No. 22-29

In The
Supreme Court of the United States

RICHELLE D. WALLACE

Petitioner,

v.

CITY OF HAMPTON ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia and
Hampton Circuit Court

REPLY TO JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

New York Times v. Sullivan, 376 U.S. 254 (1964) federalized a large swath of libel law holding that the First Amendment mandates proof of actual malice in any defamation action brought by a public official. In *Curtis publishing Co. V. Butts*, 388 U.S. 130 (1967), the Court imposed that same requirement on public figure defamation plaintiffs. The correctness of extending the "actual malice" standard to public figure defamation plaintiffs has been repeatedly questioned by members of this Court, culminating in Justice Thomas, call two terms ago for the Court to "reconsider the precedents that require courts to apply it". *McKee v. Cosby, Jr.*, 139 S Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari); see also *Kagan, A Libel Story: Sullivan Then and Now* (reviewing Anthony Lewis, Make No Law: The Sullivan Case and First Amendment (1991(, 18 Law and Social Inquiry 197, 211 (1993) (the use of the actual malice standard in this wide range of cases appears to have little connection with the story of *Sullivan*. Viewed from that vantage point, current

Questions Presented- continued

libel law seems the result not of steady and sensible common law reasoning but of a striking disregard of the doctrine's underpinnings).

1. Is the petitioner entitled to plain and structural error relief for the court's violation of implementing the Constitution successfully under the First, Fifth, Seventh, and Fourteenth Amendments.
2. Does the Petitioner meet the three threshold requirements to be eligible for plain- error relief.
3. Should the Court reconsider the argument of Freedom of Press in cases not involving reporters, journalists, photographers, but rather citizens who distribute malicious, egregious statements on the internet, social media.
4. In his dissent, Justice Neil Gorsuch raised the question, "In the case of *New York Times v. Sullivan*, if ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that encourage falsehoods in quantities no one could have envisioned almost 60 years ago?"
5. Should this case be the Court's return of its attention to the "safe deposit" of our liberties. Justice Gorsuch, dissenting from the denial of

QUESTIONS PRESENTED-continued

6. certiorari in *SHKELZËN BERISHA v. GUY LAWSON, ET AL,* statement concerning *New York Times v. Sullivan*, "But given the momentous changes in the Nation's media *New York Times* since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the safe deposit" of our liberties.

6. Whether it is an abuse of discretion under the Federal Rules of Civil Procedures when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk and/or court has failed to enter the party's default.

7. Whether it is an abuse of discretion under Federal Rules of Civil Procedures when the district judge—or a magistrate judge when authorized by local rule—fails to issue a mandated scheduling order as stated in Federal Rules of Civil Procedures Rule 16.

8. Whether the PETITION FOR A WRIT OF CERTIORARI should be fully granted when the Petitioner was given the opportunity to add

Questions Presented- continued

Respondents after the judge's Order to file an Amended Complaint.

9. Should the Petitioner be allowed damages when the court denied a mandated Scheduling Order and Discovery process for the petitioner to prove calculated damages in the case.

LIST OF PARTIES

- CITY OF HAMPTON ET AL
- MARY BUNTING, CITY OF HAMPTON CITY MANAGER
- JAIME RASTATTER, CITY OF HAMPTON DIVISION OF FIRE/ RESCUE, MEDIC/FIREFIGHTER
- NICOLE CLARK, CITY OF HAMPTON HUMAN RESOURCES DIRECTOR
- JASON MONK, CITY OF HAMPTON DIVISION OF FIRE/RESCUE, FIRE CHIEF
- MAURICE WILSON, CITY OF HAMPTON DIVISION OF FIRE/RESCUE ASSISTANT CHIEF

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STATUTES

The statutes pertaining to this case were provided in the Petition for a Writ of Certiorari.

INTRODUCTION

A. Relevant Factual Background

The Petitioner in this case is a retired Fire Captain of the City of Hampton. The Petitioner did file her original complaint in the Hampton Circuit Court. The Petitioner provided evidence of a *prima facie* case of defamation and defamation *per se*. The Respondent's counsel stated in the Joint Brief of Opposition that the defamatory comments were made surrounding the Petitioner's unsuccessful candidacy for election which is hyperbole. The libelous comments were initially made after the Petitioner successfully became a certified candidate and her name was on the ballot, prior to a campaign kickoff. To be distinguished as a public figure by the Hampton Circuit Juge, Justice Thomas, J. concurrence in the *Mckee v. Cosby* case, he states, "Far from increasing a public figure's burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary

libels. See 3 Blackstone *124 ("Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man"); 4 *id.*, at *150 (defining libels as "malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule" (emphasis added). Libel of a public official was deemed an offense "'most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.'"[1] and expressed, in writing on social media, that she deceived the public with libelous statements as to the qualification of the Petitioner.

The comments made were made by the Respondent, Jaime Rastatter, who stated she worked for the City of Hampton and "do not believe you are

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[1] SUPREME COURT OF THE UNITED STATES, KATHRINE MAE MCKEE *v.* WILLIAM H. COSBY, JR. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED, STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

qualified to help lead a city, support a fire department you worked hard at destroying. In Justices Thomas concurrence of the denial of the petition for a writ of certiorari in *McKee v. Cosby*, The common law did afford defendants a privilege to comment on public questions and matters of public interest. Starkie *237–*238. This privilege extended to the "public conduct of a public man," which was a "matter of public interest" that could "be discussed with the fullest freedom" and "made the subject of hostile criticism." *Id.*, at *242. Under this privilege, "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual." *Ibid.* And the privilege extended to the man's character "'so *far as it may respect his fitness and qualifications for the office,*'" which was in the interest of the people to know. *White*, *supra*, at 290 (quoting *Clap*, *supra*, at 169). The Respondent did not respect the qualifications of the Petitioner as a leader.

The Respondents' Joint Brief in Opposition states The Petitioner and Respondent, Jaime Rastatter, were co-workers. This is another hyperbole claimed by the Respondents. Richelle Wallace and

Jaime Rastatter were not co-workers as the Respondent was not on the same ranking level as the Petitioner nor were they assigned to work together. The one time the fire department assigned Ms. Rastatter to work as a subordinate for Ms. Wallace, Ms. Rastatter requested a transfer, and it was approved, before reporting to duty. Ms. Rastatter has no knowledge of the Petitioner's knowledge, skills, abilities, or qualifications as she never worked for the Petitioner directly.

B. Relevant Procedural History

The Petitioner submitted a Complaint filed in Hampton Circuit Court. The Respondents filed demurrers and special pleas after the mandated 21-day period and were in default. The Clerk of Court never entered the default in the case which is part of the Petitioner's argument of 18 U.S. Code § 242 Deprivation of Rights Under the Color of Law.

The Petitioner filed an amended complaint as ordered by Judge William Savage, and added

Respondents Nicole Clark, Jason Monk, and Maurice Wilson[2]. The December 29, 2020 Order, filed AFTER the March 19, 2021 hearing states, "that plaintiff was a public figure in the context of this case and in order to prevail she would be required to prove malice in accordance with the holding of *New York Times v, Sullivan".* In the case of *Root v. King & Verplanck, 7 Cow. 613 (N.Y. Sup. Ct. 1827),* the judge informed the "that if the publication admitted to have been made by the defendants, held the plaintiff up to reproach or disgrace, either in his public or private character, it was a libel. That malice need not be proved; it would be implied if the charge was false." *In DEXTER ET UX. V. SPEAR.* Circuit Court, D. Rhode Island., November 1825, "1. Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime, punishable by law, or of an act odious or disgraceful in society, is a libel." Claiming

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[2] Respondent Wilson was added because of his integral role in the process of the Petitioner's complaint. Evidence of Wilson's role was provided as evidence in the Hampton Circuit Court Complaint and the Hampton Circuit Court December 29, 2020, hearing.

the Petitioner was like a "crappy marriage, get rid of the wife and pay alimony" and "cried, lied, cheated, or manipulate" was proven with the evidence of the libelous comments, published on social media, and submitted to the Hampton Circuit Court. The libelous acts of the Respondents injured the Petitioner's reputation, and caused irreputable damage, mental and emotional distress, psychological trauma, pain and suffering.

REASONS FOR GRANTING THE PETITION

I. Petitioner did raise federal claims in the trial court which was submitted to the Supreme Court of Virginia.

The Respondents' counsel claimed the Petitioner never raised an issue of federal law in the Virginia State Courts. The Petitioner raised the issues of federal laws and the Constitution of Virginia in her Amended Complaint[3], Petition of Writ of Mandamus/ Motion for Default Judgment[4], Response to Demurrer

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[3] Amended Complaint was filed January 27, 2020. The Petitioner raised the issues of federal law on page 15, item 25.

[4] App. 1h of the Petitioner's Petition for a Writ of Certiorari

and Special Plea/Motion to Reconsider Default Judgment,[5] Motion for Summary Judgment[6] during the December 29,2020, hearing[7], and the Objection to Notice of Hearing[8]. The petitioner raised the issues with sufficient precision.

The Petitioner filed assignments of error[9] pertaining and as stated by John Marshall in the opinion of the court involving *Marbury v. Madison,* "It is emphatically the province and duty of the Judicial Department to say what the law is." Under the Judicial Review of the United States, "The State as well as Federal courts are bound to render decisions according to the principles of the Federal Constitution."

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[5] Response to Demurrer and Special Plea/Motion for Summary Judgment, page 8, paragraph 1 states, Neither the Federal Constitution nor the Constitution of Virginia protect anyone being libelous or slanderous

[6] Plaintiff argues FRCP Rule 56 in the first sentence of the Motion for Summary Judgment.

[7] App. 14l in the Petitioner's Petition for a Writ of Certioari

[8] App. 4m of the Petitioner's Petition for a Writ of Certiorari

[9] Assignments of error filed addressing the violation of a Uniform Pretrial Scheduling Order, Objection of Hearing stating the violation of FRCP Rule 16 were submitted as part of the Petition for Appeal filed by the Petitioner.

The Respondents' argument that the Petitioner not raising any federal claim in trial court or the Supreme Court of Virginia is moot as the State and Federal courts are bound to render decisions according to the principles of the Federal Constitution.

II. Considerations for governing the Petition for Writ of Certiorari

In the case of *Marbury v. Madison*, the authority of the federal courts to review the constitutionality of federal statutes was established. Chief Justice Marshall spelled this out in *Cohens v. Virginia*:[10] "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of

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[10] 19 U.S. (6 Wheat.) 264 404 (1821)

jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

The Respondents' Joint Brief of Opposition states there is only one issue which could be loosely construed as a determination of an issue under federal law, actual malice. As stated in Justice Thomas, J.'s concurrence in the *McKee v. Cosby* case, "One may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefore however good his motives may be; and the same is true whether the party defamed be an officer or a candidate for an office, elective or appointive."

III. The Virginia Court did err, not only the applicability of *New York Times v. Sullivan* but also the Constitutionally protected rights of the Petitioner.

As the Respondents argue in their Brief of Opposition, The First Amendment imposes federal requirements of what a plaintiff must prove to prevail on their defamation claim, (1) falsehood (2) actual malice, (3) that the claim was "of and concerning" the plaintiff and (4) all must be shown by clear and convincing evidence. Even und

Virginia State Law, the petitioner proved: (1) publication, (2) an actionable statement, (3) that it was made with the requisite intent.

The Plaintiff proved the Respondents statements about "resigning because of scrutiny, going after taxpayers, being qualified to lead the city, lying, cheating, stealing, manipulating, being dishonest, and not hardworking" was proven but the Petitioner was never allowed to her right of Due Process, under the Federal Constitution, to include discovery and depositions. Respondents counsel initially argued the statements were rhetorical hyperboles which is false. The judge then allowed the Respondents' counsel to speak on the

Respondent's intentions at the time she published those egregious, false statements, without depositions to be

The Respondents argue that the Petitioner incorrectly conflates violations of the Federal Rules of Civil Procedure while in the litigation stages of the Virginia State Courts. The petitioner did not conflate the two. Under the Constitution of Virginia, Article I, Sec. 1 states, That all men are by nature equally free and independent and have certain i

which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. The Fourteenth Amendment, Section 1 states, "Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws. The Virginia Code § 18.2-417. Slander and libel. "Any person who shall falsely utter and speak, or falsely write and publish, of and concerning any person of chaste character, any words derogatory of such person's character for virtue and chastity, or imputing to such person acts not virtuous and chaste, or who shall falsely utter and

speak, or falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace or who shall use grossly insulting language to any person of good character or reputation..." 28 U.S. Code § 4101 - Definitions **(1)DEFAMATION.—**

The term "defamation" means any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person. The Code of Virginia § 8.01-300. How process served on municipal and county governments and on quasi-governmental entities.

Notwithstanding the provisions of § 8.01-299 for service of process on other domestic corporations, process shall be served on municipal and county governments and quasi-governmental bodies or agencies in the following manner: 1. If the case be against a city or a town, on its city or town attorney in those cities or towns which have created such a position, otherwise on its mayor, manager or trustee of such town or city; and... The FRCP Rule 4(j)(2)(A)(2): Summons states, "State or

Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: (A) delivering a copy of the summons and of the complaint to its chief executive officer; or (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

The Code of Virginia § 18.2-409. Resisting or obstructing execution of legal process. Every person acting jointly or in combination with any other person to resist or obstruct the execution of any legal process shall be guilty...The 18 U.S. Code § 1503(a) - Influencing or injuring officer or juror generally states, "**(a)** Whoever corruptly... obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

These are a few of the Federal Codes and State Codes that "overlap", as stated in the Joint Brief of Opposition. The Petitioner did not state Federal Rules of Civil Procedure as they and Virginia Civil Procedure overlap. The Petitioner was included in the Federal Civil Procedures in her Petition for Appeal as the FRCP mirrored the Virginia Civil procedures.

The Respondents argue the petitioner failed to assert federal claims in state court, there would be no reason for the Federal Rules of Civil Procedure to apply. In the *Dred Scott v. Sanford,* "It is often the duty of this court, after having decided that **a** particular decision of the Circuit Court was erroneous, to examine into other alleged errors, and to correct them if they are found to exist. And this has been uniformly done **by** this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to farther and useless litigation." The errors of the Hampton Circuit Court and Supreme Court of Virginia stated in the Petition for Appeal and Petition for a Writ of Certiorari must be decided by this Court.

The Respondents argue the Federal Rules of Civil Procedure are utilized in civil actions, and in specific instances provided in FRCP 81 which none apply. The argument in FRCP 81 is moot as the Opinion of the Supreme Court of Virginia erroneously held a statute

that was repugnant to the Fourteenth Amendment as previous stated, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[11] "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged."[12]

What the Respondents' counsel failed to mention FRCP 81, (3) *Demand for a Jury Trial.* (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a

[11] *New York ex rel. Bryant v. Zimmerman,*

[12] Chief Justice Marshall delivered the opinion of the Court., *Marbury v. Madison* (1803)

jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. The petitioner expressly demanded a jury trial which is obvious evidence of error and a violation of the Petitioner's Seventh Amendment Right.

The Respondent fails to address the question presented present about the mandated Scheduling Order or the fact that a Scheduling Order from an unrelated case was submitted into the Supreme Court of Virginia's record.

CONCLUSION

This case is of national significance, *McKee v. Cosby, Depp v. Heard, Sarah Palin v. New York Times, Justin Fairfax v. New York Public Radio, US Dominion, Inc., Dom inion Voting Systems Inc. And Dominion Voting Systems Corporation v. Fox News, LLC* are a few of the plethora of defamation suits filed

in the courts. Being this case does not involve Freedom of the Press, this case addresses the concern expressed by Justice Neil Gorsuch, "In the case of *New York Times v. Sullivan*, if ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that encourage falsehoods in quantities no one could have envisioned almost 60 years ago?"

The Supreme Court of the United States has the power to enforce the Constitutional Rights that include individual liberties. The Court must determine the "clearly erroneous" decision by the trial court and Supreme Court of Virginia. Even though the Supreme Court of the United States is regulatory, controlling all other laws. The Constitution must be enforced to ensure all laws are not meaningless.

For the reasons discussed, the Petition should be granted.

Respectfully submitted,

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