No. 22-1125

In the Supreme Court of the United States

DON BLANKENSHIP, PETITIONER,

v.

NBCUNIVERSAL, LLC, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition states the questions presented as follows:

"(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."

Pet. i.

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BRIEF IN OPPOSITION

INTRODUCTION

In a lengthy opinion, the United States Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in defamation cases brought by Petitioner against fifteen news organizations and individuals. There was no dissent. The decision does not conflict with any other Circuit Court decision. And Petitioner hardly offers any argument that the decision was wrong under existing law.

Instead, faced with decisions that correctly applied the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, Petitioner asks this Court to "replace[]" the actual malice standard of *New York Times*

with some other, unspecified standard, and to "reform" the well-settled rules governing summary judgment. As explained below, however, this Court only recently reaffirmed the actual malice standard. It has denied six petitions raising the same or similar questions in the last three Terms, and this case is as poor a vehicle as one could imagine to consider those questions.

These defamation cases involve news coverage and commentary on Petitioner Don Blankenship's candidacy for the United States Senate. Petitioner announced his candidacy shortly after being released from federal prison, where he had served a one-year sentence following his conviction for conspiracy to willfully violate federal mine safety laws. The sole claim in these cases is that dozens of news organizations and individuals reporting on his candidacy, including the fifteen Respondents here, referred to him at one time or another as a "felon"—when the maximum sentence for his crime, one year, was one day short of qualifying the offense as a felony under federal law.

This Court should deny the Petition for a number of reasons:

1. *New York Times v. Sullivan* is one of the Court's most firmly established and important precedents. It was unanimous at the time it was decided.[1] It has been applied by federal and state courts in thousands of cases in the six decades since then. It has been reconfirmed at least a dozen times by this Court. And its subjective malice

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[1] Three Justices concurred and would have provided even greater protection by altogether prohibiting libel suits based on speech concerning public affairs. *See* 376 U.S. at 293 (Black, J., and Douglas, J., concurring); *id.* at 297 (Goldberg, J., and Douglas, J., concurring in the result).

standard, which Petitioner now seeks to replace, was explicitly reaffirmed just last Term in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023).

There is good reason why the actual malice standard of *New York Times* has been embraced for so long and so often. At its essence, the standard protects "erroneous statements honestly made." *New York Times,* 376 U.S. at 278. While it permits recovery for falsehoods uttered with knowledge of falsity or with reckless disregard for the truth, it provides the "breathing space" required for "free debate." *Id*. at 272 (internal quotation marks omitted). A free people engaged in self-government deserves no less.

2. The rules governing summary judgment are also well-established and time-tested. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which Petitioner seeks to overrule, stands for the straightforward proposition that the relevant burden of proof must be considered on a motion for summary judgment—that at that stage, a court "must bear in mind the actual quantum and quality of proof necessary to support liability." *Id.* at 254. *Liberty Lobby* is cited thousands of times every year in cases of all kinds and has been reaffirmed by this Court for decades.

3. Even if the Court were inclined to revisit some aspect of *New York Times* or *Liberty Lobby*, this Petition is a decidedly poor vehicle for doing so:

First, this case involves a candidate for political office, where the guarantee of a free press has its "most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). It therefore presents "the strongest possible case for application of the [actual malice] rule." *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 686 (1989) (internal quotation marks omitted).

Second, even if this Court were to revisit the actual malice standard as a matter of First Amendment law, the

standard still would apply in this case as a matter of West Virginia constitutional law. *See State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 565 (W. Va. 1996) (explaining that both the First Amendment and Article III, Section 7 of the West Virginia Constitution require actual malice). Consequently, the result in this case would be unchanged.

Third, the reporting here was substantially true. Respondents' use of the term "felon" was legally imprecise—the maximum sentence for Petitioner's offense was one day less than a sentence that would classify it as a felony under the U.S. Code. But it was not materially false and, thus, not actionable regardless of the level of fault required. A "statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal quotation marks omitted). Here the trial judge emphasized at sentencing that Petitioner had run a "pervasive[]," "dangerous conspiracy" that "flout[ed] … safety and health standards" and created a "risk of … death … every single day for employees in the mines." It was, in short, a "serious crime." It would have had no different effect on Petitioner's reputation if, instead of referring to him as a "felon," Respondents had simply quoted the sentencing judge. A case in which the reporting was substantially true is hardly an appropriate one in which to reconsider what level of fault is required when reporting is materially false.

Fourth, this Petition involves fifteen Respondents with different sets of facts, all of which were carefully analyzed in lengthy and thorough opinions by an experienced district judge and a unanimous court of appeals. There is no reason for this Court to review the record once again. In fact, the Petition mentions only two of the Respondents, and its discussion of the record as to

those Respondents is significantly misleading. The liberties Petitioner takes with the facts in the Petition (detailed below) is reason enough to warrant its denial.

For these and the other reasons discussed below, the Court should deny the Petition.

STATEMENT

A. Factual Background

Petitioner was the CEO of Massey Energy Company when, on April 5, 2010, an explosion at Massey's Upper Big Branch Mine killed 29 miners. Pet.App.7a. It was the country's worst mining disaster in 40 years.

In the wake of the tragedy, a federal grand jury indicted Petitioner on multiple charges. *United States v. Blankenship*, 846 F.3d 663, 667 (4th Cir.), *cert. denied*, 138 S. Ct. 315 (2017). Following a six-week trial, a jury convicted Petitioner of conspiracy to willfully violate federal mine safety laws and regulations in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371. *Id.* The evidence showed that Petitioner "was aware of [safety] violations at the Upper Big Branch mine in the years leading up to the accident," yet pressed forward because it was "cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws." *Id.* Petitioner thus became, in his own words, the "face" of the deadly tragedy. Joint Appendix ("JA"), *Blankenship v. NBCUniversal, LLC, et al.*, No. 22-1198 (4th Cir.), ECF Nos. 45-63 (May 25, 2022) at JA3245.

On April 6, 2016, the district court sentenced Petitioner to the maximum permitted by law: one-year imprisonment and a $250,000 fine. *Blankenship*, 846 F.3d at 667. Petitioner, the court found, had engaged in a "pervasive[]," "dangerous conspiracy" that "flout[ed] … safety and health standards" and created a "risk of … death …

every single day for employees in the mines." JA3324, JA3377, JA3379. Because the maximum sentence for conspiring to willfully violate mine safety laws was exactly one year, Petitioner's conviction was not classified as a felony under a separate section of the United States Code, which defines a felony as an offense punishable by imprisonment of "more than one year." 18 U.S.C. § 3559(a). But it was, as the sentencing judge found, a "serious crime" stemming from "very serious" conduct. JA3379, JA3380.

Petitioner's conviction was affirmed on appeal and this Court denied his petition for a writ of certiorari. *Blankenship*, 846 F.3d at 679; *Blankenship v. United States*, 138 S. Ct. 315 (2017). His later petition for habeas relief was denied, as was his petition for certiorari from that denial. *United States v. Blankenship*, 19 F.4th 685 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 90 (2022).

Petitioner served his year of imprisonment at a federal prison in California—which he has referred to as a "felony prison." Pet.App.8a; JA3427. Of its 2,400 inmates, he was, according to Petitioner, the only one convicted of a misdemeanor. Pet.App.8a.

Mere months after emerging from prison—while still on supervised release—Petitioner announced plans to run in the 2018 West Virginia Republican primary for the Senate seat held by Democrat Joe Manchin. *Id.* Petitioner admitted that his candidacy was a "long shot," and he ran a divisive campaign that put him at odds with his own party leadership. JA3183. In campaign ads, he dubbed then-Senate Majority Leader Mitch McConnell "Cocaine Mitch" and used phrases such as "China Family" and "China person" to refer to Senator McConnell's wife's family. Pet.App.8a; JA1314-1318.

Prominent Republicans, including then-President Trump, publicly criticized Petitioner and urged West Virginians to support either of two other candidates, arguing that Petitioner could not win the general election. Pet.App.8a. Petitioner ultimately lost the primary election, finishing in third place. *Id.* At the time, Petitioner conceded he had lost "badly" and told supporters that if there was "any single factor" that caused his loss, it was President Trump's call for West Virginians to vote for other candidates. JA1949-1950. He then repeatedly attributed his loss to President Trump, asserting that he "did us in." JA3611; *see also* JA3621, JA3624, JA3626.

B. Proceedings Below

1. Nearly a year after his election loss, Petitioner sued more than 100 news organizations, journalists, and commentators, claiming defamation and false-light invasion of privacy. Pet.App.19a-21a. The defendants included television news organizations, newspapers, news websites, and individuals from large and small outlets across the country.

Petitioner alleged that passing references to him as a "felon" during coverage of his candidacy had caused him to lose the primary (although some of the statements were published after the primary election). Of the dozens of original defendants, only sixteen remained by the end of the case.[2]

Discovery ensued, during which Petitioner deposed numerous journalists and others. Pet.App.20a. Those who were deposed testified that they believed at the time

[2] Petitioner voluntarily dismissed many of the original defendants. The District Court dismissed others for lack of personal jurisdiction. Pet.App.20a. The litigation proceeded in the District Court via three separate cases, *see id.*, Pet.App.21a, which were consolidated on appeal.

that their references to Petitioner's conviction were accurate, because he had been convicted of a serious crime and served a year in federal prison. *See, e.g.*, JA0515; JA0533-0534; JA3556. During his own deposition, Petitioner conceded, among other things, that he lacked "any evidence of what anybody knew at the time they made the statement." JA1350. He further conceded during discovery that he could not identify any individual who thought less of him or did not vote for him because of the reports at issue. JA0347; JA0589-0590; JA1601-1602; JA2193-2194; JA3601-3603.

At the conclusion of discovery, each of the remaining defendants moved for summary judgment on the grounds, among others, that Petitioner could not establish actual malice and the references to him were not materially false. Pet.App.20a-21a, 23a. Those defendants, now Respondents, were: American Broadcasting Companies, Inc.; Cable News Network, Inc.; Fox News Network, LLC ("FNN"); MSNBC Cable LLC ("MSNBC"); WP Company LLC d/b/a The Washington Post ; CNBC, LLC; NBCUniversal, LLC; Mediaite, LLC and Tamar Auber; FiscalNote, Inc., d/b/a Roll Call, and Griffin Connolly; HD Media, LLC (the Charleston Gazette); Eli Lehrer; News & Guts, LLC; and Boston Globe Media Partners (the Boston Globe).[3]

The record established that in each instance the reference to Petitioner as a felon was, at most, simply a mistake reflecting the speaker or writer's understanding that Petitioner had been convicted of a serious crime and sentenced to a substantial prison term. (Notably, Petitioner addresses only two of the parties in his Petition

[3] The defendants also included a now-defunct political group, 35th PAC, which Petitioner does not identify as a respondent here. *See* Pet. ii.

and, as explained *infra* pp. 24-27, distorts the record as to both of them.) Accordingly, the District Court granted each of the motions for summary judgment on the issue of actual malice, noting that it "need not address the sufficiency of evidence" on other grounds, including whether the references to Petitioner as a felon were materially false. Pet.App.73b n.11, 199e n.54, 226g n.16. The District Court's lengthy opinions thoroughly analyzed the arguments and factual record presented as to each Respondent, concluding in each case that Petitioner had failed to adduce evidence from which a jury reasonably could find actual malice by clear and convincing evidence. *See* Pet.App.52b-231h.

2. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. On February 22, 2023, a unanimous panel affirmed the District Court's grant of summary judgment. Pet.App.1a. After independently reviewing the arguments and record with respect to each Respondent, the Court of Appeals agreed that there was legally insufficient evidence of actual malice. "Like the district court in its well-reasoned analysis," the Court of Appeals wrote, "we reach these conclusions without crediting Defendants' denials of actual malice over contrary facts, discounting certain evidence, or drawing inferences in Defendants' favor." Pet.App.48a. As the court explained, "the record does not contain evidence that the commentators and journalists responsible for the statements were anything more than confused about how to describe a person who served a year in prison for a federal offense." Pet.App.48a-49a.

The Court of Appeals did not reach the question whether the passing references to Petitioner as a "felon" were materially false. Instead, the court merely "assume[d] that Defendants' statements satisfy the falsity

element," because his claims failed on the actual malice element. Pet.App.23a.

3. Petitioner did not seek panel rehearing or rehearing en banc. He filed the present petition for certiorari on May 15, 2023.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for two fundamental reasons: *First*, this Court's decisions in *New York Times* and *Liberty Lobby* are landmark precedents, repeatedly reaffirmed, that provide, respectively, essential protections for freedom of speech and prudent principles for the adjudication of summary judgment motions. *Second*, even if the Court wanted to revisit some aspect of those precedents, this case is decidedly not the one in which to do so.

I. The Questions Presented Do Not Warrant Review

A. *New York Times v. Sullivan* Is a Firmly Established and Important Precedent

1. *New York Times* was decided unanimously nearly sixty years ago and has served as a foundation for the development of First Amendment law ever since. It has been cited and relied upon thousands of times by federal and state courts throughout the country.[4] And it has been reaffirmed by this Court more than a dozen times—including as recently as last Term. Just eight months after deciding *New York Times*, the Court unanimously reaffirmed its holding in *Garrison v. Louisiana*, 379 U.S. 64,

[4] *See, e.g.*, *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 109, 118 (D.C. Cir. 2017) (Kavanaugh, J.) (relying upon *New York Times* and *Liberty Lobby*, reversing the denial of summary judgment to a defamation defendant); *Tucker v. Fischbein*, 237 F.3d 275, 284 (3d Cir. 2001) (Alito, J.) (same, affirming summary judgment to defamation defendants).

67 (1964). Four years later, in *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Court again reaffirmed *New York Times* and its actual malice standard, emphasizing that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Id.* at 732. Over the nearly six decades that followed, this Court then repeatedly applied, fortified, and expanded the actual malice requirement. *See, e.g.*, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Monitor Patriot*, 401 U.S. 265; *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Readers Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Liberty Lobby*, 477 U.S. at 247; *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Harte-Hanks*, 491 U.S. 657; *Masson*, 501 U.S. 496.

Just last Term, in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), this Court again reaffirmed the subjective actual malice standard of *New York Times*. There, the Court held that the First Amendment imposes a subjective mental state requirement in "true threat" cases, even if such a requirement has the effect of "shielding some true threats from liability." *Id.* at 2114. In reaching that result, the Court expressly relied on *New York Times* and its actual malice standard, emphasizing the "more than

half-century" in which that standard had governed defamation cases. *Id.* at 2118.[5]

It is no surprise, therefore, that the Court repeatedly has denied certiorari in cases seeking to overturn *New York Times*—including a half-dozen times in the last three Terms. *See Grayson v. No Labels, Inc.*, No. 22-906, *cert. denied*, 143 S. Ct. 2514 (2023); *Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, No. 21-802, *cert. denied*, 142 S. Ct. 2453 (2022); *Brimelow v. N.Y. Times Co.*, No. 21-1030, *cert. denied*, 142 S. Ct. 1210 (2022); *Pace v. Baker-White*, No. 21-394, *cert. denied*, 142 S. Ct. 433 (2021); *Konowicz v. Carr*, No. 20-1588, *cert. denied*, 142 S. Ct. 86 (2021); *Berisha v. Lawson*, No. 20-1063, *cert. denied*, 141 S. Ct. 2424 (2021); *see also Horne v. WTVR, LLC*, No. 18-584, *cert. denied*, 139 S. Ct. 823 (2019); *Haywood v. St. Michael's Coll.*, No. 13-929, *cert. denied*, 572 U.S. 1060 (2014); *Carson v. News-Journal Corp.*, No. 01-1499, *cert. denied*, 536 U.S. 923 (2002); *McFarlane v. Esquire Magazine*, No. 95-1769, *cert. denied*, 519 U.S. 809 (1996).[6]

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[5] Notably, Petitioner does not even attempt to grapple with this Court's precedents on *stare decisis*. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (recognizing that "even in constitutional cases, a departure from precedent 'demands special justification'"); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

[6] The Court also has rejected recent petitions raising related challenges. *See, e.g.*, *BYD Co. v. Alliance for Am. Mfg.*, No. 22-137 (addressing application of *New York Times* on motion to dismiss), *cert. denied*, 143 S. Ct. 306 (2022); *BYD Co. v. VICE Media LLC*, No. 21-1518 (same), *cert. denied*, 143 S. Ct. 103 (2022); *Tah v. Glob. Witness Publ'g, Inc.*, No. 21-121 (same), *cert. denied*, 142 S. Ct. 427 (2021); *McKee v. Cosby*, No. 17-1542 (arguing that plaintiff was not a limited purpose public figure), *cert. denied*, 139 S. Ct. 675 (2019).

2. *New York Times* is an essential safeguard of the liberties guaranteed by the First Amendment—for the very reasons explained so recently in *Counterman*, 143 S. Ct. at 2115. The actual malice standard of *New York Times* "is based on fear of 'self-censorship'—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements." *Id.* (quoting *New York Times*, 376 U.S. at 279). As the Court has repeatedly explained, "'we protect some falsehood in order to protect speech that matters.'" *Id.* (quoting *Gertz*, 418 U.S. at 341); *see also id.* at 2130-31 (Sotomayor, J., concurring in part and concurring in the judgment).

The actual malice standard supplies the "breathing space" that is required to ensure free discussion and debate. *New York Times*, 376 U.S. at 272 (internal quotation marks omitted). But it does not provide absolute immunity. It provides a "defense for erroneous statements *honestly made*." *Id.* at 278 (emphasis added). It leaves open a path for the recovery of damages when falsehoods are published with knowledge of falsity or reckless disregard for the truth—or, as the Court has explained, with "'serious doubts as to the truth.'" *Harte-Hanks*, 491 U.S. at 657 (quoting *St. Amant*, 390 U.S. at 731).

That is the appropriate standard in cases like this one, which involves discussion of a candidate for high political office. "It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot*, 401 U.S. at 272 (reversing jury verdict related to newspaper's coverage of allegations of criminal conduct by candidate). And "public discussion of the qualifications of a candidate for elective office presents what is probably *the strongest possible case for application of*

the [actual malice] rule"—because "examining and discussing the[] merits and demerits of the candidate[]" is "necessary for the optimal functioning of democratic institutions" and "must be protected with special vigilance." *Harte-Hanks*, 491 U.S. at 686-87 (emphasis added) (internal quotation marks omitted) (quoting 4 J. Elliott, Debates on the Federal Constitution 575 (1861)); *see also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971).

Petitioner was a candidate for United States Senate. In his own words, he is "a major figure in West Virginia politics, industry, and culture," and "one of the most outspoken, recognizable, and controversial figures in the state." *United States v. Blankenship*, 2015 WL 1565675, at *5 (S.D.W. Va. Apr. 8, 2015). His conviction for conspiracy to willfully violate federal mine safety laws—a "dangerous conspiracy" that endangered the lives of his employees "every single day"[7]—plainly was relevant to his qualifications for high public office. This case, therefore, presents "the strongest possible case for application of the [actual malice] rule." *Harte-Hanks*, 491 U.S. at 686.

3. Petitioner fails to provide any reason for revisiting the actual malice standard in any case, let alone here.

Petitioner argues that the actual malice rule is "not rooted" in longstanding American jurisprudence. Pet. 17 (internal quotation marks omitted). But *New York Times* itself is almost 60 years old, it explicitly drew upon the Nation's history, and it relied upon common law precedent. *See, e.g.*, 376 U.S. at 273-76, 280 n.20 (collecting cases). It included, for instance, a lengthy discussion of a case from decades earlier, involving a candidate for public office, that expressly required proof of "actual malice." *See id.* at 280-82. And a survey of precedents back to the

[7] JA3324, JA3377, JA3379.

Nation's founding demonstrates that the *New York Times* decision is consistent with longstanding traditions in the libel law of the United States. *See, e.g.*, M.L. Schafer, *In Defense:* New York Times v. Sullivan, 82 LA. L. REV. 81, 84 (2021). Ultimately, though, "more than 'ambiguous historical evidence' is required before [this Court] will 'flatly overrule a number of major decisions of this Court.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987)).

Petitioner argues that it is the purported "mass media oligopoly" that "benefits the most" from *New York Times*. Pet. 19. But this case belies that pejorative claim. Petitioner sued more than 100 news outlets, reporters, and commentators. His targets included both large and small news organizations—print, broadcast, and cable—as well as individuals of varying political persuasions, from across the nation. The protections of *New York Times* are available, and important, to all of them.

Petitioner also maintains that *New York Times* somehow "undermines self-government." Pet. 23. But as the Court has repeatedly emphasized, "speech concerning public affairs … is the essence of self-government." *Garrison*, 379 U.S. at 74-75; *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *Dun & Bradstreet*, 472 U.S. at 759. And in this critical sphere, *New York Times* "give[s] reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth." *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017) (Kavanaugh, J.).

Petitioner argues that the actual malice standard is "inequitable," because it discourages qualified men and women from seeking public office. Pet. 29. But it is hardly inequitable to protect good-faith discussion of the qualifications of those who seek high political office. That is

what the actual malice standard protects, and a system of self-government demands no less.

Finally, Petitioner complains that actual malice is hard to prove and that litigating the issue is "expensive." Pet. 30. Yet plaintiffs can and do win judgments in actual malice cases. Recent history includes significant jury awards and settlements.[8] And the cost of litigation cuts both ways. As this Court has recognized—again as recently as in *Counterman*—it is the cost of *defending* claims that threatens to discourage the kind of uninhibited reporting upon which an informed public depends. *See, e.g.*, *Counterman*, 143 S. Ct. at 2115; *New York Times*, 376 U.S. at 279.[9] This case amply illustrates that

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[8] *See, e.g.*, *Carroll v. Trump*, 2023 WL 4612082 (S.D.N.Y. July 19, 2023) ($2 million compensatory damages jury award); *Depp, II v. Heard*, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022) ($10.35 million award to plaintiff, $2 million award to counterclaiming defendant); *Eramo v. Rolling Stone LLC*, 2016 WL 6649832 (W.D. Va. Nov. 7, 2016) ($3 million jury verdict); *Liew v. Eliopoulos*, 84 N.E.3d 898 (Mass. App. Ct. 2017) (upholding $2.9 million jury verdict); *Kelley v. Sun Publ'g Co.*, 2014 WL 3513555 (S.C. Ct. Com. Pl. May 8, 2014) ($650,000 jury award); *Armstrong v. Shirveli*, 2012 WL 4059306 (E.D. Mich. Aug. 16, 2012) ($750,000 jury verdict for "defamation with actual malice"); *see also* MLRC, New York Times v. Sullivan – *The Case for Preserving an Essential Precedent* (2023), at 120-22 (noting defamation settlements of over $100 million), *available at* https://tinyurl.com/yr8h7xkt.

[9] *See also, e.g.*, *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari) ("A journalist who prevails after trial in a defamation case will still have been required to shoulder all the burdens of difficult litigation and may be faced with hefty attorney's fees. Those prospects may deter the uninhibited expression of views that would contribute to healthy public debate."); *Kahl*, 856 F.3d at 116 (Kavanaugh, J.) (noting that "if a suit entails long and expensive litigation, then the protective purpose of

concern, as dozens of media entities, large and small, have had to bear the burden of litigation over their mistaken use of a single word that was substantially, if not technically, accurate.

In sum, *New York Times* is a vitally important and firmly established precedent that has been repeatedly reaffirmed by this Court at every turn. There is no reason to reconsider it, least of all in a case arising from reporting about a candidate for public office.

B. There is No Need to "Reform" Summary Judgment

Anderson v. Liberty Lobby is also a firmly established, time-tested precedent. Petitioner provides no reason to reexamine it or, as he puts it, to "reform[]" the framework for summary judgment. Pet. i.

In the decades since *Liberty Lobby* was decided, it has become a pillar of civil procedure, applied on a daily basis in every type of litigation. The case has been cited more than 300,000 times by courts throughout the country.[10] This Court alone has cited it forty-one times. *See, e.g.*, *Nebraska v. Wyoming*, 597 U.S. 584, 590 (1993) ("In determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard." (citing *Liberty Lobby*, 477 U.S. at 248)).

Notably, Petitioner does not cite *any* statement by *any* Justice expressing any concern about *Liberty Lobby* since its issuance. And this Court repeatedly has rebuffed

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the First Amendment is thwarted even if the defendant ultimately prevails" (internal quotation marks omitted)).

[10] Westlaw, *Citing References for* Anderson v. Liberty Lobby, Inc., *477 U.S. 242 (1986)*, https://tinyurl.com/3my9hkps (last visited August 17, 2023).

previous efforts to overrule or reconsider it. *See, e.g.*, *Elliott v. Google*, 138 S. Ct. 362 (2017) (denying petition for certiorari); *Armenis v. Cramer*, 524 U.S. 905 (1998) (same).

Liberty Lobby's holding is, after all, a matter of common sense: the applicable evidentiary burden must be considered in determining whether a claim should go to trial, just as it must be considered on a directed verdict motion after trial. 477 U.S. at 250-55. As this Court explained, "[i]t makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Id.* at 254-55. For that reason, in considering a motion for summary judgment, "a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability." *Id.* at 254.

Petitioner's far-reaching arguments are not confined to defamation cases. The clear and convincing evidentiary standard, for instance, is applied in many types of cases—to determine a patent's validity, *see, e.g.*, *AK Steel Corp. v. Sollac & Ugine*, 344 F.3d 1234, 1239 (Fed. Cir. 2003); to determine eligibility for naturalization, *see, e.g.*, *Chaudry v. Napolitano*, 542 F. App'x 570, 571 (9th Cir. 2013); in cases of common law fraud, *see, e.g.*, *Invest Almez v. Temple-Inland Forest Prods. Corp.*, 849 F.3d 57, 76 (1st Cir. 2001); to determine the validity of certain state contract claims, *see, e.g.*, *Khezrie v. Greenberg*, 53 F. App'x 592, 593 (2d Cir. 2002); and to determine the voidability of insurance policies, *see, e.g.*, *Justofin v. Metro. Life Ins. Co.*, 372 F.3d 517, 521 (3d Cir. 2004) (all citing *Liberty Lobby*). Petitioner's arguments would upend summary judgment practice across the board.

Petitioner goes so far as to argue in his Petition that summary judgment is itself "unconstitutional." Pet. 39 (internal quotation marks omitted). That contention, of course, has been long since rejected,[11] and its advancement here only underscores the non-serious nature of Petitioner's attack.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Both the Court of Appeals and the District Court correctly stated and properly applied well-settled summary judgment principles here. They both "view[ed] all facts and ma[de] all reasonable inferences in favor of the nonmoving party" and expressly noted that their conclusions were reached "without crediting Defendants' denials of actual malice over contrary facts" or "drawing inferences in Defendants' favor." Pet.App.21a-22a, 48a; *see also* Pet.App.56b; Pet.App.141d; Pet.App.212e.

This was not, as Petitioner suggests, a "trial by affidavit." Pet. 33. After having the opportunity to take

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[11] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) ("summary judgment does not violate the Seventh Amendment" (citing *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902))); *see also, e.g.*, *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 10 (1st Cir. 2010) ("This court, as well as many of our sister circuits, has previously rejected this type of global constitutional attack on the summary judgment mechanism."); *Koski v. Standex Int'l Corp.*, 307 F.3d 672, 676 (7th Cir. 2008) ("To the extent that [plaintiff] is arguing that Rule 56 of the Federal Rules of Civil Procedure violates the Seventh Amendment, this argument … flies in the face of firmly established law.")

extensive discovery, Petitioner simply failed to adduce evidence from which a jury could find actual malice by clear and convincing proof. To the extent that Petitioner seeks to challenge that determination by the District Court and the Court of Appeals, such a fact-bound determination clearly does not warrant this Court's review. *See* Sup. Ct. R. 10. As the Court has long noted, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also, e.g.*, *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari) ("[W]e rarely grant review where the thrust of the claims is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.").[12]

II. This Case Is a Poor Vehicle for Addressing the Questions Presented

Even if this Court were inclined to reconsider some aspect of *New York Times* or *Liberty Lobby*, this case is an especially unworthy vehicle for doing so.

1. As noted, this case involves discussion of the qualifications of a candidate for high elective office, where the free press guarantee has its "its fullest and most urgent application," *Monitor Patriot*, 401 U.S. at 272, and where there is the "the strongest possible case for application of the [actual malice] rule," *Harte-Hanks*, 491 U.S. at 686; *Ocala Star-Banner Co.*, 401 U.S. at 300.

2. Even if the Court were to reconsider the actual malice standard as a matter of First Amendment law, the

[12] Moreover, Petitioner has waived any such argument with respect to facts concerning *thirteen* Respondents, which are not discussed at all in his Petition. *See* Sup. Ct. R. 14.1(g) (requiring petition to "set[] out the facts material to consideration of the question presented"); *Snyder*, 562 U.S. at 449 n.1 (declining to consider issue "never mentioned … in … petition for certiorari").

standard still would apply in this case as a matter of West Virginia constitutional law. As the West Virginia Supreme Court of Appeals has explained, the First Amendment and "Article III, Section 7 of the West Virginia Constitution" *both* require that actual malice be proven in cases like this. *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 565 (W. Va. 1996). And the state law requirement does not depend on the First Amendment requirement. To the contrary, as the West Virginia Supreme Court of Appeals has observed, "in fashioning its 'actual malice' standard," *New York Times* itself "cited, as support," a preexisting West Virginia state-law case. *Long v. Egnor*, 346 S.E.2d 778, 783 (W. Va. 1986); *see also, e.g.*, *Wheeling Park Comm'n v. Hotel & Rest. Emps., Int'l Union, AFL-CIO*, 479 S.E.2d 876, 882 (W. Va. 1996) (explaining that "more stringent limitations on the government's ability to regulate free speech may be imposed under our constitutional free speech provision than is imposed on the states by the Fourteenth Amendment of the U.S. Const[itution]"). In short, the actual malice standard applies here regardless of *New York Times*.

3. The references to Petitioner as a convicted felon were legally imprecise, but they were not materially false. They were not actionable, therefore, regardless of the level of fault that is required.

In considering material falsity, what matters is "the substance, the gist, the sting" of the words at issue, not their literal or legal precision. *Masson*, 501 U.S. at 517; *see also Pritt v. RNC*, 557 S.E.2d 853, 862 (W. Va. 2001); *Ballengee v. CBS Broad., Inc.*, 968 F.3d 344, 351 (4th Cir. 2020) (applying West Virginia law). The error alleged here—incorrect classification of Petitioner's crime as a felony—was both technical in nature and immaterial in substance.

"[A] long line of cases holds that technical errors in legal nomenclature in reports on matters involving violation of the law are of no legal consequence." *Nanji v. Nat'l Geographic Soc'y*, 403 F. Supp. 2d 425, 432 (D. Md. 2005) (internal quotation marks omitted). Courts examine the gist of a statement "by reference to the meaning a statement conveys to a reasonable reader." *Masson*, 501 U.S. at 515. "[I]t is irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 255 (2014); *see also, e.g.*, *Anderson v. Cramlet*, 789 F.2d 840, 844 (10th Cir. 1986) ("[T]he meaning of an allegedly defamatory statement is not determined by legal research, but 'by the plain and ordinary meaning of the word.'"); *Lawrence v. Altice USA*, 841 F. App'x 273, 275-76 (2d Cir.) (summary order) ("A media defendant's characterization of criminal allegations … is substantially true if the characterization comports with the common understanding of the terms employed"), *cert. denied*, 142 S. Ct. 487 (2021).

The difference between a felony and a misdemeanor is a particularly thin reed upon which to base a finding of material falsity. As Chief Justice Roberts recently observed, "[t]he line between felonies and misdemeanors is … very hard to draw" and "[i]n many cases, it's counterintuitive, and it certainly varies from state to state." Transcript of Oral Argument at 39, *Lange v. California*, 141 S. Ct. 2011 (2021) (No. 20-18) , *available at* https://tinyurl.com/3h8v5t47. In many jurisdictions, a crime punishable by a year in prison—Petitioner's sentence—is classified as a felony. Wayne R. LaFave et al., 1 Criminal Procedure § 1.8(c) (4th ed. 2018). Further, "numerous misdemeanors involve conduct more dangerous than many felonies" and "for certain offenses the exact same conduct may be charged as a misdemeanor or felony." *Lange v. California*, 141 S. Ct. 2011, 2035 (2021) (Roberts,

C.J., concurring in the judgment) (internal quotation marks omitted).

Here, Respondents' use of the term "felon" was entirely consistent with the common understanding of the term and, indeed, with the dictionary definition. To a layperson, a felon is "a person who is guilty of a serious crime." *Felon*, CAMBRIDGE DICTIONARY (2022); *see also Felon*, MERRIAM-WEBSTER THESAURUS (2023) ("a person who has committed a serious crime"); *Felon*, COLLINS ENGLISH THESAURUS (2016) ("a person who committed a serious crime"); *Felon*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014) ("a person guilty of a major crime; criminal"). That fits Petitioner to a T. In sentencing him to a year in prison and imposing a $250,000 fine, the trial judge emphasized that Petitioner had committed a "serious crime" that involved "a dangerous conspiracy." JA3377, JA3379.

The test of substantial truth is whether the words "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*, 501 U.S. at 517; *see also, e.g.*, *Bustos v. A&E TV Networks*, 646 F.3d 762, 765 (10th Cir. 2011) (Gorsuch, J.). There would have been no "different effect on the mind of the reader," *Masson*, 501 U.S. at 517, if instead of referring to Petitioner as a "felon," Respondents had quoted the excoriating words of the sentencing judge: that Petitioner had committed a "serious crime" involving a "pervasive[]," "dangerous conspiracy" that "flout[ed] … safety and health standards" and created a "risk of … death … every single day for employees in the mines," JA3324, JA3377, JA3379—or if Respondents had just called him a convicted "criminal" who served a year in federal prison.

In sum, even if this Court were inclined to reexamine *New York Times* in some case, it should not do so in a case

based on a single word that comported with common usage and had no "different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*, 501 U.S. at 517.

4. Finally, these cases involve *fifteen* different Respondents with different sets of facts. The record on appeal totaled more than 5,700 pages. The opinions of the District Court and Court of Appeals were lengthy and thorough. *See* Pet.App.1a-51a, 52b-76b, 111d-204d, 207g-229g. Although this Court "do[es] not grant a certiorari to review evidence and discuss specific facts," *Johnston*, 268 U.S. at 227, a review of the Court of Appeals' judgment here would necessarily involve a review of each of the fifteen Respondents' disparate fact patterns. Strikingly, the Petition mentions only two of the Respondents, and its discussion of the record as to those two Respondents is materially misleading. For example:

- Petitioner suggests that his claim against FNN is based in part on Judge Andrew Napolitano's statement on the air that Petitioner "went to jail for manslaughter." Pet. 5. But Petitioner neglects to mention that he abandoned that challenge below, because he came to realize Judge Napolitano had merely made a "mistake." *Blankenship*, No. 22-1198 (4th Cir.), ECF No. 87 (May 26, 2022) at 33. As the Court of Appeals noted in its opinion, Petitioner "no longer challenges Andrew Napolitano's statement that Blankenship went to jail for manslaughter." Pet.App.25a.

- Petitioner trumpets an email sent by Rupert Murdoch. But he fails to acknowledge (a) that the email nowhere suggests referring to Petitioner as a felon; and (b) that the email was never communicated to any of the individuals responsible for the statements at issue here. Pet.App.30a-31a. As the Court of Appeals put it, there

was no "nexus" between that email and the allegedly defamatory statements. Pet.App.30a.

- Petitioner misquotes Fox Business Channel Anchor Neil Cavuto to suggest falsely that Cavuto had a political motive. Cavuto did not say, as Petitioner claims, "[w]e're gonna lose West Virginia if Blankenship is allowed to win the primary." As the Court of Appeals noted, he actually said, "*The president warning Republicans*, you know what, we're going to lose West Virginia ...." *Compare* Pet. 8 & n.10 *with* Pet.App.10a (emphasis added).

- Not only does Petitioner misquote Cavuto; he then ignores on-the-air comments by Cavuto that conclusively demonstrate that he had made an honest mistake in referring to Petitioner as a felon. Cavuto interviewed Petitioner on the air two weeks after he made that reference. When Petitioner noted during that interview that he had never been convicted of a felony, Cavuto responded: "So what are you if you've served time in jail?" Pet.App.29a. And when another Fox contributor, Judge Napolitano, then noted that Petitioner was correct, Cavuto immediately responded, "So, just serving a year in jail doesn't make you a convicted felon?" Pet.App.13a. As the Court of Appeals put it, "[t]his evidence underscores that Cavuto was confused about Blankenship's criminal status because of the one-year prison sentence." *Id.*

- Petitioner also argues that Cavuto received a "dossier" notifying him that Petitioner was not a felon, but omits that this packet contained "ten pages of material on various 2018 primary campaigns," with only a "single, passing reference" to Blankenship's conviction as a "misdemeanor." Pet.App.26a-27a. As the Court of Appeals noted, this evidence was "tenuous" at best. Pet.App.27a.

- Petitioner also ignores contemporaneous evidence affirmatively demonstrating that MSNBC's Chris Hayes believed it was accurate to refer to Petitioner as a felon. This includes a recorded conversation just prior to the first statement at issue. *See* Pet.App.14a. As the Court of Appeals explained, "[d]uring [an] off-air conversation with [segment producer] Brian Montopoli hours before the April 23 broadcast, Hayes referred to Blankenship as a 'convicted felon.'" Pet.App.34a. That contemporaneous evidence showing Hayes's understanding at the time stands unrebutted. Similarly, as the Court of Appeals also noted, Hayes's response to a viewer's email after the last statement at issue by Hayes, pointing out the inaccuracy, "provides further contemporaneous evidence that he simply made a mistake." Pet.App.34a; *see also* Pet.App.14a. Hayes wrote: "Caught that after the show, but you're r[i]ght." Pet.App.14a, Pet.App.34a.

- Petitioner cites news headlines used as graphics during Hayes's November 2017 show, but omits the fact, correctly noted by the Court of Appeals, that these headlines said nothing about the classification of Petitioner's crime. Pet.App.33a. There is no evidence that Hayes read the underlying articles. *Id.* And a single email from 2015 noting that Petitioner "only got nailed for a misdemeanor" similarly fails to establish Hayes's state of mind two and a half years—and hundreds of shows—later, when he made the challenged statements, especially in light of the contemporaneous evidence directly showing his state of mind at the time. Pet.App.33a-34a.

- Petitioner also misstates the record as to guest host Joy Reid's use of the word "felon," which he claims Reid read from a script approved by executive producer Denis Horgan. In fact, as the Court of Appeals correctly observed, "the record does not identify which staff members actually inserted the 'felon' language into the

scripts," and Reid testified she "'did not work with Denis Horgan on the scripts for those shows.'" Pet.App.35a. As to Reid herself, the Court of Appeals noted there was no evidence that Reid knew or believed that Petitioner was not a felon, and that he had waived any argument as to her in any event. Pet.App.32a n.8.

These distortions of the record are one more reason to deny the Petition. A Petition that seeks such a fundamental reshaping of First Amendment law and civil procedure should at least be true to the facts. *See* Sup. Ct. R. 14.4.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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