No. 22-_____

In The Supreme Court of the United States

DON BLANKENSHIP,
Petitioner,

v.

NBCUNIVERSAL, LLC, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are: (1) whether the actual malice standard imposed on public figure plaintiffs in defamation cases should be replaced; and (2) whether the framework for summary judgment in public figure defamation cases should be reformed.

PARTIES TO THE PROCEEDING

Petitioner is Don Blankenship. Respondents are NBCUniversal LLC; CNBC LLC; Fox News Network LLC; Cable News Network INC; MSNBC Cable LLC; WP Company LLC, WP Company LLC, d/b/a The Washington Post; Mediaite LLC, FiscalNote INC, d/b/a Roll Call; News and Guts LLC; HD Media Company LLC, d/b/a The Charleston Gazette-Mail; American Broadcasting Companies INC; Tamar Auber; Griffin Connolly; Eli Lehrer; and Boston Globe Media Partners LLC, d/b/a The Boston Globe.

RELATED PROCEEDINGS

- *Don Blankenship v. NBCUniversal, LLC, et al.,* No. 22-1198, United States Court of Appeals for the Fourth Circuit. Judgment entered on February 22, 2023.

- *Don Blankenship v. NBCUniversal, LLC, et al.,* No. 2:20-cv-00278, United States District Court for the Southern District of West Virginia Charleston Division. Judgment entered on February 2, 2022.

- *Don Blankenship v. Boston Globe Media Partners, LLC, d/b/a The Boston Globe, et al.,* No. 2:19-cv-00589, United States District Court for the Southern District of West Virginia Charleston Division. Judgment entered on February 2, 2022.

- *Don Blankenship v. Fox News Network, LLC, et al.,* No. 2:19-cv-00236, United States District Court for the Southern District of West Virginia Charleston Division. Judgment entered on February 2, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Don Blankenship respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 60 F.4th 744 (4th Cir. 2023). App. 1-51. The opinions of the United States District Court for the Southern District of West Virginia Charleston Division granting Respondents' respective motions for summary judgment are reported at *Blankenship v. NBCUniversal, LLC, et al.,* No. 2:20-cv-00278, 2022 WL 329120 (S.D.W. Va. Feb. 2, 2022) (App. 52-78); *Don Blankenship v. Boston Globe Media Partners, LLC, d/b/a The Boston Globe, et al.,* No. 2:19-cv-00589, 2022 WL 329121 (S.D.W. Va. Feb. 2, 2022) (App. 207-231); *Don Blankenship v. Fox News Network, LLC, et al.,* 2:19-cv-00236, 2022 WL 321023 (S.D.W. Va. Feb. 2, 2022) (App. 79-206).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2023. App. 1-51. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Seventh Amendment provides in pertinent part: "In Suits at common law, where the value shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII.

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

INTRODUCTION

The actual malice standard poses a clear and present danger to our democracy. A representative government cannot be sustained unless the electorate receives accurate information about election candidates and retains confidence in election fairness. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny grant the press a license to publish defamatory falsehoods that misinform voters, manipulate elections, intensify polarization, and incite unrest. Election disinformation[1] undermines our nation's capacity for genuine self-government.

The *Sullivan* test violates the constitutional principles of equality and security of rights. Unjustifiable inequities are triggered by the actual malice requirement. The doctrine is also discordant with the security of reputational rights.

[1] The term "election disinformation" as used herein refers to the deliberate publication of false information purposed to obscure debate, induce opinion, alter voting, and provoke polarization during an election.

"[R]eputation . . . reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Preserving the freedom of the press does not require infidelity to these other core constitutional tenets.

The right of trial by jury in civil suits is a constitutional safeguard for the administration of justice. Summary judgment, as applied in public figure defamation cases, has degenerated into a "trial by judge" based on affidavits. Judges are violating both the letter and the spirit of the Seventh Amendment by engaging in extensive factfinding when ruling upon pretrial dispositive motions. Resultantly, a jury trial has become an illusory right to virtually all who are classified as public figures.

The framework for summary judgment is problematic as well. The clear and convincing proof requirement is extremely prejudicial to public figure plaintiffs. Moreover, judges are charged with the unworkable task of assessing the sufficiency of the evidence without determining credibility, ascribing weight, or drawing inferences therefrom. The "reasonable jury standard" is in operation a proxy for a judge's own view of the evidence's sufficiency.

The petition presents compelling reasons to reform defamation jurisprudence. First, the actual malice regime facilitates the publication of defamatory content that pollutes public discourse. Second, *Sullivan* violates egalitarian values by depriving

public figures of equal protection under the law and security of reputation. Third, judges have become de facto jurors when deciding summary judgment in public figure defamation cases. Fourth, the framework for summary judgment is unjust and untenable.

Accordingly, a writ of certiorari should be granted.

STATEMENT OF CASE

Petitioner was a leading candidate for a United States Senate seat during the lead-up to the pivotal[2] West Virginia Republican primary election ("primary") on May 8, 2018. However, Respondents[3] derailed Petitioner's candidacy by falsely publishing that Petitioner is a "convicted felon." Petitioner has never been convicted of a felony. The damage was irreparable. No person convicted of a felony has ever been elected to the United States Senate.[4]

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[2] The balance of power in the United States Senate was at stake.

[3] Due to the word limits imposed by Rule 33(g)(i) of the Rules of the Supreme Court of the United States, Petitioner confines his argument to Fox News and MSNBC, which shall not be construed as a waiver or relinquishment of any right or remedy against the other defendants.

[4] Thomas Joseph Lane (1956) and Matthew Lyon (1799) were *reelected* to the United States House of Representatives after being convicted of a felony.

A. Fox News[5] Defamation Case

Petitioner's case against Fox News is unique: (1) Petitioner was defamed by Fox News on multiple occasions rather than just once; (2) The defamatory publications occurred after Petitioner gave Fox News notice of the truth; (3) Fox News' chain of command knew from the top down that the defamatory statements were false; (4) Fox News defamed Petitioner at the behest of the highest-ranking officials in United States government; and (5) Fox News refused to timely correct a defamation even after Petitioner threatened legal action.

On January 23, 2018, Petitioner filed to run for a United States Senate seat in the primary.

On April 25, 2018, Fox News Channel (FNC) senior judicial analyst, retired Judge Andrew Napolitano, falsely stated that Petitioner "went to jail for manslaughter after people died" on the FNC show *Outnumbered*. Petitioner contacted FNC political editor, Christopher Stirewalt, and advised that a lawsuit would be filed if FNC did not promptly issue a retraction. Napolitano promised to "address [the defamation] thoroughly and accurately." Nevertheless, various Fox News producers rejected

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[5] The term "Fox News" refers interchangeably to Fox News Network, LLC, and Fox News Media. Owned by Fox Corporation, Fox News Media operates Fox News Channel (FNC) and Fox Business Network (FBN). App. 232. https://www.foxcorporation.com/businesses/fox-news/.

Napolitano's numerous pre-election requests for airtime to "correct the record."[6]

On May 1, 2018, FNC hosted a nationally televised debate during which Petitioner specified:

> "I faced 30 years in prison for a fake charge and ***I beat all three felonies*** . . . It's incredible. They sent me to prison for a ***misdemeanor***."[7]

Petitioner surged ahead in polls afterwards.[8] Luis Sanchez, *McConnell urged Trump to speak out against Blankenship: report,* The Hill (May 7, 2018). App. 233-235.

On May 3, 2018, Senate Majority Leader Mitch McConnell masterminded a character assassination of Petitioner on the FNC show *The Story with Martha MacCallum*. GOP operative Karl Rove vilified

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[6] Fox News refused Napolitano any opportunity to explain Petitioner's misdemeanor conviction to Fox News viewers until 14 days *after* the primary election on May 22, 2018. During a FNC telecast of *Your World with Neal Cavuto*, Napolitano affirmed that Petitioner was not a "convicted felon" but failed even then to "correct the record" concerning his own defamatory statement ("He went to jail for manslaughter after people died").

[7] Few Americans could make a stronger case than Petitioner that they are not a "convicted felon." He was the focus of a five-plus-year federal investigation and a politically motivated prosecution. After a six week trial and fifty hours of jury deliberations over ten days, Petitioner was acquitted of all three felony charges.

[8] *See* https://thehill.com/homenews/campaign/386537-mcconnell-urged-trump-to-speak-out-against-blankenship/.

Petitioner as a "bigot," "moron," and "crook" during the show.[9] Afterwards, McConnell expressed gratitude to Rove by email: "Thanks so much for your comments on Martha's show last night. Elaine [Chao] and I are both grateful. Mitch." App. 236-239. Rove replied: "Happy to help. [What] a sick, twisted moron." *Id.*

On May 6, 2018, at 9:04:55 PM, Fox News CEO, Rupert Murdoch, sent the following email ("Murdoch email") to Fox News president of programming, Suzanne Scott, and Fox News executive vice president of news and editorial, Jay Wallace:

> Both [President Donald] Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day. App. 240.

Murdoch admitted that his use of the word "helpful" in the email meant "it would be helpful to the Republican leadership" for Fox News to aid in defeating Petitioner in the primary. App. 241-245. According to Murdoch, "***that's what they were campaigning for, at least what President Trump said***." *Id.*

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[9] Rove also claimed he had a Morning Consult poll which confirmed Petitioner could not win the general election. Petitioner obtained the Morning Consult survey information by subpoena. No data therein corroborated Rove's false statement of fact.

On May 7, 2018, Trump published a tweet exhorting West Virginia voters to reject Petitioner in the primary after McConnell "urged [Trump] in a phone call to speak out against [Petitioner]." App. 233-235.

Later the same day, FNC and Fox Business Channel (FBC) senior vice president and business/political news anchor, Neil Cavuto, verified the alliance between Fox News and the Republican Party on the FBN show *Cavuto: Coast to Coast*:

> Morning, Republicans. You know what? ***We're*** gonna lose West Virginia if Don Blankenship is ***allowed*** to win the primary and he does win the primary outright. ***Of course, he's a convicted felon.*** You know the whole background on him, and ***the party is just eschewing the guy***.[10] App. 246-249.

Cavuto also referred to Petitioner as "the ***outside candidate***, the one that is, you know, [a] ***'convicted felon'*** during the same show. Approximately two weeks earlier on April 25, 2018, FNC correspondent, Peter Doocy, told Cavuto that Petitioner ***"served a year in jail on a misdemeanor conviction"*** on the FNC show *Your World with Neil Cavuto*. App. 11. In

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[10] Cavuto's message and language evince a collusive effort between Fox News and the Republican Party to prevent Petitioner from winning the primary. The greeting "Morning, Republicans" identifies the targeted audience. "We're" and "the party" verify a GOP-Fox News alliance. Cavuto's choice of the word "allowed" conveys an aura of power and pompousness that Fox News can (and does) sway election results.

addition, Cavuto received a dossier on May 2, 2018, which described Petitioner as a "former coal company CEO" seeking "vindication for his 2015 conviction on a ***misdemeanor*** charge." *Id.* Cavuto had ***"no doubt"*** that he would have reviewed this packet. *Id.* at 248.

Also on May 7, 2018, both FBC guest host, John Layfield, and FNC political contributor, Bradley Blakeman, falsely portrayed Petitioner as a "felon" on the FBC show *The Evening Edit.*[11]

On May 8, 2018, FBN panelist, Stephanie Hammill, falsely labeled Petitioner as a "convicted felon" on the FBN show *Making Money with Charles Payne.*

Tellingly, Fox News ***never*** falsely published that Petitioner was a "felon" or "convicted felon" before the Murdoch email.

On May 9, 2018, Trump personally called Petitioner to apologize and invited Petitioner to run again in the future.

B. MSNBC Defamation Case

Petitioner's case against MSNBC is distinctive as well. (1) Petitioner was defamed by MSNBC several times rather than just once; (2) the defamatory publications occurred after MSNBC had notice of the truth; (3) the MSNBC production team who was

[11] On May 9, 2018, FBN host, Elizabeth MacDonald, also falsely maligned Petitioner as a "felon" on *The Evening Edit*.

responsible for publishing the defamatory statements were subjectively aware of the falsity thereof; and (4) MSNBC did not correct the defamation even after a viewer notified Hayes of the inaccuracy and Hayes acknowledged the same.

On December 3, 2015, MSNBC political news anchor, Chris Hayes, lamented in an email to Denis Horgan and others that Petitioner ***"only got nailed on the misdemeanor.*** Probably not a day in jail." App. 253-254.

On November 19, 2017, Hayes' direct knowledge of the truth was reinforced by two news stories accurately describing Petitioner's misdemeanor conviction that were featured on a telecast of *All In with Chris Hayes*, an MSNBC show hosted by Hayes and produced by Horgan.

On May 4, 2018, guest host, Joy Reid falsely described Petitioner as a "convicted felon" during a telecast of *All In with Chris Hayes*. Reid was reading from a script approved by Horgan when Reid published the defamatory statement.

On May 9, 2018, Hayes falsely depicted Petitioner as a "convicted felon" during a telecast of *All In with Chris Hayes*.

C. Petitioner's Prima Facie Case

The quantum and quality of the proof adduced by Petitioner was legally sufficient for a reasonable jury

to find every element of his defamation claim by clear and convincing evidence.

Publication: The defamatory statements were published on Fox News and MSNBC telecasts. Cavuto and Napolitano were employed by Fox News. Likewise, Hayes was employed as a political news anchor by MSNBC. The FBN guest speakers were invited to discuss Petitioner. Hence, Fox News and MSNBC are deemed "publishers" of the defamatory content.

Of or concerning: Each defamatory publication referred to Petitioner.

Falsity: Petitioner never "went to jail for manslaughter after people died." In fact, both the district judge who presided over Petitioner's criminal case and the magistrate judge who recommended that Petitioner's misdemeanor conviction be set aside recognized that Petitioner was not charged with causing the mine explosion at the Upper Big Branch.[12] Moreover, Petitioner has never been convicted of a felony. Thus, Napolitano's "manslaughter" remark and Fox News' references to Petitioner as a "felon" and "convicted felon" were false statements of fact.

Actual malice: Doocy told Cavuto that Petitioner ***"served a year in jail on a misdemeanor."*** Cavuto also admitted that he subsequently read the dossier that mentioned Petitioner's "***misdemeanor*** charge."

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[12] *Blankenship v. United States,* No. 5:18-cv-00244, at 17 (Jan. 15, 2020); No. 5:14-cr-00244, at 3 (Aug. 26, 2019).

Although Cavuto later feigned ignorance that a person could be sentenced to a year in jail on a misdemeanor charge, the Doocy statement and the dossier conflicted with Cavuto's self-serving disclaimer and established a genuine dispute of material fact as to actual malice. A reasonable jury could find from this evidence that Cavuto knew his "convicted felon" references were false when uttered or that he recklessly disregarded the truth. Nonetheless, the district court and the court of appeals improperly weighed Cavuto's credibility and resolved the evidentiary conflicts in favor of Fox News.

A reasonable jury could similarly draw legitimate inferences of actual malice from the Murdoch email. Trump and McConnell pressured Murdoch ***"for help to beat"*** Petitioner. Murdoch surmised that ***"dumping on [Petitioner] hard might save the day."*** During the next two days on both the eve and the day of the primary, Petitioner was smeared as a "felon" and "convicted felon" on various FNC and FBN shows. The defamatory publications would not have been discerned by laypersons as mere innocent mistakes when examined in context of the subject matter, circumstances, wording, and timing of the Murdoch email. Fox News' rejections of Napolitano's requests to correct the record could also be viewed as corroboration of actual malice. But the district court and the court of appeals failed to draw "the most favorable of possible alternative inferences" in Petitioner's favor as required by law. *See Charbonnages De France v. Smith,* 597 F.2d 406, 414 (4th Cir. 1979).

The email in which Hayes acknowledged that Petitioner ***"only got nailed on a misdemeanor"*** created a genuine dispute of material fact. The two featured news stories about Petitioner's misdemeanor conviction could likewise be regarded as conflicting proof. Even so, both the district court and the court of appeals acted as shadow jurors by giving greater evidentiary weight to a recording in which Hayes vented that Petitioner is a "convicted felon." Hayes' credibility and the factual inconsistencies were inappropriately resolved in favor of MSNBC.

Defamation per se: Statements falsely imputing a person with the commission of a crime are actionable as defamation per se under West Virginia case law. *Mauck v. City of Martinsburg,* 280 S.E.2d 216, 219 n.3 (W. Va. 1981); *Colcord v. Gazette Pub. Co.,* 145 S.E. 751, 753 (W. Va. 1928).

D. Judicial Overreach

"It is the rare case in which a defendant will confess his state of mind and thus allow the plaintiff to prove actual malice with direct evidence." *Tah v. Glob. Witness Publ'g, Inc.,* 991 F.3d 231, 245 (D.C. Cir. 2021) (Silberman, J., dissenting in part). Therefore, the scienter of the speaker must typically be proven by circumstantial evidence. Both the district court and the court of appeals failed to assess Petitioner's proof of actual malice in toto. They also commandeered traditional jury functions by weighing the evidence, making credibility determinations, drawing factual inferences, and resolving contradictory proof, all in favor of the defendants. Petitioner was subjected to a

trial by summary judgment contrary to the Seventh Amendment.

E. District Court Proceedings

The United States District Court for the Southern District of West Virginia granted summary judgment to the defendants. App. 52-231.

F. Fourth Circuit Proceedings

The United States Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment. App 1-51.

REASONS FOR GRANTING THE PETITION

Our political system is a duopoly controlled by the Republican Party and the Democratic Party. These factions prioritize the pursuit of their own power over the public interest. In his farewell address, President George Washington warned that political parties would likely "become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion."[13] Today's press operates as an accomplice of the political parties by echoing curated narratives to targeted constituencies.

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[13] https://avalon.law.yale.edu/18th_century/washing.asp.

Petitioner's case exemplifies how the politico-media complex[14] controls who will be elected to the proverbial country club on Capitol Hill. Petitioner was an outsider election candidate who dared to criticize public policies, raise McConnell's conflicts of interest with Communist China, and challenge the Republican Party leadership. But our political elites want minions, not independent thinkers. So, Trump and McConnell abused the power of their respective offices and appealed to Murdoch "for help to beat" Petitioner in the primary. Fox News obliged them by falsely maligning Petitioner as a "convicted felon" who could not win the general election. Petitioner's speech was stifled. A federal election was sabotaged. Democracy was defeated.

It was a "systematic attack, emanating from the very highest reaches of power, on our collective ability to distinguish truth from falsehood." *See* David A. Logan, *Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 81 Ohio St. L.J. 759, 799 (2020). If the President and Senate Majority Leader can legally induce the chairman of America's most-watched cable news network to publish weaponized defamation about a leading candidate for the United States Senate, then it is game over for democracy in this country. Paid political advertising is no match against the persuasive impact and scope of election disinformation published on purported news programs.

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[14] The term "politico-media complex" as used herein refers to the symbiotic and collusive relationship between our nation's political class and the mass media.

"It should be borne in mind that the first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of the news." *Tah,* 991 F.3d at 255. The relationship between the GOP and Fox News is reminiscent of the alliance between the Politburo of the Communist Party and Pravda in the former Soviet Union. MSNBC is a purveyor of propaganda for the Democratic Party. Like a politburo, the political parties, in concert with the press, predetermine who will be elected to Congress. *Sullivan* aids and abets this corrupt process by facilitating defamatory falsehoods that deceive voters. "[A] biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness—to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press' power." *Id.* at 256.

The *Sullivan* doctrine facilitates the defamation of election candidates by the politico-media complex. The repercussion of this unintended paradigm is government censorship of free speech in violation of the First Amendment. Public discourse is plagued by untruths, innuendo, conjecture, conspiracy theories, false aspersions, alternate facts, and outright lies. Journalistic irresponsibility is the disease. The actual malice test is the responsible pathogen. As the final arbiter of the law, the Court must intervene to restore our dysfunctional public square back to health.

I. THE ACTUAL MALICE STANDARD SHOULD BE REPLACED.

A. Defamation was not protected by the First Amendment prior to *Sullivan*.

The actual malice rule "is not rooted in the longstanding tradition of American defamation law." Carson Holloway, *Malice Toward All, Defamation for None?*, Law & Lib. (Dec. 20, 2022). App. 258-264. "Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." *Herbert v. Lando,* 441 U.S. 153, 158 (1979). Prior to *Sullivan*, defamatory publications were not deemed by the Court to be among the "well defined and narrowly limited classes of speech the prevention and punishment of which has never been to raise any Constitutional problem." *Beauharnais v. Illinois,* 343 U.S, 250, 255-56 (1952) (citing *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942)); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 384-85 (1974) (White, J., dissenting) ("The Court's consistent view prior to *Sullivan* was that defamatory utterances were wholly unprotected by the First Amendment.") (internal citation omitted). Simply put, "[the] 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 v. Lawson,* 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting) (citing *Tah* 991 F.3d at 251) (emphasis deleted).

B. The media has changed since *Sullivan*.

"*Sullivan* rested on a political economy of public discourse that no longer exists." David McGowan, *A Bipartisan Case Against New York Times v. Sullivan,* 1 J. Free Speech L. 509, 528 (2022). Presently, the mass media is controlled by five multinational media conglomerates with substantial market caps: Disney ($184B), Comcast ($174B), Warner Bros. Discovery ($31B), Fox Corporation ($17B), and Paramount Global ($15B).[15] This oligopoly is motivated by profit not public service. Advertising revenue depends on ratings and website traffic. Sensationalism garners more eyeballs and clicks than factual news reporting. It is all about the money. The truth be damned.

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[15] Each of these companies have lucrative financial investments in Communist China. Some of these ventures required the approval and/or partnership of the Communist Party of China. According to FBI director, Christopher Wray, "[t]he greatest long-term threat to our nation's information and intellectual property, and to our economic vitality, is the counterintelligence and economic espionage threat from China. It is a threat to our economic security, and by extension, to our national security." *See* https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states. It was not mere chance that a frenzy of media condemnations and defamations came after Petitioner raised concern about the conflicts of interest that McConnell has with the Communist Party of China. Petitioner has opined for decades that United States corporations should avoid entanglements with the Communist Party of China and economic dependency on Communist China.

Who does the actual malice requirement really protect? Only 34 percent of reporting journalists are freelance or self-employed. Emily Tomasik & Jeffrey Gottfried, *U.S. journalists' beats vary widely by gender and other factors,* Pew Research Center, (Apr. 4, 2023).[16] App. 255-257. Most work for the mass media. *Id.* Therefore, it is the mass media oligopoly that benefits the most from the *Sullivan* regime. In the final analysis, "the privilege that the actual malice standard creates for journalism savors more of oligarchy than of democracy." Holloway, *supra*, (Dec. 20, 2022). App. 258-264.

C. There are multifarious reasons to rethink *Sullivan*.

Justice Byron White joined the judgment and opinion in *Sullivan* but later concluded that the Court "struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749, 767 (1985) (White, J., dissenting). He also recognized unintended effects of the actual malice standard:

> The *New York Times* rule countenances two evils: first, the stream of information about public officials and public affairs is polluted and

[16] https://www.pewresearchcenter.org/fact-tank/2023/04/04/us-journalists-beats-vary-widely-by-gender-and-other-factors/.

> often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. at 769.

Justice Antonin Scalia was a critic of *Sullivan*. In *Ollman v. Evans,* 750 F.2d 970, 1036 (D.C. Cir. 1984), Justice Scalia (then Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit) disapproved of the "expectation" that those who enter the "political arena" must be predisposed to "public bumping" (which is "fulsomely assured by the Court's decision in *Sullivan*"). He believed that *Sullivan* gave the press "too much license to destroy the reputations of public officials." James Brian Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court,* 314 (2006). Scalia observed that the press is "capable of holding individuals up to public obloquy from coast to coast" and "reap financial rewards commensurate with that power." *Ollman,* 750 F.2d at 1039.

In an undated White House memorandum titled *New York Times v. Sullivan: A Blight on Enlightened Public Discourse and Government Responsiveness to the People,* Chief Justice John Roberts (then Associate Counsel to President Ronald Reagan) wrote that *Sullivan*: "crown[s] the media with virtual absolute

immunity for falsely assailing public officials" and "obstructs the ability of the president and other public officials to recruit talented and loyal supporters." Adam Liptak, *Clues on How Roberts Might Rule on Libel,* The N.Y. Times, A22 (Sept. 27, 2005).[17]

Justice Elena Kagan (then a University of Chicago Law School professor) has questioned whether "uninhibited defamatory comment" promotes the social good. 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 & Soc. Inquiry 197, 206 (1993). She further observed that "[t]oday's press engages in far less examination of journalistic standards and their relation to legal rules" and "reflexively asserts constitutional insulation from any and all norms of conduct." *Id.* at 207. In that regard, Justice Kagan questioned whether *Sullivan* "bears some responsibility" for "increased press arrogance." *Id.* at 208. Perhaps most notably, she opined that *Sullivan* "may differ too greatly from most (or many) libel cases to provide a sensible doctrinal base." *Id.* at 215.

Justice Clarence Thomas has denounced *Sullivan* and its various extensions as "policy-driven decisions masquerading as constitutional law." *McKee v Cosby,* 139 S. Ct. 675, 676 (2019) (Thomas, J., dissenting). He has further decried the "lack of historical support for the actual malice doctrine" and has stressed that the Court's "reconsideration is all the more needed

[17] https://www.nytimes.com/2005/09/27/us/clues-on-how-roberts-might-rule-on-libel.html.

because of the doctrine's real-world effects." *Berisha,* 141 S. Ct. at 2425.

Justice Neil Gorsuch has focused on the radical shifting of the media landscape, the decline of the institutional press, and the emergence of 24-hour cable news and online media platforms as reasons to revisit *Sullivan*. *Berisha,* 141 S. Ct. at 2427. He has noted that "[a] study of one social network reportedly found that 'falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.'" *Id.* Justice Gorsuch has additionally bemoaned the actual malice standard as "an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable." *Id.* at 2428. "The bottom line? It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy. Under the actual malice regime as it has evolved, 'ignorance is bliss'" *Id.*

Justice Sonia Sotomayor has deemed the widespread publication of false statements on social media as "a true threat to our national security." Devin Dwyer, *Justices Sonia Sotomayor and Neil Gorsuch agree: Misinformation is threat to America,* ABC News, (Apr. 14, 2021).[18] App. 265-268.

Justice Samuel Alito has emphasized that "[t]ime and again, this Court has recognized that as a general matter false factual statements possess no intrinsic

[18] https://abcnews.go.com/Politics/justices-sonia-sotomayor-neil-gorsuch-agree-misinformation-threat/story?id=77078448.

First Amendment value." *United States v. Alvarez,* 567 U.S. 709, 746 (2012) (Alito, J., dissenting).

Justice Amy Coney Barrett (then a University of Notre Dame Law School professor) did not include *Sullivan* among the cases deemed as "super precedents"[19] in constitutional law. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711, 1734-35 (2012-2013).

D. The actual malice regime undermines self-government.

Election disinformation will kill our democracy if left unabated. The January 6, 2021, events at the United States Capitol were unimaginable a decade ago. A stolen election narrative propagandized by the press fueled the unrest that culminated in the attack. Murdoch acknowledged in the Dominion Voting Systems lawsuit that Fox News commentators Sean Hannity, Lou Dobbs, Maria Bartiromo, and Jeanine Pirro endorsed the election fraud claims.[20] Del Dover, *Rupert Murdoch admits some Fox News host endorsed false notion of 2020 election fraud,* CBS News (Feb. 28, 2023). App. 269-272. Former House Speaker Paul Ryan, who sits on the Fox Corporation Board of

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[19] "Super precedents" are "cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711, 1734 (2012-13).

[20] https://www.cbsnews.com/news/rupert-murdoch-fox-dominion-defamations/.

Directors ("Fox Board"), observed that "some high percentage of Americans" thought the election was stolen "because they got a diet of information telling them the election was stolen from what they believe were credible sources." *Id.* Murdoch replied: "Thanks Paul. Wake-up call for Hannity, who has been privately disgusted by Trump for weeks, but ***was scared to lose viewers***." *Id.*

Both Murdoch (Fox Board chair) and Ryan (Fox Board corporate governance committee chair) acknowledged that Fox News was publishing a false stolen election narrative. Furthermore, they recognized that Fox News viewers believed the stolen election narrative to be accurate. Yet no remedial measures were taken to stop the inflammatory reporting. A riot at the seat of American government ensued.

Approximately four months before Fox News unleashed the barrage of defamatory publications about Dominion Voting Systems, Petitioner gave the Fox Board advance warning that it was "neglecting its key responsibility of maintaining the reputation and well-being of Fox Corporation."[21] App. 273-281. Petitioner also alerted the Fox Board that it was "not in compliance with Fox Corporation's *Corporate Governance and Compliance Commitment*." *Id.* Finally, Petitioner questioned whether the company's

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[21] *See* Letter from Don Blankenship to Rupert Murdoch, Fox Corporation Chair, (July 10, 2020). The other directors (Lachlan Murdoch, Chase Carey, Anne Dias, Roland A. Hernandez, Jacques Nasser, & Paul D. Ryan) also received a letter.

"operational structure and committees [were] sufficient to enable the Fox Board to fulfill its responsibilities of providing oversight and accountability for Fox Corporation." *Id.* Recent events have confirmed that the Fox Board lacked the astuteness to heed Petitioner's admonitions.

Fox News was aware that defamatory falsehoods were being published about Petitioner. Petitioner substantiated that Wallace, Cavuto, Stirewalt, Napolitano, Doocy, Alan Komissaroff (senior vice president of news and political programming), Bill Sammon (vice president and managing editor), Brett Baier (chief political anchor and executive editor), Martha MacCallum (anchor and executive editor), Gavin Hadden (vice president and executive producer), Gary Villapiano (producer), and others knew that Petitioner was not a "convicted felon." Even so, these executives, officers, anchors, analysts, editors, and producers condoned the defamatory publications by acts and omissions. Advancing the election agenda of the Republican Party took precedence over the public interest in fair elections.[22]

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[22] *See* Letter from Don Blankenship to Rupert Murdoch, Fox Corporation Chair, (Oct. 4, 2021). The other directors (Lachlan Murdoch, William A. Burck, Chase Carey, Anne Dias, Roland A. Hernandez, Jacques Nasser, and Paul D. Ryan) also received a letter. Chief Legal and Policy Officer, Viet D. Dinh, received a letter as well. Petitioner urged the Fox Board to come clean about how Fox News interfered in a federal election on behalf of Trump and McConnell to "illicitly and illegally control which candidate would become West Virginia's US Senator." App. 282-285.

Petitioner was a microcosm of what MSNBC's Hayes and his staff abhorred—an anti-union, capitalist, fossil fuel-producing, coal magnate. Hayes expressed discontent that Petitioner ***"only got nailed on a misdemeanor"*** in an email. There were other emails wherein members of Hayes' production team compared Petitioner to a terrorist and murderer. Hayes and company had the means, motive, and opportunity to take Petitioner down. And that is exactly what they did.

No correction was published by MSNBC after a viewer advised Hayes in an email that Petitioner is not a "convicted felon." Hayes just brushed it off. This is a vivid illustration of the "air of [press] exceptionalism and entitlement" fostered by the *Sullivan* rule. Kagan, *supra,* at 207. The actual malice standard has "erode[d] principles of journalistic responsibility." *Id.* at 207.

"Americans have high aspirations for the news media to be a trusted, independent watchdog that holds the powerful to account." John Sands, *Americans are losing faith in an objective media. A new Gallup/Knight study explores why,* Knight Foundation, (Aug. 4, 2020).[23] App. 286-290. Strikingly, 80 percent of Americans think that inaccuracies in reporting are intentional. *Id.* They are right. Former Fox News anchor Bill O'Reilly recently described television news as "the most wicked

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[23] https://knightfoundation.org/articles/americans-are-losing-faith-in-an-objective-media-a-new-gallup-knight-study-explores-why/.

industry in the United States of America."[24] App. 291-293. Tragically, we live in a "post-truth" era in which the press deliberately defrauds its own audience.

Maintaining a representative government is impossible when false narratives are imparted as fact. The distinction between news reporting and editorializing becomes blurred. Critical thinking is compromised. Confirmation bias is reinforced. Racial, religious, political, and cultural divisions are deepened. The actual malice standard exacerbates these problems by lubricating the engine of election disinformation.

Overruling *Sullivan* will spark a resurgence of fact-based journalism. Best practices for accuracy and truthful reporting will be incentivized.[25] Reliable information will be exchanged in the public square. Facts will become distinguishable from fiction. Voters will be meaningfully informed. The broken trust in elections will be rebuilt. A sense of solidarity will be reawakened. Public discourse will be reconsecrated to the full achievement of democracy.

The Declaration of Independence affirms that government power is derived from the consent of the governed. Petitioner's case demonstrates that the actual malice requirement emboldens the press to

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[24] https://thehornnews.com/bill-oreilly-drops-tucker-carlson-bombshell/.

[25] Fox News did not have a written policy of journalism ethics and standards in 2018. This was indicative of a corporate culture that did not uphold principles of fairness and accuracy in reporting.

collude with the government and manipulate such consent with weaponized defamation. Retailing election disinformation is a form of "hybrid warfare" that subverts elections and impedes self-government. In the words of President John F. Kennedy: "The ignorance of one voter in a democracy impairs the security of all." It is imperative that the Court summon the wisdom, resolve, and unity of purpose to rescue our democracy from election disinformation.

II. THE ACTUAL MALICE STANDARD CONFLICTS WITH CONSTITUTIONAL PRINCIPLES.

A. The actual malice test is inequitable.

"EQUAL JUSTICE UNDER LAW" is written above the main entrance to the Supreme Court Building. This iconic inscription is much more than a mere platitude. It encapsulates our collective ambition for the rule of law in the United States. The actual malice test "introduces an indefensible inequality into our law of defamation." Holloway, *supra,* (Dec. 20, 2022).

In *Gertz*, the Court theorized that public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz,* 418 U.S. at 344. Yet the fallacy of this faulty reasoning was candidly acknowledged: "Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth

rarely catches up with a lie." *Id.* at 344 n.9. Besides, it is a dubious assumption that public figures "enjoy significantly greater access" to the entities that defamed them. Petitioner has been repeatedly denied access to the "channels of effective communication" since filing suit four years ago.

The Court posited that individuals assume the risk of "closer public scrutiny" and "must accept certain necessary consequences" when seeking public office. *Id.* at 344. Nowhere in the Fourteenth Amendment does the text provide or even suggest that the right of equal protection under the law is relinquished by those who run for public office. Furthermore, the premise that election candidates "must accept certain necessary consequences" of getting involved in public affairs is ***not*** "a compelling normative consideration underlying the distinction between public and private defamation plaintiffs." *Id.* To be blunt, this is twisted logic and an injudicious postulation that discourages qualified women and men from entering public service. Chief Justice Roberts rightly recognized that "crown[ing] the media with virtual absolute immunity for falsely assailing public officials" is bad law. Liptak at A22.

B. The actual malice doctrine contravenes the security of reputation.

Sullivan "runs counter to one of the basic aims of American government: to secure the natural rights of

all."[26] Carson Holloway, *Rethinking Libel, Defamation, and Press Accountability: Provocations #4,* The Claremont Institute Center for the American Way of Life, (Sept. 21, 2022). App. 295-311. Security of reputation was "commonly understood" by our nation's Founders to be a natural right and "deserves to be classed" as such. *Id.* "[W]e are all losers when the law becomes so distorted as to eliminate all manner of accountability for those who would recklessly damage personal reputations ostensibly in the name of freedom of speech or freedom [of] the press." *Reighard v. ESPN, Inc.,* No. 355053 (Mich. Ct. App. May 12, 2022) (Boonstra, P. J., concurring). The actual malice rule is a discriminatory legal precept that denies security of reputation to public figures.

Public figures are powerless to resist a mass media oligopoly that controls the airwaves and buys ink by the barrel. Most experienced First Amendment litigation lawyers work for firms who defend these behemoths. Contingency fee arrangements are not available. Public figure defamation claims are expensive to litigate.[27] Proving a speaker's mens rea is onerous. Public figure defamation cases rarely prevail (or survive summary judgment).[28]

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[26] https://dc.claremont.org/rethinking-libel-defamation-and-press-accountability/.

[27] Petitioner has spent more than three million dollars in attorney fees and expenses.

[28] "The public is left to conclude that the challenged statement was true after all." *Dun & Bradstreet,* 472 U.S. at 768. Petitioner should not have to go to the grave smeared as a "convicted felon."

Consequently, journalists have little legal incentive to ensure accuracy.

Journalism has become a "privileged profession" under the *Sullivan* regime. Holloway, *supra,* (Sept. 21, 2022). Journalists "carry practically no liability for their negligence." *Id.* In contrast, doctors, lawyers, accountants, and other professionals are subject to liability for their errors and omissions. "It is a violation of the principle of equality that all Americans are answerable for their negligence except for journalists." *Id.* 14. No legitimate constitutional interest is served by absolving journalists from professional misconduct.

The press survived and thrived without the actual malice requirement from December 15, 1791, when the First Amendment was ratified, until March 9, 1964, when *Sullivan* was decided. Jury awards to defamed public figure plaintiffs no longer pose an existential threat to the press. Disney, Comcast, Warner Bros. Discovery, Fox Corporation, and Paramount Global have sustainable revenue streams from a diversified portfolio of global businesses and brands. Wealth is synonymous with power. With great power comes great responsibility. "[T]hose exercising the freedom of the press [have] the responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they cause." *Berisha,* 141 S. Ct. at 2426.

III. THE FRAMEWORK FOR SUMMARY JUDGMENT SHOULD BE REFORMED.

A. The clear and convincing proof requirement is unsuitable for summary judgment in public figure defamation cases.

Justice Scalia was right. Imposing the clear and convincing evidence burden of proof during summary judgment in public figure defamation cases "change[s] the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts." *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). A public figure plaintiff is "effectively force[d] . . . to try his entire case in pretrial affidavits and depositions." *Id.* The increased burden of proof "is simply incompatible with the preliminary nature of the summary judgment inquiry." *Id. at* 1571.

Justice William Rehnquist predicted that "engraft[ing] the standard of proof applicable to a factfinder onto the law governing the procedural motion for summary judgment [would] do great mischief, with little corresponding benefit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 272 (1986) (Rehnquist, J., dissenting). Purportedly, the clear and convincing standard of proof "by no means authorizes a trial of affidavits." *Anderson,* 477 U.S. at 255. Yet this ostensibly prohibited course of action has been systemically adopted by judges when granting summary judgment against public figure plaintiffs,

including Petitioner. The defendant routinely prevails on summary judgment simply by having the speaker sign an affidavit denying that the defamatory statement was published with knowledge of its falsity. The equities of a trial by affidavit are overwhelmingly in favor of the defendant. Plus, a grant of summary judgement is based on a record less informative than a disposition by jury trial.

Judge Jerome Frank wrote: "The liar's story may seem uncontradicted to one who merely reads it, yet it be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his features, and the like—all matters which 'cold print does preserve.'" *Broadcast Music v. Havana Madrid Restaurant Corp.,* 175 F.2d 77, 80 (2d. Cir. 1949). Judges in public figure defamation cases evaluate the evidentiary sufficiency of an affidavit without hearing or seeing the affiant. There is no observation of the affiant's voice tone, facial expressions, body language, attitude, hesitancy of speech, or other non-verbal cues. There is no confrontation of the adverse witness or testing of the evidence by cross-examination. There is no means for clarification or recantation. There is only a piece of paper to ponder.

These out-of-court statements are prepared by lawyers who frequently employ deceptive and dilatory tactics to evade production of discoverable inculpatory evidence. For example, the Fox News legal team exploited every procedural loophole at its disposal to avoid production of intra-executive communications, including the Murdoch email. The magistrate judge presiding over discovery wrote that it was

"inconceivable why the production of those materials" had not timely taken place. *Don Blankenship v. Fox News Network, LLC,* No. 2:19-cv-00236, 7 (S.D.W. Va. July 8, 2021). Petitioner cautioned the Fox Board that "any further misconduct such as failing to follow court directives [would] inevitably expose the Fox Board itself to potential shareholder action."[29] App. 326-329. After nearly a year, multiple court orders, and exhaustive motions practice, Fox News finally yielded to judicial authority and produced discoverable materials that were "relevant and proportional to the needs of [the] case."[30] *Id.* Incidentally, Fox News lawyers were recently sanctioned for concealing inculpatory evidence in the Dominion Voting Systems lawsuit.[31] App. 330-335.

The prevailing reliance of judges on affidavits when deciding summary judgment in public figure

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[29] *See* Letter from Don Blankenship to Rupert Murdoch, Fox Corporation Chair, (July 13, 2021). The other directors (Lachlan Murdoch, William A. Burck, Chase Carey, Anne Dias, Roland A. Hernandez, Jacques Nasser, and Paul D. Ryan) also received a letter. Chief Legal and Policy Officer, Viet D. Dinh, and General Counsel, Jeff A. Taylor, received a letter as well.

[30] The production occurred after Petitioner sent the Fox Board the letter dated July 13, 2021. Still, Fox News did not produce a single text message. It is implausible, if not inconceivable, that no Fox News executive, officer, anchor, host, correspondent, analyst, editor, producer, or staffer did not send a single text message that referred to Petitioner.

[31] Melissa Quinn & Clare Hymes, *Delaware judge sanctions Fox News lawyers in Dominion lawsuit,* CBS News (Apr. 13, 2023), https://www.cbsnews.com/amp/news/delaware-judge-sanctions-fox-news-lawyers-dominion-voting-systems-lawsuit/.

defamation cases is misguided. In addition to being potentially liable for considerable monetary damages, a media defendant's shareholder value, business model, corporate reputation, and journalistic credibility are at stake. Similarly, the speaker's job security, financial status, professional reputation, and journalistic integrity are at risk. These concerns provide irrepressible motivation to procure or sign a false affidavit.[32] App. 336-340. The "we'll take your word for it" approach to affidavits when deciding summary judgment is judicial naivety of the worst order.

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[32] Abby Grossberg, a former Fox News booking producer for hosts Maria Bartiromo and Tucker Carlson, has alleged in a lawsuit against Fox News that the Fox News legal team "coerced" her into giving misleading testimony in the Dominion Voting Systems lawsuit. According to Grossberg, Fox News lawyers "coerced, intimidated, and misinformed" her during deposition preparation sessions and "were 'displeased' that she was being 'too candid and forthcoming.'" Grossberg also averred that she was coached by Fox News attorneys to "respond with a generic 'I do not recall' to as many questions as possible during a September 2022 deposition." *See* Melissa Quinn, *Fox News producer alleges network "coerced" her into giving misleading testimony in Dominion suit,* CBS News (Mar. 21, 2023), https://www.cbsnews.com/news/fox-news-dominion-suit-abby-grossberg-producer-maria-bartiromo-tucker-carlson-testimony/. Karrah Levine, a former Fox News booking producer for host Martha MacCallum, repeatedly answered "I don't know," "I don't remember," "I don't recall," or "I don't have a recollection" to questions asked during an April 2021 deposition in Petitioner's case.

B. The summary judgment framework in public figure defamation cases is problematic.

When determining whether there is a genuine issue for trial, a judge must not "weigh the evidence and determine the truth of the matter." *Anderson,* 477 U.S. at 249. Furthermore, the Court cautioned that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. Distinguishing questions of law from questions of fact is a "vexing" process. *Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1983). The evaluation of facts "depends on the nature of the materials" and "may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy." *See Baumgartner v. United States,* 322 U.S. 665 (1944).

The proof of mens rea in public figure defamation cases is intrinsically subtle. How can a judge possibly evaluate the sufficiency of actual malice evidence without determining credibility, ascribing weight, or drawing inferences? She cannot. This conundrum was echoed by Justice William Brennan: "I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Anderson,* 477 U.S. at 258 (Brennan, J., dissenting).

The "conflicting signals" sent by the Court in *Anderson* are exceedingly difficult, if not impossible,

to follow. *Id.* at 265. Justice Brennan elaborated:

> I simply cannot square the direction that the judge "is not himself to weight the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount "required," could *only* be performed by weighing the evidence.

Id. at 266. Justice Brennan shared Justice Scalia's concern that summary judgment procedure would devolve into "a full-blown paper trial on the merits" and violate a public figure's constitutional right to a jury trial. *Id.* at 266-67.

The court of appeals recognized ***there was a genuine dispute of material fact*** by observing that **"a jury could infer that Cavuto processed Doocy's remark and committed the detail to memory."** *Blankenship v. NBCUniversal, LLC, et al.,* 60 F.4th 744, 759 (4th Cir. 2023). If Cavuto did commit the detail (Petitioner "served a year in jail on a misdemeanor conviction") to memory, then it is axiomatic that Cavuto published the defamatory statement with actual malice.

The court of appeals further acknowledged that "Cavuto testified that he was sure he would have read the packet." *Id.* The packet specified Petitioner's

conviction as a misdemeanor. Therefore, "the most favorable of possible alternative inferences" is that Cavuto knew Petitioner was a misdemeanant after reading the packet. *See Charbonnages De France v. Smith,* 597 F.2d 406 (4th Cir. 1979). Whether or not Cavuto "remembered this one specific detail when speaking on air five days later" was a credibility determination for a jury. Moreover, it ***does necessarily support an inference*** that Cavuto published the defamatory statement with actual malice.

However, the court of appeals hypothesized that "it would be a stretch to infer" that Cavuto would recall Doocy's statement of fact two weeks later. *Blankenship*, 60 F.4th at 759. The court of appeals then conjectured about Cavuto's knowledge of federal sentencing. *Id.* Finally, the court of appeals speculated that Cavuto was merely confused about Petitioner's misdemeanor conviction. *Id.* at 759-60. This was a textbook encroachment on the factfinding role of a jury.

The court of appeals also disregarded Petitioner's powerful evidence that Fox News knowingly permitted Napolitano's defamatory "manslaughter" statement to remain uncorrected until after the election. *Id.* at 761. Multiple Fox News producers rebuffed Napolitano's requests to inform Fox News viewers about Petitioner's misdemeanor conviction. *Id.* The deliberate intent of Fox News to prevent Napolitano's defamatory falsehood from being timely corrected was probative on the issue of actual malice. Even so, the court of appeals downplayed this proof

and observed that "it [was] far from clear and convincing evidence." *Id.*

The court of appeals additionally recognized that Hayes was familiar with Petitioner prior to 2018. *Id.* at 761-62. For example, the court of appeals noted that Hayes interviewed Petitioner in 2014 and exchanged emails with his staff about Petitioner in 2015 and 2016, including the email in which Hayes protested that Petitioner ***"only got nailed on the misdemeanor.*** Probably not a day in jail." *Id.* at 762, emphasis added. The court of appeals also referenced on-screen graphics that were displayed during the November 29, 2017, airing of Hayes' show. *Id.* 761-62. These news sources verified that Petitioner was convicted of a misdemeanor. The foregoing evidence substantiated that Hayes knew Petitioner was not a convicted felon before he reported so. The court of appeals was "skeptical that this constitute[d] clear and convincing proof of [Hayes'] state of mind." *Id.* at 762. The skepticism of the court of appeals indicates that there was a genuine dispute of material fact for jury consideration as to Hayes' scienter.

"Summary judgment might be a wonderful procedure were it not inefficient, unfair, and unconstitutional." John Bronsteen, *Against Summary Judgment,* 75 Geo. Wash. L. Rev. 522, 551 (2007). The process is inefficient because media defendants are incentivized to engage in discovery gamesmanship and gratuitous motions practice that preempts the "just, speedy, and inexpensive determination" of public figure defamation cases. *Id.; see also* Fed. R. Civ. P. 1. The device is unfair since it "creates a

systematic bias" against public figure plaintiffs.[33] *Id.* Finally, the procedure is unconstitutional insofar as it "fails to 'preserve' the 'right of trial by jury' in civil suits as mandated by the Seventh Amendment." *Id.*

C. The reasonable jury standard is a masquerade for a judge's own opinion.

"Judges use the reasonable jury standard to decide motions for summary judgment, the directed verdict, and judgment as a matter of law." Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of Evidence,* 97 Judicature 222 (2014). The Court has interchangeably used different terms such as "reasonable jury" and "rational factfinder" when discussing the reasonable jury standard. *Id.* at 225. These labels are camouflage for the judge's own views. As Justice Benjamin N. Cardoza explained: "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." Benjamin N. Cardoza, *The Nature of the Judicial Process,* 12-13 (1921).

Neither the district court nor the court of appeals was representative of the diverse socioeconomic statuses, cultural backgrounds, and life experiences of a jury "drawn from a cross-section of the community"

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[33] Granting summary judgment "speeds along the judge's docket." On the other hand, denying summary judgment "potentially invites a trial that would backlog the docket and bring both criticism and an increased workload upon the judge." Bronsteen at 551.

in southern West Virginia. *See Thiel v. Southern Pacific Co.,* 328 U.S. 217. 220 (1946). How can judges determine if a hypothetical reasonable jury could find for the nonmoving party without knowing who would be on the jury? Age, gender, race, marital status, education, occupation, political and religious affiliation, as well as community, are all variables that influence jury decisions. Judges are human and thus susceptible to "fall[ing] prey to their own opinions of evidence upon motions for summary judgment." Thomas, *supra*, at 227. Ultimately, the "reasonable jury standard" is "a legal fiction based on the false factual premise that a court can actually apply the standard." *Id.*

CONCLUSION

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

Respectfully submitted,

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