No._____

In the Supreme Court of the United States

ALAN GRAYSON,

Petitioner,

v.

NO LABELS, INC. ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jason Johnson
Counsel of Record
BYRD CAMPBELL, P.A.
180 Park Avenue North, Suite 2A
Winter Park, FL 32789
(407) 284-3642
jjohnson@byrdcampbell.com

March 14, 2023 *Counsel for Petitioner*

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QUESTIONS PRESENTED

1. Should the "actual malice" standard for state-law defamation claims by "public figures" imposed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) be revisited by this Court—as a number of Justices have stated is necessary—especially as applied to non-media defendants?

2. Is it a misapplication of the *Times v. Sullivan* "actual malice" standard to deem the use of "footnotes" (citing supposed external sources) in an otherwise defamatory statement as negating all other evidence of actual malice, such as outright fabrication?

3. Regarding civil procedure, should this Court resolve the conflict among the Circuits by reversing the lower court's ruling that a futile amendment of a complaint is required, and the failure to make such a futile amendment of a dismissed claim waives such dismissed claim and bars appellate review of its dismissal?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Alan Grayson

Respondents and Defendants-Appellees below

- No Labels, Inc.
- Progress Tomorrow, Inc.
- United Together, Inc.
- Nancy Jacobson
- Mark Penn
- "John Doe(s)"

CORPORATE DISCLOSURE STATEMENT

This petition is not filed by or on behalf of a non-governmental corporation.

LIST OF PROCEEDINGS

The Complaint was filed in the Circuit Court of the Ninth Judicial District, in and for Orange County, Florida, Case No. 2020-CA-008342-O, *Alan Grayson v. No Labels, Inc. et al*. There was no judgment in that case, because it was removed to federal court.

The case was removed to the U.S. District Court, Middle District of Florida, Case No. 6:20-cv-1824-Orl-40LRH, *Alan Grayson v. No Labels, Inc. et al*. The final opinion in favor of Defendants was entered on May 20, 2022. M.D. Fla. Docket Entry ("D.E.") 159, App.9a. The judgment was entered on May 23, 2022. M.D. Fla. D.E. 162.

Appeal from this final judgment was taken by the Plaintiff to the U.S. Court of Appeals for the Eleventh Circuit, Case No. 22-11740, *Alan Grayson v. No Labels, Inc. et al*. An opinion was entered, affirming the District Court's dismissal, in favor of the Defendants/ Appellees on October 21, 2022. 11th Cir. D.E. 28, App.1a. Plaintiff's Petition for Rehearing and Reconsideration was denied on December 14, 2022. 11th Cir. D.E. 31, App.69a.

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Alan Grayson v. No Labels, Inc. et al., No. 22-11740, Opinion (11th Cir. Oct. 21, 2022) 11th Cir. D.E. 28, App.1a, *reconsideration denied* (11th Cir. Dec. 14, 2022) 11th Cir. D.E. 31, App.69a.

JURISDICTION

The date of the 11th Circuit decision sought to be reviewed is October 21, 2022, and the rehearing and consideration denied on December 14, 2022. The statutory provision conferring jurisdiction to review this petition for writ of *certiorari* is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I (1791)

> 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 is a petition for writ of certiorari of a decision of a U.S. Court of Appeals. The U.S. Court of Appeals had jurisdiction of the case under 28 U.S.C. § 1291, regarding final decisions of district courts. The district court had jurisdiction of the case under 28 U.S.C § 1332, the diversity jurisdiction statute.

The Plaintiff was a Member of Congress in the 111th, 113th and 114th Congresses, representing Orlando, Florida. *See* M.D. Fla. D.E. 35, 110 & 111 Ex. A. He was a candidate in a congressional primary for the 116th Congress, in August 2018. The Defendants, who are political operatives, polled the race, and found that the Plaintiff was leading. They polled voters on which particular allegations would be most effective in destroying the Plaintiff's reputation, without regard to whether they were true. They then bombarded voters in his district with attack ads against the Plaintiff—approximately 500,000 mailers and, during the last 48 hours of the race, 500,000 online ads. Their efforts had the intended effect: the Plaintiff was defeated. *Id.*

There is no dispute that the statements published in the Defendants' ads were false. Their motion for summary judgment was based solely on the "actual malice" defense established by *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (*i.e.,* knowing falsity, or reckless disregard for the truth). For instance, their ads depicted Plaintiff money-laundering $150,000 in cash by flying it to the Cayman Islands in a silver attaché case, and then lounging there on the beach,

consuming alcoholic beverages, while shirking his Congressional responsibilities. Indeed, they depicted the Plaintiff's supposed boarding pass for the flight, and "photoshopped" a fake passport, inserting Plaintiff's personal information and photo. M.D. Fla. D.E. 94 Ex. 21, App.16a. Plaintiff has never been to the Cayman Islands.[1]

The Defendants ran hundreds of thousands of ads depicting the Plaintiff as a spousal abuser, and quoting from his ex-wife's complaint against him, four years earlier. The ads neglected to mention that, three days after she made the allegation (also four years earlier), Plaintiff's ex-wife withdrew this allegation, when a video and her own call to police established that the only touching that occurred was her battery of the Plaintiff. Moreover, the ex-wife then sent the Plaintiff a written apology for lying about him. The Defendants' own records established that they knew these actual facts, M.D. Fla. D.E. 94, Ex. 12, but they went ahead with their plan to brand the Plaintiff as a spousal abuser anyway.

Regarding the record evidence of actual malice, the district court decision recognized that the Defendants had simply fabricated the Cayman Islands junket, but it attached no significance to that. M.D. Fla. D.E. 159 at 7-8, App.16a. The district court acknowledged that the Defendants knew that the Plaintiff's ex-wife had withdrawn her accusations and had apologized. But the lower court rejected that as evidence of actual malice, because of evidence that

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[1] The Defendants abashedly referred to this as "parody." They have been very hard-pressed to argue that this is not evidence of actual malice. Their summary judgment motion simply ignored it.

the ex-wife had (falsely) accused the Plaintiff on other occasions. *Id.* at 14-16, App.25a. The lower court also noted that on four occasions in their campaign against the Plaintiff, the Defendants had proceeded contrary to the advice of their defamation counsel,[2] but took this as evidence that the Defendants had no actual malice, because they had consulted such an attorney. *Id.* at 13, App.22a-23a. This, of course, betrays an ignorance between the "actual malice" standard under *Times v. Sullivan* and the lay definition of "malice."

In addition to this, the lower court simply disregarded other quite-probative evidence of actual malice, such as: (a) the Defendants falsely inserting the Plaintiff's name in a court document, using what *they* called a "fake font," (b) the Defendants manufacturing a voiceover in what they depicted as a local news report, despite one staffer warning against it; (c) the Defendants fabricating a local newspaper report; and (d) one staffer warning, six times, that Plaintiff's ex-wife had been lying, with the staffer going to far as to circulate the video showing the ex-wife punching Plaintiff in the face. M.D. Fla. D.E. 110 & 11 Ex. A; Ex. 94 at Misc. 002-015.

Despite all this, the lower court ruled that there was "not even a scintilla" of evidence of actual malice. M.D. Fla. D.E. 159 at 16. The lower court gave credit to the Defendants' claims that they had relied on

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[2] For instance, the Defendant's defamation counsel, reviewing the attack ads at issue here in advance, said to Defendants: "Inventing language for [Plaintiff] and doing the cut/paste photo stuff almost certainly would give [Plaintiff] a basis to claim defamation." M.D. Fla. D.E. 94 at PT 315-16. The Defendants ignored this advice. The lower courts did not consider this germane to actual malice.

public reports alleging Plaintiff misconduct, notably the reports that preceded the ex-wife's recantation, four years earlier. *Id.* The lower court hence did not apply the proper summary judgment standard as to disputed issues of fact.

The Defendants raised over $9,000,000 for this campaign against the Plaintiff, and related attack campaigns in mid-2016. Defendant No Labels, Inc., booked $2.1 million of profit of this (without donor permission, apparently) and No Label's Executive Director directly received another $300,000+ of this cash. M.D. Fla.110 & 111 Ex. A.[3]

The district court granted summary judgment to the Defendants on the Plaintiff's defamation and civil conspiracy claims, solely on the basis of its decision that there was no disputed issue of fact as to actual malice. The Court of Appeals affirmed on the same grounds.

In a prior version of his complaint, the Plaintiff had asserted other claims earlier, *i.e.,* invasion of privacy, cyberstalking and fraudulent conveyance. The district court dismissed those other claims as contrary to Florida law. M.D. Fla. D.E. 28 & 34.[4] The overall dismissal was without prejudice to replead (and the Plaintiff did replead, regarding defamation

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[3] Note how starkly different this is from the "freedom of the Press" situation in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), where the survival of the nation's most prominent newspaper was threatened, on account of its coverage of the Civil Rights Movement.

[4] For instance, the Plaintiff's invasion of privacy claim, citing *Tyne v. Time Warner Ent. Co.*, 204 F.Supp.2d 1338, 1344 (M.D. Fla. 2002).

and civil conspiracy). The Court expressly warned the Plaintiff about a Rule 11 violation if he re-pled the other claims, though. *Id.* Plaintiff recognized that such an effort would be futile, *Bryant v. Dupree,* 252 F.3d 1161, 1163 (11th Cir. 2001), so he did not re-plead the other claims. Plaintiff's appeal noted that the district court's rulings were contrary to the plain meaning of the Florida statutes at issue. On appeal, the Court of Appeals held that the Plaintiff had waived these claims by not repleading them, even though his repleading them would have been futile. 11th Cir. D.E. 28-1 at 8, App.7a.

Siding with the minority of circuits that have addressed the issue, the 11th Circuit joined only one other Circuit Court in requiring the repleading of futile claims. The other Circuit Courts (as well as the Eleventh Circuit, on previous occasions) had ruled that there is no need to replead futile claims. This ruling deprived the Plaintiff of the right to appellate review regarding whether the district court was right or wrong regarding the legal validity of those claims. Plaintiff urges this Court to resolve this conflict among the Circuit Courts, to preserve the right of appellate review on dismissal of claims.

REASONS FOR GRANTING THE PETITION

I. The "Actual Malice" Standard for State-Law Defamation Claims by "Public Figures" Imposed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) Should Be Revisited by This Court (as Justices Thomas and Gorsuch and Others Have Stated), Especially as Applied to Non-Media Defendants.[5]

The lower court decisions in this case are predicated entirely upon the actual malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), which the district court referred to as "seminal." M.D. Fla. D.E. 159 at 4, App.13a.

It has been argued, by many, that the "actual malice" standard for state-law defamation claims by "public figures" imposed by *Sullivan* has, at best, a tenuous foundation in the First Amendment; it upsets the balance between federal Constitutional law and state law; and it is a well-intentioned but failed effort at "social engineering" that has inadvertently caused a pervasive proliferation of false and defamatory statements, especially in political advertising. The Defendants in this case, professional political operatives who profited more than $2 million for defaming the Plaintiff in a Congressional primary, put these issues squarely before this Court.

Not long ago, these issues were raised in another petition for certiorari from the Eleventh Circuit,

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[5] The Plaintiff punctiliously raised and preserved this issue below. *See, e.g.,* M.D. Fla. D.E.131 (Joint Final Pretrial Statement).

which Justices Thomas and Gorsuch voted to grant with impassioned analysis. *Berisha v. Lawson,* No. 20-1063, *cert. denied,* 594 U.S. ___ (2021).

Justice Thomas offered a sharp "originalist" perspective, as follows:

> Berisha now asks this Court to reconsider the "actual malice" requirement as it applies to public figures. As I explained recently, we should. *See McKee v. Cosby*, 586 U.S. ___, ___ (2019) (opinion concurring in denial of certiorari) (slip op., at 2).
>
> This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears "no relation to the text, history, or structure of the Constitution." *Tah v. Global Witness Publishing, Inc*., 991 F.3d 231, 251 (CADC 2021) (Silberman, J., dissenting) (emphasis deleted). 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." *McKee*, 586 U.S., at ___ (opinion of Thomas, J.) (slip op., at 7).
>
> The Court provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment's ratification. In *Gertz*, for example, the Court reasoned that public figures are fair targets because "they invite attention and comment." 418 U.S., at 345. That is, "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Ibid*. But it is unclear

why exposing oneself to an increased risk of becoming a victim necessarily means forfeiting the remedies legislatures put in place for such victims. And, even assuming that it is sometimes fair to blame the victim, it is less clear why the rule still applies when the public figure "has not voluntarily sought attention." 378 F.Supp.3d 1145, 1158 (SD Fla. 2018); *see also Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (CA5 1978) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be").

The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton," Kennedy, *'Pizzagate' Gunman Sentenced to 4 Years in Prison*, NPR (June 22, 2017), www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison. Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Hill, *A Vast Web of Vengeance*, N.Y. TIMES (Jan. 30, 2021), www.nytimes.com/2021/01/30/technology/change-my-google-results.html. Or think of those

> who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. *See*, *e.g.*, Wemple, *Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story*, WASHINGTON POST (Sept. 6, 2019), www.washingtonpost.com/opinions/2019/09/06/bloomberg-lawtried-suppress-its-erroneous-labor-dept-story. Or read about Kathrine McKee—surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. *See McKee*, 586 U.S., at ___ (opinion of Thomas, J.) (slip op., at 1–2).
>
> The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari.

Id., slip op. at 2-3 (Thomas, J.). Justice Gorsuch provided this additional reasoning, as follows:

> At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, 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.

This principle extended far back in the common law and far forward into our Nation's history. As Blackstone put it, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods "he must take the consequence of his own temerity." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 151–152 (1769). Or as Justice Story later explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825).

This was "[t]he accepted view" in this Nation for more than two centuries. *Herbert v. Lando*, 441 U.S. 153, 158–159, and n. 4 (1979). Accordingly, "from the very founding" the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–370 (1974) (White, J., dissenting). As a rule, that meant all persons could recover damages for injuries caused by false publications about them. *See* Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L. J. 225, 234–237 (1985); J. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 474–475 (5th ed. 2019); Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782, 801–802 (1986); *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909).

This changed only in 1964. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),

this Court declared that public officials could no longer recover for defamation as everyone had for centuries. Now, public officials could prevail only by showing that an injurious falsehood was published with "'actual malice.'" *Id.*, at 279–280.. . . The Court viewed these innovations "overturning 200 years of libel law" as "necessary to implement the First Amendment interest in 'uninhibited, robust, and wide-open' debate on public issues." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring in judgment).

Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. . . . [T]hanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. *Logan* 803 (noting there are 4 billion active social media users worldwide). The effect of these technological changes on our Nation's media may be hard to overstate. . . . [S]ome reports suggest that our new media environment also facilitates the spread of disinformation. *Id.*, at 804. A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements." *Id.*, at 804, n. 302; *see* Vosoughi, Roy, & Aral, *The Spread of True and False News Online*, SCIENCE MAGAZINE, Mar. 9, 2018, pp. 1146–

1151. All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]." *Logan* 800. It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." Brief in Opposition 22. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. *Logan* 794–795. In that era, many major media outlets employed factcheckers and editors. . . .

Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.

These questions lead to other even more fundamental ones. [O]ver time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. Statistics show that the number of trials involving defamation, privacy, and

> related claims based on media publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3. *Logan* 808–810 (surveying data from the Media Law Resource Center). For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. *Id*., at 809. And any verdict that manages to make it past all that is still likely to be reversed on appeal.[6] . . . What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. *Id.*, at 804. As *Sullivan*'s actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 207 (1993) (reviewing A. Lewis,

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6 [Footnote added in this Petition:] Essentially, *Sullivan* imposes "a near-impossible burden of proof." W. Hopkins, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN 8 (1989). "Proving 'actual malice' is so daunting that it amounts to near immunity from liability and thus a license to publish falsehoods. . . . [V]ery few public plaintiffs recover substantial damages because the "actual malice" standard is extremely difficult to satisfy, especially on appeal. . . . This has resulted in little deterrence of liars and a systematic under-protection of the right to an unsullied reputation." *Logan, infra,* at 778.

MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

Again, it's unclear how well these modern developments serve *Sullivan*'s original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. . . . Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation.[7] At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.

Many Members of this Court have raised questions about various aspects of Sullivan. *See, e.g., McKee*, 586 U.S., at ___ (opinion of

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[7] [Footnote added in this Petition:] "T]he pendulum has swung so far toward defendants that defamation law gives little redress to the victims of falsehoods and provides virtually no deterrence of falsehoods. . . . In short, these sweeping constitutional protections are harming our democracy rather than protecting it, as the *New York Times* Court hoped." *Logan, infra,* at 808 & 812.

> Thomas, J.); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.,* 476 U.S. 1187 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz*, 418 U.S., at 370 (White, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting); *id.,* at 78 (Marshall, J., dissenting); *Rosenblatt v. Baer*, 383 U.S. 75, 92–93 (1966) (Stewart, J., concurring); *see also* Kagan, 18 L. & SOC. INQUIRY, at 205, 209; Lewis & Ottley, *New York Times v. Sullivan at 50*, 64 DE PAUL L. REV. 1, 35–36 (2014) (collecting statements from Justice Scalia). Justice Thomas does so again today.[8] In adding my voice to theirs, I do not profess any sure answers. I am not even certain of all the questions we should be asking. But given the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.

Id., slip op. at 1-8 (Gorsuch, J.).[9] Justice Gorsuch was referring to the views of then-Professor (now

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[8] [Footnote added in this Petition:] In contrast, there was "an arresting quiet at the center of the [*Sullivan*] case—specifically, in the Justices' failure during deliberations to criticize, debate, or question the . . . adoption of the actual malice standard." *See, e.g.,* Elena Kagan, "A Libel Story: Sullivan Then and Now," 18 L. & SOC. INQUIRY 197, 201 (1993) (reviewing Anthony Lewis, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991)).

[9] After the Plaintiff quoted Justice Thomas and Gorsuch in briefing before the Court of Appeals, the Defendants replied,

Justice) Elena Kagan, who expressed concern that *Sullivan's* progeny "distort public debate," and thus harm "public discourse" and the "democratic process." Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 207 (1993).

Former Justice Byron White noted the "grossly perverse" consequences of the *Sullivan* rule:

> The *New York Times* rule . . . countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods. . . . In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 769 (1985) (White, J., concurring).

Chief Justice Roberts has echoed such observations about the modern threat posed by pervasive lies. After recounting how Founder John Jay suffered head injuries inflicted "by a rioter motivated by a rumor," he explained:

> [W]e have come to take democracy for granted, and civic education has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital. The

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"no one but [Plaintiff] seems to question that *Sullivan* remains good law." Appeal Def.Br. at 27. That seems inaccurate.

> judiciary has an important role to play in civic education. . . .

See Chief Justice G. Roberts, Jr.*, 2019 Year-End Report on The Federal Judiciary* 1, 2 (Dec. 2019).[10]

There is dramatic new evidence confirming Justice Kagan's concern about whether the "actual malice" standard has come to "cut against the very values underlying the decision." Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 207 (1993). Four months ago, a *YouGov* poll compared the views of Americans on political advertising to what they were 40 years ago. It found that substantially more Americans today believe that political advertising today is polluted by false information.[11] "How U.S. opinion on political advertisements has changed over time," YouGov (Nov. 3, 2022).[12] Indeed, the backlash against the inaccuracies in political negative advertising is so great that 58% of American now say that "political ads about candidates have no influence at all on their vote"–they've tried just to tune them all out. *Id.*[13] Surely that was not the purpose of *Times v.*

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[10] https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf

[11] https://today.yougov.com/topics/politics/articles-reports/2022/11/03/how-us-opinion-political-advertisements-changed

[12] Mitchell et al., *Many Americans Say Made-Up News Is a Critical Problem That Needs to Be Fixed*, Pew Res. Ctr. (June 5, 2019), https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/

[13] In short, "with more than half a century of perspective, it is now clear that the Court's constraints on defamation law have facilitated a miasma of misinformation that harms democracy by making it more difficult for citizens to become informed voters. . . . The Court's hands-off approach to false speech, at the heart of

Sullivan, but it is the unfortunate and indisputable effect.

Furthermore, a number of scientific studies have established that in social media, false news reaches many more people than the truth, and also diffuses faster than the truth. *See, e.g.,* Vosoughi, *et al.*, *The Spread of True and False News Online*, SCIENCE MAGAZINE (Mar. 9, 2018) (Twitter postings 2006–17).[14] As Nobel Prize and Pulitzer Prize-winning novelist Toni Morrison put it:

> I think it is time for a modern War against Error. A deliberately heightened battle against cultivated ignorance, enforced silence, and metastasizing lies.

Toni Morrison, THE WAR ON ERROR (2019).[15] In short, the view is widespread that "the [*Sullivan*] Court

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New York Times, has been weaponized, facilitating a public square rife with 'fake news' and 'alternative facts,' which has led to a dramatic decrease in trust in our government and leaders. . . . [T]here is now what amounts to an absolute immunity from damages actions for false statements, and this evisceration of the deterrent power of defamation law has facilitated a torrent of false information entering our public square. . . . [T]he Court's almost unrestrained embrace of free speech in *New York Times* and subsequent decisions has, contrary to the goal of improving public debate, actually impoverished it.*"* Logan*, Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO STATE L. J. 759, 761-63 (2020) (footnotes omitted) ("*Logan*"); *see also* Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 371 (2018).

14 https://science.sciencemag.org/content/359/6380/1146

15 A call to action echoed in the New York Times itself. Sabrina Tavernise & Aidan Gardnier, *'No One Believes Anything': Voters Worn Out by Fog of Political News*, N.Y. TIMES (Nov. 18, 2019),

excessively devalued the important state interest in protecting reputations, as well as harming the social cohesion of the community at large, which is protected by defamation law." *Logan* at 777.

Furthermore, as Justices Thomas and Gorsuch alluded, the imposition of the "absolute malice" standard in *Times v. Sullivan* does not appear to draw support from any intent of the Framers. On the contrary, *Sullivan* "uproot[ed] centuries of state common law," *Logan* at 786,[16] which was founded on (and grew parallel to) the rigorous anti-defamation common law of the United Kingdom.[17]

Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden*, 9 Wheat. 1, 186–189 (1824).[18] The First Amendment states that: "Congress shall make no law . . . abridging freedom of speech, or of the press. . . . " U.S. Const., Amend. I. It was not until 1925 that the Supreme Court applied this provision, at all, to the States. *Gitlow v. New York*, 268 U.S. 652 (1925). Thirty-nine

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http://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html

16 *Cf. Dobbs v. Jackson Women's Health Organization,* No. 19–1392, slip op. at 15-25, 597 U.S. ___ (June 24, 2022) (U.S. law prior to *Roe*) and *Roe v. Wade,* 410 U.S. 113 (1973).

17 And, subsequently, the *Sullivan* standard apparently has not been adopted by any other high court in the world. *See* Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 902 (2006).

18 "[E]ven the most formidable policy arguments cannot overcome a clear" textual directive. *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. ___, ___ (2021) (slip op., at 12) (internal quotation marks omitted)." *Helix Energy Solutions Grp., Inc. v. Hewitt,* No. 21–984, 598 U.S. ___ (Feb. 23, 2023) (slip op. at 17).

years later, in *Sullivan,* the Supreme Court stretched it much further, applying it to dictate an element of a cause of action under the common law of the States.[19] This not only reversed settled law in many States[20] but it also reversed the Supreme Court itself, which had previously held that libel "ha[d] never been thought to raise any Constitutional problem."[21] It also deprived the States of any discretion whatsoever to tailor their law to current needs (as Justice Gorsuch notes) or local circumstances, whether by further evolution of the common law, or actions of State Legislatures, or even enactments in State Constitutions.[22] For the straitjacket that *Sullivan* imposed on all 50 States, it's "one-size-fits-all." *Wos v. EMA ex rel. Johnson*, 568 U.S. 627, ___, 133 S.Ct. 1391, 1394 (2013). This is very much at odds with the extreme care that this Court otherwise takes *not* to disturb State law, as in this statement three weeks ago:

> [T]his Court is powerless to revise a state court's interpretation of its own law. *Murdock*

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19 In Florida, as in most states, defamation is a common law tort claim, not a statutory claim. *See, e.g., Jews for Jesus, Inc. v. Rapp,* 997 So.2d 1098 (2008).

20 *See* 1 R. Smolla, LAW OF DEFAMATION § 1:8 (2d ed. 2008).

21 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (holding that libel is not "within the area of constitutionally protected speech").

22 As Justice Byron White put it, the Court erred when it "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States," while "scuttling the libel laws of the States in such wholesale fashion." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting).

> *v. Memphis*, 20 Wall. 590, 636 (1875). We thus cannot disturb state-court rulings on state-law questions that are independent of federal law.

Cruz v. Arizona, No. 21–846, slip op. at 1, 598 U.S. ___ (Feb. 22, 2023) (Barrett, J., dissenting).

For these reasons, many have formed the distinct impression that in *Sullivan,* especially as to non-"Press" defamation defendants, the Supreme Court's case law may have taken something of a wrong turn, and it needs to be set back on track. "There is certainly no unbridled constitutional right to lie," *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010). The First Amendment is not "a license to lie." *Veilleux v. National Broadcasting Co.,* 206 F.3d 92, 129 (1st Cir. 2000). But as Justice Gorsuch warns, that is how *Sullivan* has been transmogrified and disfigured.

These issues are particularly pointed in this case, with its non-"Press" defendants. This Court recognized, a long time ago, that the law for Press and non-Press defendants cannot be the same. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761 (1985).[23] Yet here, these non-Press political operatives making patently false attacks to sway a political campaign claimed to have the same immunity as the New York Times did when it was

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[23] Florida defamation law also recognizes the distinction between "Press" and "non-Press" defendants. *Abram v. Odham*, 89 So.2d 334, 335-36 (Fla.1956) (qualified privilege for fair and accurate media statements made in reporting on official government activities); *Demby v. English*, 667 So.2d 350, 353 (Fla. 1st DCA 1995) (qualified privilege for media reporting of testimony).

reporting on the Civil Rights Movement in *Sullivan*. These Defendants are neither a "lonely pamphleteer who uses carbon paper or a mimeograph," nor are they a "large metropolitan publisher," *Branzberg v. Hayes*, 408 U.S. 655, 704 (1972); rather, they were a heat-seeking missile targeting the Plaintiff's reputation in the community.

In sum, there is a compelling need for this Court to revisit the "actual malice" standard for state-law defamation claims by "public figures" imposed by *Sullivan*, especially as applied to "non-Press" defendants. "[O]ur democracy hangs in the balance." *Logan* at 814.

II. It Is a Misapplication of the *Times v. Sullivan* "Actual Malice" Standard to Deem the Use of "Footnotes" (Citing Supposed External Sources) in an Otherwise Defamatory Statement as Negating All Other Evidence of Actual Malice, Such as Outright Fabrication.

Times v. Sullivan itself required that the court:

> review the evidence to make certain that those principles [regarding actual malice] have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*, 357 U.S. 513, 357 U.S. 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the

> circumstances under which they were made. . . . "

376 U.S. at 285. The Supreme Court requires "an independent examination of the whole record," as to all evidence of actual malice. *Id.,* citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

With all due respect, neither lower court decision, as to actual malice, satisfies this requirement of such a "searching and meaningful evaluation of all relevant evidence." *Johnson v. Governor of State of Fla.*, 353 F.3d 1287, 1304 (11th Cir. 2003). Instead, both decisions take a "shortcut," *i.e.,* relying on the presence of "footnotes" in the defamatory publication, just as the Eleventh Circuit did in the prior case of *Berisha v. Lawson,* No. 20-1063, *cert. denied,* 594 U.S. ___ (2021), where Justices Thomas and Gorsuch voted to grant certiorari.

In the district court's decision, the district court enumerated some of the evidence that Grayson amassed regarding actual malice, M.D. Fla. D.E. 159 at 12-13 & 16, App.22a-23a[24] but the district court regarded it as negated by the Defendants' footnotes in Defendants' publications against Grayson:

> Both mailers cite to a December 18, 2015, report by the Office of Congressional Ethics ("OCE") and encourage readers to review it themselves. . . . One of the mailers cites to a

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[24] While, at the same time, contradictorily dismissing it as "not even a scintilla," M.D. Fla. D.E. 159 at 17, evidently "indulging in a rhetorical flourish." *See United States v. Mine Workers*, 330 U.S. 258, 307 (1947) (Frankfurter, J., concurring).

> June 30, 2015 *Politico* article. . . . [Other media reports cited.]
>
> [. . .]
>
> Defendants correctly contend that their reasonable reliance on previously published reports from these independent, reputable sources for all of their advertisements, as well as their citation to some of these sources in the mailers, rebuts the presence of actual malice.
>
> [. . .]
>
> Again, many of the challenged publications cite to articles by independent, reputable sources and encourage readers to review these sources themselves and 'check the facts.' . . .

The Court of Appeals echoed this analysis:

> The defendants' mailings and online postings cite source materials. . . . the defendants' "reliance on these many independent sources, alone, . . . defeat[s] any claim of actual malice." *Berisha,* 973 F.3d at 1313.

11th Cir. D.E. 28-1 at 7. The earlier 11th Circuit decision, *Berisha,* does, in fact, say this: "Lawson's reliance on these many independent sources, alone, should defeat any claim of actual malice." *Berisha v. Lawson*, 973 F.3d 1304, 1313 (11th Cir. 2020).

This construction of the "actual malice" requirement seems problematic in several respects:

First, and foremost in this case, there is no way that one can reasonably stretch this defense so that

it covers defamatory publications that the perpetrators simply made up, like the Cayman Islands junket, the fake TV news report voiceover, and the fake document with the Plaintiff's name planted in it. These were "manufacture[d] . . . out of whole cloth." *Guarino v. Wyeth, LLC,* 719 F.3d 1245, 1251 (11th Cir. 2013). As to those:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964). Before this case, this principle (*i.e.,* making things up reflects actual malice) had never been questioned, including in the Eleventh Circuit's prior decisions. *See, e.g., Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016), quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("a story fabricated by the defendant[s], [or] is the product of [their] imagination[s]" demonstrates actual malice.")[25]

Second, in this case, there was no testimony from the persons who actually prepared the defamatory ads (*i.e.,* the direct mail and internet ad consultants) that they paid any heed to these sources at all.[26] In

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[25] Moreover, here, as there, "there [we]re obvious reasons to doubt the veracity of the informant or the accuracy of h[er] reports." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

[26] On the contrary, at one point, the direct mail consultant insisted on using language from the anti-Plaintiff polling, rather than

other words, this defense "resembles more a *post hoc* rationalization of [Defendants'] conduct than an accurate description of their deliberations prior to" publication. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). The lower courts did not examine the record in this regard.

Third, assuming that the consultants actually did rely on these reports, the lower courts did not consider that some of the reports would constitute affirmative evidence of actual malice, rather than evidence against it. For instance, one of the reports cited by the Defendants as reflecting the supposed *absence* of actual malice publishes a letter from the Plaintiff's ex-wife, apologizing to him for lying about the alleged spousal abuse. This is a case where the Defendants' "factual allegations were undermined and contradicted by the public reports and filings upon which [they] purported to rely." *Trump v. Clinton,* No. 22-14102-DMM, Sanctions Order [DE 302] at 3 (S.D. Fla. Jan. 19, 2023). The lower courts here failed to consider that.

Fourth, the Defendants should not be permitted to rely upon reports that had been "overtaken by events," *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 n.7 (1985) as the Defendants well knew. Their research clearly showed that Plaintiff's ex-wife had filed a

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language from their research. M.D. Fla. D.E. 94 at MISC 0001. In another example, the headline in one mailer stated: "Alan Grayson ABUSED HIS POSITION IN CONGRESS to enrich himself," *Id.* Ex. 37. This mailer cited the dismissed OCE referral, *id.*, which simply doesn't say that. Indeed, one Defendants-Appellants staffer specifically informed another that: "The word 'abuse' is never used in the ethics report," *id.* at SPIROS 168-169, but the Defendants ran with it, anyway.

false domestic violence complaint against him, which was withdrawn when both video and her own call with police established that she hit him, not *vice versa.* It is unconscionable for the Defendants to hide behind the earlier reports of the domestic violence complaint (even running video of such reports), when they knew that the complainant had confessed that she had been lying, and had withdrawn her complaint. Similarly, the record confirms that the House Committee on Ethics reviewed and *dismissed* the OCE report that the Defendants claim that they relied upon, and the Defendants knew this.[27]

Fifth, some of the prior statements in the cited publications were, in fact, false, and the Plaintiff meticulously identified such statements, under oath, in the record. M.D. Fla. 110 & 111 Ex. A. If *Politico*, a District of Columbia publication not widely read in Central Florida, publishes a false statement about the Plaintiff, this does not permit professional political operatives to inundate Central Florida with one million attack ads repeating the same false statement.[28] In short, the re-publication of defamation is defamation. As the Florida Supreme Court has held: "[E]ach publication of the defamatory charge was considered a new wrong which gave rise to a new and distinct cause of action. The plaintiff could institute

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[27] This is no different from citing a decision that you know has been reversed on appeal. Moreover, the Defendants knew that the OCE had no legal authority to make any findings against the Plaintiff, because one of the Defendants' former staffers submitted an affidavit to the district court, confirming that.

[28] Contrast this with *Sullivan,* where the total circulation of the New York Times in the entire State of Alabama was 390. *Logan, supra* at 764.

suit against each person who republished the libel." *First America Dev. Corp. v. Daytona Beach N.-J. Corp.*, 196 So.2d 97, 101 (Fla. 1966).

Sixth, the use of footnotes has become pervasive in political attack ads, precisely because the practitioners of those dark arts consider them to be akin to a "get-out-of-jail-free" card, *Hudson v. Michigan*, 547 U.S. 586, 595 (2006), in any subsequent defamation litigation. They have become a device to "rig the system" against the victim of those negative ads.

Finally, when the lower courts undertake this kind of weighing of the evidence, they are inherently invading the province of the jury. A defamation case remains a Seventh Amendment case, in which the lower courts "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015).

> Because a public figure must prove actual malice by clear and convincing evidence, the appropriate question at summary judgment is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

Klayman v. City Pages, No. 15-12731, 650 F. App'x 744 (11th Cir. 2016); *Berisha v. Lawson,* 973 F.3d 1304, 1312 (11th Cir. 2020). On its face, this is not the standard that the lower court applied.

For these reasons, even if *Sullivan* were to remain unchanged, the Court should employ this case as a vehicle to ensure its proper application, in a manner that does not "tilt the playing field" even further against defamation victims. One way or another, the law should not encourage liars to lie–not only with impunity, but also with immunity.

III. Regarding Civil Procedure, This Court Should Resolve the Conflict Among the Circuits by Reversing the Lower Courts' Ruling That a Futile Amendment of a Complaint Is Required, and the Failure to Make Such a Futile Amendment Waives That Claim and Bars Appellate Review.

Regarding whether the Plaintiff had a duty to replead claims when repleading would have been futile, the issue is one of waiver. "Waiver is the voluntary, intentional relinquishment of a known right." *E.g., Glass v. United of Omaha Life Ins. Co*., 33 F.3d 1341, 1347 (11th Cir. 1994). Comporting with this rule, until this case, the Eleventh Circuit (and all other Circuits but one, the Seventh Circuit) adopted "a flexible approach that requires repleading to preserve claims dismissed for technical deficiencies, but not for claims dismissed for legal deficiencies." Mike Chak Hin Tsoi, *Raise It (again?) or Waive It—Preserving Claims for Appellate Review When They Are Dismissed with Leave to Amend*, WILLIAM MITCHELL LAW REVIEW (Vol. 38, Issue 4) 1406, 1409 (2012).[29] Under the majority rule in the Circuits, there is no

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[29] A comprehensive discussion of this issue in all Circuit Courts. https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1469&context=wmlr

waiver when a claim is dismissed on the basis of a legal defect, whether or not an amended complaint regarding other claims follows. "[C]laims dismissed for legal deficiencies are reviewable on appeal without repleading." *Id.* at 1420. This is the express rule in the Second, Third, Fifth, Eighth, Ninth and Tenth Circuits. *Id.* at 1414-24.

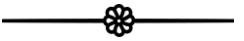
Prior to the decision below, which reversed settled law, the Eleventh Circuit had adhered to the majority rule, as in *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185 (11th Cir. 1999). The Complaint in *Dunn* was dismissed on the basis of a legal deficiency. This Court ruled that appellate challenge to that legal deficiency had not been waived:

> The pilots filed three different complaints in this suit; each complaint modified the prior complaint. The interference with business relationships claim was part of the pilots' second complaint. ALPA contends that the pilots waived their right to appeal the dismissal because after dismissal of that claim they failed to replead interference with business relationships in their third (and final) complaint. We disagree. The pilots presumably had nothing to add to their interference with business relationships claim; consequently, repleading would have been futile and would have resulted only in a second dismissal under Rule 12(b)(6). For this reason, we do not require a party to replead a claim following a dismissal under Rule 12(b)(6) to preserve objections to the dismissal on appeal. *See Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235, 1237-38

> (5th Cir. 1978), *vacated on other grounds*, 444 U.S. 959, 100 S.Ct. 442, 62 L.Ed.2d 371 (1979).

Id. at 1191 n.5; *accord Jacob v. Mentor Worldwide, LLC,* 40 F.4th 1329, 1334-35 (11th Cir. 2022); *Reynolds v. Behrman Capital IV LP*, 988 F.3d 1314, 1319 (11th Cir. 2021). That is what the ruling should have been here. (And even more so, here, where the district court said that re-pleading would have resulted in sanctions).

The draconian effect of the Eleventh Circuit joining only one other Circuit in imposing this new waiver rule is to deny appellate review (and, ultimately, review by this Court) not only to this Plaintiff, but to *every Plaintiff* who ever has *any claim* dismissed for legal deficiencies, which cannot be re-pled. The Court should intervene not only to resolve this conflict among the Circuits, but also to prevent a giant swath of lower court rulings from ever being reviewed on appeal, denying the statutory appeal of right.



CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Petition be granted.

Respectfully submitted,

Jason Johnson
Counsel of Record
BYRD CAMPBELL, P.A.
180 Park Avenue North, Suite 2A
Winter Park, FL 32789
(407) 284-3642
jjohnson@byrdcampbell.com

Counsel for Petitioner

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