QUESTIONS PRESENTED

Whether the enhanced appellate review reiterated in *New York Times Co. v. Sullivan* is required for First Amendment protection in a defamation case with a private plaintiff and non-media defendant.

Whether it is negligent within the protections of the First and Fourteenth Amendments for a mother to privately share concerns to another mother about pornographic affiliations of a gymnastics facility that advertises false credentials and posts pictures of themselves online at the Playboy mansion.

Whether the First and Fourteenth Amendments require the application of the "different effects" test, as adopted in *Masson v. New Yorker Magazine,* to a denial of a defamation claim on the basis of substantial truth.

LIST OF PARTIES

Petitioner, Jodi A. Smith was the plaintiff/counter-defendant in the Circuit Court Case 2015 CA 5720, and appellant in the Second District Court of Appeal Case 2D17-3288.

Respondents, Lakewood Ranch Gymnastics LLC, Laura Parraga, and David Parraga were the defendants/counterclaimants in the Circuit Court Case 2015 CA 5720, and the appellees in the Second District Court of Appeal Case 2D17-3288.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no corporate affiliations.

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OPINIONS BELOW

The Twelfth Judicial Circuit Court entered a written opinion with its judgment on June 16, 2017. The motion for rehearing was denied on July 10, 2017.

The Second District Court of Appeal affirmed the judgment without written opinion on June 20, 2018. The motion for rehearing en banc and for written opinion was denied on August 7, 2018.

JURISDICTION

The Florida Appellate Court entered its decision per curiam affirmed on June 20, 2018, and denied the request for a rehearing and request for a written opinion on August 7, 2018.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I

> 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.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

STATEMENT OF THE MATERIAL FACTS

Petitioner, Jodi A. Smith ("Smith"), is a mother of a young female gymnast. She had her daughter training at the gymnastics facility, Lakewood Ranch Gymnastics LLC ("LWRG") that falsely advertised on its website that one owner of the facility, David Parraga, was a Pan American Games All-Around Champion as well as a gold medal winner on two events at the men's World Gymnastics Championships. The website also detailed Laura Parraga ("Parraga")(collectively "Respondents") as a former Atlanta Falcons cheerleader.

After a year at the gym, and in an effort to find the year David Parraga made his remarkable achievements, Smith reviewed the internet, but could find nothing about him except pictures of he and his wife, Laura, at a Playboy function. Smith became concerned about exposure of pornography to children because gyms had been in trouble locally and nationally for similar things. Smith also saw that Parraga, a former Falcons cheerleader, was friends on Facebook with Tiffany Fallon, another Falcons cheerleader, who had a Playboy

bunny under her name. Smith, associating Parraga to Playboy and being a Falcons cheerleader, typed into Yahoo, an internet search engine, the words, Playboy, Falcons, and cheerleaders. The search results revealed "NFL cheerleaders in the buff or something like that." Smith tapped the link and it revealed a nude image of a woman she could not identify, but she believed had familiarity and similar facial features to Parraga. Smith was "terrified" and took a photograph of the face of the woman with her cell phone. (App. 39-41a).

Smith, in continuing conversations about concerns of the facility where the children trained, talked privately to two of her closest friends at the facility about her inability to find anything about David Parraga's credentials and the pornographic affiliations. (App. 41a).

After a period of two weeks, a meeting was held with Respondents. At the close of the meeting, all parties agreed to part ways and shook hands. However, immediately after the meeting Parraga decided a post on Facebook to over one hundred other mothers that Smith was spreading lies about David Parraga's credentials and Parraga being associated with Playboy among other things. (App. 41-42a).

Smith filed suit in state court for defamation, misrepresentation, and false advertising. Respondents filed a counterclaim for defamation and tortious interference. After a three-day non-jury trial, the trial court, through written opinion, entered judgment denying all of Smith's claims, and entered judgment for Respondents for

defamation per se. (App. 1a). After denying Smith's motion for rehearing, Smith appealed. (App 30a). After full briefing and oral argument, the judgment was affirmed without opinion by the appellate court. (App 31a). Smith sought rehearing en banc and made request for written opinion. Both motions were denied summarily. (App. 32a).

In finding liability for defamation, the trial court found Smith made false statements of fact set forth in requests for admissions, deposition transcripts, her testimony, text messages, and a recorded conversation. (App 16a, 26a). However, none of the statements, as quoted by the court, ever appear in the record. (App 43a-52a). Further, the trial court concluded she made the defamatory statements with negligence. (App 25a). In denying Smith's claim for liability the court found the Facebook post made about her was substantially true. (App 14-17a).

On appeal, Smith argued the appellate court had an obligation to review the entire record on appeal to assure that she was not denied First Amendment protection by being held liable for statements that did not exist. (App 43a-52a). She also argued to the trial court and appellate court that any statement she made was not negligent (App 33-35a)(App 59-62a), and that the court failed to apply the different effects test under *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). (App 35-38a)(App 62-65a).

REASONS FOR GRANTING THE WRIT

This Court, at this time when protection of

children is a prominent issue[1], should grant this writ of certiorari to clarify whether there is an obligation in a purely private matter for a reviewing court to look at the entire record to assure First Amendment protection; define for parents what is negligent under the First Amendment when concerns arise about the safety and welfare of children; and whether the "different effects" test is required under the First Amendment for a purely private matter in a determination of substantial truth.

a. Enhanced Appellate Review

In *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), this Court adopted an enhanced appellate review of the evidence in "proper cases" stating, "We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

In *Bose Corp. v. Consumers Union of United States, Inc.,* 466 US 485, 499 (1984), it was held, "in

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[1] The federal government has instituted new federal regulation regarding reporting suspected abuse. *https://www.congress.gov/bill/115th-congress/senate-bill/534/text?format=txt.* And, as of March 2017, the new United States Center for Safesport has implemented new procedures and programs to encourage parents and others to speak up about abuse in order to protect our children. See *https://usagym.org/pages/education/safesport/*.

cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." This Court explained, "This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of "unprotected" speech." *Id* at 503. Libelous speech has been held to constitute one such category. *Id.*

The enhanced review has been reiterated by this Court in numerous other cases, but they generally involve the review of the record to determine whether a defendant is either a "public official" or "public figure" for purposes of whether to apply the "actual malice" standard. See *Bose*; *Snyder v Phelps*, 131 S. Ct. 1207 (2011); and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

However, this Court has not specifically addressed whether the enhanced review is required in a case of a private plaintiff and non-media defendant. The case provides the perfect opportunity for this Court to clarify this Constitutional protection is deserving to private citizens because private individuals are more vulnerable to injury than public officials and public figures. See *Gertz v. Robert Welch, Inc.,* 418 U.S. 322, 345 (1974). Further, "In libel cases, … we

view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but … would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia, Inc.,* 403 U. S. 29, 50 (1971).

In this case, Smith was found liable by the courts for "unprotected" libelous speech. The Circuit Court found Jodi liable for statements that she told, or suggested, Laura was in Playboy, accused the Respondents of cheating at gymnastics competitions, that they may have used drugs or been under the influence, and had misused money from other parents. (App 15-16a and 25-26a) The Court specifically stated the Playboy statement was derived from requests for admissions, her testimony and her deposition transcript. The remaining statements were derived from text messages and the recorded conversation played into the record. A review of the evidence specifically identified by the Court finds no support for the court's determination that Smith made these alleged false statements of fact. Further, the statements she did make on these topics were isolated by the court and taken completely out of context. And, the court failed to evaluate the cautionary statements, medium of the communications and the perception of the audience to whom she spoke. (App 43-59a).

On appeal, Smith argued the Second District Court of Appeals was required to review the entire record so that her First Amendment rights were not violated, and detailed all of the specific

evidence to reveal no such statements existed. (App 43a). The Second District Court upheld the judgment without opinion for defamation although not a single false statement of fact was supported in the record. (App 31a).

If this Court applies the enhanced appellate review to private plaintiff, non-media defendant cases it would protect those most vulnerable to injury and negate the strong impetus in place for self-censorship which cannot be tolerated under the First Amendment.

b. Negligence

"It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co.* v. *Superior Court,* 457 U. S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts,* 321 U. S. 158, 168 (1944)." *New York v. Ferber*, 458 U.S. 747, 756-7 (1982).

Under Florida defamation law, a private plaintiff must prove a statement was made with negligence. *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098 (Fla. 2008). This Court has yet to provide a constitutional definition of negligence, although in *Gertz*, this court adopted a negligence standard in defamation cases between a private plaintiff and media defendant.

This case presents a perfect opportunity for this court to define "negligence" as it applies under the First and Fourteenth Amendments. If it is a "reasonable person" standard, then in light of the concern our society places on the protection of children, the question begs:

> Is it reasonable for a mother who suspects a gymnastics facility is lying about their credentials, posting pictures of themselves at the Playboy mansion, has concerns about children being hurt, and sees similarities between Parraga and an internet picture, to discuss these matters privately with her two other concerned mothers who share similar concerns with each other daily?

The problem lies in exactly what this Court has struggled with on prior occasions. "The reasonable-care standard is "elusive," *Time, Inc.* v. *Hill, supra,* at 389; it saddles the press (or in this case Smith) with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."" *Gertz* at 366. Further, "the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' … which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail" *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971)." *Id.* at 367. And, this is exactly what the Circuit Court did to Smith in this case by taking vague generalities

about her unpleasant communications about the Respondents and converting them into liability without any explanation other than to state it was negligent.

"It is perhaps unavoidable that in the area of tension between the Constitution and the various state laws of defamation there will be some uncertainty as to what publications are and what are not protected … "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law." *St. Amant* v. *Thompson,* 390 U. S. 727, 730-731." *Monitor* at 276.

The importance here is that without a clear defined standard of what constitutes First Amendment negligence parents with children in organized youth athletics, who now under federal law have an obligation to report suspicions, could be subject to liability if they discuss suspicions privately that may end up not being 100% true. It is imperative this Court provides guidance through this case to provide that outer limit on the elusive standard of First Amendment negligence.

c. "Different Effects" Test

In *Masson* v. *New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991), this Court concluded that a deliberate alteration of the words uttered by a plaintiff do not equate with knowledge of falsity for purposes of *Sullivan* and *Gertz* "unless the

alteration results in a material change in the meaning conveyed by the statement." "Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, Libel, Slander, and Related Problems 138 (1980)" *Id.*

The question unresolved in *Masson* is whether the "different effects" test falls within the ambit of the First Amendment. It appears from the holding that the test for substantial truth is perhaps limited to determinations of "actual malice." However, by this Court specifically referencing *Gertz*, it appears the "different effects" test is required for all determinations under the First Amendment where substantial truth is raised.

In *Smith v. Cuban American Nat. Foundation*, 731 So. 2d 702, 707 (Fla. 3d DCA 1999), the Florida Court specifically stated, "the U.S. Supreme Court decision in *Masson v. New Yorker Magazine,* 501 U.S. 496 (1991), which specifically addresses substantial truth, and brings it into the ambit of constitutional law."

This case is an excellent case for this Court to provide guidance on this issue. The Facebook post made by Parraga included a portion which stated, Smith was a "liar" spreading untruths about David Parraga's credentials.

Parraga then stated:

> She (*Smith*) is telling people that David has said he was a world champion gymnast. Which was NEVER said. What he is is a Specialty Worldwide Champion for those athletes that did not compete All-Around; (App 63a).

Similar to *Masson*, we are dealing with quotations attributed to an author. In *Masson*, this Court evaluated the statements attributed to determine if they had a different effect than what was actually spoken. Here, Parraga attributed to Smith, "She is telling people that David has said he was a world champion gymnast." Here, Parraga is attributing to Smith a statement that she made on her website. Then, Parraga follows with additional false statements about David Parraga's credentials and denies her own statements on her website ever existed.

In a twist, the Circuit Court determined that this Facebook post about Smith was substantially true without any application of the "different effects" test. If the court had applied the test, if required under the First Amendment, it would have determined that if the truth was told, the effect on the mind of the reader would change because the truth was Respondents, not Smith, were disseminating false information about David Parraga's credentials, not only in their many promotional materials, but within the FB Post itself. Under the "different effects" test, this portion of the FB Post was not substantially true.

As such, Smith requests this Court review this matter to clarify the scope of the proper application of the "different effects" test as it applies to substantial truth under the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Petitioner requests this petition for writ of certiorari be granted.

Respectfully submitted,

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