

14-190
No. _____

Supreme Court, U.S.
FILED

AUG 14 2014

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

—◆—
RICK BERTRAND,

Petitioner,

v.

RICK MULLIN and THE IOWA DEMOCRATIC PARTY,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The Iowa Supreme Court**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
JEANA L. GOOSMANN
Counsel of Record for Petitioner
GOOSMANN LAW FIRM, PLC
410 Fifth Street
Sioux City, IA 51101
(P) 712.226.4000
(F) 712.224.4517
Jeana@Goosmannlaw.com

QUESTION PRESENTED

Whether the Iowa Supreme Court, in deciding whether a political campaign advertisement constituted actionable defamation by implication, erred by applying an unreasonably high legal standard when it found a lack of sufficient evidence of actual malice pursuant to *N.Y. Times v. Sullivan* even though Petitioner informed Respondents several times of the false nature of the advertisement (1) at a meeting and (2) through a lawsuit which (a) sought immediate injunctive relief and (b) was accompanied by a sworn affidavit refuting the false implication.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINION BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS.....	1
A. The Defamatory Advertisement Which was Aired During the Iowa Senate Race and Respondents' Continued Publication of the Advertisement After Being Notified of its False Implications	1
B. Relevant District Court Proceedings and Rulings.....	4
C. Bertrand's Appeal to the Iowa Supreme Court and Subsequent District Court Rulings on Limited Remand.....	6
D. The Iowa Supreme Court Decision.....	8
REASON FOR GRANTING THE PETITION	9
I. THE IOWA SUPREME COURT AP- PLIED AN UNREASONABLY HIGH STANDARD FOR DEFAMATION IN A POLITICAL CASE AND THIS COURT SHOULD REVISIT AND CLARIFY THE STANDARD, ESPECIALLY AS IT RE- LATES TO "DEFAMATION BY IMPLI- CATION" CASES.....	9

TABLE OF CONTENTS – Continued

	Page
A. The Iowa Supreme Court Erred when it Found a Lack of Sufficient Evidence that Respondents Had Actual Knowledge the Advertisement's Implication was False	12
B. The Iowa Supreme Court Erred when it Found a Lack of Evidence that Respondents Published the Advertisement with Reckless Disregard of Whether it Contained a False Implication	16
1. The Court Improperly Determined the Political Forum Used by Bertrand to Notify Respondents of the False Implication was not an Environment Suited to Alert Them of the Likelihood of Their Error	16
2. The Court Erred when it Concluded that a Possible Nondefamatory Implication of the Advertisement Effectively Permitted it to Disregard the Defamatory Implication....	19
3. The Iowa Supreme Court Ignored Respondents' Admitted Concerns Regarding the Advertisement	20
CONCLUSION.....	22

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Iowa Supreme Court Opinion, Dated May 16, 2014	App. 1
Correction Order of the Iowa Supreme Court, Dated May 30, 2014	App. 35
Ruling on Motion for Judgment Notwithstanding the Verdict or in the Alternative For New Trial and Motion for New Trial or in the Al- ternative a Remittitur, Dated July 5, 2012....	App. 64
Ruling on Motion for Punitive Damages and Defendant's Motion for Directed Verdict, Dated April 6, 2012	App. 119
Judgment, Dated April 6, 2012	App. 128

TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	9
<i>Bertrand v. Mullin and The Iowa Democratic Party</i> , 846 N.W.2d 884 (Iowa 2014).....	<i>passim</i>
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485 (1984).....	9
<i>Chapin v. Knight-Ridder</i> , 993 F.2d 1087 (4th Cir. 1993).....	20
<i>Cherry v. Des Moines Leader</i> , 86 N.W. 323 (Iowa 1901).....	18
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967).....	17, 18
<i>Dodds v. Am. Broad. Co.</i> , 145 F.3d 1053 (5th Cir. 1966).....	20
<i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657 (1989).....	13, 14
<i>Michalic v. Cleveland Tankers, Inc.</i> , 364 U.S. 325 (1960).....	14
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	18
<i>New York Times Co. v. Connor</i> , 365 F.2d 567 (7th Cir. 1986)	20
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	<i>passim</i>
<i>Newton v. Nat’l Broad. Co.</i> , 930 F.2d 662 (9th Cir. 1990).....	20

TABLE OF AUTHORITIES – Continued

	Page
<i>Ollman v. Evans</i> , 471 U.S. 1127 (1985)	11
<i>Rogers v. Missouri Pacific R. Co.</i> , 352 U.S. 500 (1957)	14
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)....	11, 18, 19
<i>State of Iowa v. Stamper</i> , 195 N.W.2d 110 (Iowa 1972)	14
<i>Stevens v. Iowa Newspapers, Inc.</i> , 728 N.W.2d 823 (Iowa 2007)	9, 20
<i>Woods v. Evansville Press Co.</i> , 791 F.2d 480 (7th Cir. 1986)	20
 STATUTES, REGULATIONS, AND RULES	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1
Restatement (Second) of Torts § 614, at 311 (1965)	9

OPINION BELOW

The opinion of the Supreme Court of the State of Iowa is reported as *Rick Bertrand v. Rick Mullin and The Iowa Democratic Party*, 846 N.W.2d 884 (Iowa 2014).

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered on May 16, 2014. This petition was timely filed within ninety days after judgment, and this Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF FACTS

A. The Defamatory Advertisement Which was Aired During the Iowa Senate Race and Respondents' Continued Publication of the Advertisement After Being Notified of its False Implications

This lawsuit derives from oral and written statements made in a televised political advertisement during an Iowa State Senate campaign. In 2010, the Petitioner, Rick Bertrand (Republican), ran

for the Iowa State Senate against Rick Mullin (Democrat). Mullin and the Iowa Democratic Party, who funded Mullin's campaign, published a television advertisement in October 2010, entitled "Secrets," which indicted Bertrand's business ethics and contained several offensive verbal statements including:

"Because Bertrand doesn't want you to know he put his profits ahead of children's health";
and

"The FDA singled out Bertrand's company for marketing a dangerous sleep drug to children."

The advertisement also included several statements in large capital letters, including but not limited to: **"BERTRAND'S COMPANY MARKETING SLEEP DRUG TO CHILDREN."**

After the advertisement was broadcast, Bertrand immediately began receiving threatening phone calls and offensive comments. Constituents slammed doors in his face as a result of the advertisement while he was campaigning in his voting district, and dirty diapers were smeared on his company's signage. In fact, he lost business deals and good press for the businesses he was opening because people believed he marketed dangerous drugs to children, as implied by the egregious advertisement.

A few days after the advertisement started airing, Bertrand spoke at an October 21, 2010 meeting before the Homebuilders Association of Greater Siouxland at which he advised Mullin of the following:

the advertisement was false, Bertrand's former employer (Takeda) was never owned by him; he never sold the drug in question and did not work for the division within Takeda that sold the drug; and none of his companies marketed dangerous drugs to children or sleep drugs to children. He demanded Mullin stop the advertisement.

The day immediately following the Homebuilders' meeting, Bertrand filed a lawsuit against Mullin and The Iowa Democratic Party. In connection with the filing of the lawsuit, Bertrand also submitted an affidavit again pronouncing unequivocally that the advertisement's implications were false (among other things, Bertrand's affidavit confirmed he never sold the drug in question).

Thereafter, Respondents continued to run the advertisement and continued ordering its further publication from various media outlets. Mullin expressed doubts regarding the continued airing of the commercial, and discussed several times with his wife, Amber Pringnitz (the Director of Iowa's Senate Majority Fund) and Senator Mark Warnstadt (Democratic Senate Majority Leader) whether to continue running the advertisement, going so far as to explain how Bertrand became "extremely animated about the terrible attack ad" at the Homebuilders' meeting and had told Mullin the commercial made his wife cry. However, Respondents did not stop airing the advertisement (to the contrary, they continued media buys to air the commercial) and did not take any further actions whatsoever to determine whether Bertrand's

representations regarding the false implications of the advertisement were legitimate.

B. Relevant District Court Proceedings and Rulings

On October 22, 2010, the day after Bertrand had advised Mullin of the advertisement's falsities, and the same day Mullin relayed such information to the Iowa Democratic Party and expressed concerns, Bertrand filed a lawsuit in the District Court for Woodbury County, Iowa against Respondents, seeking injunctive relief and asserting claims for libel, slander and conspiracy to defame. The Petition sought punitive damages and attorney fees.

Although Bertrand suffered in the polls as a result of the advertisement, he won the election by a very narrow margin of 222 votes. Bertrand pursued the lawsuit after he won the election. In a pre-trial motion in limine, Bertrand moved the District Court to instruct the jury on punitive damages. The District Court withheld its ruling on the issue. However, Bertrand renewed the issue during trial (the day before the jury deliberated) by filing a Motion for Punitive Damages.

In ruling on the Motion for Punitive Damages, the District Court discussed the similar – but different – standards which apply to claims for punitive damages versus claims of actual malice under *N.Y. Times v. Sullivan*. The District Court concluded the standards are distinct in their focus (attitude toward

falsity [actual malice] versus attitude toward a plaintiff's rights [punitive damages]), and also distinct in their burdens of proof since actual malice allows a finding based on reckless disregard while punitive damages requires disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences.

The District Court denied Bertrand's Motion for Punitive Damages, finding that common law malice – rather than actual malice utilized to find defamation in a First Amendment public figure case – applied to the punitive damages claim. Ultimately, the District Court held that Bertrand did not present evidence sufficient to satisfy the burden required for punitive damages. However, the District Court failed to address the fact that Respondents proceeded to purchase additional airtime to continue running the advertisement after being advised of its falsity and failed to conduct any investigation after being so advised.

In addition, the District Court denied Respondents' Motion for Directed Verdict, finding there was sufficient evidence for Bertrand's defamation by implication claim to go to the jury under the definition of actual malice pursuant to *New York Times v. Sullivan*, 376 U.S. 254 (1964). More specifically, the District Court ruled that the advertisement's statements were not actionable as express defamation, but found that Bertrand had presented sufficient evidence for a reasonable jury to find that two of the

advertisement's statements implied a false fact, namely that Bertrand personally sold a dangerous sleep drug to children and/or owned a company that sold a dangerous sleep drug to children. Thus, the District Court submitted the case to the jury under an implied defamation theory.

After a four-day jury trial, the jury returned a verdict of \$31,000 against Rick Mullin and \$200,000 against the Iowa Democratic Party on April 6, 2012. The District Court entered a corresponding Judgment.

C. Bertrand's Appeal to the Iowa Supreme Court and Subsequent District Court Rulings on Limited Remand

On April 9, 2012, Bertrand filed a Notice of Appeal regarding the District Court's ruling on his Motion for Punitive Damages. Shortly thereafter, the Iowa Supreme Court granted Respondents' motion for a limited remand for the District Court to address post-trial motions.

On April 18, 2012, Respondents filed two post-trial motions: (1) a Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial; and (2) a Motion for New Trial or in the Alternative a Remittitur.

The District Court denied Respondents' Motion for Judgment Notwithstanding the Verdict, finding that there was substantial evidence to support a

finding that the implication Bertrand personally sold or marketed a dangerous drug to children was a reasonable inference from the commercial taken as a whole and was a “provably false fact.” The District Court also found that the record established clear and convincing evidence that Respondents published the implication with knowledge or reckless disregard of the truth of the implication when they ordered more ads on October 31, 2010.¹

In addition, the District Court issued a remittitur after finding there was insufficient evidence to support the jury’s award because Bertrand’s expert witness impermissibly assumed damages and was too speculative. The District Court reduced the judgment to \$50,000 (and allocated the judgment \$6,705 against Mullin and \$43,295 against the Iowa Democratic Party).

On July 13, 2012, Bertrand filed a Notice of Appeal regarding the District Court’s Order granting a remittitur. On July 30, 2012, Respondents cross-appealed the District Court’s denial of their Motion for Judgment Notwithstanding the Verdict.

¹ The District Court did, however, conclude that it should have directed a verdict in Respondents’ favor regarding the alleged implication that Bertrand owned the company that sold the drug in question. Thus, the only actionable defamation claim was based on the implication that Bertrand sold dangerous drugs to children.

D. The Iowa Supreme Court Decision

Bertrand raised the following two issues on appeal: (1) whether the District Court erred in failing to allow the issue of punitive damages to be submitted to the jury; and (2) whether the District Court erred in granting a remittitur.

Respondents raised one issue on appeal: whether the District Court erred in overruling their Motion for Judgment Notwithstanding the Verdict. The Iowa Supreme Court ruled affirmatively for Respondents, finding that Bertrand had failed to present sufficient evidence to prove the actual malice element of defamation.² More specifically, the Iowa Supreme Court held that (1) the evidence did not support a finding that Respondents had actual knowledge of the falsity of the advertisement's implication; and (2) the evidence did not support a finding that Respondents acted with reckless disregard for the truth or falsity of the advertisement's implication, as required by *N.Y. Times v. Sullivan*.

² As a result, the Iowa Supreme Court did not address the other issues which Bertrand raised on appeal.

REASON FOR GRANTING THE PETITION

I. THE IOWA SUPREME COURT APPLIED AN UNREASONABLY HIGH STANDARD FOR DEFAMATION IN A POLITICAL CASE AND THIS COURT SHOULD REVISIT AND CLARIFY THE STANDARD, ESPECIALLY AS IT RELATES TO “DEFAMATION BY IMPLICATION” CASES

Whether the evidence in a public figure defamation lawsuit is sufficient to support a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-511 (1984). Stated another way, it is for the court to decide whether a defendant’s words are capable of a defamatory meaning, while it is for the jury to decide whether the words actually had that effect on the reader or listener. *See, e.g., Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830 (Iowa 2007), quoting Restatement (Second) of Torts § 614, at 311 (1965). A trial court must permit a *N.Y. Times* defamation claim to go to a jury when the evidence presented could lead a reasonable jury to find actual malice by clear and convincing evidence. *See, e.g., Stevens*, 728 N.W.2d at 830, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

The Iowa Supreme Court interpreted *N.Y. Times* so narrowly that it approves an unrestricted open season on political candidates/public figures, unfettered by the truth or falsity of a statement’s implications. The Court held incorrectly that Bertrand failed to present sufficient evidence from which a reasonable

jury could conclude clearly and convincingly that Respondents (1) had actual knowledge of the falsity of the implied statement in the advertisement; or (2) acted with reckless disregard for the truth or falsity of the advertisement's implication. 846 N.W.2d at 888, 896-902. As a result, the Court reversed the District Court's denial of Respondents' related Motion for Judgment Notwithstanding the Verdict.

In reaching its conclusion, the Iowa Supreme Court applied an unreasonably high standard and disregarded several facts which put Respondents on notice of the false nature of the advertisement's implication or, at a minimum, supported a finding that Respondents acted with reckless disregard for the truth or falsity of the advertisement's implication.

This Court should grant this Petition for a Writ of Certiorari to correct the Iowa Supreme Court's misapplication of *N.Y Times* and to revisit and clarify the standard as it relates to a political candidate's obligation to investigate whether a campaign advertisement is defamatory. Otherwise, political campaign advertisements will continue to become an increasingly offensive and uncontrolled "free for all" at the local, state and national level.

While political campaign advertisements are afforded some "breathing room" under the First Amendment, the right to attack a political candidate is not unfettered and must be accompanied by a certain level of civility and, perhaps more importantly,

accountability. As Justice Fortas stated in his dissenting opinion in *St. Amant v. Thompson*:

The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.

St. Amant v. Thompson, 390 U.S. 727, 734 (1968). Indeed, Justice Rehnquist raised concerns regarding the abusive protections being afforded in public figure defamation cases under the shelter of the First Amendment nearly twenty years ago in his dissenting opinion in *Ollman v. Evans*, 471 U.S. 1127 (1985). In light of the increasingly unruly world of political campaign advertisements, those concerns should be revisited and this Court should clarify that the applicable standard is not an insurmountable hurdle, but merely a fair and reasonable obstacle.

A. The Iowa Supreme Court Erred when it Found a Lack of Sufficient Evidence that Respondents Had Actual Knowledge the Advertisement's Implication was False

It is undisputed that Bertrand, in no uncertain terms, informed Respondents repeatedly of the advertisement's false implication (1) at a pre-election meeting; and (2) through a lawsuit filed the day after the meeting which (a) sought immediate injunctive relief and (b) was accompanied by Bertrand's sworn affidavit refuting the false implication. Nonetheless, Respondents proceeded to purchase airtime to continue running the advertisement without conducting any investigation, even though they had no evidence to dispute Bertrand's protestations. Respondent Mullin expressed concerns regarding the continued airing of the commercial to both his wife and Respondent The Iowa Democratic Party on the same day Bertrand filed the lawsuit. 846 N.W.2d at 896. Respondents knew Bertrand was "extremely animated" due to the commercial and knew it had made Bertrand's wife cry. Yet Respondents did nothing to stop the advertisement from running. When Respondents continued to publish the advertisement, their conduct generated a clear inference of actual malice.

The Iowa Supreme Court erroneously determined Bertrand did not present sufficient evidence to support a finding that Respondents had actual knowledge that the implication (Bertrand sold a dangerous

baby-killing drug) was indeed false. In reaching its conclusion, the Iowa Supreme Court cited *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691 n. 37 (1989) for the proposition that the press need not accept denials, which are "so commonplace in the world of polemical charge and counter-charge that, *in themselves*, they hardly alter the conscientious reporter to the likelihood of error." Emphasis added. The Court also cited *N.Y. Times* for the principle that failure to retract is not, *by itself*, adequate evidence of malice for constitutional purposes. *N.Y. Times*, 376 U.S. at 286.

In addition, Respondents' actions go beyond a mere failure to retract (discussed by the Iowa Supreme Court, citing *N.Y. Times*). Not only did Respondents fail to retract the advertisement, but they actually continued to order more airtime for the commercial after being told repeatedly that the advertisement was false and after being sued for defamation. *There was really nothing more Bertrand could have done to notify Respondents of the advertisement's false implication.*

While *Harte-Hanks* did recognize that a mere denial of a publication, *standing alone*, will not support a finding of actual malice against the publisher of a statement, the present matter was not limited to a mere denial by Bertrand. Rather, Bertrand's denial in a face-to-face meeting with Mullin preceded the filing of a lawsuit and related affidavit which Bertrand signed under penalty of perjury again making it evident that the advertisement's implications were

false. These additional facts take the present matter well beyond a mere denial. The facts rise to the level of actual knowledge, for which Respondents lacked any evidence to the contrary. As this Court recognized in *Harte-Hanks*, a plaintiff is entitled to prove a defendant's state of mind through circumstantial evidence. *Harte-Hanks*, 491 U.S. at 668. There was clearly sufficient circumstantial evidence from which a reasonable jury could find actual malice (actual knowledge of the advertisement's false implications) by clear and convincing evidence.³

Although the Iowa Supreme Court did acknowledge that the "actual malice" standard does not allow a defendant to purposefully avoid discovering the truth (citing *Harte-Hanks Communications, Inc.*, 491 U.S. at 692), the Court nonetheless ruled in Respondents' favor. Based upon the facts of this case, however, there was clearly sufficient evidence to support a reasonable jury's finding that Respondents purposefully avoided discovering the truth through their lack of investigation. Indeed, the Iowa Supreme Court's opinion recognized:

³ This Court has frequently recognized that circumstantial evidence may not only be sufficient, but in some circumstances more certain, satisfying and persuasive than direct evidence. See, e.g., *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 329 (1960), citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 (1957); accord *State of Iowa v. Stamper*, 195 N.W.2d 110, 111 (Iowa 1972) ("Circumstantial evidence may be equal in value to and sometimes more reliable than direct evidence.").

[A]ctual malice could be derived from the actions of a candidate in continuing to run an advertisement after being informed of a false implication in the advertisement. It goes without saying that a speaker who repeats a defamatory statement after being informed of the statement's unambiguous falsity does so at the peril of generating an inference of actual malice.

846 N.W.2d at 901. Respondents were, in fact, informed of the advertisement's unambiguous false implication – that Bertrand sold the dangerous drug in question.

In summary, the evidence presented at trial was more than sufficient to permit a reasonable jury to find clear and convincing evidence that Respondents had actual knowledge of the falsity of the implied statement, or purposefully avoided discovering the truth. Notwithstanding the First Amendment protections which are afforded by *N.Y. Times* and its progeny, the Iowa Supreme Court interpreted *N.Y. Times* too narrowly and, as a result, applied an unreasonably high standard. The Court should not have reversed the District Court's denial of Respondents' Motion for Judgment Notwithstanding the Verdict.

B. The Iowa Supreme Court Erred when it Found a Lack of Evidence that Respondents Published the Advertisement with Reckless Disregard of Whether it Contained a False Implication

After finding Respondents lacked actual knowledge of the false implications of their advertisement, the Iowa Supreme Court held that Bertrand also failed to present sufficient evidence from which a reasonable jury could conclude Respondents acted with reckless disregard, i.e., whether they had a high degree of awareness of the advertisement's false implication or entertained serious doubts as to the truth of the false implication, as required by *N.Y. Times*. 846 N.W.2d at 896-901. In reaching its conclusion, the Iowa Supreme Court relied upon two misplaced theories and ignored the fact that Respondents actually expressed concerns regarding the continued publication of the advertisement.

1. The Court Improperly Determined the Political Forum Used by Bertrand to Notify Respondents of the False Implication was not an Environment Suited to Alert Them of the Likelihood of Their Error

In stretching to reach its desired outcome, the Iowa Supreme Court found the political forum which Bertrand used to notify Respondents of the false implication (a Homebuilders Association of Greater Siouxland meeting) "was not an environment suited

to alert Mullin or the Iowa Democratic Party of the likelihood of error.” 846 N.W.2d at 901. According to the Court, Bertrand’s comments at the Homebuilders’ meeting, and his subsequent filing of a lawsuit, were merely a “political stunt.” Indeed, the nature of the particular venue was an “important” factor in the Court’s analysis. *Id.*

In support of its conclusion, the Iowa Supreme Court cited Justice Warren’s concurring opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169-170 (1967), even though that opinion actually supports Bertrand’s position. Notably, Justice Warren opined that liability could be imposed where “no additional inquiries were made even after the editors were notified by respondent and his daughter that the account, to be published was absolutely untrue.” 388 U.S. at 169-170. Justice Warren also recognized that the definition of actual malice “is not so restrictive that recovery is limited to situations where there is ‘knowing falsehood’ on the part of the publisher of false and defamatory matter. ‘Reckless disregard’ for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability. . . .” *Id.* at 164. Justice Warren opined that the publisher in that case did little investigative work initially, and made no additional inquiries after the opposing party and his daughter told them the publication was false. Under those circumstances, which are quite similar to the present matter, Justice Warren was “satisfied that the evidence here discloses that degree of reckless

disregard for the truth of which was spoke in New York Times and Garrison." *Id.* at 170.

The statements in Respondents' advertisement had to be based upon truth or based upon what, in good faith and upon probable cause, was believed to be true. *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963); accord *Cherry v. Des Moines Leader*, 86 N.W. 323, 325 (Iowa 1901). Recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of the report upon which the publisher relies. *St. Amant*, 390 U.S. at 731.

Despite the prior guidance by this Court, the Iowa Supreme Court held that Bertrand used the forum in front of an audience of prospective voters and the subsequent filing of a lawsuit "to score political points and seize the moment." *Id.* As such, the Iowa Supreme Court concluded the evidence did not support a high degree of subjective awareness of the commercial's false implication due to the type of venue in which Bertrand notified Respondents of the advertisement's false implications. 846 N.W.2d at 901.

While *N.Y. Times* undoubtedly provides a political candidate with significant "breathing room" under the First Amendment, the right to attack a political candidate is not unbounded. The Iowa Supreme Court improperly focused on the "venue" in which Respondents first became aware of their error, and also ignored the significance of the lawsuit (with

Bertrand's affidavit signed under penalty of perjury) which Bertrand filed in the District Court the following day. If the Court allows lawsuits and court-filed affidavits to be considered mere "stunts," then the value of the judicial system will be discredited and politicians will continue to be held unaccountable for things they say during a political campaign.

2. The Court Erred when it Concluded that a Possible Nondefamatory Implication of the Advertisement Effectively Permitted it to Disregard the Defamatory Implication

According to the Iowa Supreme Court, the false implication (that Bertrand sold the dangerous drug) "did not undermine or eliminate the political relevance of the nondefamatory implication from the advertisement intended" (that Bertrand had associated with an unethical business). 846 N.W.2d at 897-898. While Bertrand established that the implication he personally sold the dangerous drug was false, the Court found that the "general background story" from which both implications were derived was not false. *Id.* As a result, the Iowa Supreme Court found the defamatory statement was not built on a "totally fabricated story" as the United States Supreme Court has opined would support a finding of actual malice. *See St. Amant*, 390 U.S. at 732. While the Court indicated this fact was "insufficient to conclusively establish the absence of malice" (846 N.W.2d at 898), the Court nonetheless found this fact to be highly

significant and afforded it too much weight, thereby construing *N.Y. Times* too narrowly.

Essentially, the Iowa Supreme Court determined that, because there was a possible nondefamatory implication to the advertisement, the defamatory implication could be disregarded. This conclusion twists the point of implied defamation, which involves a statement of facts which are technically true, but carry a defamatory meaning due to the juxtaposition of the facts. *See, e.g., New York Times Co. v. Connor*, 365 F.2d 567 (7th Cir. 1986); *Stevens*, 728 N.W.2d 823; *Chapin v. Knight-Ridder*, 993 F.2d 1087 (4th Cir. 1993); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662 (9th Cir. 1990); *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053 (5th Cir. 1966).

Even if an advertisement has a nondefamatory implication, the advertisement can still be found defamatory due to some other implication. Based upon the Iowa Supreme Court's rationale, however, any potentially legitimate interpretation of a statement would insulate the speaker from liability for defamation by implication. Freedom of speech is not so broad.

3. The Iowa Supreme Court Ignored Respondents' Admitted Concerns Regarding the Advertisement

Respondent Mullin expressed concerns regarding the continued airing of the commercial to both his

wife and Respondent The Iowa Democratic Party on the same day Bertrand filed the lawsuit. 846 N.W.2d at 896. In addition, in one of the emails circulated between the Iowa Democratic Party (Trial Exhibit 35) while the advertisement was being run, an advisor of Mullin stated “I guess I thought Bertrand had at least sold the drug in question. It is a flimsy attack.” Furthermore, Mullin’s email to The Iowa Democratic Party explained in no uncertain terms how Bertrand was “extremely animated about the terrible attack ad” at the Homebuilders’ meeting and had even told Mullin the commercial made his wife cry.

In *N.Y. Times*, this Court found “no evidence” that the Times knew its statements were false or were “in any way” reckless in that regard. *N.Y. Times*, 376 U.S. at 285-286. The present matter is readily distinguishable because Bertrand presented ample evidence to support a reasonable jury’s finding of recklessness. Respondents questioned themselves on more than one occasion, and the evidence showed they actually knew the advertisement was false or, at a minimum, had a high degree of awareness of the advertisement’s false implication or entertained serious doubts as to the truth of the false implication. Nonetheless, Respondents plowed forward with reckless abandon and took no actions whatsoever to stop running the advertisement. The Iowa Supreme Court ignored this set of facts entirely while conducting its “reckless disregard” analysis. *Id.* at 896-901.

The undisputed evidence showed that Respondents not only had a “high degree of awareness”

regarding the advertisement's false implication, *they had an actual awareness and did, in fact, entertain serious doubts as to the truth of the advertisement's false implication*. As such, Bertrand presented sufficient evidence to satisfy both alternative avenues for finding reckless disregard under *N.Y. Times*. Therefore, the Iowa Supreme Court erred when it reversed the District Court's denial of Respondents' Motion for Judgment Notwithstanding the Verdict.

◆

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari to correct the Iowa Supreme Court's application of an unreasonably high standard for public figure defamation, and should revisit and clarify the *N.Y. Times* standard as it relates to "defamation by implication" cases.

The Iowa Supreme Court's decision should be reversed and the matter should be remanded to the Iowa Supreme Court for further findings.

August 14, 2014

Respectfully submitted,

JEANA L. GOOSMANN

Counsel of Record for Petitioner

GOOSMANN LAW FIRM, PLC

410 Fifth Street

Sioux City, IA 51101

(P) 712.226.4000

(F) 712.224.4517

Jeana@Goosmannlaw.com