

A defamatory statement must be viewed in context, *Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014), and assessed according to the understanding of the average lay reader. The average reader consuming an article entitled "U.S. Intel Officials Probe Ties Between Trump Adviser and the Kremlin" would be surprised to learn that the "intelligence reports" that provided the "factual basis" for this story were in fact the work of the paid operative of the Democratic National Committee and its allied presidential campaign. Being alerted to the truth of the source of these incendiary claims would materially affect the average

[2] THE COURT: So, if I send the CIA a weather report that it's going to be seventy-seven and sunny today, that's an intelligence report? COUNSEL: Yes, I think that's, as the term is used in this particular article, that is true. The way that the article was using that term was simply to refer to intelligence that was received by the intelligence agencies, not reports that were issued by the intelligence agencies, or that were verified by intelligence agencies in any way. So, I think that the way the Superior Court put it below was, this could be political opposition research, it can be even unreliable as Dr. Page argues, that doesn't make it not and [sic] intelligence report.

reader's assessment of the trustworthiness of the statements in the Isikoff Article. The use of the phrase "well-placed Western intelligence source" was false. No average reader would consider Steele to fit that bill. Steele was compensated by payments funneled through a public relations firm by the DNC's law firm, and the public relations firm, Fusion GPS, was an entity owned and operated by Isikoff's long-time friend, Glenn Simpson.

Isikoff knew that Page had never met with Sechin, yet purposely used qualifying words and the passive voice to suggest that he did. The Isikoff Article states:

> That meeting, if confirmed, is viewed as especially problematic by U.S. officials because the Treasury Department in August 2014 named Sechin to a list of Russian officials and businessmen sanctioned over Russia's illegitimate and unlawful actions in the Ukraine.

The Superior Court concluded, and the Supreme Court of Delaware agreed, that "[t]he article does not claim that Plaintiff ['actually' met with those officials." Yet by stating that the (non-existent) meeting had generated a particular "view" by "U.S. officials," and that view was "problematic," creates an unmistakable factual impression on the average reader: that Page in fact met with these notorious Russian officials. Isikoff knew there had been no meeting, but he used the passive voice and qualifying words to insinuate that a meeting in fact had taken place.

Isikoff's insinuations gave rise to two thorough government investigations and fueled a media narrative and public controversy that continues to this day. As Delaware Supreme Court Justice Valihura stated in her dissenting opinion, "[e]ven in a world where the "truth" struggles to find its true north in the midst of the whirlwind of political strife, Page's allegations that the Article is not substantially true easily pass muster." This appeal presents an opportunity for this Court to provide needed guidance and definition to the meaning of "truth or substantial truth," much like it did regarding the "fact/opinion" issue in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

B. As this Case Demonstrates, Shifting the Burden of Proof Has Created a Nearly Insurmountable Obstacle to Defamation Liability Under State Law

State common law had for over a century defined truth as a defense. Defining truth as a defense reflects sound policy: it precludes the plaintiff from having to be aware of evidence, at the pleading stage of the litigation, that essentially "proves the negative," to wit: that under no set of circumstances can it reasonably be said that a statement is true or substantially true. In *Sullivan* and its progeny, this Court shifted that burden of proof, as a matter of constitutional law, to the plaintiff to prove falsehood. The Court in *Hepps* provided three reasons for this change: (1) the need to protect the freedom of the press; (2) the desire to not saddle media defendants with unwarranted liability; and (3) the need to encourage public debate and

discussion on important public issues. *Hepps*, 475 U.S. at 767, 775.

None of those conditions cited in the 1986 decision appears today to justify the continued disestablishment of state law. Public debate and discussion on all issues, important and otherwise, flow freely on numerous social media and other democratized outlets. Further, judicial intervention in state law is not needed. Congress has been engaged on this matter, creating through statutes the desired level of federal protection of free speech on social media platforms. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998), *codified as amended at* 17 U.S.C. §§ 512, 1201-1205, 1301-1332 and 28 U.S.C. § 4001 (2012); Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104 (Tit. V), 110 Stat. 133 (1996), *codified at* 47 U.S.C. § 230 (2012). State legislatures and courts can do the same with regard to the dimensions and burdens of proof of state common law defamation actions. This case presents an opportunity for this Court to reconsider, in part, its constitutionalization of state defamation law.

CONCLUSION

The Petitioner requests this Court grant a writ of certiorari to the Supreme Court of Delaware.

Dated: April 19, 2022

Respectfully submitted,

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