No. 22-906

In the Supreme Court of the United States

ALAN GRAYSON,

Petitioner,

v.

NO LABELS, INC. ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

In accordance with Supreme Court Rule 15(8), Petitioner Alan Grayson files this supplemental brief calling attention to new cases and authorities not available at the time of Petitioner's last filing, on April 23, 2023.

Last Wednesday, the California Court of Appeals reversed a ruling dismissing a defamation case brought against Congresswoman Maxine Waters. During her campaign, Rep. Waters ran four months of radio and print ads claiming that her opponent had been dishonorably discharged from the military. The basis for these claims was a prior court opinion regarding the discharge, that was incorrect. The plaintiff posted his discharge papers on his campaign website and Facebook page, showing that he had not been dishonorably discharged, even before Congresswoman Waters started running the defamatory ads against him. Notwithstanding her knowledge of this, Waters continued to disseminate claims that her opponent had been dishonorably discharged.

The trial court dismissed the case under *Times v. Sullivan,* ruling that the Plaintiff could not establish "actual malice," due to the prior court opinion incorrectly describing the discharge as dishonorable. The California Court of Appeals reversed the dismissal. *Collins v. Waters*, No. B312937 (Cal. Ct. App. May 10, 2023). The court held as follows:

> Actual malice is a term of art in defamation law. If you, with actual malice, publish falsehoods about a public figure, you forfeit the

constitutional protection of *New York Times v. Sullivan* (1964) 376 U.S. 254, 283-288. Your actual malice means the public figure can sue you for defamation. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 728 (*St. Amant*).) Blameworthy disregard for truth dissolves your constitutional shield.

. . . Reckless disregard, in this sense, requires defendant speakers to have a high degree of awareness of probable falsity. (*Harte-Hanks, supra*, at p. 667.)

Plaintiffs who are public figures must prove actual malice by clear and convincing evidence, but they may rely on circumstantial evidence to do so. (*Harte-Hanks, supra*, 491 U.S. at pp. 659, 668.) . . .

In 2020, challenger Joe E. Collins III and incumbent Maxine Waters competed for a seat in Congress. During the campaign, Waters accused Collins of a dishonorable discharge from the Navy. Collins shot back that he had not been dishonorably discharged. He showed Waters a document saying so. This document apparently was official. There was nothing suspicious about its appearance. The document, if genuine, would have established without doubt that Waters's charge was false. Waters easily could have checked its authenticity, but did not. Her appellate briefing asserts that today, years later, she still does not know the truth about whether Collins's discharge was dishonorable.

This disinterest in a conclusive and easily-available fact could suggest willful blindness.

Collins sued Waters for defamation during the campaign, but Waters convinced the trial court to grant her special motion to strike his suit. We reverse that order. The preliminary posture of the case required the court to accept Collins's evidence as true. His evidence created a possible inference of Waters's willful blindness, which is probative of actual malice. . . .

[Waters] declared she sincerely believed Collins's discharge was dishonorable. . . .

Free speech is vital in America, but truth has a place in the public square as well. Reckless disregard for the truth can create liability for defamation. When you face powerful documentary evidence your accusation is false, when checking is easy, and when you skip the checking but keep accusing, a jury could conclude you have crossed the line. . . . Collins showed Waters had failed to take an easy and conclusive step to ascertain his discharge status. In the face of facially valid proof of error, this failure created a permissible inference of willful blindness. . . .

As a matter of federal constitutional law, Collins's discharge document put Waters on notice of a considerable risk that conclusive evidence wholly disproved her accusations. It would have been easy for Waters then to check, but Waters kept repeating the accusation without checking. . . .

> We reverse the order granting the special motion to strike, vacate the trial court's fee award, and remand for further proceedings. We award costs to Collins.

Id., passim.

The *Waters* case is relevant here for several reasons. First, the evident turmoil in this area, with the *Waters* appeals court reaching a conclusion diametrically opposed to that of the trial court, illustrates the urgent need for further guidance by this Court on the issue of what evidence supports a finding of actual malice, an issue that the Court has not addressed since 1989. *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657 (1989).

Second, if the principles of the *Waters* decision were applied here, the judgment below here would have to be reversed. In *Waters,* Congressman Waters continued to run false negative ads against her opponent after he had demonstrated the truth to her. In this case, Respondents ran false negative ads against Petitioner when: (i) they already knew that Petitioner's ex-wife had almost immediately withdrawn her spousal abuse allegation against Petitioner; (ii) Petitioner's ex-wife had issued a written apology to Petitioner; (iii) Respondents' staffers internally circulated video and police evidence showing that her allegation was false; and (iv) Respondents' own staffers repeatedly warned Respondents that the allegation was false.[1]

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[1] Similarly, Respondents tried to excuse their defamatory corruption charges against Grayson based on an Office of Congressional Ethics ("OCE") report, long after they knew that the OCE report had been dismissed by the House Committee on Ethics, the OCE's supervisory authority.

Dismissal of the *Waters* case was reversed because Congresswoman Maxine Waters had reason to believe that her information was false; here, Respondents knew that their information was recanted, overruled and false.

Third, in the *Waters* case, both courts simply assumed that the negative campaign ads in that case deserved the same Constitutional protection that the *New York Times* enjoys, even though this Court has never resolved that issue. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 753, 763 (1985). That issue is raised squarely, here.

Two weeks earlier, in *McCullough v. Gannett Co.,* No. 1:22-cv-1099 (E.D. Va. April 25, 2023), the federal district court dismissed a defamation complaint that had alleged that a newspaper had falsely reported that a doctor had been "fired for spreading COVID misinformation" and "is largely discredited by the scientific community for his assertions that the COVID-19 vaccines are unsafe." The court dismissed the complaint because it ruled that the doctor had *inadequately pled* facts in support of actual malice, although the doctor obviously could have no personal knowledge of what the newspaper knew or should have known regarding the truth of these statements, when the Complaint was filed. This decision illustrates future Chief Justice John Roberts's stated concern regarding the "near-impossibility of prevailing under the *New York Times v. Sullivan* standard" (Memorandum to Fred Fielding, Aug. 28, 1985, Reply.App.1a).[2]

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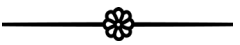
[2] *Accord Berisha v. Lawson,* No. 20-1063, *cert denied,* 594 U.S. ___ (2021) (Gorsuch, J., and Thomas, J., dissenting to denial of certiorari).

It also reinforces future Justice Elena Kagan's stated concern that the lower courts continue to attempt to "fit the square pegs of many defamation cases into the round holes of *Sullivan*." Kagan, *A Libel Story: Sullivan Then and Now,* 18 L. & SOC. INQUIRY 197, 199 (1993).

These two recent decisions, in the past three weeks, demonstrate not only why the actual malice standard has become extremely problematic and unworkable in the Age of the Internet, but also that there is now a "chorus criticizing the *New York Times* actual malice standard, particularly as implemented in the subsequent line of Supreme Court cases, as a fundamentally flawed and unnecessary rule." Prof. Louis W. Hensler, *Warren/Burger Courts Exalted 'Free' Expression Over Other American Values*, __ MARQUETTE L. REV. ___ (forthcoming).[3] Therefore, in light of this supplemental authority, the petition for certiorari should be granted.



[3] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031837

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