No. 00-56043

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUZUKI MOTOR CORPORATION
Plaintiff-Appellant,
v.

CONSUMERS UNION OF UNITED STATES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION SUPPORTING PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL

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INTEREST OF *AMICUS CURIAE*

The interest of Washington Legal Foundation (WLF) is fully stated in its motion for leave to file. If the Court grants WLF's motion, WLF will have authority to file under Fed. R. App. 29(b). WLF therefore submits this brief in support of Defendant-Appellant and in support of reversal.

SUMMARY OF ARGUMENT

This product disparagement action, brought by Suzuki Motor Corporation (Suzuki) against Consumers Union of United States, Inc. (CU), ought to have been presented to a jury. The district court erred by granting summary judgment. That decision not only wronged Suzuki, however, it threatens to distort the law. First, given the strength of the evidence supporting Suzuki's claims, the district court's decision has the effect of erecting a more stringent standard than actual malice. If adopted as the rule in other cases, that decision would mean that no product disparagement claim would be presented to a jury unless it were supported by evidence amounting to an admission of actual malice. Second, the district court's heightened standard of proof would virtually eliminate product disparagement as a meaningful form of relief. This would inevitably harm businesses and consumers, as well as unfairly leaving the victims of product disparagement practically bereft of a remedy to vindicate their legal rights. Third, such a radical change to state tort law is not dictated

by the First Amendment. A careful reading of the U.S. Supreme Court's decisions reveals that the proper standard of proof for product disparagement is not actual malice, but negligence.

ARGUMENT

I. THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT ON THE RECORD ON THIS CASE ERECTS A MORE STRINGENT STANDARD THAN "ACTUAL MALICE"

Suzuki has ably described how the district court's decision affects its legal rights. WLF will emphasize instead how that decision affects the law. Near the end of its brief Suzuki intimates where to begin that analysis:

> To hold, on this record, that Suzuki has failed to present enough evidence to create a triable issue on "actual malice" would be to hold, in effect, that the media enjoy complete immunity from liability for false statements about any manufacturer's products. That, in the words of Chief Justice Warren, would truly be an "absolute license to destroy" consumer products and the companies that make them.

Br. App. 56 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring in result)). Such an "absolute license to destroy," *id.*, distorts the First Amendment and tort law. To explain why, it is helpful to begin by showing that the district court did not apply "actual malice," but rather a

more stringent standard of proof that eliminates all product disparagement claims except those supported by an admission of actual malice.

We begin by assessing the evidence in Suzuki's favor, as seen through the lens of the correct standard of review. On appeal from an order granting summary judgment this Court "must determine, when viewing the evidence in the light most favorable to the non-moving party, whether any genuine issue of material fact exists, and whether the district court correctly applied the relevant substantive law." *General Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1396–97 (9th Cir. 1991). "Viewing the evidence in the light most favorable to the non-moving party," *id.*, means that that party's "evidence is to be believed," *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), that "[a]ll reasonable inferences drawn from the facts must be drawn in the nonmoving party's favor," *International Brotherhood of Teamsters v. American Delivery Serv.*, 50 F.3d 770, 776 (1994), and that the nonmoving party's evidence is to be viewed in its "totality." *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998).

The question before this Court is whether Suzuki produced sufficient evidence to create a "genuine issue of material fact" as to whether CU acted with actual malice in publishing statements in 1996 and afterward,

which disparaged the Suzuki Samurai. *See* Br. App. 6. Proof of "actual malice," defined as the "knowledge of falsity or reckless disregard as to truth or falsity," *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991), requires evidence of CU's state of mind. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). On this point Suzuki's brief displays a "treasure trove of evidence." Br. App. 43.

In the July 1988 edition of *Consumer Reports* CU published a cover story warning American consumers that "the Samurai rolls over too easily." ER881. CU declared that the Samurai suffered from an "unusually high propensity to roll over while performing an accident avoidance maneuver that could be demanded suddenly of *any car during routine driving*." ER875 (emphasis added).

But CU knew at the time that these statements were patently false. It knew that the Samurai had not rolled over, despite being driven 37 times through CU's standard course at speeds of up to 56.6 mph—more testing at higher speeds than any other vehicle tested at the time. ER976–77. Only after the Samurai passed such rigorous testing with flying colors did CU's own Editorial Director, Irwin Landau, scold CU's test driver, Kevin Sheehan: "If you can't find someone to roll this car, I will"! ER1186–88. CU knew that, for the first time, *Id.* at 1659–60, the standard avoidance course was redesigned specifically to force the Samurai

to tip up. *Id.* at 1360–61. CU also knew that its employee, Joe Nappi, cheered on the driver, "All right, Ricky baby," ER2200, when the Samurai was forced to tip up. And CU knew at the time that the Samurai was not alone in its capacity to be forced onto two wheels. The Mercedes 300SEL, the Volkswagen Rabbit, the Renault Dolphin, the Toyota Corolla—CU knew that all of them "not only tipped up, but rolled in similar maneuvers." Br. App. 20. Therefore, when CU stated that the Samurai had rolled during a driving maneuver that could be expected of "any car during routine driving," ER875, CU knew *at the time* that its statements were false. Its maneuver, specially modified for the purpose of failing the Samurai, certainly did not reflect "routine driving," and that maneuver could not be successfully performed by just "any car" at all.

Eight years later, in the "60th Anniversary Issue" of *Consumer Reports*, published in January 1996, CU repeated its 1988 claims. In summarizing its institutional history, CU stated that in 1986 it "discover[ed] the Suzuki Samurai easily rolls over in turns and rate[d] it Not Acceptable." ER940. It later published virtually the same claim in a "Memo to Members, written by CU President Rhoda Karpatkin, *id.*, in CD-ROMs offering advice to potential car buyers, *id. at* 1987–91 and over the Internet via America Online and CompuServe. *Id.* at 2017.

Once again, CU knew at the time that these statements were false. Not only did it know that its 1988 testing had not fairly reflected real world driving conditions, as it claimed, but it knew that other independent testing had produced substantial doubt about its 1988 rating of the Samurai as "Not Acceptable." In September 1988 the National Highway Traffic and Safety Administration (NHTSA) rejected a petition to recall the Samurai. ER734. NHTSA informed CU that the test procedures used to test the Samurai "do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data." *Id.* at 735. Soon after CU learned that the Transport Road and Research Laboratory, a division of Great Britain's Department of Transport, also rejected CU's testing methodology and its statements regarding the Samurai. *Id.* at 997–98. Thus, when CU published its attacks on the Samurai in the 1996 Anniversary issue of *Consumer Reports*, it had both direct knowledge of the falsity of its 1988 statements, as well as information from government agencies in the United States and the United Kingdom utterly rejecting the soundness of CU's testing methodology and, with it, CU's claim that the Samurai was unusually dangerous.

Despite this overwhelming evidence of knowledge, or at least recklessness, as to the statements made in CU's 1996 Anniversary Issue of Consumer Reports, the district court found that Suzuki had failed to

produce sufficient evidence to survive a motion for summary judgment. *Id.* at 1*872.* In a short and curious chain of reasoning, the court first emphasized the legitimacy of CU's "pre-testing concern" with "the safety of the Suzuki Samurai." *Id.* at 1870. The court then downplayed the significance of CU's deliberate redesign of its standard course. "Plaintiff emphasizes the redesigned test (the 'short course') in particular, as if defendant had irreversibly committed itself to testing all products the same, irrespective of new design or technology." *Id.* Despite its obviousness, the court simply refused to draw the "reasonable inference[ ]," *International Brotherhood of Teamsters v. American Delivery Serv.*, 50 F.3d 770, 776 (1994), that CU's redesigned course "evince[d] malice as a matter of law." ER1871. The court also declined to credit evidence of CU's financial motives and its departure from NHTSA standards as proof of actual malice. *Id.* Hence, in less than three pages the court traveled a brisk path from the issue of actual malice to the conclusion that "a jury could not reasonably find that the plaintiff proves its case by the quality and quantity of evidence required by governing law." *Id.* at 1872.

With this conclusion the lower court erected a barrier to product disparagement claims beyond what is fairly meant by "actual malice." A closely analogous case illustrates this point. In *Isuzu Motors Ltd.*

v. Consumers Union of United States, Inc., 66 F. Supp.2d 1117 (C.D. Cal. 1999), the U.S. District Court for the Central District of California—the same court that issued the decision below—addressed tort claims based on similar but less compelling facts than the present case. There Isuzu Motors sued CU for defamation, product disparagement, and violations of California Business & Professions Code section 17200. *Id.* at 1120.

These claims arose, in part, from CU's publication of statements claiming that the Isuzu Trooper, an SUV, "is more prone to tip up or roll over than other SUVs." *Id.* Isuzu contended that "the criteria used by CU to evaluate the Trooper were both unscientific and heavily subject to driver influence." *Id.* To support these contentions Isuzu produced "evidence that CU knew that its test was heavily subject to driver influence." *Id.* at 1125. Such evidence included internal memoranda and reports showing that tip-up rates differed depending on the test driver behind the wheel. *Id.* It also included the fact that CU "knew that its testing methods had been criticized by NHTSA as unreliable, at least for the purposes of predicting rollover propensity." *Id.* In addition, Isuzu showed that CU possessed rollover statistics on the 1995 Trooper "and chose not to refer to these statistics in its publications regarding the Trooper." *Id.*

Based on this evidence, the court reasoned that Isuzu had "raised a genuine issue of material fact as to whether defendant [CU] knowingly disregarded information within its possession about the nature of the short course and the Trooper's performance in the short course." *Id.* at 1126. The court therefore denied CU's motion for summary judgment on the issue of actual malice.

The contrast between the court's decision in *Isuzu* and the court's decision below is illuminating. Unlike Suzuki, Isuzu produced no evidence that CU had especially designed its course to fail the Trooper. Isuzu also produced no evidence showing, as Suzuki has, that CU's editor insisted during testing that "[i]f you can't find someone to roll this car, I will"! ER1186–88. Nor did Isuzu produce evidence, as Suzuki has, that NHTSA had specifically rebuffed a petition supported by CU to recall the Trooper *before* CU published its disparaging statements. But Isuzu prevailed on a motion for summary judgment and Suzuki did not. Witness credibility cannot account for these conflicting results, because both cases were decided on motions for summary judgment. *Id.* at 1126; ER1872.

What does explain the disparity in results is a significant difference in the legal standard applied by each court. The *Isuzu* court straightforwardly applied the exacting actual malice standard, the *Suzuki* court

set the bar higher still. Consider one piece of evidence produced in both cases. The court in *Isuzu* credited NHTSA's report surveying the shortcomings of CU's testing methodology, 66 F. Supp.2d at 1125; the court below did not. ER1870. Because Suzuki produced more direct and compelling evidence of actual malice than Isuzu and at the same time received virtually no credit for the same evidence that the court in *Isuzu* found probative of actual malice, the lower court evidently applied a more stringent legal standard than actual malice.

How stringent? If the district court's opinion is taken at face value, only a claimant with direct, irrefutable evidence of actual malice would survive a motion for summary judgment. Indeed, anything less than an outright admission would almost certainly fail. The statement, "If you can't find someone to roll this car, I will"!, ER1186–88, falls just short of an admission, but the court below declined to give it sufficient weight to create a triable issue of material fact. Only a direct admission would exceed the probative weight of this statement. But a standard of proof requiring evidence of an admission exceeds the actual malice standard, which requires only proof of "knowledge of falsity or reckless disregard as to truth or falsity," *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). In short, actual malice does not obligate a claimant

to produce a video recording of the defendant saying, "Yes, I know Product X is probably safe, but let's publish the article anyway." Yet the decision below leaves substantial doubt whether anything less would survive a motion for summary judgment. Because such direct evidence of an admission is exceedingly rare, the district court's decision granting summary judgment has the effect of erecting an all but insurmountable barrier to product disparagement claims.

II. BY ERECTING A MORE STRINGENT STANDARD OF PROOF THAN "ACTUAL MALICE," THE DISTRICT COURT'S DECISION THREATENS TO WIPE OUT PRODUCT DISPARAGEMENT AS A MEANINGFUL FORM OF RELIEF, AT GREAT COST TO BUSINESSES AND CONSUMERS ALIKE

"Actual malice." From those words courts have woven a net so fine that few claims manage to wriggle through. Nearly 70% of libel claims brought against the press, where "actual malice" supplies the governing standard, conclude with the defendant's motion for summary judgment. *See* Jonathan Garret Erwin, Note, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 693 (2000). Out of the remaining 30%, which survive and proceed to judgment, only 5–10% of the claims originally filed remain

alive after appellate review. *See id.* The vast majority meets its death (untimely or not) when an appellate court reverses for failure to satisfy the demands of "actual malice."

By establishing a higher standard of proof than "actual malice," the lower court transformed an already finely woven net into a web that allows only the rarest of claims to make it through. If, as the court's holding indicates, proof of "actual malice" is insufficient, then significantly fewer claims would survive the standard applied by the district court in this case than ordinarily survive the rigors of "actual malice." And because "actual malice" already excludes all but 5–10% of libel claims against the media, less than 5% of product disparagement claims would likely survive the district court's standard of proof. The district court's standard of proof, if adopted as the rule of decision in other federal courts, would therefore virtually eliminate product disparagement as a meaningful remedy.[1]

Eliminating product disparagement as a meaningful form of relief will impose high costs, both financially and socially. As an example of the high costs of product disparagement, consider what happened when

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[1] This conclusion assumes that no cause of action can be regarded as meaningful if it can be expected in advance to let less than 5% of potential claimants prevail.

the CBS television show "60 Minutes" aired a broadcast attacking the use of Alar, a "growth regulator," used by apple growers. *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 930 (E.D. Wash. 1992). Despite the absence of conclusive proof showing that Alar posed a health risk, *see id.*, "60 Minutes" covered the topic in its trademark no-holds-barred style. "The segment open[ed] with a lengthy shot of a red delicious apple emblazoned with a skull and crossbones." *Id.* at 930 n.2. This led to rather dire consequences for the apple industry.

> Both sales and prices fell sharply, not only locally, but world-wide. Alar was taken off the market and after a vigorous educational campaign spearheaded by WSAAC [the Washington State Apple Advertising Commission], the industry eventually recovered. In the interim, growers and others dependent upon apple production sustained tremendous losses amounting to perhaps as much as $75 million dollars. Beyond immediate economic loss, growers forced into bankruptcy or work-out arrangements with lenders lost their homes and livelihoods. Those who survived intact saw their property values nosedive. Entire communities dependent upon the apple market were thrown into depression.

Id. at 930–31.

These admittedly extreme consequences of one instance of product disparagement underscore an important point. Product disparagement carries financial and social costs not borne by the direct victims of product

disparagement alone. Businesses that manage to weather the storm can be expected to pass along their costs to customers in the form of higher prices, and businesses that fail can be expected to leave behind the social problems of unemployment and poverty, problems that will impose steep social costs. Unless compensated by the perpetrator, product disparagement can be expected to harm customers and the community as a whole.

In addition to the financial and social costs, virtually eliminating product disparagement as a meaningful form of relief is fundamentally unfair. In the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall wrote, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. Indeed, Marshall explained that such a right is indispensable to the rule of law.

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 163. Decisions of the U.S. Supreme Court have repeatedly relied on this principle. *See, e.g.*, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992); *Nixon v. Fitzgerald*, 457 U.S. 731, 768 (1982) (White, J., dissenting). The same principle also animated the English common law. "[I]t is a general and

indisputable rule, that when there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

The district court's decision granting summary judgment despite the "cartloads of evidence," ER1870, that Suzuki has produced in its favor represents a clear repudiation of this rule. At some point restrictions on a remedy amount to nothing less than its elimination. Here, the district court's decision erected a more exacting standard of proof than "actual malice." This has the effect of leaving Suzuki with a right to be free of injurious falsehoods but without a meaningful remedy to vindicate that right. For that reason alone the decision below ought to be reversed.

III. VIRTUALLY ELIMINATING PRODUCT DISPARAGEMENT AS A MEANINGFUL FORM OF RELIEF IS PARTICULARLY OBJECTIONABLE BECAUSE THE FIRST AMENDMENT DOES NOT DEMAND THE SHOWING OF "ACTUAL MALICE" FOR PRODUCT DISPARAGEMENT CLAIMS

Virtually wiping out product disparagement from tort law might be tolerable if it were clear that such a radical result were dictated by the First Amendment. But it is not. On the contrary, U.S. Supreme Court decisions leave substantial doubt whether "actual malice" applies to claims of product disparagement.

To be sure, some courts, relying on *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), have found that the Supreme Court has already held that the First Amendment mandates proof of actual malice for product disparagement claims. *See, e.g.*, *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986); *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 66 F. Supp.2d 1117, 1124 (C.D. Cal. 1999); *Quantum Elecs. Corp. v. Consumers Union,* 881 F. Supp. 753, 763 n.12 (D.R.I. 1995).[2] They are mistaken.

In *Bose* a manufacturer of stereo speakers brought a product disparagement claim against CU for publishing an article which asserted that "individual instruments heard through the Bose system seemed to grow to gigantic proportions and wander about the room." 466 U.S. at 487. The Court addressed a narrow procedural question: "Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind

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[2] Suzuki has acknowledged that *Unelko Corp. v. Rooney*, 921 F.2d 1049 (9th Cir. 1990) currently "requires a plaintiff in a product disparagement suit to show that the defendant acted with actual malice." Br. App. 35 n.12. At the same time, it has "reserve[d] the right to raise the argument that the actual malice standard does not apply should the case be subject to further review." *Id.*

of 'actual malice' described in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)?" *Bose*, 466 U.S. at 487. In answer the Court held that Rule 52(a) did not prescribe the correct standard of review. Instead a reviewing court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 513.

The issue here—whether a party bringing a claim for product disparagement must prove that the defendant acted with actual malice—was not resolved by the Court in *Bose*. Not only did the question presented not raise it, but the Court took pains to emphasize that it was not taking up the issue.

> The Court of Appeals entertained some doubt concerning the ruling that the *New York Times* rule should be applied to a claim of product disparagement based on a critical review of a loudspeaker system. *We express no view on that ruling*, but having *accepted it for purposes of deciding this case*, we agree with the Court of Appeals that the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment.

Id. at 513 (emphasis added).

Despite this plain language in *Bose* reserving the question, "courts and commentators alike have often read the decision as mandating that injurious falsehood cases carry the same first amendment requirements

applicable to defamation cases." Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMPLE L. REV. 903, 903–04 (1989). We respectfully disagree with this trend. The Supreme Court's refusal in *Bose* to address whether the First Amendment extends the actual malice standard to product disparagement cases means that the Court has left the application of that standard unsettled in the area of product disparagement.

The First Amendment does not require the showing of actual malice in the context of product disparagement. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The same guarantee applies against the states via the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court revolutionized tort law by holding that the First and Fourteenth Amendments "require . . . 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'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80.

The Court adopted this standard for defamation, knowing that it would sometimes protect false speech. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). Nonetheless, the Court has consistently maintained that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1973) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Its adoption of actual malice therefore reflected the Court's "conviction that the common law of libel gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press and that to avoid self-censorship it was essential that liability for damages be conditioned on the specified showing of culpable conduct by those who publish damaging falsehood." *Herbert v. Lando*, 441 U.S. 153, 159 (1979).

This passage from *Herbert* contains the key to determining whether actual malice properly extends to product disparagement. While the Court has emphasized both the identity of the plaintiff, *see Gertz v.*

Robert Welch, Inc., 418 U.S. 323, 342–46 (1974), and the category of speech, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985), in determining whether the First Amendment requires the application of actual malice, *Herbert* teaches that the common law supplies an additional criterion.

That the degree of protection afforded by the common law can be decisive in ascertaining the reach of the *New York Times* rule is further supported by the Court's reasoning in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). There Hugo Zacchini, a "'human cannonball,'" *id.* at 563, sued the Scripps-Howard Broadcasting Company for broadcasting his "entire act," *id.* at 575, on the local news. The Court addressed whether the First Amendment required to Zacchini to prove his action for the "right of publicity" with actual malice. *Id.* at 565. In deciding this question the Court explained that its decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which held that actual malice applied to claims of the right of privacy, was not controlling. As the Court stressed, the "right of publicity" was "an entirely different tort." *Id.* at 571. "The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. . . . Second, the two torts differ in the degree to which they intrude on dissemination of information to the public." *Id.* at 573.

Careful attention to the nature of the tort can be outcome determinative, as it was in *Zacchini*. In *Herbert* the Court made it clear that it had first adopted actual malice as the constitutionally-mandated standard of proof in libel cases brought against public officials and public figures, because "the common law of libel gave insufficient protection to the First Amendment guarantees." *Herbert*, 441 U.S. at 159. It follows that a common law cause of action that gave *sufficient* protection would not require the application of actual malice.

Product disparagement furnishes sufficient protection to satisfy the First Amendment without invoking actual malice. In California a claim for product disparagement requires proof of "an intentional disparagement of the quality of property, which results in pecuniary damage. . . ." *Erlich v. Etner*, 36 Cal. Rptr. 256, 258 (Cal. Ct. App. 1964). Its elements therefore include "(1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages." *Aetna Casualty and Surety Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988).

These elements differ from common law libel, which required a claimant only to prove the publication of a statement that "diminish[ed] his reputation." 3 WILLIAM BLACKSTONE, COMMENTARIES *125. In addition

to certain privileges, truth was a good defense. *See id.* at *126. But both the falsity of the statement and injury to the plaintiff were presumed. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). The latter presumption made libel "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The differences between product disparagement (or injurious falsehood) and libel are therefore substantial.

> Defamation and injurious falsehood differ conceptually and stem from separate common law sources. Whereas defamation actions are a means of protecting and vindicating the *reputation* of the party about whom a false statement was made, injurious falsehood actions are designed to afford a remedy to one whose *economic interest* was harmed as the result of another's false statement, even though the injured party's reputation was not necessarily damaged.

Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMPLE L. REV. 903, 903–04 (1989).

Because an action for product disparagement requires the plaintiff to prove falsity and special damages, it poses far less of a threat to constitutionally protected speech than libel. The nature of libel law meant that, before *New York Times*, publishers acted at their own peril since they could be successfully sued even

without proof of the falsity of their statements or of the financial injury caused by such statements. However, the prima facie case for product disparagement allows the complaining party to prevail only if he can prove both falsity and damages. Given the far greater protection for speech furnished by the elements of product disparagement than those of common law libel, the Court's "conviction that the common law of libel gave insufficient protection to the First Amendment guarantees," *Herbert v. Lando*, 441 U.S. 153, 159 (1979), is misplaced with regard to product disparagement.

Despite the protection afforded to the First Amendment by the common law elements of product disparagement, "it would be exceedingly difficult for the Court, after *Bose*, to assert that first amendment considerations should play no role in injurious falsehood law." Langvardt, 62 TEMPLE L. REV. at 937 n.203. A comparison of libel with product disparagement has shown that actual malice is not the appropriate standard for product disparagement. If not actual malice, then what?

The Court's decisions suggest that the proper standard of proof for product disparagement claims is negligence. The Court has voiced its unwillingness to extend the *New York Times* rule to the nethermost extremes of tort law. "Though the First Amendment creates a strong presumption against punishing protected

speech even inadvertently, the balance need not always be struck in that direction. . . . [T]he possibility that defamation liability would chill even true speech has not led us to require an actual malice standard in all libel cases." *Waters v. Churchill*, 511 U.S. 661, 670 (1994) (plurality opinion of O'Connor, J.) (citations omitted). When the First Amendment does not require evidence of actual malice, the Court has allowed proof of negligence instead. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The Court has made it clear that proof of actual malice is unnecessary when "the speech is wholly false and clearly damaging to the victim's business reputation." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). In addition, adopting negligence as the standard for product disparagement is consistent with the Court's holding in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). "As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection . . . we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." *Id.* at 457.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the District Court.

Respectfully submitted,

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