

DAVIS MOOT COURT COMPETITION.
BEST BRIEF. 1989.

MARK MCPHERSON & MATT ANTHONY.

IN THE
SUPREME COURT OF THE
STATE OF GOTHAM

No. 89-999

THE GOTHAM DAILY NEWS,
Petitioner,
v.

BRUCE WAYNE,
Respondent.

On Appeal from the State of Gotham Court
of Appeals

BRIEF FOR PETITIONER

D11
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Section 10-4 of the Gotham Libel Reform Act which provides The Gotham Daily News as the defendant in an action for defamation the option of choosing the statutorily prescribed declaratory judgement action, thereby superseding a plaintiff's decision to sue for monetary damages in that action, maintains a remedy for injury to character as required by Art. I, sec. 12, of the Gotham state constitution, and also, whether it fulfills the requirements of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

II. Whether section 10-5 of the Gotham Libel Reform Act which allows Respondent to recover monetary damages without proving fault on the part of Petitioner violates the first amendment of the United States Constitution.

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BRIEF FOR PETITIONER

STATEMENT OF THE CASE

In its Sunday, January 10, 1989 edition, The Gotham Daily News published an article alleging that Bruce Wayne sexually molested a 12-year-old girl. Immediately after publication, Wayne asked the paper for a retraction. The newspaper refused. On January 14, Wayne filed suit against the newspaper for defamation, seeking \$23,000 in damages.

In its answer the newspaper elected to convert the action for damages into a declaratory judgement pursuant to section 10-4 of Gotham's Libel Reform Act. Alternatively, the newspaper moved to dismiss the action for damages on the grounds that section 10-5 was unconstitutional. Wayne then filed a motion to strike. The Gotham Superior Court granted this motion, holding that section 10-4 violated Art. 1, sec. 12 of the Gotham state constitution. The trial court also denied the newspaper's motion to dismiss after finding section 10-5 constitutional. The case then proceeded to trial as an action for damages. The jury found in favor of Wayne and awarded him \$33,000 in damages. On appeal, a divided Court of Appeals upheld the Superior Court's granting of Wayne's motion to strike as well as its denial of the newspaper's motion to dismiss. The Gotham Daily News appeals the ruling of the Court of Appeals on the grounds that the court erroneously found section 10-4 unconstitutional and held section 10-5 constitutional.

SUMMARY OF THE ARGUMENT

I. Section 10-4 of Gotham's Libel Reform Act is constitutional

under both the Gotham and United States constitutions. Gotham's constitution guarantees a remedy to persons injured in their character. Section 10-4 provides for a remedy by means of a judicial declaration of the falsity of a defendant's statements. Also, this section does not deny any defamed plaintiff the right to a trial. Section 10-4 also satisfies the Due Process Clause of the Fourteenth Amendment because there is a rational relationship between the stated purpose of the Libel Reform Act and the statute itself. Finally, § 10-4 satisfies the Equal Protection Clause. This section classifies plaintiffs into two classes, plaintiffs in libel suits and all other plaintiffs. This classification is necessary in order to fulfill the legislature's stated goal of providing a speedy and efficient remedy in actions for defamation, and reasonable because it does not modify any other common law rights.

II. The Court of Appeals incorrectly held that Respondent did not have to prove fault in order to recover damages. The Supreme Court's decisions in New York Times Co. v. Sullivan and its progeny establish a constitutional rule of requiring a public official to prove actual malice before recovering damages from a media defendant. Since Respondent is a public official and the issue at hand is of public concern, the first amendment interest in protecting the media from self-censorship outweighs the state's interest in protecting the reputation of its citizens.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY HELD THAT SECTION 10-4 OF THE LIBEL REFORM ACT IS UNCONSTITUTIONAL.

A. The Court Of Appeals Erroneously Concluded That Section 10-4 Of The Libel Reform Act Violates Art. I, sec. 12, Of The Gotham State Constitution.

Article I, sec. 12, of the Gotham state constitution provides that "[e]very person for an injury done him in his lands, goods, person or character, shall have a remedy by due course of law." The controversy presented to this court concerns § 10-4 of the Libel Reform Act (hereinafter also referred to as the "Act"), which allows a defendant in an action for damages to convert the action into one for declaratory judgement. Once converted, a plaintiff cannot recover monetary damages. In its majority opinion, a divided Court of Appeals held that § 10-4 violated Art. I, sec. 12 of the Gotham state constitution because that section deprived plaintiff of a "meaningful remedy for his injuries." Bruce Wayne v. The Gotham Daily News, No. 89-999, slip op. at 1 (Gotham Ct. App. April 10, 1989), cert. granted, ___ Gotham ___. However, as discussed below, the court erred in this conclusion by misreading both the only case cited as authority and the Gotham state constitution.

The relevant inquiry is whether Art. I, sec. 12, of the Gotham state constitution limits the state legislature's ability to modify the common law of defamation; this is an issue of first impression in this jurisdiction. Id. at 4. The Court of Appeals looked to other jurisdictions for guidance but relied exclusively on Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978), to support its conclusion. Bruce Wayne, slip op. at 4.

The plaintiff in Madison instituted an action based on defamation without first demanding a retraction from the offender, as required by the challenged statute, and the trial court dismissed the suit pursuant to the terms of the statute. On appeal, the court overruled the dismissal, holding that the retraction prerequisite denied the plaintiff access to the courts for redress of an injury to his character, thus violating Minnesota's constitutional guarantee of access to the courts for injuries to character. Madison at ____ , 589 P.2d at 131. Madison would arguably apply to this case if the issue was whether § 10-2 of the Act, which sets forth retraction-demand requirements for purposes of the Act, denied respondent a judicial remedy for injury to his character. Since the case at bar involves whether and to what extent the state legislature may modify the remedies available for common law actions as it did in § 10-4, and not whether retraction-demand prerequisites for libel actions are constitutional, the Court of Appeals misread the only authority on which it relied in and thus erroneously held § 10-4 unconstitutional.

As Judge Penguin pointed out in his separate opinion concurring in the judgement below, the majority also misread the Gotham state constitution. The declaratory judgement proceeding provides a remedy for the defamed plaintiff "through a judicial declaration of the falsity of the defendant's statement." Bruce Wayne, slip op. at 7-8. In Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), the Idaho Supreme Court held that

a statutory cap on medical malpractice claims did not violate the Idaho state constitutional guaranty of a remedy for injury to one's person. The court reached this conclusion by first ruling that state constitutions do not preserve all pre-existing common law actions, recognizing that ruling otherwise would:

hold that the common law as of [the date the state adopted its constitution] governs the health, welfare and safety of the citizens of this state and is unalterable without constitutional amendment.

Id. at ___, 555 P.2d at 404. Thus, a statute does not fall as unconstitutional merely because a state legislature modifies a common law right of action or remedy recognized in the constitution. Id. at ___, 555 P.2d at 405. The court's role is to examine such modifications to ensure continuing consistency with state constitutional provisions. Id.

Despite the majority holding § 10-4 unconstitutional because it deprived a defamed plaintiff of any "meaningful remedy", Bruce Wayne, slip op. at 5 (emphasis added), the word "meaningful" appears nowhere in the interpreted section of the Gotham constitution. What the constitution requires is simply a remedy from a state court when the court finds injury to character. Section 10-4 does not deprive any defamed plaintiff access to the courts nor to a judicial remedy. It merely allows someone other than the defamed plaintiff the option of choosing a declaratory judgement as that remedy.

B. Section 10-4 Of Gotham's Libel Reform Act Is Constitu-

tional Under The Fourteenth Amendment Of The United States Constitution.

1. Section 10-4 Fulfills The Requirements Of The Due Process Clause Of The Fourteenth Amendment.

The Fourteenth Amendment provides:

No state shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court of Appeals did not evaluate § 10-4 in light of the Fourteenth Amendment because it held that that section violated the Gotham state constitution. Bruce Wayne, slip op. at 5. However, Judge Penguin did reach this issue in his concurring opinion, concluding that the section violated the Due Process Clause. Judge Penguin argued that even though "reputation is not a property or liberty interest encompassed within the protections of the Due Process Clause", citing Paul v. Davis, 424 U.S. 693 (1976), § 10-4 nevertheless deprived respondent of other property interests, namely his cause of action and his job. Bruce Wayne, slip op. at 8.

The Supreme Court has often applied the Due Process Clause to statutory limits on liability. As long ago as 1929 the court upheld a state statute granting owners and operators of automobiles immunity from negligence in actions for personal injuries of guests riding in their cars. Silver v. Silver, 290 U.S. 117 (1929). In Silver the court explicitly recognized that:

the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective. Id. at 122.

Subsequent cases elaborating on the Due Process Clause hold that due process demands only that the challenged law not be unreasonable, arbitrary or capricious, and requires that the means selected have a real and substantial relation to the object sought to be attained. Nebbia v. People of State of New York, 291 U.S. 502 (1934). In West Coast Hotel v. Parrish, 300 U.S. 379 (1937), the court added that confining any modifications of common law actions or remedies to the classes of people where the need is the greatest did not offend the Due Process Clause.

Section 10-4 satisfies the due process requirements of the Fourteenth Amendment. The Act's purpose, as stated in its preamble, is to "provide an efficient and speedy remedy for defamation." In Martinez v. State of Cal., 444 U.S. 277, 282 (1980), the court stated:

[the] State's interest in fashioning its own tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizens from state action that is wholly arbitrary or irrational.

Generally, the Act provides for two types of actions for defamation, those for money damages and those seeking declaratory judgements. Section 10-4 allows the defendant in a defamation action the option of converting it into a declaratory judgement. Thus if either party in a defamation action prefers declaratory judgement, such will be the type of action.

Section 10-3(E) of the Act provides that courts must try declaratory judgement defamation actions within 120 days of the filing of the complaint. Also, by their very nature, declaratory

judgement actions eliminate the expenses of discovering and proving (or defending) the amount of damages suffered by the plaintiff. These reductions in time and expenses in defamation lawsuits clearly fulfill the avowed goals of the Act.

Furthermore, § 10-4 offers the option of using this faster, more efficient remedy to defendants as well as plaintiffs, providing due process to both parties in defamation actions. Thus because there is a rational relationship between the Gotham legislature's purpose of providing a speedy and efficient remedy for defamation, and the practical effects of the statute, as required in Nebbia and Martinez, and because the Act limits its modification of the common law to the classes of people directly involved in defamation actions, as allowed in West Coast Hotel, § 10-4 fulfills the requirements of the Due Process Clause.

In arguing that § 10-4 denies defamed plaintiffs due process, Judge Penguin's arguments paralleled those of the plaintiff in Martinez. In that case the plaintiff argued that a parole officer's decision to parole a convicted rapist resulted in plaintiff's decedent being tortured and killed. The plaintiff attempted to sue for damages, but a statutory grant of immunity covering the parole officer for his official acts prevented any such suit. The plaintiff argued that such statute deprived the decedent of her life as protected by the Due Process Clause. Martinez, 444 U.S. at 281. Likewise, Judge Penguin argues that § 10-4 allows defendants to deprive plaintiffs of property. Bruce Wayne, slip op. at 8.

The court's response to the plaintiff's misconceived argument in Martinez is equally applicable to Judge Penguin's likewise erroneous conclusion:

A legislative decision that has an incremental impact on the probability that death [or defamation] will result in any given situation...cannot be characterized as state action depriving a person of life [or property] just because it may set in motion a chain of events that ultimately leads to the random death [or slander] of an innocent bystander.

Martinez, 444 U.S. at 281. Therefore, § 10-4, when properly evaluated by looking only to its own merits, and not in conjunction with any "chain of events" it may set off, passes scrutiny under the Due Process Clause.

2. Section 10-4 Fulfills The Requirements Of The Equal Protection Clause Of The Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment seeks to ensure that state legislation treats all persons similarly situated in a like manner. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The first issue in an equal protection challenge is, therefore, the proper standard of review.

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Id. at 440 . Statutes which classify people based on race, alienage or national origin, and state laws that infringe on personal, Constitutionally protected rights, are an exception to the general rule and courts must strictly scrutinize their

constitutionality. Id.

Since the Act does not fall within any of the categories of exceptional statutes subject to strict scrutiny, the proper standard of review is whether the Act is rationally related to a legitimate state interest. Id. Judge Penguin agreed that this was the proper standard, relying on Quinn v. Millsap, __ U.S. __, 109 S.Ct. 2324 (1989). Bruce Wayne, slip op. at 8.

The next step in reviewing statutes for equal protection purposes is to examine whether the challenged statute meets the appropriate standard of review. In this case § 10-4 must be "rationally related to a legitimate governmental purpose." City of Cleburne, Tex., 473 U.S. at 446.

The first issue arising under this standard is whether affording a speedy and efficient remedy for defamation is a legitimate state interest. Id. at 447. As fully discussed in the Due Process argument connected with Nebbia and Martinez above, states have as a very legitimate purpose the task of keeping their common law current with society's present needs.

The next issue under this standard is whether the statutory classification of the Act between defamed plaintiffs and all other plaintiffs is rationally related to the state's legitimate interest. Judge Penguin argued that § 10-4 failed this test. He viewed the classification as arbitrary and irrational because it gave the choice of remedy to the media defendant. However, Judge Penguin's conclusion is not consistent with other Equal Protection cases involving such classifications, most notably

Duke Power Co. v. Carolina Env'tl. Study, 438 U.S. 59 (1978).

Duke Power involved a challenge to the Price-Anderson Act, a federal law capping damages recoverable by persons injured as a result of nuclear power plant accidents. In addressing the plaintiff's equal protection argument, the court found "ample justification" for different treatment of plaintiffs injured in nuclear accidents and all other plaintiffs, by looking at the stated purpose of the act, which was to encourage private parties to produce nuclear power. Id. at 93.

The preamble to Gotham's Libel Reform Act states that the Act is a legislative effort to provide parties to a defamation action a speedy and efficient recovery. Including under this Act any persons not parties to a defamation action would not fulfill the purpose of efficiently and speedily resolving charges of defamation. Including plaintiffs in lawsuits concerning fiduciary duties of corporate directors in the classification under the Act is one of many examples of how the legislature could have responded to its stated purpose in an irrational way. This they did not do. Section 10-4 therefore fulfills the requisites under the Equal Protection Clause for the same reasons the Price-Anderson Act did as analyzed in Duke Power.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT IN A DEFAMATION ACTION A PUBLIC OFFICIAL PLAINTIFF CAN RECOVER MONETARY DAMAGES FROM A MEDIA DEFENDANT WITHOUT PROVING FAULT.

A. The Court Of Appeals Incorrectly Held That New York Times Co. v. Sullivan And Its Progeny Did Not Create A Constitutional Rule Requiring Proof Of Fault In Order To Recover Damages.

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court, for the first time, brought defamatory statements within the realm of first amendment protection, thereby limiting a state's power to formulate its own defamation law. Specifically, the Court held that a public official could not recover from a media defendant without proving "'actual malice'-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280.

In so holding, the Court established a constitutional law requiring fault to be shown in an action for defamation:

[t]he constitutional guarantees requires, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'. . . Id. at 279.

Many decisions handed down by the Court since Sullivan refer to the requirement of proving fault as a constitutional law. See Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 (1984); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774, 776 (1986).

Although the Court's holdings since Sullivan have diminished media protection, the Court still requires, by clear and convincing evidence, a minimal showing of fault in all defamatory cases, and a showing of "actual malice" in cases involving public officials. The Court has extended the Sullivan standard to include "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S.

29, 69 (1971) (Harlan, J., dissenting). When the plaintiff is a private figure "actual malice" need not be shown to recover actual damages, but must be proven for presumed and punitive damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49 (1974). However, states cannot award actual damages without a minimal showing of fault. Id. at 347. When the defamatory statement is between private parties and concerns private matters, no showing of "actual malice" is required to recover actual damages or presumed and punitive damages. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1984). Once again, the Court reiterated that no damages could be awarded without proving fault, even though fault could be based on a showing lesser than "actual malice." Id. at 755. Finally, the Court extended the Gertz standard to require a showing of falsity, in addition to showing fault, to recover any type of damages. Philadelphia Newspapers, 475 U.S. at 776.

Clearly, Sullivan and its progeny created a constitutional requirement of having to prove fault in a suit for defamation. Although the degree of fault varies as to the parties and the nature of the issue involved and the type of damages sought, in no instance may damages, whether actual or punitive, be awarded without a showing of some fault.

B. At The Time Of Publication, Respondent Was A Public Official Acting In His Official Capacity, Thereby Triggering The Sullivan Standard.

In determining the standard of fault to apply, the court must ask two questions regarding Respondent. First, is

Respondent a public official or public figure; and secondly, if a public official, were Respondent's alleged actions carried out in his official capacity. If the answer to both questions is "yes", then the Sullivan standard must be applied forcing Respondent to prove "actual malice."

Without any doubt, Respondent is either a public official or a public figure. Whether he is a public official or public figure is irrelevant because after Curtis Broadcasting the Sullivan standard became applicable to both classes of individuals. As chairman of the Governor's Task Force to Restore and Promote Family Values, Respondent is a public official. Bruce Wayne v. The Gotham Daily News, No. 89-999, slip op. at 1, (Gotham Ct. App. April 10, 1989), cert. granted, __ Gotham __ (1989). Respondent must be considered a public official because he is an employee of the State of Gotham and appears to be in a position to control governmental affairs. See Curtis Broadcasting, 388 U.S. at 135 (holding Respondent, an athletic director at a state university, was not a public official because he was employed by a private corporation and not by the state); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (stating "that the 'public official' designation applies to the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs").

In the alternative, Respondent qualifies as a public figure because he "commanded a substantial amount of independent public

interest at the time" the article was published. Curtis Broadcasting, 388 U.S. at 154. Likewise, by accepting the Governor's invitation to chair the Task Force, Respondent voluntarily entered the public arena to take on a public issue, thereby assuming the risk of defamation. Id. at 155. In his concurring opinion, Chief Justice Warren defined public figures as those "who do not hold public office at the moment [but] are nevertheless involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Id. at 164 (Warren, C.J., concurring). See Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (holding that Firestone's wife was not a public figure because of her highly publicized divorce because she did not voluntarily enter the public spotlight to resolve or influence some social issue).

Although Respondent's alleged criminal actions took place in the privacy of his own home and were unrelated to any official Task Force business, his actions must be considered to have occurred in his official capacity as chairman of the Task Force and are of public interest. Bruce Wayne, slip op. at Appendix A. The Court has held that when determining whether the Sullivan standard is to be applied to a public official "anything that might touch on [his] fitness for office is relevant" regardless of whether his "private reputation, as well as his public reputation is harmed". Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Furthermore, the Court has held:

as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an officials or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of New York Times. Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).

C. The First Amendment Interest In Protecting Media Self-Censorship Outweighs The State Of Gotham's Interest In Protecting The Reputation Of Its Citizens.

States have a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." Gertz, 418 U.S. at 348. On the other hand, the first amendment has an interest in "assur[ing] the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. U.S., 354 U.S. 476, 484 (1957). By weighing these interests against each other, the Court attempts to determine the proper degree of protection afforded each interest, depending on the parties involved and the issue at hand.

Since the case at bar is identical to Sullivan in that a public official has been accused of criminal activity by the media the first amendment's interest in protecting against media self-censorship outweighs the state's interest in protecting the reputation of its citizens. Therefore, Respondent must meet the constitutional requirement and show that Petitioner published the article "with knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 280. A lesser showing would result in media self-censorship against the first amendment's intent of conveying "uninhibited,

robust, and wide-open" debate on public issues. Sullivan, 376 U.S. at 270.

Whenever a public official brings a defamation suit against a media defendant and the issue involves a public concern, the Court will hold that the first amendment interest outweighs the state's interest and grant the media as much protection as possible without granting absolute immunity. Gertz, 418 U.S. at 342; Rosenbloom, 403 U.S. at 44; Sullivan, 376 U.S. at 279-80. A state's interest in protecting public officials is diminished because the officials have voluntarily assumed the risk of public scrutiny and they have greater access to the public, through the media, to rebut any defamatory comment. Gertz, 418 U.S. at 344-45. On the contrary, a private individual has limited access to openly rebut a defamatory comment, thus increasing the state's interest in protecting them. Dun & Bradstreet, 472 U.S. at 756.

Similarly, the first amendment's interest in protecting the media is enhanced when statements are made concerning public officials and public issues. Sullivan, 376 U.S. at 279-80. A showing of anything less than "actual malice" by a public official would result in media self-censorship. Philadelphia Newspapers, Inc., 475 U.S. at 777; Garrison, 379 U.S. at 74; Sullivan, 376 U.S. at 279. Without having to prove "actual malice," the burden of proof would shift to the media defendant and force them to prove the published statement was true. Philadelphia Newspapers, Inc., 475 U.S. at 777. This would place an unreasonable burden on the media to research every detail to

ensure its accuracy before publication for fear of being held liable and at the discretion of a jury. Id.; Gertz, 418 U.S. at 349; Garrison, 379 U.S. at 74; Sullivan, 376 U.S. at 279.

To protect against self-censorship, the Court continues to hold that the media's negligence and failure to investigate the accuracy of all statements insufficient to prove "actual malice." Curtis, 388 U.S. at 142. Also, the Court continues to recognize that errors of fact are inevitable, and "calculated falsehoods" must be allowed to be published in order to give the media the "breathing space" necessary to carry out the intent of the first amendment. Gertz, 418 U.S. at 340; Time, Inc. v. Hill, 385 U.S. 374, 387 (1966); Garrison, 379 U.S. at 74-75; Sullivan, 376 U.S. at 271-72. Thus, the fact that Petitioner did not check the accuracy of the article or published the article as a "calculated falsehood" does not establish "actual malice."

In determining whether the media knew the statement published was false or published in a reckless manner, the Court must focus on the state of mind and conduct of the press, rather than its attitude. Herbert v. Lando, 441 U.S. 153, 160 (1979); Curtis Publishing, 388 U.S. at 153, 157; Sullivan, 376 U.S. at 287. Thus, the fact that Respondent had sentenced the author of the article to jail is irrelevant because it shows Petitioner's attitude toward Respondent, rather than Petitioner's state of mind at publication. Furthermore, section 10-5(D) of the Gotham Libel Reform Act, which limits recovery to "reasonable compensation based on pecuniary damages" does not eliminate the

problem of media self-censorship, because individuals would not be deterred from filing defamation actions against the media and the media could still be held liable without a showing of fault. Bruce Wayne, slip op. at Appendix B.

D. De Novo Review Is The Correct Standard Of Review.

In deciding first amendment decisions, the Court must review the record de novo "to assure [them]selves that the judgment does not constitute a forbidden intrusion of the field of free expression." Sullivan, 376 U.S. at 285. More recently, the Court reiterated that "independent appellate review . . . is a rule of federal constitutional law" and must be applied when a showing of "actual malice" is required. Bose, 466 U.S. at 510-11. Specifically, the Bose court held:

[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors to the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." Id. at 511.

CONCLUSION

For the reasons set forth above, we respectfully request the Supreme Court to reverse the ruling of the Court of Appeals that section 10-4 of the Gotham Libel Reform Act is unconstitutional and reverse the ruling that section 10-5 of the Gotham Libel Reform Act is constitutional.

Respectfully submitted,

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Counsel for Petitioner