IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS,

Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA AND BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Constitution require that a corporate defamation plaintiff be treated as a "limited purpose public figure" based upon the corporation's conducting direct mail and telephone solicitation as a part of its regular business, where the corporation did not inject itself into any public controversy?

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation. No publicly held corporation owns 10% or more of petitioner's stock.

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OPINIONS BELOW

The Pennsylvania Supreme Court opinion (App. 1a-42a) is reported at 923 A.2d 389. The Pennsylvania Superior Court opinion (App. 43a-67a) is reported at 872 A.2d 1202. The opinion of the trial court (App. 68a-81a) is unreported.

JURISDICTION

The Pennsylvania Supreme Court entered its judgment on May 31, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides, in Section 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner "AFS" is a privately held corporation that publishes specialized "fast-read format" newsletters focused on business-related topics. AFS is headquartered in Pennsylvania, and its fourteen branch offices are located in

Pennsylvania and New Jersey. AFS is one of the largest business newsletter publishers in the United States, and it solicits subscriptions to its newsletters by direct mail and telephone. AFS directs these solicitation efforts to individuals in businesses, and not to residences.

In 2001, Respondents ("BBB") published a report concerning AFS's sales practices, stating that AFS "has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored."

AFS wrote to BBB contesting the report and requesting a retraction. In particular, AFS notified BBB that the "pattern" of complaints constituted approximately only one out of every 12,500 orders placed with AFS. AFS further demonstrated that many of the complaints were false. In response, BBB updated the report, but continued to state that AFS "has an unsatisfactory business performance record . . . ."

AFS filed a defamation action against BBB in the Pennsylvania trial court in Philadelphia. The case proceeded to a jury trial. AFS tried the case on the theory that BBB acted negligently by publishing its defamatory report about AFS. At trial, BBB admitted that it made no effort to determine whether or not the complaints on which it based its report were legitimate. BBB simply received these complaints, concluded that AFS had an "unsatisfactory record," and published its defamatory report on the Internet. AFS contended that BBB's failure to investigate the complaints at issue constituted negligence.

The issue of whether AFS should be considered a public or private figure first arose when the trial judge asked counsel, in connection with fashioning jury instructions, "Are we proceeding on the basis that the plaintiff is a public figure? I didn't think we were, but you enlighten me." (Oct. 7, 2003 Tr. p. 228). AFS responded that it was proceeding on the basis that it was a private figure (*Id.*), a position that it repeated. (Oct. 8, 2003 Tr. pp. 70-72). During the conference concerning jury instructions that occurred after the close of the evidence, AFS submitted to the trial judge a memorandum in support of its position that it was a private figure and that "marketing" cannot make AFS a public figure where AFS did not inject itself into a public controversy. (Oct. 10, 2003 Tr. 81-82).

The trial judge expressly found that AFS was not a public figure because AFS did not have the "persuasive power and influence" required to be an all-purpose public figure, nor had AFS "thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." (Oct. 10, 2003 Tr. 89-90). Notwithstanding the ruling that AFS was a private figure, the trial judge refused to instruct the jury that it could return a defamation verdict for AFS based solely on a finding of negligence. Instead, over AFS's objections, the trial judge instructed the jury that BBB enjoyed a conditional privilege with respect to its publication of reports of consumer complaints, and that AFS was required to prove actual malice in order to overcome the privilege.

The jury returned a verdict for defendant, and the trial court denied AFS's motions for judgment *n.o.v.* or for a new trial. In its motion for a new trial, AFS asserted that the trial judge had correctly determined that AFS is a private figure and, therefore, erred in instructing the jury that BBB could

be liable only if AFS had proved actual malice. (Motion for Post-Trial Relief, ¶¶ 17-27).

AFS appealed to the Pennsylvania Superior Court, which affirmed the trial court's decision. (App. 43a). The Pennsylvania Supreme Court granted AFS's petition for allowance of appeal.

As the Pennsylvania Supreme Court recounted in its opinion, AFS consistently contended that it was a private figure. BBB did not argue to the contrary, either in opposition to AFS's post-trial motion or in its appellate briefs. However, after oral argument, the Pennsylvania Supreme Court directed the parties to submit supplemental briefs addressing whether AFS could be considered a limited purpose public figure.

In its opinion, the Pennsylvania Supreme Court agreed with AFS that, as a matter of Pennsylvania law, BBB did not have a conditional privilege requiring AFS to establish actual malice. However, the Pennsylvania Supreme Court held that, *as a matter of Federal constitutional law*, AFS was a limited purpose public figure, requiring AFS to prove that BBB acted with actual malice. Therefore, the court affirmed the judgment in favor of BBB.[1]

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[1] In its opinion, the Pennsylvania Supreme Court acknowledged that under the circumstances, "it is possible that the jury found all elements of the cause of action to have been proved, except for malice." (App. 8a, fn. 4).

REASONS FOR GRANTING THE PETITION

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court adopted the concept that the actual malice requirement of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is applicable to defamation plaintiffs who, while not public officials or all-purpose public figures, should be considered as public figures for a limited purpose. *Gertz*, at 351-52. The Court described the latter category as existing where "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351. The Court stressed that it is necessary to look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

In *Gertz*, the Court held that the plaintiff was not the type of limited purpose public figure who falls within the actual malice requirement, because "he never discussed [the issue] with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* at 352.

In this case, the Pennsylvania Supreme Court held that AFS was required to satisfy the *New York Times* actual malice requirement, as a limited purpose public figure, even though (1) there was no "controversy" existing at the time BBB published its reports, but instead the "controversy" was of BBB's own creation; and (2) AFS had not voluntarily injected itself into a controversy, through advertising or widespread communication to the general public, but instead was found to be a public figure merely because of its regular conducting of business directed, not at the general public, but at its actual

or potential business customers. Specifically, the Pennsylvania Supreme Court held that AFS was a limited purpose public figure solely because of its direct mail and telephone solicitation activities, and the tangential relationship of those activities to the subject of the BBB report.

In so holding, the Pennsylvania Supreme Court has made a ruling based upon the Federal Constitution that typifies a division of opinion among various circuits as well as among appellate courts of various states. The Pennsylvania court also blurred the test this Court adopted in *Gertz* to the point where virtually any corporate plaintiff suing for defamation with respect to statements concerning its alleged business practices would be a limited purpose public figure.

Because the Pennsylvania Supreme Court's decision departs from the test under *Gertz*, and because the circuits and the state courts are divided on the proper test for determining whether plaintiffs in general and specifically corporate plaintiffs are limited purpose public figures under the First and Fourteenth Amendments, this Court should grant review and reverse the Pennsylvania court's decision.

A. There is a Division Both Among the Circuits and Various State Appellate Courts Concerning the Proper Test for Determining Which Defamation Plaintiffs are Limited Purpose Public Figures.

Since this Court's decision in *Gertz* over 30 years ago, this Court has not had occasion to further define the constitutional standards under which a defamation plaintiff must be considered a limited purpose public figure required

to prove actual malice under *New York Times*. This has spawned a large number of inconsistent federal and state appellate decisions.[2]

For example, in *Tavoulareas v. Piro*, 817 F.2d 762, 772-73 (D.C. Cir. 1987), the District of Columbia Circuit announced a limited purpose public figure test wholly at odds with the holding of the Pennsylvania Supreme Court in this case. Under *Tavoulareas*, the controversy has to be the subject of public discussion in which the plaintiff voluntarily decides to participate. In contrast, the Pennsylvania Supreme Court purports to adopt the Fourth Circuit's test in *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir. 1983), as refined in *Blue Ridge Bank v. Veribank*, 866 F.2d 681 (4th Cir. 1989), under which the controversy need not be an issue of preexisting interest to the public, but instead can arise from the plaintiff's own business practices.

A further conflict is found with the First Circuit's decision in *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), which held that criticism of commercial conduct does not involve a public issue of such a nature as to justify the actual malice test. Other circuits have tests involving greater or lesser degrees of flexibility, but which still emphasize the public nature of the controversy and the question of whether the plaintiff voluntarily injected itself into the controversy. *See, e.g., Snead v. Redland*

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[2] A lengthy annotation, collecting various "public figure" cases and demonstrating various patterns and inconsistencies is found in *Who is "Public Figure" For Purposes of Defamation Action*, 19 A.L.R. 5th 1 (1994).

Aggregates, 998 F.2d 1325, 1329 (5th Cir. 1993); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir. 1981); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119 (8th Cir. 1999); *Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988).

There is also a striking conflict between courts analyzing whether a corporate plaintiff may become a public figure by merely marketing its products or services. For example, the Third and Fourth Circuits have found corporate plaintiffs to be public figures because of their advertisement practices. *See National Foundation for Cancer Research*, 705 F.2d at 101 (holding corporate plaintiff thrust itself into public eye through advertisements); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-274 (3d Cir. 1980) (holding company invited public comment and criticism and was a limited purpose public figure because of its advertising campaign). Several other Circuits, and the highest courts of several states, have strongly disagreed. *See Long*, 848 F.2d at 1204-05 (corporate plaintiff did not become limited purpose public figure through its advertising because such advertising "in no way attempted to influence the outcome of the alleged controversy"); *Golden Bear Distributing Systems v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983) (holding a corporation did not "'thrust itself' into a public controversy by merely advertising its services"); *Bruno & Stillman*, 633 F.2d 583 (holding that the law of defamation would largely be obliterated if companies were public figures by successfully operating); *Vegod Corp. v. American Broadcasting Co.*, 603 P.2d 14, 18 (Cal. 1979) (rejecting argument that a corporation becomes a public figure "by selling goods to the public and by advertising");

Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau, 637 P.2d 733, 737 (Ariz. 1981) (holding plaintiff was private figure and rejecting defendant's argument that plaintiff was a public figure based on "wide-spread and far-flung mail and solicitation campaigns").

The day after the Pennsylvania Supreme Court decided this case, the Alabama Supreme Court decided *Cottrell v. National Collegiate Athletic Association*, __ So.2d __, 2007 Ala. LEXIS 104 (Ala. Jun. 1, 2007). There, in contrast to the Pennsylvania Supreme Court's approach here, the Alabama Supreme Court in *Cottrell* conducted an extensive analysis of the pre-existing nature of the public controversy at the time of the alleged defamation and whether the plaintiff voluntarily thrust himself into that controversy.

It is difficult to think of any other area of Federal constitutional law where there are so many divergent tests applied by various circuits and state courts. This case presents the Court with an opportunity to give further definition to the limited purpose public figure test and to create greater uniformity in application of the important First Amendment concepts under *New York Times* and *Gertz* to what otherwise are cases that should turn on the application of state law.

B. The Pennsylvania Supreme Court Has Departed From This Court's Holding In *Gertz*.

As noted above, this Court in *Gertz* created a narrow category of defamation plaintiffs who, while not public officials, nevertheless would fall within the *New York Times* requirement of proving actual malice. This Court did so in the context of an individual's level of prominence gained by

willing participation in an issue that already was of public interest.

In this case, the Pennsylvania Supreme Court's decision eliminates the fine lines that the Court drew in *Gertz*, and instead decided an issue of Federal constitutional law in a manner that elevates a disputed statement concerning a corporation's ordinary business practices to a level of constitutional magnitude worthy of protection under *New York Times*. There is no support for such a result in this Court's precedent. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (defendant's defamatory statement cannot be the basis for finding plaintiff to be a public figure); *see also Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157, 167-68 (1979) (emphasizing that to be a public figure, plaintiff must voluntarily enter a public controversy that exists apart from the defamatory publication).

Although *Gertz* emphasizes that states ordinarily are free to fashion their own rules of defamation liability, the Pennsylvania Supreme Court expressly ruled in favor of AFS on the state law issue and instead grounded its decision against AFS on Federal constitutional law. In so doing, the Pennsylvania Supreme Court has stretched the application of the constitutional limits on liability under certain situations worthy of protection to a point where they would unduly interfere with the assertion of rights that should exist solely as a matter of state law.

The protection of reputation is of fundamental importance to businesses. In our system, the state law of defamation serves that purpose, which the Court has

recognized as a "pervasive and strong" societal interest. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Courts must balance the equally fundamental interests that the First and Fourteenth Amendments protect by requiring the enhanced level of culpability under *New York Times* in only those limited situations where necessary to protect those constitutional interests. The necessity of such a balance is a strong theme in *Gertz*.

The Pennsylvania Supreme Court's decision here destroys this balance. The Pennsylvania court's opinion does not articulate any meaningful way to distinguish corporate defamation plaintiffs whom the Constitution requires to prove actual malice from those who are not subject to the actual malice requirement. Under the Pennsylvania court's reasoning, it is difficult to imagine any corporate defamation plaintiff suing for injury to its business reputation that would not be treated as a limited purpose public figure.

As the protection of reputation becomes of greater importance to businesses in this Internet environment, the potential for harm to the interests that state law should protect becomes greater if other courts follow the Pennsylvania Supreme Court's departure from the *Gertz* approach to demarcating the Federal and state interests. Although a state might decide to impose an actual malice requirement as a matter of its own law, a state does not have the ability to pin such a requirement on the Federal Constitution in a manner that alters the balance that this Court has established. Therefore, this is an issue worthy of this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari to review the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

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