IN THE

Supreme Court of Japan

Reiwa 3(O)302, Final Appeal

HITOSHI NAKANO

Claimant/Appellee,

v.

KAZUKO ITO

Defendant/Appellant.

On Appeal From Tokyo District Court Civil Division 24

and

Tokyo High Court

BRIEF AMICUS CURIAE FOR THE BERKELEY CENTER ON COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW IN SUPPORT OF DEFENDANT/APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

Federal Cases

TABLE OF AUTHORITIES—

Continued

TABLE OF AUTHORITIES—

Continued

TABLE OF AUTHORITIES—

Continued

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Berkeley Center on Comparative Equality and Anti-Discrimination Law ("Center") is a research institute at the University of California, Berkeley School of Law. The Center's mission is to bring together academics and legal advocates whose work focuses on inequality and discrimination law, to help them find opportunities to collaborate in order to extend our understanding of inequality through the tool of comparative law. The Center has over 700 members; they

reside on every continent but Antarctica, and in every major economic nation on the globe, including Japan. The Center partners with major NGOs from around the world, including the United Nations, the European Commission, and many national Anti-Discrimination enforcement agencies. The Center is directed by Clinical Law Professor David Oppenheimer, a member of the California and United States Supreme Court bars. Professor Oppenheimer has filed *amicus curiae* briefs in the United States and California Supreme Courts, has done pro bono legal work on behalf of an anti-violence group accused of defamation, and is the author of a recent book chapter on defamation law. See David Oppenheimer, *Defamation Law is Being Weaponized to Destroy the #MeToo Movement,* in The Global #MeToo Movement 497 (Ann M. Noel & David B. Oppenheimer, eds., Full Court Press, 2020).

One of the Center's projects is our Sexual Harassment/Violence Project, which is led by academics and advocates from the United States, the United Kingdom, the European Commission, Japan, India, Australia, Canada, China, Tanzania, Colombia, Brazil, Argentina, Sweden and South Africa. An important focus of our Sexual Harassment/Violence Project is the global movement of people speaking out against harassment, violence and pornography, which is widely described as the #MeToo movement. We have observed that in response to the #MeToo movement, defamation law is being used to suppress speech by those who are speaking out, and that this is a global phenomenon.

The Center seeks to assist wherever possible those who have been accused of defamation in response to their freely speaking out, and to counter this movement against women's equality rights. As more fully set forth within, a similar problem was faced in the 1960s in the United States by Rev. Dr. Martin Luther King Jr. and other civil rights leaders, and the press that reported on them, when defamation law was used by Southern officials to prevent civil rights leaders and the press from speaking out against racism. The tactic nearly worked but was

turned aside by the United States Supreme Court when it recognized a "free speech constitutional privilege" in defamation and privacy cases. The Center seeks to persuade this and other Supreme Courts to embrace the position of the United States Supreme Court and recognize the free speech constitutional privilege in defamation and privacy cases as applied in the United States.

STATEMENT OF THE CASE[1]

Appellant Kazuko Ito (the defendant below) is a leader of the movement for equal rights for women in Japan. She serves as the Secretary General of the Japanese NGO Human Rights Now. Human Rights Now speaks out against sexual harassment, sexual violence, and the exploitation of women in pornography. Her work has played an important role in the Japanese government taking steps to protect women from exploitation, an important matter of public concern in Japan and around the world. This work has made her a target of the pornography industry.

In January 2018, the claimant and two others were arrested for the crime of "inducement to promiscuous intercourse." The police asserted that he was the head of a pornography company that had allegedly coerced a woman into acting in a pornographic film, in violation of law. His arrest was covered in the news by three of the largest media companies in Japan and included scenes of him covering his face to protect his identity during the arrest. When Ms. Ito saw the media coverage, she sent out a tweet:

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[1] The statement of the case relies on the decision of the Tokyo District Court Civil Division 24, dated November 27, 2019 (Nakano v. Ito), the decision of the Tokyo District Court Civil Division 31 dated October 31, 2019 (Nakano v. Asahi Shimbun, Chunichi Shimbun and Tokyo Broadcasting System Television) and the decision of the Tokyo High Court Civil Division 15 dated October 28, 2020 (Nakano v. Ito).

"What I thought while watching the scene that the head of the production company was desperately hiding his face after he was arrested was: some people gain huge amounts of money, while hiding themselves, by coercing unwilling women into acting in a pornographic film and exposing their faces, bodies, and humiliating things which deserve the highest privacy, and by hurting the women severely. I wish all such people like devils will be held accountable and have their faces exposed."

The public prosecutor subsequently dropped the charges against the claimant. He then sued Tokyo prefecture supervising the police department, but his claims were dismissed. He sued the three major media companies that reported on the story, but his claims were dismissed. And he sued Ms. Ito for defaming him in her tweet by alleging that he coerced women into pornography. That claim, and that claim alone, was successful.

To be clear, Ms. Ito had nothing to do with the claimant's arrest and did not instigate the media attention he received as a result of his public arrest. All she did was to react to the media coverage by expressing her opinion that people who coerce women into acting in a pornographic film should be held accountable and expose their faces.

INTRODUCTION

In the struggle for equal rights under law, one of the most important dates in history was March 9, 1964—the date that the United States Supreme Court decided the case of *New York Times v. Sullivan,* 376 U.S. 254 (1964). The case arose when the *Times* printed an advertisement by an NGO seeking contributions for the work of Rev. Dr. Martin Luther King Jr. and other civil rights leaders in their fight against racism. The ad told the story of the civil rights movement in the Southern states, including Alabama, and attributed acts of harassment and violence to public officials in that state. The ad contained several factual inaccuracies. In response, Montgomery Alabama Police Commissioner L.B. Sullivan and four other

Alabama public officials brought defamation actions against the *Times*, Dr. King, and several other civil rights movement leaders. Sullivan's case was the first to be tried. Under Alabama law, the defendants were required to prove the truth of the assertions in the ad. Sullivan won a verdict of $500,000 (USD), roughly equivalent to $4,000,000 (USD) today. A second $500,000 (USD) verdict against the *Times*, in favor of the mayor of Montgomery, followed soon thereafter.

If *Sullivan*'s verdict had survived, the civil rights leaders of the 1960s would have had to stop speaking out or face ruinous legal verdicts. Defamation law would have been successfully used to silence the movement for racial equality. The verdict was affirmed by the Alabama Supreme Court, but it was reversed by the United States Supreme Court, which recognized a new Free Speech Constitutional Privilege in defamation and privacy cases. *New York Times v. Sullivan*, 144 So.2d 25 (Ala. 1962), rev'd, 376 U.S. 254 (1964). In the Sullivan case and subsequent cases the Court held that in defamation and privacy cases in which the statement was on a matter of public concern, even when the claimant was a private figure, the U.S. Constitution required: (1) that the burden be placed on the claimant to prove falsehood; (2) that the burden be placed on the claimant to prove actual damages; and, (3) that the burden be placed on the claimant to prove that the defendant was at least negligent, in that the defendant knew or should have known that its statement was false, *Sullivan*, 376 U.S. at 283-84. That defense saved the American civil rights movement of the 1960s.

Japan too has a Free Speech Constitutional Privilege that balances free speech and reputation interests, but it is less protective than the U.S. privilege. In this brief, we respectfully ask this Court to consider expanding the free speech constitutional privilege under Japanese law, to prevent the use of defamation law to silence Japanese women speaking out against the important social problem of sexual harassment, violence and pornography.

ARGUMENT

I. THE FREE SPEECH CONSTITUTIONAL PRIVILEGE RECOGNIZED UNDER UNITED STATES LAW STATES AN IMPORTANT PRINCIPLE OF DEMOCRATIC DISCOURSE, WHICH SHOULD BE ADOPTED BY THE SUPREME COURT OF JAPAN.

Freedom of speech and expression are fundamental to the establishment and preservation of democracy. *See* John Stuart Mill, *On Liberty* (1859) ("Unless opinions favourable to democracy and to aristocracy, to property and to equality, to cooperation and to competition, to luxury and to abstinence, to sociality and individuality, to liberty and discipline, and all the other standing antagonisms of practical life, are expressed with equal freedom, and enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) ("Without free speech and assembly, discussion would be futile."); *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); *Masses Pub. Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y. 1917) (Learned Hand): "[Opinion and criticism] fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."); *N.A.A.C.P. v. Button*, 371 U.S. 415, 443 (1965) (Brennan, J.) ("freedom of expression needs breathing space to survive.").

Freedom of speech and expression are guaranteed in the constitution or basic law of every great democratic nation, including the Constitutions of Japan (NIHONKOKU KENPŌ [KENPŌ]

[Constitution], art. 21, (Japan)) and the United States Constitution (U.S. CONST. amend. 1), as well as the European Charter of Fundamental Rights (art. 11), the Canadian Charter of Rights and Freedoms (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, Section 2(b) (U.K.), and the Constitution of India (INDIA CONST. art. 19). They are guaranteed under international law in the Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19), both of which have been ratified by Japan.

In *Sullivan*, the U.S. Supreme Court held that in defamation cases brought by a public official there is a Free Speech Constitutional Privilege that protects even defamatory speech as long as the defamatory statement was not knowingly false or made with reckless disregard for truth or falsity. 376 U.S. at 254. In subsequent cases the privilege was extended to defamation of private figures when the defamatory statement was on a matter of public concern. In such circumstances, the affirmative defense of truth was eliminated, and the burden was shifted to the plaintiff to prove falsehood as an element of the claim. Thus, in order to avoid chilling public expressions over matters of public concern, U.S. courts put the burden of proof on the claimant, requiring the claimant to prove that the statement was false, and that the defendant was negligent in that he knew or should have known that it was false.

II. THE FREE SPEECH CONSTITUTIONAL PRIVILEGE IS INTENDED TO PROTECT SPEECH ABOUT MATTERS OF PUBLIC CONCERN.

On numerous occasions, the United States Supreme Court has protected defamatory statements that are of "public concern" under the Free Speech Constitutional Privilege. Public concern refers to "any matter of political, social, or other concern to the community" and is the "subject of general interest

and of value and concern to the public." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 84 (2004). Statements that are the "subject of legitimate news interest" are of public concern as well as private remarks that discuss issues of community interest. *Roe*, 543 U.S. at 84. To determine if speech is of public concern, courts examine the full circumstances of a case, as well as the statement's "content, form, and context." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *Snyder v. Phelps*, 652 U.S. 443, 446 (2011).

The public concern defense safeguards free speech and constitutes "the heart of First Amendment Protection." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). Speech of public concern is "more than self-expression; it is the essence of self-government" and is "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Garrison v. State of La.*, 378 U.S. 64, 75 (1964); *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). As a result, the Supreme Court has repeatedly enforced protections for this form of speech since it occupies the "highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

In this case, Ms. Ito's statement was of public concern since it addressed ongoing societal problems in Japan—sexual assault and trafficking. As the Secretary General of Human Rights Now, Ms. Ito is widely considered an expert on the issue of sex trafficking in Japan and her statement was of "concern to the community." *See Connick*, 461 U.S. at 146. The tweet "was fashioned to . . . bring[] about [] political and social changes desired by the people," by condemning sexual violence and promoting national awareness of sex trafficking. *See Sullivan*, 376 U.S. at 269. Additionally, her television appearance on a national news network to discuss the legal implications of a criminal complaint for inducement to promiscuous intercourse establishes that the statement was the "subject of

legitimate news interest" and public concern. *See Roe*, 543 U.S. at 84. Thus, the Free Speech Constitutional Privilege would protect Ms. Ito's statement in the United States.

III. UNDER THE FREE SPEECH CONSTITUTIONAL PRIVILEGE, THE BURDEN OF PROVING FALSEHOOD IN A DEFAMATION CASE SHIFTS TO THE CLAIMANT, REQUIRING THE CLAIMANT TO PROVE THAT THE STATEMENT WAS FALSE.

In *Hepps*, the Supreme Court ruled that defamation claimants must prove a statement is false when speech is of "public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). The Court stated that there is a constitutional requirement that "the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id*. at 776. While the *Hepps* opinion only referred to media defendants, Justice Brennan wrote in a concurring opinion that "public concern" should also be considered for non-media defendants. *Id.* at 779-80. Justice Brennan—the "primary architect" of free speech interpretation—found any other application of *Hepps* "irreconcilable with the fundamental First Amendment principle [and] that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." *Id.* (quoting *Bellotti*, 435 U.S. at 777); Geoffrey R. Stone, *Justice Brennan And The Freedom Of Speech: A First Amendment Odyssey*, 139 U. Pa. L. Rev. 1333, 1333 (1991).

The claimant's burden is well-established: The United States Supreme Court has long required defamation plaintiffs to prove a statement is false. *See Sullivan*, 376 U.S. at 271; *Id.* at 375-76; *Hepps*, 475 U.S. at 777. In *Sullivan*, the Court found that "authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . that puts the burden of proving truth

on the speaker." 376 U.S. at 271. This approach was codified in the 1965 Second Restatement of Torts, and the majority of American courts subsequently adopted this standard. William G. Hagans, *Who Does The First Amendment Protect?: Why The Plaintiff Should Bear The Burden Of Proof In Any Defamation Action*, 26 REV. LITIG. 613, 614 (2007); Restatement (Second) of Torts § 613 (Am. L. Inst. 1965); *See Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1140 (3rd Cir. 1977); *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978); *Hunt v. Liberty Lobby*, 720 F.2d 631, 642 (11th Cir. 1983); Montemayor *v. Ortiz*, 208 S.W.3d 627, 654 n.19 (Tex. App.—Corpus Christi 2006, pet. filed); *Savage v. Pac. Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 311-12 (1st Dist. 1993), cert. denied, 513 U.S. 820 (1994); *Voyles v. Sandia Mortg. Corp.*, 751 N.E.2d 1126, 1133 (Ill. 2001).

The claimant's burden is rooted in principles of due process and the importance of free speech. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *Rosanova*, 580 F.2d at 862. Where a defendant's "transcendent value of [free] speech" is maligned, the other party is required to produce sufficient proof that the statement was false. *See Speiser*, 357 U.S. at 526; *Sullivan*, 376 U.S. at 271. Further, the claimant's burden "preserves the balance between free debate on the one hand and compensation of individuals for harm inflicted by defamatory falsehood on the other." *Rosanova*, 580 F.2d at 862.

Because Ms. Ito's tweet regarded a matter of public concern, if this case were heard under U.S. law, the claimant would have to prove that her statement was false. In order to "preserve the balance of free debate" and protect Ms. Ito's "transcendent value of [free] speech" it is imperative that the Court recognize and enforce the claimant's burden to prove falsehood. *See id.*; *Speiser*, 357 U.S. at 526.

IV. UNDER THE FREE SPEECH CONSTITUTIONAL PRIVILEGE, THE BURDEN OF PROVING FAULT SHIFTS TO THE CLAIMANT, REQUIRING THE CLAIMANT TO PROVE THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT THE STATEMENT WAS FALSE.

Under the First Amendment, there can be no liability for defamation without a showing of fault. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347 (1974*)*; *Philadelphia Newspapers v. Hepps*, 475 U.S. at 776. Because of this requirement, establishing that a statement is false is not enough to establish liability for defamation. *Hepps*, 475 U.S. at 776 (finding that "the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"). The U.S. Supreme Court has recognized that some inevitable falsehoods must be protected in order to "protect speech that matters." *Gertz*, 418 U.S. at 340-41. To protect speech of public concern, the Court has even protected demonstrably false statements when the showing of fault was not sufficient. *Hepps*, 475 U.S. at 778. A showing of fault requires that the claimant have the burden of proof to show, at a minimum, a mindset of negligence, meaning that the defendant knew or should have known that the statement was false.

Negligence generally constitutes a failure to act with the level of care that a reasonable person would have exercised under the same circumstances. Restatement (Second) of Torts §§ 282-83 (Am. L. Inst. 1975). In the defamation context this has been interpreted to mean whether the defendant had reasonable grounds for believing that the communication was true. The Second Restatement of Torts has outlined additional factors such as the nature of the interests that the defendant was seeking to promote by making the statement and how necessary the statement was to protect this interest. Restatement (Second) of Torts § 580B cmt. h (Am. L. Inst. 1975).

Under U.S. law, merely proving that Ms. Ito's statements were false would not be enough to establish liability for defamation. The claimant would have the burden of proving, at a minimum, that Ms. Ito knew or should have known that the statement was false. Based on the extensive news coverage by reputable news organizations of the claimant's arrest and the fact that the news mentioned the claimant coerced women into acting in a pornographic film, even if the court finds that Ms. Ito's statements were false, it is likely that Ms. Ito did not know that the information was false and had no reason to believe it was false. The fact that there was enough evidence for the arrest further weighs in favor of the fact that Ms. Ito had no reason to believe that the statement was false. Additionally, the tweet that Ms. Ito published was a time-sensitive tweet and it would not be reasonable to expect her to wait until a judgment against the claimant became final and binding to comment on the timely issue. Even if there was a possibility that Ms. Ito should have known the statements were false, the burden would be on the claimant to prove this.

V. CONCLUSION: UNDER THE FREE SPEECH CONSTITUTIONAL PRIVILEGE, THE JUDGMENT AGAINST THE DEFENDANT IN THIS CASE SHOULD BE REVERSED.

If this case were being decided under United States law, the First Amendment to our Constitution would require reversal. If this honorable Court agrees that Article 21 of the Constitution of Japan should be read in uniformity with Amendment 1 of the Constitution of the United States, then we respectfully urge this Court to protect the interest in speech on matters of public concern by ruling that under Article 21 of the Constitution of Japan, the judgment against appellant Kazuko Ito be reversed, and the district court be instructed that appellant cannot be held liable for defamation unless the appellee has proven that her statement was false, and that she knew or should have known that her statement was false. This understanding of defamation law is critical globally to protect the

right of women and men to speak out against sexual harassment and violence, including allegations of coercion in pornography.

Respectfully submitted,[2]

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[2] We are grateful to Berkeley student Chiari Tsunoda for her assistance in the research and preparation of this brief.

[3] Under California law, supervised law students may practice before California and federal courts and agencies. See Rule 9.42. Certified law students, CA ST PRACTICE Rule 9.42. Ashleigh Atasoy and Phoebe Lavin are certified to practice under Professor Oppenheimer's supervision. We respectfully ask this court to permit Professor Oppenheimer and the two certified law students to appear as co-counsel in this court filing without appearing personally for the court proceedings.