

# The Burger Court Opinion Writing Database

## *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*

472 U.S. 749 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

October 21, 1983

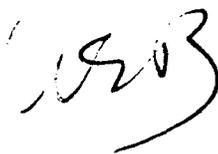
Re: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss  
Builders, Inc.

MEMORANDUM TO THE CONFERENCE:

The Court has denied cert in cases raising the precise issues that Byron now raises, on at least four previous occasions. Lower courts, however, are split on the issue, which appears to arise with more frequency than I had previously thought.

This leads me to give a reluctant "grant."

Regards,



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5/23/00

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

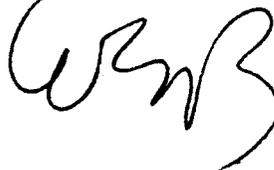
March 28, 1984

MEMORANDUM TO THE CONFERENCE:

83-18 - Dun & Bradstreet v. Greenmoss Builders

The above-mentioned case will be an agenda item  
on Friday's Conference.

Regards,



Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
THE CHIEF JUSTICE

March 31, 1984

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Green-Moss Builders, Inc.

Dear Lewis and Bill:

I write on the assumption neither of you will probably join Bill Brennan's position in this case. However, it is not feasible to assign a dissent until we see how far Bill goes. He will, I assume, want to push out some "new frontiers" on Sullivan. I'll discuss with you when we see Bill's opinion.

Regards,

WRO

Justice Powell  
Justice Rehnquist

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 19, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders

Dear Bill:

As of now, please show I would DIG.

Regards,



Justice Brennan

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

June 20, 1984

CHAMBERS OF  
THE CHIEF JUSTICE



Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Lewis:

If you think it will help "institutionally," I will go along with you. I would want to see what, if anything, Byron does.

Regards,

A handwritten signature in dark ink, appearing to read 'LWB', is written below the typed word 'Regards,'.

Justice Powell

Copies to: Justice Rehnquist  
Justice O'Connor

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 25, 1984

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 26 AIO:18

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss  
Builders, Inc.

Dear Byron:

I had voted to DIG but I will give you a  
"consolation vote" to join your vote to re-argue.

Regards,

WJB

Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

July 2, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Lewis:

I agree with the questions you propose.

Regards,

A handwritten signature in black ink, appearing to be 'L Powell', with a long, sweeping underline that extends to the right.

Justice Powell

Copies to the Conference

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 MAY 30 A9:56

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: MAY 29 1984

Recirculated: \_\_\_\_\_

*WJB*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[May —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

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SUPREME COURT U.S.  
JUSTICE MARSHALL

STYLISTIC CHANGES THROUGHOUT. '84 JUN -4 P2:49  
SEE PAGES: 2, 11, 15, 18, 19

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

JUN 4 1984

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

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### I

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RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 19 A11:19 STYLISTIC CHANGES THROUGHOUT  
SEE PAGES: 13, 18, 20-21

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: JUN 19 1984 \_\_\_\_\_

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

13, 18-20, 22

'84 JUN 22 P1:14

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: 6-22-84

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

### I

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Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: OCT 13 1983

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

DUN & BRADSTREET, INC. v.  
GREENMOSS BUILDERS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF VERMONT

No. 83-18. Decided October —, 1983

JUSTICE WHITE, dissenting.

This libel action raises the question whether the First Amendment actual malice standard applies in a defamation action brought by a private plaintiff against a nonmedia defendant. Because I think this is an important and unsettled issue that deserves our attention, I dissent from the denial of certiorari.

### I

Petitioner is a credit reporting agency, providing subscribers with financial information about corporations. On the basis of uncorroborated misinformation provided by a high school student who was paid \$200 a year to review Vermont bankruptcy petitions, petitioner reported that resp had filed a voluntary petition in bankruptcy. There is no dispute that the report was false. Respondent first learned of it from a bank from which it was seeking financing for its expanding business. The bank delayed acting upon respondent's request and later terminated its credit, though allegedly for reasons unrelated to the false report. Upon respondent's request, petitioner did print a correction, but refused to divulge the names of subscribers who had been misinformed of respondent's status.

Respondent then brought this defamation action in state court, obtaining an award of \$50,000 in compensatory and \$300,000 in punitive damages. The trial judge had second thoughts about his instructions, however, because they "permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and ab-

Supreme Court of the United States  
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JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE BYRON R. WHITE

84 JUN-5 11:13

June 5, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v.  
Greenmoss Builders, Inc.

---

Dear Bill,

I shall await Lewis's dissent.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States  
Washington, D. C. 20543

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 25, 1984

'84 JUN 25 P3:21

Re: 83-18 -

**Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.**

Dear Bill,

At this moment, I am up in the air about this case. As you might suspect, Lewis' opinion strikes a responsive chord in me; but because it appears to narrow Gertz v. Welch, or at least to withdraw somewhat from the rationale of that case, I am unprepared to take that step without a reargument. On the other hand, there is substance to his views, and I will not join your opinion with its reaffirmation of Gertz. If there is not a reargument, which I am prepared to move, I shall concur in the judgment with the following few words:

Justice White concurring in the judgment.

I am unprepared to join either Justice Brennan's or Justice Powell's opinion and believe that the case should be reargued. That view not having prevailed, I join the Court's judgment of reversal, which I think is more consistent with existing precedent than an affirmance would be.

Sincerely,



Justice Brennan

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Supreme Court of the United States

Washington, D. C. 20543

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JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 28, 1984

'84 JUN 28 AM 11:07

Re: 83-18 -

Dun & Bradstreet v. Greenmoss

---

Dear Lewis,

I agree with your proposed questions.

Sincerely yours,



Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 30, 1984

Re: No.83-18-Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference



CHAMBERS OF

JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States  
Washington, D. C. 20543  
RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

June 15, 1984

84 JUN 15 11:15

Re: No. 83-18, Dun & Bradstreet, Inc.  
v. Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 28, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

Since this case will be decided, my vote is to affirm.

This case is a "sport" in the law of libel. Dun & Bradstreet (D&B) is not fairly comparable to a media defendant. As Sandra states in her letter of this date (with which I agree), its business is narrowly specialized. New York Times was based on the essential role of the media in a democracy. This justified its First Amendment rationale. In each of our subsequent cases in which the New York Times standard has been applied, we have had a media defendant.

To be sure, D&B has some of the characteristics of the financial page of newspapers, but it is essentially different. Its business, unlike that of the press, is to sell sensitive credit information to a specialized group of buyers. D&B serves none of the purposes identified in New York Times and its progeny. In view of the nature of D&B's business and its capability to destroy the credit of other businesses (particularly small businesses), it would not be irrational to hold D&B to strict liability.

It also would be unfortunate, I think, to choose this case as a vehicle for constitutionalizing the entire law of libel. I do not think the case has been viewed in this light. If it had been, amici briefs probably would have been filed by many of the states. Gertz emphasized the "legitimate state interest in compensating for wrongful injury to reputation." 418 U.S., at 348. Moreover, the Vermont Supreme Court cites a number of state court decisions that read Gertz as not constitutionalizing the law of libel.

In sum, I would affirm. This can be done by treating D&B as belonging to a specialized category of disseminators of information. This could be viewed as a type of commercial speech.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

COMMIT NOTE 5/23/00  
NEXT PAGE IS STAPLED TO  
THIS PAGE

April 6, 1984

83-18 Dun & Bradstreet v. Green-Moss Builders

Dear Chief:

In your note of March 31 to Bill Rehnquist and me, you suggest that assignment of the dissent await circulation of Bill Brennan's opinion for the Court. I agree.

I note that your letter went only to Bill and me. I believe Sandra also voted with us to affirm.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 1, 1984

83-18 Dun & Bradstreet

Dear Bill:

In accordance with my Conference vote, I will try my hand on a dissent.

Sincerely,



Justice Brennan

Copies to the Conference

LFP/vde

84 90-1 11-55

06/15

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 15 P12:51

From: Justice Powell

Circulated: JUN 15 1984

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

### I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

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June 18, 1984

83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Byron,

My understanding of your concern about my opinion is that I would decide an issue not decided below or argued here, and therefore a reargument may be desirable.

The Vermont Supreme Court thought the question before it was whether "the qualified protections afforded the media" in Gertz should be "extended to actions involving nonmedia defendants." Petn App A7. The briefs addressed this question--as well as the commercial speech question. Bill's draft opinion for the Court also discusses both issues. The question of whether the entire law of defamation should be constitutionalized clearly is before us and needs to be decided.

As I say in footnote 12 of my draft, there will be hard cases. Your New York Times hypothetical is an example. If you are concerned about that case, I can make clearer that it would raise very different considerations. But this case is not one of the difficult ones. This is a case in which the constitutional interest clearly is tangential at best.

Nor do I think the lines between media and nonmedia, and between commercial speech and other speech, would be difficult to draw in most cases. These are not unfamiliar concepts, and there is no reason to think judges would be unable to apply them. It is entirely appropriate that we leave some part of this area of the law to case-by-case development.

If you have suggestions, I would welcome the opportunity to consider them.

Sincerely,

LFP

Justice White

June 20, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

Your note indicating that "for now" your vote is to DIG, came as a surprise. I was glad to see the emphasis on "for now"!

It may be helpful if I reviewed the "bidding" in this extremely important case. We considered the case at two Conferences, March 23 and 30. At the first one it was clear that there was some confusion as to the issue before the Court and its importance. You voted to DIG. I passed, WHR voted to affirm, John Stevens voted to DIG or reverse, and Sandra was tentative.

Sandra wrote you on March 28 that after "further reflection" her vote was to affirm rather than DIG. Also on March 28, I wrote you advising that I would affirm. You may be interested in the reasons I outlined in my letter.

You thought the case should be reconsidered, and was discussed again at the March 30 Conference. At that time, you stated that you "may vote to affirm, but were not at rest".

Following the March 30 Conference, you advised Bill Brennan to take the case for assignment, and Bill assigned it to himself. I put a memo in my file that the vote was 5 to 4, with you joining WHR, SOC and me.

On March 31 you wrote Bill Rehnquist and me the attached letter. You suggested that it was not appropriate at that time to assign the writing of a dissent "until we see how far Bill Brennan goes". I note at this point that Bill could not have gone any farther than he has in his opinion for the Court.

Because I was the author of Gertz, I thought it best for me to draft a possible dissenting opinion - to avoid being caught in the June rush.

In view of this rather clear record, I wrote a full dissenting opinion on the assumption that there were four of us who could not go with Bill Brennan. His opinion overrules two centuries of the common law and the present defamation laws of most of the states. As a vote to DIG at this time would have no significance, I hope that in due time - when you have an opportunity to take another look - you will "stay with us".

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist  
Justice O'Connor

8-10, 12

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Powell**

'84 JUN 21 AM 11:24

Circulated: \_\_\_\_\_

Recirculated: JUN 21 1984

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

### I

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NOT RECOVERED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

June 25, 1984

83-18 Dun & Bradstreet v. Greenmost Builders

Dear Chief, Bill and Sandra:

This refers to Byron's letter of this date in which he states - for the reasons indicated - that he will move that this case be reargued. If this motion should fail, he will concur in the judgment with a "few words" added.

I also will vote for a reargument. While the issues were presented, the argument may not have focused adequately on the crucial question whether New York Times and Gertz which involved media defendants, necessarily require the constitutionalizing of the entire law of defamation.

I view this as an issue of first importance. I would certainly prefer reargument to having him concur in the judgment with his accompanying statement.

Sincerely,

The Chief Justice  
Justice Rehnquist  
Justice O'Connor

lfp/ss

06/22

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHANGES ON  
pp. 1, 10, 12-13.

'84 JUN 25 A9:56

From: Justice Powell

Circulated: \_\_\_\_\_

JUN 25 1984

Recirculated: \_\_\_\_\_

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*  
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF VERMONT

[June —, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and  
JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

### I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

June 27, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Bill:

What would you think of two questions as follows:

1. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

2. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

It seems to me both of these questions are at issue. The reasoning of your opinion applies to all defamation actions against media and non-media defendants, and without regard to the type of speech. Thus, a question along the lines of No. 1 above is desirable.

My opinion, however, would leave open the question whether the constitutional rule applies with equal force regardless of the nature of speech. As our cases have recognized, for example, the constitutional interest is at its height where matters of public or general interest in a democracy are at issue. There may be a different balance where the speech relates solely to an economic matter (as in this case) or to an accusation that a lady is sleeping with the wrong gentleman.

Unless we advance questions that require counsel to focus on these possible differences, the briefing and reargument may not be much more helpful than what we have experienced.

Sincerely,

Justice Brennan

lfp/ss

M

Supreme Court of the United States  
Washington, D. C. 20543

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 27, 1984

'84 JUN 27 P3:30

83-18 Dun & Bradstreet v. Greenmoss

MEMORANDUM TO THE CONFERENCE:

Bill Brennan and I have considered appropriate questions to be asked for the reargument of this case and we suggest these two:

1. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

2. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

It seems to us both of these questions are at issue. The reasoning of Bill's opinion applies to all defamation actions against media and non-media defendants, and without regard to the type of speech. Thus, a question along the lines of No. 1 above seems desirable.

My opinion, however, would leave open the question whether the constitutional rule applies with equal force regardless of the nature of speech. As our cases have recognized, for example, the constitutional interest is at its height where matters of public or general interest in a democracy are at issue. There may be a different balance where the speech relates solely to an economic matter (as in this case) or to an accusation that a lady is sleeping with the wrong gentleman.

Unless we advance questions that require counsel to focus on these possible differences, the briefing and reargument may not be much more helpful than what we have experienced.

Absent dissent, the above questions will be submitted.

L.F.P.  
L.F.P., Jr.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

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JUSTICE MARSHALL

'84 JUN 20 P3:34

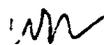
June 20, 1984

Re: No. 83-13 Dun & Bradstreet, Inc. v. Greenmoss Builders

Dear Lewis:

Please join me in your dissenting opinion.

Sincerely,



Justice Powell

cc: The Conference

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*M*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 26, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Chief:

After further reflection, I have decided to vote  
to reverse.

Respectfully,

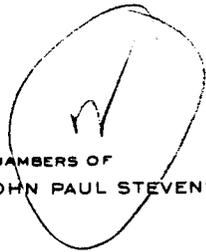
*J.P.S.*

The Chief Justice

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Supreme Court of the United States  
Washington, D. C. 20543

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JUSTICE MARSHALL

84 JUN -4 P2:49

June 4, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss  
Builders

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 28, 1984

No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Chief,

On further reflection about this case, I am not inclined to dismiss it as improvidently granted. The applicability of Gertz to non-media defendants is a question squarely posed in the case and one which we should answer. Although my position may be in the minority, I still feel we should probably try to resolve the question presented.

It does seem to me the actual malice standard should not apply to speech of the type involved here: a communication involving a purely commercial transfer of facts by a non-media defendant. The information was not broadly disseminated, and was not intended to be. It related to commercial credit and the marketplace of money, not the marketplace of ideas. This type of information transfer is routinely regulated under the federal securities laws, commercial credit reporting laws, and so on. Such information is marketed more as a commodity than as speech and deserves only the most modest First Amendment protection in my view. It is difficult to see why we should relieve Dun & Bradstreet of liability when its falsehood is merely "malicious" in the ordinary sense of the word, but not in the New York Times sense.

Accordingly, I think an affirmance is in order.

Sincerely,



The Chief Justice

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Washington, D. C. 20543

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JUSTICE SANDRA DAY O'CONNOR

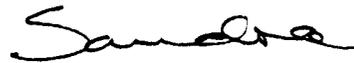
June 1, 1984

No. 83-18 Dun & Bradstreet v. Green-Moss Bldrs.

Dear Bill,

I will await further writing before joining anything in this case.

Sincerely,



Justice Brennan

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 5, 1984

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN-5 P3:41

No. 83-18 Dun & Bradstreet, Inc. v.  
Greenmoss Builders, Inc.

Dear Bill,

I will wait to see what Lewis has to say  
in this case.

Sincerely,

*Sandra*

Justice Brennan

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Supreme Court of the United States  
Washington, D. C. 20543

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JUSTICE SANDRA DAY O'CONNOR

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 19 A9:53

June 18, 1984

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Please join me in your dissenting opinion.

Sincerely,

*Sandra*

Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 20

Re: Don & Bradstreet

Dear Lewis —

Thank you for  
writing to the Chief  
to refresh recollections  
of the history of this  
important case.

Sincerely,

Sandra

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

84 JUN 28 A9:37

June 27, 1984

No. 83-18 Dun & Bradstreet v. Greenmoss

Dear Lewis,

I agree with your proposed formulation of  
the questions on reargument.

Sincerely,



Justice Powell

Copies to the Conference