No. 25-789

In the
Supreme Court of the United States

ANGELA KAY PLESE,

Petitioner,

v.

RONALD AUSTIN AND LINDA AUSTIN,

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Supreme Court

REPLY BRIEF FOR PETITIONER

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The First Amendment's Free Speech Clause prioritizes robust public debate. At a time where public civility and discussion have devolved into name-calling and worse, celebrities, politicians, and yes, even next-door neighbors, have turned to defamation lawsuits to punish speech that makes them feel bad. Such lawsuits are rarely aimed at legitimate redress but are instead designed to intimidate, silence, and financially drain defendants and to bully them into not speaking freely in the public square. This case is an ideal vehicle to vindicate the First Amendment principles that undergird *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and to restore a modicum of safety to public debate.

Respondents' objections to review are unfounded. First, the judgment below does not rest on adequate and independent state grounds because loss-of-consortium damages are not recoverable under a false-light theory, and the trial court never specified that it was awarding *any* damages for a false-light claim. Second, whether Petitioner acted with malice makes no difference to the First Amendment defense she asserts. Third, lower courts are hopelessly divided, not because of federalism but because of sharp disagreements over the scope of the First Amendment's protections. Fourth, as several courts recognize, allowing a defamation judgment absent reputational harm subverts *Gertz*'s foundational principles. And finally, this case is an ideal vehicle for resolving the question presented: The judgment below is final, there are no fact disputes, and the court of appeals made a clean holding that there was no proof of reputational harm. Certiorari is warranted.

ARGUMENT

I. The judgment does not rest on adequate and independent state law grounds.

Respondents' primary argument against granting certiorari is that the defamation-damages award is supported equally by Respondents' false-light claim. Opp.5–7. That's wrong. Tennessee law *prohibits* consortium-based damages under a false-light theory. Pet.24 n.1; *West* v. *Media General Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) ("[T]he right to privacy is a personal right" and may not "be asserted by a member of the individual's family[.] . . . Therefore, only those persons who have been placed in a false light may recover for invasion of their privacy."). Thus, if this Court reverses the defamation judgment, it will be necessary—at minimum—to reduce the judgment awarded, if not to vacate the trial court's damages award entirely with instructions to enter a new one. Respondents do not rebut this point.

Respondents are also wrong to say that the trial court's damages award is attributed to both the defamation and false-light claims. Contra Opp.6. In awarding damages, the trial court found that Ms. Plese "defamed" Ms. Austin, Ms. Austin's "testimony about the impact of the defamatory statements" was credible, and the damages for medical expenses and emotional distress "were caused by the defamation[.]" Pet.App.56a–58a. False light isn't even mentioned.

Finally, "false light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims." *SIRQ, Inc.* v. *Layton Cost.*, 379 P.3d 1237, 1246 (Utah 2016). The false-light claim is no barrier to review.

II. Malice makes no difference to Ms. Plese's legal theory.

Next, Respondents say that actual malice renders "resolution of the question presented unnecessary." Opp.7. That makes no sense. The question presented is "[w]hether the First Amendment allows a plaintiff who suffers no reputational harm to recover for defamation." Pet.i. And the answer to that question does not turn on malice. Under Ms. Plese's theory, even if a speaker expresses a message *with malice*, the First Amendment prohibits recovery absent proof of reputational harm. See Pet.23 (discussing hypothetical). Malice is simply irrelevant.

III. Lower courts remain hopelessly divided.

Respondents pivot and say that the deep and sharp division among lower courts is attributable merely to federalism, not disagreements about the First Amendment. Opp.8–11. That's inaccurate.

To begin, Respondents do not address the long-standing, acknowledged federal-court conflict over whether a plaintiff may maintain a defamation claim absent reputational harm. Pet.16–17; *Brooks* v. *Am. Broad. Cos.*, 932 F.2d 495, 501 (6th Cir. 1991) ("In contrast to the Second Circuit, the District of Columbia Circuit has rejected libel-proof notions: 'Because we think it [libel-proof theory] a fundamentally bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law.'" (quoting *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (Scalia, J.), vacated on other grounds, 477 U.S. 242 (1986))).

That split alone makes this case worthy of review. And numerous federal decisions hold that a plaintiff who cannot demonstrate reputational harm cannot prevail on a defamation claim. Pet.16 (citing *Guccione* v. *Hustler Mag., Inc.*, 800 F.2d 298, 303 (2d Cir. 1986); *Lavergne* v. *Dateline NBC*, 597 F. App'x 760, 762 (5th Cir. 2015); *Ray* v. *Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976); *Wynberg* v. *Nat'l Enquirer, Inc.*, 564 F. Supp. 924, 927 (C.D. Cal. 1982); and *Simmons Ford, Inc.* v. *Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 750–51 (S.D.N.Y. 1981)).

As for state courts, Respondents lead with a quote from *Little Rock Newspapers, Inc.* v. *Dodril*, 660 S.W.2d 933 (Ark. 1983), acknowledging that *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), held the Constitution does not "require" proof of reputational harm to recover in defamation. Opp.9. But if Respondents had continued with the rest of the quoted passage, it would have been immediately apparent that the Arkansas Supreme Court—like Ms. Plese and numerous lower courts—thinks that *Firestone* got the First Amendment analysis wrong:

> [T]he *Firestone* decision has been strongly criticized and the opposite approach has been taken in subsequent decisions in other states. See *Gobin v. Globe Publ. Co.,* 232 Kan. 1, 649 P.2d 1239 (1982); *France v. St. Clare's Hospital and Health Center,* 82 App.Div.2d 1, 441 N.Y.S.2d 79 (1981). We can find no greater substantiation after *Gertz* than before that would permit recovery for a defamation action without the element of reputational damage.

> We regard the decision we make today as consistent with the spirit of reform *Gertz* is striving to effectuate in some of the curious complexities of defamation law, *and in the legitimate protection of First Amendment principles*.

Little Rock, 660 S.W.2d at 936–37 (emphasis added, footnotes omitted). Accord, *e.g.*, *Schlegel* v. *Ottumwa Courier, a Div. of Lee Enters., Inc.*, 585 N.W.2d 217, 223–24 (Iowa 1998) (endorsing *Little Rock*'s First Amendment analysis); *Smith* v. *Durden*, 276 P.3d 943, 945 (N.M. 2012) (same).

Based on the same First Amendment reasoning, the Pennsylvania Supreme Court rightly declared that Respondents' view of the First Amendment "subverts" *Gertz*. *Joseph* v. *Scranton Times L.P.*, 129 A.3d 404, 430 (Pa. 2015) ("[P]ermitting the recovery of damages for injuries such as mental anguish without a showing of injury to reputation subverts the intended 'protective influence' of *Gertz*'s actual injury stricture." (citation omitted)); see also *Keisel* v. *Westbrook*, 542 P.3d 536, 556 (Utah. Ct. App. 2023) ("'A plaintiff may not attempt an end-run around First Amendment strictures protecting speech by instead suing for defamation-type damages under non-reputational tort claims.'" (citation omitted)). While some courts may see this as a local issue, *e.g.*, *Richie* v. *Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996) (cited at Opp.9–10), for many state courts of last resort, it is the Constitution—not federalism—driving the outcome.

Respondents accuse Ms. Plese of trying to "nationalize" defamation law. Opp.10–11. But she is merely trying to vindicate her First Amendment rights. As *Little Rock* explains, "[t]o allow recovery in a defamation action where the primary element of the cause of action [reputational harm] is missing not only sets the law of defamation on end, but also substantially undercuts the impact *Gertz* seeks to effect." 660 S.W.2d at 936. Doing so is "an unjustified infringement on the First Amendment." *Ibid.* Indeed, *Gertz* implicitly rejected the same objection; it "nationalized" defamation law by requiring proof of actual injury before allowing an award of damages in a defamation *per se* action. 418 U.S. at 349.

IV. Awarding a defamation judgment absent proof of reputational harm subverts *Gertz*.

Respondents next claim that the decision below is "consistent with" *Gertz*. Opp.12–13. Not so. To be sure, *Gertz* included "mental anguish and suffering" when it outlined customary types of defamation harm. Opp.13 n.4 (quoting *Gertz*, 418 U.S at 349–50). But *Gertz* never purported to do away with the reputational-harm requirement; that was the suggestion in *Firestone*.

As the petition explains (pp. 19–23), there are compelling free-speech reasons to overrule or sharply limit *Firestone* to its facts. And those reasons flow directly from the Court's reasoning in *Gertz*—not to mention this Court's own characterizations of defamation law in other cases, see *Counterman* v. *Colorado*, 600 U.S. 66, 73 (2023) ("defamation" is a "false statement[] of fact harming another's *reputation*." (citing *Gertz*, 418 U.S. at 340)) (emphasis

added); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) ("[D]amage to reputation is, of course, the essence of libel.").

For example, Justice Brennan's *Firestone* dissent relied on *Gertz* when he explained that to allow defamation damages absent proof of reputational harm is "to invite 'gratuitous awards of money damages far in excess of any actual injury' and jury punishment of 'unpopular opinion rather than (compensation to) individuals for injury sustained by the publication of a false fact.'" 424 U.S. at 475 n.3 (quoting *Gertz*, 418 U.S. at 349).

Similarly, the New Mexico Supreme Court recognized that "'[i]f the tort of defamation is to retain its identity at all, proof of actual injury to reputation would seem to be a prerequisite to any award of out-of-pocket loss, and it seems more logical to require proof in that order, not in the reverse.'" *Durden*, 276 P.3d at 949 (quoting *Firestone*, 424 U.S. at 475 n.3 (Brennan, J., dissenting)).

In sum, while emotional distress may be compensable in some or even many contexts, it cannot be a proxy for reputational damage without turning defamation into an all-purpose tort to punish offensive speech.

V. This case is an ideal vehicle for resolving the question presented.

It is sophistry to characterize this case as a "fact-bound" dispute. Opp.13. The Tennessee Court of Appeals found that Respondents did not prove any reputational harm but affirmed the trial court's defamation judgment anyway. The Respondents also did not appeal the Tennessee Court of Appeals' explicit finding that they failed to prove reputational harm, and they do not seek any relief of their own in this appeal. Thus, the decision below involves a clean holding that awarded Respondents substantial damages for defamation without proof of reputational harm. That point is not in dispute.

Moreover, based on the court of appeals' holding, the straightforward question presented is whether the First Amendment requires proof of reputational harm to recover for damages. That issue has nothing to do with "boat trailers and orange traffic cones." Contra Opp.13.

In sum, the facts are undisputed, the legal issue is clean and clear, and addressing the *Firestone* rule could vindicate the First Amendment's core purposes, eliminate many questionable defamation claims, and bring doctrinal coherence to modern defamation law. Pet.24–25.

The petition should be granted.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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