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

BRIEF OF AMICUS CURIAE PROFESSOR DAVID A. LOGAN IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, this is an *amicus curiae* brief submitted by Professor David Logan, a Member of the Bar of the Supreme Court, in support of the Petition for Writ of Certiorari in Case No. 22-906, *Grayson v. No Labels, Inc.*[1]

THE INTERESTS OF THE AMICUS CURIAE

The nature of the movant's interest is to provide a scholarly perspective on the Petition for Writ of Certiorari. *Amicus curiae* Professor David A. Logan has written extensively on these subjects, *e.g.,* David A. Logan, *Rescuing our Democracy by Rethinking New York Times. v. Sullivan*, 81 OHIO STATE L. J. 772, 784-93 (2020) ("*Rescuing Our Democracy"*), cited 16 times in *Berisha v. Lawson*, No. 20-1063, *cert. denied*, 594 U.S. ___ (2021) (Gorsuch, J.). Prof. Logan's 42 years of work as a legal scholar, including 11 as the Dean of the Roger Williams University School of Law, have focused on the issues presented by the Petition. *See Motion for Leave to File Amicus Brief* at 1-3.

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[1] No counsel for a party authored this brief in whole or in part. The Petitioner paid Supreme Court Press for the printing of this motion and brief. No other counsel or party made any monetary contribution intended to fund the preparation or submission of this brief, nor did any other person or entity make such a monetary contribution to the preparation or submission of the brief.

THE SUMMARY OF ARGUMENT

In this case, the Court should grant certiorari because the egregious conduct of the Defendants—mounting a campaign of false information that is timed for the eve of an election, when there is no meaningful opportunity for counter-speech—should support a jury verdict for the Plaintiff, even if the applicable standard is Actual Malice. This Court also should grant certiorari to resolve the question of whether or not the array of constitutional protections derived from *New York Times v. Sullivan*, 376 U.S. 254 (1964), and subsequent decisions should be extended to non-media defendants.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT CERTIORARI IN A CASE THAT GOES TO THE HEART OF OUR DEMOCRACY AND REVERSE THE LOWER COURT'S DECISION THAT THE PETITIONER FAILED TO PROVE ACTUAL MALICE AS A MATTER OF LAW.

This Court should grant certiorari because the egregious conduct of the Defendants—mounting a campaign of false information that is timed for the eve of an election, when there is no meaningful opportunity for counter-speech—should support a jury verdict for the Plaintiff, even if the applicable standard is Actual Malice. The Court has not considered the important question of what evidence supports a claim of

Actual Malice since its 1989 decision in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989).

Since the seminal decision of this Court in *New York Times v. Sullivan*, the heart of American libel law (and unique among other democracies) is that the plaintiff must prove Actual Malice as a matter of law, at least in cases brought by public plaintiffs. This dramatic change from the common law was intended to provide the press broad protection from defamation liability, and this has come to pass: only a tiny handful of public plaintiffs have had libel judgments upheld on appeal. See *Berisha v. Lawson*, No. 20-1063, *cert. denied*, 594 U.S. ___ (2021) (Gorsuch, J., dissenting from a denial of a writ of certiorari) and indeed only a slightly larger handful go to trial despite the millions of false statements made. *See Rescuing our Democracy*, *supra*, at 807-10 (citing data from the Media Law Resource Center). This data underscores the dark underbelly of the *New York Times v. Sullivan* regime: scurrilous falsehoods go undeterred, and, in some circumstances, like the case at bar, harm our democracy. *See Rescuing Our Democracy*, *supra,* at 810-14.

As a result, courts and the parties in such libel cases have to address the question of what proof supports a finding of Actual Malice. For example, in the recent case of *Dominion Voting Systems v. Fox News*, N21C-03-257 EMD (Delaware Sup. Ct. filed March 26, 2021), the central issue set for trial was just that: whether Fox had broadcast false statements with the requisite high level of scienter. But, as noted above, the parties and the trial judge were handicapped in their analysis by the fact that this Court has not rendered an opinion on what facts support a finding of Actual Malice since 1989, in the case of *Harte-Hanks*

Communications, Inc. v Connaughton, 491 U.S. 657 (1989). This may represent a problem merely because of the passage of time, as precedents can become ossified. However, it is definitely a problem today, in 2023, because the law of libel operates in an entirely different media, advertising and communications environment than was the case 34 years ago. We are in a world where most citizens get most of their information from the Internet, and especially social media. As a result, the Petitioner's case offers this Court the opportunity to consider Actual Malice in an age characterized by the "24-hour news cycle," "bots," "deep fakes" and even "AI" [computer-generated communications targeted to individuals]. *Rescuing Our Democracy*, *supra*, at 793-84.

If this Court does grant review in this case, it will confront a record that reflects scant analysis of the facts by the lower courts, and a cavalier disregard of evidence that should support a jury question on Actual Malice rather than summary dismissal.

For instance, the Petition documents the parts of the evidentiary record below establishing, in evidence, that:

- The Respondents ran 500,000 internet ads in the last 48 hours of the campaign, at a time when the Petitioner simply had no means to counter them and discredit them as false.[2]
- The attack ads against the Petitioner included a fake newspaper article, a doctored TV news report with a fake voiceover, a fake court

[2] An effort that would have cost $17 million if it had been possible at all, according to Petitioner's expert witness.

document inserting the Petitioner's name with what they called a "fake font," a fake personal passport, a fake boarding pass, and fake pictures of the Petitioner on a beach.

- The Respondents claim to rely upon a report by the Office of Congressional Ethics (OCE), which they knew had been rejected and dismissed by the higher authority, the House Committee on Ethics.[3] The Respondents also claim to rely upon a request for a restraining order submitted by the Petitioner's ex-wife, which they knew had been almost immediately withdrawn, was disproved by both video evidence (of the ex-wife repeatedly striking the Petitioner) and a 911 call, and which was followed by a written apology by the ex-wife to the Petitioner for making this false accusation.[4]
- The Respondents (unlike the media) were motivated by the desire to divert $2+ million in campaign donations to themselves and deliver on their promise to defeat the Petitioner, rather than by any desire to inform the public or hold a public official accountable.

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[3] They also mischaracterized the OCE report, as their own "opposition researcher" warned them at the time.

[4] In fact, one of the Respondent staffers circulated the video (of the ex-wife assaulting the Petitioner) to the other staffers, and the staffer stated six times that the ex-wife had been lying. The Respondents nevertheless proceeded with their campaign condemning the Petitioner as a spousal abuser–against the advice of their counsel, who said, at the time, that it would likely cause the Petitioner to sue the Respondents for defamation.

Petition at 9-13, and record citations therein. In short, this case is a perfect example of the "two evils" identified by Justice Byron White:

> 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). The Court should act now to rescue our democracy from the pervasive "pollution of false information" now churning up in the wake of *Times v. Sullivan*, as reflected in this case.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIFFERENCE BETWEEN CONSTITUTIONAL PROTECTIONS FOR MEDIA AND NON-MEDIA DEFAMATION DEFENDANTS

The Court should grant certiorari to resolve the question of whether or not the array of constitutional protections derived from *New York Times v. Sullivan*, 376 U.S. 254 (1964), and subsequent decisions should be extended to non-media defendants. The Court has never resolved whether the *New York Times v. Sullivan* protections should be extended to non-media defendants, and the lower courts are split on the issue. A political lobbying group that blasted false information to voters on the eve of an election does not enhance but rather corrupts important public debate, and thus

is undeserving of the full array of constitutional protections recognized by *New York Times v. Sullivan* and subsequent decisions.

Beginning with the seminal decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court revolutionized American law that was deemed to be insufficiently protective of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. The Court, in a sweeping opinion, changed the substantive law of defamation by requiring that a plaintiff who is a "public official" must prove that the defamatory statement was made with "Actual Malice," that is, with knowledge that it was a lie or with "reckless disregard" for whether it was false. *Id.* at 279-83. The Court also revolutionized the procedural law to be applied in such cases: going forward, such a plaintiff had to prove the requisite culpability by "clear and convincing evidence." *Id.* at 285-86; *compare Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 490 (1984). Additionally, the Constitution was construed to require judges to reject the long-standing power of juries to decide essential facts, by giving judges the power consider a jury's finding of Actual Malice with no deference to the fact-finder. *Id.* at 285. In the end, all justices voted to reverse the judgment of the Alabama jury, and dismiss the case.

In the following years the Court, in a series of increasingly split decisions, extended constitutional protections to other aspects of defamation law: requiring "clear and convincing" proof of Actual Malice in claims brought by low-level government employees and even by people not agents of government but who are considered "public figures"; required that plaintiffs

who were "private figures" prove that the defendant published the defamatory statement with "at least negligence"; eliminated the common law defense of truth and instead required that the plaintiff prove the falsity of the offending statement; and, finally, the Court barred a private plaintiff from recovering anything more than "actual damages" (that is, the common law availability of presumed and punitive damages). *Rescuing Our Democracy*, *supra,* at 784-93.

After reviewing these many changes mandated by the Court, Justice White, who had been part of the unanimous Court in *Sullivan*, lamented the many extensions beyond the facts of *Sullivan*. Justice White concluded that the Court had "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).

Despite these many decisions, and their many changes to the common law of defamation, there remains an issue that has not been resolved by the Court and, indeed, has been the basis of conflicting decisions in the lower courts: whether all, or even some, of the *Sullivan* protections should extend to "non-media defendants." The Court should grant its request for certiorari to address and resolve this issue.

A leading treatise points out that this Court has "has gone out of its way to declare that the legitimacy of doctrinal distinctions between media and nonmedia speakers remains an 'open question.'" 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH, sec. 22.11. And further, "[l]ower courts also refer to the issue of whether First Amendment standards should track a

distinction between media and nonmedia as an open question." *Id*. For example, the United States Court of Appeals for the Fourth Circuit observed that: "neither the Supreme Court nor this Court has specifically addressed the question of whether the constitutional protections afforded to statements not provably false should apply with equal force to both media and non-media defendants." *Snyder v. Phelps*, 580 F.3d 206, 220, n.13 (4th Cir. 2009), *aff'd. on other grds.*, 599 U.S. 206 (2010).

> The courts that have specifically addressed the distinction between media and nonmedia defendants in defamation actions have reached varying results. Some courts have noted that there is a distinction and thus two divergent standards of protection. Others, although recognizing a distinction between media and nonmedia defendants, have determined that both potential defendants merit the same protection. Still others have recognized that because the Constitution itself recognizes no distinction, the courts should not either. In sum, the lower courts, both state and federal, have made conflicting, inconsistent, and confusing decisions.

Rebecca Phillips, *Constitutional Protection for Non-Media Defendants: Should There Be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV. 173, 180-81 (2010); *see also* Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMMUNICATION L. & POLICY 1, 4 (2009).

For instance, in *Denny v. Mertz*, 318 N.W.2d 141, 153 (Wis. 1981), the Wisconsin Supreme Court ruled:

> While we recognize that some courts in other jurisdictions have held that the *Gertz* protections apply to all defamations, regardless of whether published through the media or by private persons, we do not read *Gertz* as requiring that the protections provided therein apply to nonmedia defendants, nor . . . do we consider it good public policy to so decide.

Accord, Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1362-63 (Oregon 1977) (there is no issue of censorship or government action when the defendant is not part of the media). The Vermont Supreme Court also concluded that the *New York Times v. Sullivan* Actual Malice standard applies only to media defendants. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417 (Vt. 1983), *aff'd on other grounds, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753, 763 (1985).

The media vs. non-media distinction has been recognized elsewhere in defamation law. For example, most state statutes that establish a procedure for publishing a retraction do not apply to non-media defendants. 2 Rodney A. Smolla, THE LAW OF DEFAMATION, sec. 974 (2d. ed). More fundamentally, the recognition of special protections for the media would comport with the text of the First Amendment, which protects both the "freedom of speech *[and] of the press*." (Italics added.) *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L. REV. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official

branches.") Recognizing an independent basis for protection of the media would recognize that the "Fourth Estate" plays a unique role in our democracy and further, could be the occasion to reconsider whether First Amendment protections should be extended to businesses that attempt to influence elections corruptly by the spreading of falsehoods on the eve of an election, as occurred in the case at bar.

CONCLUSION

I want to thank the Court for the opportunity to address an issue that has been very important to me, as a Professor of Law, and extremely important to our Country. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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