No. 23-____

In the Supreme Court of the United States

BYRON JOHNSON, *Petitioner,*

v.

KAIJA FREBORG, *Respondent*.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where one private figure accuses another private figure of sexual assault in an online posting, is that "a matter of public concern" under the First Amendment?

LIST OF PARTIES

Petitioner Byron Johnson is an adult citizen and resident of Minnesota.

Respondent Kaija Freborg is an adult and believed to now be a resident of California.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition under this Court's Rule 14.1(b)(iii):

Byron Johnson v. Kaija Freborg, No. 27-CV-21-3888, Hennepin County District Court. Judgement entered on October 25, 2021.

Byron Johnson v. Kaija Freborg, No. A21-1531, Minnesota Court of Appeals. Judgment entered on July 25, 2022.

Byron Johnson v. Kaija Freborg, No. A21-1531, Minnesota Supreme Court. Judgment entered on September 20, 2023.

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The opinion of the Minnesota Supreme Court is reported at 995 N.W.2d 374. (App. 1a-69a). The opinion of the Minnesota Court of Appeals (App. 70a-113a) is reported at 978 N.W.2d 911. The order and memorandum of the Hennepin County district court (App., 114a-137a) is unreported.

JURISDICTION

The opinion of the Minnesota Supreme Court was entered on September 20, 2023. (App., *infra*, 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This is a final decision, despite the remand for trial. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479, 481 (1975) (explaining that the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 where, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review"). If Johnson prevails at trial, he cannot appeal under state law because he will have been the prevailing party. *Webster v. Hennepin County*, 910 N.W.2d 420, 422 (Minn. 2018) (prevailing parties cannot appeal under Minnesota law). If Johnson does not prevail at trial, state law prevents him from re-raising this federal issue in a subsequent state-court appeal. *Interstate Power Co., Inc. v. Nobles Cnty. Bd. of*

Comm'rs, 617 N.W.2d 566, 582 (Minn. 2000) ("Issues determined in a first appeal will not be relitigated in the trial court nor re-examined in a second appeal." (quotation omitted)). This issue can only be raised now and will be considered in any later appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution Provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech [or] the right of the people to petition the Government for a redress of grievances."

The Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

This defamation case arises from a sexual spat between former lovers—both private figures— one of whom accused the other of rape in a public Facebook posting that included the hashtag #meToo. Applying this Court's First Amendment precedent, the Minnesota courts below analyzed whether the allegedly defamatory speech was a matter of "public concern" such that the defamation plaintiff would be required to show actual malice. The eleven judges who analyzed that public-concern question—between the district court, the court of appeals, and the Minnesota Supreme Court—split almost evenly. Six concluded the speech was of public concern, five concluded otherwise. In ruling that the online accusation of sexual abuse here was a matter of public concern, the Minnesota Supreme Court created a split with the high courts of two other states. The Court should issue a writ of certiorari.

STATEMENT OF THE CASE

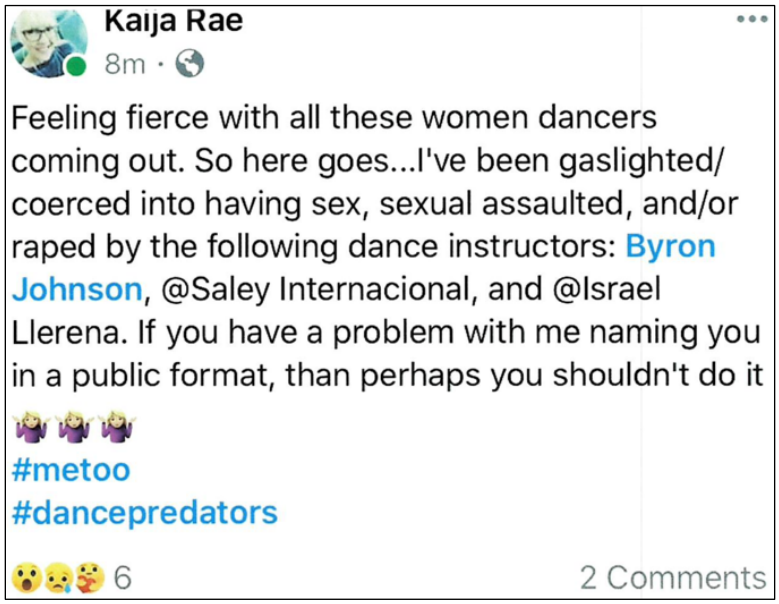
A. The parties' history

They met at a dance studio. In 2011 Byron Johnson was working there when he met Kaija Freborg. Sometime in 2012, their relationship became sexual.

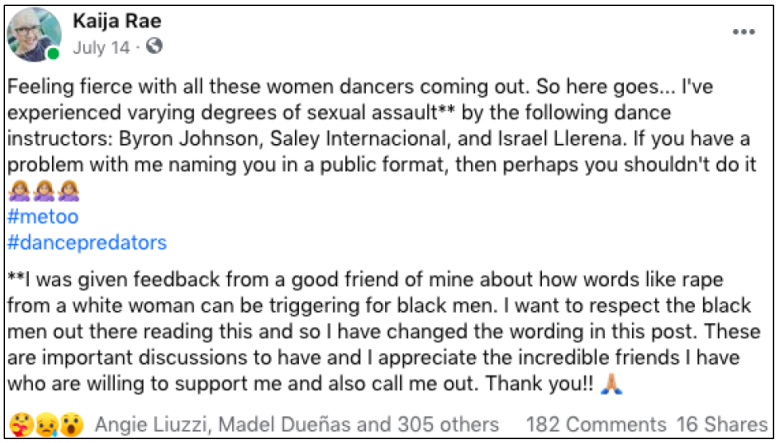
Over the next few years, they had a casual, sexual relationship. By the end of 2015, the parties' relationship shifted from sexual to strictly professional. They continued to contact one another

only in the context of dance lessons; these dance-related communications lasted until sometime in 2017. By 2020, they had not spoken to one another for several years. But that was about to change.

On July 14, 2020, Freborg posted the following public message on her Facebook page:



After receiving multiple comments and messages, Respondent edited her post. The updated post read:



Confused by this post, Johnson reached out to Freborg in an attempt to better understand why Respondent had accused him of "gaslighting, sexual assault, and/or rape." Johnson's comment reads:

> There is no good way to respond to this post but I'm gonna try anyway. I believe that my silence would only stand to indict me further. The fact that you can tag me in this post means that we are friends or were at one time.
>
> I AM CONFUSED. Please tell me what exactly are you saying that I did to you? Or why you think my name belongs on this post?
>
> This is a very serious accusation which I categorically deny.
>
> We haven't spoken in a very long time, but we can do better than this. I am not

> here to shame, I'm here to say that I just don't understand why my name is on this post. I've been nothing by nice and or accommodating to you every occasion I can remember. Frankly, I'm at a loss. I hope you can offer some clarity.

Freborg responded to Johnson:

> In all honesty I'm not interested in any kind of manipulative cat and mouse game with you. If you're "confused" (as I've heard many people say when gaslighting others to get outcomes they want) I suggest you talk to the many, many other women you've done this to or better yet talk to a therapist. "We" do not need to do better, you do.

Freborg later deactivated her Facebook account.

Many responses to Freborg's post condolences to her. Other responses that believed her, praised Freborg in various ways, describing her as a "survivor" as "brave" as a "hero."

Other responses piled on Johnson. One such response stated "over the years I have heard things said about both Byron [Johnson] and Israel by multiple women in the dance scene. These accusations go back at least 6 years…. Again I will point out that multiple women in the dance scene have had similar experiences with both Byron and

Israel. I have heard way too many stories about both of these guys."

In a contemporaneous private message, Freborg admitted to confidante that Johnson had never raped her. (App. 17a n.3, 116a ¶4.)

B. Trial court proceedings

Johnson sued Freborg for defamation arising out of her Facebook posts. After discovery, Freborg and Johnson each moved for summary judgment. Freborg moved for summary judgment of dismissal. Johnson moved for leave to amend his complaint to add punitive damages[1] and moved for partial summary judgment on liability and on actual malice.

The district court granted Freborg's motion and denied Johnson's motions. (App. 120a.) Citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the district court first concluded that her posts "reached a matter of public concern" under the First Amendment and that Johnson could not satisfy the "actual malice" standard that followed from the public-concern determination.

[1] Under Minnesota law, a plaintiff's initial complaint may not seek punitive damages; a subsequent motion for leave to amend is required. Minn. Stat. § 549.191

C. Minnesota court of appeals

Johnson appealed. On appeal, he argued that Freborg's Facebook posts were not matters of "public concern" under the First Amendment and alternatively, that the summary judgment evidence was create a fact issue as to actual malice.

In a 2-1 decision, the Minnesota Court of Appeals reversed the district court. (App. 71a.) As to the issue of public concern, the panel majority held that Freborg's posts were "personal in nature" (App. 102a) and different from the speech in *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), and thus not a matter of "public concern" under *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). (App. 81a.)

As to the issue of actual malice, the panel majority declined to reach it, reasoning that because that the posts involved a matter of private concern Johnson need not prove actual malice. (App. 95a n.25) The concurrence/dissent reached would have held that the posts involved matters of public concern and would have required Johnson to prove actual malice at trial on remand. (App. 96a.)

D. Minnesota Supreme Court

Freborg petitioned the Minnesota Supreme Court to review the public-concern issue. It granted

review and reversed the court of appeals by a 4-3 vote. (App. 1a.)

Part I of the majority opinion observed that, although Minnesota common law recognizes defamation per se for accusations of "criminal behavior or moral turpitude"—including accusations of sexual assault—"the doctrine of defamation per se cannot offend the constitutional guarantees of the First Amendment." (App. 13a.) The four-justice majority understood that "speech on matters of public concern, which 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" (App. 13a-14a, (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

Relying on this Court's decision in *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), the majority held that the determination of whether speech is of public or private concern in a particular case is "based on a totality of the circumstances." (App. 14a.) And "[n]o single factor is 'dispositive;' rather, courts should 'evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.'" (App. 14a-15a, quoting *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 881 (Minn. 2019) and *Snyder*, 562 U.S. at 454.) The majority also held that *Snyder* requires a reviewing court to "an independent examination of the whole record." (App. 15a, quoting *Snyder*, 562 U.S. at 454.)

Reviewing the whole record, the majority held that "[b]alancing the totality of the circumstances of

the Facebook posts here, we conclude that, although the speech involved personal aspects, the predominant theme of Freborg's speech involved a matter of public concern, namely sexual assault in the context of the #MeToo movement." (App. 16a.)

The majority put great weight on Freborg's posts' use of the #MeToo hashtag. The majority described the "the broader #MeToo movement" as one "characterized by survivors of sexual abuse creating social media posts disclosing their experiences with sexual violence and identifying their abusers. (App. 18a citing Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. Rev. 215, 217 (2020) and JoAnne Sweeney, *Social Media Vigilantism*, 88 Brook. L. Rev. 1175, 1219–21 (2023).)

The majority held that Johnson's case was unlike *Snyder*, in which this Court held the funeral-protest signs in there addressed "matters of public import" including "homosexuality in the military, and scandals involving the Catholic clergy." *Snyder*, 562 U.S. at 448, 454. In contrast, the majority concluded that despite Freborg specifically naming Johnson and two other dance instructors in her posts, that the dominant theme of her speech was sexual assault in the dance community, and therefore a matter of public concern.

The majority viewed *Snyder* as a development in the law that broadened the scope of what constitutes public concern beyond the "narrow

perspective…rooted primarily in decades-old Supreme Court case law [of] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1975)." (App. 21a.) Citing this Court's decision in *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017), the majority held that Freborg's use of the Internet favored a public-concern finding. (App. 26a.)

Observing that the responses to Freborg's posts "generated much discussion and mixed reactions," the majority inferred that her posts trigged discussions about engagement in democratic self-governance, which favored a public-concern finding. The majority discounted the lack of media coverage of Freborg's accusations. (App. 27a-28a.)

After concluding that Freborg's posts involved matters of public concern, the majority held that the issue of actual malice should be determined at trial on remand.

The dissent would have held that Freborg's posts did not involve matters of public concern under the First Amendment. (App. 45a, citing *Bierman v. Weier*, 826 N.W.2d 436, 462 (Iowa 2013); W.J.A. v. D.A., 43 A.3d 1148, 1157–58 (N.J. 2012).)

The dissent criticized the majority for ignoring the quintessentially private nature of the speech at issue:

> Freborg was a private person, leveling an allegation of private conduct at a private event, against a person with whom she had a personal relationship, all on her personal Facebook page—a page with no history of discussing issues of sexual violence. Consistent with the animating principle from the Supreme Court, we should not apply the actual malice standard to Freborg's speech because it does not fall within the central purpose of the First Amendment. The majority disagrees, but it has not cited a case where a court has applied the constitutional actual malice standard to speech where a private individual accuses an identified person of a crime in a private social media post that includes a hashtag.

(App. 57a.)

The dissent was joined by the court's only Black justice, and the dissent gave examples of how false accusations of rape and sexual assault have been used as a weapon to harm Blacks. (App. 62a-63a, citing Hon. Victoria A. Roberts, *The Scottsboro Boys*, 80 Mich. Bar J. 62, 62-64 (2001) (explaining that, in 1931, nine young Black men were falsely accused of raping two white women on a train; eight of the boys were tried and sentenced to death); *Alexander v. Oklahoma*, 382 F.3d 1206, 1211-12 (10th Cir. 2004) (discussing the Tulsa Race Riot, a 24-hour riot in

1921 that left as many as 300 people dead and was prompted by a rumor that a Black man assaulted a white woman); Samuel R. Gross et al., *Race and Wrongful Convictions in the United States 2022*, Nat'l Registry of Exonerations 18 (Sept. 2022) ("Two thirds of those misidentified rape defendants were Black men, most of whom were misidentified by white victims.").) Those racial dynamics are relevant to here because Johnson is Black and Freborg is white. (App. 74a n.3.)

SUMMARY OF ARGUMENT

This petition should be granted because the Minnesota Supreme Court's public-concern ruling conflicts with other state supreme courts' rulings in similar cases. Sup. Ct. R. 10(b). Existing precedent on this issue is sufficiently vague and difficult to predictably apply that lower courts can be expected to continue reaching inconsistent results when analyzing whether online speech is a matter of public concern.

This petition is a good vehicle to address the question presented because the three different lower courts that have ruled on these facts have produced five different opinions—the trial court's ruling, two at the intermediate appellate court, and two at Minnesota's highest court.

REASONS FOR GRANTING THE PETITION

I. The Minnesota Supreme Court's creates a federal conflict among state high courts.

The supreme courts of New Jersey and Iowa have analyzed the public-concern issue and reached different outcomes than the Minnesota Supreme Court's decision.

The New Jersey Supreme Court's decision in *W.J.A. v. D.A.*, 43 A.3d 1148 (N.J. 2012) is similar to this case and conflicts with the decision below. That case, like this one, involved an Internet-based defamation claim stemming from an allegation of sexual assault. *Id.* at 1150-51. The alleged assault there was more than nine years earlier, *id.* rather than the five years as here. The defamation plaintiff there, Anderson, prevailed at trial, and the defendant, Adams, did not appeal.

Five years later, Adams created a website repeating his claims of sexual abuse by Anderson and including quotations from the trial, with allegations of perjury and witness intimidation. *Id.* at 1151. On that site, Adams solicited help from anyone who "had similar experiences with [Anderson]" and encouraged visitors to contact "[t]he F.B.I., [t]he Governor of New Jersey, or [t]he Attorney General of New Jersey." *Id.* To explain his motivation for creating the website, Adams indicated he was "outraged by the justice [he] believed [he] did not get through [the trial] and [he] was desperate for any help [he] could get from

anyone." Adam's website identifies its mission as telling "all tell all 298,444,125 US Citizens about this!" Anderson's name and address were included on the site. *Id.*

The New Jersey Supreme Court concluded that the post in *W.J.A.* was not a matter of public concern. In considering the content of the speech at issue there, the New Jersey Supreme Court explained that not all allegations of crimes can be said to be of public concern:

> [I]t is evident that Adams's speech does not "promote self-government or advance the public's vital interests," nor does it "predominantly relate to the economic interests of the speaker." *Id.* at 497, 958 *A.*2d 427. To be sure, the speech accuses Anderson of engaging in serious criminal conduct, thus qualifying for *per se* treatment. But we have never suggested that such an allegation, in itself, vaults the public concern threshold.

Id. at 1157. That court treated the context of the speech as examining "the speaker's status, ability to exercise due care, and targeted audience." *Id.* at 1158.

> Adams had the ability to exercise due care when making his statements, but chose instead to publish them online for anyone with an Internet connection

> to view. His targeted audience, according to the statements on the website, was "all 298,444,125 U.S. Citizens." Adams's desire to publish the Internet statements to the entire country and the fact that the statements refer to previous court proceedings do not necessarily make his allegations a matter of public interest. Rather, they concern only Anderson, and Adams's assertion of long-past sexual abuse on his part.

Id. at 1158.

The Iowa Supreme Court held that a book author's allegation that identified person committed sexual assault was not a matter of public concern for First Amendment purposes. *See Bierman v. Weier*, 826 N.W.2d 436, 462 (Iowa 2013).

This Court should grant the petition to clarify how lower courts are to analyze whether speech is of public or private concern. Presently, Internet-based accusations of sexual abuse are, for First Amendment purposes, a public concern in Minnesota but not in New Jersey or in Iowa. *See id.* at 454, 457-58 (extensively discussing the Internet, though the publication at issue there was a book).

The fact that various supreme court justices in different states cannot predictably produce rulings on what is or is not a "public concern" under the First Amendment suggests that this Court's guidance

would be useful. Predictable results are unlikely to flow from analyzing the "totality of circumstances" related to the "form, content and context" for Internet-based speech. The capaciousness of such a test is a poor guide for lower court judges.

II. This petition is a good vehicle for addressing whether state defamation law has been over-federalized.

New York Times Co. v. Sullivan, 376 U.S. 254, (1964) was a watershed case. It and its progeny constitutionalized huge swaths of state tort law.

The constitutionalization of defamation wrought a sudden change in Minnesota's common law, *see Rose v. Koch*, 154 N.W.2d 409, 423 (Minn. 1967); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W2d 476, 281-82 (Minn. 1985), which had been quite protective of reputation. *See* Minn. Const. Art. I, § 3 ("[A]ll persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."); Minn. Const. Art. I, § 6 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character[.]").

By its common law, Minnesota imposed strict liability for libel. *Wild v. Rarig*, 302 Minn. 419, 446, 234 N.W.2d 775, 792 (1975). Allegedly defamatory statements were presumed false, but truth was a defense. *See Jadwin*, 367 N.W.2d at 480 (citing *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 294,

33 N.W. 856, 861-62 (1887); *Palmer v. Smith*, 21 Minn. 419, 420-21 (1875)). In the decision below, the Minnesota Supreme Court recognized that it must apply *Sullivan* and *Gertz* and related cases. Those cases pre-date the Internet by many years and are worth revisiting.

This petition is not a vehicle to overrule *Sullivan* or the actual-malice standard—though some have urged that outcome. But this petition is a vehicle to perhaps limit the application of *Sullivan* and its descendants in the context of matters of putatively public concern. Since *Gertz*, some members of the Supreme Court have questioned its reasoning and that of *New York Times*. Chief Justice' Burger's concurrence in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) explained that he continued to believe that *Gertz* was ill-conceived and "should be overruled." 472 U.S. at 64 (Burger, C.J., concurring).

Justice Rehnquist joined Chief Justice Burger's dissent from denial of certiorari in *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 476 U.S. 1187, 1188, (1986) observing that *Sullivan*, in practice, "constitutionally barr[s]" an individual from clearing her or his name in a court of law when it has been sullied in the court of public opinion by a false accusation of misconduct. *Id.*

Justice White's concurrence explained *New York Times* "was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and

slander." *Dun & Bradstreet*, 472 U.S. at 766. Justice White's views evolved over the intervening years, and he "came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it" and he "remain convinced that *Gertz* was erroneously decided." *Id.* He continued, "I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." *Id.*

> The *New York Times* rule thus 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 that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. at 767-68. (White, J., concurring)

Newer members of the U.S. Supreme Court have also criticized this line of cases. Justice Thomas dissented from denial of certiorari in *McKee v. Cosby*, 139 S. Ct. 675 (2019), explaining in detail

that "there appears to be little historical evidence that suggesting that the *New York Times*' holding follows the original understanding of the First or Fourteenth Amendment." *Id.* at 682. Justice Thomas would "reconsider our jurisprudence in this area." *Id.; see also Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, 142 S. Ct. 2453 (2022) (Thomas, J. dissenting from denial of cert.) (same).

Joining Justice Thomas in a later case, Justice Gorsuch dissented from denial of certiorari in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021), which explained how changes in the media landscape had undermine the reasoning of *Gertz* and *New York Times*. *Id.* at 2427 ("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."); *see also id.* at 2428 ("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.") Nowhere is this change in media landscape more obvious than the ubiquity of the Internet.

These judges are not alone. Before joining the Court, Justice Kagan observed that "[s]everal commentators have noted that to 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." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & SOC. INQUIRY 197, 207 (1993); *see, also Tah v. Global Witness Pub., Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting) (noting that the First Amendment's actual malice requirement bears "no relation to the text, history, or structure of the Constitution"); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 817-18 (1986) (answering the titular question, yes); *see generally* David McGowan, *A Bipartisan Case Against* New York Times v. Sullivan, 1 J. FREE SPEECH L. 509 (2022).

This petition is safe in the sense that does not seek to overrule the "actual malice" standard. And by revisiting the public-concern test, the Court can both help guide lower courts and perhaps limit the degree to which the "actual malice" standard displaces otherwise-functional state tort law. Justice Gorsuch correctly observed that it is "less clear is how well *Sullivan* and all its various extensions serve its intended goals in today's changed world," and "given the momentous changes in the Nation's media landscape since 1964" the Court may wish to revisit the type of question presented in this petition. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2430-31 (2021) (Gorsuch, J. dissenting from denial of cert.).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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