No. _____

In the

Supreme Court of the United States

MYPILLOW, INC. AND MICHAEL J. LINDELL,

Petitioners,

v.

US DOMINION, INC., ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A defamation lawsuit has been filed by a for-profit corporation ("Dominion") whose machines tabulated ballots in 28 States in the 2020 Presidential election. Dominion's complaint alleges that the defendants falsely stated that the election was "stolen" because of flaws and abuse of Dominion's voting machines. The defendants are (a) an individual ("Lindell") who has criticized the tabulation of votes and (b) the corporation he founded and owns in part ("MyPillow"). Dominion has widely publicized its defamation lawsuit and claims more than $1.3 billion in damages. The 115-page complaint contains no allegation that Lindell ever personally made any statement or personally committed any act manifesting subjective knowledge of falsity or reckless disregard of the truth or falsity of his assertions. To this day Lindell continues to declare that his criticism is true. Lindell moved under FRCP 12(b)(6) to dismiss Dominion's complaint under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for failure to allege actual malice. The motion was denied by the district judge on the ground that circumstantial evidence, such as a potential finding by a jury that Lindell's assertion "is so inherently improbable that only a reckless man would believe it" satisfies the constitutional "actual malice" standard. Lindell and MyPillow appealed the district court decision under 28 U.S.C. § 1291. The court of appeals dismissed the appeal on jurisdictional grounds.

The Question Presented is:

Whether a critic of official conduct may immediately appeal under 28 U.S.C. § 1291 a district

judge's refusal to dismiss under *New York Times Co. v. Sullivan* a defamation complaint against him, if the critic's motion to dismiss accepts the truth of all the allegations of the complaint, and its denial will result in his enduring long and expensive discovery and pretrial proceedings.

PARTIES TO THE PROCEEDINGS

US Dominion, Inc.

Dominion Voting Systems, Inc.

Dominion Voting Systems Corporation

My Pillow, Inc.

Michael J. Lindell

CORPORATE DISCLOSURE STATEMENT

My Pillow, Inc. has no parent corporation. There is no publicly held company that owns 10% or more of the stock of My Pillow, Inc.

STATEMENT OF RELATED PROCEEDINGS

My Pillow, Inc. v. US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation, No. 21-cv-01015, United States District Court for the District of Minnesota. Order transferring case to U.S. District Court for the District of Columbia entered Aug. 25, 2021.

Michael J. Lindell v. US Dominion, Inc., Dominion Voting Systems, Inc., Dominion Voting Systems Corporation, Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited, No. 21-cv-01332, United States District Court for the District of Minnesota. Order transferring case to U.S. District Court for the District of Columbia entered Aug. 25, 2021.

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US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 49 (D.D.C. 2021).

US Dominion, Inc. v. MyPillow, Inc., Civil Action No. 1:21-cv-0445 (CJN), Order (D.D.C. March 1, 2022).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered an order dismissing petitioners' appeal on Jan. 20, 2022. On April 6, 2022, The Chief Justice granted petitioners' application to extend the time to file a petition for writ of certiorari until June 19, 2022. This Court has jurisdiction to review the order of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> 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.

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

A. Introduction

Currently under active consideration by this Court is the controversial application of the "actual malice" standard of *New York Times v. Sullivan* to private public figures. *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*, No. 21-802. Recent notorious defamation trials involving former vice-presidential candidate Sarah Palin[1] and actors

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[1] *E.g.* Tom Hays and Larry Neumeister, "Jury rejects Sarah Palin's lawsuit against New York Times," *Associated Press*, Feb. 16, 2022, *available at* https://apnews.com/article/sarah-palin-business-shootings-alaska-lawsuits-42d05c8f2964519fd6848f2cd551d6d9; Jon Blistein, "Sarah Palin Loses Again: Jury Rejects Defamation Suit Against 'New York Times,'" *Rolling Stone*, Feb. 15, 2022, *available at* https://www.rollingstone.com/culture/culture-news/sarah-palin-defamation-lawsuit-new-york-times-thrown-out-1300105/; Danny Cevallos, "Why Sarah Palin lost her NYT libel suit –

Johnny Depp and Amber Heard[2] have generated much public discussion regarding the breadth of the unanimous 1964 landmark decision of this Court that resoundingly recognized a First Amendment "privilege for criticism of official conduct" (376 U.S. at 282). Recent opinions by Justices Thomas and Gorsuch have questioned whether "[r]ules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business . . . leave even ordinary Americans without recourse for grievous defamation." *Berisha v. Lawson,* 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J. dissenting from denial of certiorari). See also the dissenting opinion of Justice Thomas and Justice Thomas, concurring in denial of certiorari, *McKee v. Cosby*, 139 S. Ct. 675 (2019)..

This Court unanimously recognized in 1964 that "freedom of expression upon public questions is

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twice," *NBC News*, Feb. 15, 2022, *available at* https://www.nbcnews.com/think/opinion/why-sarah-palin-lost-libel-suit-against-new-york-times-ncna1289162.

[2] *E.g.* Kalhan Rosenblatt, "Johnny Depp and Amber Heard defamation trial: Summary and timeline," *NBC News*, Apr. 27, 2022, *available at* https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136; Kenzie Bryant, "The Johnny Depp-Amber Heard Defamation Trial: The Makings of a "Remarkable" Moment in American Celebrity," *Vanity Fair*, Apr. 11, 2022, *available at* https://www.vanityfair.com/style/2022/04/johnny-depp-amber-heard-us-virginia-defamation-trial.; Fabio Bertoni, "Why the Washington Post Wasn't Named in the Johnny Depp-Amber Heard Trial," *The New Yorker*, June 3, 2022, *available at* https://www.newyorker.com/news/daily-comment/why-the-washington-post-wasnt-named-in-the-johnny-depp-amber-heard-trial.

secured by the First Amendment" (376 U.S. at 269) and that "debate on public issues should be uninhibited, robust, and wide-open." (376 U.S. at 270). "The First Amendment recognizes no such thing as a 'false' idea." *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). Accordingly, this Court unanimously agreed that defamation lawsuits may not be maintained **against individuals who express criticism of the official conduct of public business** without proof that the critic acted with "actual malice."

The central thesis of the Court's 1964 opinion has not been disputed in the recent controversies. Currently challenged are decisions of this Court and lower federal and state courts that have extended the constitutional shield beyond criticism of the official conduct of public business. Justice Thomas approved in his *McKee v. Cosby* opinion of the common-law privilege governing "public conduct of a public man" and designation of such criticism as a "'matter of public interest' that could 'be discussed with the fullest freedom' and 'made the subject of hostile criticism.'" 139 S. Ct. at 679.

This petition presents a recurring issue of appellate jurisdiction that controls whether the aspect of *New York Times Co. v. Sullivan* that is not disputed will be effectively implemented. This is the legal issue that petitioners seek to argue in the court of appeals:

If a defamation complaint filed by a plaintiff who has been criticized for maladministration of a public function fails to allege subjective "actual

malice," must the district court grant the defendant's motion to dismiss?

The court of appeals' rejection of petitioners' appeal on jurisdictional grounds prevents an appellate court from meaningfully applying the "actual malice" standard to protect from harassing litigation expression criticizing official conduct of public business.

Lindell publicly criticized how Dominion implemented the momentous public duty it undertook in 28 States during the 2020 Presidential election. This was a private citizen's published personal opinion of the "public conduct of a public man." Whether or not history ultimately validates Lindell's opinion, he may not be sued for expressing it unless he acted with "actual malice."

He and MyPillow have asked a federal appellate court to consider his appeal from a district judge's decision denying his Rule 12(b)(6) motion to dismiss a defamation complaint that fails to satisfy the constitutional standard announced by this Court in *New York Times Co. v. Sullivan*. The appellate court refused to decide the merits of Lindell's appeal because it held that 28 U.S.C. § 1291 authorizes an appeal ***only*** from an adverse ***final*** judgment. This decision condemns any honest and tenacious critic of the administration of a public function to a monumentally exhausting and devastatingly costly judicial process before an appellate court has any opportunity to decide whether a district court has correctly applied the constitutional standard. It thereby obliterates the constitutional protection

afforded by the non-controversial aspect of *New York Times Co. v. Sullivan.*

B. The Complaint

Dominion consists of three for-profit corporations (paras. 6, 7, 8). It "provides local election officials with tools they can use to run elections" (para. 157). Paragraph 157 alleges, "In 2020, state and local election officials and bipartisan poll workers in 28 'red' and 'blue' states administered their elections by using Dominion's tabulation devices to count paper ballots."

Paragraphs 34-153 allege that, in various contexts and at different times between the Presidential election and the filing of the complaint, Lindell asserted that the election had been "stolen" because of defects in Dominion's voting machines and lack of integrity in the tabulation of votes. The complaint calls this assertion the "Big Lie."

The complaint fails to allege that Lindell personally made any statement or committed any act manifesting subjective knowledge or any doubt whatsoever of the truth of his statements regarding the integrity of Dominion and its voting machines. Lindell asserts today, as he did throughout the relevant period, that his statements regarding Dominion, its voting machines, and the integrity of the tabulation were, and continue to be, valid, accurate, and true.

The complaint also fails to allege that Lindell personally made any statement or committed any act manifesting subjective reckless disregard of the truth or falsity of his statements regarding Dominion, its

voting machines, and the integrity of the tabulation of votes.

The complaint frequently alleges that Lindell "knowingly lied" or "knowingly deceived" (*e.g.*, paras. 70, 103, 113; *see also* paras. 1, 71, 162, 164). The ***only*** support in the complaint for the adverb "knowingly" is circumstantial – *i.e.*, that Lindell should have known because his expressed assertions were "inherently improbable." Paragraph 164 of the complaint declares, with no direct proof of his state of mind, that Lindell acted with "actual malice." Paragraph 165 alleges that 27 statements were made by Lindell with a "malicious motive" but alleges no personal statement or act demonstrating that he subjectively knew any statement to be false or made any statement with reckless disregard of its truth or falsity.

C. The Motion To Dismiss

Petitioner moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint because Dominion failed to allege the "actual malice" that must be proved in a defamation lawsuit by a public figure under *New York Times Co. v. Sullivan*. The motion noted (1) that the subject of Lindell's allegedly defamatory statements was the integrity of the 2020 Presidential election, a "public issue" that must be open to "free public discussion," and (2) that the complaint contained "no plausible allegation that Mr. Lindell had any subjective doubt of the truth of his statements or that they were made with reckless disregard of their truth."

D. Denial of the Motion

The district court combined for hearing and decision Dominion's defamation lawsuit against MyPillow and Lindell with two other defamation actions filed by Dominion against other defendants who had also challenged the integrity of Dominion and its tabulation machines. Asserting several times that Lindell's statements were "inherently improbable," the district court denied petitioners' motion to dismiss in three pages of a 44-page opinion. (Pet. App. 4-62).

E. Attempts To Appeal

Petitioners moved in the district court for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). The district court failed to rule on the motion before the 30-day period for appeal under 28 U.S.C. § 1291 was about to expire. Petitioners therefore filed a notice of appeal on the next-to-last day authorized by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, September 9, 2021. Dominion moved 53 days later, on November 1, 2021, to dismiss the appeal. In a one-paragraph order the court of appeals dismissed petitioners' appeal on the ground that the denial of petitioners' motion to dismiss "does not qualify for immediate review under the collateral order doctrine" because petitioners had not "demonstrated that the order denied a 'colorable' immunity defense" and "the order is effectively reviewable on appeal from final judgment." (Pet. App. 1-3). On March 1, 2022, the district court denied petitioners' request for certification of an interlocutory appeal. (Pet. App. 65-71).

REASONS FOR GRANTING THE WRIT

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), this Court unanimously endorsed history's verdict on the Sedition Act of 1798 – that "the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." 375 U.S. at 276.

Dominion's gargantuan lawsuit, accompanied by mammoth national publicity, against a critic of the governmental function Dominion performed in the 2020 Presidential Election, accomplishes precisely what the Sedition Act sought to achieve. It is designed to silence Lindell, a critic who continues to believe[3] – as he believed when he made the statements that Dominion now characterizes as libelous -- that Dominion's exercise of governmental authority was faulty.

I.

REJECTION OF A *NEW YORK TIMES CO. v. SULLIVAN* DEFENSE IN A DEFAMATION LAWSUIT IS, LIKE REJECTION OF A QUALIFIED IMMUNITY DEFENSE, AN IMMEDIATELY APPEALABLE COLLATERAL ORDER

This Court said in *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009), that under the collateral-order doctrine a limited set of district-court orders are

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[3] *Cf.* Lindell's April 28, 2021 televised interview with Jimmy Kimmel on *Jimmy Kimmel Live*, *available at* https://www.youtube.com/watch?v=_2N27160HKs, at 9:40 ("I believe that you are sincere.").

reviewable 'though short of final judgment.'" (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996)). This doctrine derives from *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-546 (1949), which held that district court orders prior to final judgment are immediately appealable if they finally resolve important questions separate from the merits of the action that are effectively unreviewable on appeal from the final judgment. Immediate appeal vindicates rights that "cannot be effectively vindicated after the trial has occurred," such as the "entitlement not to have to answer for . . . conduct in a civil damages action." *Mitchell v. Forsyth*, 472U.S. 511, 525 (1985).

New York Times Co. v. Sullivan affords a defendant sued for defamation by a public official whom he criticized the same kind of protection that the law provides to law enforcement by the doctrine of qualified immunity. This Court held in *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985), that a district court's denial of a defendant's assertion that he is entitled to qualified immunity from liability is immediately appealable as a collateral order before discovery and trial. This Court said in *Iqbal* that "a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of § 1291." 556 U.S. at 672. The Court repeated this proposition in *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014) ("pretrial orders denying qualified immunity generally fall within the collateral order doctrine.")

Two summary decisions rendered at the inception of this Term of Court demonstrate this Court's acknowledgement of expeditious

implementation of a qualified-immunity defense. In *City of Tahlequah, Oklahoma v. Bond,* 142 S. Ct. 9 (2021), and in *Rivas-Villegas v. Cortesluna*, No. 20-1539, 142 S. Ct. 4 (2021), this Court reinstated district court orders granting summary judgment to defendants who, the Court concluded, had valid defenses of qualified immunity. By promptly implementing the defense even before any final judgment this Court relieved law-enforcement personnel of the cost and stress of extended judicial proceedings.

In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-107 (2009), this Court declared that "the decisive consideration" in determining whether there is jurisdiction over an immediate appeal from an order other than a final judgment is "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" (quoting *Cohen*, 337 U.S. at 546). See also *Will v. Hallock*, 546 U.S. 345, 349 (2006).

This Court explained in *Plumhoff* (572 U.S. at 772) that delaying appellate review until there is an appeal from a final judgment defeats effective review of the district court's decision "because by that time the immunity from standing trial will have been irretrievably lost." The Court of Appeals for the District of Columbia Circuit held in *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991), that "trial court error [in denying immunity at the dismissal stage] could defeat much of the defense's purpose – to protect officials not only from liability but also from undue burdens of litigation."

Other defenses comparable to qualified immunity have a "litigation-avoidance component" that is effectively extinguished by delaying appeal until there is a final judgment. Hence immediate appeal has been authorized by this Court in other contexts:

(a) Speech or Debate Clause immunity – *Helstoski v. Meanor*, 442 U.S. 500, 506-507 (1979);

(b) Double Jeopardy – *Abney v. United States*, 431 U.S. 651, 659-662 (1977);

(c) Eleventh Amendment – *P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-145 (1993);

(d) Presidential immunity – *Nixon v. Fitzgerald*, 457 U.S. 731, 742-743 (1982).

The District of Columbia Circuit has approved immediate appeal when a defendant invokes immunity under the Foreign Sovereign Immunities Act (*Process & Indus. Devs. v. Federal Republic of Nigeria*, 962 F.3d 576, 581-583 (D.C. Cir. 2020)), and under the Westfall Act (*Wuterich v. Murtha*, 562 F.3d 375, 381-383 (D.C. Cir. 2009).

The Fourth and Fifth Circuits have recognized that district court denials of First Amendment defenses constitute collateral orders that may be immediately appealed. In *Smith v. McDonald*, 737 F.2d 427, 428 (4th Cir. 1984), the court of appeals heard an appeal from an interlocutory order saying that validity of the constitutional defense "cannot be effectively reviewed after final judgment" because "[d]eferral would defeat [defendant's] claim that he

should not be put to trial." In the same vein the Fifth Circuit said in *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 752 (5th Cir. 2014), that denial of "constitutionally-protected rights to free speech and petition" should be reviewed as a collateral order because "[s]uch constitutional rights deserve particular solicitude within the framework of the collateral order doctrine."

Indeed, the text of the unanimous opinion in *New York Times Co. v. Sullivan* treats petitioners' criticism of Dominion's conduct of public business as "privileged." See 376 U.S. at 261-262. That privilege – which should shield the critic from having to suffer an expensive and stressful judicial proceeding -- can realistically be vindicated only if the district court's rejection of the defense is deemed to be an immediately appealable collateral order. Deferral of an appeal until final judgment results in the irretrievable loss of the right to avoid undue burdens of litigation.

II.

CASES ON THIS COURT'S DOCKET IN RECENT TERMS HAVE MANIFESTED THE COURT'S CONCERN OVER THE APPEALABILITY OF COLLATERAL ORDERS

The Question Presented in this petition may appear to be a narrow jurisdictional issue – *i.e.*, whether 28 U.S.C. § 1291 permits appellate review of the particular interlocutory order issued by the district court. The proper understanding and application of Section 1291 to various collateral orders is, however, an important question that has divided

the Circuits. There is little consensus today on the distinction between interlocutory rulings of district judges that qualify for immediate appeal as collateral orders and those that must await final judgment.

The Court should grant certiorari on the jurisdictional issue presented by this petition so as to provide guidance to lower federal courts on where the line should be drawn between immediately appealable interlocutory orders and those that must await final judgment. This is an important question in which the Court has shown interest in recent Terms.

In *Salt River Project Agricultural Improvement and Power District v. Tesla Energy Operations, Inc.*, No. 17-368, *writ of certiorari dismissed*, 138 S. Ct. 1323 (2018), the parties, as well as the United States as *amicus curiae*, briefed the only issue on which certiorari was requested and granted -- the scope of the collateral-order doctrine. The case was settled, however, before oral argument, and there has been no occasion since for the Court to consider and decide, on plenary briefing and oral argument, this important legal issue.

In *Hinson v. Bias*, No. 19-872, the Court came to the verge of again considering the breadth of the collateral-order doctrine. The Eleventh Circuit had vacated the denial of summary judgment to a defendant asserting a qualified-immunity defense. 927 F.3d 1103 (11th Cir. 2019). Opposition and reply briefs were filed in this Court focusing on the issue of immediate appealability. Following conference the Court requested and received the records of the lower

courts. The Court then denied the petition. 141 S. Ct. 233 (2020).

Earlier in the 2019 Term, the Court was told by the Solicitor General, "There is tension in the lower courts' approaches to applying the collateral-order doctrine" when interlocutory rulings by district judges reject defenses of military contractors comparable to qualified immunity. Brief for the United States as Amicus Curiae, *CACI Premier Technology, Inc. v. Al Shimari*, No. 19-648, pp. 5-6. The Solicitor General recommended in his *amicus* brief that if the *CACI* case was not mooted by other cases then awaiting decision, review by the Court "addressing the immediate appealability issue would likely resolve" disagreement in the lower courts over "derivative sovereign immunity." On the last day of the 2020 Term, the petition for certiorari was denied. 141 S. Ct. 2850 (2021).

This petition affords the Court an opportunity to provide the guidance to the federal judiciary that the Court would have given, if not for a last-minute settlement in the *Salt River* case and if not for intervening circumstances in the *Hinson* and *CACI* cases.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari. If certiorari is granted in *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*, No. 21-802, the Court may deem it appropriate to consider the two cases in sequence.

Respectfully submitted,

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