

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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CANDACE OWENS, an Individual and Citizen of  
the United States, and CANDACE OWENS, LLC,

*Petitioners,*

v.

LEAD STORIES, LLC, and GANNETT SATELLITE  
INFORMATION NETWORK, LLC d/b/a USA TODAY,

*Respondents.*

—◆—

**On Petition For Writ Of Certiorari  
To The Delaware Supreme Court**

—◆—

**PETITION FOR WRIT OF CERTIORARI**

—◆—

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## **QUESTIONS PRESENTED**

1. Should the First Amendment provide a defense to claims of tortious interference and similar torts that happen to involve speech?
2. May a business enter into a contract with the owner of the marketplace that, at the business' request, removes competitors from the marketplace?
3. Does the statement that the plaintiff committed a "hoax" imply false facts sufficient to support a claim for defamation?

## **LIST OF PARTIES**

The Petitioners are Candace Owens, an individual and citizen of the United States, and Candace Owens, LLC, a limited liability company organized under the laws of the State of Delaware. The Respondents are Lead Stories, LLC, a limited liability company organized under the laws of the State of Colorado, and Gannett Satellite Information Network, LLC d/b/a USA TODAY, a limited liability company organized under the laws of the State of Delaware.

## **STATEMENT OF RELATED CASES**

- *Owens, et al. v. Lead Stories, LLC, et al.*, C.A. No. S20-10-016 CAK, Superior Court of the State of Delaware, Sussex. Judgment Entered July 20, 2021.
- *Owens, et al. v. Lead Stories, LLC, et al.*, No. 253, 2021, Supreme Court of the State of Delaware. Judgment Entered February 22, 2022.

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**OPINIONS BELOW**

The Opinion of the Superior Court of the State of Delaware, Sussex, is reported unofficially at *Owens v. Lead Stories, LLC*, C.A. No. S20C-10-016 CAK, 2021 Del. Super. LEXIS 515 (Del. Super. Ct. July 20, 2021). App. 3. The Opinion of the Supreme Court of the State of Delaware is reported unofficially at *Owens v. Lead Stories, LLC*, No. 253, 2021, 2022 Del. LEXIS 63 (Del. Feb. 22, 2022). App. 1.

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**STATEMENT OF JURISDICTION**

The judgment of the Supreme Court of the State of Delaware was entered on February 22, 2022. This Petition is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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**CONSTITUTIONAL PROVISION AT ISSUE**

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

Petitioner Candace Owens (“Owens”) is a popular conservative commentator who appears frequently on national television news networks, on interview programs, and in other public venues. Through her limited liability company, Petitioner Candace Owens, LLC, she creates content and publicizes it through social media outlets. Her primary marketplace is Facebook. The Respondents Lead Stories, LLC (“Lead Stories”) and Gannett Satellite Information Network, LLC d/b/a USA TODAY (“USA TODAY”), are business competitors with Owens. All three companies compete on Facebook for valuable website “visitors,” voluntary contributions, sponsorships, and advertising revenue. Owens is a major competitor in this space, drawing hundreds of thousands of visitors every month. Like many news and opinion outlets, Owens, Lead Stories, and USA TODAY often disagree politically, engaging frequently in the free and constitutionally protected exchange of viewpoints.

Unlike the typical competitors who use Facebook’s platform as a marketplace for political commentary, the Respondents have a significant advantage: through “fact-checking” agreements each has entered with Facebook, both Lead Stories and USA TODAY now have the authority to remove a competitor from the marketplace. By virtue of these “fact-check” agreements, and as conceded by Facebook, both Lead Stories and USA TODAY can direct Facebook to obscure, “de-monetize,” or cancel entirely the pages of their competitors. They trigger this response by Facebook, according to their

contract, by labeling certain posts of competitors as “false.” When Respondent’s fact-check articles conclude that a competitor’s posts are “false,” then Facebook is obligated to remove or obscure the posts, and to super-impose over the posts prominent links that redirect visitors to the web sites of Lead Stories or USA TODAY. The Respondents can even direct Facebook to suspend competing accounts or cancel them altogether.

These contractual arrangements remove the Respondents from the protected sphere of political commentary and makes them into highly empowered business competitors. Their political commentary is protected; their acts of competitive predation are not. By virtue of their fact-check contracts, the Respondents have the ability not to “out-compete” their business rivals by convincing the public of the soundness of their views, but rather to diminish or eliminate the rivals’ ability to compete in the market altogether, all the while re-directing competitors’ customers to their own storefront. As empowered business competitors, these Respondents should be subject to the same restrictions on business practices as is any other business.

Beginning in March 2020, Owens wrote a series of Facebook posts in which she addressed the method by which governmental authorities “counted” deaths from COVID-19. Citing to several peer-reviewed publications and to public statements by leading medical authorities, Owens’ posts concluded that the government’s method of tabulating COVID deaths, which she recounted in detail, resulted in an over-estimation of



those deaths. Her comments were thoughtful, researched, political, public, and certainly controversial: in short, they lie at the very heart of the protections of the First Amendment, addressing perhaps the most important public issue at the time. Given Owens' stature and large readership, her comments were certain to draw opposition, as she knew they would. Instead of mere opposition, however, her posts drew suppression.

Instead of publishing editorials to counter Owens' speech, both Lead Stories and USA TODAY chose to publish articles that purported to "fact check" Owens' claims. No mere rhetorical device, by labeling their articles "Fact Checks," both Respondents knew that they would trigger their contractual agreement with Facebook, by which Facebook has agreed to remove or otherwise obscure or limit any posts that its contractees, acting pursuant to its fact-check contract, determine to be "false." Both Lead Stories and USA TODAY concluded that Owens' research and conclusions on the COVID counting methods were "false." Lead Stories described her posts as a hoax, issuing a "HOAX ALERT." Accordingly, once notified by Lead Stories and USA TODAY, Facebook placed bright "warning labels" over each of Owens' posts, superimposed the term "FALSE" across the top of her posts, and provided a bright-colored link to the Lead Stories and USA TODAY websites. Importantly, as part of Facebook's response to the "fact-checks," Owens' valuable "advertising contract" with Facebook was terminated, precluding Owens from placing her advertisements across Facebook's thousands of pages and severely damaging her income.

When Owens requested that Facebook reconsider its decision to obscure her posts and to terminate her contract, Facebook informed Owens that her appeal should be directed to the fact-checkers, Lead Stories and USA TODAY, not to Facebook. It was the fact checkers, Facebook advised, not Facebook, that had the authority to reduce or eliminate Owens' sanction.

Owens' LLC is domiciled in Delaware, which also serves as Facebook's corporate home. Owens sued Lead Stories and USA TODAY in Delaware state court, alleging against both defendants the torts of intentional interference with contract, intentional interference with prospective business relations, and unfair competition at common law. She also alleged, separately, a defamation claim solely against Lead Stories for its factual statement that she had engaged in a "hoax" against the American people. The Superior Court for the State of Delaware dismissed her claims against both defendants on the ground that the First Amendment precludes liability for tortious conduct involving speech. "[T]he exercise of constitutionally protected speech cannot be an 'improper' or 'wrongful' action." App. 53. As for the defamation claim against Lead Stories, the trial court concluded that the word "hoax" constituted "loose, figurative, or hyperbolic language" and could not serve as the basis for a defamation claim. App. 47-48.



## REASONS FOR GRANTING THE WRIT

Many torts involve speech. At the state level, such torts include failure to warn in products liability, common law fraud, negligent misrepresentation, defamation, intentional infliction of emotional distress, and invasion of privacy. Even simple negligence can involve speech, for example, when an owner makes a false representation about safety. Business torts usually also involve speech, including tortious interference with contract or with prospective business relations, product disparagement, unfair competition, and civil conspiracy.

In the last few decades, lower federal and state courts have frequently interpreted this Court's First Amendment decisions to provide a federal constitutional defense to these state law torts. In this case, the trial court in Delaware precluded all of the Petitioner's common law business tort claims on the basis of the First Amendment. If it stands, this decision, and the many like it, threaten to erode substantially the scope of state tort law, while also threatening the viability of federal torts and federal regulation. As Justice Kagan has cautioned, these developments risk "weaponizing the First Amendment." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

### 1. The Delaware Court Misapplied *Claiborne*

The Delaware trial court ruled that the Respondent's tortious speech was protected under the First Amendment. It relied on this Court's opinion in

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In *Claiborne*, this Court held that the fact that individual consumers had been motivated by the NAACP boycott to avoid shopping at the hardware business did not make the NAACP liable for tortious interference with business relations. *Claiborne*, 458 U.S. at 913, 915. The independent decisions of consumers to respond to the boycott and avoid shopping at the hardware store, although the foreseeable aim of the boycott, resulted from “nonviolent, protected activity” under the First Amendment. *Id.* at 918.

This case is different. As the trial court found, the Respondents in this case have a contractual relationship with Facebook that obligates Facebook, on the Respondents’ instruction, to take harmful action against Owens. App. 30, 32–33. Because of its contract, Facebook is not like the consumers in *Claiborne*: it is not an independent decision-maker concerning Owens’ posts. Lead Stories and USA TODAY did not induce independent consumers through argument and persuasion to boycott Owens’ business; instead, they had the authority to nail slats across the entryway to the store. The trial court misapplied *Claiborne*, and the Delaware Supreme Court affirmed the error without explanation.

## **2. This Extension of the First Amendment Unduly Limits Tort Liability**

This Court has been careful to limit the principal First Amendment considerations to the torts of

defamation, intentional infliction of emotional distress, and invasion of privacy, and then only where the plaintiff is a public figure and the suit involves a matter of public concern. Despite this Court's carefully devised constitutional limitations on tort law, lower federal courts and state courts have significantly expanded the reach of the First Amendment, creating significant limitations on tort liability arising from federal statutes, including statements regulated by Title VII, disclosures mandated by securities laws, NLRB postings, and warning labels on consumer products. State tort suits have been similarly impaired, including claims for ordinary negligence involving failure to warn, products liability for failure to warn, fraud in many of its manifestations, negligent misrepresentation, and the many "business torts," including tortious interference, product disparagement, misappropriation of a name or likeness, and unfair competition.

In their insightful law review article, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, Professors Abraham and White cite to numerous instances where the judicial interpretation of the First Amendment has, over the last several decades, been expanded to preclude liability for the many common and statutory torts that involve speech. Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 Tex. L. Rev. 813, 817, 819 (2020). Indeed, the "business torts" at issue in this matter almost always involve speech, as "speech" in some form is logically required to effect an interference with contract or

business relations in the first place. The article concludes with the proposition that “neither existing First Amendment doctrine nor sensible constitutional policy supports extending free speech protection to torts with communicative dimensions, except in extremely narrow circumstances.” *Id.* at 818.

The Delaware court’s treatment of Owens’ several business torts perfectly exemplifies the trend. Respondents knew their labeling of Owens’ posts as “false” would trigger their contract with Facebook, causing Owens’ posts to be demonetized and her visitors re-directed to their websites. The fact that they communicated with Facebook and triggered their contractual agreement through web-based postings, rather than phone calls or text messages, does not change the character of the communication. In essence, their labeling of Owens’ posts as “false” constitutes conduct, not speech; Lead Stories and USA TODAY were not making a public argument, hoping their contentions would persuade a neutral third-party to ignore Owens’ claims. Instead, their conduct instigated Facebook to breach its contract with Owens, as the Respondents knew it would.

### **3. The Application of the First Amendment Eviscerates the Tort of Unfair Competition**

Lead Stories, USA TODAY, and Owens are all competitors on the Facebook platform, as the trial court determined. The contract Lead Stories and USA TODAY entered with Facebook allows the defendants

to have removed, at their say-so, competitors from the marketplace. This removal power constitutes the tort of “unfair competition” under state common law: Lead Stories and Facebook act as both competitors and regulators. The patent conflict of interest that arises from the Facebook-Lead Stories and Facebook-USA TODAY agreements creates an unequal and unfair marketplace. The Respondents can demonetize, diminish, or ban competitors, having their own bright banners providing links to their competing websites super-imposed across the page.

The trial court dismissed Owens’ claim of unfair competition on the grounds that the Respondents’ conduct constituted speech protected by the First Amendment. Again, most instances of unfair competition, or its cousin, civil conspiracy, involve speech at various instances. The trial court’s extension of the First Amendment essentially renders this tort obsolete.

#### **4. The Delaware Court Misapplied *Milkovich***

This Court’s opinion in *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990) did away with the fictitious “fact-opinion” distinction in defamation law. Instead, *Milkovich* held that any statement is actionable, even statements of opinion where they connote facts that themselves are actionable. *Id.* at 18–19. To state that one is guilty of a “hoax” connotes certain and specific facts, to wit: that one knew the truth yet purposely obscured it, with the aim of inducing some action or belief on the part of the listener that relied on

the falsehood instead of the truth. To state publicly that Owens had committed a “hoax” involving the threat and danger of a worldwide pandemic is an especially heinous charge, implying that Owens knew the real danger of the disease yet purposely kept it hidden from the public, thereby choosing to endanger the health and lives of the thousands of people that visit her Facebook page.

Despite this Court’s careful delineation of defamation liability in *Milkovich*, the trial court held that the term “hoax” constitutes mere rhetorical hyperbole and is therefore constitutionally protected speech. This decision mirrors a large pattern where trial and lower appellate courts have ignored the teaching of *Milkovich* concerning “opinions” that connote facts, and instead has employed an ever-expanding definition of “rhetorical hyperbole” beyond the narrow confines articulated in *Milkovich*. Terming “hoax” as mere rhetoric is particularly questionable. To say someone’s statement is “false” merely means the person is incorrect; to state she has committed a “hoax” is to say she is ill-intentioned and even, in the context of a deadly pandemic, actually evil. It necessarily implies the fact that the speaker knew the truth yet chose to mislead. “Hoax” is not an opinion and is not rhetorical; like the use of the word “liar,” as was discussed in the *Milkovich* opinion, “hoax” implies a specific set of facts of which an ordinary lay reader would be well aware. It implies a purposeful fabrication, and it is actionable.





**CONCLUSION**

The Petitioners request this Court grant a writ of certiorari to the Supreme Court of Delaware.

Respectfully submitted,

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