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TABLE OF AUTHORITIES

All cases and authorities cited in this Further Response were referred to in the tables of the Initial Response, with the exception of Ga. Code Ann., §32-154, which is set out in Appendix A hereto.

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 814

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

FURTHER RESPONSE IN LIGHT OF ROSENBLATT V. BAER

Pursuant to the Court's request, this response is filed in light of the opinion in *Rosenblatt v. Baer*, No. 38, October Term, 1965, decided on February 21, 1966.

I.

The Instant Article Was Clearly Actionable And Aimed Unquestionably At Respondent Butts

In *Rosenblatt* this Court announced a twofold basis for reversal and the grant of a new trial:

(1) "the column on its face contains no clearly actionable statement," and

(2) "no reference is made to respondent." (Slip Opinion, p. 3).

The article in the instant case is replete with clearly actionable statements and specific references to respondent Butts. He is named repeatedly; his photograph appears in three places; he is charged with being "corrupt" three times in an editorial block signed "The Editors" and superimposed on the first page of the article (R. 1407), and the article itself was entitled in bold letters "THE STORY OF A COLLEGE FOOTBALL FIX — A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged A Game Last Fall."

The basis for the reversal in *Rosenblatt* does not exist in the instant case.

II.

There Was No Waiver In Rosenblatt

The Circuit Court here held there had been a waiver by petitioner of its constitutional defenses when it chose to rely on the sole defense of truth. The question of waiver was not involved in *Rosenblatt.*

III.

No Public Issue Was Involved In The Libel Here, Nor Was Butts A Public Official Within New York Times

This Court in *Rosenblatt* emphasizes the right of the public to discuss public issues and public officials who can significantly influence the resolution of those issues:

"The motivating force for the decision in *New*

> *York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open *and* that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U.S. at 270 (Emphasis supplied). There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." (Slip Opinion, p. 9).

This Court next proceeded to make it clear that by "public issue" it meant an issue relating to government or a government operation, and that by "public official" it meant one responsible for government operations. Thus in that portion of *Rosenblatt* immediately following the language just quoted, the Court went on to say:

> "Criticism of *government* is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for *government operations* must be free, lest criticism of *government* itself be penalized. It is clear, therefore, that the 'public official' designation applies at 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*." (Slip Opinion, pp. 9-10) (Emphasis added).

The "sell-out" of which Butts was accused was alleged to have occurred while he was Athletic Director at the University of Georgia. He was hired as Athletic Director by the Athletic Association of the University of Georgia, a separate entity denominated a private corporation, not an agency of the State, in the legislation pursuant to which it was created (*Georgia Code*, §§32-152, 32-153, cited in Appendix A of respondent's initial response). Its accounts were not subject to audit by the State, "as is required . . . in connection with the financial operations of State agencies" (*Georgia Code*, §32-154). The Athletic Association was thus not an arm of government. How could its employee, Butts be engaged in government while performing its functions?

Contrast the position occupied by Butts as Athletic Director at the University of Georgia with that occupied by Baer. There was doubt that Baer was a public official within *New York Times*. There can be no doubt about Butts. The trial judge, who had the benefit of this Court's opinion in *Times*, found that he was not a "public official" as envisioned by that case. (Pet. for Cert., App. B, pp. 95a-96a).

As stated by this Court in *Rosenblatt* in respect of Baer in his capacity as Supervisor of the County Recreation Area, a facility owned and operated by the county (Slip Opinion, p. 2):

> "Respondent was employed by and directly responsible to the Belknap County Commissioners, three elected officers of the County government. During the 1950's, a public controversy developed over the way Respondent

> and the Commissioners operated the Area; some protested that Respondent and the Commissioners had not developed Area's full potential, either as a resort for local residents or as a tourist attraction that might contribute to the County's taxes. The discussion culminated in 1959, when the New Hampshire Legislature enacted a law transferring control of the Area to a special five-man commission. At least in part to give this new regime a fresh start, Respondent was discharged."

The following distinctions stand out as between respondent Baer in *Rosenblatt* and respondent Butts here:

(1) Baer was hired by three elected county commissioners, who in their capacity as governors of the County were charged with the operation of its recreation area. Baer was their *alter ego* in this governmental operation. Butts was hired by a corporation, specifically declared in the legislation authorizing its existence not to be an arm of government, to operate an undertaking which therefore could not be classified as a government operation.

(2) A controversy had been in existence from 1950 to 1959, when Baer was discharged, as to the development and management of the County recreation area. There is no evidence of *any* issue in respect of Butts' performance of his duties as Athletic Director either before or after the publication of Curtis' article. As shown, there could have been no *public* issue.

When the instant article was published, however,

there was a *private issue* being debated in court between Curtis and Bryant growing out of a half million dollar libel suit which Bryant had only recently filed against Curtis because of a previous article concerning him.

While that private court debate was in progress, one of Curtis' attorneys in that case arranged (R. 497-99) for Curtis to *purchase* (for $5,000.00) (R. 501-02, 1380-81) from a hot check artist, then on probation (R. 911-13, 1016), an alleged story that he listened in on a telephone conversation in which Bryant and Butts "rigged and fixed" the up-coming game between Alabama and Georgia.

It is thus obvious that petitioner, in publishing in its *Saturday Evening Post* the article out of which grew the action under review, was not engaging in a *"debate on a public issue"* and clearly the article was not a "criticism of government." Curtis *had itself created the issue which was purely private* and it was engaged in career assassination for a purely private purpose.

Times, *Garrison* and *Rosenblatt* each involved *"debates on public issues"* and *"criticism of government."* This case did not, and is therefore totally unlike those cases and not subject to constitutional protection given to public issue debates.

(3) Any defamation which existed in *Rosenblatt* related to the manner in which the management of the Area had performed its duties. Curtis' defamation of Butts did not relate to his conduct of his duties as Athletic Director. He was charged with a "sell-out"

of information which was beyond the province of an Athletic Director to possess; according to the Record, he "had no idea about the game plan or the philosophy to be employed in the game" between Georgia and Alabama. (R. 682). The alleged sell-out pertained to matters handled by the football coach, not the Athletic Director (R. 681-82). Thus even if Butts had been a public official, the libel did not relate to his "official conduct" (376 U.S. at 706), and the *New York Times* rule does not apply.

The libel was simply a personal attack, charging that Butts and Bryant were "corrupt." Petitioner's charge of a "sell-out" by respondent Butts and that he and Bryant "fixed and rigged" a game (R. 681-82) was neither part of a debate of a governmental operation nor an attack on a public official within *New York Times.*

IV.

Actual Malice Within New York Times Was Conclusively Proven

While there was a serious question in *Rosenblatt* whether the alleged defamation even referred to Baer, rendering proof of malice difficult at the least, here actual malice within *New York Times* was conclusively proven. Thus even if Butts were a public official, nothing could be gained by sending the instant case back for a retrial. As stated by the trial judge (Pet. for Cert., App. B, p. 96a):

> "If it were conceded that plaintiff Butts was a 'public official,' the case of *New York Times Company v. Sullivan* would not permit the va-

> cating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice' — that is, with knowledge that it was false or *with reckless disregard of whether it was false or not.* (Emphasis supplied). In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

In reviewing the trial court's judgment, the Fifth Circuit, after giving "full consideration to the entire record," held that:

> "The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d 702, 719.

Any question this Court may have as to the basis upon which the jury, the trial judge and the Fifth Circuit Court of Appeals found such convincing proof of malice in this case may be resolved by reference to the fourteen recitals of proven malice within the meaning of *Times* as set out at pages 20-31 of respondent's Initial Response.

If the evidence in this case does not establish actual malice, then it is impossible to conceive of that which does.

V.

The Charge Affords No Basis For Granting Certiorari

Unless this Court should find that the libel in this case involved the discussion of governmental operations and that respondent was a public official within the meaning of *New York Times*, it is unnecessary to consider whether the trial court's charge in this case is constitutionally sufficient under *New York Times*.

This Court in *Rosenblatt* found the trial court's charge insufficient as permitting a finding of actual malice based on "mere negligence." This is not true of the trial court's charge in this case. While not in the identical words suggested in *New York Times*, the language was sufficient to submit the question of actual malice to the jury within the scope of the *Times* definition.

The Court will recall that the sole defense made in this case was the truth of the article. When the trial court's charge was given petitioner made no objection to the charge as to actual malice, as required by the Federal Rule of Civil Procedure 51. This rule is based on sound practice and it should not be here disregarded.

CONCLUSION

We call the Court's attention to the refusal of petitioner in the instant case to make any further investigation as to the truth of the charges it was preparing to publish against respondent, even though eleven days prior to publication it was informed by telegram and letter of the "absolute falsity of the charges." Petitioner thus recklessly and deliberately ignored the warning.

This publication involves no discussion of public issues but a plain and outright career assassination for profit. Petitioner is not entitled to the constitutional protection which it is now seeking.

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APPENDIX A.

GEORGIA CODE ANNOTATED
§ 32-154

"32-154. Audit of accounts of Associations not required of State Auditor. — The State Auditor of Georgia is not required to make an audit of the accounts of the Association as is required of him in connection with the financial operations of State agencies. (Acts 1949, p. 29)."

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Further Response has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of April, 1966.

Attorney for Wallace Butts,
Respondent