No. 15-1103

IN THE

Supreme Court of the United States

DONALD THOMAS SCHOLZ, ET AL.,
Petitioners,

v.

MICKI DELP, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONERS

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Dated: May 10, 2016

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INTRODUCTION

Respondents Micki Delp and The Boston Herald make little effort to dispute that the SJC's decision warrants this Court's review if Petitioners' description of the decision is correct. Instead, they characterize as dicta the SJC's categorical presumption that statements about the motive for suicide are opinions exempted from defamation actions by the First Amendment. Herald BIO 25 n.7. They assert that the SJC's decision instead relied on independent and adequate state-law grounds. *Id.*; Delp BIO 13-15. Respondents are incorrect.

The linchpin of the SJC's decision was the categorical presumption it adopted. The SJC opined that "[o]rdinarily, ascertaining the reason or reasons a person has committed suicide would require speculation" and demanded "manifestly clear and unambiguous" proof of "the motivation for a suicide." Pet. App. 15a. (Tellingly, The Herald relegates the SJC's "manifestly clear and unambiguous" standard to a footnote. Herald BIO 25 n.7.) The SJC thus disposed of the case at the summary judgment stage, without assessing the evidence presented by Petitioner.

There was no independent and adequate state-law ground that justified the SCJ's categorical presumption. And the SJC's decision cements a longstanding conflict on an important question of federal law that warrants this Court's review.

I. The SJC's Decision Was Predicated on a Categorical Presumption Under the First Amendment That Statements About Motives for Suicide Are Immune from Defamation Claims.

1. The Herald contends that rather than adopting a categorical presumption, the SJC applied the rule from *Philadelphia Newpapers, Inc. v. Hepps*, 475 U.S. 767 (1986), "affirmed in *Milkovich* that 'a statement on matters of public concern must be provable as false before there can be liability. . . .'" BIO 25 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)). *See also* Delp BIO 10-11. But the SJC's "application" of the *Hepps-Milkovich* rule demonstrates the SJC's reliance on the very categorical presumption the Herald says is dictum.

That categorical presumption was the sole basis for the SJC's conclusion, at the summary judgment stage, that the statements at issue were not provably false and were therefore exempt from defamation claims under the *Hepps-Milkovich* rule. The SJC made no attempt to evaluate the record. It simply asserted that this case is not among the rare cases where proof of the cause of suicide is "manifestly clear and unambiguous." Pet. App. 15a. And it quoted the categorical conclusion of the District of Massachusetts that "the interpretation of another's motive does not reasonably lend itself to objective proof or disproof." *Id.* at 16a (quoting *National Ass'n of Gov't Employees Int'l Bhd. of Police Officers v. BUCI Tel., Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000)).

The Herald nonetheless contends that the SJC's decision was rooted in the record. BIO 6-7, 33. For this, the Herald depends entirely on the SJC's

observation that "*the Superior Court* relied heavily on [the] record." BIO 33 (citing Pet. App. 47a) (emphasis added). But even the *Superior Court's* "application" of the *Milkovich-Hepps* rule was based on a categorical presumption, not its evaluation of the record, in which that court engaged for a different purpose. Pet. App. 78a n. 4. The Superior Court noted Petitioners' "amassing of powerful evidence of [Brad Delp's] mental state" (*id.* at 53a), including the severe emotional turmoil caused by the incident with Meg Sullivan, but that court held that, because "Delp's final mental state is truly unknowable[,] it can never be objectively verified," making it "impossible to disprove the proposition that [Scholz] was the actual cause of [Brad Delp's suicide." *Id.* at 74a. *See also id.* at 79a (citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). The SJC then applied exactly the same approach.

2. Respondents' recitation of evidence purportedly showing Brad Delp's quarrels with Scholz (Herald BIO 12-15; Delp BIO 5-6) merely underscores the SJC's reliance on a categorical presumption – a categorical presumption that alone can explain the SJC's failure itself to *evaluate* this evidence or even to permit a jury to evaluate it at trial – much less compare it to powerful evidence that Delp's multiple suicide notes did not reference Scholz, that his communications showed that Delp was not upset about Scholz's actions, and that Delp was severely depressed over the incident with Meg Sullivan. Pet. App. 5a-61, 55a.

3. The Herald cites the SJC's application of the purported rule that *opinions* are nonactionable if they are "based on disclosed nondefamatory facts

that do not imply undisclosed defamatory facts." BIO 23. But the invocation of this supposed "rule" simply proves our point: the SJC was operating according to generic presumptions rather than weighing the specific evidence in the case. Moreover, the SJC applied the Herald's purported rule (Pet. App. 17a, 23a) only *after* it concluded that the Herald's statements blaming Scholz for Delp's suicide were opinions rather than factual statements that could be proven false, a conclusion that in turn depended on the categorical presumption that the SJC adopted. Pet. App. 15a-17a, 23a.

In any event, the Herald's newly minted rule simply underscores the need for this Court's review. The rule directly conflicts with *Milkovich*, which stands for the proposition that "a defamatory assessment of facts can be actionable even if the facts underlying the assessment are accurately presented." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991). It conflicts with cases from other courts as well. *See, e.g., Tatum v. Dallas Morning News, Inc.,* No. 05-14-01017-CV, 2015 WL 9582903 at *11 (Tex. App. Dec. 30, 2015) (rejecting argument that defamatory implications were immunized from liability "if the individual factual statements considered in isolation are literally true.").

4. The Herald asserts that the SJC applied the *Bresler-Letter Carriers-Falwell* line of cases[1] to conclude that the Herald's statements linking Scholz

[1] *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

to Brad Delp's suicide were not factual ones. BIO 24, 29. But the SJC did not even purport to rely on this line of cases in holding that the Herald's statements were not factual. As Petitioners explained with no rebuttal from Respondents (Pet. 32), this line of cases exempts from defamation actions statements such as parodies that are not actually making the factual claims a literal reading would suggest. Pet. 32. Quite to the contrary, the Herald articles were indeed making the factual claims a literal reading would suggest.

That the Herald articles in some places included "cautionary terms," BIO 25, does not change this conclusion. The SJC did not hold that the Herald's occasional use of cautionary terms sufficed to render the Herald's statements non-actionable, and it made no reference to such terms in rejecting the claims against Micki Delp, who used no cautionary terms. Pet. App. 23a. The SJC's decision thus depended on the categorical presumption it adopted.

5. The Herald spends many pages denying that its articles actually blamed Scholz for Delp's suicide and asserting that its articles were fair based on what it knew at the time. *See, e.g.,* BIO 2-3, 7, 16-22. But the Herald acknowledges that these were arguments the SJC *did not reach*. BIO 2, 21-22. It acknowledges that the SJC "assum[ed] *arguendo* that the statements in the Herald articles *could* reasonably be interpreted as 'blaming' Scholz for Delp's decision to commit suicide," BIO 1, 2 (emphasis added). This Court reviews judgments, not opinions – much less alternative grounds that a lower court did not reach.

II. There Was No Independent and Adequate State-Law Ground For the SJC's Decision.

The SJC's reliance on a categorical presumption in applying rules purportedly derived from *Milkovich*, *Hepps* and other First Amendment cases disposes of Respondents' argument that there was an independent and adequate state ground for the SJC's decision. Herald BIO 30-31; Delp BIO 13-15. Respondents also fail to come to grips with the requirements of *Michigan v. Long*, 463 U.S. 1032 (1983). Nowhere did the SJC make the clear statement required to overcome the *Long* presumption that the SJC's decision was based on federal law.

The Herald asserts that there are state law grounds on which the SJC *could have* relied. BIO 30-31. The relevant question, however, concerns the grounds on which the SJC *did* rely. *See, e.g., Harris v. Reed*, 489 U.S. 255, 260 (1989) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). As Petitioners explained, almost all the cases on which the SJC relied are based on the First Amendment. *See* Pet 13 & n. 4.

Respondents note the SJC's citation of *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1164 (Mass. 1993), which relied in part on state law to distinguish actionable from non-actionable opinions. Delp BIO 13-14. But in citing *Lyons*, the SJC purported to be applying *Milkovich* (*i.e.*, federal law), rather than going beyond it. Pet. App. 18a. Before distinguishing actionable from non-actionable opinions, the SJC first applied federal free speech cases to conclude that the statements in question were opinions, not factual statements that could be

proven false. Thus, the SJC relied on the conclusion of the Eighth Circuit that "anyone is entitled to speculate on a person's *motives* from the known facts of his behavior.'" Pet. App. 15a (quoting *Gacek v. Owens & Minor Distrib., Inc.*, 66 F.3d 1142, 1147-1148 (8th Cir. 2012)) (emphasis added). In the Eighth Circuit's view, this is because statements about *motives* cannot generally be proven true or false. The SJC cited the Eighth Circuit's decision in *Gacek* for the same basic rule articulated in *Lyons*, and rooted that rule in the Seventh Circuit's decision in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993), as well as in *Milkovich*. *See* Pet. App. 15a.

Regardless, the SJC's citation of a case like *Lyons* that relied on state as well as federal law does not overcome the *Long* presumption, as *Milkovich* itself made clear. There, Ohio courts cited both the federal and state constitutions in concluding that the article at issue was immunized from defamation actions. But *Milkovich* held that there was not an independent and adequate state ground for the state court decisions, explaining that the Ohio courts "'failed to make a 'plain statement . . . that the federal cases . . . [did] not themselves compel the result that the court reached.'" 497 U.S. at 10 n.5 (quoting *Long*, 463 U.S. at 1040-41). *See also Florida v. Powell*, 559 U.S. 50, 57-58 (2010). Indeed, the *Long* presumption applies "even when, all things considered, the more plausible reading of the state court's decision may be that the state court did not regard the Federal Constitution alone as a sufficient basis for its ruling." *Ohio v. Robinette*, 519 U.S. 33, 44 (1996).

III. This Court Should Grant Review to Resolve a Deep and Abiding Conflict Regarding the Question Presented.

Petitioners identified a profound conflict about whether statements regarding the cause of suicide, and motivation more generally, are categorically presumed non-falsifiable and thus exempt from defamation actions. Pet. 21. Remarkably, Respondents assert that there are no cases on either side of the conflict. Herald BIO 28; Delp BIO 18-21. Respondents are wrong.

1. Respondents contend that there are no cases adopting a categorical presumption that statements about the cause of suicide are non-actionable opinion. The Herald maintains that both the decision below and the Eighth Circuit's decision in *Gacek* "held that the statements in issue were not assertions of fact." BIO 27.

But the decisions manifestly did so based on a categorical presumption. This was true in the instant case, as discussed above. It was also true in *Gacek*. Rather than examining the record to decide whether the relevant statements were opinion, the Eighth Circuit relied on the Seventh Circuit's conclusion in *Haynes*, 8 F.3d at 1227, that "'anyone is entitled to speculate on a person's motives from the known facts of his behavior'" – a rule predicated on the Seventh Circuit's conclusion that motives "can never been known for sure," and thus that "speculation" about motives "from known facts" cannot be actionable. *Id.* In the Seventh Circuit's view, statements about motives simply are not statements "that the plaintiff might be able to prove false in a trial.'" *Id.*

The First Circuit's decision in *Yohe v. Nugent*, 321 F.3d 35, 40 (1st Cir. 2003), is to the same effect. Like *Gacek* (and the decision in this case), *Yohe* barred a defamation action because it concluded that an assertion about the state of mind of a potential/actual suicide victim was a statement of opinion.

2. Respondents also assert that there are no cases on the other side of the conflict. They do not dispute, however, that *MacRae v. Afro-American Co.*, 172 F. Supp. 184 (E.D. Pa. 1959), *aff'd* 274 F.2d 287 (3d Cir. 1960), and *Rutt v. Bethlehems' Globe Publ'g. Co.*, 484 A.2d 72 (Pa. Super. 1984), permitted defamation actions about statements attributing blame for suicides. These decisions thus did not apply a categorical presumption against such actions. And *MacRae* specifically rejected the contention that the defamatory statements cited in the article at issue were non-actionable because they "were described as 'rumors' and 'whispers' instead of facts." 172 F. Supp. at 187.

Tatum v. Dallas Morning News also held that statements attributing blame for a suicide could be subject to a defamation action. In asserting otherwise, the Herald simply repeats a distinction drawn by the *Tatum* court, BIO 28 (citing *Tatum*, 2015 Tex. App. LEXIS 13067, at *44), while ignoring Petitioners' explanation as to why that distinction is untenable. Pet. at 25-26, 27 n.7. *Tatum* held viable plaintiffs' claim that they were defamed by the implication that they were to blame for their son's suicide, and it held that in assessing the claim, the factfinder could evaluate why the Tatums' son took his own life. 2015 WL 9582903, at ** 1, 7, 10-12, 15.

Tatum declined to follow the cases on which the SJC relied. Pet. 26-27.

3. Respondents ignore Petitioners' demonstration that the SJC's decision takes one side in a larger, longstanding conflict about two matters of surpassing importance to people throughout the history of human civilization: what led someone to commit suicide and, more generally, why did someone take a particular course of action? Numerous courts have held that statements of motive are non-verifiable and therefore non-actionable in contexts beyond suicide, and the SJC repeatedly relied on these decisions. Pet. 22-23. But the majority of courts have concluded that statements regarding motive, both in the suicide context and elsewhere, are verifiable and thus can be the basis of a defamation claim. Pet. 27.

4. The Herald attempts to minimize the importance of the conflict by arguing there are a relatively limited number of defamation claims related to motivation for suicide. BIO 31. But that attempt at minimizing the significance of such particularly painful forms of defamation flies in the face of fact: Petitioners have shown multiple conflicting cases related to suicide. Three of those cases (*Scholz*, *Gacek*, and *Tatum*) have been decided in the last four years. The Herald does not contend that additional percolation would be useful. And it fails to account for the larger conflict, which applies across an array of defamation actions.

Respondents also overlook the consequence of leaving unaddressed the approach of the SJC, Eighth Circuit, and other courts that will effectively immunize false statements about suicide from

liability. As Petitioners showed, suicide is one of the leading causes of death in the United States, and articles about it frequently misstate the cause. When they do, and when they falsely attribute blame for a particular suicide, they can increase the number of suicides. And they exact a devastating toll on those falsely blamed. Pet. 35-38.

IV. This Court Should Grant Review Because the SJC's Ruling Conflicts with *Milkovich* on an Important Question of Federal Law.

As Petitioners have explained with care, the SJC's adoption of a categorical presumption conflicts with *Milkovich*. Pet. 28-35. Respondents blithely assert that the SJC *purported* to be applying *Milkovich*. Herald BIO 29. But constitutional principles cannot be so easily evaded. Needless to say, calling a tail a leg does not make it one. Petitioners have shown that the SJC *did* in fact apply a categorical presumption. And Respondents do not dispute that a categorical presumption conflicts with *Milkovich*.

This Court has repeatedly instructed against crafting new categorical presumptions as defenses or immunities to defamation claims. Pet. 30 & n.8. *Milkovich* expressly rejected the creation of a new First Amendment privilege for "opinion." The categorical presumption adopted by the SJC creates just such a privilege.

As Petitioners showed, statements concerning a person's state of mind, including the state of mind of a person who has committed suicide, are routinely proven – or disproven – in litigation. Pet. 28-29. A person's "state of mind is itself a fact." *Seven Cases v. United States*, 239 U.S. 510, 517 (1916); *see also*

Miller v. Fenton, 474 U.S. 104, 113 (1985). But under the categorical presumption adopted by the SJC, statements that can be shown to be false under the standards applicable in ordinary litigation are nonetheless held exempt from defamation actions under the First Amendment. The SJC's unfounded epistemology requires certitude in the defamation context not demanded even in the criminal context. It thus undermines the important interest this Court recognized in the protection of "'reputation from unjustified invasion and wrongful hurt . . . at the root of any decent system of ordered liberty.'" *Milkovich*, 497 U.S. at 22 (citation omitted).

CONCLUSION

The Petition should be granted.

Respectfully submitted.

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