

08/28/21

MO

No. 21-343

In The

**Supreme Court of the United States**

Michelle J. Smith  
and others,

*Petitioners,*

v.

Nicholas French, Personal  
Representative,

*Respondent,*

**On Petition for a Writ of Certiorari to the  
Massachusetts Supreme Judicial Court and  
The Massachusetts Court of Appeals**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

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In Gertz v. Robert Welch Inc., 418 US 323(1974), Justice Powell, in reference to Defamation/Libel claims of a private individual concerning an issue of public concern, stated: "under the 1<sup>st</sup> Amendment there is no such thing as a false idea...(it) requires that we protect some falsehood in order to protect speech that matters". Applying that principle, a majority of lower courts to consider the issue have recognized that the privileges granted by the First and Fourteenth Amendments; and Laws enacted by Congress, immunizes citizens from Defamation liability and requires the standard of proof to be that of "Actual Malice". The Massachusetts Courts have split from that consensus causing a crucial need to seek the guidance of the Supreme Court.

Accordingly, the questions presented are:

1. Whether this State Court judgment for Defamation/Libel should be pre-empted by the recently enacted Acts of Congress entitled: "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act"; and "The Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020"? If so,
2. Whether the standard of proof in a State Defamation/Libel case arising from a parental complaint to a National Governing Body of Sport, should automatically and uniformly be that of "Actual Malice"; whereas, to create a

controlling precedent; and privilege; to protect the  
individuals who have the courage to report and advocate for  
the safety and well-being of our Nation's child athletes?

**PARTIES TO THE PROCEEDING**

Petitioner Michelle Smith and Sharon Hurley, Janet Lambert, Kelly Dickerman, David Dickerman, Kevin Fall, William Kazanek, Joseph Kelliher, William Ameen, and Sean Reed were appellants in the proceeding below. Respondent Nicholas French/Personal Representative was substituted for original appellee Martin French, below.

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**PETITION FOR WRIT OF CERTIORARI**

At issue in this case is nothing less than the right of parents to advocate on behalf of their minor children without threat of defamation liability unless "actual malice" is the standard of proof required uniformly.

Petitioner Michelle J. Smith is respectfully asking the Honorable Supreme Court of the United States to grant this Petition for Writ of Certiorari. The underlying case for Defamation/Libel is a crucial Certiorari candidate that calls upon the Supreme Court to solidify and ensure the voice, safety and protection of our Nation's child athletes. It is manifestly important for The Supreme Court: to review the subject matter of this case to determine jurisdiction and compliance with relevant provisions of Federal Statutory Law, The First and Fourteenth Amendments to The United States Constitution, and to interpret the intent of Congress regarding the recent enactments of "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act", and "The Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020". The unanimous, bi-partisan, enactment of these acts, signed into law on February 14, 2018 and October 30, 2020 respectively, reflects a shared national

feeling that child athlete safety; and protection for those who courageously report abuse; is an undeniable priority.

#### **OPINIONS BELOW**

**The Supreme Judicial Court for the Commonwealth of MA** order without an opinion, denying Further Appellate Review (**FAR # 28148**) is reproduced at App.1.

The Notice of Entry for Direct Appellate Review (without opinion) (**DAR # 27185**) is reproduced at App.18.

The Memorandum and Order of **The Commonwealth of Massachusetts Appeals Court (case # 2019 P 133, and 2019 P 1572 consolidated)** is a summary decision pursuant to M.A.C Rule 23 and is reproduced at App.4.

The original complaint App 70 and opinions and orders of the **MA Superior Courts in Suffolk (case# SUCV2013-03032) and Norfolk (case# 1482CV00639) Counties** denying Petitioner's motions to dismiss for Improper Venue, Anti-Slapp, JNOV, and 60(b) are unpublished and reproduced at App.69, App.62, App.34, and App.19 respectively.

The Jury Instructions and the Verdict Slip of the Norfolk County, MA Superior Court are unpublished and reproduced at App.38, and App.35 respectively.

The Subject Letter that this lawsuit arose from is reproduced at App.76.

The MA ASA/USA Softball notices and rulings are reproduced at App.78-82.

The MA Attorney General inquiries of BayState Blaze Softball, Inc. are reproduced at App.83-84.

The Safe Sport Act is reproduced at App.85.

Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020 is reproduced at App.93.

### **JURISDICTION**

The Memorandum and Order of The Massachusetts Appeals Court was entered on February 19, 2021, App.4. The Supreme Judicial Court for The Commonwealth of Massachusetts denied without an opinion, Petitioner's timely petition for Further Appellate Review on May 13, 2021, App.1. This Court has jurisdiction pursuant to The Supreme Court Order List 589 U.S., 594 U.S., and 28 U.S.C sec. 1254(1), 28 U.S.C sec.1257, 28 U.S.C sec.1331.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The First and Fourteenth Amendments to the United States Constitution.

The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act.

Empowering Olympic, Paralympic, and Amateur Athlete Act of 2020.  
Article III of the United States Constitution  
Supremacy Clause of the United States Constitution

### **STATEMENT**

**A. Child Athletes subjected to a toxic environment, created by a coach/role model:** This case was brought due to Petitioner's

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complaint (App. 76); to her children's National Governing Body(NGB)of Sport called the Amateur Softball Association (ASA)also known as USA Softball, concerning the Plaintiff's sexual, emotional, and bullying misconduct and abuse that he subjected minor female child athletes to as their coach/role model. The Child Athletes that were victims of the Plaintiff's abuse were ages 10-16.

**B. Parents' motive in reporting to National Governing Body of Sport(NGB):** Petitioner sent the complaint to authorities who had a similar responsibility to protect children. In response to the parental complaint, ASA/ USA Softball; as the National Governing Body of Softball under the jurisdiction of The U.S. Olympic Committee and by the authority of The Ted Stevens Act and The Safe Sport Act, lawfully held a "quasi judicial" proceeding that resulted in the coach being suspended for five years. The Plaintiff appealed this decision of the MA chapter to the National Chapter of USA Softball where the decision was upheld(App. 78,79,80,82). Instead of getting help for his illicit behavior as the parents had hoped, the coach sued all of the parents after three years of reacclimating their children to a healthy sports environment.

**C. Proceedings Below:** This case for Defamation/Libel (App 70) was filed by the Plaintiff, Martin French ("Plaintiff") on August 23, 2013, one day shy of the expiration of the statute of limitation, and in the improper venue of Suffolk County MA, Superior Court. Instead of being dismissed for improper venue (App 69), the case was erroneously transferred after almost nine months to Norfolk County, MA Superior Court on May 6, 2014. The case was designated to be on the Average "A" track for litigation; meaning that it should have been litigated within 32 months by January 6, 2017. However, due to unwarranted and unauthorized delay, this case came to trial despite the lack of prosecution on June 11, 2018 (almost five years after initial filing and eight years after the alleged cause). The case came to trial in a cloud of confusion, and resulted in the jury producing an inconsistent verdict (App 35), after being given erroneous jury instructions since they did not contain the standard of proof to be "actual malice. (App 38). A timely appeal was perfected and given case No. 2019 P 133. The Petitioner filed post-trial motions, including JNOV (App. 34), and a 60(b) (App.19), that contained a challenge to subject matter jurisdiction while invoking

federal question jurisdiction under 28 U.S.C sec. 1331. The trial court denied the motions causing another appeal to be filed for the denial of the 60(b) motion. This resulted in the appeals being consolidated and given the case No. 2019 P 1572. Petitioner filed a petition for Direct Appellate Review to the MA Supreme Judicial Court that was denied without an opinion (App. 18). The MA Appellate Court affirmed the Trial Court judgment stating that Petitioner had waived her constitutional rights and defenses because they were not raised until the post-trial motions and on appeal. This is erroneous as the Federal question of subject matter jurisdiction was raised via the 60(b) (4) motion and because subject matter cannot be conferred by consent, conduct or waiver, it may be raised for the first time on appeal. Lastly, Petitioner filed a timely petition for Further Appellate Review to the MA Supreme Judicial Court that was denied on May 13, 2021, prompting this Petition for Writ of Certiorari with a prayer for relief. Petitioner requests for the Supreme Court to review this as a Petition for an Extraordinary Writ pursuant to 28 U.S.C. sec.1652. This Federal Statutory law mandates: *The laws of several states, except where The Constitution or Acts of*

*Congress otherwise require or provide, shall be regarded as rules of decision in civil actions.*

Because Congress has the Constitutional authority under Article III of The United States Constitution to enact a piece of legislation such as: "The Protecting Young Victims from Sexual Abuse and The Safe Sport Authorization Act" and "The Empowering Olympic, Paralympic, and Amateur Athlete Act of 2020", it automatically has the authority to pre-empt all state law actions that conflicts with this legislation, Patchak v. Zinke, 583 U.S. (2018), Bank Markazi v. Peterson, 578 U.S. (2016).

#### **REASONS FOR GRANTING THE PETITION**

##### **I. Preemption by two acts of Congress:**

- 1."The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act".
- 2."The Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020"

This case for Defamation warrants federal pre-emption due to substantial reasons affecting the interest of justice, public interests, and statutory Federal Laws created by Congress. The newly enacted Statutory Federal Law entitled "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization

Act"36 U.S.C sec.220541(d) (1) (2) (3) (F) (G); provides for

**(d) Limitation on Liability-** (1) an applicable entity shall not be liable for damages in any civil action for defamation, libel, slander, or damage to reputation arising out of any action or communication, if the action arises from responsibilities or functions described in this section, section 220542, or section 220543. (2) Exception-paragraph 1 shall not apply to any action in which an applicable entity acted with "actual malice", or took action not pursuant to this section, section 220542, or section 220543.

(3) *Definition of applicable entity means-* (A) the center, (B) a national governing body, (C) a paralympic sports org. (D) an amateur sports org. or other person sanctioned by a national governing body under section 220525, (E) an amateur sports organization reporting under section 220530 (F) any officer, employee, agent, or **member** of an entity described in subparagraph (A), (B), (C), (D), or (E); and (G) any individual participating in a proceeding pursuant to this section.

Petitioner's actions in sending the complaint to USA Softball as members of their organization; a National Governing Body, immunizes them in a case for defamation and requires the plaintiff to prove "actual malice". The plain language of the

statute prescribed by Congress mandates a reversal or remand to the trial court for a new trial, as the statutory law pursuant to The Safe Sport Authorization Act Pub.L, No.115-126, and Title II sec. 201-04, 132 Stat.318,320-25(2018) requiring proof of actual malice, was not the standard applied to this defamation case. Additionally, Congress enacted The Empowering Olympic, Paralympic), and Amateur Athlete Act of 2020, 36 U.S.C. sec. 220542(3) (A), to further their purpose of safeguarding Youth Athletes in Amateur Sports by giving voice to and protecting reporters of abuse from retaliation. Section 220501(b) (11) of the act provides protection from retaliation, it states:

*Retaliation means any adverse or discriminatory action, or the threat of an adverse or discriminatory action, carried out against a protected individual as a result of any communication, including the filing of a formal complaint, by the protected individual or a parent or legal guardian of the protected individual relating to the allegation of physical abuse, sexual harassment, or emotional abuse.*

By adopting this case to create a controlling precedent in consideration of future similar cases, The Supreme Court will help to ensure that the Judicial System creates a uniform system of justice. State Defamation laws need to be amended to make

sure that parents exercising their duty and rights to advocate for their minor children are automatically afforded the standard of law granted by The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act, and The Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020.

**II. The Decision Below breaks with consistent authority on defamation; regarding issues of public concern/public figure, that the First and Fourteenth Amendments automatically shield from liability unless "actual malice" is the proven standard of proof:** The lower courts failed to address a threshold question of law in this Defamation/Libel case. The question was whether the plaintiff, who is a coach/role-model, was a limited public figure due to the content of the complaint to USA Softball relating to his official duties as a coach/role-model, Time, Inc. v. Firestone, 424 U.S. 448(1976), Ocala Star-Banner Co. v. Damron, 401 U.S. 295(1971). Moreover, "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act" 36 U.S.C. ch. 220541, defines that the Coach-Athlete relationship constitutes a power imbalance, meaning that the coach has assumed a role of authority in the context of the relationship with the athlete. Seemingly, this power imbalance is the criteria used to legally qualify a person as a limited public

figure, which would further solidify Petitioner's contention that this instant case should be pre-empted pursuant to the Federal Statutory Law created by The Safe Sport Act, Zeran v. America Online, Inc. 129 F.3d 327 (4<sup>th</sup> Cir. 1997), Monitor Patriot Co., v. Roy, 401 U.S. 265 (1971). Additionally, the lower courts all refused to recognize that the underlying issue in this case; which is the protection and safety of minor female athletes ages 10-16, is a crucial matter of public concern that immediately should have invoked the standard of proof; as prescribed by New York Times v. Sullivan, 376 U.S. 254 (1964), to be that of "actual malice", Rosenblatt v. Baer, 383 U.S. 75 (1966) (1<sup>st</sup> amendment case(libel) remanded for determination of public figure and public interest), Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971) (balanced 1<sup>st</sup> Amendment rights against reputation interests and applied the "actual malice" standard to issues of public interest). Further, the lower courts should have observed the "actual malice" test of New York Times v. Sullivan because the parental complaint to USA Softball was not a private libel issue rather it was a public issue since it clearly related to the fitness of a coach to be around minor female athletes, Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990), Gandia v. Pettingill, 222 U.S. 452 (1912), McDonald v. Smith, 472 U.S. 279 (1985).

**III. The Decision below conflicts with decisions by other federal or state appellate courts regarding the issues of this case:** The MA Appeals Court decision stating that Petitioner's Constitutional rights and defenses had been waived; because the panel determined that they were not asserted at trial but instead in her post judgment 60(b) motion and on appeal, is in direct conflict with other case decisions regarding the issues of this case. Specifically, regarding Petitioner's request for Federal Preemption pursuant to The Federal Statutory Laws prescribed in "The Safe Sport Act", Augustino Tosti v. Baheege Ayik + another 386 Mass. 721 (1982). In Tosti v. Baheege, the court ruled that "a defendant's claim that an action for libel was pre-empted by Federal Labor Law raised a question of subject matter jurisdiction, which could properly be considered for the first time on appeal". "Preemption of the libel claim- Federal Labor Law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with "actual malice" and proven injury", Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273 (1974), Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 61 (1966). Therefore, because the policy of proving "actual malice" mandated by "The Safe Sport Act" and the Federal Laws that it prescribes are so important; a court only has jurisdiction to apply State remedies if the complainant pleads and proves that the statements were made with "actual malice" and injured him. Since the Plaintiff in this instant case was only required to prove the negligence standard, this State court judgment is void due to lack of jurisdiction.

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**IV. The MA lower courts have decided an important question of Federal Law that has not been, but should be, settled by The Supreme Court:** The lower courts decided the important question of Federal pre-emption under the Supremacy Clause of The United States Constitution and pursuant to the new laws created by Congress with the enactment of "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act". The decision below did not preserve a balance between Plaintiff's rights to defamation with Petitioner's Constitutional rights and this Honorable Court now needs to interpret Congress' intention in enacting this law and set a controlling precedent for future similar cases. A proper pre-emption analysis will restore equity and justice, Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 108 (1992).

**V. The MA lower courts committed serious Federal errors of Law that require summary reversal as an alternative measure by this Court; additionally, the lower courts were wrong and the errors will have serious consequences:** Petitioner Michelle J. Smith brought up her issues of liability and subject matter jurisdiction via a pretrial Anti Slapp motion, post-trial JNOV and 60(b) motions, on appeal, and with petitions for DAR and FAR to the MA Supreme Judicial Court, that were all passed over or erroneously denied resulting in a miscarriage of justice and an erosion of the public's trust in the Judicial System. These orders and judgment were not proper because by the 1<sup>st</sup> Amendment; there was a genuine issue of substantial truth; the subject of

the challenged publication (our Nation's Child Athletes' safety) was a matter of grave national interest; and the essential ingredient of Petitioner's liability, namely, "actual malice", was not pled or required to be proven. Thus, in this instant case the trial judge's charge, lacking as it did an instruction that for the plaintiff to prevail on the defamation counts, he would have to prove actual malice, constituted reversible error which requires a new trial. The judge's instructions in this case were not a mere error of law. Rather, Congress in passing the Federal Child Athlete Protection Laws as conferred by "The Safe Sport and The Empowering Athlete Acts, deprived the State of MA of the power to act, in a defamation case arising from a complaint to a National Governing Body of Sport like USA Softball, absent the correct application of the New York Times standard. Additionally, Petitioner invoked Federal subject matter jurisdiction in her 60(b) motion and again on appeal to no avail. This was clearly erroneous as subject matter jurisdiction may be raised for the first time on appeal as it "cannot be conferred by consent, conduct or waiver", Litton Business Syss., Inc. v Commissioner of Revenue, 383 Mass. 619, 622(1981), Allard v. Estes, 292 Mass. 187, 196(1935). Petitioner Michelle J. Smith's actions and powers challenged

were plainly authorized by law and Constitution. The decisions below have dangerously chilled Constitutional rights.

**VI. The Questions presented are Important:** The safety and protection of our children and a parent's right to advocate for their well-being is of the utmost importance to society.

Congress saw the need to prescribe laws to protect and give voice to child athletes; however, this instant state action stands as an obstacle to accomplish and execute the full purposes and objectives of Congress, L.Tribe, American Constitutional Law Section 6-23, at 377(1978). The expertise of the Supreme Court is needed to interpret and apply the laws created by "The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act" and "The Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020".

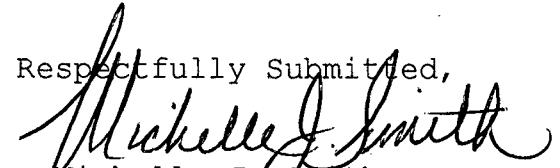
### CONCLUSION

For the foregoing reasons, Petitioner Michelle J. Smith is respectfully asking this Honorable Court to grant this Writ of Certiorari and reverse the lower court decision or remand to the Trial Court for a new trial; where the standard of proof required is "actual malice" as defined in New York Times v. Sullivan, due to the statutory protections that Petitioner is entitled to pursuant to the Safe Sport Authorization Act, The

Empowering Olympic, Paralympic, and Amateur Athletes Act of  
2020, and The United States Laws and Constitution specifically  
the First and Fourteenth Amendments.

August 28, 2021

Respectfully Submitted,



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