

No. _____

In the
Supreme Court of the United States

KATHRINE MAE MCKEE,
Petitioner,

v.

WILLIAM H. COSBY, JR.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a victim of sexual misconduct who merely publicly states that she was victimized (*i.e.*, “#metoo”), has thrust herself to the forefront of a public debate in an attempt to influence the outcome, thereby becoming a limited purpose public figure who loses her right to recover for defamation absent a showing of actual malice by clear and convincing evidence.

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INTRODUCTION

Respondent Bill Cosby (“Cosby”) is a famous actor, comedian, and television personality. Cosby has been credibly accused by scores of women of a consistent pattern and practice, over the course of approximately four decades, of sexually assaulting young women working or seeking work in the entertainment industry.

The Cosby allegations, along with allegations against Hollywood producer Harvey Weinstein and others, have helped inspire numerous victims of sexual assault and sexual harassment to come forward, including on social media using the hashtags “#metoo” and “#timesup”. Victims are uniting, and are standing up against sexual predators like Cosby, who in the past have relied on defamatory statements to silence victims and shield their criminal conduct.

Petitioner Kathrine McKee (“McKee”), one of many Cosby victims, came forward and made a public statement that amounted to “#metoo”, after numerous other women had already made credible accusations against Cosby. McKee confirmed that Cosby had sexually assaulted her to a reporter from the *New York Daily News*, Pet. App. 124a-128a, and later appeared in a photo shoot for *New York* magazine with other Cosby victims. However, she has not become a prominent advocate in any public controversy, and has not publicly called for any change in the laws, or any social reforms, and has consistently maintained her privacy other than to say, as many other women have said, “me too”.

In December 2014, Cosby and his lawyer, Martin Singer, faced a tidal wave of credible allegations of rape and other sexual misconduct against Cosby. In response to McKee's rape allegation that appeared in the *New York Daily News*, Singer, acting as the agent of Cosby, fired off a letter to the newspaper containing numerous false and defamatory statements about McKee, which he and Cosby then deliberately leaked to the media. McKee sued for defamation, and the district court and the court of appeals rejected her claim on the ground that by merely saying "me too", she made herself into a limited purpose public figure with respect to any defamation claim that related to her rape.

The court of appeals' determination conflicts with several cases from sister courts of appeals, which hold that similarly minimal public statements do not constitute the sort of purposeful injection into a public debate that is required under this Court's caselaw to confer limited purpose public figure status.

This Court, at this historical moment, should grant McKee a writ of certiorari to clarify what criteria should be used to determine limited purpose public figure status in a case of a public accusation of sexual misconduct. And moreover, this Court should confirm that the act of publicly identifying oneself as a crime victim, and merely that act alone, is not equivalent to injecting oneself into the vortex of a public debate. A person who decries sexual misconduct should not be stripped of the protections of private figure status, such that she has virtually no recourse to protect her reputation through a defamation lawsuit. McKee should not be victimized twice over.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-23a) is reported at 875 F. 3d 54. The opinion of the district court (Pet. App. 25a-73a) is reported at 231 F. Supp. 3d 427.

JURISDICTION

The basis of jurisdiction in the district court is 28 U.S.C. § 1332(a)(1), because the amount in controversy exceeds \$75,000, and is between citizens of different states.

The court of appeals entered its judgment on October 18, 2017 (Pet. App. 5a), and denied the petition for rehearing on December 20, 2017 (Pet. App. 3a-4a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

On March 18, 2018, Justice Stephen Breyer granted an extension of time to file this petition for a writ of certiorari, to and including April 19, 2018.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend I.

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 ¹

McKee is a performer, actress, and casting agent who started working in the entertainment industry in the 1960's. Pet. App. 84a-85a. She met Cosby around 1964, when she was working in Las Vegas as a showgirl. Pet. App. 85a. For approximately a ten-year period, Cosby was an acquaintance of McKee; McKee once appeared on Cosby's television show during that period and occasionally socialized with Cosby and his wife Camille Cosby. *Id.*

In 1974, Cosby invited McKee into a hotel room in Detroit and then forcibly raped her. Pet. App. 85a-86a. McKee did not publicize the assault for forty years.

In December 2014, after more than twenty other women had revealed that Cosby had drugged, raped, and/or assaulted them, McKee came forward and publicly identified herself as a victim of Cosby, describing her assault in an interview with Nancy Dillon, a reporter for the *New York Daily News*, which resulted in a published article. Pet. App. 87a.

Other than the *New York Daily News* article, the only publicity that McKee voluntarily participated in was to pose for a photograph with some of Cosby's other victims, which appeared in *New York* magazine. See Noreen Malone & Amanda Demme, *I'm No*

¹ Because this is an appeal from an order dismissing the amended complaint under Fed. R. Civ. P. 12(b)(6) (*see* Pet. Ad. 6a-23a), the facts as pleaded by McKee are taken to be true.

Longer Afraid: 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, And the Culture That Didn't Listen, New York (July 26, 2015). There is no evidence that McKee participated in any debates about sexual assault or harassment, or publicly discussed any changes in the law or the culture related to this issue.

The same day that the *New York Daily News* article ran, Singer, acting on Cosby's behalf as his agent and employee, wrote and transmitted a six-page letter to the *New York Daily News* (the "Singer Letter"). Pet. App. 89a-90a. Despite the fact that more than twenty women had already come forward alleging credible claims that Singer's client is a serial rapist, Singer personally attacked McKee with numerous false allegations, calling her an admitted liar, not credible, unchaste, and a criminal. Pet. App. 90a-92a.

While the Singer Letter on its face was directed solely to its recipients at the *New York Daily News* as well as its "cc" recipients, and was marked "Confidential Legal Notice" and "Publication or Dissemination is Prohibited", Pet. App. 74a, those statements were simply Singer and Cosby trying to have it both ways: Singer, acting on behalf of Cosby, deliberately leaked copies of the Singer Letter to the media, ensuring that his false statements and allegations of and concerning McKee were widely and extensively distributed and caused a great deal of harm to McKee's reputation. Pet. App. 90a-94a.

McKee brought the instant action in the United States District Court for the District of Massachusetts in December 2015, alleging that Cosby defamed her. McKee filed an amended complaint in July 2016 alleging 24 counts of defamation against Cosby. Pet. App. 83a *et seq.*

Cosby moved to dismiss the amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and in February 2017, the district court granted Cosby's motion, holding that the gist of the Singer Letter was Singer's viewpoint that McKee was not credible, which was non-actionable opinion, and that each of the defamatory statements in the Singer Letter were non-actionable under the First Amendment and/or Michigan defamation law, which the district court applied under choice-of-law principles. Pet. App. 25a *et seq.*

McKee appealed and the court of appeals affirmed on alternate grounds. Pet. App. 6a *et seq.* The court of appeals held that McKee was required to allege facts that would support a finding of actual malice as demonstrated by clear and convincing evidence, because McKee was a limited purpose public figure. Pet App. 15a-17a. The court of appeals reached this conclusion based on the fact that the flood of highly publicized accusations from Cosby's numerous victims had created a public controversy and McKee, by saying "me too" and detailing her own rape, had "thrust" herself voluntarily into that controversy and attempted to "influence the outcome". *Id.*

The court of appeals applied the actual malice standard and found that defamatory statements in the Singer Letter were not actionable under that standard. Pet. App. 17a-22a. In addition to Cosby's false denial that he raped McKee, these statements included (1) a claim that McKee told a reporter that she did a lot of lying, including lying her way into her job as a Las Vegas showgirl, a statement which was taken completely out of context (McKee was talking about concealing her mixed race background to "pass" as white); (2) a claim that McKee praised a Cosby comedy routine; and (3) a claim that McKee was unchaste and had affairs. Pet. App. 20a-22a.

REASONS FOR GRANTING THE WRIT

Almost four decades ago, this Court announced several principles that govern whether a person is a limited purpose public figure who is stripped of her right to file a defamation action absent a showing of actual malice by clear and convincing evidence. There is now a conflict in the courts of appeals as to how these rules are to be interpreted. The First Circuit in this case held that merely publicly confirming her status as a crime victim rendered McKee a limited purpose public figure for purposes of defamation claims arising out of her rape. The First Circuit's holding in this case conflicts with the decisions of several sister circuits.

The limited purpose public figure doctrine was announced in *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974), which defined a limited purpose public figure as "an individual [who] voluntarily injects himself or

is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues”. *Gertz* itself makes clear that this is a significant burden — the plaintiff in *Gertz* was a very well-known lawyer who represented a family in a publicized coroner’s inquest, but nonetheless was held not to be a limited purpose public figure because he made no public statements relating to the inquest.

This Court last reviewed the limited purpose public figure doctrine in a pair of 1979 cases, which emphasized that the status is reserved for those who voluntarily participate in public debates, rather than those who simply have some connection to them. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), held that a government research scientist who was accused by a member of Congress of wasting taxpayer money was not a public figure, and *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157 (1979) held that a recipient of a subpoena in an investigation of alleged Soviet spies was not a public figure. Neither one had voluntarily injected himself into a public debate.

In this case, the First Circuit distinguished this Court’s precedents on the theory that merely by confirming that she was one of Cosby’s many victims, McKee thrust herself to the forefront of a public debate and sought to influence the outcome. Pet. App. at 15a-16a (“McKee came forward after more than twenty other women had levelled highly publicized sexual assault accusations against Cosby, who in response allegedly hired a team of lawyers and investigators ‘to discredit them, to intimidate them, and to intimidate any future would-be accusers.’ By purposefully disclosing to the public her own rape

accusation against Cosby via an interview with a reporter, McKee ‘thrust’ herself to the ‘forefront’ of this controversy, seeking to ‘influence its outcome.’”).

The First Circuit’s holding creates a conflict with the Fourth, Eighth, and Eleventh Circuits, all of which have ruled that conduct along the same lines as McKee’s does not confer limited purpose public figure status. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1545 (4th Cir. 1994) (grandparents of child in publicized custody fight who “accede[d] to requests for several newspaper and magazine interviews, attend[ed] at least three press conferences or rallies organized by or on behalf of their son, and appear[ed] on at least two television shows” were not limited purpose public figures); *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir. 1987) (publisher who published story about rival’s bankruptcy was not a limited purpose public figure with respect to defamation suits relating to the bankruptcy); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632 (8th Cir. 1986) (vice president of meatpacking firm who testified in public as part of congressional investigation and provided documents to investigators was not a limited purpose public figure); *Long v. Cooper*, 848 F.2d 1202, 1203 (11th Cir. 1988) (satellite television dealer who extensively advertised its low prices, but never commented in any public debate regarding discount retailers, was not a limited purpose public figure with respect to defamatory article relating to subject matter of discount retailers); *Lundell Mfg. Co. v. American Broad. Cos.*, 98 F.3d 351, 363 (8th Cir. 1996) (manufacturer of garbage machine purchased by city who advertised machine’s virtues but did not enter into any public debate about

the machine was not a limited purpose public figure with respect to defamatory statements about the machine); *Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1007-08 (4th Cir. 1981) (police informant was not a limited purpose public figure).

Specifically, under the approach taken in the Fourth, Eighth, and Eleventh Circuits, the fact that McKee was raped by a famous person would not constitute voluntary conduct that transformed her into a limited purpose public figure, and the fact that she came forward publicly with her rape allegation would not constitute voluntarily injecting herself into the forefront of the debate to influence the outcome, as she took no position in the debate over sexual assault in the entertainment industry. All she ever said was essentially “#metoo”.

Accordingly, this Court should review this case and resolve the conflict among the circuit courts, and clarify that a victim of sexual assault who raises her voice and joins other victims and says “me too” does not by that action alone surrender her rights under the First Amendment as a private figure. Petitioner respectfully urges this Court to review this matter.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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