No. _____

In The
Supreme Court of the United States

NICHOLAS SANDMANN,

Petitioner,

v.

NEW YORK TIMES COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do statements conveying observed sensory impressions in factual, descriptive terms constitute protected "opinion" under the First Amendment to the Constitution of the United States?

2. Did the United States Court of Appeals for the Sixth Circuit effectively eliminate the distinction between fact and opinion articulated in *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990)?

LIST OF PARTIES

The Petitioner is Nicholas Sandmann, an individual and citizen of the United States. The Respondents are:

- The New York Times Company, a corporation organized under the laws of the State of New York;
- CBS News, Inc., a corporation organized under the laws of the State of Delaware; ViacomCBS, Inc., a corporation organized under the laws of the State of Delaware; CBS Interactive, Inc., a corporation organized under the laws of the State of Delaware;
- ABC News, Inc., a corporation organized under the laws of the State of Delaware; ABC News Interactive, Inc., a corporation organized under the laws of the State of Delaware; The Walt Disney Company, a corporation organized under the laws of the State of Delaware;
- Gannett Co., Inc., a corporation organized under the laws of the State of Delaware; Gannett Satellite Information Network, LLC, a limited liability company organized under the laws of the State of Delaware;
- Rolling Stone, LLC, a limited liability company organized under the laws of the State of Delaware; and Penske Media Corporation, a corporation organized under the laws of the State of Delaware.

STATEMENT OF RELATED CASES

There are no related cases pursuant to Supreme Court Rule 14(1)(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Kentucky is reported at: *Sandmann v. New York Times Co.*, 617 F. Supp. 3d 683 (E.D. Ky. 2022). App. 71. The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at: *Sandmann v. N.Y. Times Co.*, 78 F.4th 319 (6th Cir. 2023). App. 1.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 16, 2023. App. 1. The United States Court of Appeals for the Sixth Circuit denied a petition for rehearing en banc on October 31, 2023. App. 93. This Petition is timely filed within 90 days of the decision denying rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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

Since its inception five years ago, this case has been of high public salience, attracting a great deal of media and professional attention. The admitted errors of the defendant major national publications in publicly censuring an innocent high-school student have come to epitomize the high-water mark of the "cancel culture." Its victim, Nicholas Sandmann, has steadfastly for these five years sought his day in court, laboring through extensive motions, discovery, hearings, and re-hearings, only for the United States Court of Appeals for the Sixth Circuit to hold that the defendants' vivid and graphic descriptions of Sandmann's movements are all constitutionally protected "statements of opinion," and not statements of fact actionable as defamation under state law.

In their publications, the defendants included statements that Sandmann "blocked" the progress of a Native American protestor, "prevented his escape" from a crowded situation, and "slid left" and "slid right" to continue that blocking. The entire sequence of events was witnessed by hundreds of bystanders and fully captured on several video recordings from multiple angles. These vivid, graphic statements constitute protected "opinion," reasoned the Sixth Circuit, because witnesses differed in their description of the video or the events. As the dissent to the panel opinion

stated, "These cases are commonsense applications of a simple question: are the statements objectively verifiable? Reading fairly the blocking, retreating, and sliding statements leads to an unequivocal 'yes.'"

This case began on January 18, 2019. Standing on the steps of the Lincoln Memorial, awaiting a bus to take him and his Kentucky high-school classmates home after a day in Washington, D.C., the plaintiff/appellant Nicholas Sandmann was confronted by Nathan Phillips, a Native American political activist. As the ample video recordings show and eyewitness accounts confirm, Phillips walked up to Sandmann, standing inches in front of his face while beating his drum, saying nothing. Sandmann too remained silent and unmoving, smiling awkwardly throughout, clearly uncomfortable. In a few brief minutes, the odd encounter was over.

As multiple video recordings of the encounter would show in clear detail, it was Phillips who was the instigator of this incident. Before confronting Sandmann, Phillips had confronted a number of the school children waiting for their bus, navigating a path directly through the huddled teenagers, dislodging them from where they stood. It was Phillips who, beating his ceremonial drum, walked up to Sandmann, stopping mere inches in front of his face, his drumsticks actually brushing up against Sandmann's chest. At all times, Sandmann just stood there, never moving, smiling politely and silently, wearing the "MAGA" hat he and others had just purchased as a joke souvenir earlier in the

day, not once changing his position until it was time to board the bus.

At the time, and subsequently as he slept on the bus during the return trip to Kentucky, Sandmann thought nothing of the encounter nor what he later characterized as Phillips' "weird" behavior. Nonetheless, a misleadingly edited video, one that depicted Sandmann as the rude aggressor in the encounter, made its way onto social media, where it quickly became "viral."[1] To capitalize on the social media traffic, the defendant media publications contacted Phillips. In their subsequent publications, the defendants described Sandmann's behavior in false, aggressive terms, quoting Phillips to state that Sandmann had "slided left" and "slided right," was "blocking" Phillips and that he "wouldn't let him retreat."[2]

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[1] In the days following publication of the misleading video to social media, members of the United States Congress and House Intelligence Committee, including Senator Mark Warner of Virginia, asked Twitter to provide information about the suspicious account that initially published the misleading video clip to Twitter and about the accounts that initially retweeted it. *See* Kate Conger and Sheera Frenkel, *Who Posted Viral Video of Covington Students and Protestor? Congress Wants to Know*, NEW YORK TIMES (Jan. 23, 2019), *available at* https://www.nytimes.com/2019/01/23/technology/covington-video-protester-congress.html.

[2] Although they appear in slightly varying forms in the defendant publications, these are the three statements that the panel majority of the Sixth Circuit held to constitute opinion: (1) "I started going that way, and that guy in the hat [Sandmann] stood in my way and we were at an impasse. . . ."; (2) "He [Sandmann] just blocked my way and wouldn't allow me to retreat."; and (3) "I seen [sic] him start putting himself in front of me, so I slided [sic] to the right, and he slided [sic] to the right. I slided

These statements were loaded with defamatory implications. In the heated political climate of our times, the claim that a white teenager from a private Catholic school wearing a red MAGA hat was physically blocking the progress of a peaceful Native American protestor carried unmistakable connotations of racism, intolerance, intimidation, and insensitivity. The consequences for Sandmann were immediate and catastrophic. Over the ensuing hours, as he slept on the bus back to Kentucky, and over the next day, Nicholas Sandmann changed from a quiet, anonymous teenager into a national social pariah, one whose embarrassed smile in response to Phillips' aggression became a target for anger and hatred, the subject of media commentary and talk-show invective, his name and reputation forever tarnished. Sandmann was denounced by his church diocese, denied re-admission to his high school, and attacked in the national media. Round-the-clock police protection was assigned to his house; his visage was featured on nearly all major television outlets, with celebrity commentators stating that they would "like to punch him in the face," and worse. These results were a foreseeable consequence of defendants' heedless publications of Phillips' defamatory accusations.

All this social obloquy and public scorn came about for one reason: because of the defendants' careless

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[sic] to the left and he slided [sic] to the left—so by the time I got up to him, we were right in front of him. He just positioned himself to make sure that he aligned himself with me, so that sort of stopped my exit." App. 56-57.

failure to investigate the dubious claims that Phillips made in describing the encounter. It was Sandmann, Phillips claimed, who was the aggressor, who "slided left" and "slided right," "blocking" Phillips' peaceful path upward on the Memorial, and not "allow[ing] me to retreat" to a point of safety. It was Sandmann, Phillips falsely suggested, who had acted disrespectfully and interfered with a Native American protestor's peaceful enjoyment of the iconic Lincoln Memorial. Eager to create and further his false narrative, which dovetailed with his political agenda, Phillips spun his tale to the gathered journalists. Without investigation or even cursory review, these experienced and credentialed media publications swallowed Phillips' false narrative hook, line, and sinker.

Even a cursory pre-publication fact-check would have spared Sandmann's reputation. Several other, non-edited videos of the encounter pervaded the internet and were top hits on leading search engines. These unedited videos, free of Phillips' spin, were readily available on the top of the Google search page. These other videos, all included in the record both at the trial phase and on appeal, make the truth plain: they show Phillips, starting at a point far removed from the school children, proceeding directly at them, dislodging child after child from the child's place, making them move aside from their friends and classmates as Phillips and his beating drum marched to confront, directly and at close range, one student after the other, all while cameras from Phillips' ad hoc entourage videotaped the proceedings from directly behind him. It

was Phillips who walked up to Sandmann, trying to make him move also. It is plain from the video that, had it really been Phillips' intention, as he later claimed, to surmount the Memorial, he had numerous open avenues to proceed up steps that are more than one-hundred feet wide.

Instead of the truth, here is what the defendants published about the event, quoting Phillips without qualification or explanation. CBS stated that Nicholas Sandmann "slided to the right" and "slided to the left" and "positioned himself . . . so that he stopped my exit." ABC stated that Sandmann "blocked my way and wouldn't allow me to retreat." Gannett published, "I started going this way, and that guy in the hat stood in my way. . . . He just blocked my way and wouldn't allow me to retreat." The other media defendants published similar statements. These false claims, which portrayed Sandmann as a bigoted, callous, entitled MAGA aggressor against a peaceful Native American, catapulted the public narrative forward, resulting in the immediate and permanent social ostracization and reputational destruction that Sandmann feels to this day, as the faculty at his private college in Kentucky has sought to have him expelled, and the students there shame him publicly and privately at every opportunity.

By not fact-checking, and indeed without the mere semblance of care or research, these publications ignored the basic ethical and investigatory obligations of professional journalism. Worse, they carelessly or maliciously unleashed this thoughtless attack on an

underage minor, publicizing his name, his school, his town of residence, and his face, casting him permanently and at a tender age into the "canceled" world of social pariahs and moral outcasts. The defendants' vivid and false portrayals instigated and unleashed a torrent of vile criticism, including charges of racism, bigotry, and threats of death. In truth, Sandmann no more "blocked" Phillips than it can be said that a lone tree "blocks" one's way across an otherwise open field. Phillips had ample room to walk up the wide Memorial steps, had that been his genuine intention. The videos show that Sandmann did not slide, and in fact never moved his feet. Phillips' vile statements were factual, false, and defamatory; the defendants' negligent publication of them without even a semblance of care was journalistically irresponsible. Kentucky tort law provides a remedy for negligent publication of defamatory falsehoods concerning a private citizen. The defendants will be subject to liability, should this Court reverse the grant of summary judgment and allow a jury to hear the case.

REASONS FOR GRANTING THE WRIT

A. Unless it constitutes rhetorical hyperbole, *Milkovich* identifies the object of a statement, not its form, as determining what is a "statement of fact"

False and defamatory statements of fact are not constitutionally protected "opinions" under the First Amendment, and thus are actionable under state law

for the tort of defamation. The panel majority of the Sixth Circuit misconstrued this Court's opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) in defining protected "opinion," and did so in a way that would, as a practical matter, eliminate the residual space for state tort liability. According to the panel opinion, even statements that describe physical, observable phenomena, and do so in graphic, factual terms, constitute "statements of opinion" because people can perceive things differently. This misconstruction of *Milkovich*, if it is allowed to stand, would expand the category of "opinion" to a point where state defamation law is an empty category. If statements such as "he slid left" and "he slid right" and "he blocked me" are not statements of fact, then none exist.

Milkovich's standard for identifying statements of fact is where a statement is "capable of objective verification" or "susceptible" to objective resolution. *Milkovich*, 497 U.S. at 21. Mere variance among witnesses in what they perceived, or even videos from different angles that may differ in what they depict, does not convert all such descriptions or depictions into matters of opinion. If a statement is "provable as false" then it is not opinion. *Milkovich* presumes an objective reality that people can describe; it speaks to "articulation[s] of an objectively verifiable event." *Id.* at 22. It is the "event" that must be verifiable, not the words used to describe it. Whether Sandmann slid to his left and his right, and whether or not he blocked Phillips, is itself, in se, "an objectively verifiable event," no matter what particular words are employed by witnesses to describe it. Even where a speaker prefaces the factual

statement with the words, "in my opinion," the speaker is nonetheless making a factual statement. *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980); *Milkovich*, 497 U.S. at 18-19. It is the subject of the statement, and not its form, that determines its constitutional status. "[A] viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts." *Compuware v. Corp. v. Moody's Inv. Serv., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007); *Milkovich*, 497 U.S. at 21 (statement is not opinion where it is "sufficiently factual to be susceptible of being proved true or false").

The form of the statement matters only if the speaker uses "loose, figurative, or hyperbolic" language. But even where a statement comprises a mixture of opinion and fact, such a statement is actionable if it is "sufficiently factual." *Milkovich*, 497 U.S. at 3, 21-22. A statement is "sufficiently factual" if it is "susceptible of being proved true or false." *Id.* That "proof" is necessary implies that people might, before hearing proof, have different perspectives as to what they witnessed. It is not that people differ in their observations that make a statement an "opinion," as the panel opinion asserts; it is whether those differences can be dispelled by evidence.

The *Milkovich* standard recognizes that many statements might be seen as either factual or opinion; as long as a statement is "sufficiently factual," then it is without constitutional protection. As *Milkovich* instructs, the trial court's role is to decide only if the

statement is "sufficiently factual" to go to the jury to determine its truth or falsity; in other words, the trial court is to preclude liability on the grounds of "opinion" only if the statement is not "sufficiently factual." The jury should be allowed to resolve the issue if a "reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts." *Compuware Corp.*, 499 F.3d at 529 (citing *Parks v. LaFace Records*, 329 F.3d 437, 462 (6th Cir. 2003)).

One other aspect of *Milkovich* was also misconstrued. Whether a statement constitutes protected opinion is a question of law for the court to decide; but in so deciding, the court must determine if the finder of fact is "capable" of verification of the truth or falsity of a statement. This standard refers to the object of the statement itself: a factfinder is certainly "capable" of determining whether Sandmann slid to his left and to his right, or moved to block Phillips' progress or egress. The physical, visible movement of people, seen by multiple witnesses and captured on multiple video recordings, is patently susceptible or capable of determination. This case falls squarely within *Milkovich*'s definition of "statement of fact." The defendants' published statements do not constitute constitutionally protected opinion.

B. The form of the statements in this matter indicates they were not "opinions"

The panel opinion misconstrued *Milkovich*'s "capable of verification" to refer not to the content or

object of the statement, but solely to its form. Even under that standard, Phillips' statements were straightforward assertions of fact, and were meant to be. First, stated the panel, citing *Milkovich*, a speaker who uses "loose" or "figurative" language is not "seriously maintaining" an assertion of fact. The panel twists *Milkovich*'s words. The Court in *Milkovich* stated, "[t]his is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury." Nothing in Phillips' statements would indicate he was engaging in hyperbole and was not serious in accusing Sandmann of blocking his path. Nor does the general tenor of the defamatory statements negate this impression. His statements contain no hint of qualification. They were clear, unambiguous, and factual. He described Sandmann's alleged movements in graphic detail. The panel opinion states, "there is no bright-line rule that statements based on sensory perceptions are necessarily factual." Yet if statements where the speaker directly reports what the speaker saw or heard are not factual, then there is no space left for factual statements. People cannot describe events in a more elemental, factual way than to report the data directly perceived through sense impressions. The legal standard that divides facts and opinions presumes that there are such things as "facts," and that "facts" exist independently of our perceptions of or perspectives on them. In a court of law, facts exist, even if witnesses disagree about what they saw or heard. The reasoning of the Sixth Circuit, that the defamatory articles merely provided "Phillips's

perspectives and statements on the encounter," (App. 11) effectively render overtly factual statements into pure opinions.

The panel majority reasons that, because words like "block" and "impasse" and "slid" can have several meanings, statements using these words are semantically indeterminate and thus not statements of fact. This is not the law. Whether or not statements are actionable is to be resolved according to the understanding of the common reader. Under Kentucky law, the alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader and not be subjected to the critical analysis of the legal mind. *E.g.*, *Digest Publishing Company v. Perry Publishing Co.*, 284 S.W.2d 832, 834 (Ky. 1955).

Ordinary words such as "blocked" and "slid" are easily understood by the common reader. A jury can assess the video and witness evidence to determine their truth. Yet for the panel majority, even video evidence depicting the precise scene is of no use: "Whether or not a video shows Phillips attempting to move around or away from Sandmann—or indeed any active movement—does not help us ascertain or objectively verify whether Phillips accurately interpreted Sandmann's actions. . . ." This reasoning is faulty. It reflects the view that all statements, even those describing "active movement," are ultimately "unverifiable," even with direct, videographic evidence, because Phillips' description of that movement constitutes an "interpretation." The panel's holding denies objective reality, even if seen with one's own eyes. Under the

panel's view, all witnessed events are a matter of subjective interpretation, and hence all a matter of opinion.

Such abject subjectivism does not reflect federal law. This Court's entire jurisprudence respecting the intersection of the First Amendment and state defamation law presumes that there is an ultimate, observable reality and that "statements of fact" that describe it remain actionable under long-standing state tort law. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("there is no constitutional value in false statements of fact"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (false statements of fact "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *Milkovich*, 497 U.S. at 21 (1990) ("the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false"). "Opinions are statements which cannot be proved or disproved." *Heyward v. Credit Union Times*, 913 F. Supp. 2d 1165, 1186 (D.N.M. 2012). Statements of fact can be proved or disproved. The Sixth Circuit's understanding of *Milkovich* reads this important residual category right out of the law of defamation.

Any observation about the external world could, in an abstract theoretical sense, be characterized as a mere "perspective," as if no objective or verifiable factual reality exists at all. Simply couching one's factual

descriptions with "in my opinion" or "I think" does not exonerate the speaker from defamation liability. *Milkovich*, 497 U.S. at 19 ("the distinction between actionable facts and protected opinion does not depend on the use of phrases such as 'in my opinion' "). As Judge Friendly cautioned, speakers should not be considered to have converted statements of fact into opinions so easily. *Cianci*, 639 F.2d at 64 (Friendly, J.) ("It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.' "). The test is not whether reasonable observers or readers might differ in their interpretation or perspective on a factual matter; the test is whether the matter referred to in the statement is itself sufficiently factual to be capable of being proved true or false. Many factual perspectives, upon examination, can nonetheless be proved to be false.

The panel majority's determination that Phillips' graphic description of real events constitutes "pure opinion" stretches word meaning beyond plausible limitations. The implicit determination of "pure opinion" stands in sharp contrast to Phillips' evident intent. In his comments, immediately re-published without investigation by the media defendants, Phillips provided a description of what he intended to be objective fact. He stated that Sandmann blocked his path, slid to the left and right to mirror Phillips' movements, and prevented his escape. "[Sandmann] just positioned himself to make sure that he aligned himself with me so that he stopped my exit." (App. 9, 25-26, 42, 57, 87).

Opinion statements are those couched in language that clearly connotes their opinion status. *Scott v. The News-Herald*, 496 N.E.2d 699, 708 (Ohio 1986) ("A review of the context of the statements in question demonstrates that [the writer] is not making an attempt to be impartial and no secret is made of his bias."). In *Scott*, the court reasoned that, because the article appeared in the sports pages, a place of common jocularity, was headlined in an editorial style, and contained a great deal of qualifying language, the speaker was uttering an opinion. *Id.* at 708-09. Nathan Phillips was not speaking jocularly nor offering an editorial comment. Phillips accused the plaintiff of blocking him and preventing his retreat, and so stated, without qualification or ambiguity. Phillips did not mince words, try to hide his meaning, or stop short of accusatory language. It does not matter that other observers and participants might describe the scene differently. What does matter is that Phillips described a real event in factual terms and that the defendants published his factual statements without reasonable inquiry. The words Phillips used convey factual events. "Block" is a transitive verb. Transitive verbs require an object to receive the action of the verb.[3] Thus, by definition, a transitive verb refers to an external object, something apart from the verb, to provide the thing on which verb acts or impacts. To "block" means to "block something or someone." It would make no sense to say one

[3] *E.g.*, Walden University, *Grammar: Transitive and Intransitive Verbs*, https://academicguides.waldenu.edu/writingcenter/grammar/verbs#:~:text=Prepositions,Transitive%20Verbs,object%20to%20receive%20the%20action (last visited Feb. 9, 2022).

"blocks," without reference to the thing that is blocked. The verb "block" refers to a real, physical object. Similarly, "sliding" also connotes a physical thing along which the subject moves, such as a floor or sidewalk. These are active verbs, and are consistent with factual description.

To state that one person "blocked" another, and that he did so by "sliding left and right" in order to stay in front of the other person, is a statement of fact. It is a statement about the physical world, taken directly from our sensory perception of it. The "block" happened or it did not. The "slide" either occurred or did not. These are matters that are readily observable by any bystander; to slide and to block connotes the oppositional position of two human bodies; it requires a certain pose of belligerence on the part of one toward another; it is something that all of us, at some time in our lives, have either done or had done to us. If asked, we would recount such an activity without the need for elaboration; the word "block" is readily understood. The alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader and not be subjected to the critical analysis of the legal mind. *Digest Publishing Company v. Perry Publishing Co.*, 284 S.W.2d 832 (Ky. 1955).

For instance, when a lay witness testifies, "I smelled smoke," the witness of course could be truthful or untruthful, or mistaken or lying. But the speaker cannot be accused of uttering an opinion, because no additional explanation or "why do you say that?" is expected or possible. We first observe through our senses,

then our senses identify the observation to our mind, and next we speak: "I smell smoke." How else could we explain such a thing? What does smoke smell like? No one can say, except circularly, that smoke smells like smoke. The same is true of "blocking" or "sliding." We can add words to the explanation, thus using other words to define "blocking," but in the end all we can say is that "blocking" means that one person stood in the way of another, or "blocked" her. It is a circular explanation, and it's circular because it is a statement of fact. No words in common usage explicate facts at a more basic level than the fact itself.

Sensory impressions can differ; such differences do not convert sensory impressions into "opinions" of the sort that merit constitutional protection. A fact drawn from direct sensory data is a human being's most basic unit of description. It would be nonsensical to ask a speaker who said another blocked his path, "what do you mean by 'blocked'?" The answer could only repeat the word "block" or provide the dictionary definition of it, along the lines of "he stood in my way to prevent me from advancing," which is "blocked" in so many words. The same could be said of the statement that a person "slid to the left." Statements of fact are the way we describe matters that are rationally based on perception. Statements of fact can be true or false, or the speaker could be lying or mistaken, but in no sense does a statement of fact become an opinion just because people might disagree about what they did or saw or smelled. The necessary subjectivity of our sensory perceptions does not convert a sense impression

into a matter of opinion. If it did, then no statements of fact would exist. All would be "mere perspective."

When one says that someone "blocks" another, it is direct observation taken from sensory data. It is of no significance that the statement describes the conduct of another, or that it even refers, indirectly, to another's implicit intentions; in fact, that is typically the case. The RESTATEMENT (SECOND) OF TORTS § 565 defines "statements of fact" for defamation law: "Statements of fact, the communication of which is defamatory, usually concern the conduct or character of another."

People use the word "block" in everyday discourse. Everyone understands and could describe the facts it denotes: a car parked in a driveway could "block" another from leaving; but a car parked in the middle of an empty parking lot could not be said to "block" another car, even if that other car's driver were intent on driving directly through the parked car's space. These are factual terms. They are easily capable of being proved true or false.

Statements far more subjective than "sliding" and "blocking" have been held, under the *Milkovich* standard, to constitute statements of fact. *Milkovich*, 497 at 21, 26 ("committed perjury;" and the example "Jones is a liar"); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 130 (1st Cir. 1997) (the statement, "you are sometimes put on hold for twenty minutes—or the phone is never picked up at all," constituted a statement of fact because it was verifiable by objective evidence). Merely because another observer of the event provides a

different description of observable facts does not convert factual observations into opinions: every factual conclusion necessarily involves a degree of subjectivity. *Shepard v. Courtoise*, 115 F. Supp. 2d 1142, 1147 (E.D. Mo. 2000) (plaintiff "abuses employees" is a statement of fact); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 806 (N.D. Ill. 2011) (plaintiff "had difficulties in interpersonal communication throughout his residency" is a statement of fact). Some measure of subjectivity is inherent in any factual observation; nonetheless, these statements can comprise "statements of fact" for constitutional purposes. *Advanced Technology Corp. v. Instron, Inc.*, 66 F. Supp. 3d 263, 270 (D. Mass. 2014) (a list of "the most promising" scientific testing methods was a statement of fact); *Yoder v. Workman*, 224 F. Supp. 2d 1077, 1082 (S.D.W. Va. 2002) ("[plaintiff has] engaged in a vitriolic campaign . . . of spurious and unethical legal actions" was a statement of fact); *Metcalf v. KFOR-TV*, 828 F. Supp. 1515, 1531 (W.D. Okla. 1992) (statement that "critics say" doctor's suites are not monitored closely enough is a statement of fact because it is capable of verification). The statement that an "employee is extremely confrontational and exhibiting constant insubordinate behavior" was held to be a statement of fact. *McCray v. Infused Solutions, LLC*, No.4:14-cv-158, 2018 U.S. Dist. LEXIS 88645, at *25 (E.D. Va. May 25, 2018). A supervisory attorney's statement that associate "did nothing" to solve a statute of limitations problem constituted statement of fact. *Mittelman v. Witous*, 552 N.E.2d 973, 983, 985-86 (Ill. 1989). A statement to a newspaper that employee was terminated for "poor performance" was statement

of fact. *Samuels v. Tschechtelin*, 763 S.2d 209, 242 (Md. Ct. Spec. App. 2000). A statement that plaintiff "told anti-Semitic jokes" was a statement of fact. *Tech Plus, Inc. v. Ansel*, 793 N.E.2d 1256, 1266 (Mass. App. Ct. 2003). All of these statements could be proved true or false; in each instance, the speaker could be a liar or be mistaken in the speaker's perception of reality. Nonetheless, all were statements of fact.

C. *Milkovich* does not require "objective evidence"

The panel opinion, citing *Milkovich*, states that whether or not Sandmann slid and blocked Phillips must be determined by "a core of objective evidence," and that, because the movements of Sandmann and Phillips are "all dependent on perspective," (App. 26-27), then the requisite "objective evidence" is lacking. The Court's conclusion misreads *Milkovich*. It is the object of the statement, specifically whether or not Sandmann moved, that must be objectively verifiable, not the manner of establishing it. Whether or not Sandmann moved requires a factual determination; its resolution will include video and testimonial evidence. Indeed, there is no such category of evidence law called "objective evidence." Practically speaking, all questions of fact are contestable, and are resolved through the customary presentation of testimony, exhibits, and other evidence.

Even if "objective evidence" is deemed a category of evidence and is required to establish defamation

liability, this case includes a great deal of evidence that is as "objective" as can be imagined. Several versions of unadorned, unedited video evidence taken from multiple angles provides a large corpus of "objective evidence," even more so when augmented by the available testimony from literally dozens of eyewitnesses, including the principals. Where "there is 'a videotape capturing the events in question,' the court must 'view[] the facts in the light depicted by the videotape.'" *Green v. Throckmorton*, 681 F.3d 853, 859 (6th Cir. 2012) (quoting *Scott v. Harris*, 550 U.S. 372, 378, 381 (2007)). It tries the imagination to conceive of what additional evidence, "objective" or not, could possibly be added to this large corpus to provide more compelling evidence of Sandmann's movements. Video evidence provides the strongest possible evidence of the truth of observable phenomena. *Hanson v. Madison Cty. Det. Crt.*, 736 Fed. App'x 521, 527 (6th Cir. 2018) ("Where, as here, there is a videotape capturing the events in question, the court must view those facts in the light depicted by the videotape.").

This Court's opinion in *Milkovich* holds that a statement of fact is one that is "sufficiently factual to be susceptible of being proved true or false." *Milkovich* means what it says. "[A] viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts." *Compuware Corp.*, 499 F.3d at 529 (citing *Milkovich*, 497 U.S. at 21). The judicial inquiry mandated by *Milkovich* goes to the nature or character of the statement: is it one that is "sufficiently factual"

that a "reasonable factfinder" could conclude that it is "susceptible of being proved true or false," or, in other words, does it "connote[ ] actual, objectively verifiable facts." In short, it is the defamatory statement that must be an "objectively verifiable fact," not the proof adduced to establish it.

The Sixth Circuit's added requirement of "objective evidence" creates an unprecedented addition to the plaintiff's burden of proof in defamation cases. In essence, the panel opinion requires that only "objective evidence" may be used to establish whether the statement is susceptible to being proved true or false. *Milkovich* did not create this additional requirement. *Milkovich* is clear on this point. "[T]he connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the [ ] board with his subsequent testimony before the trial court." The Court's opinion is merely providing an example, stating that proof "in this instance" can be made on a core of objective evidence, "inter alia," or among other methods of proof.

D. Kentucky law defining "opinion" does not produce a different result

Under Kentucky law, to re-publish a defamatory statement is itself defamatory, unless reasonable investigation is first made. If the statement is factual in

nature, then it is actionable if it is false, defamatory, and published with fault. Kentucky has expressly rejected the four-part test for "opinion" articulated in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989). The *Ollman* test gives the trial judge wide discretion in deciding whether or not a particular statement constitutes fact or opinion. Instead, Kentucky has adopted the more stringent categories outlined in the Restatement. *Yancey*, 786 S.W.2d at 857 ("[t]he drafters of *The Restatement (Second) of Torts* developed a somewhat different approach to the fact-opinion distinction which we believe to be sound, and thus hereby adopt"). In dividing facts and opinions, the Restatement creates a third category of statements, what it calls "mixed opinions," that can also be actionable. These "mixed opinions" can provide the ground for defamation suits where statements of opinion imply undisclosed defamatory facts. According to the Restatement, it is only "pure opinions" that enjoy absolute constitutional protection. *Yancey*, 786 S.W.2d at 857; RESTATEMENT (SECOND) OF TORTS § 566, cmt. c.

Thus, under the Restatement approach, a speaker can be liable in two situations: first, if the speaker conveys a factual defamatory statement, then the statement is actionable unless "it is clear from the context that the [speaker] is not intending to assert [an] objective fact" *Id.*, cmt. b. Second, if the speaker states an opinion, but the opinion implies undisclosed defamatory facts, then the speaker is liable for those statements as well. *Id.*

The panel majority did not determine that Kentucky law supplied a separate ground for its decision; instead, applying a mixture of judicial precedent from federal, Kentucky, Ohio, and New York courts, including this Court's opinion in *Milkovich*, the panel majority determined that the published statements "are protected by the [U.S.] Constitution and by Kentucky law." Thus, Kentucky law did not supply an independent and adequate ground of decision.

E. The Sixth Circuit's interpretation of *Milkovich* threatens the careful balance between the First Amendment and state defamation law

This Court has created a careful balance between the traditional tort of defamation and the First Amendment to the U.S. Constitution. Part of that balance is the protection of "opinion" from the encroachment of state tort liability. The Court has not defined "opinion" in the utterly subjective manner described by the panel majority in this case; that definition encroaches too far on state tort law. Instead, this Court has made clear that any statement that is "sufficiently factual" remains actionable, and not subject to the "opinion" defense. *Milkovich*, 497 U.S. at 21. The Sixth Circuit's determination that what appear to be factual statements nevertheless constitute "opinions" extends the constitutional defense far beyond its intended and literal application, over-stepping the delicate balance struck over decades of Supreme Court jurisprudence.

Of this Court's many rulings defining the constitutional limitations on state defamation law, one is notable for the extent to which it has been ignored: *Milkovich v. Lorain Journal*. Many decisions have omitted consideration of *Milkovich*. *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990); *Janklow v. Viking Press*, 459 N.W.2d 415 (S.D. 1990). Others have deemed it "inapplicable" in cases involving private plaintiffs, *Roffman v. Trump*, 754 F. Supp. 411, 415 (E.D. Pa. 1990), or in private matters, *Swengler v. ITT Corp.*, 993 F.2d 1063, 1071 (4th Cir. 1993); *Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1997). Numerous state and federal courts have resorted to applying state constitutional or state common law to avoid *Milkovich*. *Cassidy v. Merlin*, 582 A.2d 1039, 1048 (N.J. Super. Ct. App. Div. 1990); *Gross v. New York Times Co.*, 623 N.E.2d 1163 (N.Y. 1993); *Flamm v. American Association of University Women*, 201 F.3d 144, 147 (2d Cir. 2000).

This case presents no such obstacles. The Sixth Circuit purported not to distinguish *Milkovich*, but to apply it directly. In doing so, it construed "statements of fact" so narrowly as to make them disappear. That is not the intent of *Milkovich*, nor its holding, nor is that outcome the intent of this Court's historic balance between the federal constitution and state defamation law. The opinion for the panel majority cited *Milkovich* and its progeny. Yet this is not a situation where a lower federal court simply misapplied the correct legal standard to the facts of the case. Instead, by concluding that statements that are overtly factual in nature

constitute protected opinion because people can differ as to what they perceive, the panel opinion effectively obliterates the *Milkovich* standard. If statements that describe the witnessed and videotaped movements of people are themselves mere opinion, then no actionable "statement of fact" is possible. The state tort law of defamation is effectively overturned.

CONCLUSION

The Petitioner requests this Court grant a writ of certiorari.

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Respectfully submitted,

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