No. _____

In The
Supreme Court of the United States

SHKELZËN BERISHA,

Petitioner,

v.

GUY LAWSON, ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., AND RECORDED BOOKS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

New York Times v. Sullivan, 376 U.S. 254 (1964) federalized a large swath of libel law by holding that the First Amendment mandates proof of actual malice in any defamation action brought by a public official. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court imposed that same requirement on public figure defamation plaintiffs. The correctness of extending the "actual malice" standard to public figure defamation plaintiffs has been repeatedly questioned by members of this Court, culminating in Justice Thomas' call two Terms ago for the Court to "reconsider the precedents that require courts to" apply it. *McKee v. Cosby, Jr.*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari); see also Kagan, A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)), 18 Law and Social Inquiry 197, 211 (1993) ("The use of the actual malice standard in this wide range of cases appears to have little connection with the story of *Sullivan*. Viewed from that vantage point, current libel law seems the result not of steady and sensible common law reasoning but of a striking disregard of the doctrine's underpinnings.").

The question presented is whether this Court should overrule the "actual malice" requirement it imposed on public figure defamation plaintiffs.

RELATED PROCEEDINGS

- *Shkelzën Berisha v. Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc., and Recorded Books, Inc.*, No. 17-22144-Civ-COOKE/LOUIS, United States District Court for the Southern District of Florida, Judgment entered December 21, 2018.
- *Shkelzën Berisha v. Guy Lawson, Alexander Podrizki, Simon & Schuster, Inc., and Recorded Books, Inc.*, No. 19-10315, United States Court of Appeals for the Eleventh Circuit, Judgment entered September 2, 2020.

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Petitioner Shkelzën Berisha respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1-37) is published at 973 F.3d 1304. The opinion of the United States District Court for the Southern District of Florida (App. 38-73) granting respondents' motion for summary judgment is published at 378 F. Supp.3d 1145.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2020. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

This petition presents an important constitutional question: should the First Amendment continue to shield from liability publishers of false defamatory statements merely because the subject of these statements is deemed a "public figure" and cannot show that they were made with actual malice. Constrained by this Court's holdings in *Sullivan, Curtis*, and their various iterations, the District Court and the Eleventh Circuit below absolved respondents from all liability even while assuming that their very public defamatory accusations that petitioner was part of the Albanian mafia and engaged in corrupt arms dealing were false. App. 57, n.7. Because the Court-manufactured "actual malice" requirement for public figure plaintiffs is untethered from the original understanding of the First Amendment and inimical to its values, this Court should overrule it.

Justice Thomas' concurrence in *McKee* charged that "*New York Times* and the Court's opinions extending it were policy-driven decisions masquerading as constitutional law." *McKee*, 139 S. Ct. at 676. It is far from the only such criticism. Before her appointment to the Court, then-Associate Professor Kagan similarly wrote about *Sullivan* and "the puzzling adoption of the actual malice standard." Kagan, A Libel Story:

Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)), 18 Law and Social Inquiry 197, 199 (1993) [hereinafter "Kagan, A Libel Story"]. More bluntly, she offered that, "[i]n extending *Sullivan*, the Court increasingly lost contact with the case's premises and principles." *Id.*, at 209. And, in his unmistakable voice, Justice Scalia exhorted that:

> "One of the evolutionary provisions that I abhor is *New York Times v. Sullivan*. . . . For the Supreme Court to say that the Constitution requires that, that's not what the people understood when they ratified the First Amendment. Nobody thought that. Libel, even libel of public figures, was permitted, was sanctioned by the First Amendment. Where did that come from? Who told—who told Earl Warren and the Supreme Court that what had been accepted libel law for a couple hundred years was no longer?"

Charlie Rose, *Antonin Scalia Interview* (Nov. 27, 2012), https://charlierose.com/videos/17653 (last visited Jan. 24, 2021), at 29:21.

A key thesis of *Sullivan*—that public official defamation plaintiffs were to be held to a heightened standard—was grounded on the First Amendment guarantee allowing the citizenry to petition the government: " 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.' " *Sullivan*, 376 U.S.

at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." *Id.*, at 273. *Curtis Publishing* transmuted that premise when it extended *Sullivan's* holding to defamed individuals who were not public officials. From there, the result almost was inevitable. Soon enough, the Court expanded *Sullivan's* "actual malice" standard not only to "public officials," and not even to true "public figures," but even to those deemed to be a "public figure for a limited range of issues" (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)), as well as to one who has "become a public figure through no purposeful action of his own." *Id.*, at 345.

Justice White's dissent in *Gertz* highlighted this disconnect:

> "The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put,

> the First Amendment did not confer a 'license to defame the citizen.' "

Gertz, 418 U.S. at 387 (White, J., dissenting) (quoting W. Douglas, The Right of the People 36 (1958)) (citations omitted).

Reexamination now of *Sullivan's* unbridled expansion far beyond its initial limited application only to public officials is particularly timely. Today's world of ubiquitous social media postings risks tagging anyone as a "public figure," thereby subjecting them to the nearly insurmountable "actual malice" standard and imposing an unjustified constitutional barrier to defamation actions at large. See Kagan, A Libel Story, at 210 ("A more informal definition [of public figure] might go something like: Everyone the reader has heard of before and a great many people he hasn't."). The Eleventh Circuit's decision below showcases that risk in full display concluding, as it did, that petitioner was a public figure because "even if Berisha never sought public attention, federal courts have long made clear that one may occasionally become a public figure even if one doesn't choose to be." App. 14 (citations and internal quotation marks omitted).

This case cleanly and squarely presents the question that Justice Thomas invited the Court to review and that other members of the Court have raised. The District Court entered summary judgment against petitioner on his defamation claims solely because, having been found to be a limited public figure, petitioner was required to but did not show that respondents'

false and defamatory statements about him were made with actual malice. App. 57; App. 65-73. The Eleventh Circuit affirmed the judgment based on that sole ground. App. 11-27.

This Court should grant the petition, overrule the First Amendment "actual malice" requirement imposed by this Court on public figure defamation plaintiffs, and restore the original meaning of the First Amendment as it relates to such claims.

Proceedings Before The District Court

1. Petitioner is a private citizen and resident of Albania, where he is a lawyer, businessman, and a father. App. 281, ¶ 22. He has neither run for nor held any public office. App. 252.

2. Petitioner's claim to fame is that he is the son of the former Prime Minister of the Republic of Albania. *Ibid*. Beyond that, he is in a relationship with Albania's former contestant in the Miss World beauty pageant, sometimes posts comments on his Facebook social media page and, as may be expected from informed citizens, has participated in the public debate on matters of concern to his country on media channels. App. 48.

3. This case concerns petitioner's defamation action against respondents brought in the United States District Court for the Southern District of Florida. App. 275-363. At issue is the 2015 book by respondent Guy Lawson entitled, *Arms and the Dudes: How*

Three Stoners From Miami Beach Became the Most Unlikely Gunrunners in History. The book was published by respondent Simon & Schuster, Inc. and, after Lawson sold the movie rights, its story was turned into the Hollywood feature film *War Dogs*, starring celebrity actors Jonah Hill and Miles Teller. App. 8.

4. Although the details of the real-life story and its characters are extensive, petitioner's action stems from the book's telling of how three Miami youngsters (respondents Alexander Podrizki, David Packouz, and named-defendant Efraim Diveroli)[1] became international arms dealers. App. 2. The book traces the protagonists' travels to Albania to survey an inventory of ammunition they were intent on reselling. Each of the three later would be indicted and plead guilty to federal offenses related to their allegedly corrupt arms trafficking. App. 42.

5. Petitioner's complaint challenges several defamatory statements made about him as part of the book's recounting of the protagonists' Albanian encounters—statements that accuse petitioner of being part of the Albanian mafia and involvement in corrupt arms dealing. The district court recounted the pertinent passage:

> "First, a scene in Lawson's book describes the meeting in Tirana attended by Diveroli, Packouz, Podrizki, Pinari, Delijorgji and 'a young

[1] Diveroli was a named defendant but was later dismissed following a settlement. App. 8, n.1. Respondent Recorded Books, Inc. produced the audio version of the book. App. 8.

man . . . sitting in the corner.' *Compl.*, ECF No. 1, at ¶ 87. The book states:

> 'Dressed in a baseball cap and a sweater, [the young man] had dark hair, a soft chin, and sharklike eyes. He wasn't introduced.
>
> This was Shkelzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkelzen was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister. . . . The son of the prime minister remained silent. . . . Diveroli and Podrizki departed. . . . 'Did we just get out of a meeting with the Albanian mafia?' Podrizki joked. 'Absolutely. Absofuckinglutely.'" *Id.*

App. 51.

6. The book also quoted a recorded conversation in which Diveroli said: "[The corruption] went up higher to the prime minister and his son. I can't fight this mafia. It got too big. The animals just got out of control." App. 52 (bracketed content in original).

7. Following the book's publication, respondent Lawson also sat for an interview on Albanian television in which he said: "[T]he ex-prime-minister's son met with the Dudes when they were in Albania to arrange the delivery and repackaging of these munitions at . . . twice the price that the Albanian government

was getting. . . . So what happened to all that money? Well, the implication is clear that the prime minister's son, . . . and other officials, were profiteers and the money was shipped off to a Cyprus holding company and then vanished." App. 52 (quoting App. 342-43, ¶ 108).

8. Petitioner asserted claims for defamation and defamation *per se*, alleging respondents' statements about him were false, defamatory, and had caused financial harm and injury to his reputation. App. 357-361, ¶¶ 143-169. The District Court had jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a)(2). App. 282, ¶ 23.

9. Following extensive discovery, respondents moved for summary judgment. App. 160. Their sole basis was that: "As a public figure, Plaintiff must come forward with clear and convincing evidence that each Defendant published the statements about him with actual malice (*i.e.*, that Defendants subjectively knew the statements were false or harbored serious doubts about the accuracy of the reporting.)." App. 163. Respondents argued petitioner failed to produce evidence supporting this required "actual malice" standard. *Ibid*.

10. Respondents conceded their motion was limited only to challenging petitioner's failure to meet the "actual malice" standard because "[s]olely for purpose of this Motion, Defendants will assume the Statements are false so as to avoid any questions of fact." App. 182, n.6.

11. The District Court assumed respondents' defamatory statements about petitioner were false but

still granted summary judgment. App. 57, n.7. It found that "Plaintiff is a limited public figure for purposes of the controversy at issue in this case. As a public figure, Plaintiff must demonstrate actual malice to prevail in his defamation claim." App. 65. The District Court held that petitioner's evidence failed to meet the requisite "actual malice" standard and entered judgment against him on this basis. App. 65-73.

12. The District Court found irrelevant petitioner's claim that he never sought the public attention visited upon him: "Where the issues of truth and voluntariness are so entangled, a plaintiff can be deemed a public figure without regard to whether . . . [he] initially thrust [him]self into the case." App. 62 (internal quotation marks omitted).

Proceedings Before The Eleventh Circuit And The Decision Below

1. Petitioner appealed. Respondents confirmed to the Eleventh Circuit that the only issues to be resolved were whether, as a public figure, petitioner was required but failed to show evidence of respondents' actual malice. App. 86, ¶¶ 1-2; App. 88 ("Berisha lacks any evidence of actual malice—let alone the clear and convincing evidence required—and summary dismissal should be affirmed."); App. 107-109 (same).

2. Again, respondents never contested the falsity of their statements but rested their argument solely on petitioner's failure to meet the actual malice standard they claimed he had to satisfy as a public figure: the

"Order should be affirmed because Defendants' 'good faith reliance on previously published reports in reputable sources'—all of which reported on Berisha's involvement in corrupt arms deals and mafia activity—'precludes a finding of actual malice as a matter of law.'" App. 106.

3. The Eleventh Circuit understood the appeal to raise only two questions on the merits: whether petitioner was a public figure who had to meet the "actual malice" standard and, if so, whether he had admissible evidence to support that showing. App. 11.

4. It answered the first inquiry in the affirmative after upholding the District Court's finding that petitioner was a limited public figure for purposes of the controversy at issue. App. 10-15. The Eleventh Circuit reasoned that petitioner met this label because he: had wide name recognition; had been the subject of public media reporting; had participated in public debate by engaging media channels; and, as the son of Albania's former Prime Minister, was close to those in power. App. 15. The Eleventh Circuit found especially significant that "Berisha forced himself into the *public debate* over his involvement" in the activities that the press had reported about him. App. 13 (italics in original).

5. The Eleventh Circuit paid short shrift to petitioner's argument that neither the media attention directed at him nor his name recognition had been sought by petitioner. In the court's view, this was all beside the point because, "even if Berisha never voluntarily sought public attention, federal courts have long

made clear that one may occasionally become a public figure even if one doesn't choose to be." App. 14 (internal quotation marks omitted). It concluded that "Berisha's is exactly the rare case in which courts recognize involuntary public-figure status." App. 15.

6. Having found petitioner a public figure, the Eleventh Circuit explained that "[b]ecause Berisha is a public figure, he cannot prevail in this suit unless he shows, by clear and convincing evidence, that the defendants acted with actual malice toward him." *Ibid*. (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989)).

7. After cataloguing the evidence and arguments presented by each side about the basis for respondents' statements, the Eleventh Circuit affirmed the District Court's judgment, finding petitioner did not meet his burden of proffering clear and convincing evidence of respondents' actual malice. App. 15-27.

8. The Eleventh Circuit underscored that its analysis of petitioner's status as an involuntary limited public figure and the requirement he show respondents' actual malice was governed solely by federal law under the First Amendment. App. 22, n.6.

REASONS FOR GRANTING THE WRIT

This Court's successive extensions of *Sullivan* foreordained the result below. But, in doing so, these defamation law precedents have become unmoored

from the original understanding of the First Amendment. Their holdings conflict with core values held by those who ratified the First Amendment and with protections the Amendment was enacted to safeguard. The Court should grant the petition, reexamine those decisions, and restore the original meaning of the First Amendment as it relates to defamation claims.

Stare decisis does not foreclose review. That doctrine is not only at its weakest when the Court interprets the Constitution because that precedent cannot be altered by normal legislative process, but this Court also has highlighted that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: 'This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one).'" *Janus v. American Federation of State, Cnty., and Municipal Employees*, 138 S. Ct. 2448, 2478 (2018) (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)) (internal quotation marks omitted). And any reliance interests here would inure only to those who, by definition, had published false defamatory statements, making resort to those interests a peculiarly weak argument against revisiting this Court's jurisprudence.

The decision below perpetuated a wrong result on a recurring and important constitutional question, and this case presents an ideal vehicle for this Court to resolve the question presented.

I. THIS COURT'S IMPOSITION OF THE "ACTUAL MALICE" STANDARD ON DEFAMATION PLAINTIFFS WHO ARE NOT PUBLIC OFFICIALS SHOULD BE OVERRULED.

A. Extending *Sullivan's* "Actual Malice" Standard Beyond Public Official Defamation Plaintiffs Is Inconsistent With The Original Understanding and Meaning of the First Amendment.

Sullivan cited no cases from the time of ratification of the First Amendment. Nor could it have. Before this Court's twentieth century decisions making the First Amendment applicable to the States through the incorporation doctrine, the First Amendment applied only against the federal government. By contrast, at the time of the Amendment's ratification, defamation was a creature of state law. *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

Documentary evidence from the late eighteenth and early nineteenth century confirms that the contemporaneous understanding of the First Amendment's guarantees did not shield the press from defamation claims. Benjamin Franklin, for example, wrote that:

> "If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with

> my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus'd myself."

10 B. Franklin, Writings 38 (Smyth ed. 1907).

So too, Thomas Jefferson endorsed a view of the First Amendment's guarantee of freedom of expression subject to the reservation that "[t]he people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others." F. Mott, Jefferson and the Press 14 (1943) (quoted in *Gertz*, 481 U.S. 384 (White, J., dissenting)). This understanding of the Amendment prevailed well through the twentieth century until this Court decided *Sullivan*. Justice White detailed how before this Court's incorporation decisions extending the First Amendment limitations to the States, this Court repeatedly entertained cases during the late nineteenth and early twentieth centuries in which federal law applied, expressing no hint that the Amendment posed an obstacle to recovery for defamation actions. See *Gertz*, 418 U.S. at 384 (White, J., dissenting) (collecting cases).

Well into the twentieth century before deciding *Sullivan*, this Court remarked that "punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the commonlaw rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our

Constitutions." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931). It therefore seemed unremarkable when the Court included libel as a category of speech unaffected by the First Amendment:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); see also *Beauharnais*, 343 U.S. at 255 ("In the first decades after the adoption of the Constitution . . . nowhere was there any suggestion that the crime of libel be abolished."); *Roth v. United States*, 354 U.S. 476, 483 (1957) ("This phrasing [of the First Amendment] did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech.").

None of these authorities, however, involved defamation of public officials. *Chaplinsky* and *Roth* were not defamation cases, and *Beauharnais*' criminal libel prosecution did not involve public officials. *Sullivan*

homed in on this distinction to justify its consideration of the limits that the First Amendment placed on defamation actions despite the authority from this Court recognizing generally that defamation was not protected by the Amendment. Writing for the Court, Justice Brennan explained that:

> "Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials."

Sullivan, 376 U.S. at 268 (footnote omitted).

Sullivan entailed an advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South appearing in the New York Times. *Id.*, at 256-57. The ad described efforts by "Southern violators of the Constitution," including police officers, to derail the civil rights struggle through acts of governmental abuse and violence. *Id.*, at 257-58. L. B. Sullivan, a Commissioner of the City of Montgomery, Alabama in charge of supervising the police, brought a libel suit against the New York Times based on the ad. *Id.*, at 256. Though he was neither named nor featured in the ad, Sullivan claimed statements about the Montgomery police and southern law violators had been read to refer to him. He maintained that incorrect assertions in the ad injured his reputation. *Id.*, at 256, 258.

This Court reversed the Alabama Supreme Court's affirmance of the jury's money damages award. *Id.*, at 292. In doing so, it did not examine the history of defamation cases during the First Amendment's ratification or as of the time of this Court's extension of its guarantees against action by the States. *Sullivan*, instead, pinned its holding on "the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment." *Id.*, at 273. That untested, since-repealed legislation, long assumed to violate the Constitution, "made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish * * * any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.'" *Id.*, at 273-74 (quoting Sedition Act of 1798, 1 Stat. 596).

Viewing the First Amendment as the bulwark against the evils visited by the seditious libel laws, the Court fashioned its holding: "the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or

with reckless disregard of whether it was false or not." *Id.*, at 279-80.

Whatever criticisms may be levied against *Sullivan's* reasoning or ultimate result, they are not at issue in this petition. That opinion justified its outcome on the "public official" status of the defamation plaintiff. *Id.*, at 279-83. Its whole underpinning was that allowing government officials to recover for defamation solely by showing false defamatory statements about them would stifle the constitutional guarantee permitting the citizenry to criticize or seek redress from the government and its officials. *Id.*, at 273-83. Petitioner never was a public official. App. 281, at ¶ 22; App. 252-253.

Sullivan's reasoning that its "actual malice" standard was undergirded by a judgment that the First Amendment guaranteed the right to critique the government and that this guarantee would be undermined by allowing defamation claims by public officials to proceed unabated arguably gains some traction from the treatment of government officials' defamation claims near the time of the First Amendment's ratification. To the extent any understanding or meaning of the Amendment was informed by the prevailing English law at the time, those authorities recognized that defamation claims based on communications made to government officials about official conduct were not actionable absent a showing of malice:

> "That petitions to the king, or to parliament, or to the secretary of war, for redress of any

> grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appears that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies."

Fairman v. Ives, 5 Barn & Aldridge 642 (1822) (Best, J.) (quoted in *White v. Nicholls*, 44 U.S. 266, 289 (1845)).

In *McDonald v. Smith*, 472 U.S. 479, 485 (1985), the Court held that the First Amendment "actual malice" standard formulated in *Sullivan* applied with the same vigor under the First Amendment's protection for the people's right to petition the government for a redress of grievances. In his concurring opinion, Justice Brennan rejected the appellant's argument for absolute immunity from defamation liability grounded on the notion that, whereas the defamatory ad in *Sullivan* was not presented to the government, the allegedly defamatory letter in *McDonald* was sent to then-President Reagan. *Id.*, at 486-87 (Brennan, J., concurring). Justice Brennan explained that the newspaper ad implicitly criticizing Sullivan as a public official was as much petitioning activity within the First Amendment as the communication made directly to the government in *McDonald*:

> "Thus the advertisement at issue in *New York Times*, every bit as much as the letter to President Reagan at issue here, 'communicated information, expressed opinion, recited grievances,

> [and] protested claimed abuses'—expression essential 'to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'"

Id., at 489, n.3 (Brennan, J., concurring) (quoting *Sullivan*, 376 U.S. at 266, other internal quotation marks omitted).

Likewise, courts in states whose constitutions contained protections identical to those of the First Amendment to the federal constitution also relied on their Petition Clauses to curtail defamation liability in actions brought by government officials. See Volokh, Tort Liability and the Original Meaning of the Freedom of Speech, Press and Petition, 96 Iowa L. Rev. 249, 251 (2010) ("In 1802 and 1806, the highest courts of Vermont and South Carolina reversed libel verdicts for the plaintiffs, holding that the state equivalents of the Petition Clause generally barred recovery for alleged libels in petitions to the legislature."). To be sure, there are arguments on the other side—not all states held to the same effect and federal decisions, like *White*, presented their limitations on defamation claims brought by public officials as matters of common law privileges rather than constraints imposed by the First Amendment. See *White*, 44 U.S. at 289 (describing limitation on defamation claims brought by public officials in the context of recognized common law privileges to defamation actions).

But the salient point is that the mainstay of *Sullivan's* stake to a First Amendment limitation on

defamation claims is the presence of a government official claimant. As Justice (then-Associate Professor) Kagan explained:

> "Public official libel suits were different: they were not (or not merely) attempts by individuals to redress damage to personal reputation, but rather were attempts by government to shut down criticism of official policy. To treat them simply as libel suits was to miss the point."

Kagan, A Libel Story, at 204.

The Court's repeated extension of *Sullivan's* "actual malice" standard broke whatever link that decision's rationale could trace back to the First Amendment. When the Court first expanded *Sullivan's* reach beyond public official defamation plaintiffs to defamation claimants like the college football coach suing in *Curtis Publishing*, it did away with any pretense that what it was vindicating was any curb on potentially abusive government power like the seditious libel prosecutions that had animated *Sullivan's* result:

> "In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special

> privilege protecting his utterances against accountability in libel."

Curtis Publishing, 388 U.S. at 154 (plurality opinion).

Chief Justice Warren's separate concurrence necessary for the result was even more candid in shunning any semblance of a connection between the logic underpinning *Sullivan* and the expansion of its result to non-public officials in *Curtis Publishing*: "To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Id.*, at 163 (Warren, C.J., concurring in result). But with that break, *Curtis Publishing* should not be seen (as it erroneously has been) merely as a benign extension in applying *Sullivan's* logic to a new factual scenario; instead, by abandoning all need for any concern about checking abusive government-wielded power, *Curtis Publishing* vitiated the very premise on which *Sullivan* rested its result.

The Court took a wrong turn when it so readily transposed *Sullivan's* treatment of "public official" defamation plaintiffs as raising a First Amendment concern onto the treatment to be accorded *any* defamation plaintiff deemed a "public figure" (whether a football coach—as in *Curtis Publishing*—or a demonstrator at a college campus as in the companion case, *Associated Press v. Walker*, 389 U.S. 28 (1967)). It has continued down that incorrect path by thereafter holding that even full "public figure" status is no longer a requirement; a mere "limited" or even "involuntary" public

figure (whatever that may entail) suffices to graft *Sullivan's* "actual malice" standard onto these defamation claimants. See *Gertz*, 418 U.S. at 345, 351.

When *Sullivan* announced the "actual malice" standard, it focused on that plaintiff's position as Montgomery's City Commissioner who could wield his control over the police force to stifle citizen protests against government power. *Sullivan*, 376 U.S. at 258-80. When the District Court below considered whether petitioner's defamation claim should be subject to that same standard, it noted petitioner "receives attention through his relationship with Armina Mevlani, a former Miss World contestant with approximately one million social media followers," (App. 48), and noted the existence of "Facebook posts." *Ibid*. It takes no prescient insight to question whether the pendulum's arc from *Sullivan* to the decision below has swung too far.

Justice Kagan posed the same inquiry:

> "The adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far. And that question can be answered only by returning to *Sullivan* itself and focusing on what the decision most fundamentally concerned."

Kagan, A Libel Story, at 205; see also *McKee*, 139 S. Ct. at 680 (Thomas, J., concurring in denial of certiorari) ("There are sound reasons to question whether either

the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.").

This petition presents the Court with an opportunity to take up the questions raised by Justices Kagan and Thomas. It should do so. The Court should grant the petition and overrule the unbridled expanse of *Sullivan's* "actual malice" standard to defamation claims not involving public official plaintiffs.

B. Transposing *Sullivan's* "Actual Malice" Standard From Public Official Defamation Plaintiffs Onto All Public Figures Runs Counter To Values The First Amendment Was Understood To Safeguard.

The Court's transposition of *Sullivan's* "actual malice" standard from public official defamation plaintiffs onto any public figure plaintiff runs counter to key values the First Amendment was understood to safeguard. The Court should grant the petition so it may conform its libel law jurisprudence to the values the First Amendment was enacted to uphold.

The Court's formulation of a "public figure" to whom *Sullivan's* heightened standard now applies ensnares within its grasp any private citizen who "voluntarily injects himself or is drawn into a particular public controversy." *Gertz*, 418 U.S. at 351. To obtain redress for wrongful injury to their reputation, these otherwise private citizens must pay the added cost of

proving the defendant's "actual malice" before obtaining relief. By contrast, the individual who avoids vigorous participation in public commentary or limits his engagement to trite matters of only private concern avoids that added burden. See Kagan, A Libel Story, at 210 ("In a tiny category of cases, in which a private figure is defamed on a 'matter of purely private concern,' the actual malice standard disappears, as may all other constitutional requirements") (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759-61 (1985)).

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion." *Cohen v. California*, 403 U.S. 15, 24 (1971). "Those First Amendment rights are important regardless whether the individual is, on the one hand, a 'lone pamphleteer[] or street corner orator[] in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate [his] political ideas through sophisticated' means." *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 203 (2014) (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)). But, by exacting this toll on those who deign to vocally comment or participate in matters of public concern, extension of the onerous "actual malice" standard to these otherwise private citizens discourages the very participation in the marketplace of ideas that the First Amendment was enacted to protect and foster.

Professor Richard Epstein has detailed this concern:

> "It does not seem far-fetched to assume that some honest people are vulnerable to serious losses if defamed. The greater their reputations, the greater their potential losses. If the remedies for actual defamation are removed, or even watered down, one response is for these people to stay out of the public arena, thus opening the field for other persons with lesser reputations and perhaps lesser character. The magnitude of this effect is very hard to measure, but there is no reason to assume that it is trivial. Distinguished men and women invest substantial sums in their reputation. They have the most to lose if the price of participating in public debate is the loss of all or part of that reputational capital."

Epstein, Was *New York Times v. Sullivan* Wrong?, 53 Univ. of Chicago L. Rev. 782, 799 (1986).

Respondents recognized and relied on these added costs to defeat petitioner's claims. Before the Eleventh Circuit, they touted that "[t]he constitutional standard imposed on Berisha is 'daunting.'" App. 108 (quoting *McFarland v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996)); see also *McKee*, 139 S. Ct. at 675 (Thomas, J., concurring in denial of certiorari) ("Like many plaintiffs subject to this 'almost impossible' standard, McKee was unable to make that showing.").

Sullivan accounted for these costs when it imposed them on public official defamation plaintiffs. It found them sufficiently offset by the reciprocal privilege that the federal and state governments extended to their officials "when they are sued for libel by a private citizen." *Sullivan*, 376 U.S. at 282. "[A]ll officials are protected unless actual malice can be proved. . . . Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." *Ibid.* (citations omitted).

But neither petitioner nor any other mere "public figure" enjoys this offsetting privilege upon which *Sullivan* relied. When the Court extended the "actual malice" standard beyond the government officer context, it stripped away the justification that *Sullivan* put forth to rationalize the added cost it would impose on these defamation plaintiffs. Outside the "public official" plaintiff context, the gulf between the tax exacted by the "actual malice" standard and the "public participation" value the First Amendment was enacted to protect could no longer be rationally bridged by resort to *Sullivan's* reasoning.

The Eleventh Circuit below deemed petitioner a public figure precisely because he exercised his right to engage in spirited commentary through international media channels. App. 13, 15. That label imposed on petitioner the added cost of having to prove respondents' defamatory publications about him were made with actual malice—a burden he would not have had to bear had he contented himself with remaining

a recluse outside the very marketplace of ideas in which the First Amendment encourages hearty participation. The Court should grant the petition to rectify the distortion of First Amendment values brought about by its precedents extending *Sullivan's* "actual malice" standard outside the public official plaintiff context.

Equally troubling is that the "actual malice" standard shortchanges the value placed on one's reputation—a value robustly defended by the populace at the time of the First Amendment's enactment. "The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy." Kagan, A Libel Story, at 205. *Sullivan* reconciled that shortfall by reasoning that any impediment to redressing injury to a public officer's reputation was more than offset by the importance of protecting public criticism of government and its actors. *Sullivan*, 376 U.S. at 281. "The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare." *Ibid.* (quoting *Coleman v. McLennan*, 78 Kan. 711, 724 (1908)).

When it imported *Sullivan's* "actual malice" standard outside the realm of "public official" defamation plaintiffs in *Curtis Publishing*, the Court hewed to this same equation even though criticism of government

conduct was no longer at play. *Curtis Publishing*, 388 U.S. at 154-55 (plurality opinion). Chief Justice Warren's opinion concurring in, and necessary to, the result contains no separate mention or analysis of the reputational interest to be protected by libel actions prevailing during the First Amendment's ratification. See *Curtis Publishing*, 388 U.S. at 162-65 (Warren, C.J., concurring in result) (justifying adoption of *Sullivan's* standard to public figure defamation plaintiffs without mention of interest in protection of reputation).

This omission conflicts with the prevailing understanding during the First Amendment's ratification. "The common law of defamation defined the balance between free speech and reputation decisively in favor of reputation." Weaver and Parlett, Defamation, Free Speech, and Democratic Governance, 50 N.Y.L. Sch. L. Rev. 57 (2005-2006) (citing N. Rosenberg, Protecting The Best Men: An Interpretive History Of The Law Of Libel 17 (1986)). *Curtis Publishing's* intact extrapolation of *Sullivan's* standard from public official defamation plaintiffs to cases involving non-government plaintiffs undervalued the weight that those who ratified the First Amendment accorded to protection of one's reputation. It is hard to accept that a society in which public slights to one's honor and good name were routinely settled by duels would have understood that by adopting that Amendment it was agreeing to significantly curtail the legal redress then available for reputational injury. See generally LaCroix, To Gain The World And Lose His Own Soul: Nineteenth Century

American Dueling As Public And Private Code, 33 Hofstra L. Rev. 501, 502-03 (2004) ("the duelist demonstrated to himself and to his community that he was a man of honor, a man whose reputation and integrity were so substantial that to affront him was knowingly to set in motion an inexorable chain of delicate negotiations, an exchange of carefully worded letters and perhaps even of pistol shots.").

Respondents' false accusations charging petitioner with being part of the Albanian mafia and involvement in corrupt arms dealing are precisely the type of libel that would have been actionable under the common law with no constraints imposed by the First Amendment at the time of the Amendment's enactment. *Sullivan* changed that to accommodate a competing concern over governmental abuse of power akin to seditious libel laws. But when this Court detoured away from public official defamation plaintiffs able to wield that power and treated non-government defamation plaintiffs just the same, it undercut the values the First Amendment was understood to support.

This Court should grant certiorari to "carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should" this Court. *McKee*, 139 S. Ct. at 676 (Thomas, J., concurring in denial of certiorari).

II. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is an ideal vehicle to decide the question presented. Respondents moved for summary judgment solely on the basis that, under the First Amendment, petitioner was required but failed to produce evidence of respondents' actual malice. App. 178. When they did so, respondents clarified that they were raising no other bases to support their motion and were not disputing the falsity of their statements about petitioner. App. 182, n.6 ("Solely for purposes of this Motion, Defendants will assume the Statements are false so as to avoid any questions of fact."). The District Court decided the motion on that same premise (App. 57), assuming the defamatory statements to be false, and ruling only whether petitioner had proffered admissible evidence to meet the actual malice standard required of public figures under the First Amendment. App. 57, n.7.

So too, in defending their judgment before the Eleventh Circuit, respondents again clarified that the sole ground for their motion was petitioner's failure to meet the "actual malice" standard they claimed he had to satisfy as a "public figure." App. 86, ¶¶ 1-2; App. 88 ("Berisha lacks any evidence of actual malice—let alone the clear and convincing evidence required—and summary dismissal should be affirmed."); App. 107-109 (same). The Eleventh Circuit understood the appeal to raise only two questions on the merits: whether petitioner had to meet the "actual malice" standard and, if so, whether he had proffered admissible evidence to

support that showing. App. 11. It answered the first inquiry in the affirmative after concluding that petitioner was a "public figure" and hence subject to the "actual malice" standard. App. 11-15. It then affirmed the District Court's judgment that petitioner had failed to submit evidence to support the requisite "actual malice" standard. App. 15-27.

The Eleventh Circuit also underscored that the "actual malice" requirement it was addressing was a creature of federal constitutional law, not state law: "Florida law governs the merits of Berisha's defamation action, though standards for public figures and 'actual malice' derive from the First Amendment and thus, as discussed above, are matters of federal law." App. 22, n.6. For his part, petitioner disputed that he had to meet the "actual malice" standard. App. 254-262.

The judgment below turned on the single "actual malice" inquiry, which the District Court and Eleventh Circuit resolved against petitioner as a matter of federal constitutional law. This case therefore cleanly and squarely presents the question presented. The Court should grant the petition to resolve this important constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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