No. 13-_____

In The
Supreme Court of the United States

NORMAN LE, et al.,

Petitioners,

v.

DUC TAN, a single man; and
VIETNAMESE COMMUNITY OF
THURSTON COUNTY, a Washington Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is calling a political rival a Communist, or a fascist, or a racist, the type of "objectively verifiable" statement which this Court held actionable in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990), or is it a statement on a matter of public concern which this Court said "receive[s] full constitutional protection" because it is not a "provably false" assertion? *Id.* at 20.

2. Are the same criteria for distinguishing between actionable and nonactionable statements of opinion equally applicable to cases where the plaintiff is a public figure, as they are to cases, such as *Milkovich*, where the plaintiff was not a public figure?

3. Is the "substantial truth" defense constitutionally required in cases involving core political speech about a public figure where all the underlying factual predicates for the allegedly defamatory statement are fully disclosed, enabling the audience to draw its own conclusions?

PARTIES TO THE PROCEEDINGS

The Petitioners are NORMAN LE and PHU LE, husband and wife; PHIET NGUYEN and VINH T. NGUYEN, husband and wife; DAT HO and JANE DOE HO, husband and wife; NGA T. PHAM and TRI V. DUONG, wife and husband; and NHAN T. TRAN and MAN M. VO, wife and husband.

The Respondents are DUC TAN, a single man; and VIETNAMESE COMMUNITY OF THURSTON COUNTY, a Washington corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Washington Supreme Court which reinstated a judgment against them for defamation.

OPINIONS BELOW

The opinion of the Washington Supreme Court is published as *Tan v. Le*, 177 Wn.2d 649, 300 P.3d 356 (2013). App. 1-52. The Supreme Court's decision reversed the decision of the Washington Court of Appeals, published as *Tan v. Le*, 161 Wn.App. 340, 254 P.3d 904 (2012). App. 53-84.

JURISDICTION

The Washington Supreme Court denied Petitioners' motion for reconsideration on August 15, 2013. App. 103-04. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall

make no law . . . abridging the freedom of speech, ..."

STATEMENT OF THE CASE

Petitioners and Respondents are politically active in the Vietnamese community in Thurston County, Washington. In 2003, Petitioners, "members of the Committee Against the Viet Cong Flag[,] disseminated an e-mail message accusing Duc Tan and the Vietnamese Community of Thurston County (VCTC), a non-profit corporation, of engaging in procommunist activities." App. 1. In addition, Petitioner Norman Le wrote three newsletter articles reiterating the allegations of the e-mail and accusing Respondent Tan of being an agent for the Viet Cong. App. 2.

All of the parties were born in Vietnam and immigrated to the United States after the end of the Vietnam War. Tan was drafted into the Southern Vietnamese Army in 1968. App. 3. When the Vietnamese Communist Army captured Saigon in April of 1975, Tan was sent to a Communist reeducation camp. App. 3. The Communists released Tan after six months imprisonment. App. 3. "His release was contingent upon signing a loyalty pledge to the Communist Party. To secure his release, Tan signed the pledge." App. 3. After his release, Tan worked for the Communist Party until 1978 when he left Vietnam; in 1979 he came to the United States and settled in Washington where he became a member of the VCTC.

App. 3. Tan is the VCTC's director of education and is recognized as one of the organization's leaders. App. 3.

Petitioners Tran and Ho escaped Vietnam when Saigon fell in 1975. App. 4. Petitioner Le was imprisoned in a Communist labor camp for nine years and seven months. App. 4. Petitioner Nguyen was imprisoned for six years and six months. App. 4. "Like Tan, [Petitioners] are politically active in the Vietnamese community. Norman Le was the VCTC's secretary for several years. [Petitioners] are all members of the Committee Against the Viet Cong Flag which was formed in 2003 to seek removal of the Socialist Republic Vietnamese flag from the lobby of the South Puget Sound Community College." App. 4. Many Vietnamese refugees living in the United States view the current flag of Vietnam as the "communist flag," and its display elicits painful memories for them. App. 4. The local Vietnamese community is divided on how best to prevent the display of this flag. App. 4.

On August 7, 2003, Petitioners disseminated an e-mail entitled "Public Notice." App. 9, 105-14. They accused Tan and the VCTC of falsely pretending to be anti-Communist Nationalists while actually "conduct[ing] activities on behalf of the evil communists and harm[ing] our compatriots and poison[ing] our children's mind[s]." App. 114.

Petitioners' Public Notice set forth the following "correct and true evidences" upon which they based

their conclusion that Tan and his "gang" were actually pro-Communist. App. 109-10.

A. Opposition to Use of the Word "Nationalist" in the Name of Tan's Organization.

The first "evidence" concerned a dispute over the renaming of Tan's organization. When it was first formed in 1975, it was called the Vietnamese Mutual Assistance Association. App. 4. "In 1995, the organization voted to change its name." App. 4. Petitioner "Le suggested that the new name include the word 'national' or 'nationalist' to signal a clear anticommunist agenda." App. 4. The Public Notice stated that Tan and his "gang insisted that the name '**National** Vietnamese Committee'" suggested by several anti-Communist groups "be denied." App. 110 (bold in original). Le's proposal was defeated and the organization was renamed the Vietnamese Community of Thurston County. App. 4-5. Petitioners concluded that it was "obvious" from Tan's opposition to the word "nationalist" that the VCTC "had been impersonating the representatives of the community with illegal political intentions." App. 110.

B. Accepting Financial Donation from a Suspected Viet Cong Supporter.

Petitioners' Public Notice stated that the VCTC had accepted a monetary contribution from a local market owner who had distributed free calendars that had been printed by the Communist Party in Ho

Chi Minh City. App. 5. When asked why he had used a Communist printer the owner said he had the calendars printed in Vietnam because it was cheaper than using a printer in the U.S. App. 5. The VCTC was satisfied with that explanation and accepted his donation. App. 6. Petitioners asserted that Duc Hua, the President of the VCTC, made the statement "There is nothing wrong with receiving VC [Viet Cong] money." App. 6. Hua denied making this statement and testified that he said only "that the VCTC accepts any donation as long as no conditions are attached." App. 6.

C. Playing the Communist National Anthem at a VCTC Event.

At the start of a VCTC organized event honoring a Vietnamese poet, the band hired by the VCTC began to play the national anthem of the current Communist government of Vietnam. App. 6. After playing a portion of the Communist anthem, the band stopped, apologized for playing the "wrong" anthem, and played the anthem of the former Republic of South Vietnam. App. 6. The Public Notice asserted that once the band started to play the Communist anthem, "the audience stood up and protested violently. . . ." App. 111. The Respondents disputed this contention and asserted that there was no big negative reaction from the crowd. App. 6.

D. Scheduling VCTC Events on Communist Holidays.

The VCTC newsletter suggested scheduling an event on September 2nd even though the Vietnamese community knows September 2 as the date of the "Fall Revolution" when the Communist Party declared Vietnam's independence from France. App. 7. In addition, the VCTC scheduled events on April 30th, which is the anniversary of the fall of Saigon, and therefore an inappropriate day for any anti-Communist to celebrate, or to schedule for a Vietnamese cultural event. App. 7.

E. Failure to Vigorously Oppose the Display of the Communist Flag.

Tan ran a Vietnamese language school for children of Vietnamese refugees, and his school utilized classrooms provided by a private school. App. 7. One of the classrooms displayed flags from around the world, including the current Communist flag of the Socialist Republic of Vietnam. App. 7. Petitioners accused Tan of not acting vigorously to oppose the display of the Communist flag. App. 7.

In early 2003, members of the Vietnamese refugee community met to discuss how best to stop a local community college from displaying the Communist flag of Vietnam. App. 8. They elected Petitioner Norman Le as a co-chair of their group, which they named the Committee Against the Viet Cong Flag. App. 8. At a subsequent meeting, Respondent Tan

proposed that Le step down as co-chair so that the group could hold a new election. App. 8. Tan's proposal was defeated and Le remained one of the elected co-chairs. App. 8.

F. Use of an Apron Bearing a Picture Interpreted as a Representation of Ho Chi Minh.

The VCTC annually sponsored a food booth at the Lakefair celebration held in Olympia, Washington. App. 8. In 2003 a VCTC volunteer found an apron in the booth which bore an image of a man "wearing a red hat with a yellow star" and "a boxing glove [with a] red back ground yellow star," and displaying a VC flag swallowing an American flag. App. 8-9, 108. While the VCTC later asserted that the man was simply Santa Claus, in their Public Notice the Petitioners asserted that "Every Vietnamese political refugee having experience with the Communists understand right away" that the red flag and the yellow star portrayed the Vietnamese Communists and that the bearded Santa Claus figure was Ho Chi Minh wearing a "VC boxing glove swallowing the American flag insinuat[ing] the idea of 'the Vietnamese Communist Party (CSVN) defeat[ing] America'. . . ." App. 108. Petitioners described the apron incident as "an intentional display of the communist regime in the Vietnamese community." App. 9, 109.

The Public Notice e-mail announced that Petitioners would be holding a press conference where they would display their evidence that Tan and the

VCTC were actually supporters of Vietnam's current Communist government. They invited all refugees from Communist countries. They also specifically invited the Respondents, to attend the press conference to respond to Petitioners' allegations:

> To have more details and clearly see the evidence (evidence in *English*), please attend the first press conference in Seattle from 2:00 p.m. to 4:00, Sunday August 17, 2003 at Rainier Community Center, 4600 38th Avenue South, Seattle, near Rainier South and Alaska Way.
>
> We also invite the Vietnamese Community in Thurston County to send representatives to this press conference and subsequent conferences, if any, to present its side of the matter.

App. 106-07. Despite this invitation, neither Tan nor any other representative of the VCTC attended the press conference. App. 9.

Under the heading "Alert and Summon," Petitioners warned that Tan and the VCTC were phony anti-Communists, who in fact supported the Communist government of Vietnam. App. 118. Based on the evidence they disclosed, Petitioners' Public Notice asserted that they had "more than enough" to conclude

> that the Duc Tuc [sic] Tan gang had abused people's name, hidden under the Nationalist Coat to serve the common enemy of the Vietnamese refugees that is the Communist Hanoi. The organization of Duc Thuc Tan

> gang had betrayed our Vietnamese community, continuously and systematically since its establishment date.

App. 113.

Noting that Tan and his associates did not have clear Nationalist (anti-Communist) credentials, Petitioners asserted that they were simply pretending to be Nationalists:

> The Committee Against Viet Cong Flag summons the Communist refugee compatriots, the companions in arms, anti-communist organizations in Washington State and everywhere, to strongly condemn Duc Thuc Tan and gang that are "**fed by the Nationalists and worship the Communists**". Duc Thuc Tan and gang are in the Vietnamese Community of Thurston County and the Vietnamese Language School Hung Vuong.

App. 113-14 (bold in original).

In addition to the Public Notice e-mail, which was signed by all of the Petitioners, Petitioner Le wrote three newspaper articles which repeated the allegations from the e-mail and accused Tan and the VCTC of being undercover Viet Cong agents. App. 2.

Tan and the VCTC sued the Petitioners for defamation. The trial court determined that Tan and the VCTC were public figures as a matter of law, and therefore the actual malice standard of *New York*

Times v. Sullivan[1] applied. App. 2 n.1. The case was tried and a jury concluded that the plaintiffs had been defamed and awarded them judgments against Petitioners totaling $310,000. App. 2.

Petitioners appealed to Washington State's intermediate Court of Appeals. That Court reversed and remanded for dismissal, finding that the statements made were protected opinion supported by disclosed facts, with the exception of Petitioner Le's allegation that members of the VCTC were undercover agents of the Viet Cong. App. 2. The Court of Appeals further found that Tan and the VCTC had failed to make the requisite showing that Petitioners published any of their statements with actual malice. App. 2.

The Washington Supreme Court granted discretionary review of the Court of Appeals' decision. With one Justice dissenting, the Supreme Court reversed the Court of Appeals' decision, and reinstated the jury's verdict and the judgment against Petitioners. App. 2. The majority held that the statements made were not protected opinion, and that they were actionable because they "carried a provably false factual connotation." App. 20.

The Washington Supreme Court recognized that "[d]ue to concerns about stifling valuable public debate, the privilege of 'fair comment' was incorporated

[1] 376 U.S. 254 (1964).

into the common law as an affirmative defense to an action for defamation" in order to provide legal immunity for the honest expression of opinion on matters of legitimate public interest. App. 15. Acknowledging that the common law privilege applied only to a statement of opinion and not to a false statement of fact, the Court noted that in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), this Court held that even though a statement is structured as an opinion, it could "still be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion, because it may then contain a provably false factual connotation." App. 116, citing *Milkovich*, 497 U.S. at 20.

The Washington Supreme Court reasoned that Petitioners' statements accusing Tan and his organization of having "supported" and "worshipped" the Viet Cong government, and of having "illegal political intentions," were actionable because they "carried a provably false factual connotation." App. 20.

The Petitioners argued that their statements accusing Respondents of being Communists were protected by the First Amendment because they had disclosed all of the facts upon which they relied as the basis for that accusation. App. 17. The Washington Supreme Court rejected this contention, reasoning that "[t]he mere fact that the [Petitioners] disclosed a basis for their false charge that Tan and the VCTC support the Viet Cong government does not protect them from liability when the opinion itself is based on false and defamatory facts." App. 17. The Court

agreed with the general principle that "[w]hen the audience knows the facts underlying an opinion and can judge the truthfulness of the alleged defamatory statement for themselves, the basis for liability for the opinion is undercut." App. 17. But the Court held that Petitioners could not avoid liability on this basis because some of the factual statements upon which they based their opinion that Tan and the VCTC were Communist supporters were themselves false. App. 18-19.

The Washington Supreme Court did not identify *which* factual statements set forth in the Public Notice e-mail were false. No such identification was possible because the special verdict forms completed by the jury did not ask the jurors to identify which statements in the e-mail were false; they asked only if the plaintiffs were "defamed" by the e-mail. App. 91-94.

Petitioners argued that the sting of their publications was the charge of being a Communist or a Communist sympathizer. App. 22. Respondent Tan conceded that "nothing could be more hurtful than calling [him] a Communist." App. 70. Most of Petitioners' factual statements were undisputed, and any minor inaccuracies in the statements, such as the degree to which the audience reacted negatively to the playing of the "wrong" national anthem, did not cause any further sting. Therefore, Petitioners argued that they were entitled to First Amendment protection from liability. App. 22. But the Washington Supreme Court disagreed. Although acknowledging that it had held the substantial truth defense was

applicable in past defamation cases, it refused to "extend" this defense so as to provide protection to opinion statements. App. 23. The Court reasoned that there was "no objectively established truth" in this case, because "there [were] no true statements showing that Tan and the VCTC are communists," and therefore it was impossible to compare the sting that would have been caused solely by the opinion that they were Communists to the additional sting that was caused by a false factual statement offered in support of that opinion. App. 23.

In his dissenting opinion, Justice James Johnson rejected the majority's premise that the accusation that a person was a Communist or a Communist sympathizer was objectively verifiable. He characterized this assertion as "at most, conjecture," which the audience would have recognized as "one of belief, not of fact." App. 37. Faulting the majority for "not recogniz[ing] the First Amendment's inherent protection of conjecture within a political debate," Justice Johnson concluded that the "allegations that [plaintiffs] are communists or communist sympathizers are opinions based on disclosed facts within the context of a political debate and thus nonactionable." App. 36. He argued that when determining whether a statement should be characterized as nonactionable opinion, "a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." App. 38. Justice Johnson concluded that all three factors

weighed in favor of nonactionability. "First, the context of the statements was an ongoing political debate about how best to achieve the goals of the Vietnamese refugee community." App. 38. Second, "in light of their cultural background and familiarity with the events described, the audience," comprised of Vietnamese immigrants, "was uniquely situated to determine the validity of the [Petitioners'] claims." App. 38. Third, the Petitioners' "conjecture that [Duc Tan and his associates] are communists or communist sympathizers does not imply undisclosed facts." App. 39.

In addition, Justice Johnson disagreed with the majority's conclusion that Petitioners were not entitled to avoid liability on the ground that their e-mail had disclosed all of the facts upon which they based their conclusion that the plaintiffs were supporters of the Communist government of Vietnam. He noted that since the Petitioners had set out their version of the incidents which they believed supported their allegations, "the audience was given all the necessary information to determine the validity of [their] conjecture." App. 39-40. Pointing to an example given by the Restatement (Second) of Torts, § 566 cmt. c, Justice Johnson argued that when the speaker discloses the basis for his conjecture, there should be no liability because the audience is able to judge for itself the validity of his allegation. App. 40.

Moreover, he noted that most of the underlying facts proffered by the petitioners as the basis for their opinion were essentially undisputed: "Each event described by the [Petitioners] actually happened." App.

50. It was undisputed that the "wrong" national anthem *was* briefly played; a monetary donation *was* accepted from a donor who had employed a Communist printer; VCTC events *were* scheduled on dates that were Communist holidays; Duc Tan *did* oppose use of the word "Nationalist" in the name of his organization; a Communist flag *was* displayed at the private school out of which Duc Tan operated his language school; an apron bearing the image of a bearded man wearing a red hat with a yellow star *was* found at the VCTC food booth; and Duc Tan *did* sign a loyalty pledge as a condition of being released from a Communist reeducation camp. As Justice Johnson noted, what was disputed was how to interpret these events. App. 50. He concluded that the Public Notice was nonactionable because it was conjecture based on disclosed facts, made within a political debate, did not imply the existence of undisclosed facts, and none of the disclosed underlying factual allegations were defamatory. App. 41, 44.

Further, Justice Johnson opined that to impose liability simply because there were minor inaccuracies in the Petitioners' statements describing their "evidences" was inconsistent with this Court's decisions in *Sullivan* and *United States v. Alvarez*.[2] App. 44-45. Recognizing the "inevitability of some error in the situation presented in free debate," *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 152 (1967), and the fact that a rule compelling a speaker "to guarantee the

[2] 132 S.Ct. 2537 (2012).

truth of all of his factual assertions would deter protected speech, ..." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 334 (1974), Justice Johnson opined that the majority had actually imposed a rule of strict liability which was "antithetical to the protections of the First Amendment" which harms our system of self-government by chilling valuable political speech. App. 44.

SUMMARY OF THE ARGUMENT

Twenty-three years after this Court's decision in *Milkovich,* the lower courts are continuing to struggle to apply its distinction between nonactionable opinion, and actionable opinion which contains "impl[ied] assertion[s] of objective fact." *Milkovich*, 497 U.S. at 18. Declining to create "an artificial dichotomy between 'opinion' and fact," *id.* at 19, this Court held that some statements of opinion were actionable and some were not: "[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law," but "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 19-20.

Milkovich was a private figure plaintiff[3] who sued for libel when a newspaper article "impl[ied]

[3] *Milkovich*, 497 U.S. at 6 (Supreme Court of Ohio "decided that [Milkovich] was neither a public figure nor a public official"),

(Continued on following page)

that [he] . . . lied under oath in a judicial proceeding about an incident which occurred at a wrestling match." *Id.* at 3.[4] This Court identified three factors pertinent to the determination of whether a statement of opinion was actionable: (1) whether the statement referred to an "objectively verifiable event," (2) whether it employed "loose, figurative or hyperbolic language," and (3) whether the "general tenor" of the article negated the impression that the statement was meant seriously. *Id.* at 21-22.[5]

Since *Milkovich* was decided, courts have been unable to draw a consistent line between actionable opinion and nonactionable opinion, particularly in cases where the plaintiff is a public figure who was engaged in ongoing political debate. In *Milkovich* this Court made no attempt to set forth "a comprehensive definition of the distinction between fact and opinion," and left it up to the lower courts to devise tests to differentiate between the two. K. Sowle, *A Matter*

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and at 10 n.5 (that determination that he was a private figure continued to be the law of the case on that issue).

[4] The article stated in part, "Anyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 5 n.2. This statement was held actionable because "[u]nlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id.* at 21-22 (internal quotation marks omitted).

[5] This Court did not hold that these were the *only* pertinent factors, thus leaving unresolved what additional factors might sometimes be relevant.

of Opinion: Milkovich *Four Years Later*, 3 WM. & MARY BILL RTS. JOURNAL 467, 472 (Winter 1994). One commentator has concluded that "[n]o area of modern libel law can be murkier than the cavernous depths of this inquiry." Sanford, *Libel & Privacy* § 5.1 (Supp. 1997).

Particularly when courts are called upon to apply the *Milkovich* test of actionability in cases where *public* figure plaintiffs claim to have been defamed by their adversaries in the course of political debate, they have struggled. As the present case illustrates, appellate judges are divided as to whether it matters that the allegedly defamatory opinion was made in the context of a political debate. They disagree as to whether the nature of the audience is relevant, whether full disclosure of the factual basis for the opinion insulates the statement from liability, and if so, whether it is sufficient if the underlying factual statements are substantially true, even if not completely accurate in all respects.

Twelve years after *Milkovich*, one scholar surveyed the case law and discovered a complete lack of uniformity as to how the lower courts were navigating the actionability line between objectively "provable" factual statements and nonactionable statements of opinion:

> The court in *Milkovich* relied on three factors to determine whether a statement was [actionable] opinion. However, a survey of cases that refer to *Milkovich* shows that some courts are following it, others are misinterpreting

> it, and others are simply refusing to follow it. . . . Some courts use authorities other than *Milkovich* in deciding the fact/opinion issue. Some courts do not rely on any precedent, but construct their own reasons for differentiating fact from opinion. Some courts use all three *Milkovich* factors, while others eclectically choose from among the three.

R. Maloy, *The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119, 120-21 (2002).

Today the inconsistency in the way in which courts apply *Milkovich* and distinguish between actionable and nonactionable opinion continues unabated. Prior to *Milkovich* two circuits used a four-factor test which analyzes: (1) the common meaning of the specific language used; (2) the statement's verifiability; (3) the full context of the statement within the entire article; and (4) the broader social circumstances in which the statement was made. *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.,* 829 F.2d 1280, 1287 (4th Cir. 1987) (adopting the *Ollman* factors). Other courts used a three-factor test, created by the Ninth Circuit, which focused on consideration of (1) the facts surrounding the publication, (2) whether the statements were made in the course of a public debate, or under circumstances in which the audience would anticipate efforts to persuade it to accept the speaker's position through the use of "epithets, fiery rhetoric or hyperbole"; and (3) whether

the statements were "cautiously phrased in terms of apparency" or were the type of statements "typically generated in a spirited legal dispute in which the judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended, making the statement less likely to be understood as a statement of fact." *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 784 (9th Cir. 1980).

Milkovich briefly mentions three pertinent factors (verifiability, hyperbole and the general tenor of the article). But there is nothing in the opinion to suggest that this Court intended to prohibit the consideration of other factors, and after *Milkovich* most courts have assumed or held that this Court did *not* limit the analysis to just these three factors. For example, both the D.C. Circuit and the Fourth Circuit have continued to use the four-factor *Ollman* test. *See Lapkoff v. Wilks*, 969 F.2d 78, 82 (4th Cir. 1992); *Moldea v. New York Times*, 22 F.3d 310, 314-15 (D.C. Cir. 1994) (rejecting the contention that *Milkovich* is to be read as prohibiting courts from considering the fourth *Ollman* factor of "social context," and holding that consideration of this factor remains appropriate because the "setting" in which the statements were made helps determine the way in which the intended audience will receive them). *See also Joliff v. NLRB,* 513 F.3d 600, 610-11 (8th Cir. 2008) (after noting that *Milkovich* "did not explicitly detail a test," and after reviewing the post-*Milkovich* tests adopted by the First, Second, Fourth and Ninth Circuits, the Eighth

Circuit adopted a four-factor test which appears quite similar to the *Ollman* test). In sum, one scholar has concluded that "today there are as many tests for identifying opinion as there are home remedies for hiccups." R. Smolla, *Freedom of Speech,* § 23.10 (2009).

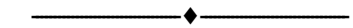
Three unresolved legal questions continue to vex the lower courts. First, there is the question of whether a statement of opinion affixing a political label to a person is the type of opinion that can provide the basis for a claim of defamation. Courts are split on the question of whether statements such as, "He's a Communist," or "He's a racist," are sufficiently factually verifiable to be actionable. There is widespread disagreement over whether the political context of such statements should be considered when deciding whether such statements are constitutionally protected.

Second, there is disagreement as to whether the same criteria for actionability should be used in cases involving private and public figure plaintiffs.

Third, courts are split on the question of whether full disclosure of the underlying factual predicates upon which the opinion is based, renders such statements nonactionable because the audience is provided with all the facts necessary to make up its own mind. Some courts hold that these opinions are constitutionally protected only if all the disclosed underlying facts are completely true; others hold that they are still constitutionally protected even if some of the

disclosed facts are not entirely true, so long as they are substantially true.

These divisions are manifested in the sharp differences between the majority opinion and the dissenting opinion issued below, which makes this case a highly appropriate vehicle for resolving these legal questions.



REASONS FOR GRANTING THE WRIT

I. Courts are divided as to whether statements which characterize the political philosophy or beliefs of an opponent are sufficiently objectively verifiable so as to be actionable.

The Washington Supreme Court held that statements such as "He's a Communist or a Communist sympathizer" are objectively verifiable. This presents a question this Court should settle: Are statements that accuse a political opponent of being a dishonest phony – a person who is only pretending to ascribe to a particular program or philosophy – provably false factual statements about an "objectively verified event" which may be actionable? *Milkovich*, 497 U.S. at 22. Or are they statements of opinion relating to matters of public concern which are entitled to "full constitutional protection"? *Id.* at 20.

The majority opinion below relies upon *Milkovich* as support for the conclusion that such statements are actionable. But the dissenting justice also relied

upon *Milkovich* as support for the opposite conclusion that they are not actionable. *Milkovich* did not involve a public figure plaintiff, did not involve political issues, and did not involve a dispute between rival political leaders. Many courts faced with the task of applying *Milkovich* in this type of a political context have come down on the side of *non*actionability.

For example, in a remarkably similar case involving a dispute over the display of the Communist flag of Vietnam, the California Court of Appeal concluded that such statements were not actionable. When a video store owner placed the Communist flag and a poster of Ho Chi Minh in a store window, large numbers of Orange County's Vietnamese community were outraged and staged demonstrations at the store. *Lam v. Ngo,* 91 Cal.App.4th 832, 111 Cal.Rptr.2d 582, 586 (Cal.Ct.App. 2001). They also demanded the support of local politicians including Tom Lam, a city council member, but Lam decided to remain silent and declined to support the protesters. *Id.* A group of demonstrators criticized Lam for showing a lack of concern over the video store owner's display of the Communist flag. *Id.* The demonstrators began showing up at a restaurant owned by Lam bearing "numerous signs casting Lam as a communist and a traitor." *Id.* at 587. They displayed a life-sized effigy of Lam tied to a gallows next to a life-sized effigy of Ho Chi Minh. *Id.* In response, Lam brought suit against the protesters for intentional infliction of emotional distress and intentional interference with his economic interests. Noting that this Court's

opinion in *Milkovich* had refined the analysis of what constitutes an actionable statement of fact in the defamation context, the California court held that the protesters' statements were *not* actionable because they were *not* objectively verifiable, and because they were made in the context of a political controversy. *Id.* at 595.

Lam was portrayed as "a communist sympathizer" and as an "ideological lackey of Ho Chi Minh." *Id.* at 595. Although the court believed these statements were grossly unfair to Lam, it recognized that this was "beside the point." *Id.* Instead, the salient point was that "in context, the protesters were making a political point as to what they thought of Lam's stand on the video store controversy" over the display of the Communist flag. *Id.* Recognizing that "[c]harges of communism are part of the heat of the political kitchen," *id.*, citing *Sullivan*, 376 U.S. at 273 n.14 (observing that political figures must often face charges of "communist sympathies"), the court concluded that such an allegation was not actionable. *Id.* at 595-96. Recognizing that the *Milkovich* verification test provides the necessary "breathing space" for polemical speech, the *Lam* court held that the protesters' state-ments were not actionable because they "were not susceptible to verification using a falsifiability test." *Id.* at 595-96 & n.11.

In both pre- and post-*Milkovich* decisions, other courts have come to similar conclusions holding accusations of extreme political or social beliefs are nonactionable. *See, e.g., National Ass'n Government*

Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996, 1000 (Mass. 1979) (accusation that union director was a Communist not actionable because underlying facts were disclosed and listeners were "free to make up their own minds"); *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972 (N.J. 1994) (allegations of racism or bigotry not actionable); *Vail v. The Plain Dealer,* 72 Ohio St.3d 279, 649 N.E.2d 182, 184 (Ohio 1995) (accusation of anti-gay bias not actionable); *Buckley v. Littell*, 539 F.2d 882, 890-95 (2nd Cir. 1976) (charge that political commentator was a "fellow traveler of fascism"); *Russell v. Davies,* 97 A.D.3d 649, 948 N.Y.S.2d 394 (N.Y.App.Div. 2012) (accusations that plaintiff was a racist and an anti-Semite); *Beverly Hills Foodland v. United Food and Commercial Workers,* 39 F.3d 191, 195 (8th Cir. 1994) (accusation that employer used discriminatory hiring practices nonactionable because it was made "in the context of [an] existing labor dispute"); *Baca v. Moreno Valley Unified Sch. Dist.,* 936 F.Supp. 719, 728 n.6 (C.D.Cal. 1996) (statement "X is a racist" is "legally an expression of opinion rather than a statement of fact and hence is not actionable as slander"). *Cf. Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943) (words like "unfair" or "fascist" are not actionable because they are "part of our conventional give-and-take in our economic and political controversies"). Indeed, in *Milkovich* itself this Court hypothetically observed that the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the

teachings of Marx and Lenin" would not be actionable. *Milkovich*, 497 U.S. at 20.

On the other hand, the Arizona Supreme Court has held that when a statement is made accusing another of being a Communist, it is for a jury to decide whether the statement implied the existence of objectively verifiable facts, and if the jury decides that it did then the statement is actionable. *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (Ariz. 1991).

A statement that accuses another of being a phony – such as Petitioners' accusation that Tan was a phony anti-Communist, a person who merely professed to be anti-Communist when in fact he really was a Communist sympathizer – is not objectively verifiable because no court has the ability to get inside the plaintiff's head and read his mind. This point was well made by the Utah Supreme Court when it held that a newspaper's statement of opinion about the duplicity of the town mayor was not actionable: "Whether [the mayor] actually intended to dupe voters into electing him by misrepresenting his position on municipal power is something only [the mayor] himself knows, not something that is subject to objective verification." *West v. Thomson Newspapers,* 872 P.2d 999, 1019 (Utah 1994). Similarly, in *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 249 (1st Cir. 2000) the Court held that the statement that a lobbyist was faking his "closeness" to President Reagan was a "protected opinion" because it was not something objectively verifiable. And in *Guilford Transportation Industries v. Wilner*, 760 A.2d 580, 599

(D.C. 2000), the opinion that the plaintiffs were "anti-labor" was not actionable because the statement was "not provably false. Whether the plaintiffs are hostile to labor is not an issue of fact susceptible of objective proof." Contrary to the decisions in *West, Gray,* and *Guilford*, which recognize that it is not possible to prove that a person is "faking" his political or social beliefs, in the present case the Washington Supreme Court majority has held that a statement that a person is faking his anti-Communism beliefs is an objectively verifiable or "provably false" factual assertion.

In this case the Petitioners were held liable for having said that Tan and his associates were "impersonating the representatives of the community with illegal political intentions." App. 110. By accusing the Respondents of "impersonating" the fervently anti-Communist Vietnamese refugee community, the Petitioners were accusing the Respondents of being "fake" anti-Communists. In Petitioners' opinion, the Respondents had "illegal political intentions" because they were actually pro-Communist sympathizers.

In *Ollman*, *supra,* the D.C. Circuit correctly anticipated the *Milkovich* approach by recognizing that a statement about a person's real political intentions is not actionable because it is not a statement about an "objectively verifiable event." In that case two newspaper columnists accused a university professor with Marxist views of using the classroom to indoctrinate his students. The Circuit Court held that this kind of political statement was unverifiable and

therefore nonactionable. The Court noted that allowing an unverifiable statement such as "he's a fascist" to subject a speaker to liability would create a constitutionally unacceptable risk that "the trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject." 750 F.2d at 981. The Court concluded that the statement "Ollman is an outspoken proponent of political Marxism" was "obviously unverifiable." *Id.* at 987. Ollman also complained about the statement that he was using the classroom for indoctrination was actionable. But the court noted that there was no way to "prove" that accusation was factually true because "what is indoctrination to one person is merely the vigorous exposition of ideas to another." Since this was not the kind of factual statement that could be "proved," the court held it was not actionable. *Id.* at 989.

The present case is in conflict with cases such as *Ollman, Lam* and *West.* The Washington Supreme Court concluded that the following accusations made against the Respondents were actionable because they were "provably false": (1) the Respondents were "impersonating" anti-Communists; (2) had "hidden under the Nationalist coat" in order to (3) "serve the enemy"; (4) "betraying" their community; and (5) harboring "illegal political intentions." But other courts hold that these kinds of political statements are not actionable because they are not about objectively

verifiable events, and they are typical of the type of fiery rhetoric used in political debate.[6] This Court should grant review to resolve the issue of how to apply the *Milkovich* objective verifiability test to political epithets. Moreover, stricter fault and burden of proof rules are required when the plaintiff is a public figure. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986). A stricter opinion actionability rule should be required as well. *Cf. Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) ("in public debate [we] must tolerate insulting, even outrageous, speech in order to provide adequate 'breathing space' to . . . the First Amendment."). This Court should grant review to decide whether the same test adopted in *Milkovich*, a private figure plaintiff case, is also applicable when political epithets are directed at a public figure plaintiff who has chosen to enter the political fray.

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[6] Similarly, most courts continue to hold that because statements of opinion made in the context of political debate are readily identifiable as non-factual statements they are *not* actionable. *See, e.g.*, *Brennan v. Kadner,* 351 Ill.App.3d 963, 814 N.E.2d 951 (Ill.App.Ct. 2004) (accusation that organizer of a political committee, was using the mail to perpetrate a fraud held nonactionable because it was directed at the political debate surrounding a campaign finance dispute relating to a school board election); *Melius v. Glacken,* 94 A.D.3d 959, 960, 943 N.Y.S.2d 134 (N.Y.App.Div. 2012) (accusation that a political rival was an "extortionist" held nonactionable because "[l]ooking at the broader social context, the statement was made in the midst of a heated political debate").

II. When a statement of opinion about a matter of public concern involving a public figure is accompanied by a full disclosure of all the facts upon which it is based, most courts hold that the opinion is constitutionally protected so long as the underlying facts are substantially true. But the Washington Supreme Court held it is not protected unless *all* the predicate factual statements are true, and refused to "extend" the substantial truth defense to statements of opinion.

In *Milkovich,* this Court unanimously agreed that statements phrased as opinion were not exempt from defamation liability, and that only statements capable of being proved false were subject to liability under state libel law. *Milkovich,* 497 U.S. at 23 (Brennan, J., dissenting). The dissenting justices only disagreed with how to apply that principle to the facts of the case. *Id.* at 25.

In Justice Brennan's view, it was of key importance that the article candidly set out all the facts upon which the author had based his conclusion that the coach had lied. The author "not only reveals the facts upon which he is relying but makes it clear at which point he runs out of facts and is simply guessing." *Id.* at 28. Both state and federal courts have held that audiences can recognize conjecture, just as they could recognize hyperbole, and have concluded that there can be no defamation liability when the author's factual "premises are

explicit," because the reader is not required to share the author's conclusion and is free to make up his own mind. *Id.* at 30 n.7.

The *Milkovich* majority opinion did not comment on the significance *vel non* of full disclosure of the factual basis for a statement of opinion. It neither condemned nor approved of judicial consideration of this factor, thus leaving the lower courts in some doubt as to whether this is a relevant factor. But many courts continue to find this factor highly relevant to the question of actionability. These courts hold that if a statement of opinion is accompanied with full disclosure of all the facts upon which it is based, the opinion is not actionable because such disclosure either expressly or implicitly invites the audience to examine the evidence and to decide for itself whether it agrees with the conclusion that the speaker has drawn. *See, e.g.*, *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730-31 (1st Cir. 1992) (holding case "was fundamentally different from *Milkovich*" because article asserting that company was presenting a "phony" or "fake" version of the famous musical production of the Phantom of the Opera included "full disclosure of the facts underlying [the author's] judgment" and thus "readers were implicitly invited to draw their own conclusions").[7]

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[7] The First Circuit concluded that while this Court did not explicitly hold that statements of opinion based on fully disclosed information were nonactionable, nevertheless that principle flowed from prior decisions involving statements of

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In *Milkovich* this Court held that the statement that the plaintiff "lied at the hearing after . . . having given his solemn oath to tell the truth" was actionable because it was an assertion about an objectively verifiable event. *Milkovich*, 497 U.S. at 5. In stark contrast, in *Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002), the Court analyzed a nearly identical statement accusing the plaintiff Riley of perjury, and explicitly recognized that it was "provably false" just like the statement found actionable in *Milkovich*. There the author (Harr) wrote that "Riley had lied" when he had "sworn at his deposition" that he had never dumped toxic chemicals on his property. Nevertheless, the First Circuit held that this statement was *not* actionable because the author "not only discussed . . . the facts underlying [Harr's] views but also gave information from which readers might draw contrary conclusions." *Riley*, 292 F.3d at 292, quoting *Phantom Touring*, 953 F.2d at 730.

Numerous other courts have similarly held that an opinion is not actionable if the author makes a full disclosure of all the facts upon which the opinion rests, leaving his audience free to draw their own conclusions. *See, e.g., Levin v. McPhee,* 119 F.3d 189, 196 (2nd Cir. 1997), citing *Gross v. New York Times*, 82 N.Y.2d 146, 154, 623 N.E.2d 1163, 1168 (N.Y.

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rhetorical hyperbole, such as *Letter Carriers Ass'n v. Austin*, 418 U.S. 264 (1974) (use of the word "traitor" not actionable) and *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6 (1970) (the word "blackmail" not actionable in context).

1993); *Chapin v. Knight-Ridder Incorporated*, 993 F.2d 1087, 1093 (4th Cir. 1993); *Foodland,* 39 F.3d at 196; *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995);[8] *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1994) (attorney's opinion that judge was a racist and an anti-Semite was constitutionally protected); *Thomas v. Los Angeles Times Communications*, 189 F.Supp.2d 1005, 1016 (C.D.Cal. 2002) (opinion that plaintiff lied when he claimed to be a Holocaust concentration camp survivor).

In the present case, the Petitioners disclosed all of the facts which they viewed as supporting their conclusion that Tan was a Communist or a Communist agent. App. 110-12. Moreover, they informed their e-mail addressees that their evidence "will be displayed at the next press conferences [sic] so that the public could see it in person." App. 109. The Washington Supreme Court acknowledged that Petitioners disclosed all the underlying facts which

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[8] "The courts of appeals that have considered defamation claims after *Milkovich* have consistently held that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment. . . . Thus, we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."

formed the basis for their opinion. App. 17-18. Nevertheless, the court still found Petitioners' statements actionable because it concluded that some of the underlying facts were themselves defamatory. App. 18-19.[9]

Courts are divided on the question of whether *all* of the underlying facts have to be completely true in order for a statement of opinion based on disclosed facts to be constitutionally protected. This Court has twice commented on the substantial truth defense, but it has never decided whether this common law defense is constitutionally required.

In *Sullivan* this Court hinted that the common law defense of substantial truth was constitutionally required in cases involving public figure plaintiffs. Starting from the settled premise that "freedom of expression upon public questions is secured by the First Amendment," the Court framed the question before it as "whether [expression] forfeits that protection by the falsity of some of its factual statements. . . ." 376 U.S. at 269, 271. The Court likened its "actual malice" test to the common law privilege of "fair comment," which shields a statement from defamation liability even though it asserts false facts so long as the statement is made in good faith. *Id.* at 280-81. Although the factual content of the ad was

[9] The Court did not specifically identify which of the underlying factual statements were defamatory. The dissenting justice specifically disagreed with this conclusion. App. 41.

substantially true, it did contain some minor false statements. This Court noted that the rejection of the substantial truth defense by the Alabama Supreme Court raised a constitutional question, but found it unnecessary to decide it:

> The ruling that these discrepancies between what was true and what was asserted were sufficient to injure [Sullivan's] reputation may itself raise constitutional problems, but we need not consider them here.

Sullivan, 376 U.S. at 289.

Later, in *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991), this Court recognized that the common law of defamation "overlooks minor inaccuracies and concentrates upon substantial truth." Further, since California, like most jurisdictions, recognized this common law defense, in that state a defamation defendant could prevail notwithstanding some minor inaccuracies so long as the gist of the challenged statement was true. *Id*. at 517. If the false portion of the statement did not produce an additional harm to reputation beyond that caused by the true portions, then the overall statement was not considered false at all. *Id.*

The *Masson* Court had no occasion to decide whether the common law substantial truth defense was constitutionally required because California already recognized it. But tellingly, the appellate courts of at least six states have held that the defense is constitutionally required by the First

Amendment, and several of them have specifically stated that this Court so held in *Masson*. *See Shulman v. Hunderfund*, 12 N.Y.3d 143, 150, 905 N.E.2d 1159 (N.Y. 2009) ("the Constitution follows the common law of libel," citing *Masson*); *Basic Capital Management v. Dow Jones & Co.,* 96 S.W.3d 475, 481 (Tex.App. 2002) ("substantial truth test from the. . . . protections of the First Amendment," citing *Masson*); *Smith v. Cuban American National Foundation,* 731 So.2d 702 (Fla.Dist.Ct. 1999) (*Masson* makes the elimination of the substantial truth doctrine a violation of the First Amendment); *Gist v. Macon County Sheriff's Department*, 284 Ill.App.3d 367, 671 N.E.2d 1154, 1157 (Ill.App.Ct. 1996) (substantial truth doctrine rooted in United States Constitution citing *Sullivan* and *Masson*); *Collins v. Detroit Free Press,* 245 Mich.App. 27, 627 N.W.2d 5, 9 (Mich.Ct.App. 2001) ("Substantial truth is an absolute defense" citing *Masson*); *McKee v. Laurion,* 825 N.W.2d 725, 730 (Minn. 2013) (citing *Masson*).

In addition, one circuit court has also held that the substantial truth defense is constitutionally mandated. *Lundell Manufacturing Company v. American Broadcasting Companies,* 98 F.3d 351, 359 (8th Cir. 1996).[10] Another circuit has held that when a speaker

[10] In addition, the D.C. Circuit seems to suggest that it thinks the defense of substantial truth is constitutionally mandated. *See Moldea*, 22 F.3d at 318 ("'substantial truth' is a defense to defamation. . . . The Supreme Court explained this defense in *Masson*. . . ."). In *Moldea* the alleged defamatory statement was the author's pronouncement in a book review

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outlines the basis for his conclusion, his statement is "protected" even if it turns out that he has relied upon a false factual predicate, as long as he based his opinion on facts that he reasonably believed to be true. *Flowers v. Carville,* 310 F.3d 1118, 1129 (9th Cir. 2002).

While all of these other courts have held that the substantial truth doctrine is constitutionally required, the Washington Supreme Court refused to apply it in this case. According to the majority, it could not apply it because there was no way of assessing the "objective truth" of the accusation that the plaintiffs were Communists, and therefore it could not compare the sting of any substantial truth with the additional sting, if any, of a minor inaccuracy. App. 23. This ruling is in direct conflict with its other ruling that the accusation of being a Communist is

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that the plaintiff had engaged in "sloppy journalism." This opinion was supported by the disclosure of six factual statements, of which the court found five to be true. The court held: "Because the review relies principally on statements that are true . . . we are constrained to find that it is substantially true and therefore not actionable."). *Id.* at 319. *See also Ollman*, 750 F.2d at 1024-25 (Robinson III, Chief Judge, dissenting in part) ("I would hold that a hybrid statement is absolutely privileged as opinion when it is accompanied by a *reasonably* full and accurate narration of the facts pertinent to the author's conclusion. . . . I do not mean that the author must supply every little detail that conceivably might have some bearing. What I do mean is that the author's presentation must be reasonable enough to enable the audience to fairly judge the conclusion stated.").

actionable because it is "provably false." If it could be proved false, then why couldn't it also be proved true?[11]

In sum, this case presents an appropriate vehicle for deciding the question left open in *Sullivan*, and for resolving the conflict between the Washington Supreme Court and the courts of six other states and one federal circuit over whether the substantial truth defense is constitutionally required when a statement of opinion based on fully disclosed facts is made the basis of a claim of defamation.

CONCLUSION

Our law recognizes "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," even when it "include[s] vehement, caustic, and sometimes unpleasant attacks" on public figures. *Sullivan,* 376 U.S. at 270. "In the realm of . . . political belief, sharp differences arise." *Id.* It is equally well settled that "errors of fact, particularly in regard to a man's mental states and processes, are inevitable." *Id.* at 272, quoting *Sweeney v. Patterson*, 128 F.2d 457, 458

[11] Moreover, it is settled that the First Amendment *requires* a defamation *plaintiff* to carry the burden of proving that the defamatory statement is *false*, and *prohibits* requiring the *defendant* to prove that the statement is *true*. *Hepps*, 475 U.S. at 775-76.

(D.C. Cir. 1942) (upholding dismissal of action based upon statement accusing Congressman of anti-Semitism).

In the post-*Milkovich* era in which opinions are no longer automatically exempt from claims of defamation, courts are seriously divided as to how to apply the *Milkovich* analysis to public figure cases, where the plaintiff has been accused of having politically unpopular views, and of being a closet Communist, fascist, or racist. Even when the factual bases for such opinions are fully disclosed, courts remain divided as to (1) how to determine whether the expression of such political opinions should receive full constitutional protection; and (2) whether the disclosure of all the factual bases for an expressed political opinion affords the speaker constitutional protection so long as the underlying factual statements which support his conclusion are substantially true.

For these reasons stated above, Petitioners ask this Court to grant certiorari and to resolve these important First Amendment questions.

DATED this 12th day of November, 2013.

Respectfully submitted,

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MICHAEL B. KING
**Counsel of Record*

Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DUC TAN, a single man; and VIETNAMESE COMMUNITY OF THURSTON COUNTY, a Washington corporation, Petitioners, v. NORMAN LE and PHU LE, husband and wife; TUAN A. VU and HUYNH T. VU, husband and wife; PHIET X. NGUYEN and VINH T. NGUYEN, husband and wife; DAT T. HO and "JANE DOE" HO, husband and wife; NGA T. PHAM and TRI V. DUONG, wife and husband; and NHAN T. TRAN and MAN M. VO, wife and husband, Respondents.	No. 86021-1 En Banc Filed May 09 2013

MADSEN, C.J. – In 2003, members of the Committee Against the Viet Cong Flag disseminated an e-mail message throughout the Olympia Vietnamese community accusing Duc Tan and the Vietnamese Community of Thurston County (VCTC), a nonprofit corporation, of engaging in procommunist activities.

Additionally, defendant Norman Le authored three newsletter articles repeating allegations from the e-mail and also accusing Tan and the VCTC of being undercover Viet Cong agents. Tan and the VCTC sued the authors of the publications for defamation.

The trial judge determined that Tan and the VCTC were public figures as a matter of law at summary judgment.[1] The case then proceeded to trial where a jury found Le and his coauthors liable for defamation and awarded Tan and the VCTC $310,000 in damages. The Court of Appeals reversed and remanded for dismissal, finding the statements in the e-mail and newsletters were protected opinion supported by disclosed facts, with the exception of the allegation that members of the VCTC, including Tan, are undercover Viet Cong agents. The court found Tan and the VCTC failed to make the requisite showing that the authors published any of the statements with actual malice.

We hold that the defamatory statements made by Norman Le and the other authors were not protected opinion and therefore actionable. We also hold that clear, cogent, and convincing evidence supports the jury's finding of actual malice with respect to those statements. We reverse the Court of Appeals and reinstate the jury's verdict.

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[1] Plaintiffs have not challenged this ruling.

FACT AND PROCEDURAL HISTORY

Tan was a teacher in Vietnam when the Southern Vietnamese Army drafted him for military training in 1968. After training, he returned to teaching, retaining his military ranking. The Vietnamese Communist Army captured Saigon in April 1975 and sent Tan to a communist reeducation camp. They released him after six months to resume his teaching position. His release was contingent upon signing a loyalty pledge to the Communist Party. To secure his release, Tan signed the pledge.

Tan worked for the Communist Party as a teacher until September 1978, when, fearing for his safety, he fled Vietnam with his family. After spending time in a Malaysian refugee camp, in 1979, the family settled near Olympia where Tan became active in the Vietnamese community as the principal of a Vietnamese language school and member of the VCTC.

The VCTC was started in the 1970s and became a nonprofit corporation in 1997. Duc Hua was elected its president in 1995. Tan is its director of education and is recognized as one of the organization's leaders, although apparently his position is not part of the executive committee. The VCTC's purpose is to provide cultural support for Vietnamese refugees in Thurston County.

Norman Le, Dat Ho, Phiet Nguyen, Nhan Tran, and Nga Pham (defendants) were all born in Vietnam. Tan and the VCTC (together generally referred to as plaintiffs) brought this lawsuit against these

five defendants as well as their marital communities. Tran and Ho escaped Vietnam when Saigon fell in 1975. Norman Le was imprisoned in a labor camp for nine years and seven months. Phiet Nguyen was imprisoned in a labor camp for six years and six months.

Like Tan, defendants are politically active in the Vietnamese community. Norman Le was the VCTC's secretary for several years. The defendants are all members of the Committee Against the Viet Cong Flag, which was formed in 2003 to seek removal of the Socialist Republic Vietnamese flag from the lobby of South Puget Sound Community College. Many Vietnamese refugees view Vietnam's current flag as the "communist flag," eliciting painful memories and emotions. The local Vietnamese community has divided over strategies for seeking the removal of communist flags in the region.

The e-mail message and newsletter articles at issue relate to the series of incidents described below.

I. The Incidents

A. Name Change of the VCTC

The VCTC was formed in 1975 as the Vietnamese Mutual Assistance Association. In 1995, the organization voted to change its name. Defendant Le suggested that the new name include the word "national" or "nationalist" to signal a clear anticommunist agenda. Le's proposal was defeated. The organization

was renamed the "Vietnamese Community Association of Thurston County," which was eventually shortened to "Vietnamese Community of Thurston County." Le later interpreted the decision to not include "nationalist" in the name to signal the organization's communist sympathies.[2] In the defendants' signed letter (the "Public Notice"), at issue in this case, they noted, "all the local anti-communist organizations, societies, had boycotted and did not recognize it from the beginning," after the name change. Ex. 8.

B. VCTC Allegedly Receiving Money from the Viet Cong

Following the name change, defendant Le raised concerns about a local market owner's monetary contribution to the VCTC. Le was uncomfortable accepting a donation from the market owner because the owner previously distributed free calendars that had been printed by the Communist Party in Ho Chi Minh City. The VCTC called a meeting to ask the owner why he had printed the calendars in Ho Chi Minh City. Satisfied that the owner had the calendars printed in Vietnam because it was cheaper, the VCTC

[2] There is also an organization in Washington called "Vietnamese Community of Pierce County." Le claims he also has concerns about this organization's commitment to the anticommunist cause but says he has not found any proof to confirm his suspicions. However, he also acknowledges that in 2003, there were few communist sympathizers living in the United States.

accepted his monetary donation. Le testified that at the meeting, Hua, president of the VCTC, stated, "There is nothing wrong with receiving V.C. [(Viet Cong)] money." 7 Verbatim Report of Proceedings (VRP) at 1398. Hua denies saying this, testifying that he said only that the VCTC accepts any donation as long as no conditions are attached.[3]

C. Playing of National Anthem

On October 4, 1997, the VCTC organized an event to honor a Vietnamese poet. At the start of the event, one member of the hired band, a recent refugee from Vietnam, began to play Vietnam's current national anthem. After the first few notes, the band apologized for playing the wrong anthem and proceeded with the national anthem of the Republic of South Vietnam. At trial, there was conflicting testimony regarding the crowd's reaction, with plaintiffs' witnesses claiming the crowd barely noticed and defendants' witnesses alleging there was a negative reaction. Two local Vietnamese newsletters published articles about the incident, at least one of which was authored by Le. Le wrote this article despite not being present to hear the wrong anthem played or to see the crowd's reaction. The VCTC held a press conference to apologize for the mistake.

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[3] Defendants have not accused the market owner of being a Communist or a Communist sympathizer.

D. Scheduling Events on Communist Holidays

In the fall of 1999, the VCTC newsletter suggested scheduling a cultural event on September 2. The event, Armed Forces Day, commemorates the establishment of the Southern Vietnamese Army and is typically held on June 19. The Vietnamese community knows September 2 as the date of the "Fall Revolution," when the Communist Party declared independence from the French. Additionally, one of the defendants testified that events sponsored by the VCTC sometimes occurred on April 30, the anniversary of the fall of Saigon. At least one defendant testified that these dates were inappropriate for any Vietnamese celebration or event.

E. Flag Display at Language School

Plaintiff Tan ran a Vietnamese language school for children of Vietnamese refugees. Lacking its own facility, the language school borrowed classrooms from a private school. Before every class, the students gathered in the hallway to salute the flag of the Republic of South Vietnam and sing its national anthem. One of the classrooms displayed flags from around the world, including the current flag of the Socialist Republic of Vietnam. Tan testified that because the classroom was on loan from the private school, the language school's policy was not to touch or modify the display. The defendants accused Tan of not acting vigorously enough to oppose the display of the flag. Facing resistance from the classroom's

teacher, the private school principal decided not to display any Vietnamese flag. Although the defendants knew Tan had the students honor the nationalist flag before every class, the defendants sent a delegation to the school to meet with the teacher and the principal. Eventually, the principal agreed they could display the nationalist flag at the school although his reason for doing so is disputed.

F. Leadership of the Committee against the Viet Cong Flag

In early 2003, several concerned community members met to discuss how to stop the community college from displaying the communist flag of Vietnam. The committee elected Le cochair at the first meeting. At the second meeting, because of Le's controversial involvement in other organizations and a dramatic increase in attendance, Tan proposed Le step down so the organization could hold new elections. Tan's proposal failed and Le remained one of the cochairs. Many of those in attendance left the meeting and withdrew their support when reelections were not held. Tan and members of the VCTC continued their efforts to remove the communist flag, but did so separately from the defendants' organization.

G. The Apron Incident

Every year, the VCTC sponsors a food booth at the Lakefair celebration in Olympia. In 2003, a volunteer working in the booth found an apron on top

of a vending machine outside of the booth. The apron was decorated with an image of Santa Claus and several gold stars. The volunteer, who had served in the Southern Vietnamese Army, believed the apron bore communist symbols and must have been placed there by "some kind of bad people." 2 VRP at 364-65. No one knew where the apron came from, but plaintiff Tan dismissed the idea that it was communist propaganda. The volunteer turned the apron inside-out and wore it that way for the rest of his shift. He took the apron home with him at the end of the day.

Ten days later, the volunteer told Tuan Vu, previously a defendant in this litigation, about the apron. Vu said that he would like to keep the apron as a "souvenir." 2 VRP at 366-67. The apron later came into defendants' possession.

On August 7, 2003, the defendants disseminated the Public Notice, describing the apron incident as an intentional display of communist symbols to show the presence of the communist regime in the Vietnamese community. The letter called for a press conference and meeting to debate the allegations, but neither plaintiff Tan nor any other VCTC representative attended the meeting. Defendants did not approach Tan or any other member of the VCTC to ask for an explanation about the apron or any of the other accusations in the Public Notice. Defendant Le testified that to ask Tan about his background would have been culturally taboo.

At trial, the jury heard from a former colonel in the South Vietnamese army who was imprisoned by the communists for 13 years. Despite great animosity toward the Viet Cong flag, he did not recognize the apron as being a communist symbol.

II. The Publications

The defendants disseminated the Public Notice by e-mail and posted it on the Internet. According to their own testimony, defendants worked together to carefully select the language in the Public Notice. The first section of the letter describes the apron incident. The second section, as summarized below by the Court of Appeals, accuses the VCTC of "doing activities" for the Vietnamese communists:

> 1. When choosing a name (for the organization), the Duc Thuc Tan (Duc TT) and Khoa Van Nguyen gang insisted that the name "National Vietnamese Committee" . . . be denied. . . . Mr. Duc TT claimed . . . he "does not have members". . . . It is obvious that [the] Vietnamese Community in Thurston County had been impersonating the representatives of the community with illegal political intentions.
>
> 2. Duc Minh Hua, . . . President [of VCTC], . . . declaring . . . "there [was] nothing wrong with receiving [Viet Cong] money."
>
> 3. Suggest[ing] the idea of organizing the yearly anniversary of September 2 [the Fall Revolution].

> 4. The band that Duc TT brought . . . played the whole portion . . . of the [communist national anthem at the 1997 event].
>
> 5. [The] [Viet Cong] flag was hung in [Duc Tan's] classroom . . . [u]ntil . . . organizations . . . convince[d] the Administration to remove the [Viet Cong] flag and let fly the National flag.
>
> 6. Organized the Autumn 2002 Meeting to commemorate the Fall Revolution.
>
> 7. Had sabotaged the fight of the Committee . . . from the unit in charge of the Community Against Viet Cong Flag [and] had "gone under the table" with the administration of . . . [South Puget Sound Community College] to send the secret message [that] there is no need for removing the bloody communist flag.
>
> 8. [C]leverly [covering] up, cheating [our] people, all those 28 years [as shown by Duc Tan's admission the VCTC had no voting members].

Duc Tan v. Le, 161 Wn. App. 340, 350, 254 P.3d 904 (2011) (alterations in original) (citing Ex. 8). The third section concludes that plaintiff Tan and members of the VCTC have abused people's names, hidden under the "Nationalist coat" to serve the communist regime in Vietnam and betrayed the Vietnamese community "continuously and systematically." *Id.* at 350-51. The Public Notice states that no one – referring to Tan and the leaders of the VCTC – has a

background (service in South Vietnam's military or time spent in a labor or reeducation camp) guaranteeing they are Nationalists. *Id.* at 351. Finally, it urges that community members condemn, boycott, and expel Tan and the VCTC, who allegedly "worship the Communists" and conduct activities on behalf of "evil communists." *Id.*

Three additional newsletter articles, written by defendant Le alone, contain allegedly defamatory statements. Two articles were published on November 15, 2002, in the *Community Newsletter,* an informal publication of the Vietnamese community of Washington. The first article describes the flag display issues at the language school. It states that after the delegation came to the school and convinced the principal to allow them to permanently display the Vietnamese Nationalist flag, plaintiff Tan refused to help display it. Exs. 14A, 18. The second article warns of an "Evil Axis" made up of organizations that assist the Viet Cong. Ex. 14A. This article identifies the VCTC as one such organization, noting that it played the Viet Cong national anthem and called for a celebration on September 2. The article claims that the leadership of the VCTC is part of a plot "to form the Evil Axis in Thurston-King-Tacoma aiming at a total control over the whole Vietnamese community in Washington State by the VC." *Id.* Finally, the article notes that the VCTC members never use the word "Nationalist" in any of their organizations' names. *Id.* (emphasis omitted). These two articles were translated and admitted into evidence at trial.

The third article was published in October 2003, in a newsletter called *New Horizon: The Voice of the Vietnamese Community in Washington State*.[4] This article refers to Tan's organization as a "VC undercover agent[ ]." Ex. 14A. It asserts that for many years undercover agents, including Tan, have attempted to display Viet Cong flags in schools while disguised as Nationalists. Excerpts of this article were translated and admitted into evidence. This article was singled out by the Court of Appeals as particularly problematic because Le made the undercover agent allegation about Tan and other VCTC members without disclosing facts in support of his claim.

III. Procedural History

In March 2004, plaintiffs sued defendants for defamation based upon the allegations in the Public Notice and Le's articles.

The trial court granted partial summary judgment for the defendants, ruling that plaintiff Tan and the VCTC "are public figures as a matter of law." Clerk's Papers (CP) at 31. The trial court made no findings pertaining to the "capacities or status of

[4] The naming structure of this newsletter parallels the name of plaintiff Vietnamese Community of Thurston County. Ironically, defendants suggested this naming structure might signal ties to communism.

defendants when publishing the alleged defamatory materials." *Id.* at 32.

After an 11 day trial, the jury found by special verdict that each of the defendants had defamed Tan and the VCTC; the jury awarded Tan damages of $225,000 and the VCTC damages of $85,000. The jury was asked to complete four special verdict forms, the first asking whether defendants defamed Tan in the Public Notice, the second asking whether the defendants defamed the VCTC in the Public Notice, the third asking whether Le defamed Tan in his articles, and the fourth asking whether Le defamed the VCTC in his articles. The jury answered yes to all questions. It then awarded $150,000 to Tan and $60,000 to VCTC based upon the defamatory effect of the Public Notice and $75,000 to Tan and $25,000 to VCTC based upon the subsequent three articles.

The Court of Appeals reversed and remanded for dismissal. *Tan,* 161 Wn. App. at 366. The court concluded that the "sting" of most of the statements made by defendants was that Tan and the VCTC are communists and that the right to call someone a communist is protected by the First Amendment. *Id.* at 356-57. It reasoned that "defendants' mischaracterizations, exaggerations, and seemingly improbable inferences took place in an ongoing political discussion protected by the First Amendment." *Id.* at 366. As to any statements not protected by the First Amendment, because the Court of Appeals accepted that the defendants subjectively believed the truth of

their allegations, it concluded that plaintiffs failed to prove actual malice. *Id.* at 364.

ANALYSIS

A defamation action consists of four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages. *Herron v. KING Broad. Co.,* 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Actual malice must be shown in cases involving both public figures and public officials. *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (plurality opinion). Rhetorical hyperbole and statements that cannot reasonably be interpreted as stating actual facts are protected under the First Amendment. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

Historically, defamatory communications were deemed actionable regardless of whether they took the form of opinion or fact. *Id.* at 11. However, due to concerns about stifling valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation; it afforded "'legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.'" *Id.* at 13 (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS § 5.28, at 456 (1956)). Generally, the privilege of fair comment applied only to a statement of opinion and not to a false statement of fact, whether it was expressly

stated or implied from an expression of opinion. *Id.* at 14 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)). "Thus under the common law, the privilege of 'fair comment' was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." *Id.*

Even at common law, the privilege of fair comment did not extend to "'a false statement of fact, whether it was expressly stated or implied from an expression of opinion.'" *Id.* at 19 (quoting RESTATEMENT § 566 cmt. a). In *Milkovich,* the Supreme Court reiterated that a statement structured as an opinion may still be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion, because it may then contain a provably false factual connotation. *Id.* at 20 (citing *Phila. Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); *Dunlap v. Wayne,* 105 Wn.2d 529, 540, 716 P.2d 842 (1986) (quoting RESTATEMENT § 566)).

As the Supreme Court explained:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the

> statement may still imply a false assertion of fact.

497 U.S. at 18-19.

The defendants here argue their statements about plaintiffs Tan and the VCTC's communist affiliations were protected by the First Amendment because defendants expressed an opinion based upon disclosed facts. To support their argument, they point to *Restatement* § 566 (a defamatory statement may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion).

We reject defendants' argument. The mere fact that the defendants disclosed a basis for their false charge that Tan and the VCTC support the Viet Cong government does not protect them from liability when the opinion itself is based on false and defamatory facts.

> A simple expression of opinion based on disclosed or assumed *nondefamatory* facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

RESTATEMENT § 566 cmt. c (emphasis added), *quoted in Dunlap,* 105 Wn.2d at 540. When the audience

knows the facts underlying an opinion and can judge the truthfulness of the allegedly defamatory statement themselves, the basis for liability for the opinion is undercut. RESTATEMENT § 566 cmt. c. Thus, to determine liability for an opinion statement it is crucial to ascertain the type of information that underpins an opinion:

> "When a publisher makes a qualified or unqualified assertion of fact based on *true* information supplied to the public or equally available to the public, he simply deduces a particular fact about the defamed person from known facts. . . . Those who receive the communication are in a position to judge for themselves the validity of the deduction made. . . . [Such] opinions must be distinguished from evaluative opinions expressing a value judgment concerning specific conduct. The distinction will eliminate much confusion of the law of defamation if the law recognizes that deductive opinions are not necessarily in the same category of actionability as . . . communications that convey false and defamatory information about the plaintiff."

Dunlap, 105 Wn.2d at 540 (emphasis added) (alteration in original) (quoting W. Page Keeton, *Defamation & Freedom of the Press,* 54 TEX. L. REV. 1221, 1250-51 (1976)).

This case does not involve a situation where defendants deduced the opinion that Tan and the

VCTC are communist or communist sympathizers from nondefamatory disclosed information. *See* RESTATEMENT § 566 cmt. c. Rather, defendants made a series of false statements to support their assertion that plaintiffs supported communism and the Viet Cong government.

Indeed, the vast majority of the statements made by defendants were made as statements of fact, not opinion. For example, statements in the Public Notice accuse Tan and the VCTC of taking certain procommunist actions or otherwise connect plaintiffs to communism: (1) that Tan and the VCTC "impersonat[ed] the representatives of the community" and conducted activities on behalf of "evil communists;" (2) that Tan's hired band played a few notes of the Viet Cong anthem and prompted a violent protest; (3) that Tan displayed the Viet Cong flag at his Vietnamese language school; (4) that VCTC President Duc Hua stated that "there is nothing wrong with receiving VC money;" (5) that a meeting occurred between the VCTC and the community college where the VCTC sent a secret message that there is no need to remove the Viet Cong flag; (6) that plaintiffs displayed the apron to show the presence of the Hanoi Communist regime in the Vietnamese community; (7) that Tan and other VCTC members lack a background as Nationalists (not in the military to protect the South Vietnam nor imprisoned by the Communists); (8) that the VCTC has been accused by several anticommunist organizations of doing activities for the Vietnamese Communists; and (9) that plaintiffs planned

community events on dates associated with the Viet Cong for the purpose of celebrating North Vietnam. Ex. 8 (emphasis omitted).

In the articles written by defendant Le, there is substantial repetition of the statements made in the Public Notice. Additionally, in one article, Le refers to Tan's organization as a "VC under-cover agent[ ]" seeking to display Viet Cong flags. Ex. 14A. While an allegation that someone is a communist may be merely imprecise or loose language, it is "quite another case" to accuse someone of being an agent of the Viet Cong communist government. *See Buckley v. Littell,* 539 F.2d 882, 894 n.11 (2d Cir. 1976). Statements of "membership or well-defined political affiliation are readily perceivable as allegations of fact susceptible to proof or disproof of falsity." *Id.* at 894.

Moreover, defendants' assertions that could be construed as opinion statements imply undisclosed defamatory facts or are otherwise provably false. In the Public Notice, for example, relying on their allegations of the ways in which Tan and the VCTC supported the Viet Cong government, defendants opine that plaintiffs had "illegal political intentions," betrayed the local community, cheated the Vietnamese people for 28 years, and worshipped the Viet Cong government. *See* Ex. 8 (emphasis omitted). These statements imply undisclosed defamatory facts regarding plaintiffs' connection to the unpopular Viet Cong government. These statements carried a provably false factual connotation.

There is no First Amendment protection for the type of false, damaging statements uttered here; indeed, the purpose of the law of defamation is to punish such statements. *Milkovich,* 497 U.S. at 12.

We hold that the Public Notice and articles written by Le each contain actionable statements, not protected by the First Amendment.

Defendants urge us, though, to apply *Mark v. Seattle Times,* 96 Wn.2d 473, 635 P.2d 1081 (1981), and *Herron,* 112 Wn.2d 762, to conclude their statements are nonactionable. We reject this argument as well.

In *Mark* and *Herron* this court held that there is no liability when defendants' true factual statements create the "sting" of the damaging publication and their additional false statements do not cause any separate or additional harm. *Mark,* 96 Wn.2d at 496; *Herron,* 112 Wn.2d at 771-72. In *Mark,* Albert Mark was arrested after being charged with larceny based on fraudulent Medicaid billing. 96 Wn.2d at 496. A news report stated that Mark had "bilked the state out of at least $300,000." *Id.* Ultimately, the State was only able to prove fraudulent claims totaling about $2,500. *Id.* at 477. Concluding the gist of the report was the arrest of Mark for Medicaid fraud involving substantial funds, the court found that any inaccuracy in the specific amount involved did not alter the sting of the publication as a whole and did not have a materially different effect on a viewer than

what the literal truth would have produced. *Id.* at 496.

Herron involved a newscast, which stated that "'a prosecuting attorney was being investigated in respect to practices concerning bail bonds, that he had a close friend who was arrested with two local bondsmen, and that he had accepted substantial sums from a bondsman to finance election campaigns.'" *Herron,* 112 Wn.2d at 770 (quoting Clerk's Papers). The newscast also stated that half of Herron's election funds came from bail bondsmen, when in fact the true figure was closer to two percent. *Id.*; *see id.* at 766. Because this inaccuracy suggested Herron was involved in bargaining "'away his ethics and integrity in exchange for campaign contributions,'" when in fact he was not, the broadcast caused a sting beyond what the truth would have. *Id.* at 770 (quoting *Herron v. KING Broadcasting Co.,* 109 Wn.2d 514, 523, 746 P.2d 295 (1987)).

Relying on these two cases, defendants argue that the sting of the publications is the charge of being a communist or communist sympathizer. Defendants contend that this allegation is an opinion, and opinions are protected under the First Amendment. It follows, defendants argue, that because the allegations they made were merely in furtherance of their protected opinion and caused no further sting, the First Amendment provides protection for the statements they published.

In *Mark* and *Herron* this court considered whether false facts caused harm to reputation in excess of the harm caused by the true facts. Defendants seek an extension of the "sting" analysis to allow opinion statements to provide protection to otherwise actionable false statements.

Mark and *Herron* were never meant to apply as argued by defendants. In those cases the court compared the harm caused by an objective truth (*Mark*: the arrest of Mark for Medicaid fraud involving $2,500; *Herron*: a prosecutor's receipt of a small amount of funds from local bondsman) with the harm caused by potentially actionable false facts (*Mark*: that Mark "bilked the state out of at least $300,000;" *Herron*: half of Herron's election funds came from bondman). The court in each case then determined whether the latter caused a separate, additional harm. In both cases the ultimate purpose of the inquiry was to determine whether a false statement actually caused damage in excess of what the truth would have caused.

In this case there is no objectively established truth. Defendants insist that the sting of their allegations is that Tan and the VCTC are communists or communist sympathizers. However, there are no true statements showing Tan and the VCTC are communists or communist sympathizers. It is impossible then to compare the harm to reputation caused by false statements with the harm to reputation that would have been caused by the truth alone, and the "sting" analysis of *Mark and Herron* does not apply.

Next, we must decide whether the evidence supports the jury's decision that defendants acted with actual malice. A public figure defamation plaintiff must prove with clear and convincing evidence that the defendant made the statements with "actual malice."[5] *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 510-11, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). A defendant acts with malice when he knows the statement is false or recklessly disregards its probable falsity. *Id.*

We do not measure reckless conduct by asking whether a reasonably prudent person would have published or would have investigated before publishing. *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Actual malice can, however, be inferred from circumstantial

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[5] Amici invite us to replace the preponderance of the evidence standard with the clear and convincing evidence standard for proving falsity in defamation cases. However, the law of this case is that only actual malice must meet the clear and convincing standard. Further, faced with an opportunity to change the standard of proof in *Richmond v. Thompson,* 130 Wn.2d 368, 388, 922 P.2d 1343 (1996), this court held, "Neither the common law nor the First Amendment, as interpreted by the United States Supreme Court, requires proof of any element of a defamation action, other than actual malice, by evidence of convincing clarity." (quoting *Haueter v. Cowles Publ'g Co.,* 61 Wn. App. 572, 582, 811 P.2d 231 (1991)).

evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly investigate an allegation. *Margoles v. Hubbart,* 111 Wn.2d 195, 200, 760 P.2d 324 (1988); *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 172, 736 P.2d 249 (1987). These factors in isolation are generally insufficient to establish actual malice; they must cumulatively amount to clear and convincing evidence of malice to sustain a verdict in favor of a plaintiff. *Id.* However, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant,* 390 U.S. at 732. Evidence of intent to avoid the truth may also be sufficient to show actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 693, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). Professions of good faith are unpersuasive when a publisher's allegations are so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation. *Margoles,* 111 Wn.2d at 201; *St. Amant,* 390 U.S. at 732.

When reviewing a defamation verdict, the First Amendment requires us to independently evaluate whether the record supports a finding of actual malice. *Richmond v. Thompson,* 130 Wn.2d 368, 388, 922 P.2d 1343 (1996); *Bose Corp.,* 466 U.S. at 510 ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law."). Appellate courts must "'make an independent examination of the whole

record'" to ensure the judgment does not constitute a forbidden intrusion on the field of free expression. *N.Y. Times Co.,* 376 U.S. at 285 (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963)). We have considerable latitude in deciding whether the evidence supports a finding of actual malice. However, "the constitutionally based rule of independent review" does not mean that we disregard credibility determinations of the trier of fact. *Bose Corp.,* 466 U.S. at 499-500; *see Harte-Hanks,* 491 U.S. at 689 n.35 (appellate court should not disregard a jury's opportunity to observe live testimony and assess witness credibility). Deference to factual determinations that turn on credibility assessment is essential because of the fact finder's unique opportunity to observe and weigh witness testimony.[6] *Harte-Hanks,* 491 U.S. at 688; *Newton v. Nat'l Broad. Co.,* 930 F.2d 662, 670-71 (9th Cir. 1990).[7]

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[6] Recognizing the difficult position in which an appellate court is placed, the Ninth Circuit has noted the reviewing court faces the "daunting task of reconciling our duty to respect the jury's fact-finding role with our duty to protect the values enshrined in the First Amendment" because the independent review standard and the clearly erroneous standard are in tension. *Newton,* 930 F.2d at 666. "[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact." *Id.* at 670.

[7] The dissent's claim that we grant improper deference to the jury, which evidently flows from its view that appellate

(Continued on following page)

In *Richmond,* two eyewitnesses stated Trooper Richmond did not threaten to blow Thompson's brains out, did not push Thompson, and did not unclip his weapon after Richmond had brought a defamation action against Thompson for allegations to this effect. 130 Wn.2d at 374-75. On review, after the jury found actual malice, this court concluded a reasonable juror could have inferred from the evidence that Thompson knew the falsity of his allegations. *Id.* at 388-89.

Harte-Hanks concerned a newspaper company that failed to conduct an interview that would likely have led to information confirming or contradicting the facts of a story it was about to publish. 491 U.S. at 682. The Court inferred intentionality because the newspaper contributed substantial resources to investigating the story, but failed to interview the one witness most likely to have evidence bearing on the truth or falsity of two competing narratives. *Id.* The newspaper also failed to listen to tape recordings with evidence relevant to the story. *Id.* at 683.

After conducting its own independent review of the evidence, the Court of Appeals in this case found the evidence did not establish actual malice because defendants' behavior only rose to the level of negligence, not the required recklessness. *Tan,* 161 Wn. App. at 364.

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review is entirely a matter of this court's independent review of the record, is thus incorrect. *See* dissent at 10.

The Court of Appeals aptly observed that *Harte-Hanks* involved undisputed evidence of an intentional failure to ascertain the truth and *Richmond* included direct evidence from two nonparty eyewitnesses that revealed Thompson could not have had a good faith belief in the truth of his statements. *Id.*; *Harte-Hanks,* 491 U.S. at 692; *Richmond,* 130 Wn.2d at 389. However, the Court of Appeals incorrectly concluded that the lack of this type of evidence here bolstered its own finding that Tan and VCTC failed to show actual malice. *See Tan,* 161 Wn. App. at 365. *Harte-Hanks* and *Richmond* are merely illustrative of the type of evidence that will support a finding of actual malice.

Here, the issue of malice turns largely on the credibility of the witnesses, particularly of defendants. The jury was properly instructed on the requirement of actual malice and the ways in which it could be satisfied. The jury was told it may only find defamation in this case if the actual malice requirement was met. The question that the jury was required to answer was whether defendants were credible when they claimed they acted in good faith when they published the Public Notice and articles about Tan and the VCTC. Having had the opportunity to assess each witness' credibility, the jury was ideally suited to answer this question, and even when conducting an independent review, the appellate court must strongly defer to the jury's determinations of credibility. *See Harte-Hanks,* 491 U.S. at 688-89; *Newton,* 930 F.2d at 670-71.

In *Harte-Hanks,* the Supreme Court suggests that the reviewing court should only defer to the credibility determinations the jury must have made, not the ones it may have made. 491 U.S. at 689-90. In order for the jury to have found for Tan and the VCTC, it must have rejected (1) the testimony of defendants that without entertaining serious doubts they relied in good faith on newsletter articles to support all their claims in the Public Notice (even though the articles submitted into evidence only discussed the anthem incident), (2) that the Public Notice cosigners otherwise made all their allegations in good faith, and (3) that Le wrote the subsequent newsletter articles in good faith. *See id.*

The jury was in the best position to determine which testimony to believe and whether to accept defendants' claims of good faith.

We defer to the jury's determination that defendants were not credible when they claimed to have made their accusations in good faith. This, together with our independent review of the record leads us to conclude there was clear and convincing evidence to support the inference of actual malice.

Specifically, (1) defendants knew that people did not boycott the VCTC because Le himself remained associated with the VCTC for years after the name change; (2) Le knew that Hua never said he would accept Viet Cong money because Le was present when Hua spoke and the defendants did not accuse the market owner who donated the funds of being

pro-Communist; (3) the VCTC newsletter did not advocate for organizing on the anniversary of September 2; (4) the defendants were aware that the playing of the Vietnam national anthem was an accident and that the VCTC issued an apology; (5) none of the defendants testified that Tan actually refused to display the nationalist flag, and Dat Ho even testified that he was aware that Tan displayed the national flag at the language school; and (6) the defendants admitted that if the VCTC had held a meeting to commemorate the Fall Revolution, there would have been an uproar and significant media attention, which no one testified had occurred.

As noted earlier, actual malice can also be inferred from circumstantial evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly investigate an allegation. *Margoles,* 111 Wn.2d at 200.

The evidence here is that (1) the committee members made no attempt to contact Tan before publishing the Public Notice; (2) the defendants had previously worked with Tan to organize events opposing communism until the divisive flag committee meetings in 2003; (3) the defendants had a history of acrimony with Tan; (4) some of the defendants had witnessed Tan speak publicly on flag issues, including speaking in support of displaying the nationalist flag; (5) the defendants failed to investigate any of the facts before publication, including the authenticity of the apron; and (6) the defendants were upset that

Tan arranged a meeting with the dean of the community college because it diverted attention from their committee.

As discussed above, *Harte-Hanks* involved a decision to publish a story without interviewing a person or listening to a tape, although each was believed to have relevant information. Similarly, this case involves systematic and continuous failures to interview Tan, Duc Hua, or anyone else with information that would bear on the defendants' allegations. Without providing specifics, defendants only vaguely pointed to articles they read and sources they consulted.[8]

As early as 1997, Le already had a tense relationship with Tan and the VCTC. The record reflects little to no effort by defendants, only vague references to articles not produced at trial, supposedly used to confirm their suspicions. *See Harte-Hanks,* 491 U.S. at 692. Then, rather than temper their allegations to reflect their lack of investigation, defendants trumped up their charges, claiming "Duc Thuc Tan and gang" "worship the Communists," "poison our

[8] The Court of Appeals suggests that defendants did not fail to investigate their allegations because they called for a public hearing and asked Tan and the VCTC to participate *after* defendants had published their accusations; however, even assuming the hearing was an attempt to investigate and not just to make further accusations, the relevant inquiry is whether defendants investigated *before* publishing their statements. *See Tan,* 161 Wn. App. at 364. They did not.

children's minds," and have "continuously and systematically" betrayed the Vietnamese community by working on behalf of the Viet Cong government. Ex. 8. Le went even further by referring to Tan's organization as an "under-cover agent[ ]" for the communists. Ex. 14A. Defendants directed their publications to refugee communities still living in fear of communists plots to exert influence upon them, prepared to resort to violence if necessary to combat a perceived threat.

While there is no single smoking gun proving actual malice in this case, the clear and convincing evidence standard does not require defendants to admit on the record they entertained serious doubts as to the truth of their allegations. *See Margoles,* 111 Wn.2d at 200. Considering the record as a whole, there is clear and convincing evidence here justifying the inference of actual malice, as the jury concluded on proper instruction.[9]

[9] As the dissent points out, many parties to this case have lived through traumatic times. However, as an appellate court, we must apply the proper legal standards of review and not decide issues based on the personal experiences and histories of the parties, except as legally relevant to the issues before us. In our system of justice each litigant is entitled to the protection of the rule of law – our fiercely protected and willingly shared right.

CONCLUSION

We hold that the provably false statements made in the Public Notice and in Le's articles are actionable. We conclude that clear and convincing evidence in this case supports the jury's finding that defendants acted with actual malice. We reverse the Court of Appeals and reinstate the jury's verdict against defendants.

/s/ Madsen, C.J.

WE CONCUR:

/s/ C. Johnson, J. /s/ _____

/s/ Chambers, J. P.T. /s/ Stephens, J.

/s/ Owens, J. /s/ _____

/s/ _____ /s/ González, J.

J.M. JOHNSON, J. (dissenting) – On April 30, 1975, respondent Norman Le watched as communist North Vietnamese forces stormed the South Vietnamese capital city. 7 Verbatim Report of Proceedings (VRP) at 1372. He saw a North Vietnamese soldier lower the Republic of Vietnam flag from the top of the Independence Palace and replace it with the flag of North Vietnam. *Id.* at 1372-73. Because of his civil government position in the Republic of Vietnam, Norman Le was arrested as a political prisoner. *Id.* at

1367-68, 1373. Mr. Le was continuously imprisoned in a communist labor camp for nine years and seven months. *Id.* at 1376. In 1990, he escaped Vietnam by boat to try to find freedom. *Id.* at 1386. Approximately one million Vietnamese were not as fortunate.[1]

In his flight for freedom, Mr. Le settled in Washington, where he opened a business in addition to directing a refugee center. *Id.* at 1387. He has been an administrator, consultant, and volunteer for countless charitable organizations since. *Id.* at 1388. After escaping to the United States, he earned both an MBA (master of business administration) and a PhD (doctor of philosophy). *Id.* at 1364. Mr. Le is charitably active, especially in the Vietnamese refugee community.[2]

In contrast, a petitioner's admission found in the majority opinion notes that "[Tan's] release" from a communist labor camp "was contingent upon signing a loyalty pledge to the Communist party. To secure his release, Tan signed the pledge." Majority at 2.

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[1] *See* Charles Hirschman, Samuel Preston & Vu Manh Loi, *Vietnamese Casualties During the American War: A New Estimate,* 21 POPULATION & DEV. REV., no. 4, 783, 807 (1995).

[2] Contrary to the majority's assertion, the experiences and histories of the parties are undeniably relevant to the legal questions at hand. Here, the petitioners have an exceedingly high burden of proving that the respondents acted with knowledge of or reckless disregard for the statements' falsity. The respondents' experiences with communism are most certainly relevant to this analysis. This issue is discussed further, *infra* pp. 17-18.

Based on genuine beliefs supported by nondefamatory disclosed facts, Mr. Le and the other respondents believed and alleged that the petitioners in this action retained communist sympathies. The majority today reverses the Court of Appeals and reinstates a jury verdict, which found the respondents liable for defamation and awarded $310,000 in damages. The majority's holding is a miscarriage of justice for Mr. Le and all those who have risked everything to enjoy the protections of the United States Constitution, its First Amendment, and article I, section 5 of the Washington State Constitution.

The United States Supreme Court has recognized that "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). "The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008) (citing *Abrams v. United States,* 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919)). Extolling the significance of this marketplace of ideas, Judge Learned Hand wisely noted that the First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have

staked upon it our all.'" *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (quoting *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Considering our First Amendment jurisprudence in light of these principles, this court has recognized that "the best remedy for false or unpleasant speech is more speech, not less speech." *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d 843, 855-56, 168 P.3d 826 (2007). This court has also noted that "[a] basic cost of defamation law is its potential chilling effect on the press." *Dunlap v. Wayne,* 105 Wn.2d 529, 534, 716 P.2d 842 (1986). Because the majority fails to accord full protection to the First Amendment's marketplace of ideas, the cost of chilling speech, and the more protective provisions in article I, section 5 of Washington's Constitution, I respectfully dissent.

The majority does not recognize the First Amendment's inherent protection of conjecture within a political debate. Furthermore, while the majority states the *New York Times* standard for determining whether the evidence supports a finding of actual malice, I disagree with this application of the standard. I would therefore hold that the respondents' allegations that Duc Tan and the Vietnamese Community of Thurston County (VCTC) are communists or communist sympathizers are opinions based on disclosed facts within the context of a political debate and thus nonactionable. I would further hold that the petitioners have failed to show that the respondents acted with actual malice in making the underlying

factual allegations. Accordingly, I would affirm the Court of Appeals.

A. Respondents' Assertions that Petitioners Are Communist Sympathizers

The respondents' assertions that the petitioners are communists or communist sympathizers are, at most, conjecture. "Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's 'best guess.'" *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 28 n.5, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (Brennan, J., dissenting). "[C]onjecture is intrinsic to 'the free flow of ideas and opinions on matters of public interest and concern' that is at 'the heart of the First Amendment.'" *Id.* at 34 (quoting *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)). Conjecture is a powerful means of "fueling a national discourse . . . and stimulating public pressure for answers from those who know more." *Id.* at 35. The cost of punishing conjecture is wiping out "a genuinely useful mechanism for public debate." *Id.* at 36.

In *Dunlap,* this court explicitly adopted the rule of the *Restatement (Second) of Torts* § 566 (1977), holding that statements of opinion that do not imply the allegation of undisclosed defamatory facts are not

actionable in defamation. 105 Wn.2d at 538. Although the United States Supreme Court in *Milkovich,* 497 U.S. at 17, held that there is not a separate First Amendment protection for defamatory opinion statements, *Dunlap* is still good law in the state of Washington. This court has not held to the contrary. Although declining to acknowledge the existence of separate protection for statements of pure opinion, the Court in *Milkovich* determined that protection of opinion was dictated by existing doctrine. *Id.* at 14-17; *see also id.* at 24 (Brennan, J., dissenting).

This court in *Dunlap* formulated a three part test for determining whether a statement should be characterized as nonactionable. "[A] court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." *Dunlap,* 105 Wn.2d at 539. Here, all three factors weigh in favor of finding that the respondents' conjecture that the petitioners are communists or communist sympathizers is nonactionable opinion.

First, the context of the statements was an ongoing political debate about how to best achieve the goals of the Vietnamese refugee community. Recognizing that speech from both sides may bring the truth to the surface, the public notice called for a press conference and meeting to debate the allegations. The petitioners chose not to attend.

Second, the audience mainly comprised Vietnamese immigrants who would have been familiar with the disagreements between the petitioners and respondents. Some members of the audience would have had firsthand knowledge of the circumstances described in the publications. Furthermore, those audience members who are also Vietnamese immigrants can likely interpret the respondents' statements within a broader cultural context. Mr. Le expressed this principle in his testimony:

> [A]n American reader of that announcement, they might have a different perspective than a person at advanced age, experience, and hardship with the community – with the communists. They have a different perspective while reading the article.
>
> We have suffered 50 years of hardship, extortion, propaganda. So it create [sic] in our minds a different perspective of things when you read the article.

8 VRP at 1364. I agree. In light of their cultural background and familiarity with the events described, the audience was uniquely situated to determine the validity of the respondents' claims.

Third, the conjecture that petitioners are communists or communist sympathizers does not imply undisclosed facts. The statements include the respondents' versions of incidents that they believe support their allegations that the petitioners harbor communist sympathies. In this way, the audience was

given all the necessary information to determine the validity of the respondents' conjecture.

The significance of undisclosed facts is well illustrated by an example from *Restatement (Second) of Torts* § 566 cmt. c, as explained by Justice Brennan in his *Milkovich* dissent:

> [A] statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast . . . the following statement could not be found to imply any defamatory facts:
>
> > "A writes to B about his neighbor C[,] 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.' "

Milkovich, 497 U.S. at 27 n.3. Here, the respondents' statements are analogous to the *Restatement*'s example. The conjecture that the petitioners are communists or communist sympathizers is based on the disclosed facts of the apron incident, the flag issues, the national anthem incident, and other such verifiable events. As in the *Restatement*'s example, the link between the disclosed facts and the respondents' conjecture is tenuous. Nevertheless, because the basis for the conjecture is disclosed, the audience may judge for themselves the validity of the allegations.

"[A]s long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is one we have chosen to tolerate in pursuit of 'individual liberty [and] the common quest for truth and the vitality of society as a whole.'" *Milkovich,* 497 U.S. at 36 (Brennan, J., dissenting) (alteration in original) (internal quotation marks omitted) (quoting *Falwell,* 485 U.S. at 50-51). Based on the factors set out in *Dunlap,* the respondents' conjecture that the petitioners are communists or communist sympathizers is nonactionable.

B. Underlying Factual Allegations

I agree with the majority that conjecture based on disclosed false and defamatory facts is not protected by the First Amendment. However, the majority errs by conflating its analysis of the actionability of the conjecture with its defamation analysis of the disclosed facts upon which the conjecture relies. Having concluded that the respondents' conjecture is nonactionable because the statements were made within a political debate and do not imply the existence of undisclosed facts, we now consider whether the respondents' underlying factual allegations are defamatory. I conclude that they are not.

The United States Supreme Court in *New York Times* established a federal rule that public officials cannot recover damages for defamation unless it is proved that the statement was made with "actual malice." The Court defined "actual malice" as

"knowledge that [the statement] was false or [was made] with reckless disregard of whether it was false or not." 376 U.S. at 280. In establishing this standard, the Court recognized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. The Court further noted that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to . . . survive.'" *Id.* at 271-72 (alteration in original) (quoting *Nat'l Ass'n for Advancement of Colored People v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)). Three years after *New York Times,* the United States Supreme Court in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (plurality opinion), held that the *New York Times* "actual malice" standard applies to public figures in addition to public officials. For both public figures and public officials, the *New York Times* malice requirement is subject to a clear and convincing standard of proof. *Gertz,* 418 U.S. at 342. The trial judge in this case determined that Tan and the VCTC were public figures as a matter of law at summary judgment, and the petitioners have not challenged this ruling. Because the petitioners are deemed public figures as a matter of law, the *New York Times* "actual malice" standard is proper.

In applying the malice standard, we must make an "'independent examination of the whole record'" in order to ensure that "'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (quoting *New York Times,* 376 U.S. at 284-86). While purporting to do an independent examination, the majority grants improper deference to the jury. "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 685, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). We must undertake an independent examination of the facts, and the burden lies with the petitioners to prove by clear and convincing evidence that the respondents acted with knowledge of the statements' falsity or reckless disregard for the statements' falsity.

In her dissent in *Rickert,* Justice Madsen wisely noted the difficulty of meeting the "actual malice" standard:

> [T]he actual malice standard is an exceedingly high standard to meet. Most political speech does not even approach being subject to regulation under this standard; the standard prohibits only the very worst untruths – those made with knowledge of their falsity or with reckless disregard to truth or falsity. In addition, the burden of proof is also high –

> proof must be by clear and convincing evidence. The actual malice standard is deliberately difficult to satisfy, precisely because free speech rights are at issue. Therefore, much nuanced speech, and all speech that constitutes opinion rather than fact, will simply fall short of it.

Rickert, 161 Wn.2d at 859-60 (Madsen, J., dissenting). The justice correctly states the stringent limitations of the malice standard. Here, in addition to being nonactionable as political conjecture based on disclosed facts, the respondents' allegations that the petitioners are communists is opinion and thus cannot meet the malice standard. Furthermore, the respondents' underlying factual allegations certainly do not rise to the level of being "the very worst untruths." They are the epitome of nuanced speech – written in Vietnamese and translated into English, with testimony being spoken in Vietnamese and translated into English. Considering these facts in addition to the cultural lenses of both the speaker and most of the audience, the nuance of the respondents' speech weighs against a finding of malice.

Although the majority purports to apply the *New York Times* malice standard, they apply strict liability for these statements. This is antithetical to the protections of the First Amendment and causes harm to our system of self-government by chilling valuable political speech. *See United States v. Alvarez,* ___ U.S. ___, 132 S. Ct. 2537, 2544-45, 183 L. Ed. 2d 574 (2012) (striking down the Stolen Valor Act of 2005,

18 U.S.C. § 704, and refusing to recognize "false speech" as a category appropriate for content-based regulation); *Gertz,* 418 U.S. at 334 ("[A] 'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." (quoting *New York Times,* 376 U.S. at 279)); *New York Times,* 376 U.S. at 279 ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism . . . even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They . . . 'steer far wider of the unlawful zone.'" (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958))). This "self-censorship" would most certainly "dampen[ ] the vigor and limit[ ] the variety of public debate." *New York Times,* 376 U.S. at 279.

The United States Supreme Court has "recognized the 'inevitability of some error in the situation presented in free debate,' . . . and that 'putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.'" *Butts,* 388 U.S. at 152 (plurality opinion) (quoting *Time, Inc. v. Hill,* 385 U.S. 374, 376, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (Harlan, J., dissenting)). For this reason, "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a 'high degree of awareness of . . . probable falsity.'" *Gertz,* 418 U.S. at 332 (alteration in original)

(quoting *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)).

In *New York Times,* the newspaper published an editorial advertisement that expressed opinions, recited grievances, and sought financial support for the civil rights movement. A commissioner of the city of Montgomery, Alabama, brought a libel action against the newspaper's publisher and the individuals who signed the editorial. The trial court awarded $500,000 to the plaintiff, and the Supreme Court of Alabama affirmed. The United States Supreme Court reversed, establishing the malice standard for public officials and holding that the evidence was constitutionally insufficient to support judgment for the plaintiff. The editorial contained certain factual inaccuracies. The Court noted:

> It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although . . . students staged a demonstration on the State Capital steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the

> students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

New York Times, 376 U.S. at 258-59. Although the United States Supreme Court acknowledged these factual inaccuracies, it still found in favor of the defendants due to a lack of malice on the plaintiffs' behalf. As in *New York Times,* the facts at issue here are disputed and, at times, inaccurate. Exactly what happened with the apron, the national anthem, the flag in the classroom, and the conversation with the shop owner is unclear. However, *New York Times* instructs us that even factual inaccuracies concerning a public figure are constitutionally insufficient to support a defamation judgment.

The majority's recitation of the claimed "clear and convincing" evidence of malice in this case is unpersuasive. First, the majority claims that "defendants knew that people did not boycott the VCTC because Le himself remained associated with the VCTC for years after the name change." Majority at 24. This statement contains a logical fallacy. Knowing that others boycotted an organization and remaining associated with the organization oneself are not mutually exclusive.

Second, the majority asserts that "Le knew that Hua never said he would accept Viet Cong money because Le was present when Hua spoke and the defendants did not accuse the market owner who donated the funds of being pro-Communist." Majority at 24-25. A review of the record reveals that there is much disagreement about what was said at that meeting, heightened by the issue of translation of testimony from Vietnamese to English. *See* 7 VRP at 1398. I am not convinced that Hua did not say he would accept Viet Cong money. *See Harte-Hanks,* 491 U.S. at 688-89 ("Although credibility determinations are reviewed under the clearly-erroneous standard . . . the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" (alterations in original) (quoting *New York Times,* 376 U.S. at 285)).

Third, the majority claims that "the defendants were aware that the playing of the Vietnam national

anthem was an accident." Majority at 25. This is incorrect at best, unlikely at least. At trial, when asked if he thought the playing of the wrong national anthem was a mistake, Mr. Le testified that "[a] political issue is not that simple, especially when you have experience of how the communists do business." 8 VRP at 1347. He also testified that "[t]o me, with my experience, it's a big deal, because I know [the communists] operate by increments." 7 VRP at 1400. Although the majority claims "the defendants were aware" that the anthem incident was an accident, Mr. Le's testimony indicates that he genuinely believed the playing of the anthem was no mistake but was orchestrated by communist sympathizers.

Fourth, the majority cites as evidence of malice that "the committee members made no attempt to contact Tan before publishing the Public Notice" and "the defendants failed to investigate any of the facts before publication, including the authenticity of the apron." Majority at 25-26. Our case law is clear. "Failure to investigate does not in itself establish bad faith." *St. Amant,* 390 U.S. at 733. The evidence of malice cited by the majority is tenuous at best. The petitioners fail to meet the high bar of proving malice by clear and convincing evidence.

The majority cites to *Margoles v. Hubbart,* 111 Wn.2d 195, 201, 760 P.2d 324 (1988), for the proposition that professions of good faith are unpersuasive when a publisher's allegations are so inherently improbable that actual malice may be inferred. Majority at 21. This may be true, but the majority

again conflates the analysis of the opinion statements' actionability with the defamation analysis of the disclosed underlying facts. Here, the "extreme statements" alluded to by the majority are the respondents' allegations that the petitioners are communists or communist sympathizers. These statements are opinions, not facts that should be analyzed under the *New York Times* malice standard. Rather, after deciding the actionability of the opinion statements, courts should turn to a defamation analysis of the underlying disclosed facts. Here, the underlying disclosed facts are not extreme.

Each event described by the respondents actually happened. The description was the respondents' interpretation of events, colored by their cultural and political experience. Because the disclosed facts were not extreme or improbable, the respondents' professions of good faith should weigh against a finding of malice. The respondents' invitation for the petitioners to participate in a public debate also weighs in favor of this finding.

Finally, the malice standard requires consideration of the speakers' mens rea. The majority suggests that "the personal experiences and histories of the parties" are not "legally relevant to the issues before us." Majority at 27 n.9. This assertion is patently incorrect and reveals the majority's misunderstanding of the malice standard. Here, the respondents' experiences and history weigh against a finding that they had knowledge that the statements were false or acted with reckless disregard of the statements'

falsity. *See New York Times,* 376 U.S. at 280. Individuals with their experiences and history would be more sensitive to interpreting events as motivated by communist sympathies. Because the malice standard requires a consideration of the speaker's mens rea, it is improper (and at times culturally insensitive) to disregard a speaker's history and experiences.

It is inappropriate to apply either strict liability for a statement's falsity or even a reasonable person standard. Instead, courts must interpret the evidence to determine the speaker's mental state with respect to his statements. The burden is on the petitioners to prove malice by clear and convincing evidence. A lack of evidence means a defamation action cannot stand. Mr. Le testified about his emotional and psychological connections with communism:

> So if you know anything about communism at all, those regime's doctrines, they left a very deep scar, and so a lot of horror [*sic*] impression in my mind. So when I see any display of their symbol, it give [*sic*] me a big scare. For example, 70 percent of the nights when I sleep here, I still dream about my days in their prison.

7 VRP at 1378. Mr. Le and the other respondents have been greatly impacted by communism. Mr. Le spent nearly 10 years of his life in a communist labor camp and has worked tirelessly since his escape to rehabilitate other Vietnamese refugees who have been harmed by Vietnam's current government. Mr. Le and the other respondents are more inclined than

most to be mindful of potential communist infiltration of their community.

The majority admits that "there is no single smoking gun proving actual malice in this case" but still finds that "there is clear and convincing evidence here justifying the inference of actual malice." Majority at 27. I disagree. Constitutional free speech rights are not destroyed by such inferences. As did the Court of Appeals, I find that the petitioners have failed to meet the high bar of proving by clear and convincing evidence that respondents acted with knowledge of or reckless disregard for the statements' falsity. The evidence is constitutionally insufficient to support a defamation judgment.

The respondents' allegations that Tan and the VCTC are communists or communist sympathizers are opinions based on disclosed facts within the context of a political debate and thus nonactionable. The First Amendment to the United States Constitution and article I, section 5 of the Washington State Constitution protect such political speech. That an immigrant may be financially destroyed by a $310,000 verdict for engaging in constitutionally protected rights is unacceptable, and violative of precedent in this court and the United States Supreme Court. I respectfully dissent.

/s/ J.M. Johnson, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DUC TAN, a single man; and VIETNAMESE COMMUNITY OF THURSTON COUNTY, a Washington corporation, Respondents, v. NORMAN LE and PHU LE, husband and wife; TUAN A. VU and HUYNH T. VU, husband and wife; PHIET X. NGUYEN and VINH T. NGUYEN, husband and wife; DAT T. HO and "JANE DOE" HO, husband and wife; NGA T. PHAM and TRI DUONG, wife and husband; and NHAN T. TRAN and MAN M. VO, wife and husband, Appellants.	No. 39447-2-II PUBLISHED OPINION (Filed Apr. 19, 2011)

ARMSTRONG, J. – In 2004, members of the Committee Against the Viet Cong Flag disseminated an e-mail message and several newsletter articles throughout the Olympia Vietnamese community accusing Duc Tan and the Vietnamese Community of Thurston County (VCTC), a nonprofit corporation, of

being communists or communist supporters. Tan and the VCTC sued the committee members for defamation. A jury found the defendants liable for defamation and awarded Tan and the VCTC $310,000 in damages. On appeal, the defendants argue, in part, that (1) the statements in the letter are opinions and therefore not actionable and (2) even if some of the supporting factual statements are false, the plaintiffs failed to prove that the defendants published the defamatory statements with actual malice. We agree that the statements in the e-mail and newsletters are not actionable and that Tan and the VCTC failed to show that the defendants published the statements with actual malice. Accordingly, we reverse and remand for dismissal.

FACTS

A. Parties

Tan was a teacher in Vietnam when the Southern Vietnamese Army drafted him for military training in 1968. After training, he returned to teaching, retaining his military ranking. The Vietnamese Communist Army captured Saigon in April of 1975, and sent Tan to a Communist reeducation camp. They released him after six months to resume his teaching position. His release was contingent upon signing a loyalty pledge to the Communist party. Tan maintains that he signed the pledge to secure his release, not because he believed in what he was signing.

Tan worked for the Communist party as a teacher until September 1978, when, fearing for his safety, he fled Vietnam with his family. After spending time in a Malaysian refugee camp, the family settled near Olympia where Tan became active in the Vietnamese community as the principal of a Vietnamese language school and member of the VCTC.

The VCTC was started in the 1970s and became a nonprofit corporation in 1997. Duc Hua was elected its president in 1995. Tan is its director of education and is recognized as one of the organization's leaders. The VCTC engages in political activities, stating its purpose as developing the cultural, economic, and political potential of the Vietnamese community in Thurston County. In recent years, however, its membership has dwindled and the organization's focus tends to be less political. Although the organization is in good standing today, there have been issues concerning filings with the State of Washington: for example, Tan filed a document stating that the organization had no members with voting rights.

Norman Le, Dat Ho, Phiet Nguyen, Nhan Tran, and Nga Pham, five of the defendants,[1] were all born in Vietnam. Tran and Ho escaped Vietnam when Saigon fell in 1975. Le was imprisoned in a labor

[1] The remaining defendants are their respective spouses. Tuan Vu, who also signed the e-mail message, was dismissed from the lawsuit.

camp for nine years and seven months. Nguyen was imprisoned in a labor camp for six-and-a-half years.

Like Tan, the defendants are politically active in the Vietnamese community. Le was the VCTC's secretary for several years. The defendants are all members of the Committee Against the Viet Cong Flag, which was formed in 2003 to seek removal of the Socialist Republic Vietnamese flag from the lobby of South Puget Sound Community College. Many Vietnamese refugees view Vietnam's current flag as the "Communist flag," eliciting painful memories and emotions. VII Report of Proceedings (RP) at 1252. The activities surrounding the flag issues have divided the Vietnamese community.

B. Background

Several incidents form the basis of the allegedly defamatory statements, culminating in the "apron incident." We discuss them in chronological order.

1. Name Change of the VCTC

The VCTC was formed in 1975 as the Vietnamese Mutual Assistance Association. In 1995, the organization voted to change its name. Le, one of the defendants, suggested that the new name include the word "national" or "nationalist" to signal a clear anti-communist agenda. Le's proposal was defeated, ostensibly because the title was too long. The organization was renamed the "Vietnamese Community

Association of Thurston County," which was later shortened to VCTC.

2. VCTC Allegedly Receiving Money from the Viet Cong

Following the name change, Le raised concerns about a local market owner's monetary contribution to the VCTC. Le believed the market owner to be a Communist because he previously distributed free calendars that had been printed by the Communist party in Ho Chi Minh City. The VCTC called a meeting to ask the owner why he had printed the calendars in Ho Chi Minh City. Satisfied that the owner printed the calendars in Vietnam because it was cheaper, the VCTC accepted his monetary donation. Le testified that at the meeting, Hua, president of the VCTC, stated, "[W]hat's wrong with receiving Viet Cong's [sic] money as long as we don't listen to them." VII RP at 1398. Hua denies saying this, testifying that he said only that the VCTC accepts any donation as long as no conditions are attached.

3. Playing of National Anthem

In 1997, the VCTC organized an event to honor a Vietnamese poet. At the start of the event, the hired band began to play Vietnam's current national anthem. After the first few notes, the band apologized for playing the wrong anthem and proceeded with the national anthem of the Republic of South Vietnam. Witnesses gave conflicting testimony about the

crowd's reaction: some claimed the crowd barely noticed while others claimed there was a negative reaction. Two local Vietnamese papers wrote about the incident. The VCTC held a press conference to apologize for the mistake.

4. Scheduling Events on Communist Holidays

In the fall of 1999, the VCTC newsletter suggested scheduling a cultural event on September 2. The event, Armed Forces Day, commemorates the establishment of the Southern Vietnamese Army and is typically held on June 19. The Vietnamese community knows September 2 as the date of the "Fall Revolution," when the Communist party declared independence against the French. Later, in the fall of 2002, the VCTC organized an annual meeting. Additionally, one of the defendants testified that events sponsored by the VCTC sometimes occurred on April 30, the anniversary of the fall of Saigon. Community members testified that these dates were inappropriate for any Vietnamese celebration or event.

5. Flag Display at Language School

Tan ran a Vietnamese language school for children of Vietnamese refugees. Lacking its own facility, the language school borrowed classrooms from a private high school. Before every class, the students gathered in the hallway to salute the flag of the Republic of South Vietnam and sing its national anthem. One of the classrooms displayed flags from

around the world, including the current flag of the Socialist Republic of Vietnam. Tan testified that because the classroom was on loan, the language school's policy was not to touch or modify the display. One student's parent asked, however, that the flag be removed. One of the defendants subsequently became involved and asked Tan to replace the current flag with the nationalist flag. Facing resistance from the classroom's teacher, the private school principal decided not to display any Vietnamese flag. Although the defendants knew Tan had the students honor the nationalist flag before every class, the defendants sent a delegation to the school to meet with the teacher and the principal. Eventually, the principal agreed they could display the nationalist flag at the school.

6. Leadership of the Committee Against the Viet Cong Flag

In early 2003, several concerned community members met to discuss how to stop the community college from displaying the Communist flag of Vietnam. Two of the defendants, including Le, were elected co-chairs of the committee at the first meeting. At the second meeting, which many more people attended, Tan proposed holding new elections and that Le step down given his controversial involvement in other organizations. Tan's proposal failed and Le remained one of the co-chairs. According to one of the defendants, many of those in attendance left the meeting and withdrew their support when reelections

were not held. He also claimed that Tan, without advising the committee members, met with the president of the community college to discuss the issue. Several years after the initial dispute, the college agreed to remove the flag.

8. The Apron Incident

Every year, the VCTC sponsors a food booth at the Lakefair celebration in Olympia. In 2003, a volunteer working in the booth found an apron on top of a vending machine outside of the booth. The apron was decorated with an image of Santa Claus and several gold stars. The volunteer, who had served in the Southern Vietnamese Army, believed the apron bore Communist symbols and must have been placed there by "some kind of bad people." II RP at 364-65. No one knew where the apron came from, but Tan dismissed the idea that it was Communist propaganda. The volunteer turned the apron inside-out and wore it that way for the rest of his shift. He took the apron home with him at the end of the day.

Ten days later, the volunteer told Vu, one of the initial defendants, about the apron. Vu said that he would like to keep the apron as a "souvenir." II RP at 366-67. Shortly thereafter, on August 7, 2003, the defendants signed a letter (the "Public Notice") describing the incident as an intentional displaying of Communist symbols to show the presence of the Communist regime in the Vietnamese community. The letter called for a press conference and meeting

to debate the allegations, but neither Tan nor any other VCTC representative attended the meeting.

C. The Defamatory Statements

1. The Public Notice

The defendants disseminated the Public Notice by e-mail and posted it on the internet. The first section of the letter describes the "apron incident." The second section accuses the VCTC of "doing activities for the Vietnamese Communist[s]," enumerating the following conduct by Tan and the VCTC as "correct and true evidences":

> 1. When choosing a name (for the organization), the Duc Thuc Tan and Khoa Van Nguyen gang insisted that the name "National Vietnamese Committee" . . . be denied. . . . Mr. Duc TT claimed . . . he "does not have members". . . . It is obvious that . . . [the] Vietnamese Community in Thurston County had been impersonating the representatives of the community with illegal political intentions.
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> 2. Duc Minh Hua, . . . President [of VCTC], . . . declaring . . . "there [was] nothing wrong with receiving VC money."
>
> 3. Suggest[ing] the idea of organizing the yearly anniversary of September 2 [the Fall Revolution].

> 4. The band that Duc TT brought . . . played the whole portion . . . of the [communist national anthem at the 1997 event].
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> 5. [The] VC flag was hung in [Duc Tan's] classroom. . . . [u]ntil . . . organizations . . . convince[d] the Administration to remove the VC flag and let fly the National flag.
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> 6. Organized the Autumn 2002 Meeting to commemorate the Fall Revolution.
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> 7. Had sabotaged the fight of the Committee . . . from the unit in charge of the Community Against Viet Cong Flag . . . [and] had "gone under the table" with the administration of . . . SPCC to send the secret message . . . [that] there is no need for removing the bloody communist flag.
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> 8. [C]leverly [covering] up, cheating [our] people, all those 28 years [as shown by Duc Tan's admission the VCTC had no voting members].

Ex. 8. The third section concludes that Tan and the VCTC have abused people's names, hidden under the "Nationalist coat" to serve the Communist regime in Vietnam, and betrayed the Vietnamese community "continuously and systematically." The letter states that no one – referring to Tan and the leaders of the VCTC – has a background guaranteeing they are Nationalists. Finally, the letter asks that community members condemn, boycott, and expel Tan and the VCTC, who allegedly "worship the Communists" and

conduct activities on behalf of "evil communists." Ex. 8.

2. Newsletter Articles

Three additional newsletter articles, written by Le, contain allegedly defamatory statements. The first two articles were published on November 15, 2002, in the *Community Newsletter,* an informal publication of the "Vietnamese Community of Washington State." The first article describes the flag display issues at the language school. It states that after the delegation came to the school and convinced the principal to allow them to permanently display the Vietnamese Nationalist flag, Tan refused to help display it. The second article warns of an "evil axis" made up of organizations that assist the Viet Cong. The article identifies the VCTC as one such organization, noting that it played the Viet Cong national anthem and called for a celebration on September 2. The article claims that the leadership of the VCTC is part of a plot "to form the Evil Axis in Thurston-King-Tacoma aiming at a total control over the whole Vietnamese community in Washington State by the VC." Ex. 14A, 18. Finally, the article notes that "they" never use the word "Nationalist" in any of their organization's names. These articles were translated and admitted into evidence at trial.

The third article was published in October 2003, in a newsletter called *New Horizon: The Voice of the Vietnamese Community in Washington State.* This

article refers to Tan's organization as an "under-cover agent [ ][.]" Ex. 14A. It asserts that for many years undercover agents, including Tan, have attempted to display Viet Cong flags in schools while disguised as Nationalists. Excerpts of this article were translated and admitted into evidence.

D. Procedural History

In March 2004, Tan and the VCTC sued the signatories to the Public Notice for defamation, including Le, his wife, and five other married couples.

The trial court granted partial summary judgment for the defendants, ruling that Tan and the VCTC "are public figures as a matter of law." Clerk's Papers at 31. After an 11-day trial, the jury found by special verdict that the defendants had defamed Tan and the VCTC; the jury awarded Tan damages of $225,000 and the VCTC damages of $85,000.

ANALYSIS

I. Actionable Statements

The defendants argue that the statements made in the Public Notice are political opinions, protected by the First Amendment. They reason that the "gist" or "sting" of the Public Notice is that Tan is a Communist or Communist sympathizer; opinions that cannot support a defamation action. Br. of Appellant at 33.

Tan and the VCTC respond that the statements about their political affiliation go beyond opinion by accusing them of taking tangible steps to support the Communist party. Alternatively, they maintain that even if the Public Notice's overarching assertions qualify as statements of opinion, the underlying facts used to support the claim are untrue and therefore actionable as defamation.

A defamation action consists of four elements: (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages. *Herron v. KING Broad. Co.,* 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Generally, a statement must be one of fact to be actionable. *Dunlap v. Wayne,* 105 Wn.2d 529, 538, 716 P.2d 842 (1986); *see also Schmalenberg v. Tacoma News, Inc.,* 87 Wn. App. 579, 590, 943 P.2d 350 (1997) ("A defamation claim must be based on a statement that is provably false"). In contrast, because there is no such thing as a false idea, most expressions of opinion are protected by the First Amendment and are not actionable. *Robel v. Roundup Corp.,* 148 Wn.2d 35, 55, 59 P.3d 611 (2002); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

An opinion can support a defamation claim if it implies that undisclosed defamatory facts form the basis of the opinion. *Dunlap,* 105 Wn.2d at 538 (quoting RESTATEMENT (SECOND) OF TORTS § 566); *see also Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18, 110

S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (there is not a wholesale exception to defamation for anything that might be labeled an opinion). But a defamation claim fails when the audience members know the facts underlying an assertion and can judge the truthfulness of the alleged defamatory statement themselves. *Dunlap,* 105 Wn.2d at 540. We will not seek to impose a rigid distinction between fact and opinion. *Dunlap,* 105 Wn.2d at 538-39; *see also* RESTATEMENT (SECOND) OF TORTS § 566, comment *b* (an opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated). Whether an allegedly defamatory statement is actionable is a threshold question of law for the court. *Benjamin v. Cowles Publ'g Co.,* 37 Wn. App. 916, 922, 684 P.2d 739 (1984).

In considering whether an allegedly defamatory statement is actionable, we examine all the circumstances surrounding it. *Dunlap,* 105 Wn.2d at 539. Three factors guide us in this analysis: (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implied undisclosed facts. *Dunlap,* 105 Wn.2d at 539. The third circumstance is the most crucial of the three factors. *Dunlap,* 105 Wn.2d at 539.

Generally, audiences should expect statements of opinion in contexts such as political debates. *Dunlap,* 105 Wn.2d at 539. And we view such statements

"against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Tan and the defendants are prominent community leaders engaged in a protracted debate over how best to achieve the political goals of the Vietnamese refugee community. The political activities of their respective organizations and committees, such as efforts to remove displays of the Communist flag across Washington State, are matters of public concern to the Vietnamese community. The defendants sought an exchange of ideas by inviting representatives of the VCTC to a public hearing to "present its side of the matter." Ex. 8. Undeniably, the Public Notice was written and disseminated in the context of political debate. Thus, we presume the audience was prepared for mischaracterizations, exaggerations, rhetoric, hyperbole, and biased speakers. *Dunlap,* 105 Wn.2d at 539. Accordingly, we accept that the Vietnamese community, as recipients of the Public Notice, understood the context of the statements and the authors' biases.

Finally, no statement or assertion in the Public Notice implies the existence of undisclosed facts. To the contrary, the letter painstakingly outlines "correct and true evidences" to support the conclusion that Tan and the VCTC support the Communist party. Given the nature of this disclosure, there is no reason

to believe that the defendants withheld facts that would have bolstered their assertions. And even though several of their assertions – that Tan is actively supporting the Communist party – are presented like facts, we reject labeling them as actionable. *See Dunlap,* 105 Wn.2d at 540 (quoting KEETON, *Defamation & Freedom of the Press,* 54 TEX. L. REV. 1221, 1250-51 (1976) (where an author makes an assertion of fact based on disclosed information, he simply deduces a particular fact from known facts)); *see also Info. Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 784 (9th Cir. 1980) (even apparent statements of facts may assume the character of opinion when made in a political debate). The disclosure of facts allowed the recipients of the Public Notice to judge for themselves the validity of the defendants' conclusions about Tan's political views. In addition, the public was invited to the hearing to examine the "evidences" and evaluate the accuracy of the accusations. All three of the *Dunlap* factors support our conclusion that the defendants' claim that Tan and the VCTC are Communists or Communist sympathizers are protected political opinions. *Snyder v. Phelps,* ___ U.S. ___, ___, 131 S. Ct. 1207, 1219, ___ L. Ed. 2d ___ (2011) ("in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.") (quoting *Boos v. Barry,* 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)).

Nonetheless, Tan and the VCTC maintain that the underlying untrue facts are actionable. A defendant who bases his derogatory opinion of the plaintiff on his own statement of false and defamatory facts can be subject to liability for the factual statement but not for the expression of opinion. RESTATEMENT (SECOND) OF TORTS § 566, comment *c*; *Dunlap,* 105 Wn.2d at 538 (adopting the rule of RESTATEMENT § 566). But not every misstatement of fact is actionable: it must be apparent that the false statement presents a substantial danger to the plaintiff's personal or business reputation. *Mark v. Seattle Times,* 96 Wn.2d 473, 493, 635 P.2d 1081 (1981); *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001,* 77 Wn. App. 33, 44, 888 P.2d 1196 (1995). When a report contains a mixture of true and false statements, a false statement affects the "sting" of the report only when "significantly greater opprobrium" results from the report containing the falsehood than would result from the report without the falsehood. *Herron,* 112 Wn.2d at 769. The "sting" of a report is the gist or substance of a report when considered as a whole. *Herron,* 112 Wn.2d at 769. To be actionable, the allegedly false statements here must lead to a distinct and separate damaging implication not otherwise conveyed in the general message of the Public Notice. *See Herron,* 112 Wn.2d at 774.

In *Mark,* the court found that the inaccurate reporting of the amount of misappropriated money did not alter the "sting" of the story, reasoning that the amount involved did not affect the damage done

to the plaintiff from being called a thief. *Mark,* 96 Wn.2d at 496. In contrast, the *Herron* court found that a similar inaccuracy regarding the amount of money that the plaintiff received in campaign contributions *did* alter the sting of the story. *Herron,* 112 Wn.2d at 774. The court reasoned that while a small percentage of the total campaign contributions constituted a reasonable donation, the statement that a group contributed over 50 percent of all campaign contributions implied that the plaintiff had taken a bribe. *Herron,* 112 Wnh.2d at 774. Because the impression that the plaintiff had sold his integrity as a public official was an implication not otherwise made in the report, the statement was actionable. *Herron,* 112 Wn.2d at 774.

Here, the "sting" of the Public Notice is that Tan and the VCTC are Communists. This is clear not only from reading the Public Notice as a whole but also from the plaintiffs' characterization of their case at trial. In opening statements, plaintiffs' counsel explained that "[t]here could be nothing more odious, nothing more hateful, and nothing more hurtful than calling my client a communist." I RP at 195. Then, in closing arguments, counsel reiterated that being called a Communist is not just an insult, "[i]t is the insult." IX RP at 1612. Where the plaintiff's theory before the jury was that being labeled a Communist is the most severe and shameful accusation in the world of Vietnamese refugee politics, any factual misstatements in the Public Notice do not cause additional distinct and separate harm. In fact, rather

than impugning some other aspect of Tan's character or the VCTC's associations, all the statements were presented as evidence supporting the claim that Tan and the VCTC are Communists.

Moreover, many of the allegedly false statements are equivocal at best. Tan and the VCTC highlight the following statements as false: (1) that Hua declared there is nothing wrong with receiving Viet Cong money, (2) that the audience "protested violently" when the band played the Viet Cong anthem, (3) that Tan "refused to display" the national flag at the language school and claimed that a delegation was sent there to intimidate him, (4) that the VCTC organized an annual meeting to commemorate the Fall Revolution, and (5) that Tan had "gone under the table" with the administration of the community college and sent a secret message that there was no need to remove the Communist flag. Br. of Resp't at 30-34. While a defamatory statement must be provably false, these statements are the defendants' characterizations or interpretations of events that took place. Their characterizations, though biased and perhaps exaggerated, fall under the type of rhetoric to be expected throughout a political debate. *Dunlap,* 105 Wn.2d at 539.

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *Connick v. Myers,* 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). That labeling Tan a Communist is inflammatory is precisely the reason the First Amendment

affords it near perfect protection. *Milkovich,* 497 U.S. at 20 (First Amendment protections extend to rhetorical hyperbole, which has traditionally added much to the discourse of our nation). Considering the whole document, all of the allegations – whether true, inaccurate, or false – are merely iterations of the defendants' conclusion that Tan and the VCTC are Communists. Even if some of the statements are in fact inaccurate, Tan and the VCTC have failed to identify any separate or distinct harm resulting from each untrue statement.[2]

Turning to the newsletter articles, the defendants urge us to collapse our analysis of the articles into our review of the Public Notice. They reason that the overarching assertion of the newsletter articles is the same as the Public Notice – that Tan and the VCTC are Communists – and that the articles differ only by asserting one factual basis at a time instead of an exhaustive list. Tan and the VCTC concede that the news articles fit within the general analysis of opinion accompanied by specific supporting facts, and that we can analyze them similarly to the Public Notice.

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[2] At January 14, 2011 oral argument, the defendants' counsel claimed that even if the allegedly false statements support the overarching assertion that Tan is a Communist, they are equally defamatory in their own right. But counsel is incorrect in separating each statement from the gist of the letter. *See Camer v. Seattle Post-Intelligencer,* 45 Wn. App. 29, 37, 723 P.2d 1195 (1986) (in determining whether a publication is defamatory, it must be read as a whole and not in part or parts detached from the main body).

Although we do not reject their concession – indeed, our discussion above resolves any claims arising from the articles that contain facts in support of the assertion that Tan is Communist – we note some differences between the Public Notice and the newsletters. In particular, the *Community Newsletter* article detailing the events surrounding the display of the flag at the school does not editorialize. The *New Horizon* article describes members of the VCTC as undercover Viet Cong agents disguised as nationalists but does not disclose facts in support of this statement. Thus, we discuss the sufficiency of the plaintiffs' actual malice evidence to show that even if we considered any of the factual statements to be actionable, their claims would fail.

II. Actual Malice

The defendants argue that the plaintiffs failed to prove they acted with actual malice. Specifically, they argue that Tan and the VCTC failed to prove that, at the time of publication, the defendants had serious doubts about the truth of their statements or knew that their statements were probably false.

A public figure defamation plaintiff must prove with clear and convincing evidence that the defendant made the statements with "actual malice." *Sullivan,* 376 U.S. at 279-80. A defendant acts with malice when he knows the statement is false or recklessly disregards its probable falsity. *Sullivan,* 376 U.S. at 279-80. A defamation plaintiff proves

reckless disregard by showing that the defendant published with a "high degree of awareness of . . . probable falsity," or entertained serious doubts as to the truth of the publication. *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 1094 (1964); *Herron,* 112 Wn.2d at 775.

In reviewing for evidence of actual malice, we focus on whether the defendant believed in the truth of the challenged statement. *See Margoles v. Hubbart,* 111 Wn.2d 195, 200, 760 P.2d 324 (1988). We do not measure reckless conduct by asking whether a reasonably prudent person would have published or would have investigated before publishing. *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Actual malice can, however, be inferred from circumstantial evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly investigate an allegation. *Margoles,* 111 Wn.2d at 200. These factors in isolation are insufficient to establish actual malice; they must cumulatively amount to clear and convincing evidence of malice to sustain a verdict in favor of a plaintiff. *Margoles,* 111 Wn.2d at 200.

In reviewing a defamation verdict, the First Amendment requires us to independently evaluate whether the record supports a finding of actual malice. *Richmond v. Thompson,* 130 Wn.2d 368, 388, 922 P.2d 1343 (1996); *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 510, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) ("The requirement of independent

appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law.") Although we still defer to the fact finders' credibility determinations, we have considerable latitude in deciding whether the evidence supports a finding of actual malice. *See Harte-Hanks Commc'n, Inc. v. Connaughton,* 491 U.S. 657, 689 n.35, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) (appellate court should not disregard a jury's opportunity to observe live testimony and assess witness credibility). In *Bose,* the issue was whether the author of the defendant's article reviewing the plaintiff's sound system truthfully described the apparent movement of the sound from the speakers. *Bose,* 466 U.S. at 494-95. The United States Supreme Court accepted the trial court's determination that the author was not credible in explaining his choice of wording. *Bose,* 466 U.S. at 512. But unlike the trial court, the Supreme Court was unwilling to infer actual malice where "the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." *Bose,* 466 U.S. 512-13 (quoting *Time, Inc. v. Pape,* 401 U.S. 279, 290, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971)). The court held that even if the witness knew that his wording was inaccurate, his disingenuous trial testimony was insufficient to prove that he wrote the challenged statement with actual malice. *Bose,* 466 U.S. at 512-13.

In *Harte-Hanks,* the United States Supreme Court considered whether the Sixth Circuit's independent review of the jury's finding of actual malice

was consistent with *Bose. Harte-Hanks,* 491 U.S. at 659. In that case, the defendant newspaper published a story claiming that the plaintiff, a candidate for municipal court judge, had promised sisters Alice Thompson and Patsy Stephens jobs and vacations in return for making allegations of corruption against the incumbent judge's court administrator. *Harte-Hanks,* 491 U.S. at 660. The plaintiff allegedly made the promises in a tape-recorded meeting with six persons present in addition to the plaintiff and his wife. The newspaper interviewed the plaintiff, who denied making the promises. It also interviewed five of the other witnesses, all of whom denied that the plaintiff had made any promises. Nonetheless, the newspaper published the story with Thompson as the only source. *Harte-Hanks,* 491 U.S. at 691. But the newspaper failed to interview Stephens, the remaining and critical witness, and failed to listen to the tape recording of the meeting, which the plaintiff had made available. *Harte-Hanks,* 491 U.S. at 682-83. Like the appellate court, the Supreme Court affirmed the jury's finding that the newspaper published with actual malice, but it rejected the appellate court's reliance on facts the jury *could* have found. *Harte-Hanks,* 491 U.S. at 690. Searching for less speculative grounds to support actual malice, the court analyzed the trial court's instructions, the jury's answers to the three special interrogatories, and the undisputed facts to ascertain that the jury *must* have rejected the defendant's explanations for its omissions. *Harte-Hanks,* 491 U.S. at 690-91. The court held that when considered alongside the undisputed evidence – that

the newspaper never listened to the tape recording and never interviewed Stephens – the jury's findings supported the conclusion that the defendant purposefully avoided learning facts that would have proved its story false. *Harte-Hanks,* 491 U.S. at 690-91.

The Washington State Supreme Court engaged in a *Bose* analysis in *Richmond,* 130 Wn.2d at 389. There, a Washington State Patrol Trooper, Davis Richmond, sued Woodrow Thompson for publically accusing the trooper of pushing him, pointing a gun at him, and telling him that he would blow his brains out. *Richmond,* 130 Wn.2d at 373-74. The court accepted the trial court's finding that Thompson acted with actual malice based on two eyewitnesses who testified that the trooper did not push Thompson or unclip his weapon, the trooper's testimony that he did not threaten to blow Thompson's brains out, and the fact that Thompson first alleged the trooper's misconduct six months after the incident. *Richmond,* 130 Wn.2d at 388-89. In reaching this conclusion, the court accepted that the jury gave great weight to the trooper's testimony, but also relied on the "direct evidence" of the eyewitnesses and the timing of Thompson's allegations. *Richmond,* 130 Wn.2d at 388-89.

A finding that the defendant or his spokesperson has not been credible may be sufficient to prove malice "'when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves.'" *Bose,* 466 U.S. at 512 (quoting *Time, Inc.,* 401 U.S. at 285). But it is inadequate

where an allegedly defamatory statement is only "'one of a number of possible rational interpretations'" of events that "'bristle with ambiguities.'" *See Bose,* 466 U.S. at 512 (quoting *Time, Inc.,* 401 U.S. at 285); *see also Harte-Hanks,* 491 U.S. at 689-90. Moreover, we cannot assume that in a complex trial with multiple defendants and over 20 witnesses, the jury disbelieved or rejected all the testimony of the defense witnesses. Where we can only speculate as to the jury's assessment of each witness, and where the events underlying the alleged defamation are wrapped in obscurity and capable of being interpreted or described in more than one way, we require evidence independent of possible credibility determinations to support a jury's finding of actual malice. *See Harte-Hanks,* 491 U.S. at 690-91.

Turning to the evidence, Tan and the VCTC contend that the jury obviously rejected the defendants' assertions that they wrote the Public Notice statements in good faith. They point out that the disclosure of information about Tan's release from a reeducation camp after signing a loyalty pledge and his continued employment as a teacher by the Communist party occurred *after* the Public Notice was written, thereby undermining the defendants' assertions of good faith regarding that publication. But discredited testimony is not sufficient to support a contrary conclusion. *Bose,* 466 U.S. at 512 (relying on *Moore v. Chesapeake & Ohio Ry. Co.,* 340 U.S. 573, 575, 71 S. Ct. 428, 95 L. Ed. 547 (1951)). In *Bose,* the court held that although the discredited testimony

did not rebut any inference of actual malice, it alone did not prove actual malice by clear and convincing evidence. *Bose,* 466 U.S. at 512. Here, it is possible the jury rejected all of the defendants' professions of good faith and believed that the defendants were disingenuous in citing Tan's history with the Communist party as a basis for their good faith claim. Even so, the discredited testimony fails to meet the clear and convincing standard where the underlying events are capable of being honestly perceived very differently by different people.

Tan and the VCTC also argue that the defendants knew their statements were false because the defendants must have been "aware" of the truth.[3] Br. of Resp't at 31-32, 34. But where the events are not sufficiently clear to "speak for themselves," arguing

[3] Specifically, Tan and the VCTC cite the following examples to prove that the defendants knew their statements were false: (1) defendants knew that people did not boycott the VCTC because Le remained associated with the VCTC after the name change, (2) Le knew that Hua never said he would accept Viet Cong money because Le was present when Hua spoke, (3) the VCTC newsletter did not advocate for organizing on the anniversary of September 2, (4) the defendants were aware that the playing of the Vietnam national anthem was an accident and that the reports of violent protests were exaggerated impressions, (5) none of the defendants testified that Tan actually refused to display the nationalist flag and Ho even testified that he was aware that Tan displayed the national flag at the language school, and (6) the defendants admitted that if the VCTC had held a meeting to commemorate the Fall Revolution, there would have been an uproar and significant media attention.

that the defendants unreasonably construed the facts imposes a negligence standard on the defendants that is at odds with the plaintiffs' burden of proving the defendants' actual beliefs. *See Bose,* 466 U.S. at 512. That a reasonable person would have been aware of the inaccuracies is not enough to establish a defendant's actual malice, particularly where, as here, the underlying incidents are colored in shades of gray, not black or white. *Bose,* 466 U.S. at 511-12.

Finally, Tan and the VCTC argue they proved actual malice with the following: (1) the committee members made no attempt to contact Tan before publishing the Public Notice, (2) the defendants had previously worked with Tan to organize events opposing communism until the divisive flag committee meetings in 2003, (3) the defendants had a history of acrimony with Tan, (4) some of the defendants had witnessed Tan speak publicly on flag issues, most likely in support of displaying the nationalist flag, (5) the defendants failed to investigate any of the facts before publication, including the authenticity of the apron, and (6) the defendants were upset that Tan arranged a meeting with the dean of the community college because it diverted attention from their committee.

But these factors, whether considered alone or together, fail to prove that the defendants published their accusations with actual malice. Their failure to contact Tan or investigate the authenticity of the apron suggests, again, only that the defendants were negligent. In *Harte-Hanks,* the court distinguished

the failure to investigate from the purposeful avoidance of the truth. *Harte-Hanks,* 491 U.S. at 692; *see also Sullivan,* 376 U.S. at 287-88 (failure to investigate is not sufficient to prove recklessness). Unlike the newspaper in *Harte-Hanks,* whose inaction was a deliberate decision not to acquire knowledge, the defendants called for a public hearing and asked Tan and the VCTC to participate. Although the hearing was scheduled after the letter was published, the defendants' willingness to engage in further debate about the issues rebuts any inference that they sought to purposely avoid the truth. Moreover, the defendants never admitted they had concerns about the truthfulness of their charges, as opposed to the authors in *Harte-Hanks* who admitted to Thompson that they had concerns about whether Stephens would corroborate her story. *Harte-Hanks,* 491 U.S. at 682. In contrast, the defendants' belief that the apron was Communist propaganda is entirely plausible given their experience and political perspective, and nothing in the record suggests that they thought otherwise. There is no evidence that the defendants deliberately ignored contrary evidence or otherwise sought to avoid the truth. *See Harte-Hanks,* 491 U.S. at 692-93.

Unlike the records in *Harte-Hanks* and *Richmond,* the evidence here does not clearly and convincingly set forth direct or undisputed facts that support a finding of actual malice. In *Harte-Hanks,* the court relied primarily on two pieces of undisputed evidence in holding that the newspaper deliberately ignored

evidence that would undermine its story: the newspaper's failure to interview a key eyewitness, and its failure to listen to the plaintiff's recording of the conversation where he allegedly offered bribes to the sisters. *Harte-Hanks,* 491 U.S. at 692. And in *Richmond,* the direct evidence consisted of testimony from the trooper and two eyewitnesses that flatly contradicted Thompson's account of the incident. The circumstantial evidence that Thompson did not accuse the trooper until six months after the incident merely supported the testimony by the trooper and the two eyewitnesses. *Richmond,* 130 Wn.2d at 389. Thus, concrete, factual evidence of actual malice supported credibility determinations made in the plaintiffs' favor in both *Harte-Hanks* and *Richmond.*

Here, the history of acrimony between Tan and the defendants and the fact that Tan had previously worked with the defendants on political issues bolsters the plaintiffs' case theory but offers no concrete support for their claim of actual malice. That the defendants had worked with Tan to oppose communism and knew he had spoken in favor of displaying the nationalist flag is equivocal and does not eliminate the possibility that they thought Tan was secretly working for the Communists. It is also impossible to pinpoint the cause of the acrimony between Tan and the defendants; it may have stemmed from the defendants' perceptions that Tan was sympathetic to the Communists. If so, this acrimony offers no support for the notion the defendants falsely accused Tan of being a Communist. A showing of ill

will or malice, in the ordinary sense, is insufficient to prove "actual malice." *Harte-Hanks,* 491 U.S. at 666. Without evidence that unequivocally shows that the defendants knew or entertained serious doubts that Tan was a Communist or Communist supporter, the circumstantial evidence offered by the plaintiffs shows, at best, that a reasonable person would question the charge. This is insufficient to prove that the defendants subjectively believed their statements false or even probably false.

In sum, Tan and the VCTC contend that clear and convincing evidence shows that the defendants simply seized upon the apron incident as an opportunity to defame them. The context of this case suggests otherwise: the Vietnamese community takes seriously what it perceives to be a very real threat of communism. Within this context, the defendants attacked Tan and the VCTC for being Communists or Communist sympathizers. During the course of the conflict, the defendants used the tools people frequently use to advance a political position – vitriol and hyperbole. The defendants may also have been overly quick to build a conspiracy theory from facts too scant and equivocal to persuade a jury that the conspiracy existed in fact. Nonetheless, the defendants' mischaracterizations, exaggerations, and seemingly improbable inferences took place in an ongoing political discussion protected by the First Amendment. And to the extent the defendants made factual statements not encompassed by the opinion framework, the plaintiffs failed to prove actual malice.

We reverse and remand for dismissal.

/s/ Armstrong, J.
Armstrong, J.

We concur:

/s/ Quinn Brintnall, J.
Quinn-Brintnall, J.

/s/ Penoyar
Penoyar, C.J.

APPENDIX C

☐ **EXPEDITE**
■ Hearing is set:
Date: May 8, 2009
Time: 9:00 a.m.
Judge/Calendar:
McPhee – Not Cal

SUPERIOR COURT
OF WASHINGTON
FOR THURSTON COUNTY

DUC TAN, a single man; and VIETNAMESE COMMUNITY OF THURSTON COUNTY, a Washington corporation,

Plaintiffs,

v.

NORMAN LE and PHU LE, husband and wife, et al.,

Defendants.

NO. 04-2-00424-9

JUDGMENT FOR PLAINTIFFS

Clerk's Action Required

I. JUDGMENT SUMMARY

A. Judgment Summaries for Plaintiff Duc Tan

1. Judgment Creditor: Duc Tan
2. Judgment Debtors: Norman Le, Dat Tan Ho, Phiet Nguyen, Nga Thi Pham, and Nhan Than Tran
3. Address: See attached Exhibit B

4. Principal Judgment Amount: $150,000.00
5. Interest to Date of Judgment $ - 0 -
6. Attorney's Fees: $ 100.00
7. Costs: $ 2,085.31
8. Other Recovery Amounts: $ - 0 -
9. Principal Judgment Amount Shall Bear Interest at 12% per annum
10. Attorney's Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% per annum
11. Attorney for Judgment Creditor: Gregory M. Rhodes
12. Attorney for Judgment Debtor: Nigel S. Malden

1. Judgment Creditor: Duc Tan
2. Judgment Debtor: Norman Le
3. Address: See attached Exhibit B
4. Principal Judgment Amount: $75,000.00
5. Interest to Date of Judgment $ - 0 -
6. Attorney's Fees: $ - 0 -
7. Costs: $ - 0 -
8. Other Recovery Amounts: $ - 0 -
9. Principal Judgment Amount Shall Bear Interest at 12% per annum
10. Attorney's Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% per annum
11. Attorney for Judgment Creditor: Gregory M. Rhodes

12. Attorney for Judgment Debtor: Nigel S. Malden

B. Judgment Summaries for Plaintiff Vietnamese Community of Thurston County

1. Judgment Creditor: Vietnamese Community of Thurston County
2. Judgment Debtor: Norman Le, Dat Tan Ho, Phiet Nguyen, Nga Thi Pham, and Nhan Than Tran
3. Address: See attached Exhibit B
4. Principal Judgment Amount: $ 60,000.00
5. Interest to Date of Judgment $ - 0 -
6. Attorney's Fees: $ 100.00
7. Costs: $ 1,042.66
8. Other Recovery Amounts: $ - 0 -
9. Principal Judgment Amount Shall Bear Interest at 12% per annum
10. Attorney's Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% per annum
11. Attorney for Judgment Creditor: Gregory M. Rhodes
12. Attorney for Judgment Debtor: Nigel S. Malden

1. Judgment Creditor: Vietnamese Community of Thurston County
2. Judgment Debtor: Norman Le
3. Address: See attached Exhibit B
4. Principal Judgment Amount: $25,000.00

5.	Interest to Date of Judgment	$	- 0 -
6.	Attorney's Fees:	$	- 0 -
7.	Costs:	$	1,042.65
8.	Other Recovery Amounts:	$	- 0 -
9.	Principal Judgment Amount Shall Bear Interest at 12% per annum		
10.	Attorney's Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% per annum		
11.	Attorney for Judgment Creditor:	Gregory M. Rhodes	
12.	Attorney for Judgment Debtor:	Nigel S. Malden	

II. BASIS

This matter was tried by a jury of 12 from March 30, 2009, to April 16, 2009, the Honorable Wm. Thomas McPhee presiding. Plaintiffs, Duc Tan and the Vietnamese Community of Thurston County, appeared personally through their attorney of record, Gregory M. Rhodes of YOUNGLOVE COKER, P.L.L.C. Defendants, Norman Le; Dat Ho; Phiet Nguyen; Nga Pham; and Nhan Tran, appeared personally through their attorney of record, Nigel S. Malden of DAVIES PEARSON, P.C., and by Tam Nguyen, appearing Pro Hac Vice.

The parties presented evidence and testimony to the jury from March 30, 2009, through April 15, 2009, and on April 16, 2009, the jury returned a verdict in favor of Plaintiff, Duc Tan, in the amount of Two

Hundred Twenty-Five Thousand Dollars ($225,000) and to Plaintiff, Vietnamese Community of Thurston, in the amount of Eighty-Five Thousand Dollars ($85,000) on their defamation claims. A copy of the jury's verdict is attached as Exhibit A.

III. JUDGMENT AWARD & COSTS

Consistent with the jury's verdict in this action, the Court enters final judgment in this matter as follows:

3.1 Plaintiff, Duc Tan, is awarded judgment against Defendants, Norman Le; Dat Ho; Phiet Nguyen; Nga Pham; and Nhan Tran, in the amount of $150,000.00.

3.2 Plaintiff, Duc Tan, is awarded judgment against Defendant, Norman Le, in the amount of $75,000.00.

3.3 Plaintiff, Vietnamese Community of Thurston, is awarded judgment against Defendants, Norman Le; Dat Ho; Phiet Nguyen; Nga Pham; and Nhan Tran, in the amount of $60,000.00

3.4 Plaintiff, Vietnamese Community of Thurston, is awarded judgment against Defendant, Norman Le, in the amount of $25,000.00.

3.5 Plaintiffs are awarded the following costs pursuant to RCW 4.84.010:

a. Filing Fee and Jury Demand	$	360.00
b. Statutory Attorney Fees	$	200.00

c.	Process Service Fees	$ 270.62
d.	Interpreter Services – Circle Language Solutions	$ 840.00
e.	Interpreter Services – Nova Cuong Phung	$ 2,700.00

DATED this 8 day of May, 2009.

/s/ Thomas McPhee
WM. THOMAS MCPHEE,
JUDGE

Presented by:

YOUNGLOVE & COKER, P.L.L.C.

/s/ Greg Rhodes
Gregory M. Rhodes, WSBA #33897
Attorney for Plaintiffs

Approved for entry:
[No objection to Form, Notice of Presentation waived]
DAVIES PEARSON, P.C.

/s/ Nigel S. Malden
Nigel S. Malden, WSBA #15643
Attorney for Defendants

EXHIBIT A
JURY SPECIAL VERDICT
FORMS A-D

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

DUC TAN, and the VIETNAMESE COMMUNITY of THURSTON COUNTY, Plaintiffs,	NO. 04-2-00424-9
vs.	SPECIAL VERDICT FORM A PLAINTIFF DUC TAN
NORMAN LE, PHIET NGUYEN, DAT HO NGA PHAM, and NHAN TRAN, et al., Defendants.	

We, the Jury, answer the questions submitted by the court as follows:

QUESTION 1: Was plaintiff Duc Tan defamed by the following defendants in the Public Notice (Exhibit 8)?

INSTRUCTION: Answer by writing "yes" or "no" after the name of each defendant:

Defendant Norman Le: yes

Defendant Dat Ho: yes

Defendant Phiet Nguyen: yes

Defendant Nga Pham: yes

Defendant Nhan Tran: yes

(INSTRUCTION: If you answered "no" to each defendant identified in Question 1, sign this verdict form. If you answered "yes" to one or more defendants in Question 1, answer Question 2.)

QUESTION 2: Was the defamation in the Public Notice (Exhibit 8) a proximate cause of damage to the plaintiff Duc Tan?

ANSWER: yes (Write "yes" or "no")
(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff Duc Tan's amount of damages for the defamation in the Public Notice (Exhibit 8)?

ANSWER: $ 150,000
(INSTRUCTION: Write the amount of damages you find were proximately caused by the defamation in the Public Notice. If you answered "yes" to more than one defendant in Question 1, do not allocate the amount of damages among defendants.)

DATE: 4/16/2009 /s/ [Illegible]
Presiding Juror

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

DUC TAN, and the VIETNAMESE COMMUNITY of THURSTON COUNTY, Plaintiffs, vs. NORMAN LE, PHIET NGUYEN, DAT HO NGA PHAM, and NHAN TRAN, et al., Defendants.	NO. 04-2-00424-9 SPECIAL VERDICT FORM B PLAINTIFF VCTC

We, the Jury, answer the questions submitted by the court as follows:

QUESTION 1: Was plaintiff Vietnamese Community of Thurston County defamed by the following defendants in the Public Notice (Exhibit 8)?

INSTRUCTION: Answer by writing "yes" or "no" after the name of each defendant:

Defendant Norman Le: yes

Defendant Dat Ho: yes

Defendant Phiet Nguyen: yes

Defendant Nga Pham: yes

Defendant Nhan Tran: yes

(INSTRUCTION: If you answered "no" to each defendant identified in Question 1, sign this verdict form. If you answered "yes" to one or more defendants in Question 1, answer Question 2.)

QUESTION 2: Was the defamation in the Public Notice (Exhibit 8) a proximate cause of damage to the plaintiff Vietnamese Community of Thurston County?

ANSWER: yes (Write "yes" or "no")
(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff Vietnamese Community of Thurston County's amount of damages for the defamation in the Public Notice (Exhibit 8)?

ANSWER: $ 60,000
(INSTRUCTION: Write the amount of damages you find were proximately caused by the defamation in the Public Notice. If you answered "yes" to more than one defendant in Question 1, do not allocate the amount of damages among defendants.)

DATE: 4/16/2009 /s/ [Illegible]
Presiding Juror

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

DUC TAN, and the VIETNAMESE COMMUNITY of THURSTON COUNTY, Plaintiffs,	NO. 04-2-00424-9
vs.	SPECIAL VERDICT FORM C PLAINTIFF DUC TAN
NORMAN LE, PHIET NGUYEN, DAT HO NGA PHAM, and NHAN TRAN, et al., Defendants.	

We, the Jury, answer the questions submitted by the court as follows:

QUESTION 1: Was plaintiff Duc Tan defamed by Norman Le in the following statement contained in the *Community Newsletter of the Vietnamese Community of Washington State*, Issue #20, published on November 15, 2002, under the headline "Community Activity News" by defendant Norman Le?

> A bloody VC flag has been displayed in a classroom of a big high school where Mr. Duc Tan and Mr. Duc Hua use [sic] to teach Vietnamese . . . the Principal agreed to let display the Nationalist flag . . . Norman Le asked Mr. Duc TT to do the displaying of the flag. After almost two hours of discussion, he refused to do it.

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: If you answered "yes", proceed to Question 2. If you answered "no", skip Question 2 and proceed to Question 3.

QUESTION 2: Was the defamatory statement in Question 1 a proximate cause of damage to plaintiff Duc Tan?

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: Proceed to Question 3.

QUESTION 3: Was plaintiff Duc Tan defamed by defendant Norman Le in the following statement contained in the *Community Newsletter of the Vietnamese Community of Washington State*, Issue #20, published on November 15, 2002, under the headline beginning "The Statement of the former president . . . ," by defendant Norman Le?

> Voters should take a good look into what the Evil Axis has done in the past: The Axis's head is Mr. Sanh Pham . . . He is trying to organize and be allied with the politically dangerous people and the organizations publicly recognized in their services to the VC regime, among which they are: The organization of Seng sang DUC HUA and Seng Sang DUC TAN who have once run a ceremony of flag salutation with the VC national anthem, and called for celebration of "The Sept. 2 anniversary."

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: If you answered "yes", proceed to Question 4. If you answered "no", skip Question 4 and proceed to Question 5.

QUESTION 4: Was the defamatory statement in Question 3 a proximate cause of damage to plaintiff Duc Tan?

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: Proceed to Question 5.

QUESTION 5: Was plaintiff Duc Tan defamed by defendant Norman Le in the following statement contained the newspaper the *New Horizon* under the headline "Campaign of Honoring the Vietnamese People's Yellow Flag" by defendant Norman Le?

> It has been for many years that the VC under-cover agents disguised as Nationalists started making attempts to display VC Flags in many American High/Mid/Grade schools; among those were the group of DUC Tan at St. Michael School in Olympia.

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: If you answered "yes", proceed to Question 6. If you answered "no", skip Question 6 and proceed to Question 7

QUESTION 6: Was the defamatory statement in Question 3 a proximate cause of damage to plaintiff Duc Tan?

ANSWER: yes [Write "yes" or "no"]

INSTRUCTION: Answer Question 7 only if you have answered "yes" to both Questions 1 and 2, *or* "yes" to both Questions 3 and 4, *or* "yes" to both Questions 5 and 6: otherwise, do not answer Question 7 and sign the verdict form

QUESTION 7: What do you find to be the plaintiff Duc Tan's amount of damages for the defamatory statement or statements in Questions 1, 3, and/or 5, above?

ANSWER: $ 75,000

INSTRUCTION: Answer only one amount even if you find that more than one of the three statements were defamatory and proximately caused damage to plaintiff Duc Tan. Write in the amount and sign the verdict form.

DATE: 4/16/2009 /s/ [Illegible]
Presiding Juror

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

DUC TAN, and the VIETNAMESE COMMUNITY of THURSTON COUNTY, Plaintiffs, vs. NORMAN LE, PHIET NGUYEN, DAT HO NGA PHAM, and NHAN TRAN, et al., Defendants.	NO. 04-2-00424-9 SPECIAL VERDICT FORM D PLAINTIFF VCTC

We, the Jury, answer the questions submitted by the court as follows:

QUESTION 1: Was plaintiff Vietnamese Community of Thurston County defamed by defendant Norman Le in the following statement contained in the *Community Newsletter of the Vietnamese Community of Washington State*, Issue #20, published on November 15, 2002, under the headline beginning "The Statement of the former president . . . ," by defendant Norman Le?

> Voters should take a good look into what the Evil Axis has done in the past: The Axis's head is Mr. Sanh Pham . . . He is trying to organize and be allied with the politically dangerous people and the organizations publicly recognized in their services to the VC regime,

among which they are: The organization of Seng sang DUC HUA and Seng Sang DUC TAN who have once run a ceremony of flag salutation with the VC national anthem, and called for celebration of "The Sept. 2 anniversary."

ANSWER: yes [Write "yes" or "no"]
(INSTRUCTION: If you answered "yes", proceed to Question 2. If you answered "no", skip Question 2 and proceed to Question 3.

QUESTION 2: Was the defamatory statement in Question 1 a proximate cause of damage to plaintiff Vietnamese Community of Thurston County?

ANSWER: yes [Write "yes" or "no"]
INSTRUCTION: Proceed to Question 3.

QUESTION 3: Was plaintiff Vietnamese Community of Thurston County defamed by defendant Norman Le in the following statement contained in the newspaper *New Horizon* under the headline "Campaign of Honoring the Vietnamese People's Yellow Flag" by defendant Norman Le?

It has been for many years that the VC under-cover agents disguised as Nationalists started making attempts to display VC Flags in many American High/Mid/Grade schools; among those were the group of DUC Tan of St. Michael School in Olympia.

ANSWER: no [Write "yes" or "no"]
INSTRUCTION: If you answered "yes", proceed to Question 4. If you answered "no", skip Question 4 and proceed to Question 5.

QUESTION 4: Was the defamatory statement in Question 3 a proximate cause of damage to plaintiff Vietnamese Community of Thurston County?

ANSWER: _____ [Write "yes" or "no"]
INSTRUCTION: Proceed to Question 5.

INSTRUCTION: Answer Question 5 only if you have answered "yes" to both Questions 1 and 2, *or* "yes" to both Questions 3 and 4; otherwise, do not answer Question 5 and sign the verdict form

QUESTION 5: What do you find to be the plaintiff Vietnamese Community of Thurston County's amount of damages for the defamatory statement or statements in Questions 1, and/or 3, above?

ANSWER: $ 25,000

INSTRUCTION: Answer only one amount even if you find that both of the statements were defamatory and proximately caused damage to plaintiff Vietnamese Community of Thurston County. Write in the amount and sign the verdict form.

DATE: 4/16/2009 /s/ [Illegible]
Presiding Juror

DEFENDANTS

NORMAN LE
4110 14TH AVENUE SE
LACEY WA 98501

DAT TAN HO
13330 124TH AVENUE NE
KIRKLAND WA 98034

PHIET X. NGUYEN
6210 37TH LANE SE
LACEY WA 98503

NGA THI PHAM
2248 222ND STREET SE
DES MOINES WA 98198

NHAN THANH TRAN
535 FLORAL COURT
LONGVIEW WA 98632

APPENDIX D

THE SUPREME COURT OF WASHINGTON

DUC TAN, a single man; and VIETNAMESE COMMUNITY OF THURSTON COUNTY, a Washington corporation, Petitioners, v. NORMAN LE, and PHU LE, husband and wife; TUAN A. VU and HUYNH T. VU, husband and wife; PHIET X. NGUYEN and VINH T. NGUYEN, husband and wife; DAT T. HO and "JANE DOE" HO, husband and wife; NGA T. PHAM and TRI V. DUONG, wife and husband; and NHAN T. TRAN and MAN M. VO, wife and husband, Respondents.	**ORDER DENYING MOTION FOR RECONSIDERATION** No. 86021-1 (Filed Aug. 15, 2013)

The Court having considered the "RESPONDENTS' MOTION FOR RECONSIDERATION AND TO CONSIDER UNDECIDED ISSUES AND CLAIMS PURSUANT TO RAP 12.4 AND RAP 13.7(b)" and "RESPONDENTS PHAM'S AND DUONG'S MOTION FOR RECONSIDERATION";

Now, therefore, it is hereby

ORDERED:

That the motions for reconsideration are denied.

DATED at Olympia, Washington this 15th day of August, 2013.

For the Court

/s/ Madsen, C.J.
CHIEF JUSTICE

APPENDIX E

[LOGO]
THURSTON COUNTY
CLERK'S OFFICE
WASHINGTON
SINCE 1852

BETTY J. GOULD
COUNTY CLERK
and Ex-Officio Clerk
of Superior Court

Plaintiff/Petitioner Exhibit # 8

Cause # 04-2-00424-9

Date Admitted 3-31-09

By DM
Deputy

From: Tuan Vu [tvu2020@yahoo.com]

Sent: Thursday, August 07, 2003 8:24 AM

To: viet.nguyen@comcast.net; Shpham1@Attbi. Com; normanle@netzero.net; khavous@yahoo.com; thanhnguyenusa@hotmail.com; danghi@vncac.org; Tan Duc; sdn23066@premier1.net; Nam Lai; svu@co.kitsap.wa.us; dsteussy@highline.com; hdao@webtv.net; TIEN NGUYEN; nvtbkp86@aol.com; Julien Pham; lily.iftner@dbmengineers.com; Dan Nguyen; pr@tetinseattle.org; kietaly@u.washington.edu; nhanvodao@yahoo.com; nguoithien_98104@yahoo.com; dieuhien@u.washington.edu; mongmo@u.washington.edu; uyen.t.le@rssmb.com; vinhx@hotmail.com; thanh_tan@hotmail.com; tvinh@seattletimes.com; sngo@windermere.com; mbach@u.washington.edu; mariehb@u.washington.edu; xiulan@u.washington.edu; radi011568@aol.com; Mai Nguyen; f5ttang@hotmail.com; biet-hai@pacbell.net; t_nambinh@yahoo.com;

baodacbui@yahoo.com; vamco13@hotmail.com; baokiemdam@aol.com; dat_ho@hotmail.com; huynhpq@yahoo.com; rhuynh@spscc.ctc.edu; thuynhrmt@hotmail.com; dieu81@hotmail.com; Nguyen, Hieu; tcyevnus@hotmail.com; nguyenanquy@hotmail.com; I taokng@aol.com; nguyentj1@juno.com; npham@hcc.ctc.edu; tongmai@msn.com; stonthat@online.no; huongviet19@hotmail.com; duocmy@aol.com; rickn@rpne.net; huytuong@hotmail.com; vuthuy@u.washington.edu; tvu2020@yahoo.com

Subject: Public Notice regarding The Vietnamese Community in Thurston County displaying VC Flags .

To the Communist Refugees Compatriots in the whole world,

The Committee Against Viet Cong Flag in Olympia invites you to follow up and have appropriate and legal (legal *in English*) actions in regard of The Vietnamese Community in Thurston County displaying Viet Cong flag (VC Flag *in English*) in the Lakefair booth in Olympia, Washington, USA, July 17, 2000. (2003*?*)

People have the access to the Internet or newspapers, radio stations, television . . . are asked to further distribute this Public Notice.

To have more details and clearly see the evidence (evidence *in English*), please attend the first press conference in Seattle from 2:00pm to 4:00, Sunday August 17,2003 at Rainier Community Center, 4600 38th Avenue South, Seattle, near Rainier South and Alaska Way.

We also invite the Vietnamese Community in Thurston County to send representatives to this press conference and subsequent conferences, if any, to present its side of the matter.

Sincerely,

Tuan Vu
Co-Chair (*in English*)
Committee Against Viet Cong Flag

P.S. (*in English*) Sorry (*we*) cannot attach the picture (*in English*) of Old Ho (*Ho Chi Minh*) due to overload.

Please come to the press conference to see the evidence.

(NOTE: the translator for better comprehension added Words in Italic).

COMMITTEE AGAINST VIET CONG FLAG
P.O. Box. 83, Kirkland, WA 98083

PUBLIC NOTICE

RE: The Vietnamese Community in Thurston County displaying disguised VC Flags at Lakefair, Olympia Washington State

I. FACTS

In the NVHB Choir practice on Saturday night 7/26/03 at the Fern Ridge Community House, Olympia, Washington, a member of the choir, Mr. DP, reported an incident that just happened on the 16 of July, 2003 at the Lakefair booth belonging to the Vietnamese Community in Thurston County of Mr.

Duc Minh Hua, Mr. Duc Thuc Tan, Mr. Dieu Nguyen and Mrs. Bich-Que (*her First name*). Mr. DP is a person hired by the management of the CDNVQT booth (*acronym of Vietnamese Community in Thurston County in Vietnamese*) to cook for the duration of the Fair. At the inauguration of the Fair, when Mr. DP went to the kitchen to start his cooking duties, he found an apron (tablier/apron *in English*) in the kitchen (*redundancy in original text*). He wore it to work. On the dark blue (*or dark green – the color green or blue was not specified*), there is a printed picture of Santa Claus wearing a **red hat with a yellow star**. Across the chest, there are two pockets printed on each of them is a boxing glove **red back ground yellow star** (*words bolded and underlined is grammatically incorrect in Vietnamese*). On the red flag there are numbers of American flags, scattered and swallowed by the VC flag. (*This sentence is in Italic*). At the bottom, are printed 7 yellow stars in a horizontal line. (Please see attached picture)

Every Vietnamese political refugee having experiences with the Communists understand right away: (*following section in Italic*) the picture printed on that shirt (*apron?*) wants to show the public the red flag and yellow star of the Vietnamese Communist. And the picture of Santa Claus reminds the viewers, of the picture of Old Ho. The Vietnamese Communist Party tactfully put on Santa Claus' head a hat with a red crescent, representing the International Communist Party flag. Santa Claus represents love and brings gifts to people. VC boxing glove swallowing the

American flag insinuated the idea of "the Vietnamese Communist Party (CSVN) defeats America" (*end of Italic section*).

The intention of displaying the above symbols is to show the presence of the Hanoi Communist regime in the Vietnamese community, to about 250,000 Lakefair goers, just like they intentionally displayed the VC flag at SPSCC and some other places.

It is unknown for how long Mr. DP has been wearing Old Ho's picture with 2 red flags with yellow stars, and if anyone had taken a picture. After discovering these Viet Cong symbols, Mr. DP, the cook, promptly turned the apron inside out and wore it.

At the end of the Fair, Mr. DP asked the key persons of the Vietnamese Community in Thurston County (Mr. Duc Minh Hua, Mr. Duc Thuc Tan, Mr. Dieu Nguyen and Mrs. Bich-Que) and others working his shift to find out who owns that apron in order to give it back, but nobody identifies it as his/hers! The cook took it home with the intention of erasing (*removing?*) the picture of Old Ho and the VC flag to "recycle" it. But, on Sunday morning, the 27 of July, 2003, Mr. TV obtained the apron and took it home for evidence. This evidence will be displayed at the next press conferences so the public can see it in person.

II. RECORDS OF THE TAN THUC DUC GANG.

Since its establishment, the Vietnamese Community in Thurston County has been accused of doing activities

for the Vietnamese Communist, by several organizations against the communists in this state, having correct and true evidences.

1. The Vietnamese Community in Thurston County was established under the guidance of Cong Da Le, who guided Nguyen Tan Dung (VC Deputy Prime Minister) in the visit to Boeing, when he came to Seattle. When choosing a name (*for the organization*), the Duc Thuc Tan and Khoa Van Nguyen gang insisted that the name "**National** Vietnamese Committee" suggested by the H.O. Association, and other National associations, be denied. Therefore, all the local anti-communist organizations, societies, had boycotted and did not recognize it from the beginning. In the records filed at the Washington State Department of the Interior, Mr. Duc TT claimed with the authorities that he "DOES NOT have members" (*in Italic*), meaning not representing anybody at all. It is obvious that CDNVQT (Vietnamese Community in Thurston County) had been **impersonating the representatives of the community with illegal political intentions**. They also abused the name of the local community in order to be awarded a booth at the annual Lakefair, getting around $10,000.00 that nobody knows for what!

2. Mr. Duc Minh Hua, "First and for life President", when answering to questions about the Cao Son calendar and the receiving money from Cao Son, did declare at St Michael

school **“there is nothing wrong with receiving VC money”**

3. Suggested the idea of organizing the yearly anniversary of **September 2** in the Olympia Newsletter of the Vietnamese Community in Thurston County;

4. Inaugurated the 1997 Autumn Poems, Songs, Music (Ha Huyen Chi Poems and Music Night) by playing the “**VC anthem**”: The band that Duc TT brought from Portland played the whole portion “**Doan Quan Viet Nam di, Chung long cuu quoc**” of the VC Tien Quan Ca song. Immediately, the audience stood up and protested violently, the band had to switch to the VNCH (*Republic of Viet Nam*) anthem.

5. VC flag was hung in his Viet Ngu Hung Vuong classroom, a class teaching Vietnamese language at St Michael school, for many years but the “Principal Duc Thuc Tan” intentionally ignored. Until the Catholic Community of Olympia, the Protestant Community of Olympia and other organizations, members of the National Vietnamese Community of NW Washington (H.O. Association of Olympia, Association of the Elderly people, Association of Me-Linh Women, Voters’ Consortium), organized a delegation??? to convince the Administration to remove the VC flag and let fly the National flag. Mr. Duc Thuc Tan refused to display the National flag, in the contrary, he falsely claimed that “Mr. Ngo Thien Le brought with him 18

adolescents to intimidate the superintendent" (*in Italic*).

6. Organized the Autumn 2002 Meeting to commemorate the Fall Revolution, exactly as the 1997 Autumn **Flag Saluted with VC anthem incident**.

Most recently and most importantly, the Duc Thuc Tan gang had sabotaged the fight of the Committee Against VC Flag (UBCCVC), by false accusations and wanting to eliminate the true nationalists who fervently fight the communists, from the unit in charge of the Committee Against Viet Cong Flag, and had tried by all means to isolate the UBCCVC (*Committee Against VC Flag*) from anti-communist organizations of Tacoma and Seattle to exterminate the UBCCVC ability to fight. In the mean time, the Duc Thuc Tan gang had "gone under the table" with the administration of South Puget Sound Community College (SPSCC) to send the secret message to the Dean that the Vietnamese community is deeply divided, therefore there is no need for removing the bloody communist flag hung at SPSCC. The Duc Thuc Tan gang also used the Internet to continue making stories to distort the truth about the failure of UBCCVC, in a 17-page letter. Now everybody knows why the UBCCVC failed so miserably!

This Public Notice is an opportunity to point out the "hypocritical nature" ("xanh vo do long") of Duc Thuc Tan and the gang heading the Vietnamese

Community of Thurston County that they had cleverly covered up, cheating (*our*) people, all those 28 years. (*This sentence is awkward in Vietnamese language*).

III. ALERT AND SUMMON

That many proofs in addition to the Viet Cong flag display at Lakefair 2003 are more that [sic] enough for us to conclude that the Duc Tuc [sic] Tan gang had abused people's name, hidden under the Nationalist coat to serve the common enemy of the Vietnamese refugees that is the Communist Hanoi.. The organization of Duc Thuc Tan gang had betrayed our Vietnamese community, continuously and systematically since its establishment date. Other proofs are, Duc Thuc Tan and his companions, **NO ONE had a clear background, enough to guarantee that they are Nationalists (not in the military to protect the South Vietnam, not been emprisoned** [sic] **by the Communists, etc . . .)**. And no one ever saw the Vietnamese Community in Thurston County participate in anti-communist activities, such as the Tran Truong, Nguyen Xuan Phong, Nguyen Tam Chien, VC delegation attending WTO, etc! . . .

The Committee Against Viet Cong Flag summons the Communist refugee compatriots, the companions in arms, and anti-communist organization in Washington State and everywhere, to strongly condemn Duc Thuc Tan and gang that are "**fed by the Nationalists and worship the Communists**". Duc Thuc Tan and gang are in the Vietnamese Community of

Thurston County and the Vietnamese Language School Hung Vuong.

Please boycott and expel the above people from the organizations of refugees such as the Vietnamese Community of Thurston County and the Vietnamese Language School Hung Vuong so they would not have any ground to conduct activities on behalf of the evil communists and harm our compatriots and poison our children's mind.

The Committee Against Viet Cong Flag will use all means of communication to expose more details of this matter to people everywhere, in the coming days. Please keep following the news.

Olympia, August 7, 2003
For The Committee Against Viet Cong Flag
On Duty Section

Tuan Anh Vu Co-Chair	Dat Tan Ho Commissioner	Phiet Xuan Nguyen Commissioner
Ngo Thien Le Co-Chair	Nhan Thanh Tran Commissioner	Hga Thi Pham Commissioner