No. _____

In The
Supreme Court of the United States

PAMELA YOUNG and MODELS PLUS INTERNATIONAL, LLC DBA THE YOUNG AGENCY,

Petitioners,

v.

WENDY ROGERS and HAL KUNNEN, and WENDYROGERS.ORG,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wendy Rogers aired a political attack ad claiming that her adversary Steve Smith "is a slimy character whose modeling agency specializes in underage girls and advertises on websites linked to sex trafficking." Although the ad was directed at Smith, it was "of and concerning" Pamela Young and her modeling agency because it was common public knowledge that Young's agency employed Smith. Young sued for defamation and false light, alleging Rogers implied that she and her agency were complicit in sex trafficking underage girls.

In a 4-3 opinion, the Arizona Supreme Court held that Young's claim, though actionable under defamation law, was barred by the First Amendment. The court acknowledged the statement was capable of bearing the meaning Young alleged, but concluded that Young's meaning "would not likely be drawn by a reasonable reader." According to the dissent, the majority's opinion "effectively weaponizes the First Amendment against innocent bystanders ensnared by often-vitriolic political campaigns, disregards well-established precedent, and is unnecessary for protecting political speech."

The questions presented are:

1. Whether the First Amendment immunizes a political candidate from a private figure's defamation and false light claims where the candidate publishes an attack ad that makes statements of and concerning

QUESTIONS PRESENTED—Continued

the private figure and whose implication could bear a defamatory meaning.

2. Whether under *Milkovich*'s enhanced appellate review, an appellate court may usurp the jury's role by concluding that although a communication is capable of bearing a defamatory meaning, it would not likely be drawn by a reasonable listener.

PARTIES TO THE PROCEEDING

Petitioners Pamela Young and Models Plus International, LLC dba The Young Agency were plaintiffs in the trial court proceedings, respondents-real parties in interest in the special action appellate proceedings, and petitioners in the supreme court proceedings.

Respondents Wendy Rogers, Hal Kunnen, and wendyrogers.org were the defendants in the trial court proceedings, petitioners in the special action appellate proceedings, and respondents in the supreme court proceedings.

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Models Plus International, LLC.

RELATED CASES

Rogers v. Mroz, No. CV-21-0001-PR, Arizona Supreme Court. Opinion entered February 1, 2022.

Rogers v. Mroz, No. 1 CA-SA 190262, Arizona Court of Appeals. Opinion entered December 8, 2020.

Young v. Rogers, No. CV2018-013114, Maricopa County Superior Court in the State of Arizona. Ruling entered November 12, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Pamela Young and Models Plus International, LLC dba The Young Agency petition for a writ of certiorari to review the opinion of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The Arizona Supreme Court's opinion is reported at 502 P.3d 986 (2022) and reproduced at App. 1-26. The Arizona Court of Appeals' opinion is reported at 479 P.3d 410 (App. 2020) and reproduced at App. 27-70. The Maricopa County Arizona Superior Court's decision is reproduced at App. 71-72.

JURISDICTION

The Arizona Supreme Court entered its opinion on February 1, 2022. App. 1-26. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS

The First Amendment and Seventh Amendment to the United States Constitution are reproduced in the appendix at App. 73.

Article II, § 6 of the Arizona Constitution provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Article II, § 23 of the Arizona Constitution provides in pertinent part: "The right of trial by jury shall remain inviolate."

STATEMENT OF THE CASE

The Arizona Supreme Court rendered an erroneous decision on a substantial federal question arising under the First Amendment of the Constitution. The question—the scope of First Amendment protections applied to state defamation law—was raised in all courts below. Rogers moved for summary judgment on Young's defamation and false light claims, asserting First Amendment protections. App. 35 ¶ 16. The appellate court accepted special action jurisdiction to review the denial of Rogers' summary judgment motion because "the suit raises serious First Amendment concerns." App. 37 ¶ 19. The supreme court "granted review to decide the important question of whether the First Amendment tolerates a defamation action under the facts presented here." App. 7 ¶ 11. Both appellate courts' opinions were premised on First Amendment grounds. App. 7 ¶ 9; App. 2 ¶ 1.

I. Factual Background

Pamela Young is one of Arizona's most accomplished African American small business owners. For 25 years, she has operated The Young Agency, a premier full-service model/talent agency in Phoenix, Arizona (the "Agency"). App. 4 ¶ 5. Roughly half of the Agency's models are minors, working subject to parental or legal guardian consent. *Id.*

Young's reputation fell under siege in 2018 when her employee Steve Smith ran for the House of Representatives. *Id.* His opponent in the primary, Wendy Rogers, aired an attack ad on radio and television stating:

> Tom O'Halleran is a dangerous leftist and ally of Nancy Pelosi and the open borders lobby, but he'll win again if we run Steve Smith for Congress. **Smith is a slimy character whose modeling agency specializes in underage girls and advertises on websites linked to sex trafficking.** Smith opposed Trump, never endorsed Trump against Clinton and ridiculed our much needed border wall. Who'll beat O'Halleran? Wendy Rogers.

App. 5 ¶ 7 (emphasis added).

Rogers' only basis to claim the Agency "advertise[d] on websites linked to sex trafficking" was Smith's account on one website known as Model Mayhem, a social media platform for models and modeling agencies. App. 4 ¶ 6. In 2013, a local news outlet in

Columbia, Missouri published an article reporting on Model Mayhem titled "Modeling website linked to disappearances, rape and human trafficking." App. 30 ¶ 5.

Rogers effectively conceded her attack ad peddled deliberate falsehoods, admitting:

- she had no evidence that Young and the Agency were complicit in sexual misconduct with "underage girls" or were connected to "sex trafficking" [App. 76];

- she had no evidence that Model Mayhem had pro-sex trafficking policies or solicited sex traffickers [App. 75]; and

- she had no concern if these false statements would damage Young's reputation because she just "wanted to win" [App. 74-75].

Following the primary election, Young sued Rogers for defamation and false light invasion of privacy, alleging Rogers' statements were untrue and the common usage of Rogers' words connoted Young and the Agency's complicity in sex trafficking and other misconduct with minors. App. 6 ¶ 8. Rogers moved for summary judgment. *Id.* The trial court denied the motion, leaving it for the jury to decide whether an ordinary listener would have understood Rogers' statements as a factual assertion bearing a defamatory meaning. App. 71.

Rogers petitioned the appellate court for special action review. The appellate court accepted jurisdiction, granting relief and reversing the trial court over

the dissent. App. 29 ¶ 2. In a 2-1 split, the majority reasoned that the attack ad was nonactionable as mere opinion. App. 48-58.

Disagreeing, the dissent explained that a reasonable person could understand the words used in the attack ad to imply the Agency's complicity in child sex trafficking, as Rogers herself had tacitly admitted during her deposition. App. 63-66. By overlooking this permissible meaning, the dissent continued, the majority had created "a limitless license to lie about someone not associated with any political campaign as long as the lie is bookended by comments disparaging the values held by one's actual political opponent." App. 67 ¶ 78. The dissent concluded "the jury, rather than the court, [should be] the ultimate arbiter of 'whether the defamatory meaning of the statement was in fact conveyed.'" App. 64 ¶ 72 (quoting *Yetman v. English*, 168 Ariz. 71, 79 (1991)).

II. Arizona Supreme Court Opinion

On review, the supreme court also directed summary judgment for Rogers, but on grounds more stringent than the appellate court. Any scintilla of hope the appellate court left for claims like Young's, the supreme court dashed. It vacated the appellate court's opinion in a 4-3 decision, holding that Young's claim was actionable under state defamation law, but barred by the First Amendment.

The majority acknowledged that Young's claim contained all the necessary components of an actionable

defamation claim as a: (i) third-party (ii) implied defamation claim (iii) on a matter of public concern (iv) asserted by a private person (v) against a public figure (vi) in which the publication is of and concerning the plaintiff and (vii) capable of bearing the defamatory meaning that the plaintiff alleged. App. 8 ¶¶ 13-14; App. 14 ¶ 27; App. 15 ¶ 28; App. 18 ¶ 36; App. 23 ¶ 45. But, the majority reasoned, "we do not examine the circumstances here solely through the lens of state defamation law; we do so bearing in mind that such law is constrained by First Amendment protections." App. 8 ¶ 15.

As the constitutional backdrop for its decision, the majority cited this Court's opinions in *Sullivan* and *Greenbelt*—both public figure/official, public concern cases—as instances where the First Amendment granted newspapers additional protection from state law defamation claims. App. 9 ¶ 17 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); App. 10-11 ¶¶ 18-19 (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970)). The majority recognized that this Court's opinion in *Milkovich* held that a private figure/public concern implied defamation case was actionable under the First Amendment. App. 11 ¶¶ 20-21 (citing *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 22 (1990)). However, the majority distinguished *Milkovich* from this case because there the publication expressly identified the plaintiff by name. *See id.*

The majority further recognized *Yetman*, in which the Arizona Supreme Court, applying *Milkovich*'s constitutional safeguards in the political speech context,

found a public figure implied defamation claim actionable under the First Amendment. App. 12 (citing *Yetman v. English*, 168 Ariz. 71, 73, 75-76, 81-82 (1991)). Consistent with *Milkovich*, *Yetman* instructed that in only the "clearest of cases" should a court find as a matter of law that a given communication does or does not imply actual facts. App. 12-13 (citing *id.* at 79). But "where there are truly two tenable views or interpretations of the statement" the question "**must** be left to the jury." 168 Ariz. at 79 (emphasis added).

Noting that "it was unable to identify, and the parties did not supply, any other case presenting third-party defamation by implication" the majority reasoned that its "enhanced appellate role" to protect First Amendment values is heightened in "this case, even more than most." App. 14 ¶ 27. But *Bell v. National Republican Congressional Committee*, 187 F. Supp. 2d 605 (S.D. W.Va. 2002), cited by Young in the trial court, held that an unnamed third party private figure could bring an implied defamation claim against a political candidate arising out of an attack ad.

Under this heightened enhanced appellate review, the majority below barred the jury from hearing Young's claim, reasoning that "a jury's charge, unlike [the court's], does not include safeguarding freedom of speech." App. 20 ¶ 40. Despite acknowledging that the attack ad is capable of bearing the defamatory meaning Young alleged, the majority concluded as a matter of law that a reasonable person would not have understood the attack ad to mean that Young and the Agency were complicit in sex trafficking. App. 19-20 ¶¶ 37-38.

The majority concluded that Young's claim is "too attenuated to be actionable without inflicting a serious chilling effect on important, even if repugnant, political speech" and "opening the floodgates to litigants who are aggrieved by perceived indignities visited upon them by politicians." App. 20 ¶ 38; App. 21 ¶ 41. It held:

> [T]he First Amendment precludes a defamation action based on a political advertisement directed at an opposing candidate, in which the third-party plaintiff is unnamed, the alleged defamation is not expressed but only implied, and the asserted implication is not one that would likely be drawn by a reasonable listener.

App. 2-3 ¶ 1.

By contrast, the dissent held that the trial court properly denied Rogers' motion for summary judgment because the attack ad "permitted a reasonable factfinder to conclude that it implied as a matter of actual fact that Young Agency was complicit in sex trafficking girls, a fact provable as false." App. 22 ¶ 43; App. 23-24 ¶¶ 45-46; App. 25 ¶ 48; App. 26 ¶ 49 (citing *Yetman*, 168 Ariz. at 79).

The dissent criticized the majority for its unprecedented holding that a campaign ad cannot as a matter of law defame a third party who is not the ad's primary target. App. 24 ¶ 47. Such a standard "largely bars" private figure implied defamation claims because "political opponents, not private parties, will usually, if not always, be the targets of political speech." App. 26 ¶ 50.

Rather, under well-established precedent, the attack ad need only be "of and concerning" Young, a matter which Rogers and the majority conceded. App. 24 ¶ 47 (citing Restatement (Second) of Torts § 564 (Am. Law Inst. 1977)).

According to the dissent, the majority's opinion "supplants the jury's role in deciding factual issues" because the majority feared that (i) a "barrage of lawsuits" would ensue against political candidates, (ii) "juries won't safeguard the First Amendment," and (iii) candidates' speech "might be chilled" out of concern for "costly litigation and potentially embarrassing discovery." App. 25 ¶ 49. But the dissent observed that the protections afforded under *Milkovich* are "adequate to ensure that debate on public issues remains 'uninhibited, robust, and wide open.'" *Id.* (citing *Yetman*, 168 Ariz. at 75 (quoting *Milkovich*, 497 U.S. at 20)).

In sum, the dissent concluded that the majority's view "effectively weaponizes the First Amendment against innocent bystanders ensnared by often-vitriolic political campaigns, disregards well-established precedent, and is unnecessary for protecting political speech." App. 26 ¶ 50.

REASONS FOR GRANTING THE PETITION

Increasingly in today's political arena, private parties are made unwilling participants in wars between political factions where everything is considered fair game. Politicians like Wendy Rogers enjoy access to

effective channels of communication to counteract false statements. Private individuals like Pamela Young do not. Because "the truth rarely catches up with a lie," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n. 9 (1974), "[t]he destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem." *Milkovich*, 497 U.S. at 22 (citation omitted). For this reason, state defamation law and the First Amendment allow private individuals like Young—who lack any meaningful platform to refute an accusation of criminal conduct within the marketplace of ideas—to vindicate their reputational interest through a defamation claim.

Whether the First Amendment shields political candidates from private citizens' defamation claims is an important, recurring question that has not been, but should be, settled by the Court. *See* U.S. Sup. Ct. R. 10(c). In today's political climate it has become increasingly common for public figures to defame third-party private citizens (expressly and impliedly) in rallies, campaign speeches, and other forms of political speech. *See*, *e.g.*, *US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021). The Court's guidance on the interplay of state and federal interests respecting these claims would be timely and would forestall further conflicts between lower courts on the issue.

This Court should grant the petition and reverse the court below. *See*, *e.g.*, *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974) (granting certiorari because the case presents "important questions touching the

accommodation of state and federal interests under the Constitution.").

I. This Court Should Grant Certiorari to Decide the Outer Boundaries of the First Amendment on State Defamation Law

This case presents an opportunity for the Court to affirm that First Amendment protections do not displace state defamation law as to private citizens' implied defamation claims arising from political speech. Such claims, actionable under state defamation law, must proceed unconstrained by the First Amendment.

Private plaintiffs' defamation remedies should reside outside the First Amendment's protections as they historically have. "From the very founding of the Nation" the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz*, 418 U.S. at 369-370 (White, J., dissenting). It remained "untouched by the First Amendment" because "the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964" by *Sullivan* and its progeny requiring public officials/figures to prove actual malice to prevail on defamation claims. *Id.*

Tellingly, this Court declined to extend *Sullivan* to private defamation plaintiffs, noting that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more

deserving of recovery" and therefore, "the state interest in protecting [private individuals] is correspondingly greater." *Gertz*, 418 U.S. at 334-345. Accordingly, the Court left private defamation claims untouched by the First Amendment to permit the states to exercise their "strong and legitimate . . . interest in compensating private individuals for injury to reputation. *Id.* at 348.

In tension with *Gertz*'s directive, the majority below gives greater protection to politicians in private defamation suits like Young's than they would otherwise receive under *Sullivan*. Paradoxically, Smith (a public figure) would have had a greater chance of success against Rogers under the *Sullivan* actual malice standard than Young (a private figure) had under the standard applied by the majority below. *See* App. 74-76; App. 66 ¶ 76 (evidence demonstrating Rogers acted with actual malice). Indeed, even Young would have fared better under *Sullivan*'s strictures because Rogers conceded she had no evidence that Young's agency was complicit in sexual misconduct with "underage girls" or was connected to "sex trafficking." App. 76. Finally, *Gertz* was grounded in the rationale that the First Amendment placed additional hurdles on public figure *plaintiffs* because they chose the limelight and its inherent risks of reputational attacks, and have greater access to media sources to vindicate their reputational interest. *Gertz*, 418 U.S. at 344. In contrast, the majority below held that the First Amendment affords greater protections to public figure *defendants* such as Rogers, which was never the intent or ambit of *Gertz* and *Sullivan*.

This Court has long held that because speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S. at 340. Yet in this case, ordinary Americans "involuntarily swept into the political maelstrom" are effectively barred under the First Amendment from seeking recourse for their reputational injuries, even where the challenged publication is admittedly actionable under state defamation law. App. 21 ¶ 41. "Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers." *Gertz*, 418 U.S. at 381.

Existing state defamation law strikes a prudent balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. Arizona, for example, recognized at statehood that parties have the right to free speech but must be accountable for abuses of that right. *See* Ariz. Const. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.") Thus, Arizona's constitution recognizes a cause of action for defamation, and it is to be decided by a jury. *See* Ariz. Const. art. II, § 23 ("The right of trial by jury shall remain inviolate.").

Yetman, whose framework the majority purported to apply, has governed implied defamation claims in Arizona for more than 30 years. App. 12 ¶ 22 n. 2. Pertinent here is *Yetman*'s adoption of the Restatement § 614—the broadly accepted principle concerning the judge and jury's role in determining the meaning of an alleged defamatory communication. First, the court determines as a matter of law whether a communication is capable of bearing a defamatory meaning. *Yetman*, 168 Ariz. 71, 79 (1991) (citing Restatement (Second) of Torts § 614 (Am. Law Inst. 1977)). Second, if so, the jury decides whether the defamatory meaning was conveyed to the recipient. *Id.*

This Court applied the same framework in *Milkovich*:

> The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative.

Milkovich, 497 U.S. at 21. Finding the statement capable of bearing a defamatory meaning, the Court permitted the case to proceed to the jury. *Id.* at 23.

The approach of *Milkovich* is consistent with the Restatement:

> In some cases imputations are so clearly innocent or so clearly defamatory that the court is justified in determining the question itself. On

> the other hand, if, in the opinion of the court, the question is one on which reasonable men might differ, it is for the jury to determine which of the two permissible views they will take.

Restatement (Second) of Torts § 614, cmt. d.

Here, the trial court did as *Milkovich* and the Restatement direct: it concluded the attack ad could bear a defamatory meaning and left the resolution of the case to a jury. App. 71. On review, the majority below acknowledged the attack ad is capable of bearing the defamatory meaning Young alleged, but concluded as a matter of law that the alleged meaning "is not one that would likely be drawn by a reasonable listener." App. 3 ¶ 1. By purporting to decide what meaning a juror would likely draw, the majority effectively carved out an area of non-liability in order to prevent juries from finding statements such as Rogers' defamatory.

The majority usurped the jury's role, and deprived Young of her right to a jury trial in contravention of *Milkovich*. In doing so, the Arizona Supreme Court abused its "enhanced appellate review" power to depart from this Court's precedent and invent new federal constitutional standards. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (appellate court's role is limited to examining the record to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression.").

Additionally, as the dissent noted, the majority below placed a heightened First Amendment requirement on the "of and concerning" standard in conflict

with *Peck v. Tribune Co.*, barring implied defamation claims where plaintiff is not specifically named in the communication but is readily identifiable by the public at large. *See Peck v. Tribune Co.*, 214 U.S. 185, 188-89 (1909); App. 24 ¶ 47.

The majority's opinion is also in conflict with *Bell v. National Republican Congressional Committee, supra*, in which a district court found actionable a claim like Young's, denied summary judgment to the defendant, and sent the claim to the jury. 187 F. Supp. 2d at 616. Like Young's case, *Bell* involved third party private figure defamation and false light claims against a political candidate arising out of an attack ad that implied the plaintiff was a sex offender and rapist.

Bell and his wife posed in campaign photographs with their neighbor, James Humphreys, a Democratic political candidate. *Id.* at 609. One such photograph, depicting Bell and his wife listening to Humphreys speak at a local drug store, appeared on Humphreys' campaign website. *Id.* Later in the campaign, the National Republican Congressional Committee ("NRCC") mailed a political pamphlet featuring a version of the Humphreys-Bell photograph, downloaded from Humphreys' website, from which Mrs. Bell had been cropped. *Id.* The cropped photograph appeared immediately adjacent to the bold text, "Humphreys Defended Sex Offenders as a Criminal Defense Lawyer," and the caption "A multi-millionaire trial lawyer, Jim Humphreys has represented rapists and repeat child molesters." *Id.* The pamphlet did not identify Bell. *Id.* Like Rogers, the NRCC argued that "in no respect

whatsoever" is it reasonable to conclude that the pamphlet's text referred to Bell." *Id.* at 615.

Bell filed suit for libel per se and invasion of privacy, asserting that the publication implied that Bell was a repeat sex offender and rapist. *Id.* at 609. To arrive at its conclusion that the claim was actionable under state law, the court applied a framework consistent with the Restatement § 614 and *Milkovich* to determine the meaning of the alleged defamatory communication:

> The court finds that a reasonable reader could conclude that the headline and the picture implied that Bell is a sex offender. Therefore, the court finds that the pamphlet is capable of defamatory meaning. Whether it actually was defamatory is a question for the jury.

Id. at 616.

In light of the differing judicial responses to this question of widespread importance, this Court should grant review to determine the outer boundaries of the First Amendment on state defamation law as it relates to third parties defamed in political speech. *See*, *e.g.*, *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (certiorari granted based solely on a conflict between a court of appeals decision and a single-judge district court ruling); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 & n. 4 (1980) (certiorari granted "to forestall a possible conflict in the lower courts" on an "important" issue, even though there was "no direct conflict" among district court and court of appeals opinions).

II. This Case Presents Exceptionally Important and Recurring Questions

Free speech is undoubtedly a compelling civil liberty in a democratic society. But the right to a jury trial in civil matters, enshrined in the Seventh Amendment and in most state constitutions, is an equally compelling civil liberty that is integral to democratic self-governance. *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting) ("The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty."). *Milkovich* struck an appropriate balance between these two competing interests. The Arizona Supreme Court's opinion places that balance in jeopardy. The majority below exalted political speech over private citizens' reputational interest, usurped the jury's role in defamation cases, and thereby deprived private citizens of their right to a jury trial.

If allowed to stand, the decision will provide increased protection to potentially false speech and decreased protection to reputational interests, leaving ordinary Americans without recourse for grievous defamation at the hands of public figure politicians.

At the heart of the issue is the need to safeguard everyday Americans' reputational interests. An "individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz, supra*, at 341 (quoting *Rosenblatt v. Baer*, 383

U.S. 75, 92, (1966)) (Stewart, J., concurring). Given revolutions in technology, now more than ever before it is critical to safeguard reputational interest. As Justice Gorsuch recently observed, because "everyone carries a soapbox in their hands," now "virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world." *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting).

Unlike politicians, ordinary citizens do not have access to adequate platforms to defend themselves in the marketplace of ideas, so they must resort to the courts. Under the majority's opinion, plaintiffs like Young, damaged by the most outrageous falsehoods, will be rendered powerless under the First Amendment, even if their claim is otherwise actionable under state law. The lie will go uncorrected and the public will continue to be misinformed, believing the lie to be true. This will happen again and again, because a would-be plaintiff's burden under the majority opinion is so exceedingly difficult to satisfy.

The majority posits that allowing claims such as Young's to proceed to the jury would "not only chill free speech in this case but also open the floodgates to litigants who are aggrieved by perceived indignities visited upon them by politicians." App. 20 ¶ 38. If the goal is to prevent frivolous lawsuits and chilled political speech, we need not escalate plaintiff's burden to a near impossible level to achieve it. *See Gertz*, 418 U.S. at 349 ("It is . . . appropriate to require that state

remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.").

Necessary breathing room for politicians is ensured by existing jurisprudence. Contrary to the majority's contention, not "any third party who might indirectly be identified in a passing reference in a political advertisement" will have a cause of action. App. 20 ¶ 39. Such plaintiffs must overcome the "of and concerning requirement." App. 24 ¶ 47. In addition, the constitutional protections against defamation liability as summarized in *Milkovich* are "adequate to ensure that debate on public issues remains 'uninhibited, robust, and wide open.'" *Yetman*, 168 Ariz. at 75 (quoting *Milkovich*, 497 U.S. at 20); App. 25 ¶ 49.

Prior to this decision, the proverbial "floodgates" were already opened. There was nothing preventing claims such as Young's from being actionable under *Milkovich*. Yet courts were not inundated by third-party implied defamation claims against political candidates. There is no basis to assume that a decision permitting Young's claim to reach a jury, consistent with *Milkovich*, will suddenly provoke an influx of claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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