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**

REPLY TO BRIEF IN OPPOSITION

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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. Respondent was defendant in the district court and defendant-appellee in the court of appeals.

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REASONS FOR GRANTING THE PETITION

Whether *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) should be revisited is an important question for this Court and the instant Petition does not understate the ramifications of revisiting its central holding. While showcasing the policy rationales for its continued use, the Brief in Opposition fails to explain why this Court should not grant the Petition and review *Sullivan*'s ongoing applicability for two reasons.

First, Respondent overstates this Court's commitment to *Sullivan* since this Court has never taken a case that squarely questioned *Sullivan*'s central holding and reaffirmed its principles. And Respondent's examples of *Sullivan* working in practice actually prove *Sullivan*'s failure as a threshold hurdle for public figure plaintiffs to plead and prove in order to recover for reputational harm.

Second, Respondent's suggestion that this case is not the correct vehicle for a thorough examination of *Sullivan*'s ongoing viability is likewise unconvincing since it ignores the sole basis for the Eleventh Circuit's opinion on this issue and is premised on unattainable task – convincing a lower court to ignore this Court's precedent.

I. RESPONDENT OVERSTATES THIS COURT'S COMMITMENT TO *SULLIVAN* AND UNDERSTATES *SULLIVAN*'S DISASTROUS PRACTICAL EFFECTS

Respondent suggests there are numerous policy rationales for not revisiting *Sullivan*. Noticeably absent from its list of reasons, though, is any argument that *Sullivan* was correctly decided. This Court's review is not based on whether a decision is a wise policy choice. This Court's constitutional mandate is to decide whether *Sullivan* comports with the text and meaning of the Constitution. Nonetheless, even Respondent's policy reasons fall short of showing why this Court should not grant the Petition and reconsider *Sullivan*.

First, while it is true this Court has quoted portions of *Sullivan* in various opinions, this Court has never "reaffirmed" *Sullivan* as Respondent suggests. This Court is abundantly clear when it reaffirms or overrules its precedent, particularly in cases where the precedent has been widely questioned or is subject to intense public debate.

For instance, in another context, this Court reviewed *Roe v. Wade* in 1992 only 19 years after *Roe*'s inception. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). While *Roe* had been cited 48 times by the Court between 1973 and 1992, there was no question this Court was deciding in *Casey* whether to reaffirm or overrule *Roe*. This Court made its choice clear and specifically held that "the essential

holding of *Roe v. Wade* should be retained and once again reaffirmed." *Id.* at 846.

In searching for support in this Court's past decisions, Respondent points to no such statement regarding *Sullivan*. Rather, it relies heavily (almost exclusively) on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) to suggest this Court has *sub silentio* reaffirmed *Sullivan*. Not only was that question not raised in *Hustler* (since Falwell took no issue with *Sullivan*'s test for his libel claim), but this Court's opinion did not review *Sullivan*, nor make any decision as to whether it should be overturned. Justice White even explained in his concurrence the case had nothing to do with *Sullivan*. *Id.* at 57 (White, J., concurring in the judgment). When this Court reconsiders an important or controversial precedent and determines whether to overrule or reaffirm its holding, it does so clearly. And it has made no such decision as to the ongoing viability of *Sullivan*. Respondent also ignores the fact that even if this Court had reviewed the issue in *Hustler*, the Court's analysis of the issue 34 years ago would not prevent it from addressing the issue today.

Second, Respondent suggests the Petition focuses on a few critiques of *Sullivan*, but Respondent wholly understates the multitude of voices that call for this Court to reconsider *Sullivan*. Professor McGowan recently published *A Bipartisan Case Against* New York Times v. Sullivan, which outlines both the conservative and liberal critiques of *Sullivan* and discusses many of the same reasons the instant Petition suggests *Sullivan* should be reconsidered. 1 J. Free Speech L. 509

(2022). Even editorials from legacy media entities have suggested the protection publishers receive from *Sullivan* are doing more societal harm than good and the actual malice standard needs to be reconsidered.[1]

Third, Respondent provides a page-long string cite of district court (and one circuit court) opinions denying motions to dismiss based on alleged failure to satisfy the actual malice standard. This selective collection of opinions at the pleading stage does not reflect the state of public figure defamation law as a whole, and Respondent fails to take into account the chilling effect of *Sullivan*'s rule that prevents many cases from even being filed in the first place. It is impossible to calculate how many public figures choose to suffer the reputational harm from defamation actionable under state law but for *Sullivan*'s actual malice requirement, rather than risk the expense for the fool's errand of suing a media entity with deep pockets and *Sullivan*'s protection.[2]

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[1] Reynolds, Glenn H., *How to Restore Balance to Libel Law*, THE WALL STREET JOURNAL, March 24, 2021 (available at https://www.wsj.com/articles/how-to-restore-balance-to-libel-law-11616603215).

[2] Professor Epstein, using the maxim, " 'Millions for defense and not a penny for tribute,' " explains legacy media entities have a built-in incentive to expend great sums on attorneys vigorously defending defamation lawsuits since they are "repeat players in defamation actions" and the successful defense "will deter other plaintiffs from bringing similar suits. . . ." Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. Chi. L. Rev. 782, 809–10 (1986).

More importantly, Respondent's argument is beside the point. It does a plaintiff no good to satisfy the requirement to *plead* actual malice, if she can, only to lose later if she cannot *prove* actual malice. The Petition explains how *Sullivan*'s requirement of *proof* of actual malice often cannot be proved because it calls for facts that are neither constitutionally required nor likely to exist in the vast majority of cases.

Respondent mistakenly draws attention to the case of former Governor Sarah Palin versus the New York Times, which perfectly explains the problems with *Sullivan*'s insurmountable bar at both the pleading and proof stage. Governor Palin alleged (and attempted to prove at trial) The New York Times published an editorial that falsely suggested a connection between a tragic shooting and an advertisement her political action committee published. *Palin v. New York Times Co.*, 940 F.3d 804, 808 (2d Cir. 2019).

The District Court dismissed the case reasoning the Complaint failed to sufficiently plead actual malice. *Id.* at 809. The Second Circuit reversed since Governor Palin had pleaded specific facts, which accepted as true, were sufficient to show The New York Times had knowledge the editorial was false when it was published. *Id.* at 810. The Second Circuit addressing just the allegations at the pleading stage determined Governor Palin adequately *pleaded* actual malice. *Id.* Respondent would point to this as evidence the actual malice standard can be satisfied and is not an "insurmountable bar." But wait, there's more.

The New York Times's article was demonstrably false and attempted to connect Governor Palin to a tragic shooting while knowing such a suggestion was false. *Id.* at 813–16. There was no question the evidence showed The New York Times made false statements about Governor Palin – the issue was whether the evidence showed that it had done so with actual malice. On remand to the District Court, the case was presented to a Jury.

Following the close of evidence and while the Jury was deliberating, the District Court announced it would direct a verdict in favor of The New York Times determining as a matter of law Governor Palin failed to prove actual malice. *Palin v. The New York Times Company*, Case No. 1:17-cv-04853-JSR, ECF 171 (S.D. N.Y. February 15, 2022). The Jury then returned a verdict against liability. Worse yet, it has become apparent members of the Jury learned of the District Court's decision to dismiss the case for failure to prove actual malice while deliberating and before reaching a decision.[3] Putting aside any procedural errors, Governor Palin's case stands as a stark example of the immunity conferred by the actual malice standard on publishers who otherwise would be held to account for defaming public figures. Despite her ability to *plead* actual malice, Governor Palin was barred from recovering for the false statements made about her because of the

[3] Luc Cohen, *Sarah Palin jurors received push notifications judge would dismiss case – court filing Reuters*, Reuters (https://www.reuters.com/world/us/sarah-palin-jurors-received-push-notifications-judge-would-dismiss-case-court-2022-02-16).

difficulty in *proving* actual malice. And Governor Palin's case is not unique in this aspect.

Fourth, Respondent's concerns about unrelated federal statutes that have incorporated the actual malice standard have no bearing on the issue before this Court. Nothing about this Court's reconsidering *Sullivan* would interfere with Congress's ability to legislate and invoke the actual malice standard even if this Court determines it is not constitutionally required by the First Amendment in public figure defamation claims. Congress has always enjoyed the ability to enact laws adopting this Court's prior constitutional tests, and it has exercised that authority when necessary.

For instance, following this Court's opinion in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), Congress passed the Religious Freedom Restoration Act seeking to legislatively enact the pre-*Smith* religious exemption test that required exemptions from laws of general applicability if the challenged rule or statute substantially burdened a person's exercise of religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014). There is nothing inconsistent with this Court determining the correct test required by the Constitution for public figure defamation claims and Congress legislatively enacting the Court's prior test. The Aviation Transportation Safety Act, Lanham Act, and the like can safely rely on the actual malice standard as legislated by Congress even if this Court reconsiders whether the First Amendment compels *Sullivan*'s actual malice standard.

Even if Respondent's policy rationales were persuasive, the question is not whether *Sullivan* is the correct policy choice based on competing alternatives. That was where the Warren Court initially strayed. The Constitution does not obligate or even permit the Justices of this Court to "revise the Constitution to address every social problem they happen to perceive." *Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018). This Court's obligation is to faithfully interpret the Constitution.

II. THIS CASE PRESENTS A TIMELY OPPORTUNITY TO REVISIT A DOCTRINE THAT CONTINUES TO INJURE PERSONS WHO HAVE ACTUALLY BEEN DEFAMED BUT LACK REDRESS DUE TO AN ERRONEOUS CONSTITUTIONAL ROADBLOCK

This Petition provides this Court a timely opportunity to correct a constitutional wrong that only the Court can correct. Respondent's two arguments as to why this case is not an appropriate vehicle are unpersuasive.

First, Respondent's suggestion that the Ministry did not adequately battle with the lower courts to overrule *Sullivan* conditions this Court's ability to review its precedent on a quixotic task. Respondent incorrectly argues this Court requires a litigant to unsuccessfully ask the lower courts to overturn one of this Court's prior precedents as a condition of asking this

Court to reconsider one of its precedents. The three cases cited by Respondent do not establish such a rule nor do any of the three cases even involve a petition asking this Court to overturn one of its precedents.

In *Wood*, this Court reversed the Tenth Circuit's application *sua sponte* of a statute of limitations defense after the state "twice informed the District Court that it '[would] not challenge'" a habeas petition on statute of limitation grounds. *Wood v. Milyard*, 566 U.S. 463, 474 (2012). Likewise, in *Musacchio v. United States*, 577 U.S. 237, 248 (2016) this Court determined the statute of limitations was not a jurisdictional bar to a criminal defendant's conviction and that the defendant's failure to assert that factual defense in the District Court prevented it from being raised on appeal. And *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) cuts against Respondent's claim since it was undisputed before this Court the City of Newport failed to timely object to the punitive damage instruction in the District Court. Yet, this Court still considered the issue presented since it raised an important question as to whether punitive damages were available under *Monell* against municipalities. *Id.*

Of course, neither the District Court nor the Eleventh Circuit could ignore *Sullivan*. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating the axiomatic rule that lower courts are bound to follow this Court's decisions until withdrawn or modified by this Court). Respondent's suggestion that the Ministry engage in a futile exercise

as a precondition to this Court's review simply makes no sense.

Second, Respondent argues this case is not an appropriate vehicle since the District Court had alternative reasons for dismissing the Ministry's defamation claim. Those arguments are not before the Court, nor could they be. Although, if they were before this Court, the Ministry would prevail. The instant Petition asks this Court to review the decision of the Eleventh Circuit that rejected the Ministry's defamation claim "on the ground that [the Ministry] did not sufficiently plead actual malice. . . ." App. at 8. The petition does not seek review of the District Court's opinion, nor could it. This Court has jurisdiction to review the judgment of the Eleventh Circuit, not the District Court. *William A. Graham Co. v. Haughey*, 794 F. Supp. 2d 566, 569 (E.D. Pa. 2011) (petition for writ of certiorari reviews "the judgment of the Court of Appeals, not that of the district court"); *Studiengesellschaft Kohle, mbH v. Novamont Corp.*, 578 F. Supp. 78, 79 (S.D. N.Y. 1983) (recognizing the judgment reviewed in the Supreme Court is that of the Court of Appeals, not the district court).

Respondent seems to suggest the Eleventh Circuit was going to agree with its argument on the provable as false element anyway and this Court's analysis of *Sullivan* would merely be an academic exercise. But the Eleventh Circuit's opinion does not warrant such confidence. In the Ministry's appeal to the Eleventh Circuit, it challenged the District Court's incorrect conclusions regarding the "provable as false" element

highlighted by Respondent. The Eleventh Circuit rejected the invitation to reach that analysis. But not because it was going to decide the issue in favor of Respondent.

The Eleventh Circuit did not adopt Respondent's or the District Court's analysis on this point. Rather, the court noted "[t]here is a fair debate about whether the term hate group . . . is provable as false. ***That debate is complicated in this case by the fact that SPLC put its own definition of the term on its website.***" App. at 6, n.7 (emphasis added). The Ministry will be able to prove the "hate group" term is a false, factual assertion. Alabama law requires the publication not to be "measured by its effect when subjected to the critical analysis of a trained legal mind, but must be construed and determined by its natural and probable effect upon the mind of the average lay reader." *White v. Birmingham Post Co.*, 172 So. 649, 651 (Ala. 1937).

It took the District Court over fourteen pages to explain why the "hate group" label was not provable as false (App. at 25–41), but that "critical analysis of a trained legal mind" is the "forced construction" that improperly "relieve[d] the defendant from liability." *White*, 172 So. at 651–52. The District Court plainly erred by taking it upon itself to decide what the term "hate group" means rather than allowing a jury to determine the common understanding of that phrase. Respondent's use of the "hate group" moniker against the Ministry despite its patently false application is a debate to be had on remand once this Court removes the

Sullivan actual malice hurdle that prevented the Eleventh Circuit from undertaking the provable as false analysis.

Finally, Respondent's suggestion that the speech at issue is of public interest and debate does not counsel against this Court's review. Respondent did not suggest that the Ministry is a "Bible-follower" or a "supporter of the traditional understanding of marriage." And Respondent (successfully, like in the case of Amazon) convinced other businesses to exclude the Ministry from the public square based on its factual assertion that the Ministry is a "hate group" alongside other truly hateful organizations like the Ku Klux Klan, Nazi sympathizers, and the like. Respondent's cries for "open and searching debate" ring hollow. Respondent chose to create a fundraising tool with a specific definition for a "hate group" and it applied that moniker to the Ministry, despite all evidence to the contrary of the Ministry's love for everyone (the core tenant of its faith and public message), in an attempt to ruin the Ministry's reputation in the public square. Respondent is not a religious entity, nor has it ever expressed its speech is protected as religious speech. Such is a convenient label adopted in its current brief to convince this Court not to grant the petition. Absent this Court's actual malice requirement, the Ministry will show the "hate group" characterization by Respondent is false and defamatory.

Each day that passes with *Sullivan* intact is another day that public figures endure defamation with a nearly insurmountable bar preventing them from

seeking redress for the reputational harm suffered. The time has come for the Court to give this important First Amendment issue the consideration it deserves and reconsider the ongoing viability of *Sullivan*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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