No. 21-_____

In The

Supreme Court of the United States

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a D. JAMES KENNEDY MINISTRIES,

Petitioner,

v.

SOUTHERN POVERTY LAW CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMY D. BAILIE
WEBER, CRABB & WEIN, P.A.
5453 Central Avenue
St. Petersburg, Florida 33710
(727) 828-9919
Jeremy.Bailie@webercrabb.com

DAVID C. GIBBS, III
Counsel of Record
THE NATIONAL CENTER FOR LIFE & LIBERTY, INC.
2648 F. M. 407, Suite 240
Bartonville, Texas 76226
(727) 362-3700
dgibbs@gibbsfirm.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *New York Times v. Sullivan*, this Court upended common law defamation jurisprudence creating a more-often-than-not insurmountable bar for a public figure to plead and prove a defamation claim—the "actual-malice" standard. The term "public figure" was later expanded to explicitly include non-elected public officials in *Curtis Publishing Co. v. Butts*. Since the "actual malice" standard, particularly as applied to non-elected public officials, conflicts with the correct, original understanding of the First Amendment, this Court should untangle defamation claims from the clutches of the First Amendment and ensure a public figure's right to assert a common law defamation claim for redress for reputational harm remains protected.

1. Whether this Court should reconsider *Sullivan*'s "actual-malice" standard or, at a minimum, cabin *Sullivan*'s "actual malice" standard to speech concerning public officials and be eliminated altogether for private public figures.

PARTIES TO THE PROCEEDING

Petitioner is Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries. Petitioner was plaintiff in the district court and plaintiff-appellant in the court of appeals. Petitioner has no parent corporation and no publicly held company owns 10% or more of Petitioner's stock.

Respondent is Southern Poverty Law Center ("SPLC"). Respondent was defendant in the district court and defendant-appellee in the court of appeals.

RELATED PROCEEDINGS

This case arises from the following lower court proceedings:

- *Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries v. Amazon.com, Inc., et al.*, No. 19-14125 (11th Cir.) (opinion affirming judgment of district court, issued July 28, 2021) (reported at 6 F.4th 1247);
- *Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries v. Amazon.com, Inc., et al.*, No. 2:17-cv-566-MHT (N.D. Ala.) (order adopting report and recommendation and granting the motions to dismiss, filed September 19, 2019 (reported at 406 F.Supp.3d 1258); and
- *Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries v. Amazon.com, Inc., et al.*, No. 2:17-cv-566-MHT (N.D. Ala.) (report and recommendation recommending the district court grant the motions to dismiss, filed February 21, 2018) (unreported, available at 2018 WL 4697073).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR REVIEW

Petitioner, Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries (the "Ministry"), respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals is reported at 6 F.4th 1247. (App. at 1). The opinion of the district court is reported at 406 F.Supp.3d 1258. (App. at 16). The report and recommendation of the magistrate judge is unreported but is available at 2018 WL 4697073. (App. at 112).

JURISDICTION

The Eleventh Circuit entered judgment on July 28, 2021. (App. at 1). This Court previously extended the deadline for Petitioner to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This petition presents an important question this Court has struggled with for the better part of fifty years: Is it time to reconsider *Sullivan* and the actual malice standard it imposes on every public figure and, sometimes, non-public figures that happen to be thrust into the limelight? The answer to that question is resoundingly "yes." Constrained by this Court's opinion in *Sullivan* and its progeny, the Magistrate Judge, District Court, and Eleventh Circuit below absolved Respondent of any liability for its intentional impugning the Ministry's name and reputation in the public square.

This Court's "actual-malice" standard, invented for a particular time and a particular purpose, has become obsolete and does not serve any of the interests it was designed to protect by limiting private individuals from bringing defamation claims against other private companies or individuals. *Sullivan*'s near-absolute-prohibition on public officials bringing libel claims

cannot trace its roots to the Founding, and its extension to every public figure is fundamentally untethered from the original understanding of the First Amendment. Today, *Sullivan* no longer acts as a bulwark to protect civil rights. Instead of the shield it was designed to be, it is now a sword used to bludgeon public figures with impunity while hiding behind this Court's mistaken view of the First Amendment.

Since 1964, nearly a dozen members of this Court have questioned various aspect of *Sullivan* and its viability. Most recently, Justice Thomas pointedly criticized its "policy-driven decision[] masquerading as constitutional law." *McKee v. Cosby*, 139 S. Ct. 675, 203 L. Ed. 2d 247 (2019) (Thomas, J., dissenting). And Justice Gorsuch "add[ed] [his] voice" to the now-choir of voices calling on the Court to "return[] its attention . . . to a field so vital to the 'safe deposit' of our liberties." *Berisha v. Lawson*, 141 S. Ct. 2424, 2430 (2021) (Gorsuch, J., dissenting). This case presents this Court that opportunity.

A. Factual Background

This case was resolved by the District Court and the Eleventh Circuit at the motion to dismiss stage limiting the facts of this case to the Ministry's well-pleaded factual allegations. Relevant to this Court's consideration, the facts are straightforward.

The Ministry is a not-for-profit Christian ministry that primarily exists to broadcast *Truths That Transform*, a television program that airs the

previously-recorded messages of its (now-deceased) founder, Dr. D. James Kennedy. (App. at 19–20). In fact, since much of the Ministry's work consists of rebroadcasting programs recorded before Dr. Kennedy's death, the message cannot have changed since his death. These messages are faith based and are based in Dr. Kennedy's beliefs and the Bible's teachings. (App. at 20).

SPLC declared to the world the Ministry is to be considered a "hate group" because of these religious teachings by Dr. Kennedy. (App. at 21). SPLC made this determination and published its "hate group" designation of the Ministry on its "Hate Map."[1] (App. at 20–21). In addition to its website, SPLC also widely distributed this "hate group" designation to third parties in fundraising materials, direct mail solicitations, publications, and training programs. (App. at 20–21). SPLC intended for its readers to rely on this information as a statement of fact. And SPLC publicly stated its aim is to "completely destroy" the groups it has listed on its Hate Map. *See* n.1, *supra*.

For some of the groups listed, there is good reason to wish their end. To put this designation in context, SPLC associated the Ministry with real hate groups like the Ku Klux Klan, white nationalists, and the neo-Nazi movement—groups that have been associated with and have well-documented histories of horrific violence and true acts of hate. There are no facts

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[1] SPLC's "Hate Map" is located on its website. https://www.splcenter.org/hate-map. (App. at 44).

(nor does SPLC include any on its "hate map") that could ever bring the Ministry within the "hate group" definition. Indeed, SPLC's broad brush wrongfully paints the Ministry in a horrible light leaving the "hate map" readers with the impression the Ministry participates in acts of hate like the KKK and neo-Nazis. Nothing could be further from the truth. Declaring a Christian ministry, that exists to serve its community and share the love of Jesus with the world, to be a hate group constitutes libel *per se* under Alabama law. (App. at 19).[2]

B. Procedural History

The Ministry filed its Complaint in the Northern District of Alabama against SPLC. Not relevant here, the Ministry brought additional claims against GuideStar USA, Amazon.com, Inc. and the AmazonSmile Foundation (the "Amazon Defendants"). (App. at 117). Thereafter, the Ministry filed its First Amended Complaint alleging its common law defamation claims against SPLC and related claims against the Amazon Defendants for its acts against the Ministry in reliance on SPLC's hate group designation. (App. at 117).

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[2] In 2018, Attorney General Sessions ordered the Department of Justice to review (and potentially cease) its partnerships with Respondent due to its "hate group" designations that "unfairly defame Americans for standing up for the Constitution or their faith." Attorney General Sessions, Attorney General Jeff Sessions Delivers Remarks at the Alliance Defending Freedom's Summit on Religious Liberty (Aug. 8, 2018) (transcript available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-alliance-defending-freedoms-summit) (last visited November 22, 2021).

Both SPLC and the Amazon Defendants filed motions to dismiss the First Amended Complaint. (App. at 113). The District Court referred the motions to Magistrate Judge David A. Baker, who issued a Report and Recommendation recommending both motions be granted and the case by dismissed with prejudice. (App. at 113–14). The Ministry timely objected to the Magistrate's Report and Recommendation, and the District Court heard argument of counsel on the motions to dismiss on May 29, 2018. Thereafter, the District Court entered its Order granting the motions to dismiss and entering judgment for SPLC and the Amazon Defendants. (App. at 17).

Relevant here, the Magistrate Judge's and District Court's analyses of the Ministry's defamation claim against SPLC began and ended with *Sullivan*. (App. at 23, 121). Specifically, the District Court began by explaining the near-insurmountable hurdle the Ministry must clear: the Ministry must "plausibly allege" the defamatory statement was: (1) provable as false; (2) actually false; and (3) made with actual-malice. (App. at 23) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). Ultimately, the District Court concluded the Ministry did not complete the herculean effort. (App. at 44–45). The District Court rejected some of the Ministry's allegations as "conclusory" and determined the complaint lacked "plausible" allegations of SPLC's internal, subjective knowledge that its "hate group" designation of the Ministry was false. (App. at 44).

Also applying *Sullivan*, the Eleventh Circuit concluded the courthouse doors were slammed shut on the Ministry. (App. at 6). The Eleventh Circuit, with the assistance of oral argument, affirmed the district court's opinion on July 28, 2021. (App. at 1). This Court's "actual-malice" standard had another victim. The Eleventh Circuit summed up its conclusion as to the claims against SPLC: "Because we agree that Coral Ridge failed to adequately plead actual malice, we affirm the dismissal of Coral Ridge's defamation claim." (App. at 6). Such was the sole basis for its affirming the District Court's dismissal—this Court's "actual-malice" standard that is presented for review in this Petition.

The District Court exercised jurisdiction in this matter under 28 U.S.C. § 1367 as the state law claims (common law defamation) were supplemental to the Ministry's federal law claims under Title II and the Lanham Act. (App. at 17). The District Court also had jurisdiction over the common law defamation claims under § 1332 as the parties are completely diverse and the amount in controversy exceeds $75,000. (App. at 17).

REASONS FOR GRANTING THE PETITION

Sullivan and its warts are no surprise to the members of this Court. The flaws in its reasoning and its primary criticisms are discussed below explaining why this Court should reconsider (or, at a minimum, cabin)

its holding. More importantly, *Sullivan* was a results-oriented decision and made out of whole cloth a standard for public official and public figure defamation that was not in place at the time of the Founding nor would have it been understood by those of the Founding-era as implicit in the protections of the First Amendment. This Petition presents a clean opportunity for this Court to reconsider *Sullivan* and it should take that opportunity.

"'This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one).'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478, 201 L. Ed. 2d 924 (2018) (quoting *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 500, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (Scalia, J., concurring in part and concurring in judgment)). Often, when asked to reconsider one of this Court's precedents that has had an outsized impact in a particular field for fifty years, stare decisis cautions against taking that opportunity. And for good reason. Decisions of this Court should be long-lasting and because that is the case this Court brings stability and predictability to the law.

But those concerns are not present here. Despite its age, *Sullivan* has not stood the test of time and is not to be celebrated as landmark constitutional guideposts like *Marbury v. Madison*, *Gideon v. Wainwright*, and those like it. The principles of stare decisis are not in opposition to reconsidering *Sullivan*. For instance, setting aside for the moment whether it was correctly

decided, unlike many instances where this Court is asked to reconsider its prior jurisprudence and must account for significant reliance interest, such is not present here. Any reliance interest would only be those who, by definition, had published false, defamatory statements. A consideration this Court can easily dispense with leaving this Court with the real question: Is now the time to reconsider *Sullivan*?

Our county is experiencing an era of unrivaled lows in the quality of public discourse coupled with the fact a lie "will gallop halfway round the world before the truth has time to pull its breeches on."[3] Not to mention the fact anyone with a cell phone and an internet connection can become a publisher and broadcast any message to the world—whether true or not. It is difficult to imagine a better time for this Court to readdress the limits of *Sullivan*.

As the Court explained in *Shelby County*, an uncommon exercise of this Court's substantial judicial power that alters the state-federal balance may be justified by "exceptional conditions" but that exercise of power must also change with the times and cannot simply justify its continued existence on the way things were in the past. *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 549, 553, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) (tracing the history of the Voting Rights Act and limiting its expansive congressional oversight of a

[3] Langworth, Richard M., *Galloping Lies, Bodyguards of Lies, and Lies for the Sake of Your Country*, September 30, 2020, available at (https://richardlangworth.com/galloping-lies) (last accessed November 19, 2021).

traditionally state function—elections). While *Sullivan* may have been appropriate for a season. Seasons change. And the time for *Sullivan* to fade into the annals of history has come.

I. *SULLIVAN* HAS BEEN RIGHTLY CRITICIZED FOR ITS UNINTENDED CONSEQUENCES AND ITS SHAKY CONSTITUTIONAL UNDERPINNINGS

At the time it was decided, *Sullivan* was warmly received since many saw the Court's decision as an important tool in protecting Civil Rights in the South.[4] In fact, some saw the Court's opinion as the last line of defense against an onslaught of enormous verdicts (and pending libel actions) against Northern newspapers and media companies aimed to shut out those that had the courage to speak about the atrocities being committed against Southern African-Americans. Kagan, Elena A., *A Libel Story:* Sullivan *Then and Now (reviewing Anthony Lewis, Make No Law: The* Sullivan

[4] As then-Professor Kagan explained, the verdict in *New York Times* carried a particular stench of injustice because of the circumstances surrounding the verdict. A Libel Story, at p. 202. *Sullivan*'s trial judge, Judge Walter Burgwyn Jones (a confederate sympathizer and believer in "white man's justice") presided over the trial, seated an all-white jury in a racially segregated courtroom, and found for Sullivan on every significant ruling. *Id.* Even worse, Sullivan was just the tip of the iceberg. *Id.* There was a coordinated campaign in the South to devastate the Northern press' ability to shed light on the atrocities being committed in the South seeking a combined $300 million in libel damages. *Id.* And if *Sullivan* had gone the other way, the coordinated effort likely would have succeeded. *Id.* at 200-01.

Case and the First Amendment (1991), 18 Law and Social Inquiry 197, 202–03 (1993) (hereinafter referred to as "A Libel Story").

Beginning with lofty goals (protecting Civil Rights and the freedom of the press and individuals to speak out against elected officials' wrongdoing), the Warren Court's purposivist leanings were on full display in *Sullivan*. The Court worked its way backwards to its ultimate decision: effectively eliminating a cause of action for libel against a public official. *Sullivan*'s progeny expanded that well-meaning goal far beyond its roots and ultimately federalized much of the common law tort of defamation.

The whispers of opposition to *Sullivan* after its inception have now grown into a deafening roar. Its criticism has generally fallen into two camps: (1) concerns over its practical implications and the virtual immunity it gives media companies and the impact that license has had on society and public discourse; and (2) *Sullivan*'s doctrinal shortcomings and the Court's failure to ground its analysis in either the text or the original understanding of the First Amendment.

A. *Sullivan*'s Disastrous Practical Effects Should be Enough for This Court to Reconsider its Decision

With the passage from the Warren Court to the Burger Court, a shift in *Sullivan*'s support began to make its way through the Court. Since *Sullivan*'s

inception, nearly a dozen justices of this Court have expressed concern with its onerous standard and its slamming shut the courthouse doors on legitimate claims of reputational harm. And leading constitutional scholars have joined in the criticism.

Justice White, who joined the Court's opinion in *Sullivan*, and some of its progeny,[5] came to appreciate its disservice to the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (White, J., concurring in judgment). Justice White explained his conversion. This Court "struck an improvident balance" between protecting the public's right to speak (and hear speech) about public officials and "the competing interest of those who have been defamed in vindicating their reputation." *Id.* Even in its short history, *Sullivan* had already begun to wreak havoc. Justice White explained the problem:

> [I]n *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there

[5] Justice White joined *Sullivan* and also joined (or wrote) some of its progeny, including, *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (expanding application of *Sullivan*'s actual malice rule to public figures that are not public officials); *Time, Inc. v. Hill*, 385 U.S. 374, 398, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (expanding application to claims against publisher for invasion of right of privacy); *Garrison v. State of La.*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (striking down Louisiana criminal libel statute); *St. Amant v. Thompson*, 390 U.S. 727, 728, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); among others.

> will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts.

Id. at 768.

Although Chief Justice Burger expressed his agreement with Justice White's concurrence in *Dun & Bradstreet, Inc.*,[6] his full-throated demand for *Sullivan* to be reconsidered came the following term in *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 476 U.S. 1187, 1188, 106 S. Ct. 2927, 91 L. Ed. 2d 554 (1986)

[6] *Dun & Bradstreet, Inc.*, 472 U.S. at 764 (Burger, C.J, concurring) (recognizing *Gertz* should be overturned and agreeing with Justice White's criticism of *NYT v. Sullivan*).

(Burger, C.J., dissenting from denial of certiorari). Chief Justice Burger and then-Associate Justice Rehnquist observed *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.* And *Sullivan*'s standard protects even "egregious conduct on the part of the media." *Id.* (quoting *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 780 F.2d 340 (3d Cir. 1985) (Becker, J.)).

At this same time, members of the Court were not the only legal minds wrestling with this issue. Across the street, members of Congress were concerned with the impact a reversal of *Sullivan* would have on media defendants and the White House was asked to wade into the "raging debate."[7] President Reagan's counselors, in response to correspondence from then-Representative Charles Schumer, advised caution from entering into the "raging debate" regarding the "near-impossibility of prevailing under the *New York Times*" actual malice standard. *Id.*

Professor Richard Epstein did not hesitate to jump into that raging debate.[8] Anywhere but 1960s deep-South Alabama, Sullivan's claims would have faced a

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[7] Ronald Reagan Presidential Library and Museum, John G. Roberts Collection, Box 66, *Libel Laws*, at p. 10. (available at https://www.reaganlibrary.gov/public/digitallibrary/smof/counsel/roberts/box-066/40_485_6909456_066_004_2017.pdf) (last visited November 21, 2021).

[8] Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. Chi. L. Rev. 782, 786 (1986).

skeptical judiciary and an even more suspicious jury. *Id.* And the case never would have survived pre-trial motion practice, much less making its way to the Court. By design, Sullivan brought suit in the Alabama courtroom (eloquently described by then-Professor Kagan) that he knew was sympathetic to his claims. *See* n.4, *supra*. Sullivan's outlandish claims and hand-picked venue became the "source of many of the modern problems with the law of defamation" since "the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth." *Id.* at 787. To put it bluntly, bad facts made bad law.

Prior to *Sullivan*, defamation claims were the sole province of common law courts. *Id.* at 788. But faced with such a clearly unjust verdict, this Court had to act. Something had to be done to right the injustice of the $500,000 verdict against the New York Times based on the flimsiest of evidence and a judicial system likely (if not openly) stacked against it. *Id.* The only problem, as Epstein points out, the Court had few instruments at its disposal to intervene in an otherwise state law matter. But, act it must.

Results-oriented, the Warren Court used the only tool in its toolbox—constitutionalizing. *Id.* By making the issue one of constitutional magnitude, the Court was able to federalize common law defamation and establish a framework to permit (or prevent) claims brought by public figures. *Id.* Deciding an issue it needed not reach, this Court created the actual-malice standard differing sharply from the existing body of

common law defamation. *Id.* at 795. Epstein explained the actual-malice standard's departure from then-recognized principles:

> The proposition stands in very sharp opposition to the majority common law position on the same question, which drew a line between statements of fact, for which liability was strict if the statements were false, and statements of opinion, which were generally privileged absolutely because they are incapable of being either true or false.

Id. at 795–96.

This Court's pre-*Sullivan* opinions bear this out. This Court had previously recognized public elected officials had the right, *post*-publication, to "find their remedies for false accusation in actions under libel law as providing for redress and punishment," only limiting the right to *pre*-publication restraint. *Id.* at 788 (quoting *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 718–19, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)). There was no "hint" of constitutional "infirmity" in permitting public figures to bring private tort actions for defamation. *Id.* One of the reasons this Court rejected the use of the pre-publication injunction in *Near* was precisely the existence of the post-publication claim for damages (e.g., the adequate legal remedy). *Id. Sullivan* devastates this delicate balance by eliminating the availability of a legal remedy.

After detailing both the common law history pre- and post- *Sullivan*, Epstein resounded the all-too familiar

refrain: *Sullivan* presents an often insurmountable bar for a public figure plaintiff since it requires proof of the defendant's internal state of mind. *Id.* at 813. Recognizing what has now become overwhelmingly evident, "[t]he difficulties of proof under an actual malice standard have a powerful influence on the overall behavior of the media." *Id.* at 809. What Professor Epstein could not have foreseen are the corresponding results of the near-complete immunity for media companies when applied to trillion-dollar tech companies.

Then-professor Elena Kagan explained that at the time, *Sullivan*'s result appeared "justified, correct, even obvious," but over time its unintended consequences have begun to stack up. A Libel Story, p. 208. Similar to Professor Epstein's criticisms, her analysis exposed how the actual malice standard "impose[d] serious costs" both to reputations and "the nature and quality of public discourse." *Id.* Discussing its "obvious dark side," *Sullivan*'s actual-malice standard "allows grievous reputational injury to occur without monetary compensation or any other effective remedy." *Id.* at 205. The culprits in these situations are often media companies, the same sympathetic defendants this Court bent the First Amendment to protect. The protections of the First Amendment extended to prevent injustice have now become a license to libel.

Although the jury may still be out on whether a causal connection exists, there is certainly anecdotal evidence *Sullivan* brought about a cultural shift in the press. *Id.* at 208. And it is easy to see why. Given its "get-out-of-jail-free card," the press has significant

breathing room (or, "a greater sense of entitlement and self-importance") to write and publish without serious accountability. *Id*. Then-Professor Kagan wrote:

> Is it possible that *Sullivan* bears some responsibility for a change in the way the press views itself and its conduct-a change that the general public might describe as increased press arrogance? It is wise to be wary about attributing too much cultural impact to a Supreme Court decision; yet it is hard to believe that those most directly affected by a decision like Sullivan are in no way changed by it. At the most basic level, judicial declarations of unaccountability can go to the head. It is hardly unthinkable that increased legal protection may lead to a greater sense of entitlement and self-importance (which in turn may manifest itself in questionable conduct). But the effects of *Sullivan* on the press's conception of itself may go yet deeper. Just as the Court treats the story of *Sullivan* as an archetype, so too may the press: the heroic role of the Times in that case helps to define and inform self-understanding. This mythical image may at times serve as model, but it also may blind the press to numerous less attractive aspects of its role and performance. Thus, the self-image of the press becomes semi-delusional, and journalists cease to ask the questions of themselves which they ask of other powerful actors in society.

A Libel Story, p. 210.

A few years later, Justice Scalia publicly condemned *Sullivan* and its failure to find any footing in the text or original understanding of the First Amendment. In one of a few public statements regarding *Sullivan*, Justice Scalia stated he "abhor[ed]" *Sullivan*.[9] Justice Scalia's primary criticism was *Sullivan*'s lack of support in the original understanding of the First Amendment. Lewis & Ottley, John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DePaul L. Rev. 1, 35–36 (2014) ("In his view, the framers of the Constitution 'would have been appalled' by the decision and the adoption of the actual malice standard for public officials. According to Justice Scalia, the Supreme Court 'was revising the Constitution' with its opinion, not interpreting it.") (internal citations removed).

Next to pick up the mantle of calling out *Sullivan*'s disservice to our legal system, Justice Thomas similarly criticized *Sullivan* (discussed in more detail below) for its shaky foundation. In his view, there is little, if any, historical evidence the actual-malice rule comports with the original understanding of the "First Amendment." *McKee*, 139 S. Ct. at 676, 678. Although *McKee* presented a poor vehicle for that review, Justice Thomas called for the Court to take up the case that presents the question in the appropriate case. *Id.* Just

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[9] Charlie Rose, *Antonin Scalia Interview* (Nov. 27, 2012), https://charlierose.com/videos/17653 (last visited October 29, 2021), at 29:21.

last term, Justice Thomas reiterated his call for the Court to reconsider *Sullivan* re-stating the thought provoking criticism: "This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears 'no relation to the text, history, or structure of the Constitution.'" *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting) (quoting *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J. dissenting)).[10]

Most recently, Justice Gorsuch similarly dissented from the Court's denial of certiorari arguing the "momentous changes in the Nation's media landscape since 1964" should give the Court reason to return to its analysis of *Sullivan* and review whether it remains the correct standard. *Berisha*, 141 S. Ct. at 2429 (Gorsuch, J., dissenting). Justice Gorsuch noted the purposivist underpinnings of *Sullivan* (or, as he phrased it, "[d]epartures from the Constitution's original public meaning") "are usually the product of good intentions. But less clear is how well Sullivan and all its various extensions serve its intended goals in today's changed world." *Id.*

Scholars from every position on the political spectrum and Justices appointed by every President since John F. Kennedy have called for this Court to consider

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[10] Rejecting his request for the Court to slightly modify the pleading standard applicable under *Sullivan*, this Court recently denied Tah's Petition for Writ of Certiorari. *Tah v. Glob. Witness Publ'g, Inc.*, No. 21-121. Although Tah failed to squarely present Judge Silberman's call for *Sullivan* to be overruled.

Sullivan's outside impact on our society. It is time to answer that call.

B. *Sullivan*'s Actual-Malice Test Finds No Support in Either the Text or Historical Understanding of the Constitution

Any examination of the problems with *Sullivan*'s underpinnings risks merely plowing well-worn ground. Multiple petitions for certiorari have come before this Court explaining the disconnect between the original understanding of the First Amendment and *Sullivan*'s actual-malice standard. Nonetheless, to begin, there is no reading of the First Amendment's text which mandates the actual malice standard. The analysis therefore rests on whether the original understanding of the "freedom of speech" and "freedom of the press" included an understanding that those freedoms encompassed protection from libel claims but for that small subset of cases where the false statements were published with actual knowledge of the falsity. As explained many times before, "those who won our independence"[11] would not have understood the First Amendment to impose the actual-malice standard. Justice Gorsuch provided a brief historical overview:

> The Bill of Rights protects the freedom of the press not as a favor to a particular industry,

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[11] *Whitney v. California*, 274 U.S. 357, 375, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

> but because democracy cannot function without the free exchange of ideas.
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> * * *
>
> Like most rights, this one comes with corresponding duties. The right to due process in court entails the duty to abide the results that process produces. The right to speak freely includes the duty to allow others to have their say. From the outset, the right to publish was no different. At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused. This principle extended far back in the common law and far forward into our Nation's history. As Blackstone put it, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods "he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries on the Laws of England 151–152 (1769). Or as Justice Story later explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825).

Berisha, 141 S. Ct. at 2426 (Gorsuch, J., dissenting).

The idea that a libelous publication would have to be evaluated to determine whether it is protected by the First Amendment would have been a completely foreign concept to the Founders. The Founders understood libel to be completely outside the protections of the First Amendment. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (internal citations omitted). This Court's precedents (until *Sullivan*) made that clear. For instance, this Court explained in the context of a conviction for distributing religious literature:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky, 315 U.S. at 571–72 (internal citations omitted); *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 255, 72 S. Ct. 725, 96 L. Ed. 919 (1952) ("In the first decades after the adoption of the Constitution . . . nowhere was there any suggestion that the crime of libel be abolished."); *Roth v. United States*, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) ("This phrasing [of the First Amendment] did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech.").

To the contrary, Colonies and States, at the time of Ratification, imposed criminal penalties for libel (and certainly permitted civil actions for the common law tort). Prior to *Sullivan*, persons accused of libel could not seek refuge under the First Amendment to prevent their prosecution. In fact, the opposite was true. Libelous speech was granted no protection under the First Amendment. Under that (proper) test, if a person was accused of libel, the First Amendment would have no place in the analysis. And if found to have libeled another, the First Amendment (historically) provided no get-out-of-jail-free-card.

Ignoring that body of law, Justice Brennan, writing for the Court, attempted to distinguish the cases where this Court had excised libelous speech from the protections of the First Amendment:

> Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.

New York Times Co., 376 U.S. at 268 (footnote omitted).

Drawing a very narrow distinction, Justice Brennan flatly ignored the prior decisions of the Court permitting the First Amendment and common law defamation actions against public figures to exist concurrently. Notably, Justice Brennan did not point to writings of

the Founders or judicial opinions from the Founding supporting this strained reading of the First Amendment. Nor could he have, since this reading was of recent vintage thrust onto the Constitution.

At bottom, the historical record (completely overlooked by the Court in *Sullivan*) compels this Court's reconsideration of *Sullivan*. There is no reading of the First Amendment, consistent with the Founder's understanding of the text, that would permit *Sullivan*'s test, much less compel it.

C. The Ministry's Experience in the Courts Below is the Perfect Example of *Sullivan*'s Dark Side

SPLC designated the Ministry to be a hate group and published that information to third parties through its website and other means. (App. at 20). The Hate Map's purpose is to permanently tar the reputation of those listed on the map and, like occurred with the Amazon Defendants, encourage businesses to void those listed on the Hate Map. Under Alabama defamation law, this conduct constitutes libel *per se*. *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386 (Ala. Civ. App. 1999). Although a defendant may raise truth as a defense to a claim of libel *per se*, the burden is on the defendant to prove the truth of his statement. *Gaither v. Advertiser Co*., 102 Ala. 458, 463 (Ala. 1893); *Ripps v. Herrington*, 241 Ala. 209, 212 (Ala. 1941).

While actual malice is not an element of libel *per se* or indirect defamation in Alabama, relying squarely

on *Sullivan* the Magistrate Judge recommended dismissal and the District Court dismissed the Ministry's common law defamation claim against SPLC, reasoning the Ministry failed to sufficiently plead facts to show it could later prove *Sullivan*'s actual-malice standard. Imagine the difficulty of that proposition: at the pleading stage, prior to any discovery, the Ministry had to plead specific facts to show SPLC subjectively knew its designation that the Ministry is a hate group to be false.

Well-meaning in its purpose, *Sullivan* upended 200 years of common law defamation jurisprudence. The time has come for *Sullivan* to be reconsidered and cabined to its rightful place: protecting free discourse regarding public officials, while not foreclosing the right of public figures to bring a claim for reputational harm caused by false statements.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RECONSIDERING *SULLIVAN*

This case is an excellent vehicle for addressing whether *Sullivan* should be substantially modified or overruled. The Magistrate Judge relied solely on the actual-malice standard in recommending the dismissal of the Ministry's claims against SPLC. While recognizing that it must accept all factual allegations in the Complaint as true, applying *Sullivan*, the District Court agreed (albeit examining *Sullivan* differently) and dismissed the Ministry's Complaint at the pleading stage without any opportunity to amend or take

discovery. And the Eleventh Circuit affirmed the dismissal for the same reason—*Sullivan*.

The procedural posture of this case provides the Court with a clean platform free of litigated factual disputes to decide the purely legal question of the appropriate legal standard to apply to a common law defamation claim brought by a public figure. This case squarely calls into question *Sullivan* and there is no way to distinguish its holding or avoid its application. The Court is left with a perfected record for determining whether and in what form *Sullivan* should continue to exist. That is not to say factual disputes do not exist. Those disputes will be properly resolved on remand under whatever test this Court adopts post-*Sullivan*.

Moreover, it is important for this Court to take this opportunity to address *Sullivan*, one way or the other. If this Court wishes to declare *Sullivan* to be good law and permit its standard to exist for the next fifty years, it should say so. But, by every indication, a majority of the members of this Court do not believe *Sullivan* should continue unrefined.

Legal challenges to *Sullivan* may not come before the Court again if this Court declines to take this case. In the past few terms, this Court has passed on three opportunities (*McKee*, *Lawson*, and *Tah*) to reassess *Sullivan* (although each of those cases presented procedural challenges not present in this case). This Court's denial of certiorari in this case will send a message it is not willing to reconsider the fundamental

principles of *Sullivan*. Given the enormous amount of time and resources it takes to bring such a challenge through the trial court, intermediate appellate court, and finally to this Court, such a rejection would likely discourage future litigants from expending the resources to bring another opportunity to this Court.

2021 is a remarkably different cultural and legal landscape than what the Court faced in 1964. Greater accountability increases civility in the culture and journalistic integrity in the media. The time has come for the Court to reconsider the ongoing viability and reach of *Sullivan*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEREMY D. BAILIE
WEBER, CRABB & WEIN, P.A.
5453 Central Avenue
St. Petersburg, Florida 33710
(727) 828-9919
Jeremy.Bailie@webercrabb.com

DAVID C. GIBBS, III
Counsel of Record
THE NATIONAL CENTER
FOR LIFE & LIBERTY, INC.
2648 F. M. 407, Suite 240
Bartonville, Texas 76226
(727) 362-3700
dgibbs@gibbsfirm.com