IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Panel: Ronayne Krause, P.J., and M.J. Kelley and Yates, JJ.

ROBERT J. ZABRISKIE,

Plaintiff-Appellant,

v.

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, MIRIAM AUKERMAN, ELAINE LEWIS, and ANTHONY GREENE,

Defendants-Appellees.

MSC No. 164855
COA No. 356570
Trial Ct No. 20-008227-CZ

Brief on Appeal — Amicus Curiae
ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction to entertain plaintiffs' application for leave to appeal under MCR 7.303(B)(2). This Court has jurisdiction to entertain this motion to file an *amicus curiae* brief under MCR 7.312(H).

STATEMENT OF QUESTIONS PRESENTED[1]

I. Should this Court grant leave to appeal where the Court of Appeals' decision would allow public official plaintiffs to prevail on defamation claims based on disagreements with the speaker's characterization or interpretation of disclosed facts?

FIRE says: yes.

II. Where the Constitution requires that public-official defamation plaintiffs prove that the speaker acted with actual malice (i.e., knew the statement was false or recklessly disregarded whether it was false), should this Court grant leave to appeal where the Court of Appeals erroneously held that any of the following suffice to meet the actual malice standard:

A. The Court does not deem the speaker's views to be reasonable.

B. The speaker did not investigate the accuracy of government documents before relying on them.

C. An advocacy organization engages in "one-sided" advocacy.

FIRE says: yes.

[1] The trial court answered no with regard to the underlying merits of Questions Presented I and II. FIRE takes no position on Questions Presented III or IV.

INTEREST OF *AMICUS CURIAE*[2]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. FIRE defends the rights of individuals through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate First Amendment expressive rights. See, e.g., *Kennedy v Bremerton Sch Dist*, 213 L Ed 2d 755; 142 S Ct 2407 (2022); *Mahanoy Area Sch Dist v B L*, 210 L Ed 2d 403; 141 S Ct 2038 (2021).

FIRE has a significant interest in the appeal before this Court because the Court of Appeals' decision, if allowed to stand, will effectively overturn the "actual malice" standard for defamation claims against public officials as established by the Supreme Court of the United States in *New York Times Co v Sullivan*. In FIRE's decades of experience defending freedom of expression, defamation threats are often raised to quash criticism of public officials or public figures. By granting review in this case to maintain the high bar for defamation suits against public

[2] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

officials, this Court can preserve the right of Michiganders to advocate and investigate matters of local and national concern.

SUMMARY OF ARGUMENT

The Court of Appeals took a well-established constitutional standard and flipped it on its head. Should this ruling remain on the books, it will send a clear message to investigators, advocates, and gadflies statewide that if you ask the wrong questions, you could wind up in court.

Until the Court of Appeals' decision, the constitutional standard for "actual malice" in defamation cases had been well established since at least 1964: to constitute defamation of a public official, a false statement must have been made "with knowledge that it was false *or with reckless disregard of whether it was false or not*." *New York Times Co v Sullivan*, 376 US 254, 271; 84 S Ct 710, 726; 11 L Ed 2d 686 (1964) (emphasis added); accord *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533, 540 (2010) (applying *New York Times*). It was equally well established that the high bar for reckless disregard is met only by the defendant's *subjective* belief that the information is probably false.

St. Amant v Thompson, 390 US 727, 731; 88 S Ct 1323, 1325; 20 L Ed 2d 262 (1968).

Yet the Court of Appeals turned this test on its head and made it an objective test by invoking a reasonableness standard in ruling against the ACLU of Michigan (ACLU-MI). See, e.g., slip op at 17 ("The … unreasonableness of defendants' 'interpretation' of the transcript demonstrates actual malice."). The old subjective standard had one goal: Stop self-censorship. The Court of Appeals' new objective standard will have one effect: Stop public debate on matters of local and national concern throughout Michigan, including issues like police conduct, abortion, and race relations.

This "reasonableness" test not only cuts off the "actual malice" standard at its knees but has also been expressly and repeatedly rejected by the Supreme Court of the United States. As such, this Court should grant leave to appeal to correct the court's inaccurate interpretation of the "actual malice" standard.

ARGUMENT

I. The "Actual Malice" Standard Protects Free Debate on Public Officials and Matters of Public Concern.

The "actual malice" standard exists for a reason: to protect free and open public discourse on the most important questions of our time. While this may sometimes result in uncomfortable or even inaccurate criticism, the U.S. Supreme Court has already struck that balance for us.

A. American law has long protected the right to criticize public officials.

The constitutional "actual malice" standard was formulated in *New York Times Co v. Sullivan*, but its original formulation stretches back even further. The American common law has long acknowledged the "privilege of fair comment" as an affirmative defense to defamation. "[C]omment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Milkovich v Lorain Journal Co*, 497 US 1, 13-14; 110 S Ct 2695, 2703; 111 L Ed 2d 1 (1990). This "privilege" was used by common law courts "to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." *Id.* at 14.

The tort principle of fair comment began to be constitutionalized in the early to mid-20th century. In his concurrence to *Whitney v California*, 274 US 357; 47 S Ct 641; 71 L Ed 1095 (1927), Justice Brandeis discussed the relationship between the First Amendment and the ability to criticize, even when those criticisms may be wrong:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . . They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction . . . .

Id. at 375 (Brandeis, J., concurring). Judge Learned Hand similarly noted that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v Associated Press*, 52 F Supp 362, 372 (SD NY, 1943), aff'd 326 US 1; 65 S Ct 1416; 89 L Ed 2013 (1945).

B. *New York Times Co v Sullivan* and its progeny created the "actual malice" standard to guard against self-censorship.

The U.S. Supreme Court built upon these principles when it adopted the "actual malice" standard in *New York Times Co v Sullivan*. There, *The New York Times* was accused of libel for printing an advertisement that contained several false statements about government opposition to the civil rights movement in Montgomery, Alabama, including some that allegedly defamed the Commissioner in charge of the Police Department. 376 US at 256-57. It was uncontroverted that the news files of *The New York Times* would have proven these statements were false, but that the advertising manager who ran the ad "knew nothing to cause him to believe that anything in it was false," and therefore "made [no] effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means." *Id.* at 261. Nevertheless, the Supreme Court of Alabama affirmed a judgment of libel against the newspaper.

The U.S. Supreme Court reversed. Its primary ground for reversal was fear that "[a] rule compelling the critic of official conduct to

guarantee the truth of all his factual assertions . . . leads to a comparable 'self-censorship.'" *Id.* at 279. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, *even though it is believed to be true* and *even though it is in fact true*, because of doubt whether it can be proved in court or fear of the expenses of having to do so." *Id.* (emphases added). In order to avoid this chill on criticism of the government, the Court held that the First Amendment prohibits a defamation claim by a public official "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Thus, even though the *Times* failed to investigate within its own news files, it could not be liable for libel because there was no evidence that the advertising manager *actually knew or suspected* the advertisement was false. *Id.* at 287.

The Court further clarified the rationale behind the "actual malice" standard in *Gertz v Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974), explaining why the bar for defamation is so much higher for public officials than for private citizens. The Court acknowledged that the *New*

York Times test could deprive some of the ability to sue, but still affirmed that the Constitution required it:

> Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the New York Times privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures.

Id. at 342-43. This harm is mitigated, however, by the fact that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. Thus, in the Court's view, the combination of the value of public discourse and the unique ability of public officials to correct public falsehoods justified the higher bar for public officials to bring defamation claims.

C. "Actual malice" is a subjective standard, not a "reasonableness" test.

When crafting the "actual malice" standard, the Court in *New York Times* made clear that reckless disregard was *not* a negligence, or reasonableness, test. Indeed, the Court explicitly held that "a finding of

negligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 US at 288. Rather, the Court's test is a subjective one: Did the publisher of the false statements personally consider that they may be false and publish them regardless, or did the publisher believe them to be true in "good faith"? *Id.* at 286.

The subjective nature of "actual malice" was further developed by *St. Amant v Thompson*, 390 US 727; 88 S Ct 1323; 20 L Ed 2d 262 (1968). There, a Louisiana deputy sheriff brought a libel action against a candidate for public office who gave a televised speech falsely accusing the plaintiff of accepting union bribes. 390 US at 728-29. Notwithstanding the egregiousness of the accusations and the trial court finding that they were false, the U.S. Supreme Court still ruled that there was no showing of "actual malice." The Court reemphasized that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* at 731. Rather, reckless disregard requires evidence showing "that the defendant *in fact* entertained serious doubts as to the truth of his publication." *Id.* (emphasis added).

The Court provided several examples of conduct that may qualify as reckless disregard. First, it noted that a defendant likely did not operate in good faith "where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." *Id.* at 732. Likewise, reckless disregard is likely "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *Id.* The *St. Amant* Court also held that recklessness is likely "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* A later case where the Court *did* find reckless disregard, *Harte-Hanks Communications, Inc v Connaughton*, additionally held that reckless disregard can be found when the contrary facts "were well known to the [publisher] before the story was published," 491 US 657, 691; 109 S Ct 2678, 2697; 105 L Ed 2d 562 (1989), and where the publisher engages in "the purposeful avoidance of the truth." *Id.* at 692.

Finally, in *St. Amant*, the Court noted that "[f]ailure to investigate does not in itself establish bad faith," and therefore is *not* an example of reckless disregard, even when a reasonably prudent person may have done so. 390 US at 733; accord *Harte-Hanks*, 491 US at 688.

* * *

Hundreds of years of American common law and several decades of American constitutional law have converged on the same answer: The value of free and open debate outweighs, in most cases, the harm it may cause. This is particularly so when public officials, public figures, or matters of public concern are involved. By choosing to apply a higher subjective standard for "actual malice," the Supreme Court acknowledged that some mistruths would be published but trusted that "at the length truth will out." William Shakespeare, *The Merchant of Venice*, act II, sc 2. Applying an objective "reasonableness" standard instead, as the Court of Appeals did, rejects that carefully-struck balance.

II. This Case Should Properly Be Considered Under the *New York Times* Test.

Had the Court of Appeals properly applied the "actual malice" standard, it would have noted that this case is on all fours with *New York Times*. Like the advertising manager there, when the ACLU-MI issued its press release, it "knew nothing to cause [it] to believe that anything [in the transcript it relied upon] was false." *New York Times*, 376 US at 261. Court transcripts are typically accurate, particularly when it comes to substantive issues under examination. The ACLU-MI's source thus

"bore the endorsement" of the court and the ACLU-MI "had no reason to question" its veracity at the time it released the press statement—just like the advertising manager in *New York Times* had no reason to question the source of the ad. *Id.*

Furthermore, none of the hallmarks of actual malice were present here. The conversation between the police officer and the juror was neither "fabricated" by the ACLU-MI nor wholly "the product of [its] imagination"—the conversation took place, albeit slightly differently than recorded in the transcript. *St. Amant*, 390 US at 732. Indeed, the Court of Appeals expressly noted that "the press release shows that defendants *believed* plaintiff's conduct to be both corrupt and committed under the color of his office." Slip op at 16 (emphasis added). Furthermore, the ACLU-MI's press release was not based on "an unverified anonymous" source. Nor would it be "inherently improbable" that a police officer would engage in jury tampering (particularly in light of the inaccurate transcript). *Id.* Furthermore, the accurate text message exchange was not "well known to [the ACLU-MI] before the [press release] was published"—as the Court of Appeals observed, the ACLU-

MI "had only the transcript with which to work." *Harte-Hanks*, 491 US at 691; slip op at 15.

The Court of Appeals relied on two points to support an allegation of "actual malice": (1) the ACLU-MI's failure to investigate, and (2) the unreasonableness of the ACLU-MI's interpretation of the transcript. Slip op at 16 ("[D]efendants made *no* effort to investigate . . . ."); *id.* at 17 ("The total lack of diligence on defendants' part and the unreasonableness of defendants' 'interpretation' of the transcript demonstrate actual malice."). But the U.S. Supreme Court expressly has already rejected both. Regarding the failure the investigate, the U.S. Supreme Court has repeatedly held that "[f]ailure to investigate does not in itself establish bad faith," and therefore cannot be grounds for actual malice. *St. Amant*, 390 US at 733 (citing *New York Times*, 376 US at 287-88). With respect to the reasonableness of interpretation, the U.S. Supreme Court has likewise repeatedly held that even unreasonable interpretations do not show a reckless disregard when the publisher actually held those interpretations in good faith. *St. Amant*, 390 US at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published . . . . There must be sufficient evidence to permit the

conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). Indeed, in *New York Times*, the Court noted that even "half-truths and misinformation" are not sufficient to prove actual malice, so long as the publisher personally, subjectively believed them at the time of publication. 376 US at 273. As the Court of Appeals noted, the ACLU-MI subjectively and in fact "believed" it had identified corrupt misconduct when it issued the press release. Slip op at 16

To the extent there were allegations of actual malice by the ACLU-MI here, the Court of Appeals did not rely on them. Instead, the court ignored a fifty-year-old precedent and imposed its own standard instead, simultaneously ignoring the protections of the First Amendment. If allowed to stand uncorrected, that holding will inevitably chill public discourse on issues of local and national concern. That kind of self-censorship harms the public and subverts the very purpose of the "actual malice" standard.

CONCLUSION

This Court should grant leave to appeal, apply the correct "actual malice" standard, and preserve free debate on the contested issues of our time.

Dated: November 7, 2022

/s/ Conor T. Fitzpatrick

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Date: November 7, 2022

/s/ Conor T. Fitzpatrick
Conor T. Fitzpatrick

CERTIFICATE OF SERVICE

The undersigned certifies that on November 7, 2022, an electronic copy of the Foundation for Individual Rights and Expression Brief of *Amicus Curiae* was filed with the Michigan Supreme Court using the MiFILE system. The undersigned also certifies all parties in this case are represented by counsel who are registered MiFILE users and that service of the brief will be accomplished by the MiFILE system.

Dated: November 7, 2022

/s/ Conor Fitzpatrick
CONOR T. FITZPATRICK