23-1303

ORIGINAL

No. _____

In The
Supreme Court of the United States

CRAIG MALIN,

Petitioner,

v.

LEE ENTERPRISES, INCORPORATED, LEE PUBLICATIONS, INC. d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FARRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Respondents.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

As a global information network accessible by smartphones was science fiction, *New York Times v. Sullivan* federalized libel law in 1964. Variously critiqued by members of this Court, including Justice Thomas, Justice Gorsuch and Justice Kagan, *Sullivan* explicitly left open the question of whether "failure to retract may ever constitute evidence" of actual malice. Leaving *Sullivan's* actual malice core intact, Petitioner presents two questions of national importance.

The first addresses the crucial role of juries in public figure defamation cases. The second seeks an answer to the question left open sixty years ago, addressing *Sullivan's* actual malice provision from a practical perspective in the internet age.

Question #1 – Does grant of summary judgment to Respondent Lee Enterprises conflict with requirements for a jury trial per *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)?

Question #2 – Can years-spanning refusal to retract objectively false statements on a website under a publisher's sole control constitute evidence of actual malice?

Related Proceedings

Malin v. Lee Enterprises, et al., Appeal No. 22-1940, Iowa Supreme Court, Petitioner's Request for Further Review Denied March 18, 2024, Procedendo order on April 1, 2024.

Malin v. Lee Enterprises, et al., Appeal No. 22-1940, Iowa Court of Appeals, Judgement entered January 14, 2024.

Malin v. Lee Enterprises, et al., LACE132888, Scott County District Court for the State of Iowa, Summary Judgement Ruling entered September 11, 2022, Order Denying Petitioner's Rule 1.904(2) Motion October 28, 2022.

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Petitioner, Craig Malin, respectfully petitions for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

Opinions Below

The Order of the Iowa Supreme Court is appended at App. 1. The Opinion of the Iowa Court of Appeals is appended at App. 3. The Ruling of the 7th District Court for Iowa is appended at App. 17.

Jurisdiction

The Iowa Supreme Court entered judgment on March 18, 2024. (App. at 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Section 2 of Article III of the Constitution of the United States provides:

... In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

A. Introduction

Given that factual differences to *New York Times v. Sullivan* are significant to Question #2, and given that per Section 2 of Article III of the U.S. Constitution this Court has, *"...appellate Jurisdiction, both as to Law and Fact..."*, the facts of the case will be established in some detail.

There is a casino in Davenport, Iowa which has paid over $150 million in taxes since it designed, constructed, and funded a $13.9 million road so it could move off a barge in the Mississippi River to Interstate 80 in 2016. Located five minutes from their corporate headquarters, Respondent Lee Enterprises knows the casino well. In 2015, they possessed two official City of Davenport reports documenting the "entire" casino relocation project was "funded" by the casino "alone" (App. at 65, 68). In 2017, they published a "Big Story" (App. at 61) about how the casino's relocation from the Mississippi River barge to Interstate 80 was a "win" for "Taxpayers".

But in September of 2019, on the eve of and during a tortious interference trial brought by

Petitioner in 2017 concerning 2015 publications of Lee Enterprises' corporate hometown newspaper (the Quad City Times), two different Lee Enterprises newspapers and websites falsely claimed Petitioner engaged in "wrongdoing" and "backroom wheeling and dealing" in 2014, resulting in part of the Davenport casino project being "taxpayer-funded" (App. at 57). The objectively false 2019 publications, contrary to the two City of Davenport reports possessed and concealed by Lee Enterprises in 2015 (App. at 63 - 69), and contrary to their 2017 "Big Story" about how the Interstate 80 casino was a "win" for "Taxpayers" (App. at 61), remain on Lee Enterprises websites to this day, and are the center of this case.

In the internet age, it is not a false statement in a newspaper on its way to a recycling plant that ruins a reputation and life. What ruins lives in the internet age are false statements instantly searchable, globally published and perpetually accessible on media websites. The 2019 publications at issue in this case have their foundation in false publications Lee Enterprises corporately refuses to correct, dating to 2015.

With regard to Question #1, Petitioner entered five affidavits into evidence from people who read the 2019 Lee Enterprises publication about "groundwork" for the casino project being "taxpayer-funded" due to Petitioner's purported "wrongdoing". While each of the affiants stated the publication changed their opinion of Petitioner negatively (App. at 70, 71) and Respondents offered no contrary evidence, the Iowa Supreme Court upheld (App. at 1) the Iowa Court of Appeals ruling (App. at 3 - 14)

which upheld the District Court's grant of summary judgment (App. at 17 - 56) to all Respondents, including Lee Enterprises.

That grant of summary judgment ignored the affidavits as evidence of defamation and also ignored Lee Enterprises' possession of the 2015 City of Davenport reports which established the casino "alone" (not "taxpayers") funded the "entire" casino project. Ignoring such independent documentary evidence while granting summary judgment to Respondent Lee Enterprises is contrary to this Court's ruling in *Anderson v. Liberty Lobby*:

> *"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

With regard to Question #2, the District Court, Court of Appeals and Iowa Supreme Court all completely ignored material differences between *New York Times v. Sullivan* and the case at bar. The Iowa courts refused to consider, much less rule, on whether Lee Enterprises' years-spanning refusal to publish corrections to objectively false publications on websites Lee owns is evidence of actual malice. In 1964, the *Sullivan* ruling cited two specific reasons which do not apply to the case at bar for why the New York Times' failure to retract was not evidence of actual malice. While doing so, *Sullivan* explicitly left open the question of, "Whether or not a failure to

retract may ever constitute such evidence ...." *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964)

Democracy rests upon journalism. In the interest of journalism the public can rely upon, and in an information technology environment the *Sullivan* Court could not have fathomed, Petitioner poses two questions with national implications to this Court.

B. Factual Background

1. Parties

Petitioner Craig Malin is a career local government employee. He is currently a volunteer firefighter and Village Administrator for Poynette, Wisconsin, population 2,600. In 2015, he was City Administrator for Davenport, Iowa, population 103,000.

Respondent Roy Biondi is a former employee of Lee Enterprises, serving as Publisher for the Waterloo Courier in September of 2019.

Respondent Tod Robberson is a former employee of Lee Enterprises, serving as Editorial Page Editor of the St. Louis Post-Dispatch in September of 2019.

Respondent Ray Farris is a former employee of Lee Enterprises, serving as Lee Enterprises Vice President and St. Louis Post-Dispatch Publisher in September of 2019.

Respondent Kevin Mobray is Chief Executive Officer of Lee Enterprises at all times relevant.

The Waterloo Cedar Falls Courier and St. Louis Post Dispatch are newspapers and websites owned by Lee Enterprises.

Lee Enterprises Inc. ("Lee") is a national media corporation owning in excess of seventy newspapers, publishing more than 350 weekly publications and boasting of 29 million unique website visitors each month. Lee is headquartered in Davenport, Iowa, and is the controlling Respondent.

2. The Original 2015 False Publications, Still Uncorrected

In 2014, while serving as Davenport City Administrator, Petitioner recommended the Davenport City Council enter into an agreement requiring the local casino to design, construct and fund a road extension so the casino could move to Interstate 80, make more money, and pay more taxes. Petitioner also recommended the Davenport City Council create a tax increment financing district surrounding the casino and road extension so general Davenport taxpayers would pay nothing for the casino relocation, and could only be benefitted by it. The Davenport City Council unanimously approved both recommendations.

On June 18, 2015, the Lee Enterprises editorial page editor at the Quad City Times secretly instructed the Lee Enterprises reporter at the Quad City Times to specifically report Davenport aldermen believed they were "misled" by Petitioner in 2014 about the City / casino road agreement, so the reporter's "Dull" draft article, which was "Not news", would become "News".

On June 19, 2015, in the same "news" article with the secret editorial page editor directive, the Quad City Times published a false excerpt of the 2014 City / casino agreement, concealing the words "Real Estate" and "Casino Real Estate" were separately defined terms.

On June 19, 2015, in the same "news" article with the secret editorial page editor directive and falsified agreement excerpt, the Quad City Times falsely reported the road project's cost to be $7.8 million, when it was budgeted to be $13 million.

In June of 2015, the Quad City Times used the falsely reported agreement excerpt and falsely reported $7.8 million road cost to support a wildly false storyline about the Interstate 80 casino "sitting on" $5 million of grading expenses, with "taxpayers" "unwittingly committed" "to millions in site improvements on the Rhythm City Casino site".

In June of 2015, Petitioner concluded his thirteen years of service as Davenport City Administrator one week after the false Quad City Times reporting.

3. The Cover Up Begins

In October and December of 2015, the Lee Enterprises reporter at the Quad City Times who falsified the 2014 agreement and project cost in June of 2015 was provided City of Davenport staff reports which included the sentence, "The **entire** Elmore Extension project (both phases) of $13.xxx[1] million

[1] The October 7, 2015 City report referenced a $13.8 million cost, while the December 2, 2015 City report referenced a $13.925 million cost.

will be funded through the issuance of bonds abated by tax increment financing (TIF) generated from the casino development **alone**." (emphasis added)

The City reports (App. at 65, 68), establishing the "entire" project was funded by the casino "alone," were contrary to the Quad City Times storyline from June of 2015.

The same reporter who falsified the 2014 agreement and road cost in his June 2015 article concealed the existence of the October and December 2015 City reports in news articles published on October 7, October 8, December 9, and December 10. He did so while specifically removing the words "entire" and "alone" from the (uncited) October and December City reports in four news articles which otherwise included verbatim word sequences from the City reports. Doing so specifically concealed to Quad City Times readers that the entire casino project was funded by the casino alone.

Page 19 of the December 2, 2015 City staff report details grading expenses for the project. No expense for grading the casino site is referenced.

Petitioner, then unaware of the October and December 2015 City reports, first requested corrections to the June 2015 Quad City Times publications on December 10, 2015. The Times' publisher forwarded the request fourteen minutes after receiving it to a Lee Enterprises Vice President. That Lee Vice President issued the corporate directive, "attorneys are handling it from here". Through counsel in December of 2015, Lee Enterprises refused to publish any corrections.

The casino moved to Interstate 80 in 2016, where it has paid over $150 million in taxes, to date.

Petitioner sued Lee Enterprises columnist Barb Ickes, former Lee Enterprises reporter Brian Wellner, the Quad City Times and Lee Enterprises for defamation and tortious interference in 2017. In discovery, Petitioner requested "background information" the former Lee Enterprises reporter used for articles referencing Petitioner in 2015, but the October and December 2015 City staff reports documenting the entire project was funded by the casino alone were not provided.

Respondent Lee Enterprises successfully eliminated Petitioner's defamation claim through summary judgment in 2018, solely due to Petitioner's lack of evidence of reputational harm. Petitioner's tortious interference claim remained for trial by jury, beginning on September 23, 2019.

4. The Second Attack & Current Case

On September 19, 2019, Lee Enterprises Vice President Ray Farris published an editorial (App. at 57 - 59) in the St. Louis Post Dispatch criticizing Petitioner for his 2017 litigation on the eve of the 2019 trial in Davenport. The editorial falsely stated as fact that Petitioner was "involved" in "backroom wheeling and dealing" and "wrongdoing", resulting in "taxpayer-funded" groundwork for the casino.

On September 24, 2019, as the trial was underway, another Lee Enterprises newspaper and website (the Waterloo Courier) published the same editorial.

In September of 2019, Petitioner was living and working in Seaside, California, more than 2,000 miles distant from Waterloo, or St. Louis.

Petitioner has never lived nor worked in either Waterloo, Iowa or St. Louis, Missouri, and neither the St. Louis Post Dispatch nor Waterloo Courier had ever reported a single word about Petitioner's litigation until the 2019 publication at issue.

The 2019 publications resulted from Lee Enterprises' corporate refusal to retract objectively false statements concerning the Davenport casino relocation project on websites Lee Enterprises solely controls, combined with their litigation strategy of containing and concealing truth, spanning years.

Petitioner requested the St. Louis Post Dispatch and Waterloo Courier retract false statements in the 2019 publications. Lee Enterprises corporately refused.

5. The Current Litigation

Petitioner sued Respondents for defamation and related claims in 2020.

Petitioner entered five affidavits into evidence from individuals who had no opinion of Petitioner until they read the 2019 publication, after which they had a negative opinion of Petitioner, and would be less likely to hire him (App. at 70, 71).

Petitioner entered into evidence that his salary at the time of the 2019 publications was $234,988.28.

Petitioner entered into evidence professional harm resulting from the 2019 publications, including

his salary at a new position after the 2019 publications being $92,000.

Petitioner entered into evidence an expert opinion that the 2014 City / casino agreement benefitted taxpayers.

Petitioner entered official reports from the Iowa Racing and Gaming Commission, Scott County and City of Davenport into evidence that the Interstate 80 casino paid in excess of $65 million in taxes, prior to the September 2019 publication.

Petitioner entered into evidence a "Big Story" concerning the Interstate 80 casino Lee Enterprises published on June 4, 2017 with the subheading, "Taxpayers win" (App. at 61).

Petitioner discovered the December 2, 2015 City of Davenport staff report (App. at 66 - 69) in City archives in December of 2021. Petitioner entered the December 2, 2015 City of Davenport staff report into evidence on January 10, 2022 by supplying it to Lee Enterprises counsel.

On April 8, 2022, Lee Enterprises admitted the sentence in the December 2, 2015 City report, "The entire Elmore Extension project (both phases) of $13.925 million will be funded through the issuance of bonds abated by tax increment financing (TIF) generated from the casino development alone." Petitioner noted that admission and Lee Enterprises' provable possession of the City reports in 2015 was dispositive to determining Lee Enterprises knew the casino was not "taxpayer-funded" years in advance of the 2019 publications.

6. The Cover-Up Grows

Beginning on May 5, 2022, Lee Enterprises initiated a series of recantations of their April 8, 2022 admission.

Following Lee's initiation of recantations of their April 8, 2022 admission of the December 2, 2015 City report sentence establishing the entire project was funded by the casino alone, Petitioner served notice on the former Lee Enterprises reporter who authored the false 2015 publications to be deposed regarding the 2015 City reports.

Lee Enterprises filed a protective order motion to resist Petitioner's deposition of the former Lee Enterprises reporter, claiming hardship. Lee's motion was approved by the District Court.

Petitioner entered an affidavit into evidence from retired City of Davenport Deputy Clerk Jackie Holecek that she provided the former Lee Enterprises reporter the October and December 2015 City reports.

On pages 11 and 12 of their Final Reply Brief in Appeal 22-1940, Respondent Lee Enterprises made the following knowingly false statement to the Court regarding the 2015 City reports,

> *"Regardless, whether Lee Enterprises knew of any City of Davenport reports before the 2015 and 2019 publications (which Malin was free to obtain from the City of Davenport during the Quad-City Times Litigation, and which he knew about because he was the City Administrator at the time the documents were created), it does not*

change the application of issue preclusion and claim preclusion."

Petitioner's last day as Davenport City Administrator was June 26, 2015. He was not a Davenport employee while the October and December 2015 City reports were created.

Respondent Lee Enterprises made a knowingly false statement of fact to the Court about time itself, masking the 2015 City reports were concealed by Lee Enterprises for years. Lee Enterprises timed that false statement to be the last word in briefs to the Iowa Court of Appeals.

7. Refusing to Retract Years of False Statements

The origins of the false 2019 publication at issue date to June of 2015, when the Quad City Times falsified an excerpt of a 2014 agreement between the City and casino, and falsified the casino road extension's cost by more than $5 million, thereby creating a fake scandal of $5 million of public funds being purportedly unaccounted for.

Possessing independent documentation that "Real Estate" in the 2014 City / casino agreement was a defined term, Respondent Lee Enterprises refuses to correct a falsified except of the agreement originally published on June 19, 2015 that concealed "Real Estate" was a defined term.

Possessing independent documentation that the casino project cost $13.925 million (App. at 67), Respondent Lee Enterprises refuses to correct the falsified project cost of $7.8 million reported in

multiple June 2015 publications, and remaining on the Quad City Times website to this day.

Possessing independent documentation that the entire casino project was funded by the casino alone (App. at 65, 68), Respondent Lee Enterprises refuses to correct the objectively false statement in the 2019 editorial about Petitioner's purported "backroom wheeling and dealing" resulting in groundwork for the casino being "taxpayer-funded".

Per *Milkovich v. Lorrain Journal*, which held that a separate constitutional privilege for opinion publications was not required to ensure the freedom of expression guaranteed by the First Amendment, whether Petitioner engaged in "backroom wheeling and dealing" or whether the casino was or was not "taxpayer-funded" are both "sufficiently factual to be susceptible of being proved true or false." *Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990).

Neither the "backroom wheeling and dealing" nor "taxpayer-funded" allegations of 2019 are true. The 2014 agreement was conceived, reviewed and approved at a series of Davenport City Council meetings in June of 2014 (which the Quad City Times reported on in June of 2014). Further, Lee Enterprises knows the "entire" casino relocation project was funded by the casino "alone" (App. at 65, 68), resulting in a "Taxpayer win" (App. at 61), which Lee Enterprises itself published in 2017.

Lee Enterprises' years-spanning corporate refusal to correct objectively false publications concerning Petitioner on websites Lee Enterprises owns has devastated Petitioner's career.

C. Proceedings Below

1. The Preceding Litigation

Petitioner previously commenced a 2017 defamation and tortious interference action for the 2015 Lee Enterprises publications in the Quad City Times.

Respondent Lee Enterprises sought summary judgement for Petitioner's 2017 litigation in 2018.

Respondent Lee Enterprises was successful in securing summary judgment on Respondent's 2017 defamation claim solely based on lack of evidence of reputational harm. However, the Court ruled the tortious interference claim would continue to trial, stating,

> *"Without explaining to readers the way public-private partnerships and public financing commonly worked on municipal projects such as the Modern Woodmen Park renovation and the Rhythm City Casino development, Defendants' insistence that "public money" was being used on these projects despite Malin's protestations or explanations otherwise demonstrates, at the least, a genuine issue of material fact on whether the statements were published with actual malice; at most, this shows actual malice ..."* (District Court ruling, October 4, 2018, pgs. 15, 16)

Respondent Lee Enterprises was removed as a defendant at the 2019 trial in Petitioner's 2017 litigation. All other Defendants in Petitioner's 2017 litigation on the remaining tortious interference claim secured a favorable jury verdict at the 2019

trial. The verdict was a general verdict, not specifying any reason for the verdict.

The jury instructions at the 2019 trial permitted a victory for defendants even if the jury determined the 2015 publications were false, but Petitioner did not prove the 2015 publications caused his separation from the City of Davenport. Respondents' counsel made precisely that argument in closing statements.

Petitioner appealed the 2019 jury instructions to no success, with the Iowa Court of Appeals upholding the 2019 instructions and verdict.

2. The Current Litigation

Petitioner commenced the case at bar in 2020. The case raised claims of defamation against a series of Defendants subsidiary to Respondent Lee Enterprises specific to the 2019 publications. Lee filed a combined Answer.

Following discovery of the December 2, 2015 City of Davenport staff report establishing the entire casino project was funded by the casino alone in December of 2021, and determining Lee Enterprises reporter Brian Wellner possessed that report in December of 2015 by comparing the exact same words in Wellner's news articles to the staff report, except for Wellner omitting the words "entire" and "alone" to conceal the entire project was funded by the casino alone in his news articles, Petitioner sought partial summary judgment.

Importantly, Petitioner sought summary judgment only against Lee Enterprises and only for

the claim of defamation, with damages and all other claims to be resolved by a jury.

Petitioner's summary judgment claim incorporated every element of a defamation claim required under Iowa law, including evidence of professional damage, reduced compensation and five affidavits from independent individuals who read the 2019 publication and universally came to a negative opinion of Petitioner solely from reading the 2019 publication (App. at 71).

Respondents presented no evidence that Petitioner was not damaged, nor any evidence that any individual read the 2019 publications and came to anything other than a negative opinion about Petitioner.

Petitioner presented contextual and factual differences to *New York Times v. Sullivan* on pages 26 and 27 of his Partial Summary Judgment Brief, and pages 10, 11 and 30 of his Reply Brief.

Respondent Lee Enterprises resisted Respondent's motion for partial summary judgment MPSJ. Lee also simultaneously filed its own Motion for Summary Judgment, for all Respondents and all claims.

The summary judgment motions were ultimately adjudicated. The District Court Ruling (the "Ruling", App. at 17 - 56) granted summary judgment to all Respondents for all claims, citing *New York Times v. Sullivan* multiple times, including in its final paragraph explaining (App. at 50, 51) its grant of summary judgment on Petitioner's defamation claim.

The District Court's Ruling neither references the 2015 City reports documenting the entire project was funded by the casino alone nor any of the five affidavits Petitioner supplied documenting the 2019 publication negatively impacted people's opinion of Petitioner.

The District Court Ruling simply ignores that Lee Enterprises, as the controlling Respondent, possessed the City Reports in 2015, and published that the casino was a "Taxpayer win" in 2017, prior to attacking Petitioner in 2019 about a purportedly "taxpayer-funded" casino. While doing so, the District Court's Ruling ignores that Petitioner's motion was specifically against Lee Enterprises. The District Court addresses Lee Enterprises' summary judgment motion for all Respondents and all claims at substantial length, and then denies Petitioner's motion as "moot" in two sentences (App. at 56).

The District Court's Ruling did note the 2019 jury verdict did not establish the truth or falsity of the 2015 "taxpayer burden" claims originally litigated in Petitioner's 2017 litigation, finding (App. at 28) that "the whole subject matter" remains "at large".

Petitioner filed a Rule 1.904(2) motion to the District Court, seeking to amend and enlarge the September 11, 2022 Ruling. Petitioner referenced contextual and factual distinctions to *Sullivan* and its progeny on pages 29, 31 and 32 of his Brief, and pages 16, 17, 18, 19 and 20 of his Reply Brief. Petitioner also cited the requirement in *Anderson v. Liberty Lobby* for juries rather than judges to weigh evidence, make credibility determinations and draw

legitimate inferences from evidence on page 16 of his Reply Brief.

Respondents resisted Petitioner's Rule 1.904(2) motion, and the District Court ruled in their favor without any comment on the 2015 City reports, the defamation affidavits or Petitioner's constitutional claims (App. at 15, 16).

Petitioner timely appealed the adverse Ruling after exhausting all post Ruling motions, on November 22, 2022. Petitioner referenced *Anderson v. Liberty Lobby* on page 65 and 66 of his Appeal Brief and page 52 of his Appeal Reply Brief. Petitioner raised contextual and factual distinctions to *Sullivan* on pages 73, 79, 80, 81, 82, 84, 87 and 88 of his Appeal Brief and pages 36, 37 and 38 of his Reply Brief. Respondent Lee Enterprises resisted Petitioner's appeal and filed a cross appeal.

Petitioner's and Respondents' appeals were assigned to the Iowa Court of Appeals. The Court of Appeals entered its Opinion sustaining the District Court's grant of Summary Judgment on January 24, 2024 (App. at 3 - 15). The Opinion did not reference *Sullivan* but did address Petitioner's complaint that the 2019 publications falsely stated groundwork for the casino project was "taxpayer-funded". In a footnote ignoring the only evidence in the record of five individuals reading the 2019 publication and coming to a negative opinion of Petitioner, and ignoring the revenue for the *entire* casino relocation project came from the casino *alone* and has resulted in $150 million of taxes the casino alone has paid, the Court of Appeals considered the *"gist of the publications' statement to be true because the casino*

development was to be funded by bonds that would be repaid by tax revenue". (App. at 13).

Petitioner notes the five affidavits in the record (App. at 70, 71) demonstrated without exception that the 2019 publication negatively impacted people's opinion of Petitioner. Petitioner also notes if the phrase "taxpayer-funded" in the 2019 publications were replaced with "tax-funded by the casino alone" or similar language, none of the rest of the 2019 publication concerning Petitioner's purported "wrongdoing" would make any sense.

The Court of Appeals Opinion dismissed Petitioner's constitutional claims with a footnote. Irrespective of raising contextual and factual distinctions to *Sullivan* across thirteen pages of briefs at the District Court and eleven pages at the Court of Appeals, the Court of Appeals footnote stated, *"Malin also raises a constitutional claim on appeal. However, that claim is not preserved for our review because Malin never developed the argument below. ..."* (App. at 8).

Petitioner timely sought further Review by the Iowa Supreme Court, again raising the jury requirements of *Anderson v. Liberty Lobby* and contextual and factual distinctions to *New York Times v. Sullivan.* Respondent Lee Enterprises resisted Petitioner's Review request.

The Iowa Supreme Court denied Petitioner's Request for Further Review on March 18, 2024 (App. a 1) and issued a procedendo order on April 1, 2024.

Reasons For Granting The Petition

Sixty years after *Sullivan*, the results are in. Public trust in media[2] is at a historic low. It is hard to trust an industry empowered to publish false statements. Public trust in government[3] is also at a historic low. If media corporations can easily profit by lying about public figures, they can and they will. Such conduct, over the span of decades, has democracy-threatening consequences.

Iowa courts have decided the case both in conflict with this Court's decision in *Anderson v. Liberty Lobby* (Question #1) and, in refusing to address the factual and contextual distinctions to *New York Times v. Sullivan*, and open question left in *New York Times v. Sullivan* regarding refusal to retract as possible evidence of actual malice (Question #2), left an important question of federal law that should be settled by this Court.

Petitioner's two questions seek to restore public trust in media by establishing individuals with a prima facie defamation claim have access to a jury. Against a goliath national news corporation with essentially unlimited publishing capacity, Petitioner simply seeks to present truth to a jury. While hardly a revelatory notion, the ability of a damaged

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[2] https://news.gallup.com/poll/512861/media-confidence-matches-2016-record-low.aspx

[3]https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/

individual to simply ask a corporate official to explain to a jury why the corporation refuses to correct objectively false publications on websites the corporation owns would provide the barest minimum of accountability. From that seed of bare minimum accountability, some public trust may grow.

I. Question #1 - Does grant of summary judgment to Respondent Lee Enterprises conflict with requirements for a jury trial per Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)?

In *Anderson v. Liberty Lobby*, a post-*Sullivan* public figure defamation case, this Court stated,

> *"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

In his Motion for Partial Summary Judgment, Petitioner entered into evidence an October 7, 2015, City of Davenport report stating, "The entire Elmore Extension project (both phases) of $13.8 million will be funded through the issuance of bonds abated by tax increment financing (TIF) generated from the casino development alone." (App. at 65). Petitioner also entered a December 2, 2015, City of Davenport report into evidence with the same sentence (App. at 68), except for the $13.8 million amount being

replaced by $13.925 million. The December 2, 2015 City report also included complete documentation of every expense related to the casino relocation project spanning 123 pages. On the expense page detailing grading costs, there was no cost referenced for grading the casino site.

Petitioner also entered into evidence an affidavit from a retired City of Davenport employee, establishing Lee Enterprises employee Brian Wellner was provided the October 7 and December 2, 2015 City reports. Petitioner further entered into evidence four news articles by Wellner which document Wellner concealed the existence of the City reports as he edited the words "entire" and "alone" out of the City reports while otherwise copying the October 7 and December 2 City report sentences verbatim. In doing so, he specifically concealed the entire casino project was funded by the casino alone.

If the entirety of "X" (whatever "X" may be) is funded by "A" alone (whoever "A" may be), no one other than "A" can possibly fund any part of "X".

Presented with the 2015 City of Davenport reports documenting the entire casino project was funded by the casino alone, no jury could possibly infer or conclude anyone other than the casino alone funded any part of the casino project. The words "entire" and "alone" in the City reports do not allow any juror to come to any other inference or conclusion except that the casino alone funded its entire relocation project.

The Iowa Court of Appeals determination that the "gist" of the 2019 publications' "taxpayer-funded" statement was true "because the casino development

was to be funded by bonds that would be repaid by tax revenue" ignores two inescapable and uncontroverted facts. First, it ignores revenue repaying the bonds comes from the casino "alone". General Davenport taxpayers have not paid a penny for the casino relocation project. There is no evidence of a single Davenport citizen paying a penny for the casino relocation project. To the contrary, the record documents general Davenport taxpayers have benefitted from tens of millions of dollars the casino pays in taxes every year.

Second, the Iowa Court of Appeals "gist" footnote ignores the only evidence in the record regarding how people interpreted the 2019 publication is contrary to their "gist". Learning from his failed 2017 defamation lawsuit, which was defeated solely due to lack of reputational harm, Petitioner entered five affidavits (App. at 70, 71) into the record. Each of those affidavits documents the 2019 publication had a defamatory impact. "Taxpayer-funded" in the 2019 publication is obviously intended to be understood as general taxpayers. If the 2019 publications (App. at 58) used the phrase "casino-funded" rather than "taxpayer-funded", none of the rest of the 2019 publication would make any sense.

Iowa courts not only ignored this Court's ruling in *Anderson v. Liberty Lobby*, they did precisely what *Liberty Lobby* does not allow. From a record of documentary evidence entirely favoring Petitioner, the Iowa courts ignored *Anderson v. Liberty Lobby* and deprived Petitioner of his right to trial by granting summary judgment to Respondent Lee Enterprises.

If Respondents have any evidence that any entity other than the casino alone funded the entirety of its relocation project, they can enter that evidence into the record and explain that evidence to a jury. That is a certain path to victory, and all it requires is a single piece of evidence. If Respondent Lee Enterprises has any evidence their reporter did not know and did not specifically conceal the entire casino project was funded by the casino alone in 2015, they can also enter that evidence into the record and explain that evidence to a jury. When Petitioner offered Lee that opportunity during summary judgment in 2022, Lee responded by keeping their former reporter from being deposed.

But what Lee Enterprises cannot do, because this Court decided otherwise in 1986, is have a judge relieve them of all responsibility to present any evidence, and win on summary judgment.

II. Question #2 - Can years-spanning refusal to retract objectively false statements on a website under a publisher's sole control constitute evidence of actual malice?

Establishing precedent distinct from hundreds of years of common law, the "actual malice" standard was created when *New York Times v. Sullivan* federalized libel law in 1964. Lauded by some and critiqued by others over the years, including Justice Thomas, Justice Gorsuch and Justice Kagan, *Sullivan* was conceived in a different era, when a global electronic information network instantly accessible by ubiquitous smartphones was science fiction.

Sullivan began as a shield. It has become a sword, wielded by the mightiest media corporations in the nation, against ordinary citizens working as public employees, or trying to defend themselves in the slightest following a defamatory attack. As Justice Kagan wrote about *Sullivan* while at the University of Chicago,

> *"... the law insulates powerful institutional actors -- possessing both a great capacity to harm individuals and a far-reaching influence over society at large -- from charges of irresponsibility made by persons with little societal influence and few avenues of self-protection. If part of the point of Sullivan was to check the abuse of power and to ensure the accountability of those wielding it, then these cases suggest that the Court's constitutionalization of libel law has gone askew."* Elena Kagan, "A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991))," 18 Law and Social Inquiry 197, p.214 (1993).

Gone askew, indeed. A national news corporation refused to correct false statements for four years and then doubled down with new attacks in 2019, comparing a faithful public employee who delivered a $150+ million economic development "win" (App. at 64) to a notorious felon. Years into their cover-up, Lee Enterprises simply cannot go backwards. So they attack again. And again.

Having served as a local government employee and respecting role the role of journalists by answering their questions truthfully and promptly for more than thirty years, Petitioner does not seek

to "overturn" *Sullivan*, or otherwise hamper impactful journalism. Having watched the *Berisha v. Lawson*, *Coral Ridge Ministries v. Southern Poverty Law Center* and *Blankenship v. NBCUniversal* writ of certiorari petitions and dissents rise and fall while battling a giant national media corporation as an ordinary citizen and community volunteer, Petitioner simply hopes to present truth to a jury.

Petitioner argues *Sullivan* had different facts, at a different time, and left open a question about actual malice this Court alone must resolve, so a nation born in a revolutionary sentence about truth may regain its footing in truth. *Malin v. Lee Enterprises* has Petitioner's name and no small amount of his effort attached to it, but it is not -- fundamentally -- about him. It is about where corporate media is leading this nation, and whether we want to continue over that cliff.

1. Sullivan Had Different Facts

Sullivan had different facts. Sullivan was an elected official; Petitioner was not. Sullivan was not named; Petitioner was. Sullivan filed suit about an advertisement; Petitioner filed suit for an opposite of the truth statement published as fact and editorial voice of Respondent's largest circulation newspaper. Sullivan complained of trivial errors and suffered no demonstrable harm; Petitioner complains of career ruining falsehoods, with uncontroverted evidence of catastrophic career damage.

Most importantly with regard to *Sullivan's* "actual malice" standard, the police department

Sullivan led in Montgomery, Alabama was in fact hostile to peaceful civil rights demonstrators. There were no official government reports the New York Times possessed prior to the 1960 publication that were contrary to the words at issue in *Sullivan*. Unlike the facts of *Sullivan*, Lee Enterprises possessed and concealed official government reports (App. at 63 - 69) in 2015 which were utterly contrary to their 2019 "taxpayer-funded" casino claim. Similarly, the New York Times never published an article in 1958 about how Police Commissioner Sullivan's leadership of the Montgomery Police Department was a "win" for the civil rights movement. But there was a Lee Enterprises "Big Story" (App. at 60 - 62) in their corporate hometown newspaper two years prior to their 2019 "taxpayer-funded" falsehood about how that very *same* casino was a "win" for "Taxpayers" (App. at 61).

In 1960, the New York Times was not about to go to trial on a 1956 publication because the Court had determined the 1956 publication, "*demonstrates, at the least, a genuine issue of material fact on whether the statements were published with actual malice ...*" (District Court ruling, October 4, 2018, pgs. 15, 16). There was no prefactory 1956 publication or preceding Court ruling about actual malice in *Sullivan*.

Completely unlike the facts in *Sullivan*, Respondent Lee Enterprises tells two fundamentally opposing stories about the Davenport casino. When they are not attacking Petitioner, the casino is a "Taxpayer win" (App. at 61). But when they are attacking Petitioner, they claim he was involved in "wrongdoing" about a "taxpayer-funded" casino (App.

at 57). Lee piously cites *Sullivan* as a shield, while in fact they use *Sullivan*'s pre-internet protections to bludgeon Petitioner every minute of every day with opposite of the truth falsehoods on websites Lee Enterprises owns and profits from.

2. *Sullivan* Preceded The Internet

Sullivan not only had different facts, it occurred in a different century. Sullivan complained about an advertisement in a *newspaper*. The ad was published on March 29, 1960. There were only a few dozen copies of the ad in newspapers delivered that day in Montgomery County, Alabama. The ad was ink, on newsprint, destined for the trash, fish wrap, or bottom of the birdcage.

In 1960, Petitioner was not yet born. Nor were four (nearly five) Justices of this Court. Nor was the internet.

In 1964, if someone wanted to read the March 29, 1960 edition of the New York Times they would have to find a library with an excellent microfilm collection, open a dusty box, thread the film into the projector, and scroll through pages and pages of grainy reproductions of the Old Gray Lady. Even if they did all that, they still would not know anything about Mr. Sullivan, because he was not named.

Today, if anyone with an internet connection wants to know about Petitioner, all they need to do is type his name into a search box on their smartphone. Respondent Lee Enterprises has multiple search boxes at the ready, monetizing every page view of articles, columns, editorials, and advertisements, whether true or false. The internet - inconceivable in 1964 - is a global, perpetual, and inescapable

monetization machine. What is more, studies document false and salacious information on the internet spreads farther, faster than truth.

Justice Gorsuch cited such studies in his *Berisha v. Lawson* dissent, concluding,

> *"it's unclear how well these modern developments serve Sullivan's original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area - "pervasively famous," "limited purpose public figure" - seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether Sullivan's rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life".* 594 U.S. pg.7, 2021

Petitioner, a faithful public employee on the front lines of community service, wishes he lived in Sullivan's quaint time, because he could rise above a few dozen unwelcome by some (but noble) newspaper ads rotting in a landfill. But what he nor anyone else can escape nor rise above today are continuously and

perpetually published opposite of the truth statements on media corporation websites.

3. *Sullivan's* Open Question

With different facts, in a different time, *Sullivan* left open a question that bears resolving in this time, so lower courts across the nation will know and can apply this Court's answer. The Iowa District Court, Court of Appeals and Supreme Court all dodged the question, so it is left for this Court.

Considering whether the New York Times' refusal to retract comparatively trivial errors in the "Sullivan" publication was evidence of actual malice, the *Sullivan* ruling stated,

> *"The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes.* ***Whether or not a failure to retract may ever constitute such evidence,*** *there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point — a request that respondent chose to ignore." New York Times Co. v. Sullivan,* 376 U.S. 254, 286 (1964) (emphasis added)

Neither of the two reasons cited in *Sullivan* applies to the case at bar.

What does apply to the case at bar is Lee Enterprises possessed two City of Davenport reports

in 2015 which documented the entire casino project was funded by the casino alone (App. at 65 and 68), and they possessed those reports prior to refusing Petitioner's 2015 retraction demand. The December 2, 2015 report established the project cost $13.925 million (not $7.8 million as was reported in June of 2015). The December 2, 2015 report documented no cost for grading the casino site (not "millions" as was reported in June of 2015). Lee Enterprises knew in 2015 that the entire casino project was funded by the casino alone; not taxpayers. But if they published that truth in October or December of 2015, they would have had to explain their false June 2015 publications. So, to this day, the false 2015 (and resulting 2019) publications are uncorrected.

What also applies to the case at bar is Lee Enterprises, while refusing Petitioner's request to retract the false 2015 publications, published a "Big Story" in 2017 about the casino being a "win" for "Taxpayers", stating, *"While Rhythm City is winning big in its debut on land, its mandate to share is translating into wins for others, too. Higher gaming revenue mean greater gaming taxes, which benefits the state, counties, and cities where casinos are located"* (App. at 61). Lee Enterprises knew in 2017 that what they had published in 2015 (and would publish in 2019) was false. To this day, the false 2015 and 2019 publications are uncorrected on websites Lee Enterprises owns.

What also applies to the case at bar is Lee Enterprises was informed by the Court on October 4, 2018 that,

> *"Without explaining to readers the way public-private partnerships and public financing*

> *commonly worked on municipal projects such as the Modern Woodmen Park renovation and the Rhythm City Casino development, Defendants' insistence that "public money" was being used on these projects despite Malin's protestations or explanations otherwise demonstrates, at the least, a genuine issue of material fact on whether the statements were published with actual malice; at most, this shows actual malice ..."* (District Court ruling, pgs. 15, 16).

Lee was told by the Court in 2018 that what they published in 2015 (and would later publish in 2019) was actionable.

Ignored by the Iowa Courts, the 8th Circuit addressed the topic of repeating a defamatory statement after being informed of its falsity, finding,

> *"A speaker who repeats a defamatory statement or implication after being informed of its falsity "does so at the peril of generating an inference of actual malice." "[O]nce the publisher knows that the story is erroneous ... the argument for weighting the scales on the side of [its] first amendment interests becomes less compelling." Nunes v. Lizza,* 12 F.4th 890, 900 (8th Cir. 2021).

It is one thing to make an error in reporting. It is quite another to possess and conceal contrary documents or be told by the Court that publishing something which demonstrated *"at the least, a genuine issue of material fact on whether the statements were published with actual malice"* and then do it again (twice), referencing the ruling (but not the part about actual malice) while doing so, and

adding in felonious associations as frosting on the defamation cake. But that is exactly what Lee Enterprises did in 2019. Twice.

Respondent Lee Enterprises knew in 2015 that they had published wildly false statements regarding the Davenport casino relocation project. Instead of correcting those false publications, a Lee Enterprises reporter concealed the truth that the entire casino project was funded by the casino alone (App. at 65, 68) in four news articles and a Lee Vice President told the Quad City Times Executive Editor, "attorneys are handling it from here". As Lee attorneys "handled" the false 2015 statements about the road project costing only $7.8 million and Davenport aldermen thus committing taxpayers to "millions" for casino site improvements, Lee refused to correct the false 2015 publications on websites Lee Enterprises owns. Days before trial, the false 2019 publications followed.

In 1964, this Court explicitly left open the question of whether refusal to retract "may ever constitute" evidence of actual malice. The *Sullivan* Court did so decades prior to the internet and in a case without any of the following facts:

1) The New York Times possessing, fraudulently editing and concealing government reports contrary to their 1960 publication.

2) The New York Times publishing the opposite of the "Heed Their Rising Voices" advertisement as a "Big Story" news article prior to the ad.

3) The New York Times ignoring a court's finding of a genuine issue of material fact

regarding actual malice for a prior similar publication.

4) The New York Times admitting official government reports in litigation contrary to their 1960 publication, and then recanting that admission up to and including a false statement of fact about time itself to a state Court of Appeals.

Respondent Lee Enterprises did all (1-4) of the preceding. They possessed, fraudulently edited and concealed government reports (App. at 63 - 69) contrary to their 2019 publication. They published the opposite of their 2019 publication, in 2017 (App. at 60 - 62). They ignored a court's finding of a genuine issue of material fact regarding actual malice for a prior publication. They admitted an official government report contrary to their publication at issue, and then recanted that admission up to and including a false statement of fact about time itself to the Iowa Court of Appeals.

If Respondent Lee Enterprises' cascade of corporate bad faith while corporately refusing to publish corrections to false statements on websites they own is not evidence of actual malice, it is hard to imagine what could be. Again prescient in 1993, Justice Kagan then wrote of *Sullivan*, "*The paradigmatic case increasingly appears exceptional – or at least far removed from many cases currently equated to it. These cases – and the rules that give rise to them – stand in need of independent justification*". Ibid, pg. 205.

There is no justification for a media corporation refusing to publish corrections to objectively false

and reputation destroying statements on websites they own and control, for years. There is absolutely no justification for such conduct -- or even conception of the conduct, context and facts at bar -- in *Sullivan*.

The refusal of Iowa courts to consider contextual and factual distinctions between the case at bar and *Sullivan*, or to consider the unanswered question in *Sullivan* regarding refusal to retract as potential evidence of actual malice, can only be addressed by this Court.

□

The Petition is an Excellent Vehicle For Updating *Sullivan* For The 21st Century

This case is an excellent vehicle for updating *Sullivan* for the 21st Century. It does not seek to overturn *Sullivan* or disempower journalism in any way. Aggressive journalism which is not knowingly or recklessly false may continue, with errors corrected by ethical media outlets as needed. This is not a case of restricting the *"breathing space" Sullivan* (376 U.S. 272 (1964)) provides journalists. This is not a *"breathing space"* case at all; Lee had years to correct the false 2015 publications, but corporately chose not to.

What the facts demonstrate is what occurs when a media corporation refuses to correct objectively false publications on their own websites, long after they know the publications are false. What happens in the internet age is the false publications multiply, and get worse. In the 21st Century, refusal to correct false statements on media websites has neither

transitory nor solely local effects. Refusal to correct false statements on media websites is instant, continuous, perpetual and global. Applying a 1964 prescription to a viral 21st Century malady is completely inadequate.

Years before Respondents' false 2019 claims about Petitioner's purported "wrongdoing" and the Davenport casino being "taxpayer-funded", Lee Enterprises knew through the 2015 City of Davenport reports and their own "Taxpayer win" publication that the 2019 "taxpayer-funded" claim was not true. But rather than correct opposite of the truth 2015 publications on their Quad City Times website, Lee Enterprises corporately directed their attorneys to "handle it".

Then, in the case at bar, Lee kept their former employee from being deposed about the 2015 City of Davenport documents he concealed, and made a statement of fact to the Iowa Court of Appeals about those same documents so brazenly false it requires time travel to be truthful. None of that is on a Lee Enterprises website, but the false 2019 publications about Petitioner's "wrongdoing" and the casino being "taxpayer-funded" are, along with the false 2015 publications that gave rise to the 2019 attacks.

Specifically referencing the *New York Times* analysis on the same page in which the District Court granted summary judgment to Respondent Lee Enterprises (App. at 50, 51), in the same ruling the District Court found the 2015 "taxpayer-burden" claims of the Quad City Times were not resolved by the 2017 litigation, but remained "at large" (App. at 27).

Dispensing public figure defamation cases has become so rote under *Sullivan* and its progeny that in the *same* ruling in which the District Court found the 2015 "taxpayer-burden" claims were not resolved by the 2017 litigation, the District Court failed to address the only evidence in the record concerning whether Lee Enterprises possessed the 2015 City reports in real time four years prior to the 2019 publications (they did), failed to address the only evidence in the record of whether Lee Enterprises published a "Big Story" about the Davenport casino being a "win" for taxpayers in 2017 (they did), and failed to address the only evidence in the record of whether the 2019 publications had a universally defamatory impact on readers (again, they did).

Respecting that some want to overturn *Sullivan* in its entirety, and that sensible originalist and 14th Amendment arguments exist for doing so[4], Petitioner offers an incremental and pragmatic alternative.

Petitioner, a public employee and volunteer firefighter for a Wisconsin village of just 2,600 residents, up against a leviathan national media corporation boasting of their 350 weekly publications and 29 million unique website visitors each month, is asking something both far simpler and more impactful than overturning *Sullivan*.

Petitioner is asking this Court if juries and truth still matter in America.

An affirmative answer to either of his two questions, sending the case back for a jury trial, would have positive national impact. An affirmative

[4] Made by Justice Thomas, among others

answer to either of Petitioner's two questions would signal *Sullivan's* substantial protections are still a shield for honest journalists making errors, but those 1964 protections cannot be a 21st Century internet sword, used by national media corporations to falsely attack individuals continuously and forever on globally accessible media websites, which the *Sullivan* Court could not have imagined sixty years ago.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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