№ 21-839



# In the Supreme Court of the United States



THOMAS H. OEHMKE,
*Petitioner*

v.

PATRICK ANDREW GUINAN
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

First Amendment constitutional protections for free speech, as applied by this Court in *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964) require a federal rule that imposes liability for defamation on a speaker who knowingly and maliciously relates a false criminal report to law enforcement.

The Majority Rule, as applied in 34 jurisdictions (by 31 State courts and 3 Federal Circuits), grants a *qualified privilege* to relators of crime reports made in good faith and without actual malice.

Differently here, the Michigan Supreme Court followed the Minority Rule (adhered to in only 4 other States) upholding *absolute immunity* for a relator who knowingly and maliciously makes a false crime report to the FBI.

The questions presented are:

### *Qualified Privilege for FBI Crime Tips*

Under the First Amendment, should there be a *qualified privilege* (instead of *absolute immunity*) for relators who post FBI Internet online crime tips?

### *Liability for Maliciously False Tips*

Under the standard of *qualified privilege*, should there be liability for relators who post FBI Internet crime tips when the "facts" posted are knowingly false or made with reckless disregard for truth or falsity?

## PARTIES TO THE PROCEEDINGS BELOW

Thomas H. Oehmke and Joan M. Brovins were Plaintiffs/Appellants and Respondent Patrick Andrew Guinan and his father, Patrick Cantwell Guinan were Defendants/Appellees.

## LIST OF PROCEEDINGS

The final judgment of the Michigan Supreme Court Case in Case 162976, *Joan M. Brovins and Thomas H. Oehmke, Plaintiffs-Appellants, v. Patrick Cantwell Guinan and Patrick Andrew Guinan, Defendants-Appellees* is *Order Denying Application for Leave to Appeal* (11/02/2021), is published at 965 N.W.2d 518 and reprinted at App. 20a.

The *Opinion and Judgment* of the Michigan Court of Appeals in Case 349861 captioned *Joan M. Brovins and Thomas H. Oehmke, Plaintiffs-Appellants, v. Patrick Cantwell Guinan, and Patrick Andrew Guinan, Defendants-Appellees* (04/22/2021), has not been published but is reported at 2021 WL 1589573, and is reprinted at App. 3-19a.

The 13$^{TH}$ Judicial Circuit, Leelanau County, Michigan Case 2018-010099-NO, *Joan M. Brovins and Thomas H. Oehmke, Plaintiff, v. Patrick Cantwell Guinan and Patrick Andrew Guinan, Defendants* is unreported. The final judgment is entitled *Order Granting and Denying in Part Defendants' Motions for Summary Disposition* and was entered 07/01/2019, has not been published, is reported at 2019 WL 12383194, and is reprinted at App. 1-2a.

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## OPINIONS AND ORDERS

*Order Denying Leave to Appeal* (11/2/21) of Supreme Court of Michigan in Case No. 162976 is reported at 965 N.W.2d 518 (Mich. 2021).

*Opinion and Order* (4/22/21) of the Michigan Court of Appeals in Case No. 349861 is not published but is reported at 2021 WL 1589573.

*Summary Disposition Order* (7/01/19) of the Leelanau County (Michigan) Circuit Court in Case No. 18-010099-NO is reported at 2019 WL 12383194 (Mich.Cir.Ct.) and is reprinted at App. 1-2a.

*Family Division Decision* (11/15/19) of the 13th Judicial Circuit, Leelanau County (Michigan), Family Division in *Thomas H. Oehmke vs. Patrick Andrew Guinan,* 2017-010009-PH was not published but is reprinted at App. 21-37a. This *Decision* issued after three days of bench trial with Guinan JR represented by counsel. The findings are *res judicata* as to the parties.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(A) to review the Michigan Supreme Court's *Order Denying Leave to Appeal* (11/02/2021).

## CONSTITUTIONAL PROVISION

**The First Amendment to the United States Constitution** provides in relevant part: "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I.

## STATEMENT OF THE CASE

### *A. Court Review of Evidence*

The Supreme Court's duty is not limited to elaboration of constitutional principles; in proper cases, this Court reviews the evidence to assure those principles have been constitutionally applied. When a line must be drawn between speech unconditionally guaranteed and speech legitimately regulated, the Supreme Court examines for itself the statements in issue and the circumstances under which they were made to see whether they are protected by First Amendment principles.[1]

> *The following facts are not in dispute* and were either admitted during discovery in the Trial Court or decided in the Family Court's *Decision and Order* [see App. 21-37a].

### *B. Sequence of Proceedings*

Patrick A. Guinan ("Guinan" or "Guinan JR") threatened Oehmke's life. In response, Petitioner obtained a Personal Protection Order (PPO) enjoining Guinan from stalking or posting a message about Oehmke on the Internet.

Later, Oehmke filed a civil suit against Guinan for nuisance. Days after his deposition, Guinan posted two false crime reports on the FBI's Internet Online Tips identifying Oehmke as the 2018 Mid-Term Elections Pipe Bomber.

Oehmke then amended his civil suit to add

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[1] *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Counts for defamation and intentional infliction of emotional distress. The Trial Court dismissed both Counts holding that making knowingly false FBI Internet tips is First Amendment protected speech.

### *C. Factual Background*

1. 1st False FBI Internet Online Tip

In 2018, a pipe bomb was found in the New York mailbox of Democratic donor George Soros; CNN and 13 Democratic Party critics of then-President Trump were also mailed pipe bombs.

Guinan's 1st FBI Internet Online crime tip identified Oehmke as the pipe bomber:

> A very likely suspect in the most recent bomb packages sent to high ranking government and former political officials is a Thomas Harold Oehmke a michigan lawyer with history of making threats and ... sending very similar looking packages to his perceived targeted enemies[.] ...Oehmke brags to being attorney with clients who are mafia and drug smugglers, Oehmke is a very likely suspect to numerous violent criminal plots [addresses omitted].[2]

2. FBI Team Investigates Florida Home

FBI agents were dispatched to Key West. Not finding Oehmke (who was then in Michigan), the FBI

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[2] Appellant's Mich. Ct. of Appeals App. Vol. 5, p. 44 (Plff Tr. Ex. 19 - FBI Declaration).

interrogated his neighbor, a retired judge.[3]

3. Guinan Posts 2nd FBI Internet Tip

"There is no dispute ... that [Guinan] submitted [a second] online tip to the FBI Public Access Line":[4]

> Most likely suspect for the recent bomb packages is a Tom Oehmke, a deranged michigan lawyer with a history of making threats[.] Oehmke has indeed sent very similar packages like the ones most recently mailed to high ranking former government officials[.] Oehmke has mailed very similar package to my father ... [who] had it returned to sender [addresses omitted].[5]

4. FBI Visits Michigan Home

Guinin's second FBI Tip precipitated a predawn operation by FBI agents in Michigan who informed Oehmke he was the suspected pipe bomber.

The FBI interrogated Oehmke about his bomb-making knowledge [none], explosives on hand [none], mailing incendiary devices [never], and attitude toward the U.S. Government [Oehmke declared himself a patriot with a SECRET security clearance and

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[3] Appellant's Mich. Ct. of Appeals App. Vol. 3, pp. 270-276, 284-285 (Stocklas Dep., pp. 7-13, 21-22).

[4] Appellant's Mich. Ct. of Appeals App. Vol. 4, pp. 209-210, 54 and Plff Tr. Ex. 20, 55.

[5] Appellant's Mich. Ct. of Appeals App. Vol. 5, pp. 35 & 48 [Plff Tr. Ex. 16 - Admissions and Ex. 20 - FBI 302 Report).

30 years as a Reservist with the U.S. Department of Homeland Security].

"...Guinan JR was not criminally charged in either state or federal court as a result of the [false FBI] tip[s]...."[6]

### *D. First Amendment Question Raised*

Petitioner seeks review of a Michigan Supreme Court judgment denying leave to appeal a First Amendment constitutional free speech issue.

1. Constitutional Issue at Trial Court

The First Amendment free speech question was raised before the court of first instance (i.e., Leelanau County, Michigan's 13th Judicial Circuit) in Count 7 (Slander and Defamation) of Plaintiffs' 2nd Amended Restated Complaint. That Count was dismissed by the Trial Court's *Order Granting ... Motions for Summary Disposition* (07/01/2019).[7] The Court found Guinan's 2 FBI Internet tips absolutely privileged under the First Amendment and the Michigan Supreme Court *Shinglemeyer* decision made in 1900.[8]

The Trial Court reluctantly held:

> ... **[T]he [absolute First Amendment] privilege attaches and I am not saying it is a good idea. I kind of like having a more limited proof.**

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[6] See App. 16a.

[7] See App. 1-2a.

[8] *Shinglemeyer vs. Wright,* 124 Mich. 230, 82 N.W. 887 (1900).

> **When you intentionally lie to the police to injure somebody, I think it ought to be actionable,** but that's ***not*** what the state of the law is in Michigan at this time. So the claim for defamation based upon the false report to the FBI is barred by that [absolute] privilege.[9]

2. Appellate Court Denies Appeal

On review, the Michigan Court of Appeals held:

> Michigan applies an absolute privilege to statements such as the tip Guinan, Jr., provided to the FBI. *** There is an "absolute privilege that arises in the context of a defamation claim and covers any report of criminal activity to law enforcement personnel," and that if this were to change, such **change must come from the** Legislature or the **Michigan Supreme Court.**[10]

3. State Supreme Court Denies Leave

Leave to appeal was sought but denied without opinion by the Michigan Supreme Court.[11]

The First Amendment question [pertaining to

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[9] App. 42a.

[10] App. 16a; *Brovins v. Guinan,* No. 349861, 2021 WL 1589573, at *5 (Mich. Ct. App. Apr. 22, 2021), appeal denied, 965 N.W.2d 518 (Mich. 2021).

[11] App. 20a; *Brovins v. Guinan,* 965 N.W.2d 518 (Mich. 2021).

absolute immunity (versus qualified privilege) relating to false crime reports knowingly made to the FBI] was timely and properly raised at all judicial levels below.

## REASONS FOR GRANTING THE PETITION

The Michigan Supreme Court is the outlier in granting *absolute immunity* for knowingly false crime reports maliciously made to law enforcement. Indeed, this Michigan decision conflicts with the First Amendment's rule of *qualified privilege* applied in 35 other jurisdictions:

- 20 other state courts of last resort, plus
- 3 U.S. Circuit Courts of Appeal, and
- 11 State appellate courts (ruling in the absence of decisions by their own State's high courts).

The U.S. Supreme Court can bring about a uniformity of result on this First Amendment issue.[12]

The standard for posting FBI Internet online crime tips should be qualified privilege (which is the same as the *New York Times v. Sullivan* test for libel of public officials or public figures (*i.e.*, liability for knowingly false statements or those made with reckless disregard for truth or falsity).

Qualified privilege is a better standard than absolute immunity. Qualified privilege protects legitimate law enforcement interests while shielding innocent people from being targeted by false criminal charges. Qualified privilege works to prevent malevolent actors from posting false FBI Online Tips to retaliate against others who, for example, make

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[12] U.S.Sup.Ct. Rule 10(b) [Considerations Governing Review on Certiorari].

statements protected by the First Amendment.

I. Qualified Privilege is Rule in 34 Jurisdictions

*20 State Courts*

Twenty state Supreme Courts held that law enforcement reports enjoy only qualified privilege.

> These 20 State High Court holdings from 1888 to 2020 are digested in App. 43-47a.

Last year, the Fifth Circuit articulated the Majority Rule – A relator enjoys a qualified privilege as an affirmative defense to a defamation claim if the speaker makes a statement in good faith,

- On a subject in which the speaker has a common interest with the statement's recipient, or is under a duty to communicate to the other, and
- Without actual malice, or knowledge of its falsity, and without reckless disregard as to its truth.[13]

*3 Federal Circuits*

Three U.S. Circuit Courts have held that the immunity afforded a citizen reporting suspected criminal conduct to law enforcement is qualified, not absolute. After immunity is claimed, the burden shifts to the plaintiff to show a motivation by malice or ill will.

In 2020, the Fifth Circuit (Texas law) held, in defense of a defamation claim, that "[t]o be entitled to the qualified privilege, the person making the

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[13] *Smith v. Wal-Mart Stores, Inc.*, 980 F.3d 1060 (5th Cir. 2020).

statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other."[14]

The Tenth Circuit found no Utah law on point so it adopted the Majority Rule affording qualified privilege to reports of suspected criminal conduct as "...qualified immunity is well established in both federal and state courts across the country."[15]

The Second Circuit (New York law) held in a slander case that good faith communications of a party with an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to someone with a corresponding interest/duty.[16]

*11 State Appellate Courts*

When state intermediate appellate courts have spoken in the absence of their state's high court, other courts treat those decisions as authoritative.[17] In this spirit, 11 intermediate appellate courts – where the

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[14] *Smith v. Wal-Mart Stores, Inc.*, 980 F.3d 1060, 1063 (5th Cir. 2020) (Texas law).

[15] *Murphree v. US Bank Of Utah, N.A.*, 293 F.3d 1220, 1222–23 (10th Cir. 2002).

[16] *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 410 (2d Cir.2000) (New York law); see, also, *Colon v. Wal-Mart Stores, Inc.*, 182 Misc. 2d 921, 703 N.Y.S.2d 863 (Sup. Ct. 1999) (person who in good faith reports suspected criminal activity to police enjoys a qualified privilege from liability for defamation, even if a more prudent person would not have reported the information, or the information turns out to be false).

[17] *Auburn Sales, Inc. v. Cypros Trading & Shipping, Inc.*, 898 F.3d 710, 715 (6th Cir. 2018).

State's High Court has not ruled on the issue of privilege as to crime reports – have found that only a qualified, not an absolute, privilege pertains.[18]

II. Absolute Immunity in Only 5 States

Only Michigan and 4 other State High Courts cling to the thread that knowingly false crime reports maliciously made to law enforcement are absolutely privileged.[19]

*Absolute* immunity has dehydrated into the minority view because absolute privilege deprives

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[18] *Tuomela v. Waldorf-Astoria Grand Wailea Hotel,* — P.3d — , No. CV 20-00117 JMS-RT, 2021 WL 233695, at *4 (U.S.D.C., D. Haw. Jan. 22, 2021); *Burke v. Greene,* 963 P.2d 1119 (Colo. App. 1998); *Pate v. Service Merch. Co., Inc.,* 959 S.W.2d 569, 575–78 (Tenn.Ct.App.1996); *Starnes v. Int'l Harvester Co.,* 184 Ill. App. 3d 199, 203, 539 N.E.2d 1372, 1374 (1989), abrogated on other grounds by *Bryson v. News Am. Publications, Inc.,* 174 Ill. 2d 77, 672 N.E.2d 1207 (1996); *Story v. Shelter Bay Co.,* 52 Wash. App. 334, 760 P.2d 368 (1988); *Paramount Supply Co. v. Sherlin Corp.,* 16 Ohio App. 3d 176, 475 N.E.2d 197 (1984); *Jones v. Wesley,* 424 So. 2d 1109, 1111 (La. Ct. App. 1982); *Dijkstra vs. Westerink,* 168 N.J.Super. 128, 401 A.2d 1118, 1121, cert. denied, 81 N.J. 329, 407 A.2d 1203 (1979); *Hardaway v. Sherman Enter., Inc.,* 133 Ga.App. 181, 210 S.E.2d 363, 364 (1974), cert. denied, 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed.2d 672 (1975); *Kahermanes v. Marchese,* 361 F.Supp. 168, 172 (E.D.Pa.1973) (construing Pennsylvania law); *Marsh v. Com. & Sav. Bank of Winchester, Va.,* 265 F. Supp. 614 (W.D. Va. 1967) (construing Virginia law).

[19] *Ledvina v. Cerasani,* 213 Ariz. 569, 146 P.3d 70 (Ct. App. 2006); *Hagberg v. California Fed. Bank,* 32 Cal. 4th 350, 81 P.3d 244 (2004); *Correllas v. Viveiros,* 410 Mass. 314, 572 N.E.2d 7, 11 (1991) (statements made to police where investigation of crime was not initiated by relator); *McGranahan v. Dahar,* 119 N.H. 758, 408 A.2d 121, 127–28 (1979) (statements made to police during a pre-trial, criminal investigation).

victims (who are maliciously reported as criminals) of any protection from reputational damage.

III. Constitutional Privilege and Immunity

A conditional privilege immunizing honest mistakes of fact communicated to law enforcement is required by the First and Fourteenth Amendments. However, libel can claim no talismanic immunity from constitutional limitations; indeed, it must be measured by standards that satisfy the First Amendment.[20]

IV. *Actual Malice* Standard

A uniform federal rule on qualified immunity is needed in these times of seemingly unrestrained turmoil to protect the integrity of the First Amendment and deny its use as both a sword and a shield. If maliciously false FBI Internet Online Tips are permitted to ensnarl innocent, law-abiding people, then the rule of law is eroded and the First Amendment is made a mockery. This Court has held:

> The meaning of ... "actual malice" and ... "reckless disregard" ... is ... captured ... only through ... case-by-case adjudication ... [that] give[s] content to these ... elusive constitutional standards ... particularly ... [with] free speech....[21]

V. FBI Agents in Harm's Way

This appeal seeks to constrain relators who

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[20] *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

[21] *Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 686 (1989).

would abuse the First Amendment by their maliciously posting false FBI Online Tips to retaliate against perceived enemies. Fake crime reports also place FBI agents unnecessarily in harm's way.

Absolute immunity gave Guinan license to recruit armed FBI agents to intercept Oehmke at home. Guinan enlisted the FBI into misdirecting its limited resources during a nationwide, emergency manhunt for a vicious pipe bomber who was targeting Democratic party supporters and undermining our democracy.

This case at bar is important to protect Government resources from being misused via easy-to-file but knowingly false internet crime tips targeting an innocent.

## VI. Redressing Reputational Damage

When false statements are knowingly and maliciously made to the FBI, and go unchallenged by federal and state criminal prosecutors, the only remaining path to justice is to permit the victim to publicly address the defamation in court to redress reputational harm. Otherwise, we are left with an intentional injury, but without a remedy.

Absolute immunity from suit encourages malevolent relators to misbehave; differently, qualified privilege protects bona fide tipsters and shields potential victims from knowingly false accusations, particularly those which enlist FBI agents to further the malicious perpetrator's evil designs.

## VII. Internet Magnifies Perceived Reality

The Internet magnifies both the good and bad in our society. FBI Internet Online Tips can become a trash bin of misinformation when the criminal element

is afforded absolute immunity from both criminal prosecution and civil liability. This affords neither accountability nor corresponding remedy.

Everyone is armed in America. This magnifies the potential for life-threatening law enforcement interventions. A fatal misunderstanding frequently looms around the corner. Imagine the challenge to an adrenaline-charged Special Agent who mistakes a cell phone for a firearm. What follows next could affect two innocent lives forever – both the Agent who shoots and the innocent who is targeted because of a malicious and knowingly false crime report.

Operating online in real time invites rapid FBI responses, especially during an all-hands-on-deck emergency like the manhunt for the pipe bomber. Such haste can lead to tragedies when intentionally-false information is fed to law enforcement requiring lightening-quick responses endangering bystanders and Special Agents alike.

The urgency of capturing the pipe bomber did not afford the FBI ample opportunity to verify Guinan's extensive criminal background. This allowed Guinan to dispatch two FBI teams on wild goose chases from Detroit and Miami to the land's end at Northport and Key West.

## VIII. Accessory Before the Fact

Absolute immunity enables criminal speech, making the First Amendment an accessory before the fact, especially when coupled with the Internet.

Abuse of the FBI Internet Online Tip hotline evades prosecution because the Bureau does not want to deter its use. Knowing this, malevolent relators can readily use it to attack innocent victims. Restoring balance means replacing a shield of absolute immunity

with one of qualified privilege that permits a civil action against malicious relators of false FBI tips while continuing to protect free speech.

IX. Private Self-Help Measures

The Michigan Courts' holdings are inconsistent with the First Amendment values of shielding protected speech. Malicious falsehoods should not be constitutionally protected in any quarter.

Guinan's free reign to misbehave grew from his knowledge that posting false FBI Internet tips are crimes which would go unpunished under the shield of "protected speech." Guinan's posting fake Internet tips to the FBI was likely seen as a parlor game. Absolute immunity promotes malicious mischief.

Because federal and state authorities are not up to the task of prosecuting false FBI Internet Tips, the victims should have their day in court to civilly prosecute the cyber-criminals who stalk them in order to redress their reputational harm.

Lawful, self-help measures are the only viable recourse to curing the virus of false online postings. As one law review commentator notes:

> ... [G]iven the ... immensity of cybercrime and the comparative advantage of private entities in dissuading it, law enforcement strategies will ... need to make private self-help measures a cornerstone of any comprehensive cybercrime prevention strategy.[22]

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[22] Michael Edmund O'Neill, *Old Crimes in New Bottles: Sanctioning Cybercrime,* 9 Geo. Mason L. Rev. 237 (Winter 2000).

Applying a uniform State rule of qualified privilege and permitting private would recognize that the First Amendment cannot be used as both a sword and a shield.

## CONCLUSION

The Order of the Michigan Supreme Court should be reversed and the case remanded.

Respectfully submitted, December 2021

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