No. 22-1125

In The Supreme Court of the United States

DON BLANKENSHIP,
Petitioner,

v.

NBCUNIVERSAL, LLC, ET AL.,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents argue that this case is a wrong vehicle to overrule *New York Times Co. v. Sullivan,* 403 U.S. 713 (1964). This is only true if you are the Respondents. What case could offer more proof of the importance of overruling *Sullivan* than one involving a request by the top two officials in the United States government for help from the press to defeat a leading United States Senate candidate?[1] There was cogent proof that those in charge of the government got help from the press. What defamation case could be more pertinent to Americans' present day concerns that democracy is under attack and elections are unfair?

The people know that the press does not tell them the truth. What can be done to incentivize the press to be trustworthy? Holding the press accountable for defamation is essential to restoring accurate and reliable news reporting and commentary. As important as it is to have a free press, it is equally important that press freedom is not misused to destroy reputations, provoke dissension, and undermine election fairness.

Respondents defend *Sullivan* as a "firmly established" precedent (Br.Opp. 2) but offer no analysis to justify the actual malice rule other than parroting the often repeated but not corroborated myth that *Sullivan* provides "breathing space" for "free debate." Br.Opp. 3. The essence of freedom of the press is holding power to account. Petitioner had no

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[1] Due to the word limits imposed by Rule 33(g)(iii), Petitioner confines his argument herein to Fox News.

power of office. Allowing the press to defame election candidates engaged in free debate with government officials prevents robust discourse. It also leads to altered election outcomes, public distrust, civil unrest, and potentially worse.

Respondents likewise vindicate *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), as a "time-tested" precedent (Br.Opp. 3) yet make no effort to validate *Anderson's* "conflicting signals to trial courts and reviewing courts." *Id.* at 265 (Brennan, J., dissenting). The reasonable jury standard empowers judges to usurp jury functions. The right to a jury trial was crucial to the Founders for the same reason that is clear in this case. A jury would reach a different conclusion than the judges.

This watershed case warrants a landmark overruling. It involves concerted action by the politico-media complex to sabotage an election with weaponized defamation.[2] On May 6, 2018, President

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[2] The term "weaponized defamation" as used herein means to attack and destroy a person's reputation with false statements of fact. Defamatory falsehoods can now be published in more ways at more times in more places with more speed than anyone could possibly have imagined a few years back, much less decades ago. In the absence of 24-hour cable news networks and modern communication technologies, weaponized defamation did not exist in the 1960s. Leading scholars have recognized weaponized defamation as a critical defect of the constitutional protection of false speech and questioned whether *Sullivan's* approach for defamation still works. *See* Erwin Chemerinsky, *Keynote Address: Fake News, Weaponized Defamation, and the First Amendment*, 47 Sw. L. Rev. 291, 292 (2018). Past and present justices of the Court have recognized how the nation's media

Donald Trump and Senate Majority Leader Mitch McConnell appealed to Fox News Chairman Rupert Murdoch "for help to beat" Petitioner in the West Virginia Republican primary. App. 240. Murdoch directed his highest executives to "save the day" by "dump[ing] on [Petitioner] hard." *Id.* Thereafter, five Fox News commentators smeared Petitioner as a "felon" or "convicted felon." App. 10-11. Tellingly, no Fox News reporter had ever called Petitioner a "felon" or "convicted felon" before Murdoch's email. Murdoch admitted that having Petitioner lose was "what they were campaigning for, at least what President Trump said." App. 244.

The most powerful forces in American government and the media conspired to rig a United States Senate election. Watergate looks tame by comparison. Petitioner was an alternative voice who criticized the Republican Party leadership. The politico-media complex falsely labeled Petitioner as a "felon" and "convicted felon" to derail his candidacy and stifle his speech. App. 9-11. *Sullivan* has been exploited as a shield to avoid liability.

Petitioner produced evidence that Fox News anchor Neil Cavuto was twice informed that Petitioner was a misdemeanant before falsely branding Petitioner as a "convicted felon."[3] JA3814;

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landscape has dramatically shifted since the *Sullivan* decision in 1964. Pet.Br. 19-22.

[3] Respondents falsely accuse Petitioner of misquoting Cavuto. Br.Opp. 25. During Cavuto's deposition, a video clip of Cavuto's defamatory statement was played. The following text was transcribed by the court reporter: "Morning, Republicans. You

JA3860-3866; JA3868. Cavuto's self-serving denials do not refute his prior knowledge of the truth. Plus, any uncertainty about Petitioner's misdemeanor conviction was previously dispelled by Petitioner during the debate telecast by Fox News:

> I faced 30 years in prison for a fake charge and I beat all three felonies . . . It's incredible. They sent me to prison for a misdemeanor. . . . It was clear from the beginning to the end that it was a fake prosecution.

JA3803-JA3804. The Court should spurn Respondents' efforts to camouflage and minimize these damning facts.

This case is an excellent vehicle to address the questions presented. Petitioner's *amicus* may have said it best: "By any standard, this case presented an exceptionally strong circumstantial showing of actual malice, and if these facts were not sufficient to avoid summary judgment, this Court's test in *New York Times v. Sullivan* is hopelessly flawed." Ditto for *Anderson*.

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know what? We're gonna lose West Virginia if Don Blankenship is allowed to win the Primary and he does win the Primary outright. Blankenship, of course, is arguing that he – he's the best qualified for this. Of course, he's a convicted felon." JA3868.

REASONS FOR GRANTING THE PETITION

The Petition demonstrated how our democracy is being destabilized with political disinformation facilitated by the actual malice standard. *Anderson's* convoluted summary judgment framework has exacerbated the crisis. The facts of this case present valid reasons to reconsider *Sullivan* and *Anderson*. The petition for writ of certiorari should be granted.

I. *SULLIVAN* AND *ANDERSON* ARE RIPE FOR REVIEW.

A. Precedents are not sacrosanct.

Observance of precedent is not "an inexorable command." *Kimble v. Marvel Entertainment, LLC,* 576 U.S. 446, 455 (2015). "[*S*]*tare decisis* is not absolute, and indeed cannot be absolute." *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2307 (2022) (Kavanaugh, J., concurring). The policy of *stare decisis* is most tenuous when the Constitution is interpreted. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). As Justice William O. Douglas wrote:

> A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.

William O. Douglas, *Stare Decisis*, 49 Colum. L.R. 735, 736 (1949).

B. *Sullivan* lacks historical support.

The tort of defamation was transplanted to the American Colonies with the English common law. Samantha Barbas, *Actual Malice*: *Civil Rights and Freedom of the Press in New York Times v. Sullivan* 15 (2023). Libel was judged under the rule of strict liability. *Id.* Thus, the actual malice requirement is not "rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotations omitted). "In fact, the opposite rule historically prevailed: [T]he common law deemed libels against public figures to be . . . more serious and injurious than ordinary libels." *Berisha,* 141 S. Ct. at 2425 (citations and internal quotations omitted).

"Founding Era rights discourse featured a symbiotic relationship between natural rights and legal rules." Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 253 (2017). Natural law imposed a duty not to interfere with the natural rights of others. *Id.* at 271. Under social contract theory, "no conflict arose between the preservation of natural rights and the exercise of government powers to promote the public good." *Id.* at 274-275. Defamation laws were not deemed as restrictions on the liberty of the press.

C. *Sullivan* should be overruled under the *Dobbs* test.

The nature of the Court's error: *Sullivan* was "egregiously wrong" when decided. "The Equal Protection Clause represented a foundation[al] principle–the absolute equality of all citizens of the United States politically and civilly before their own

laws." *Students for Fair Admissions, Inc.*, *v. President & Fellows of Harvard Coll.,* 143 S. Ct. 2141, 2159 (2023) (citations and internal quotations omitted). The folly of *Sullivan's* false dichotomy is that defamed public figures are denied equal protection of law under the guise of freedom of the press. *Anderson* further short-circuits the democratic process by erecting a wall to a jury trial. The Seventh and Fourteenth Amendments are sacrificed on a First Amendment alter.

The quality of the reasoning: *Sullivan* has no grounding in constitutional text, history, or precedent. The decision distorted and disregarded precedents affirming that defamatory statements were among the "certain well defined and narrowly limited classes of speech the prevention and punishment of which ha[d] never been thought to raise any Constitutional problem." *Beauharnais v. Illinois,* 343 U.S. 250, 255-256 (1952). Equating civil liability to a criminal prosecution under the Sedition Act (1798) was spurious reasoning. Notably, the Act did not criminalize the defamation of election candidates.

The Court's objective was to safeguard the Civil Rights Movement. Righteous motives do not legitimize judicial improvisation. Replacing the long-established rule of strict liability with the Court's own brainchild was legislating from the bench. Moreover, it was a violation of the separation of powers doctrine.

Anderson's reasoning is paradoxical. The clear and convincing standard "by no means authorizes trial on affidavits." *Anderson*, 477 U.S. at 255. Still, the summary judgment process in public figure

defamation cases has been reduced to "a full-blown paper trial on the merits." *Id.* at 266-267 (Brennan, J., dissenting). *Anderson* instructs that "the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. Yet judges are directed to draw "all justifiable inferences" in the nonmovant's favor. *Id. Anderson* "is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions." *Id.* at 265 (Brennan, J., dissenting). Nonetheless, there is copious text "which could surely be understood as an invitation – if not an instruction – to trial courts to assess and weigh evidence much as a juror would." *Id.* at 266 (Brennan, J., dissenting).

Workability: *Sullivan* and *Anderson* impose rules that "can[not] be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272 (citations omitted). The actual malice test requires proof of scienter. However, defamatory speakers rarely have the integrity to risk their employment, economic livelihood, and/or professional reputation by admitting culpability. Additionally, it is not possible to determine "whether the evidence is of sufficient caliber and quantity . . . in light of the quantum" without weighing the evidence. *Anderson*, 477 U.S. at 266 (internal quotations omitted).

Effect on other areas of law: The Constitution is "the supreme law of the land." *Martin v. Hunter's Lessee*, 14 U.S. 304, 341 (1816). "No state shall . . . deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV. Petitioner is a person. Jurisdiction is not an issue. There is no constitutional basis to deprive Petitioner

of equal reputational protection under the law.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U. S. Const. amend. VII. A federal defamation action "involves rights and remedies of the sort traditionally enforced in an action at law, rather than in action in equity or admiralty." *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974). The value in controversy exceeded twenty dollars. Even so, *Anderson's* calculus for summary judgment was an unyielding gate to a jury trial.

Respondents' reliance on *Counterman v. Colorado,* 143 S. Ct. 2106 (2023), is misplaced. In *Counterman*, the Court held that the First Amendment requires proof that the defendant in a "true threats" criminal case has a "subjective understanding of the threatening nature of his statements." *Id.* at 2111. True threats of violence are not remotely akin to the defamation of a public figure by the politico-media complex. *Sullivan* was an erroneous analog for *Counterman's* newly fashioned "Goldilocks judgment." *Id.* at 2140 (Barrett, J., dissenting). In the final analysis, the Court uncritically "extend[ed] its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence." *Id.* at 2133 (Thomas, J., dissenting). In all events however, the *Sullivan* analysis in *Counterman* can be readily carved out of public figure defamation law while keeping *Counterman* intact.

Reliance interests: "Traditional reliance interests arise where advance planning of great

precision is most obviously a necessity." *Dobbs,* 142 S. Ct. at 2276 (citations and internal quotations omitted). The term "news" is defined by Oxford Languages as "newly received or noteworthy information, especially about recent or important events." Other than investigative journalism, the press does not typically engage in "advance planning of great precision." Thus, reliance interests are not a factor.

II. THIS CASE IS A WORTHY VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

A. This case embodies the unintended consequences of *Sullivan* and *Anderson*.

The fact that the politico-media complex employed weaponized defamation to subvert a senatorial election is reason enough to grant certiorari. The press shirked its responsibility to keep the electorate accurately informed. Propaganda replaced the news. The degeneration of public discourse was a setback for democracy.

B. The actual malice requirement would not apply in this case as a matter of West Virginia constitutional law if *Sullivan* is overruled.

Respondents take a creative license with the law when arguing that the actual malice standard would still apply in West Virginia if *Sullivan* were overruled. The West Virginia Legislature is authorized to "provide for the punishment of libel, and

defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation." W. Va. Const. Art. III, § 7. Moreover, "[i]n prosecutions and civil suits for libel, the truth may be given in evidence; and if it appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant." W. Va. Const. Art. III, § 8. Truth is the only defense referenced in the West Virginia Constitution for a defamatory publication.

Prior to *Sullivan*, malice was presumed if a publication falsely imputed a crime:

> The authorities fully sustain the position, that a publication in a newspaper made either of a public officer or of a candidate seeking office from the votes of the people, which imputes to him a crime . . . is not a privileged publication, either absolute or conditional; but such a publication is per se actionable, the law imputing malice to the author or publisher.

Sweeney v. Baker, 13 W. Va. 158, 185 (1878). Repetition of a defamatory charge and refusal to retract were also admissible to show malice. *England v. Daily Gazette Co.,* 104 S.E.2d 306, 315 (1958). Notably, both seminal cases in West Virginia defamation law, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674 (1975), and *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (1992), do not cite any West Virginia precedent relevant to defamation. West

Virginia Secretary of State Mac Warner recently stated that overruling *Sullivan* in this case "could reaffirm the critical role that legislatures hold in crafting how elections are run" and "positively impact the integrity of our elections."[4]

C. The references to Petitioner as "felon" and "convicted felon" were materially false.

As to material falsity, the district court ruled:

> All the defendants' statements identifying the plaintiff as a "felon" are materially false. The term "felon" is an objective label with a clear legal meaning – having been convicted of a crime with a term of imprisonment of more than one year. A person either is or is not a felon; there is no in between room for "substantial truth." The United States Code clearly outlines the difference between a felony and a misdemeanor even when the criminal statute does not clarify the category of the crime. The different consequences associated with being a felon, including that "felons can suffer numerous restrictions on their constitutional rights," further

[4] https://myemail.constantcontact.com/Op-Ed--U-S--Supreme-Court-Can-Help-Restore-Confidence-in-American-Elections.html?soid=1133101880478&aid=3grsQH28C2A.

> underscore that the two categories are distinct.

Blankenship v. Napolitano, 451 F. Supp. 3d 596, 617 (S.D.W Va. 2020). "[S]ociety at large view a 'felon' far differently that a person who has committed an offense resulting in a misdemeanor conviction." *Myers v. Telegraph,* 773 N.E.2d 192, 198 (2002). In sum, "the likelihood of damage to one's reputation by the false attribution of felonious conduct approaches a near certainty." *Id.*

Petitioner in no way compares his circumstances to the atrocities and prejudices suffered by Martin Luther King, Jr. However, King, like Petitioner, was unjustly indicted and tried for a felony but acquitted by a jury. Leonard S. Rubinowitz, *Martin Luther King Jr.'s Perjury Trial: A Potential Turning Point and a Footnote in History*, 5 Ind. J.L. & Soc. Equality 237, 252-258 (2017). Suppose that the press falsely and repeatedly published that King was a "felon" and "convicted felon." Would that be the substantial truth? Of course not.

Words have power to shape thoughts, opinions, attitudes, and judgments. The terms "felon," "convicted felon," and "went to jail for manslaughter" are stigmatizing, if not dehumanizing. Petitioner was acquitted of all felonies. He never went to jail for manslaughter. Hence, Petitioner is not a "felon," "convicted felon," or someone who "went to jail for manslaughter." That is the substantial truth. The rest is obfuscation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: September 1, 2023

Respectfully submitted,

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