No. 21-802

In The Supreme Court of the United States

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a D. JAMES KENNEDY MINISTRIES,

Petitioner,

v.

SOUTHERN POVERTY LAW CENTER,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

National Religious Broadcasters (NRB) is a nonpartisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's members reach millions of listeners, viewers, and readers on every continent through radio, television, the Internet, and other media.

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication, to ensure they may broadcast their messages of hope through fully realized First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

Where a case presents issues of great importance to NRB's membership, NRB will step forward as an amicus curiae to share its experience and insights. The First Amendment issues raised by the petitioner here make this matter such a case.

Indeed, NRB's membership features a breadth that gives NRB a heightened objectivity with respect to the First Amendment's effects on defamation law. NRB members include individuals and organizations that broadcast their messages through media

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amicus curiae, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus curiae's intent to file this brief and consented to its filing.

platforms owned or operated by others, making them susceptible to grave injury when defamation spurs publishing platforms to silence them. NRB members also include organizations that operate media and other publishing platforms themselves, including radio and television facilities as well as Internet-based media platforms. Thus, NRB serves the united interests of public figures and publishers, making it acutely attuned to whether the law strikes the right balance between allowing speakers to engage in debate and meaningfully permitting those injured by defamatory speech to seek redress.

In this brief, NRB draws on its perspectives and experience to explain that this Court's defamation case law no longer strikes the correct balance, if it ever did, and the situation continues to worsen. Private actors who qualify as public figures are increasingly experiencing real injuries that cannot be remedied because of an actual malice standard that unduly shields those who disseminate false statements, diminishes the quality of debate, and encourages ignorance in a society where nearly anyone can now be a publisher. NRB encourages the Court to grant the petition and revisit this important area of constitutional law.

SUMMARY OF ARGUMENT

Not every wrongly decided precedent will or should be overruled. This Court has explained that it "will not overturn a past decision unless there are strong grounds for doing so." *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018).

Insofar as *New York Times Co. v. Sullivan*'s actual malice standard extends beyond public officials to all public figures, the grounds for this Court to recede from its precedent have grown increasingly strong. The ill effects of extending *Sullivan*'s actual malice standard to all public figure defamation plaintiffs more than satisfy the Court's standards for determining when to revisit precedent.

From its inception, the constitutional support for *Sullivan*'s actual malice standard has been the subject of serious question, even in the context of public officials performing the duties of their office. That support grew even shakier as the actual malice standard came to govern defamation claims by plaintiffs who qualify as public figures but are not public officials.

Furthermore, and perhaps most important, "developments since [*Sullivan*] was handed down have shed new light," *Janus*, 138 S. Ct. at 2460, on whether the actual malice standard balances the encouragement of democratic debate with the need for persons injured by defamation to seek redress. Five extraordinary changes in the landscape show that *Sullivan*'s actual malice standard no longer strikes the right balance, if it ever did, at least in the context of public figures who are not public officials.

First, at the time of *Sullivan*, relatively few publishers existed. They held an esteemed position in society and generally operated within a high cost business environment that encouraged accuracy. Today's technology, by comparison, allows anyone to be a publisher, with little to no investment and much less at stake should a factfinder determine particular speech to be false. The result is an explosion in the number of publishers combined with reduced incentives to ensure accuracy and avoid falsehoods.

Second, the value of information has changed. The Internet enables communications that cover every subject imaginable, and standing out in the marketplace often involves providing information not yet available from other sources. As the need to gather and share more information has grown, and to do so ahead of others who might offer similar services, so too has the potential to provide information that is false.

In addition, the size of the audience any given publisher can reach has greatly expanded. In the 1960s, most speech was local or at most regional, with few publishers able to reach national or international audiences. Modern technology, however, now allows nearly anyone to speak nationally just as easily as speaking locally. As a result, defamatory speech now often has a far broader audience and a far greater potential to cause harm than was true in the day of *Sullivan*.

At the same time, changes in the way we live have also dramatically increased the number of persons who qualify as public figures. It seems nearly anyone can become a public figure by utilizing communication tools made possible by the Internet. The result is that

many more persons are public figures today, and such persons cover a broader spectrum of the public, than when the Court fashioned the actual malice standard.

Finally, the number of falsehoods has exploded. This change is partly the consequence of the societal changes discussed above, but it is also the direct and lamentable result of this Court's jurisprudence requiring proof of actual malice for a public figure to succeed on what would otherwise be a valid state law defamation claim. The actual malice standard actually discourages well informed speech, including the research that one would expect responsible publishers to insist upon before obviously derogatory speech is disseminated. The actual malice standard permits publishers to take refuge in ignorance.

These changes have significantly raised the costs and consequences of the actual malice standard. To the extent that standard was ever workable, it is no longer so today.

NRB thus encourages the Court to grant the petition for writ of certiorari in this case and revisit whether *Sullivan* and its progeny still serve their stated purpose of promoting democratic debate. When the Court undertakes that inquiry, the Court should answer the question in the negative and eliminate the actual malice requirement, at least in the context of defamation plaintiffs who are not public officials.

ARGUMENT

THE TIME HAS COME TO REVISIT WHETHER THE FIRST AMENDMENT REQUIRES PUBLIC FIGURES TO PROVE ACTUAL MALICE IN DEFAMATION ACTIONS, PARTICULARLY PUBLIC FIGURES WHO ARE NOT PUBLIC OFFICIALS.

The Eleventh Circuit's decision in *Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021), affirmed the dismissal of a Christian ministry's state law defamation claim because the ministry, a public figure, could not allege that the defendant acted with actual malice. In doing so, the circuit court dutifully followed this Court's precedents. The time has come to revisit that jurisprudence.

Courts and scholars have debated whether the actual malice standard ever served a constitutionally appropriate role in promoting democratic debate. This Court need not go so far. The Court's authorities on *stare decisis* together with a series of extraordinary social changes over the last six decades fully support revisiting whether actual malice deserves a continuing constitutional role in defamation actions, particularly in the context of public figures who are not public officials.

A. The Actual Malice Requirement Originated Nearly Sixty Years Ago in the Context of Claims Brought by Public Officials.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court considered the First Amendment's

effect on a public official's defamation action against a nationally renowned newspaper. The Court held that the First Amendment "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.

Sullivan's analysis could have been limited to public officials, but the Court quickly took a different course. "Three years later," in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), "the Court extended its actual malice standard from 'public officials' in government to 'public figures' outside government." *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from denial of certiorari). "Later still," in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "the Court cast the net even wider, applying its new standard to those who have achieved 'pervasive fame or notoriety' and those 'limited' public figures who 'voluntarily inject' themselves or are 'drawn into a particular public controversy.' " *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from denial of certiorari) (quoting *Gertz*, 418 U.S. at 351).

B. Now Is the Time to Revisit the Actual Malice Standard.

"*Stare decisis* is not an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 560 (2003). "If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

Furthermore, the weight of *stare decisis* is weakest when the Court interprets the Constitution because the Court's interpretation can be altered only by constitutional amendment or by the Court overruling its prior decisions. *Janus*, 138 S. Ct. at 2478.

This Court considers several factors when deciding whether to overrule a precedent, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79. Examining the most pertinent of these considerations confirms that the time has come for the Court to revisit whether or when a public figure must prove actual malice to recover in a defamation action.

1. The Actual Malice Requirement Faces Continued Criticism.

Judge Laurence Silberman emphatically summarized the weakness of *Sullivan*'s reasoning when he recently described the case as "a policy-driven decision masquerading as constitutional law." *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting). He explained that *Sullivan*'s holding "has *no relation* to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication." *Id.* (emphasis in original). "As with the rest of the opinion," Judge Silberman stated, "the actual malice requirement was simply cut from whole cloth." *Id.*

Numerous justices have questioned *Sullivan*'s reasoning. Justice White joined the majority in *Sullivan*, but he later came to criticize its actual

malice holding, having seen the decision's consequences. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring) ("I have . . . 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.").

Justice Thomas and Justice Gorsuch have likewise provided powerful critiques of *Sullivan*. In *Berisha*, Justice Thomas observed that *Sullivan* "provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment's ratification." *Berisha*, 141 S. Ct. at 242 (Thomas, J., dissenting from denial of certiorari). Justice Gorsuch further observed that, "[a]t the founding . . . those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused." *Id.* at 2426 (Gorsuch, J., dissenting from denial of certiorari).

Prior to her service on the Court, Justice Kagan penned a lengthy review of a book on *Sullivan*. In the review, she acknowledged the costs of the actual malice standard and explored whether the Court should have cabined it to cases with public official plaintiffs: "[T]he use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputation, of course, but also, at least potentially, to the nature and quality of public discourse." Elena Kagan, *A Libel Story:* Sullivan *Then and Now* (reviewing Anthony Lewis, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991)), 18 L. & Social Inquiry 197, 204–05 (1993). She

added: "The adverse consequences of the actual malice rule . . . force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far." *Id.* at 204–05.

2. Developments Since *Sullivan* Have Eroded Whatever Policy Support Actual Malice Once Had.

The story of *Sullivan*'s obsolescence is a story of technological change, and the Internet takes the lead role. Since the Court decided *Sullivan* in 1964, the "media landscape has shifted in ways few could have foreseen." *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting from denial of certiorari).

"Large numbers of newspapers and periodicals have failed. Network news has lost most of its viewers. With their fall has come the rise of 24-hour cable news and online media platforms that monetize anything that garners clicks." *Id.* (citations and internal quotation marks omitted).

Social media, with its billions of worldwide users, has become a dominant means of communication. Through social media, information—true or false—has the potential to reach tens or even hundreds of millions of people, and it can do so in hours.

The technological changes produced by the Internet's rise have led to dramatic changes in our social structure. Whether viewed separately or together, these changes upend the balance *Sullivan* intended to strike when it fashioned the actual malice requirement.

First, relatively few publishers existed when the Court decided *Sullivan*. The costs of creating a publishing business resulted in a small field of publishers whom the public generally held in high esteem. Publishers guarded their reputations for accuracy both to promote their businesses and to protect their investments. Today's technology, by comparison, allows nearly anyone to become a publisher. Often little to no investment is necessary, which has the concomitant effect of placing little at risk should a publisher be sued for defamation and suffer an adverse judgment. The result has been an explosion in the number of publishers and yet a reduction in the incentives that publishers have to ensure accuracy and avoid falsehoods.

Second, the value of information has changed. The Internet enables communications that cover every subject imaginable. Standing out in the marketplace often involves sharing information not available—or not yet available—from other sources. As the need to gather and share more information has grown, and to do so ahead of others who might offer similar services, so too has the potential to share false information.

Third, the size of the audience any given publisher can reach is now greatly expanded. In the 1960s, most speech was local or, at most, regional. In rather few instances was speech national or international, and in those cases publishers had incentives to protect their own reputations for accuracy. Today, social media and Internet sites allow nearly anyone to speak nationally or even internationally just as easily as speaking locally. As a result, defamatory speech may now reach a far broader audience, and carries a far greater potential to cause harm, than was true in the day of *Sullivan*.

Fourth, modern advances have dramatically increased the number of persons, and in turn the number of types of persons, who qualify as public figures. Indeed, it seems nearly anyone can become a public figure by utilizing various communication tools made possible by the Internet. The result is that public figures today represent a greater cross-section of the public at large, and are more likely to have less means to defend themselves against false attacks, than was true when the Court fashioned the actual malice standard and applied it broadly to all public figures.

Fifth, the number of falsehoods involving public figures has exploded. This change is partly the consequence of the societal changes discussed above. There are countless more publishers today, with larger platforms and more public figures to discuss, and thus it is perhaps inevitable that more falsehoods would follow. However, it cannot be overemphasized that the growth in falsehoods involving public figures is also the direct and lamentable result of this Court's jurisprudence and its adoption of the actual malice standard.

The actual malice standard does not encourage careful and thorough research before making statements regarding a public figure. To the contrary, the actual malice standard discourages well informed speech, including the research that one would expect responsible publishers to insist upon before obviously derogatory speech is disseminated.

Under the actual malice standard, publishers can take refuge in ignorance. Inevitably, some do. The publisher that quickly disseminates inaccurate information, without taking the time to investigate

and confirm its accuracy, has a defense of constitutional magnitude—a lack of actual malice. The publisher that cares less, but publishes first, literally wins.

Consistent with the aforementioned changes in technology and society, many high profile persons who qualify as public figures—including many of NRB's members—do not own their own publishing platform. Rather, to spread their messages they rely on access to platforms owned or operated by others. Such dependency creates serious vulnerability, as false speech casually disseminated about them could lead a platform owner or operator to de-platform the public figure, taking away not only the person's public presence and perhaps livelihood but also the communication method the person might use to counter the false speech.

Consider the example of a news outlet that obtains video of a public figure observing a controversial rally. The news outlet quickly and without further investigation publishes the video with a statement that the public figure was apparently present to support the cause. Third parties opposed to that cause then mount a public relations campaign to persuade those who provide the public figure with financial support or communications platforms to cease doing so, and those efforts succeed. The public figure suffers catastrophic losses of income, reputation, and the means of communicating a contrary message, when, as it turns out, the public figure merely observed the rally to consider a different point of view, not as an expression of support. The actual malice standard encourages such news outlets not to investigate before publishing and may well leave the public figure with no redress.

Notably, the recklessness component of the actual malice standard generally offers public figures no assistance. Under *Sullivan*, actual malice requires a defamation plaintiff to prove that the defendant made a false statement about the plaintiff "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80. The Court has explained that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Rather, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *Id.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. *Id.*

This definition of recklessness raises the concern, acknowledged by the Court in *St. Amant*, that the actual malice standard "puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." *Id.* Nearly sixty years of experiences with the actual malice standard have shown that the Court was right to be concerned. "In short, under an 'actual malice; regime, ignorance is bliss." David A. Logan, *Rescuing Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio St. L.J. 759, 778 (2020) (citation omitted). Because the actual malice standard makes ignorance a safe harbor for defamation defendants, it "created an 'open season' for targeting the reputations of individuals who choose to participate in public life." *Id.* at 777–78 (citations omitted); *see also Berisha*, 141 S. Ct. at 2428

(Gorsuch, J., dissenting from the denial of certiorari) ("It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy.") (emphasis in original).

Today, based on these changes in how society operates, the actual malice standard makes public figures more vulnerable to defamatory injury than at any prior point in time. Consequently, and ironically, many public figures are less likely to engage in public discourse or debate than they otherwise would be, to avoid being falsely labeled. Given that promoting informed democratic debate was the stated justification for *Sullivan* and its progeny, the Court should now revisit how well that goal is served by an actual malice standard that "encourage[s] falsehoods in quantities no one could have envisioned almost 60 years ago[.]" *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

3. As a Standard That Discourages Well Informed Speech, and Encourages Publishers to Seek Refuge in Ignorance, Actual Malice Has Become Unworkable.

The "fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *see also Janus*, 138 S. Ct. at 2478–79 (a factor to be considered in deciding whether to overrule a precedent is "the workability of the rule it established"). The actual malice standard has become unworkable, particularly in the context of public figures who are not public officials.

The aim of *Sullivan* and its progeny was to "balance the State's interest in compensating private

individuals for injury to their reputation against the First Amendment interest in protecting this type of expression." *Dun & Bradstreet*, 472 U.S. at 757. *Sullivan* and its progeny have not succeeded in that aim, however, because no real balance has been struck: the actual malice standard bars relief in nearly all cases. *See id.* at 768 (White, J., concurring) (the actual malice standard is "exceedingly difficult to satisfy"); *see also Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari) ("[O]ver time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability."); W. Wat Hopkins, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 8 (1989) (the actual malice standard is "a near-impossible burden of proof").

As one commentator has stated, "[T]he threat that defendants today face from libel litigation is virtually nil." Logan, 81 Ohio St. L.J. at 810. Yet a legal standard meant to balance the interests in protecting free speech and preventing reputational injury that, in practice, "amounts to an absolute immunity from damages actions for false statements," is a legal standard that fails on its own terms. *See id.* at 763 (the actual malice standard has "eviscerate[ed] . . . the deterrent power of defamation law").

C. The Court's Recent Decision in *South Dakota v. Wayfair* Offers Striking Parallels Regarding the Internet's Potential Effects on Precedent.

The Court's recent decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), offers striking parallels to this case. There, the Court was asked to overrule *National Bellas Hess, Inc. v. Department of*

Revenue of Ill., 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), which held that a State cannot require retailers without a physical presence in the State to collect taxes on the sale of goods to its residents. The Court accepted that invitation, explaining that while "*Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful." *Wayfair*, 138 S. Ct. at 2097.

Just as *Wayfair* found that the "Internet's prevalence and power have changed the dynamics of the national economy," *id.,* it is undeniable that the Internet has fundamentally altered the media landscape with respect to publications and social interaction. Just as the Court in *Quill* "could not have envisioned a world in which the world's largest retailer would be a remote seller," *id.*, the Court could not have envisioned the effect that billions of social media users would have on the world when it decided *Sullivan*.

Furthermore, just as the rise of e-commerce dramatically increased the costs of *Quill* by robbing the States of billions per year in sales tax revenues, today's media landscape has dramatically increased the costs of *Sullivan* and its progeny compared to their costs when the Court decided those cases. Finally, just as a business "is in no position to found a constitutional right on the practical opportunities for tax avoidance," *id.* at 2098, a publisher has no constitutional right to the protection of the actual malice standard when that standard has come to function as an incentive to take refuge in ignorance rather than to engage in a rigorous investigative process.

CONCLUSION

For the foregoing reasons, now is the time to revisit the actual malice standard. NRB respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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