No. 22-906

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' response to the Petitioner's certiorari petition essentially reiterates their misconception that "no one but [Plaintiff] seems to question that [*New York Times v.*] *Sullivan* remains good law." Brief in Opposition ("BIO") at 27.

Respondents wholly ignore recent comments by both Justices Thomas and Gorsuch regarding the continuing viability of the defamation standard set forth in *Times v. Sullivan. See Berisha v. Lawson*, No. 20-1063, *cert. denied*, 594 U.S. ___ (2021); *see also Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center,* No. 21-802, *cert. denied,* 597 U.S. ___ (2022) (Thomas, J., dissenting to denial of certiorari) ("the Court should not insulate those who perpetrate lies from traditional remedies like libel suits unless the First Amendment requires us to do so"); *McKee v. Cosby,* 586 U.S. ___, ___ (2019) (Thomas, J., concurring in denial of certiorari) (slip op. at 2).

Prior to his tenure on the bench, Chief Justice Roberts expressed some of the same reservations in a memorandum to White House Counsel Fred Fielding. Reply.App.1a. He observed that—even back in 1985—there was already a "raging debate" about whether libel law had become more of a threat to the media or to:

> [P]ublic figures (because of the near-impossibility of prevailing under the *New York Times v. Sullivan* standard).

Id. Chief Justice Roberts expressed his "personal view" that:

> [A] return to the pre-*Sullivan* standards[] in exchange for eliminating punitive damages would strike the balance about right, and would satisfy the First Amendment concerns of *Sullivan*.

Id. More recently, former Justice Scalia, in a TV interview with Charlie Rose, stated that he "abhor[red]" *Times v. Sullivan.*[1]

> [F]or the Supreme Court to say that the Constitution requires th[e actual malice rule], that is not what the people understood when they ratified the First Amendment. Nobody thought that libel, even libel of public figures, was permitted, was sanctioned by the First Amendment. Where did that come from? Who told — who told Earl Warren and the Supreme Court that what had been accepted libel law for a couple of hundred years was no longer [the law?] . . .

Id., 29:21-31:07; *see also* Lewis & Ottley, "*New York Times v. Sullivan* at 50*,"* 64 DEPAUL L. REV. 1, 35–36 (2014) (collecting such statements from Justice Scalia). Additionally, in a C-SPAN interview, former Justice Scalia added that the Framers "would have been appalled" by *Times v. Sullivan.* He said that *Times v. Sullivan* was "revising the Constitution," not interpreting it.[2]

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[1] https://charlierose.com/videos/17653

[2] C-SPAN TV, *The Kalb Report: Justices Scalia and Ginsberg on the First Amendment* (Apr. 17, 2014), http://www.c-span.org/video/?318884-1/conversationjustices-scalia-ginsburg

Similarly, many lower federal courts have expressed reservations over *Times v. Sullivan*. By way of example, in *Tah v. Global Witness Publishing, Inc.,* 991 F.3d 231, 243 (D.C. Cir. 2021) (Silberman, J., dissenting), *cert. denied,* 142 S.Ct. 427 (2021), Judge Silberman expressly called for *Times v. Sullivan* to be overruled. *Id.* at 251.

> After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of *New York Times v. Sullivan*. Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. *See McKee v. Cosby*, ___ U.S. ___, 139 S.Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari). The 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. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380-88, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting). As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth. *New York Times* should be overruled on these grounds alone. . . .
>
> [N]ew considerations have arisen over the last 50 years that make the *New York Times* decision (which I believe I have faithfully applied in my dissent) a threat to American Democracy. It must go. . . .

> I readily admit that I have little regard for holdings of the Court that dress up policymaking in constitutional garb. That is the real attack on the Constitution, in which —it should go without saying—the Framers chose to allocate political power to the political branches. The notion that the Court should somehow act in a policy role as a Council of Revision is illegitimate. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 138, 140 (Max Farrand ed., 1911). . . .
>
> As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity.

Id. at 251-54.[3] This is all the more true in this case, where the defendants are not "the press," but rather paid political operatives who, finding Petitioner then ahead in the polls, set out to defeat him by destroying his reputation with falsehoods.

As Justice (and then Professor) Elena Kagan put it, the Court's "adoption of the actual malice standard" in *Times v. Sullivan* is "puzzling." Kagan, *A Libel*

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[3] Justice Amy Coney Barrett was a law clerk to both Justice Scalia and Judge Silberman. When Justice Barrett was asked, at her confirmation hearing, about whether *Times v. Sullivan* is a "super-precedent," (*i.e.,* immune from overruling), she declined to identify it as such. https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-3-transcript 02:20-02:21 (Oct. 14, 2020). Note that the Defendants mischaracterize *Times v. Sullivan* as a "super precedent," Cert. Opp. at i (citing nothing), even though Justice Barrett expressly refused to do so.

Story: Sullivan Then and Now, 18 L. & SOC. INQUIRY 197, 199 (1993) ("*Kagan*"). Future Justice Kagan added:

> One of the great puzzles of *Sullivan* concerns why the Court adopted the actual malice rule rather than decide the case on one of numerous available grounds based on common law principles: that the published statements were not "of and concerning" *Sullivan*; that they were not substantially false; that they did not injure his reputation.

Kagan at 203. Justice Kagan then noted:

> The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy. . . . [T]o the extent *Sullivan* decreases the threat of libel litigation, it promotes not only true but also false statements of fact—statements that may themselves distort public debate.

Id. at 205-06.

Many legal scholars have confirmed that the "actual malice" standard in *Times v. Sullivan* leaves public figures "with the near-impossibility of prevailing," as Chief Justice Roberts put it. In the landmark article, Was *New York Times v. Sullivan Wrong?*, Professor Richard Epstein wrote:

> The greatest cost of the present system is that it makes no provision for determining truth. When a defendant wins a case on actual malice, there is no correction of past errors, and no sense of vindication for the

plaintiff who can complain bitterly that he lost on a technicality that was of no concern to him. Indeed it is not surprising that the plaintiff's level of frustration is so great in defamation cases precisely because of the frequency with which the defendant avoids the only issue that matters to the plaintiff-falsehood, which could allow rehabilitation of the plaintiff's reputation. The public, too, is a loser because the present system places systematic roadblocks against the correction of error. If it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press. The centrality of truth is of critical importance to any overall assessment of the system. . . .

In my own view the optimal strategy involves a return to earlier principles in which strict liability rules are used to determine liability. I have no question as a matter of general principle that any plaintiff should be entitled to a determination in court that a statement made by the defendant was false with respect to him. . . .

[Such a] rule that hurts the reputation of unreliable members of the press creates useful differential advantages for their competitors, and it helps elevate the entire level of public discourse and debate. If this change and this change only were made, it would markedly improve the structure of the law.

Richard Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 813-15 (1986) (footnotes omitted). Epstein, like Chief Justice Roberts, suggested that the actual malice standard be replaced with restrictions on punitive damages. *Id.* at 816-817. Professor Epstein concluded:

> On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the *New York Times* rule that has replaced it. Now that the exigencies of the immediate case and of the segregation crisis that brought it to the fore have passed, the sensible constitutional conclusion is to abandon the actual malice rule in *New York Times*. In its institutional sense, *New York Times v. Sullivan* was wrongly decided.

Id. at 817-18.[4]

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[4] Aside from ignoring the chorus of scholars, lower court judges, and former and current Justices of this Court criticizing the *New York Times* actual malice standard, the certiorari response seeks to trivialize the fundamental and pressing question of whether *Times v. Sullivan* is now "profoundly flawed." B. Fein, *NEW YORK TIMES V. SULLIVAN*: AN OBSTACLE TO ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE (1984). Rather than address such valid criticism of *Times v. Sullivan*, Respondents attempt to distract the Court, with arguments that simply miss the point, such as: (a) the "waiver and abandonment" of the defamation claim, Cert. Opp. at 2, with which neither lower courts agreed; (b) the notion that Petitioner "refus[ed] to identify what he found defamatory," *id.* at 5-7,

Notably, this Court has not yet made a definitive determination of whether the "actual malice" standard applies the same way to "the Press" (like the *New York Times*) and non-press citizens (like Respondents here). *But see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 753, 763 (1985) ("the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions . . . for reasons different from those relied upon by the Vermont Supreme Court"), *affirming Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417 (Vt. 1983); *Denny v. Mertz*, 318 N.W.2d 141, 153 (Wis. 1981) (different standards).

Furthermore, there is no doubt that the actual malice rule is chafing hard against state law. This case comes out of Florida, where the Legislature currently is in session. One bill that has been introduced, H.B. 951, begins as follows:

> Section 1. The Legislature finds that: (1) Defamation is and should be purely a matter of state law. (2) *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny have federalized major aspects of defamation law, notwithstanding the United States Supreme Court's pre-1964 precedents

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which Petitioner addressed in detail in the District Court ("Plaintiff's Delineation of Defamatory Statements and Publication," M.D.Fla.D.E. 138); (c) the suggestion that the Respondents fabricating a money-laundering excursion by Petitioner, to a place he has never visited (while supposedly shirking his Congressional duties), was harmless, because the place is "lovely," Cert. Opp. at 12; and (d) the misconception that granting certiorari, reversing summary judgment and ordering a trial would somehow be merely "an advisory opinion." *id.* at 20-23.

and historical understanding to the contrary, and foreclosed many meritorious defamation claims to the detriment of citizens of all walks of life. (3) The federalization of defamation law, including the judicially created actual malice standard, bears no relation to the text, structure, or history of the First Amendment to the United States Constitution. (4) The federalization of defamation law fails to acknowledge that defamatory falsehoods are equally injurious to plaintiffs regardless of whether they are public officials, public figures, or private figures, and regardless of whether the alleged defamatory falsehoods relate to matters of official conduct or of private concern. (5) The federalization of defamation law interferes with the ability of the states to update their defamation laws in response to societal changes, including the widespread proliferation of defamatory falsehoods via new technologies and the ever-diminishing investigation and reporting standards of publishers. (6) The federalization of defamation law has further fostered an environment in which defamatory falsehoods are routinely published without fear of consequence, but truthful speech is often self-censored for fear of being tarnished without an adequate remedy at law. (7) The United States Supreme Court should therefore reassess its post-1964 understanding of defamation law and, consistent with our nation's system of federalism, return to the states the authority to protect their residents from defamatory falsehoods and

> the ability to make their own policy judgments regarding the prevention of defamation. . . . (12) The state has an important interest in protecting its residents from injurious defamatory statements.

H.B. 951, Fla. H.R. (2023).[5] A companion Florida Senate bill, S.B. 1220, was voted out of the Florida Senate Judiciary Committee with bipartisan support. It provides, in part, as follows:

> Section 6. Section 770.11, Florida Statutes, is created to read:
>
> 770.11 Clarifying defamation standards.—A defamatory allegation is made with actual malice for purposes of a defamation action if any of the following apply:
>
> (1) The defamatory allegation is fabricated by the defendant, is the product of his or her imagination, or is based wholly on an unverified, anonymous report.
>
> (2) The defamatory allegation is so inherently improbable that only a reckless person would have put it into circulation.
>
> (3) If the defamatory allegation was based on an informant or an informant's report, there are obvious reasons to doubt the veracity of the informant or his or her report.
>
> Obvious reasons exist to doubt the veracity of a report if: (a) There is sufficient contrary evidence that was known or should have been known to the

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[5] https://www.flsenate.gov/Session/Bill/2023/951/BillText/Filed/PDF

> defendant after a reasonable investigation; or (b) The report is inherently improbable or implausible on its face.

S.B. 1220, ll. 138-156.[6] If this Florida bill already had been enacted, then the Petitioner, not the Respondents, would have been entitled to summary judgment below.[7]

Furthermore, regardless of the virtues or flaws of *Times v. Sullivan* at this point, in the Age of the Internet, it is readily apparent that the lower court rulings in this case are, as Justice Kagan put it, yet another attempt to make "it fit the square pegs of many defamation cases into the round holes of *Sullivan*." *Kagan* at 199. There is no reason to think that the *Sullivan* Court would have protected Respondents' defamatory attacks on Petitioner by political operatives simply for the sake of Respondents' monetary profit.[8]

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6 https://www.flsenate.gov/Session/Bill/2023/1220/BillText/Filed/HTML

7 Existing Florida statutory law provides special defamation protection for newspapers, Fla. Stat. 836.07-836.08, and "newspaper[s], periodical[s], or other medi[a]," Fla. Stat. 770.01. Florida therefore has also chosen to protect "the Press," U.S. Const. Amend. I, in ways that do not extend to the Respondents here. Under Florida law, the identity of the speaker hence is an important consideration, which was never addressed in *Times v. Sullivan.*

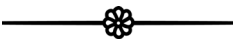
8 Compare this to the facts in *Times v. Sullivan,* where no evidence was offered that the statements in question were even "of and concerning" the plaintiff. *Kagan* at 200. This is most certainly not a case of "an organized government campaign to stifle public criticism, which happened to take the form of defamation suits," as in *Times v. Sullivan. Id.* at 204. As Justice

Next year will be another Presidential Election year. As Justice Gorsuch has noted, and as this case reflects, political defamation is now a profitable business model, with campaign spending in 2022 at $17 billion.[9] Under current circumstances, paid political operatives will run "negative ads" falsely accusing candidates of everything short of cannibalism. The Petitioner implores this Court to grant certiorari, and to address this deep, pervasive problem, left in the wake of a 60-year-old decision that could not have possibly foreseen the world today.[10]

Kagan pointedly observed, "not all such suits look like *Sullivan*, and the 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." *Id.* at 204-05.

9 https://www.cnbc.com/2022/11/03/2022-midterm-election-spending-set-to-break-record.html

10 The issue of the future of the actual malice standard, as to non-media defendants, clearly is the most pressing issue in this case. We reiterate, however, the danger of the current split among the circuits as to whether a futile amendment of a claim is necessary to preserve that claim (even where, as here, the judge threatens sanctions for doing so, M.D.Fla.D.E. 20 at 19, followed by "prohibiting" such amendments, M.D.Fla.D.E. 34 at 15 n.5). Denying certiorari on this issue "would blow a gaping hole in the final decision rule of 28 U.S.C. § 1291" and appeals-of-right, *O'Hanlon v. Uber Technologies, Inc.*, 990 F.3d 757, 763 (3d Cir. 2021), one of the most hallowed and sacred features of the federal court system. There will be hundreds if not thousands of cases in the two "out-of-line" circuits where such appeals-of-right will never see the light of day, because the district judge will rule a claim legally flawed, and the plaintiff will not risk sanctions by a futile repleading of it.



CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 24, 2023

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JOHN G. ROBERTS WHITE HOUSE MEMORANDUM ON LIBEL LAWS (AUGUST 28, 1985)

THE WHITE HOUSE
WASHINGTON

AUGUST 28, 1985

Memorandum for Fred F. Fielding
From: John G. Roberts
Subject: Libel Laws

Congressman Schumer (D/Lib.–NY) has written the Office of Media Relations, seeking views on revision of libel laws. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee will soon hold hearings on public figure libel, at Schumer's suggestion, and Schumer has introduced H.R. 2846 as a "study bill." H.R. 2848 [*sic*, 2846] would bar punitive damages in media libel cases and permit media defendants in public figure libel cases to convert damage suits to suits for a declaratory judgment, with no possibility of damage awards.

I do not think the White House as an institution should enter the raging debate about whether the current state of libel law threatens the media (because of the cost of defense and the rare large verdict) or public figures (because of the near-impossibility of prevailing under the *New York Times v. Sullivan* standard). My own personal view is that a legislative trade-off relaxing the requirements for public figures to prevail (a return to the pre-*Sullivan* standards) in exchange for eliminating punitive damages would

strike the balance about right, and would satisfy the First Amendment concerns of Sullivan. In any event, libel is a private cause of action, a common law tort, of only indirect interest to the Executive branch. I do not know if the Administration would want to take a formal position on possible revision of the libel laws. The question should probably be referred to Justice for review.

Attachment