No. 20-1063

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

REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

Reading more like a policy paper on the wisdom of legislative action than a legal brief on the meaning of the First Amendment, the brief in opposition does not cite a single decision from the time of the First Amendment's ratification or its extension to the States. Respondents thereby tacitly admit that the "actual malice" standard this Court first imposed on public official defamation plaintiffs in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and later extended to public figures in *Curtis Publishing v. Butts*, 380 U.S. 130 (1967) has no historical mooring. That concession alone merits this Court's review.

But there is more. *Curtis Publishing's* extension of the "actual malice" standard from public officials to public figures is a product of a single Justice's opinion. Chief Justice Warren's concurring opinion, necessary for the judgment in *Curtis Publishing*, was the only one to advocate extending *Sullivan's* "actual malice" standard to public figure plaintiffs. *See Curtis Publishing*, 380 U.S. at 162-164 (Warren, C.J., concurring in result). Ever since, however, that opinion of a lone Justice has been perpetuated as the binding First Amendment law governing public figure defamation plaintiffs. That this Court's public figure defamation cases rest on such a thin reed also counsels for review now.[1]

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[1] Respondents' revisionist narrative claims that "[i]n *Curtis*, the Court carefully balanced First Amendment principles with the reputational interests of libel plaintiffs and held that the

Respondents do not question the importance of the question presented. They extol its gravity in pleading that the current "actual malice" standard be kept intact. Their arguments against granting certiorari are unpersuasive.

The claim that *Sullivan's* and *Curtis Publishing's* minting of a constitutional standard for defamation claims has been free from criticism flouts the historical record. Equally flawed is respondents' suggestion that, with over 50 years having passed since *Sullivan*, *stare decisis* now forever insulates the decision and its subsequent extension from review. Last, the attack on this case as a poor vehicle misstates the record and misapprehends the question presented.

A. RESPONDENTS DO NOT DISPUTE THE IMPORTANCE OF THE QUESTION PRESENTED BUT DISCOUNT THE MOUNTING CALLS TO RECONSIDER THIS COURT'S ADOPTION OR EXTENSION OF THE "ACTUAL MALICE" STANDARD.

The brief in opposition, while conceding the importance of the question presented, paints an

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actual malice requirement announced in *Sullivan* must apply to public figures." BIO 10. The Court did no such thing—only Chief Justice Warren's concurring opinion urged the extension of *Sullivan's* standard to public figures.

inaccurate picture of uninterrupted acceptance of the "actual malice" standard.[2]

1. Respondents point to there being "no circuit split or other reviewable issue emanating from lower courts." BIO 12. This facile incantation ignores the obvious reality that no split among the lower courts could exist given the binding effect of *Sullivan* and *Curtis Publishing*. Only this Court may review those precedents and, time and again, several of this Court's Justices have called for such review.

2. Respondents try to refute the petition's assertion that Justice White openly questioned the correctness of *Sullivan's* "actual malice" standard or its extension in *Curtis Publishing* and later cases. They assert that "even in dissent Justice White unequivocally stated that he 'continue[s] to subscribe to the *New York Times* decision and those decisions extending its protection to defamatory falsehoods about public persons.'" BIO 20 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 398-99 (1974)) (White, J., dissenting). Respondents, however, selectively ignore Justice White's unambiguous recantation a decade later:

> "I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other

[2] Respondents try to restrict the question presented to publications involving matters of "political corruption." BIO i. But *Curtis Publishing* requires public figure defamation plaintiffs to meet the "actual malice" standard regardless of whether the false defamatory publication relates to political corruption or purely personal matters.

> situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation."

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985) (White, J., dissenting).

3. The statement of Chief Justice Burger, joined by Justice Rehnquist, a year later was to the same effect:

> "In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 764, 2948 (1985) (Burger, C.J., concurring in judgment), I wrote to express my agreement with Justice White that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) should be reexamined. Petitioners in this petition ask this Court for such a reconsideration. I dissent from the Court's refusal to grant certiorari and give plenary attention to this important issue."

Coughlin v. Westinghouse Broadcasting and Cable, Inc., 476 U.S. 1187 (1986) (Burger, C.J., dissenting from denial of certiorari).

4. Respondents take a myopic view of the petition to justify evading Justice Thomas' separate statement just two Terms ago in *McKee v. Cosby, Jr.*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) openly calling for this Court to reconsider and ultimately overrule its adoption in *Sullivan* and later extension in *Curtis Publishing* of the "actual malice" standard. They posit incorrectly that "Petitioner pointedly distances himself from this view." BIO 20. Respondents' claim is that while Justice Thomas called for overruling *Sullivan*, the petition lobbies for maintaining *Sullivan's* reach to public officials and overruling only its extension to public figures. *Id.*, at 20-21.

a. Petitioner did no such thing. He took no position on whether *Sullivan* should be left intact for the simple reason that petitioner is not a public official—the sole type of plaintiff to whom *Sullivan* was directed. That is why the petition made clear that "[w]hatever criticisms may be levied against *Sullivan's* reasoning or ultimate result, they are not at issue in this petition." Pet. 19. Far from advocating for or against *Sullivan*, the petition pointed out that, as to public officials "[t]o be sure, there are arguments on the other side." *Id.*, at 21.

b. If Justice Thomas' call to reconsider and overrule *Sullivan's* imposition of the "actual malice" standard were adopted, the result would be entirely

consistent with the outcome petitioner seeks for his case. Because *Curtis Publishing* merely extended *Sullivan's* "actual malice" standard from public officials to public figures, it necessarily follows that if the standard itself were overruled as constitutionally unjustified, its extension to public figures could not stand. While Justice Thomas' concurrence in *McKee* may go even further than what petitioner may have standing to advocate, it is folly to contend, as respondents do, that "Justice Thomas' concurrence thus contradicts the arguments in the Petition far more than it supports them." BIO 21.[3]

5. Respondents fare no better in dealing with the serious question Justice Kagan raised (then as an Associate Professor) about the correctness of the Court's extension of *Sullivan*. Justice Kagan's law review article effectively presaged the question presented by the petition:

> "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."

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[3] The petition also identified Justice Scalia's scathing historical criticism of *Sullivan's* "actual malice" standard (Pet. 3)—a criticism respondents do not even identify.

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, 205 (1993) [hereinafter "Kagan, A Libel Story"].

a. The very arguments Justice Kagan identified as ones that "force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far," *ibid.*, are the arguments petitioner posed in presenting that same question. While Justice Kagan could only put forward that inquiry as part of a scholarly article, petitioner brings forth the question as a matter in controversy in his case ripe for the Court's review.

b. Respondents concede that Justice Kagan raised the same question petitioner presents. Their attempt to reconcile that with their opposition to the question being taken up is unconvincing. They merely argue that while Justice Kagan's law review article identified the importance and open nature of the question, the article also allowed for the possibility that "*Sullivan may* well have relevance beyond its boundaries, because libel of government officials *may* share sufficiently important traits with other instances of libel to justify the extension of the actual malice rule to the latter." Kagan, A Libel Story, at 212 (quoted in BIO 21, emphasis added). That equivocal statement, however, is merely an argument for the merits of how to resolve the question. It does not counsel against considering the question in the first instance.

6. While intoning that there is an "absence of pressure from courts below," BIO 12, to have the Court revisit *Sullivan's* "actual malice" standard or its extension to public figure defamation cases, respondents are forced to confront that merely weeks after the petition's filing, Judge Silberman of the D.C. Circuit did just that. His partial dissent in a case brought by a public figure defamation plaintiff openly called for the overruling of *Sullivan's* "actual malice" standard. See *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

a. After Judge Silberman's call for the "actual malice" standard to be overruled, the Wall Street Journal's Editorial Board—a likely beneficiary of leaving *Sullivan* and *Curtis Publishing* alone without further judicial review—recognized the propriety of considering the question:

> On the other hand, it's hard to deny that many in the media have taken a bad turn in recent decades—often under the protection of the actual-malice standard. The public agrees, judging by opinion surveys on collapsing trust in the press.
>
> Think of the way the media trashed the Covington, Ky., high school student for his silence and half smile as he was assailed by an adult after a pro-life rally in 2019. The Washington Post and CNN settled the young man's lawsuits, but would the outlets have shown more caution without the protection of *Times v. Sullivan*?

> Or recall Sarah Palin's suit against the New York Times for claiming in 2017 she had incited the deranged man who shot Rep. Gabby Giffords in 2011. The editorial was clearly false, the editing process was remarkably slipshod, and the Times ran a correction. A judge tossed the suit under the actual-malice standard until the Second Circuit Court of Appeals reinstated it, and it is now headed for trial.

Wall Street Journal Opinion, Reconsidering *Times v. Sullivan* (Mar. 22, 2021).[4]

b. Respondents' sole rejoinder is that taking up Judge Silberman's call would "diminish protections that make it possible to critique prominent individuals." BIO 24. But that policy-driven retort is wrong on at least two fronts. First, it presents respondents' argument on the merits of overruling *Sullivan's* standard without addressing whether the question should be considered. Second, it shuns constitutional interpretation of what the First Amendment was understood to require and substitutes instead policy considerations that legislatures would be free to weigh if the Court sided with petitioner. See *McKee v. Cosby, Jr.*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in denial of certiorari) ("The States are perfectly capable of striking

[4] The characterization of the petition as presenting "a novel proposal" with no historical support, BIO 10, ignores the positions taken by well-respected legal scholars. See Epstein, Was *New York Times v. Sullivan* Wrong?, 53 U. Chicago L. Rev. 782, 788 (1986) ("In consequence the decision has not stood the test of time well when applied to the more mundane cases of defamation arising with public figures and officials.").

an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.").

7. Either before or after their appointment, at least six members of the Court—Chief Justice Burger and Justices White, Rehnquist, Thomas, Scalia, and Kagan—have either questioned or openly called for the reexamination of *Sullivan's* "actual malice" standard or its extension in later cases. The Court should take up those calls once and for all by granting the petition.

B. RESPONDENTS' RELIANCE ON *STARE DECISIS* IS UNAVAILING.

Respondents do not quarrel with the well-accepted proposition that resort to *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Given that and the repeated questioning of *Sullivan's* initial adoption of the "actual malice" standard or its extension in *Curtis Publishing*, respondents' reliance on *stare decisis* to evade review does not carry the day.

1. The brief in opposition repeatedly touts the more than 50-year span since *Sullivan* as somehow barring review. See BIO 1, 11, 16. It does not. *Stare decisis* does not insulate from correction decisions unsupportable by the Constitution. The 58-year interval between *Sullivan's* discovery of the "actual malice" standard and the filing of the petition coincidentally

corresponds to the time it took the Court to decide *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) and overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. The repeated questioning of the correctness of *Sullivan's* holding or its reach, as documented in Section A *supra*, makes resort to *stare decisis* a particularly weak argument. Those same critiques fatally undermine respondents' self-serving suggestion that the "correctness of the actual malice standard for public figure libel plaintiffs—and the soundness of the reasoning behind it—is beyond dispute." BIO 26.

3. The only reliance interest respondents advance in their plea for *stare decisis* protection is *Sullivan's* imposition of a "national standard for libel cases," BIO 31, without which, respondents contend the press would be subject to a "a patchwork of state laws setting different minimum requirements for libel cases." *Ibid*.

a. But that is precisely the point that illustrates the flaw in constitutionalizing an "actual malice" standard for public figure defamation plaintiffs. For over a century before *Sullivan* decreed otherwise, defamation was a creature exclusively of state law and exempted from the category of speech protected by the First Amendment. See Pet. 15-16.

b. Respondents' advocacy for a uniform standard of defamation liability (which does not exist even after *Sullivan*, given the States' disparate definition of the remaining elements of the tort) is a proper plea to be made to the State legislatures or, barring that, to Congress. It says nothing about whether *Curtis*

Publishing's interpretation of the First Amendment was correct as an initial matter.[5]

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

Respondents falsely assail the case as an improper vehicle to decide the question presented. Their attack is wrong on the facts and, regardless, advances petitioner's cause.

1. Respondents argue that "[i]f the First Amendment actual malice standard is overruled, New York law controls." BIO 34. They concede, however, that "New York courts have not had occasion to declare whether the state constitution requires public figures to prove actual malice separate and apart from the current First Amendment requirements." *Ibid*.

2. Further, respondents' argument is flawed for two other independent reasons. First, both the Eleventh Circuit and the District Court found petitioner's defamation claims were governed by Florida law, not New York law, and that the "actual malice" requirement was a product of the federal Constitution. See Pet. 22, 6 ("Florida law governs the merits of Berisha's

[5] Respondents decry the result they claim could ensue if petitioner prevails: for the same false publication, a public official plaintiff would have to show actual malice but a public figure would not. See BIO 17-18. But the double-standard respondents now object to is one of *Sullivan's* and *Curtis Publishing's* own making. Those decisions first crafted a two-tiered system of proof, with public officials and figures held to a defamation standard altogether different than private persons.

defamation action, though standards of public figures and 'actual malice' derive from the First Amendment and thus, as discussed above, are matters of federal law."); Pet. 53-54 (discussing substantive elements of petitioner's defamation action under Florida law); Pet. 57, n.8 (respondents filed a SLAPP motion under Section 768.925 of the Florida Statutes).

3. Regardless, even if New York law applied, that State's possible choice to grant publishers the protection of an "actual malice" requirement in public figure defamation actions is entirely consistent with petitioner's position. If *Curtis Publishing's* requirement of an actual malice showing as a matter of First Amendment law were overruled, states like New York would be free to extend greater, lesser, or equal protection to defamation defendants, as guided by their legislatures or courts. See *Jean v. Dugan*, 20 F.3d 255, 262 (7th Cir. 1994) ("it is perfectly appropriate for states to give speakers greater protection than the United States Constitution requires.").

4. The Eleventh Circuit and the District Court entered summary judgment against petitioner only because, bound by *Curtis Publishing*, they found petitioner had to show respondents' actual malice as a matter of First Amendment law. The petition questions the correctness of that interpretation of the First Amendment. Because that is the only basis on which the judgment rests, this case presents an ideal vehicle to decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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