No. 21-802

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner is a media company whose primary activity is broadcasting the sermons of its late founder, including his belief that homosexual conduct is "lawless," "an abomination," "vile," "against nature," "profane," and "shameful." Respondent Southern Poverty Law Center ("SPLC") described Petitioner as an "Anti-LBGT hate group" based on these views. Petitioner sued SPLC for defamation, and the lawsuit was dismissed on three separate grounds: because the appellation "hate group" was not capable of being proven false, because Petitioner had not adequately alleged the falsity of the statement, and because Petitioner had not adequately alleged "actual malice" as required by this Court's ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. The question presented is:

Whether this Court should reconsider the requirement for public figure defamation plaintiffs to establish that an allegedly defamatory statement was made with "actual malice" fault where this Court has repeatedly reaffirmed and extended that standard, where defamation plaintiffs have proven themselves able to meet the standard in appropriate cases, where the standard has been firmly entrenched in law, and where there exists an independent basis to affirm the judgment of the lower courts in this case.

PARTIES TO THE PROCEEDING

Petitioner Coral Ridge Ministries Media, Inc. is a Florida not-for-profit corporation.

Respondent SPLC is an Alabama not-for-profit corporation. No publicly held corporation owns 10 percent or more of SPLC's stock.

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INTRODUCTION

Coral Ridge Ministries Media, Inc. ("Petitioner") asks this Court to reconsider *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny—in particular, the rule that, in order to recover on a defamation claim, public figures must show that an allegedly defamatory statement was made with "actual malice," *i.e.*, that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. The Petition should be denied.

Petitioner advances two main arguments. First, Petitioner characterizes a handful of critiques of *Sullivan* over the past half century as a "deafening roar" from the bench and bar calling to reconsider *Sullivan*. Pet. at 11. It is not, as evidenced by the numerous decisions of this Court that have repeatedly affirmed and extended *Sullivan*, as well as myriad ways in which *Sullivan* and the actual malice standard now permeate American law. Second, Petitioner asserts that *Sullivan* has had the "disastrous practical effect" of extending "virtual immunity" to defamation defendants. *Id.* A review of this Court's precedents, and the cases decided in the lower courts, demonstrates that this claim is also untrue.

In any event, this case would be a poor vehicle to reconsider *Sullivan*. An independent alternative basis supports the outcome below: the challenged statement is not provable as false and therefore not actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In addition, both parties here are not-for-profit corporations, making this a particularly inapt case to examine any "momentous changes in the Nation's

media landscape since 1964." Pet. at 20 (quoting *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from denial of certiorari)). Not least, the challenged speech here relates to issues of religious belief, which this Court recognized as particularly worthy of First Amendment protection long before *Sullivan* was ever decided.

For all these reasons, and as explained further below, certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

A. Relevant Factual Background

Petitioner is a Florida non-profit corporation founded by Dr. Dennis James Kennedy. App. 19. Kennedy, who died in 2007, was a pastor and broadcaster who produced a television program now called "Truths That Transform" and a related radio show. *Id*. Petitioner's primary activity is to broadcast past episodes of "Truth that Transform." *Id*. 20. The record below does not identify any other organizational activity beyond broadcasting and fundraising to buy airtime for its broadcasts. *See, e.g.*, Amended Complaint ("Am. Compl.") ¶ 39, *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc. et al.*, No. 2:17-cv-566-MHT (M.D. Ala.), ECF No. 40.

Dr. Kennedy's messages, and Petitioner's, "seek[] to communicate the Gospel of Jesus Christ, the supremacy of His Lordship, and a biblically informed view of the world, using all available media[.]" *Id*. ¶ 33. By its own account, Petitioner espouses "biblical morals and principles concerning human sexuality and marriage." *Id*. ¶ 58. Those principles include that homosexual conduct is "lawless," "an abomination,"

"vile," "against nature," "profane," and "shameful." *Id.* ¶ 155.

Respondent SPLC is also a non-profit corporation, registered in Alabama. *Id.* ¶ 20. Among other activities, SPLC publishes a "Hate Map" on its website, which lists various organizations that SPLC considers "hate groups" based on their beliefs or practices. App. 20; *see also, e.g.*, *Toston v. Thurmer*, 689 F.3d 828, 831 (7th Cir. 2012) (citing testimony that "[i]n the United States, [the] two main organizations that monitor intolerance and hate groups are the Anti-Defamation League (ADL) and the Southern Poverty Law Center (SPLC)") (citation omitted); *Ctr. for Immigration Studies v. Cohen*, 410 F. Supp. 3d 183, 186 (D.D.C. 2019) ("[SPLC] monitors and publishes investigative reports and expert analyses of groups that it identifies as extremist 'hate groups.'"). SPLC listed Petitioner on its Hate Map, identifying Petitioner as:

> D. James Kennedy Ministries
> (formerly Truth in Action)
> Fort Lauderdale, Florida
> ANTI-LGBT

Am. Compl. ¶ 56. The Amended Complaint alleged that Petitioner's inclusion on the Hate Map was due to its views on homosexuality. *Id.* ¶¶ 58, 61.

B. Relevant Procedural History

Petitioner filed this case in the Middle District of Alabama on August 22, 2017. SPLC moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and in response, Petitioner moved to amend its complaint. The District Court granted Petitioner's motion, and Petitioner filed

the operative Amended Complaint on October 18, 2017.

The Amended Complaint asserted two claims against SPLC, for defamation under Alabama common law and for trademark infringement under the Lanham Act, 15 U.S.C. § 1125. Am. Compl. ¶¶ 88-145. Petitioner predicated both claims on SPLC's inclusion of D. James Kennedy Ministries on its Hate Map. *Id.*[1]

SPLC again moved to dismiss, and a Magistrate Judge recommended granting the motion on February 21, 2018. App. 112-127. The Magistrate Judge first noted that Petitioner *conceded* that it was a public figure, and therefore was required to allege actual malice to state a claim. *Id.* 121. He then considered the Amended Complaint's allegations, concluding that "[t]he Court is at a loss to discern any legal or logical connection between these alleged circumstances and SPLC's state of mind regarding actual malice," and recommending that the Amended Complaint be dismissed with prejudice. *Id.* 123. The recommendation also noted that SPLC had "forcefully advance[d] additional arguments based on its First Amendment right to publish opinions," but in light of Petitioner's failure to allege actual malice, did not reach these additional arguments. *Id.* 123 n.4.

Petitioner objected to the Magistrate's Report and Recommendation. On September 19, 2019, the District Court issued a 141-page opinion affirming the Report and Recommendation. App. 16-109. The

[1] The Amended Complaint also included claims against Amazon.com and the AmazonSmile Foundation. Those claims are not subject to the Petition.

District Court also noted that Petitioner conceded that it was a public figure subject to the actual malice standard. *Id*. 24. In so noting, the District Court Judge explained that it was Petitioner's "focus on broadcasting its viewpoints through the media and the global reach of its television program" that rendered it a public figure. *Id*. The District Court reasoned that the actual malice standard "likely would not apply if SPLC had called an ordinary church or ministry a 'hate group,'" as opposed to Petitioner, a "media corporation that has successfully sought public influence and broadcast its views to millions[.]" *Id*. 24 n.5.

The District Court then addressed Petitioner's defamation claim. It first explained that there was "no single, commonly understood meaning of the term 'hate group'," and that the term therefore was not "provable as false" as required for a statement to be actionable as defamation under *Milkovich*, 497 U.S. at 19. App. 26-40.[2] Thus, by definition, Petitioner also could not meet the constitutional requirement that the challenged statement be false, which the District Court found an "independently sufficient" reason for dismissal. *Id*. 40-41. Only then did the District Court consider the fault element of the defamation claim, concluding that, even if the term "hate group" were provable as false, Petitioner had not stated a claim because it had no cognizable theory of actual malice. *Id*. 41-46.

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[2] The Petition thus errs in claiming that "the District Court's analys[i]s of [Petitioner's] defamation claim against SPLC began and ended with *Sullivan*." Pet. at 6.

Petitioner appealed, and on July 28, 2021, the Eleventh Circuit affirmed the District Court's opinion. App. 1. Like the trial court judges, the Eleventh Circuit began by noting that Petitioner conceded its status as a public figure. *Id*. 5 n.5. The Court recognized, like the District Court, that to state a claim, Petitioner must be able to establish *both* that the allegedly defamatory statement was "provable as false," *and* that SPLC published it with actual malice. *Id*. at 5-6. The Eleventh Circuit did not reach the question of whether the term "hate group" is provable as false, however, because the "bare bones allegations" of actual malice in the Amended Complaint were "insufficient to show that SPLC doubted the truth of its designation." *Id*. 8.[3]

This Petition, which asks this Court to "reconsider *Sullivan's* 'actual malice' standard, or, at a minimum, cabin *Sullivan's* 'actual malice' standard to speech concerning public officials," followed. Pet. at i.

REASONS FOR DENYING THE PETITION

I. The Petition Dramatically Understates The Vitality And Importance Of *Sullivan*

A central premise of the Petition is that *Sullivan* is a shaky and often-criticized precedent, and therefore one that is ripe for this Court's reconsideration. *See, e.g.*, Pet. at 10-21. To support that thesis, the Petition cites a handful of criticisms in the nearly 60 years since *Sullivan* was decided—the

[3] The Eleventh Circuit observed that Petitioner "ask[ed] us, for the first time on appeal, to get rid of the actual malice requirement," and suggested that Petitioner had waived this argument by failing to make it before the District Court. App. 8 n.9.

proverbial stray friends in the crowd. But there can be no reasonable dispute that this Court has consistently reaffirmed both the core First Amendment principles underlying *Sullivan* and the actual malice requirement, and extended that requirement to circumstances well beyond the public official defamation claim that was at issue in *Sullivan*. In short, *Sullivan* has not "become obsolete." Pet. at 2. It occupies a foundational place in the constitutional firmament that has only become stronger with the passage of time.

A. This Court Has Repeatedly Reaffirmed Its Support For *Sullivan*

Petitioner urges that, "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." Pet. at 11. This Court's precedents belie that contention.

Most obviously, this Court's unanimous decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), decided nearly 25 years after *Sullivan*, cannot be squared with Petitioner's assertion that the Court's support for *Sullivan* eroded over that time. In *Falwell*, the Court considered the case of a nationally known minister, Jerry Falwell, who sued a pornographic magazine for defamation and intentional infliction of emotional distress based on the magazine's publication of a satirical advertisement about him. *Id*. at 47-48. A jury returned a defense verdict on the defamation claim, but found for the plaintiff on the intentional infliction of emotional distress claim, awarding compensatory and punitive damages. *Id*. at 49. This Court, in an opinion authored by Chief Justice Rehnquist, reversed. Noting that "[a]t the

heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern[,]" the Court concluded that "public officials and public figures may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'." *Id.* at 50, 56. In reaching this conclusion, Justice Rehnquist emphasized that the decision did not result from the "blind application" of *Sullivan*, but rather from the Court's "considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56. Put differently, *Falwell* stands not only for the proposition that *Sullivan* is vital to the "free flow of ideas and opinions on matters of public interest," but also that the actual malice standard is such an effective guardian of those critical interests that it extends to non-defamation tort claims predicated on protected speech. An overwhelming majority of this Court agreed with both of those propositions in *Falwell*,[4] a decision ignored entirely by the Petition.[5]

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[4] Justice White concurred in the judgment, but wrote a short, separate opinion noting that he did not believe the facts of the case implicated *Sullivan* because the jury found that the satirical ad contained no assertion of fact. *Falwell*, 486 U.S. at 57.

[5] The Petition's omission is glaring because the 1988 opinion post-dates much of the ostensible criticism of *Sullivan* upon which the Petition relies. *See* Pet. at 12-13 (discussing Justice White's concurrence in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)); *id.* at 13-14 (discussing Chief Justice Burger's dissent from denial of certiorari in *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 476 U.S. 1187 (1986)); *id.* at

Falwell is not the only conspicuous omission from Petitioner's description of this Court's treatment of *Sullivan* over time. While the Petition acknowledges several of the cases that reaffirmed and extended *Sullivan* in the decades after it was decided, *see* Pet. at 12 n.5, it excludes more. Over a multi-decade period, this Court extended the actual malice requirement to a broader range of defamation plaintiffs, *see, e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (actual malice applies to "public figures" as well as public officials), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (expanding actual malice to "limited purpose" as well as "general purpose" public figures), as well as to a broader range of causes of action that implicate free speech, *see, e.g.*, *Time Inc. v. Hill*, 385 U.S. 374 (1967) (actual malice applies to claims for false light invasion of privacy), *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (product disparagement), *Falwell*, 485 U.S. 46 (intentional infliction of emotional distress). The Court held that even private defamation plaintiffs must demonstrate actual malice fault to recover punitive damages, *see Gertz*, 418 U.S. at 349. And it heightened the procedural requirements attendant to the actual malice standard, including holding that such fault must be established by clear and convincing evidence for a claim to survive summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and that appellate courts must conduct an independent review of all factual findings related to actual malice, *Bose Corp.*, 466 U.S. at 510.

14-17 (discussing Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong*?, 53 U. Chi. L. Rev. 782 (1986)).

Taken separately or as a whole, these precedents demonstrate that Petitioner's description of a "shift in *Sullivan's* support" over time is illusory. Pet. at 11.[6]

B. There Is No "Deafening Roar" Calling For Reconsideration Of *Sullivan*

Against this unbroken line of authority supporting the continued vitality and importance of *Sullivan*, Petitioner musters a handful of criticisms of the decision, none of which support the notion that *Sullivan* was called into question in any serious way in the decades after it was decided.

First, Petitioner relies on non-controlling opinions from Justices White and Burger that critiqued the balance *Sullivan* struck between free speech and the risk of reputational harm stemming from such speech, as well as a law review article authored by Professor

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[6] The federal Courts of Appeal have also consistently endorsed the continuing vitality of *Sullivan*, not just as mandatory precedent but as an integral part of this Court's First Amendment jurisprudence. *See, e.g.*, *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 108, 112 (D.C. Cir. 2017) (Kavanagh, J.) (*Sullivan's* actual malice standard operates "[t]o preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth" and "[t]o encourage and facilitate debate over matters of public concern"); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 717 (4th Cir. 1991) (Wilkinson, J.) (explaining that actual malice standard is necessary because "[i]n the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it prints is true. If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment.") (citations omitted).

Richard Epstein espousing similar themes. Pet. at 12-16. These writings date from the period 1984-1986, a full two or more years before the Court unanimously reaffirmed both the premise and holding of *Sullivan* in *Falwell*. *See supra* note 5.

Second, Petitioner relies on a book review that then-Professor (now Justice) Kagan wrote in 1993. Pet. at 17-18. The Petition includes a page-length quotation from that review, ostensibly in support of the notion that *Sullivan* had the unintended effect of leading to "a greater sense of entitlement and self-importance" among the press. *Id*. at 18. The Petition fails to acknowledge that, in the review, Professor Kagan was *posing questions*, not opining on their answers. Petitioner also omits the very next sentence of the review: "Questions of this kind in no way prove that the Court decided Sullivan incorrectly or that the Court now should reconsider its holding." Elena Kagan, *A Libel Story*: Sullivan *Then and Now (reviewing Anthony Lewis, Make No Law: The* Sullivan *Case and the First Amendment (1991)*, 18 Law and Social Inquiry 197, 208 (1993).

Finally, Petitioner jumps ahead more than twenty-five years to focus on the concurrence by Justice Thomas from the denial of certiorari in *McKee v. Cosby*, 139 S. Ct. 675 (2019), and the dissents of Justices Thomas and Gorsuch from a similar denial in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021). The Petition argues that these opinions identified two bases on which *Sullivan* should be reconsidered: first, because of the supposed lack of "historical evidence the actual-malice rule comports with the original understanding of the First Amendment," Pet. at 19; and second, because of purportedly "momentous

changes in the Nation's media landscape since 1964." *Id*. at 20.[7]

With respect to the historical critique of *Sullivan*, recent scholarship has convincingly argued that the Founders' understanding of the First Amendment was very much in line with *Sullivan*. *See, e.g.*, Matthew Schafer, *In Defense:* New York Times v. Sullivan, 82 La. L. Rev. 81 (2021); Wendell Bird, *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act* (2020). And with respect to the "momentous changes in the Nation's media landscape," as discussed in more detail in Section IV, *infra*, there is little reason to think that reconsideration of *Sullivan* or the actual malice standard, particularly in *this case*, would have any significant impact on the "spread of disinformation" or the dissemination of "anything that garners clicks." *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting).

In sum, the criticisms cited by the Petition provide little reason to conclude that *Sullivan* is ripe for reconsideration, particularly in light of the numerous

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[7] That the Petition identifies no substantive criticisms of *Sullivan* from 1993 through 2019 undermines its contention that *Sullivan* is somehow a "shaky" precedent. The Petition cites a single line from a 2012 television interview with Justice Scalia, in which he opined in passing that he "abhor[red]" *Sullivan*, as well as a law review article which reported other negative oral statements by Justice Scalia. Pet. at 19. Tellingly, though, the same law review article on which Petitioner relies ultimately concluded that the *Sullivan* decision "remains one of the most enduring in the Court's history." John Bruce Lewis and 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 (2014).

decisions of this Court reaffirming and extending *Sullivan's* core holding. While every decision of this Court is subject to rigorous judicial and academic scrutiny, and some criticism is inevitable, that is the nature of our nation's "uninhibited, robust, and wide-open" debate on public issues. *Sullivan*, 376 U.S. at 270. That some jurists and commentators disagree with aspects of *Sullivan's* holding does not make for a "deafening roar" calling for its re-examination. Pet. at 11. This is particularly true given the unbroken line of authority in this Court reaffirming it as a bedrock principle of First Amendment jurisprudence.

II. The Actual Malice Standard Does Not Grant Defamation Defendants "Virtual Immunity" From Public Figure Claims

Petitioners are factually mistaken in asserting that *Sullivan* should be re-examined because it has had the "disastrous practical effect" of granting media companies "virtual immunity" from public figure defamation claims. Pet. at 11. This Court's precedents belie the notion that actual malice presents an insurmountable hurdle for public figure defamation plaintiffs. While the Court has only had occasion twice since 1989 to evaluate whether a defamation plaintiff had adequately established actual malice against a media defendant, *both times* the Court concluded that it had. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (reversing grant of summary judgment for failure to establish actual malice where reporter had altered quotes to make them substantially false); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) (upholding jury verdict that newspaper acted with actual malice in deliberately ignoring contrary evidence).

Moreover, dozens of decisions published just during the pendency of this case reveal no shortage of public official and public figure plaintiffs that have adequately alleged actual malice, belying Petitioner's claim that *Sullivan* "slamm[ed] shut the courthouse doors" on such claims. *See, e.g.*, *Nunes v. Lizza*, 12 F.4th 890 (8th Cir. 2021); *Blankenship v. Trump*, No. 19-cv-549, 2021 U.S. Dist. LEXIS 165989 (S.D. W. Va. Sept. 1, 2021); *US Dominion, Inc. v. Powell*, No. 21-cv-40, 2021 U.S. Dist. LEXIS 150495 (D.D.C. Aug. 11, 2021); *Nunes v. WP Co. LLC*, No. 21-cv-506, 2021 U.S. Dist. LEXIS 150498 (D.D.C. Aug. 11, 2021); *Colborn v. Netflix Inc.*, No. 19-cv-484, 2021 U.S. Dist. LEXIS 99478 (E.D. Wis. May 26, 2021); *Dershowitz v. CNN, Inc.*, No. 20-cv-61872, 2021 U.S. Dist. LEXIS 120809 (S.D. Fla. May 24, 2021); *Moore v. Cecil*, 488 F. Supp. 3d 1144 (N.D. Ala. 2021); *Am. Addiction Ctrs. v. Nat'l Ass'n of Addiction Treatment Providers*, 515 F. Supp. 3d 820 (M.D. Tenn. 2021); *Blankenship v. Napolitano*, 451 F. Supp. 3d 596 (S.D. W. Va. 2020); *Williams v. Roc Nation*, No. 20-cv-3387, 2020 U.S. Dist. LEXIS 195173 (E.D. Pa. Oct. 21, 2020); *FinancialApps, LLC v. Envestnet, Inc.*, No. 19-cv-1337, 2020 U.S. Dist. LEXIS 139090 (D. Del. July 30, 2020), *R. & R. adopted in relevant part*, 2020 U.S. Dist. LEXIS 168562 (D. Del. Sept. 15, 2020); *Watson v. NY Doe 1*, 439 F. Supp. 3d 152 (S.D.N.Y. 2020); *Gilmore v. Jones*, 370 F. Supp. 3d 630 (W.D. Va. 2019); *Butowsky v. Folkenflik*, No. 18-cv-442, 2019 U.S. Dist. LEXIS 104297 (E.D. Tex. Apr. 17, 2019); *Wigington v. Metro. Nashville Airport Auth.*, 374 F. Supp. 3d 681 (M.D. Tenn. 2019); *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-2824, 2019 U.S. Dist. LEXIS 10263 (N.D. Cal. Jan. 22, 2019); *Steele v. Goodman*, 382 F. Supp. 3d 403 (E.D. Va. 2019); *Spirito v. Peninsula Airport Comm'n*,

350 F. Supp. 3d 471 (E.D. Va. 2018).). And, just in recent weeks, a public figure won a $4 million jury award for defamation and a former national vice presidential candidate took a defamation case against The New York Times Company to a jury trial in New York. *See* Nancy Dillon, *Cardi B Defamation Award Now Tops $4 Million*, Rolling Stone (Jan. 25, 2022); Jeremy W. Peters, *Sarah Palin's libel trial against The New York Times begins again*, N.Y. Times (Feb. 3, 2022).

In short, Petitioner's claim that defamation defendants effectively have "absolute immunity" against claims brought by public officials and public figures is empirically inaccurate.[8]

III. Reconsideration Of *Sullivan* Would Have Effects Far Beyond The Law of Defamation

The Petition remarkably describes the impact of reconsidering *Sullivan* as minimal, asserting that

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[8] Petitioner also complains about the "difficulty" of pleading actual malice without the benefit of discovery. Pet. at 26. But public figure defamation lawsuits are hardly the only circumstance where plaintiffs are required to plead a defendant's subjective state of mind without discovery; such standards are a regular feature of American law. *Cf.* 5A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1301 (4th ed.) (discussing requirement to plead "conditions of mind" for claims of, *inter alia*, malicious prosecution, common law fraud, violation of the False Claims Act, and breach of the implied duty of good faith and fair dealing). This Court has also squarely considered, and rejected, Petitioner's argument. *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009) ("Rule 9 merely excuses a party from pleading [malice] under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8.").

there are no "significant reliance interest[s]" tied up in the decision outside of those who "by definition, had published false, defamatory statements." Pet. at 9. Once again, Petitioner is provably incorrect. Numerous decisions of this Court have applied or relied on the actual malice standard outside of the law of defamation. Reconsideration of *Sullivan* would require re-examination of those precedents as well. Moreover, Congress has explicitly or implicitly incorporated the actual malice standard into a number of federal statutes; reconsideration of *Sullivan* would therefore also call into question the enforcement and application of these laws, and thereby undermine Congressional intent.

Beginning with *Time Inc. v. Hill*, 385 U.S. 374 (1967), the Court has consistently applied the actual malice standard not just to defamation claims, but to a variety of other tort claims predicated on speech about public figures or matters of public interest. Thus, in *Hill*, the Court, relying on *Sullivan*, held that actual malice applied to claims for false light invasion of privacy. *Id*. In *Bose Corp.*, it applied the standard to claims for product disparagement. 466 U.S. at 490. In *Falwell*, it reached the same conclusion with respect to intentional infliction of emotional distress. 485 U.S. at 56. Any reconsideration of *Sullivan* necessarily calls into question these precedents as well, and thereby promises to reshape much more than the law of defamation.

The actual malice standard also plays an important role in this Court's labor law precedents. In *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966) the Court reversed a lower court decision that the National Labor Relations Act

pre-empted defamation suits based on statements made in connection with "labor disputes" governed by the Act. Relying on *Sullivan*, the Court imposed an important condition on its holding: where such a suit arises in the context of a "labor dispute," a plaintiff must plead and prove actual malice—regardless of his or her status as a public figure. *Id*. at 65. Eight years later, in *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 279 (1974), the Court extended the rule articulated in *Linn* and clarified that it applied not only to disputes between labor and management, but to "any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity." These precedents remain bedrock principles of labor law. *See, e.g.*, *Adamo Demolition Co. v. Int'l Union of Operating Eng'rs Local 150*, 439 F. Supp. 3d 933, 945 (E.D. Mich. 2020).

The Court has also required that state statutes regulating false campaign speech incorporate the actual malice standard to pass First Amendment muster. *Brown v. Hartlage*, 456 U.S. 45, 61-62 (1982) (reversing judgment that a candidate for public office had forfeit his electoral victory by promising to serve at a reduced salary in violation of the Kentucky Corrupt Practices Act where "[t]here has been no showing [that the statement was made with] knowledge of its falsity, or . . . reckless disregard as to whether it was false or not."); *see also id*. ("Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount."). The lower courts have regularly

invoked *Brown* to strike down similar state statutes that failed to adhere to *Sullivan*. *See* Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 Tul. L. Rev. 889, 904 n.116 (2008) (collecting cases).

Congress too has endorsed the actual malice standard by incorporating it, implicitly or explicitly, into a number of federal statutes. As this Court recently explained in *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 246 (2014), in enacting the Aviation Transportation Safety Act (ATSA) in the wake of September 11, "Congress patterned the exception to ATSA immunity after the actual malice standard of *New York Times v. Sullivan*." Similarly, the 1988 amendments to the Lanham Act contained protection for "innocent" trademark infringement that, in the words of the law's sponsor, are "intended to encompass the constitutional standards set forth in *New York Times v. Sullivan* . . . and its progeny." 134 Cong. Rec. H10411 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier); *see also Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 419-20 (S.D.N.Y. 2001) (applying actual malice standard to innocent infringement defense of Lanham Act claim).

More recently, in 2010, both houses of Congress *unanimously* passed the SPEECH Act, which was aimed at discouraging "libel tourism" and provides in relevant part that:

> [A] domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that—

> (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located[.]

28 U.S.C. § 4102.

Both the House and Senate Reports on the SPEECH Act cite *Sullivan* and the actual malice standard as the prime example of how the First Amendment is more protective of speech than the law of many other countries. *See Recognition of Foreign Defamation Judgments*, 111 H. Rpt. 154 at 2, 7 (2009); *SPEECH Act*, 111 S. Rpt. 224 at 2 (2010). The Reports equally make clear that the law's primary purpose is to ensure that defamation plaintiffs cannot circumvent those protections by obtaining judgments in foreign jurisdictions and enforcing them in the United States. *Id.* Reconsideration of the *Sullivan* standard would undoubtedly undermine that purpose.

For all these reasons, Petitioner's assertion that reconsideration of *Sullivan* would have no impact beyond the law of defamation ignores the extent to which, over more than a half century, *Sullivan* has become a foundational First Amendment precedent in the law.

IV. This Case Is A Poor Vehicle To Revisit *Sullivan*

Separate from the legal and empirical flaws in the Petition's central arguments for reconsideration of *Sullivan* is the question about whether this case is the right vehicle to do so—an issue on which the Petition says little. Pet. at 26-28. It is not. As set forth briefly below, Petitioner did not challenge *Sullivan* in the District Court. There is a clear alternative basis for the lower court to affirm the dismissal of the action. Nor is Petitioner, a non-profit religious media company, a suitably representative plaintiff, and the speech at issue lies at the heart of the First Amendment.

A. Petitioner Did Not Challenge *Sullivan* In The District Court

As the Eleventh Circuit noted, Petitioner did not challenge Sullivan in the District Court, and therefore waived its right to do so on appeal under the law of that Circuit. App. 8 n.9 (citing *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009)). This Court too has regularly concluded that the failure to raise an issue in the lower courts counsels against this Court's consideration of that issue. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 275 n.4 (1981) (Brennan, J., dissenting) ("This Court has considered issues not raised in the courts below only in 'exceptional cases or particular circumstances . . . where injustice might otherwise result.'") (citation omitted); *see also Musacchio v. United States*, 577 U.S. 237, 248 (2016)

(defendant cannot raise non-jurisdictional statute of limitations defense for first time on appeal); *Morrison v. Olson*, 487 U.S. 654, 670 (1988) (declining to consider non-jurisdictional argument not raised in district court).

B. There Is An Alternative Basis To Affirm The Holding

Even if the Court were to grant certiorari and consider the question presented regarding the actual malice standard, Pet. at i, the outcome in this case likely would not change. The District Court dismissed the Amended Complaint for two reasons independent of its failure to plead actual malice: as the allegedly defamatory term "hate group" has a "highly debatable and ambiguous meaning," the complaint did not plausibly plead that it is "provable as false" and "false." App. 40-41.

The Eleventh Circuit affirmed the District Court's dismissal on the third ground, that "Coral Ridge failed to adequately plead actual malice," without reaching the other rulings. App. 6 n.7. Accordingly, any opinion the Court might reach on the actual malice fault standard likely would not change the ultimate outcome: the complaint would be dismissed with prejudice. Granting certiorari therefore would be inappropriate. *See, e.g., Belcher v. Stengel*, 429 U.S. 118 (1976) (per curiam) (dismissing writ of certiorari as improvidently granted when question framed in petition not presented by record); *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted and noting that "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here .

. . can await a day when the issue is posed less abstractly."); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., concurring) (dismissing writ of certiorari as improvidently granted and noting that "[a]s Justice Brandeis famously observed, the Court has developed, 'for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' The second of those rules is that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (concurring opinion))).

C. This Is Not The Case To Re-examine The Standard For Public Figures

Nor is this an appropriate case to re-examine the fault standard for public figures generally, should the Court be inclined to accept Petitioner's alternative request that the Court "cabin *Sullivan's* 'actual malice' standard to speech concerning public officials" and eliminate it "altogether for private public figures." Pet. at i. The issue was not presented below, and Petitioner is not an "ordinary American without recourse for grievous defamation." *Berisha*, 141 S. Ct. at 2429 (Gorsuch, J., dissenting). Petitioner is a media company speaking on issues of the utmost national importance and interest, with the ability to reach millions of people with its message.

Petitioner conceded below that it was a public figure. App. 5, 24, 121.[9] There was no briefing or

[9] As the District Court put it: "Coral Ridge concedes it is a public figure, and this concession makes sense, given its focus on

motion practice to determine whether public figure status was appropriate, and the issue was not developed in either the District Court or on appeal. This cautions against granting certiorari on this issue. *See, e.g,*, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("We ordinarily will not decide questions not raised or litigated in the lower courts"); *New York v. Uplinger*, 467 U.S. 246, 251 (1984) (Stevens, J., concurring) (per curiam) ("Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible."). Petitioner is a media company whose business is devoted to rebroadcasting sermons by its founder, whose broadcasts reached "three million viewers," and who now objects primarily to how the substance of those broadcasts is characterized.[10] It is far removed from the sympathetic examples of limited-purpose public figures or involuntary public figures proffered by Justices Thomas and Gorsuch in their opinions in *McKee* and *Berisha*.

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broadcasting its viewpoints through the media and the global reach of its television program." App. 24.

[10] Petitioner's limited corporate operations are significant. It is unclear how Petitioner believes its reputation, as opposed to that of its founder, has been tarnished by the alleged defamation. Certainly, there are no non-conclusory allegations in the Amended Complaint that answer that question. And of course, the late Dr. Kennedy cannot maintain an action for defamation. *See* 1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* §2-10.1 (Fifth Ed. 2017) ("The dead have no cause of action for defamation under the common law").

Petitioner is not a "pizza shop rumored to be 'the home of a Satanic child sex abuse ring,'" the subject of "online posts falsely labeling someone as 'a thief, a fraudster, and a pedophile,'" an individual who has had job offers rescinded, or a woman who has accused "a powerful man of rape." *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting). Nor is Petitioner an *individual* who has become a public figure subject to the actual malice standard by achieving "pervasive fame or notoriety" or a "'limited' public figure[] who 'voluntarily inject[s]' themselves or are 'drawn into a particular public controversy.'" *Id*. at 2426 (Gorsuch, J., dissenting) (quoting *Gertz*, 418 U.S. at 351). As Petitioner is a corporate media company, this case would not enable the Court to grapple with whether the boundaries of involuntary or limited-purpose public figure status have become "increasingly malleable and even archaic." *Id*. at 2429.

Unlike the type of plaintiffs identified in the *McKee* and *Berisha* opinions, Petitioner has the resources and platform to reach the public with its views, and to counter critical or even allegedly defamatory speech about it.[11] *Gertz*, 418 U.S. at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and

[11] Indeed, following SPLC's inclusion of Petitioner as an anti-LGBT hate group on its Hate Map, Petitioner took out a full-page advertisement in a local newspaper, "running an open letter under the headline: 'D. James Kennedy Ministries Is Not A Hate Group,'" released a documentary "focused on the SPLC's work to 'demonize' conservative and Christian groups" and had prepared a pamphlet for donors entitled "The Southern Poverty Law Center: Exposed." See Kate Shellnutt, *D. James Kennedy Ministries Sues SPLC over Hate Map*, Christianity Today (August 24, 2017).

hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."); *cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion, the falsehoods and the fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

Moreover, to the extent that members of the Court have expressed interest in examining how technological and economic changes in "our Nation's media landscape" since *Sullivan* was decided have impacted its reasoning, this is similarly not the case to do so. *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting). Respondent SPLC is a non-profit corporation, and as such does not share the "business incentives fostered by our new media world." *Id.* at 2428. There are no allegations in the record regarding the effect of *Sullivan* on the media's performance or incentives, and this case would not provide the Court an opportunity to fully consider whether *Sullivan* has impacted "investigation, fact-checking or editing." *Id.*

Nor is this a case that would permit review of the defamation ramifications of the rise of social media. *Id.* at 2427 ("[S]ome reports suggest that our new media environment also facilitates the spread of disinformation"). Both Petitioner and Respondent spread their dueling messages through traditional media as well as digital media, but the claim at issue in this case is not one about defamation spread unchecked through social media.[12]

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[12] In any event, the actual malice standard has little to do with the spread of misinformation and defamatory content

D. The Speech At Issue Is Core Speech Of Immense Public Interest And Debate

This case is also a particularly inappropriate one to revisit *Sullivan* because it concerns core speech about issues of tremendous public importance and interest. This Court has repeatedly affirmed the principle that speech about issues of public concern—including religion—should be "uninhibited, robust and wide-open[.]" *Sullivan*, 376 U.S. at 270.

The Court has also recognized that the questions surrounding certain religious views of homosexuality are of significant public interest and that free and open debate in this area is essential. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."); *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015) ("[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view

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through social media. Social media companies typically rely on Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides online platforms with immunity from liability based on content provided by their users, to defend against lawsuits based on such content. Reconsideration of *Sullivan* would have no impact on this *statutory* immunity. See generally, Valerie C. Brannon, Eric N. Holmes, Cong. Rsch. Serv., R46751, *Section 230: An Overview* (Apr. 7, 2021).

in an open and searching debate."); *id.* at 714 (Scalia, J., dissenting) ("[P]ublic debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views."); *Snyder v. Phelps,* 562 U.S. 443, 444-45 (2011) (Placards reading, *inter alia*, "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You" highlight "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy" and "are matters of public import"). Similarly, the Court has acknowledged that religion itself is an area that is prone to sharp disagreements and heightened language. As it noted in the pre-*Sullivan* case of *Cantwell v. Connecticut*:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view,

> essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

310 U.S. 296, 310 (1940) (quoted in *Sullivan*, 376 U.S. at 271).[13]

In fact, the very nature of religious disputes cautions against using this case as a means to revisit *Sullivan*. Petitioner here seeks to limit debate on its religious views by claiming defamation when those views have caused it to be described as an anti-LGBT hate group—though presumably it believes its *own* views are entitled to the protections of the First Amendment. To revisit the actual malice standard in a case that is at its root about criticism of religious beliefs would threaten to significantly limit free and open discussion on vital issues of public importance, like religion and hate, contrary to *Sullivan* and much

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[13] *Cantwell* is instructive here. In that case, several members of the Jehovah's Witnesses were arrested for breaches of the peace for proselytizing in a heavily Roman Catholic part of New Haven, including by playing a record which "described a book entitled 'Enemies,' [and] included an attack on the Catholic religion." The Court reversed a conviction for breach of the peace, finding that though it offended, the communication did not include any "assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse." 310 U.S. at 310. So too here, where Petitioner seeks to use the law to punish (and stop) criticism of its religious views through the guise of a defamation case. Such a result would raise the clear specter of chilling critical speech on important public issues. *See also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (New York law prohibiting display of "sacrilegious" films violates First Amendment; "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.").

of the Supreme Court's other First Amendment jurisprudence.

CONCLUSION

For the reasons discussed above, the Petition should be denied.

Respectfully submitted,

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