No. 22-906

In the
Supreme Court of the United States

ALAN GRAYSON,

Petitioner,

v.

NO LABELS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
Counsel of Record
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
202-282-5622
Cman@winston.com

Counsel for Respondents

QUESTIONS PRESENTED

Former Congressman Alan Grayson sued Respondents, alleging that their political speech opposing his 2018 campaign for Congress was defamatory and injured him by influencing voters in his district to vote against him, costing him the election. Grayson also alleged blatantly inapplicable causes of action for invasion of privacy, cyberstalking, and fraudulent transfer in a prior complaint that were dismissed without prejudice for pleading defects, which Grayson did not attempt to cure through repleading in his subsequent complaint. Applying this Court's seminal decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the District Court granted summary judgment in favor of Respondents on the remaining defamation-related counts, finding "there is *not even a scintilla of evidence* showing—much less clear and convincing proof of—actual malice." Pet.App.27a (emphasis added). On de novo review, a unanimous panel of the Eleventh Circuit affirmed in an unpublished per curiam opinion, finding "Grayson submitted no evidence from which a jury might plausibly infer that the defendants" knowingly or recklessly made false statements about Grayson. Pet.App.6a.

The questions presented are:

(1) Whether this Court should issue an advisory opinion overruling its super precedent in *Sullivan* to allow candidates for Congress to sue those who campaign against them for defamation, even where the campaign speech at issue was not false or made with actual malice.

(2) Whether the courts below misapplied *Sullivan* in rejecting Grayson's claim of actual malice

where Respondents accurately stated that an official congressional report found that Grayson acted unethically while in Congress and that his ex-wife claimed that Grayson abused her, and Grayson made no effort to dispute that those criticisms of him had been made by the congressional report and his ex-wife.

(3) Whether Grayson abandoned his claims that were dismissed without prejudice for pleading defects by not repleading them in his subsequent complaint, as the Eleventh Circuit found, consistent with the law of other courts.

RULE 29.6 STATEMENT

Respondents No Labels, Inc., Progress Tomorrow, Inc., and United Together, Inc. are nongovernmental corporations. They do not have parent corporations. No publicly traded corporation owns 10% or more of any of their stock.

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INTRODUCTION

This case is not worthy of this Court's review. While Grayson's petition is full of inflammatory rhetoric, his factual claims are often patently false, he has grossly mischaracterized the lower courts' rulings, and none of the questions that he proposes were preserved or are properly before the Court. Grayson abandoned his claims for invasion of privacy, cyberstalking, and fraudulent transfer by failing to replead them in his subsequent complaint after they were dismissed without prejudice for technical pleading defects. He waived his defamation claims[1] through inadequate briefing that failed to address any specific allegedly defamatory statement in the argument section of his brief to the Eleventh Circuit. Thus, Grayson has not preserved any claim for this Court to review.

Apart from the waiver and abandonment issues concerning Grayson's defamation claims, every court to consider their merits has appropriately rejected them due to a complete absence of evidence. Grayson does not contest that an official congressional report found that he acted unethically when he was a Member of Congress, and that his ex-wife accused him of extensive physical abuse. Respondents' campaign speech against Grayson accurately stated that those claims had been made, and they cited the congressional report and extensive reporting on those

[1] Grayson's final complaint, his Second Amended Complaint, brought claims for defamation, defamation by implication, and civil conspiracy. The civil conspiracy claim requires proving that an underlying tort was committed, which were the defamation or defamation by implication counts. Accordingly, Respondents refer to these as the defamation counts.

allegations in well-respected press outlets. Respondents even vetted their campaign speech through legal counsel and an opposition researcher.

Because Grayson presented no evidence to the contrary, the Eleventh Circuit did not deem Grayson's appeal worthy of oral argument and rejected his claims in a per curiam unpublished opinion without dissent.[2] Not a single one of the Eleventh Circuit's eleven active judges voted in favor of rehearing Grayson's claims en banc. Pet.App.69a. Despite a multitude of federal judges considering Grayson's claims, none has identified any merit in them.[3]

This Court recently rejected a similar call to overrule *Sullivan*'s actual malice standard in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021), another case from the Eleventh Circuit, and there is even less reason to grant review here. *Berisha* involved a more typical defamation claim, involving the ongoing sale of a book that made allegedly defamatory claims about a foreign national. *Berisha* did not suffer from the waiver and abandonment issues that plague Grayson's petition, and the petitioner there alleged that the statements in the book were actually false. By contrast,

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[2] Chief Judge Pryor and Circuit Judges Lagoa and Brasher were on the panel.

[3] The District Court recently granted Respondents' motion for attorneys' fees under a Florida fee-shifting statute involving an offer of judgment, rejecting Grayson's claim that Respondents' offer of judgment for $500 was not made in good faith because it was so much less than the $17 million that Grayson sought. The District Court affirmed a magistrate judge's recommendation to reject Grayson's argument after finding that Grayson's case was devoid of any serious merit, and Respondents' nominal offer was therefore reasonable. Dist.Ct.ECF.184.

Grayson acknowledges that Respondents accurately relayed the accusations made in a congressional report and by his ex-wife, leaving Grayson without any cognizable claim of defamation. Additionally, because this case arises in the context of campaign speech, where the need for First Amendment protection is at its highest, it is a poor vehicle for addressing whether *Sullivan* should be recalibrated in less compelling circumstances.

The Court also should reject Grayson's call for the Court to overrule its seminal decision in *Sullivan* through an advisory opinion that would do nothing to redress Grayson's alleged injury. Grayson's claim for damages is based on allegations of past defamation that ended with the 2018 election, and he does not allege that Respondents have defamed him since.[4] But any ruling by this Court overturning *Sullivan* would be prospective only—and would not revive Grayson's damages claim—because due process prevents this Court from creating retroactive liability by eliminating a constitutional safe harbor that Respondents relied upon when campaigning against Grayson. Moreover, even a retroactive First Amendment decision from this Court would not save Grayson's damages claims because his claims arise under Florida law, and

[4] It also is hard to imagine how Grayson could establish that Respondents caused him reputational damage. Respondents did not break any news in stating that an official congressional report accused Grayson of acting unethically or that his ex-wife had accused him of extensive physical abuse. That news was widely reported before Respondents campaigned against Grayson, including in the *New York Times*, *Orlando Weekly*, *Politico*, *Vanity Fair*, and *Washington Post*.

the equivalent of the actual malice standard exists under Florida's Constitution, Article I, Section 4.

Grayson's final question asks this Court to resolve an imagined circuit split on a civil procedure issue that may not exist at all, and that certainly is not implicated here. Grayson claims the Eleventh Circuit created a circuit split by adopting a "new waiver rule" (Pet.32) that is inconsistent with that court's prior precedent in finding that Grayson abandoned his invasion of privacy, cyberstalking, and fraudulent transfer claims. But this Eleventh Circuit panel did not silently overrule circuit precedent, and surely at least one circuit judge would have voted for rehearing en banc if it had. Grayson simply misunderstands the opinion and relies upon the wrong rule.

Grayson argues that repleading is required to preserve a claim for appeal only where dismissal is due to a technical deficiency, such as the failure to properly plead a claim, as opposed to a legal deficiency. But the Eleventh Circuit appropriately found that Grayson abandoned his claims, consistent with the law of other circuits, because those claims were dismissed without prejudice for pleading defects. Moreover, any possible error here would be harmless because Grayson's claims are utterly implausible based on the facts that he alleged. Grayson's petition should be denied.

STATEMENT

A. Grayson Never Pled All The Defamation Claims Raised In His Petition

It was never clear whether Grayson brought this lawsuit as retribution against those who campaigned against him or as some sort of political stunt, but it

clearly was not a case that Grayson litigated conscientiously. The District Court complained of Grayson's "haphazard advocacy" in failing to identify the record evidence that he relied upon and noted that, in "[a]nother example of carelessness, Plaintiff's brief sporadically mentions allegedly defamatory statements that are not challenged in the Second Amended Complaint." Pet.App.23a & n.18.

Grayson's Second Amended Complaint did not attach the campaign advertisements that he found defamatory, and Grayson tried to make a moving target of his claims by refusing to identify what he found defamatory and why. Grayson continued to contend on appeal that he could essentially amend his complaint through discovery answers and his opposition to summary judgment. Pet.App.6a–7a; *see also* Pet.App.17a n.9. The Eleventh Circuit rejected Grayson's frivolous claim that the District Court had "cherry-picked" which allegedly defamatory statements to consider by looking only to those that Grayson pled in his complaint. Pet.App.6a–7a.[5]

[5] Throughout the litigation, Grayson advanced several irresponsible legal arguments in addition to claiming a right to amend his complaint through discovery responses. On appeal, for example, Grayson asked the Eleventh Circuit to rule that this Court's decision in *Sullivan* already had been overruled. Grayson.CA11.Br.16, 38. Additionally, after Respondents noted that Grayson was relying upon amended language in the cyberstalking statute that was added *after* Respondents' allegedly defamatory statements were made and even *after* the District Court dismissed this claim, Grayson told the Eleventh Circuit that this amendment, which explicitly applied only prospectively, could be applied retroactively. Grayson.CA11.Reply.20–21.

Even on appeal, Grayson curiously refused to identify what statements he believes were defamatory. Although Grayson's complaint alleged that it was Respondents' *publicly disseminated* campaign advertisements that defamed him and cost him the election, Grayson still insisted that he could not be expected to plead what those allegedly defamatory statements were in his complaint because he could not know what statements were made without discovery. Grayson.CA11.Br.44–45.

B. Grayson Waived His Defamation Claims On Appeal Through Inadequate Briefing

Grayson's defamation claims should be deemed abandoned due to inadequate briefing before the Eleventh Circuit. The "Argument" section of Grayson's brief failed to specify any statement, in any specific publication, that he claims was defamatory, or respond to the District Court's analysis for why Grayson failed to meet his burden of proving actual malice. Accordingly, Grayson abandoned those claims through inadequate briefing.

The "Statement of the Case" section of Grayson's brief directs the Court to read Grayson's brief in opposition to summary judgment that he filed in the District Court for a "statement by statement" analysis of his claims, and then he "summarizes" them in three bullet points: "• Grayson is a spousal abuser," "• Grayson is corrupt, and neglects his Congressional duties," and "• Grayson is a money launderer." Grayson.CA11.Br.21–22. Grayson then chose "simply to reiterate [points] from Grayson's summary judgment opposition brief." *Id.* at 22.

Grayson inadequately briefed what specific statements were at issue or how he satisfied the actual malice standard for any specific statement by showing that any Respondent had the subjective belief that the statement was false. Consistent with other Circuits, the Eleventh Circuit explains: "A party fails to adequately 'brief' a claim [on appeal] when he does not 'plainly and prominently' raise it, 'for instance by devoting a discrete section of his argument to those claims.'" *Sapuppo v. Allstate Floridan Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (quoting *Cole v. U.S. Att'y Gen.,* 712 F.3d 517, 530 (11th Cir. 2013)). Grayson's failure to address these issues in the "Argument" section of his brief is fatal because "[i]f the party mentions the issue only in his Statement of the Case but does not elaborate further in the Argument section, the party has abandoned that issue." *Cole,* 712 F.3d at 530; *see, e.g.*, *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) ("Although point was raised in statement of issues, issue was deemed abandoned by appellant where it was not addressed anywhere else in the brief."); *Sapuppo*, 739 F.3d at 681 ("Abandonment of a claim or issue can also occur when the passing references to it are made in the 'statement of the case' or 'summary of the argument,' as occurred here.").

Similarly, Grayson could not have preserved the issue on appeal by directing the Eleventh Circuit to review his motion for summary judgment that was filed in the District Court. *See, e.g.*, *Greenbriar*, 881 F.2d at 1573 n.6 (referring to an argument made in a motion before the district court is inadequate to preserve issue for appeal). "A brief must make all arguments accessible to the judges, rather than ask them

to play archaeologist with the record." *Heine v. Comm'r of Dep't of Comm. Affairs*, 794 F. App'x 236, 238 (3d Cir. 2020) (quoting *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999)). Surely, the Eleventh Circuit had "no obligation to comb through the record to find the evidence that the district court has already told us is missing." *Hulbert v. Wilhelm*, 120 F.3d 648, 657 (7th Cir. 1997); *see also Chandler v. Volunteers of Am. N. Ala. Inc.*, 598 F. App'x 655, 663 (11th Cir. 2015) ("[C]ounsel still seems to be under the misimpression that it is the court's job, not counsel's, initially to comb through the record, identify the facts supporting the plaintiff's legal position, and apply them to the law-all without any guidance from counsel."). Grayson merely re-directing the Eleventh Circuit to the argument he made to the District Court results in the abandonment of the argument because Grayson "did not discuss the district court's analysis of that issue, and did not make any legal or factual argument as to why the district court's decision was in error." *Attea v. Univ. of Miami*, 678 F. App'x 971, 973–74 (11th Cir. 2017) (citing *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001)).

Grayson's request that the Eleventh Circuit read his District Court motion to understand his argument also was flawed because that motion was incoherent. It is the same summary judgment motion faulted by the District Court for "haphazard advocacy," a "disorderly citation to the record" that made it "impossible" to locate the record evidence that Grayson relied upon, and that included defamation allegations that he never made in his complaint. Pet.App.23a.

C. Grayson's Petition Misstates The Facts

1. Grayson falsely claims: "There is no dispute that the statements published in the Defendants' ads were false." Pet.2. That is plainly not true; Respondents' statements identified that the claims against Grayson were made by Grayson's ex-wife and in an Office of Congressional Ethics ("OCE") report. There has never been a dispute that Grayson's ex-wife and the OCE report made those accusations, as reported by Respondents. Additionally, there is considerable evidence that what Grayson's ex-wife and the OCE report have said about Grayson is true. Consequently, the parties never agreed that the allegations of Grayson's ex-wife or findings in the OCE report are false.

2. Grayson misstates the facts concerning his ex-wife's claims of spousal abuse. Grayson tells this Court that it is "unconscionable" that Respondents raised his ex-wife's abuse allegations "when they knew that [she] had confessed that she had been lying." Pet.28. When Grayson made these claims before the District Court, that court found that Grayson's "citations to the record are incorrect and incoherent." Pet.App.26a. In his petition to this Court, Grayson omits citations to record evidence in support of these claims altogether.

In making these hyperbolic claims, Grayson brazenly omits that his ex-wife submitted a sworn declaration in this case on January 3, 2021, attesting that "I have not retracted those allegations and stand by those allegations today, as they are true," and she attached exhibits of medical records and police reports concerning her alleged abuse. Dist.Ct.ECF.94-14 at 3 ¶ 14. Her declaration identifies several specific claims

of abuse, including physical abuse during her pregnancies. *Id.* at 2–3 ⁋⁋ 4–13. She described those abuse incidents again under oath in her November 10, 2021 deposition, and she again stood by her prior claims of abuse. *Id.* at 50–64.

Just as he did below, Grayson's petition also ignores the fact that Respondents called attention to his ex-wife's claims of repeated instances of abuse over a twenty-year period, and Grayson instead "only discusses an altercation in 2014." Pet.App.26a. The District Court correctly noted that, even if Respondents took Grayson's word over his ex-wife's as to this incident, that would not mean "that she lied about *all* allegations of abuse." *Id.* (emphasis by District Court).

3. Grayson also misstates the facts concerning Respondents' campaign statements concerning the OCE report. Respondents' political ads stated—accurately—"Congressional Ethics Investigation Found Alan Grayson Abused His Office for Financial Gain." The ethics concern raised by these political ads concerned OCE's finding that Grayson acted unethically when he previously served in Congress. Grayson ran eponymously named hedge funds that were based in the Cayman Islands at the same time he was a sitting Member of Congress. OCE found that Grayson had improperly used his official office to benefit himself financially through his Cayman-based hedge funds, including by having a congressional staffer do work for the hedge funds. Pet.App.4a.

Now, in his petition, Grayson attempts to recast his defamation claims as not being based on the words used in the political advertisements noting OCE's findings of corruption. Instead, Grayson claims that

images used in the political advertisements defamed him by falsely implying that he had been to the Cayman Islands when he had never visited the islands where his hedge funds are based.

Nevertheless, Grayson falsely claims "the district court decision recognized that the [Respondents] had simply fabricated the Cayman Islands junket." Pet.3. Again, Respondents did not make any allegations that there was a "Cayman Islands junket," and neither Grayson nor the lower courts appear to have even used the word "junket" in their opinions.

Ignoring that the focus of this campaign speech was on the OCE report's finding that Grayson unethically profited off his position in Congress, Grayson now pretends that the real injury done to his campaign was the suggestion that he had visited the Cayman Islands. Grayson clutches his pearls while feigning shock that Respondents would blatantly parody the OCE report's allegation that he corruptly used his office to profit through his Cayman Island hedge funds. The political advertisements depicted Grayson sitting on a beach (the advertisement did not specify a Cayman Islands beach) along with images of attaché cases full of cash and what Grayson calls a "fake passport" that he complains had been "photoshopped" to replace his eyes with dollar signs. Pet.3.

That this is parody is not subtle. While Grayson fails to appreciate parody as an art form (at least when directed at him) and complains that the images used are not accurate depictions of him, no one viewing the campaign materials would think that Respondents are claiming that Grayson has cartoonish dollar bill signs in place of eyeballs in his official

passport photo. Nor would anyone think that the images suggest that Grayson engaged in "money-laundering" by depicting him travelling with an attaché case full of cash, even to the Cayman Islands. Pet.2–3. Even taken literally, Grayson's claim makes no sense because the crime of money laundering is not committed by taking cash on vacation in the Cayman Islands, but no one would think Respondents are literally suggesting that he did so. Rather, the images of attaché cases full of cash, dollar signs for eyeballs, and Grayson sitting on the beach instead of working in Congress merely parody the OCE report's findings that Grayson used his office for personal profit.

Moreover, Grayson's effort to refashion this campaign advertisement highlighting the allegations of corruption against him as a false attack on his choice of vacation spots is far more of an exaggeration than Respondents' parody of him. There is nothing defamatory in suggesting that someone would visit the Cayman Islands (they are lovely). In any event, the parody of Grayson sitting on a beach is far less disturbing than the parody addressed in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), which this Court found constitutionally protected by the First Amendment.

4. Grayson misrepresents the lower courts' opinions as creating some sort of categorical rule that no statement is defamatory if it is accompanied by the "presence of 'footnotes'" (Pet.24), but that is a grossly inaccurate and unfair characterization of the lower courts' opinions. The lower courts looked to the substance of those footnotes, and the fact that they included "source materials, including an official congressional report, articles in well-known newspapers

and magazines, and police reports" to show that Respondents had a good faith basis for the statements that they made. Pet.App.6a. Moreover, the lower courts specifically noted that Respondents advised voters to "check the facts" by identifying those source materials, and a voter who did so would see that they do, in fact, support Respondents' statements about Grayson. Pet.App.17a. The fact that Respondents also vetted their political ads through legal counsel and an opposition researcher further undermines Grayson's claim that Respondents knew the allegations were false. Pet.App.24a n.19.

5. Grayson is wrong in claiming that his invasion of privacy, cyberstalking, and fraudulent transfer claims were dismissed without prejudice due to legal deficiencies, rather than technical deficiencies, which he claims means there was no waiver in his failure to replead those claims properly. While it is no doubt true that those claims are legally defective in that Grayson cannot prove them, each of those claims was dismissed for a technical deficiency, the failure to properly plead them.

The District Court dismissed Grayson's invasion of privacy claim because, rather than plead the necessary element that Respondents had disclosed "private facts," Grayson pled the opposite, that the disclosure involved a matter of "public concern." Pet.App.40a–41a. He alleged that the statements were made in the political arena concerning Grayson's fitness for office. Pet.App.41a. Thus, Grayson failed to plead a technical element of the claim.

Similarly, the District Court dismissed Grayson's cyberstalking claim for failure to plead an essential

element of that claim. Florida courts require that messages be directed at the claimant, as opposed to being posted online or sent to third parties, and Grayson did not allege that any of Respondents' political ads were directed to him personally. Again, just the opposite, Grayson alleged that Respondents' political ads were directed to third parties in an effort to influence their votes. Pet.App.60a–62a.

The same is true of Grayson's fraudulent transfer claim, which was dismissed for failure to state a claim. Pet.App.66a–67a. The statute only provides a remedy for creditors who are harmed by a fraudulent transfer, and Grayson's complaint "never alleges that *Plaintiff himself* is one of Defendants' creditors." Pet.App.67a (emphasis by District Court). Grayson merely hoped to win a cash judgment against Respondents so that he could someday become a creditor, but he did not allege that he actually *was* a creditor.[6]

REASONS TO DENY THE PETITION

The decision below was correct, and it poses no conflict with any decision by this Court or another court of appeals. Rather than being inconsistent with any decision of this Court, Grayson instead asks this Court to overrule its seminal decision in *Sullivan* and the nearly sixty years' worth of cases that followed. This Court recently refused such an invitation in *Berisha*, and it has all the more reason to do the same here. This case is a poor vehicle to address the

[6] Grayson claims that the District Court threatened him with sanctions if he attempted to replead viable causes of action, but Grayson cites nothing in support of that claim. Pet.32. Respondents have no reason to believe that Grayson would have been sanctioned if he had repled viable claims.

questions presented because of Grayson's misstatement of facts, flawed effort to plead the allegedly defamatory statements that he challenged in his complaint, and his abandonment and waiver of arguments. Additionally, review should be denied because no decision from this Court could redress Grayson' alleged injuries and would therefore only be an advisory opinion.

I. Grayson's Waived Defamation Claims Are Not Reviewable

Grayson's failure to preserve his defamation claims through inadequate briefing before the Eleventh Circuit renders those claims unreviewable by this Court. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010); *Stolt-Nielson, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2012). Grayson compounds that waiver problem before this Court by not even challenging the lower courts' exclusion of his allegations of defamation that never were pled in his complaint, most likely because he now realizes that he was required to plead his defamation allegations in his complaint. Nevertheless, Grayson continues to repeat these unpled allegations in his petition, apparently hoping this Court will not realize that those claims are not properly before it.

Grayson's petition reads like a wish list for what he now regrets having failed to plead or even argue to the Eleventh Circuit. For example, with respect to Grayson's allegations concerning his ex-wife, the District Court found that "the Second Amended Complaint does not state what allegations of abuse were recanted by Lolita Carson-Grayson, attach the

challenged publications, or otherwise describe the allegedly defamatory statements at issue with any specificity." Pet.App.24a–25a. Grayson failed to address these issues in the argument section of his brief to the Eleventh Circuit as well. Grayson's effort to make these arguments to this Court now in his petition comes too late and should be ignored. Pet.3–5, 27–28.

II. There Is No Need To Reconsider *New York Times v. Sullivan* In The Context Of Political Campaign Speech

New York Times v. Sullivan is a seminal precedent that has been applied and reaffirmed by this Court in dozens of cases for nearly 60 years, and this Court recently turned back a request to overrule that decision in *Berisha*, 141 S. Ct. 2424. This Court's denial of review in *Berisha* should dictate that Grayson's petition be denied as well. *Berisha* did not have the abandonment and waiver issues that permeate this case. Moreover, *Berisha* would have allowed the Court to consider *Sullivan* in a more routine defamation case involving a private individual, unlike Grayson who chose to make himself a public figure and place his character at issue by running for Congress in Florida. And unlike *Berisha*, which involved allegations that a foreign national had engaged in misconduct in Albania, the speech at issue in Grayson's petition arose in the context of citizens debating who best should represent them in Congress. Whatever criticism can be leveled at *Sullivan* for protecting speech of less significant public concern, the campaign speech at issue here concerning who the people should elect to represent them is of the utmost importance.

There can be no dispute that "[i]f the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014). This Court has repeatedly "emphasized, the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Id.* at 191–92 (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971)).

Grayson's case exemplifies the threat of relaxing First Amendment protections during an election. If during a campaign for Congress someone can face protracted litigation for even calling attention to the fact that an official government report found that a candidate violated ethics laws while a Member of Congress, it is hard to imagine what criticism of a candidate any citizen could make without risking being sued.

Without a meaningful First Amendment safe harbor to protect campaign speech, such as *Sullivan*'s requirement that a plaintiff prove actual malice, it is far too easy for political candidates to silence their critics. Here, for example, Grayson does not deny that Respondents accurately reported what his ex-wife and an official government report said about him, but he says his defamation claim should be allowed to proceed because Respondents must have known that his ex-wife is a liar, and the official government report contained lies from his political enemies. If such a flimsy rationale could be the basis for suing anyone who engages in critical political speech during an election, robust debate over the election of our leaders will be chilled. Not only is that a blow to the First Amendment freedom of expression, it also is a blow to the

bedrock of our representative democracy that depends on voters making educated decisions about who should represent them.

Compounding the problem, such a rule would allow the weaponization of partisan litigation at the expense of a functioning government. Grayson's case highlights the problem. Members of Congress run for reelection every two years, often leading to a re-match from the prior election cycle. Any election loser can claim the prevailing candidate's winning message defamed the loser in some way, burdening the sitting Member of Congress with litigation and keeping them from focusing on the needs of the people. Litigation would become a partisan weapon for sidelining opposition candidates and their political agendas.

To be sure, no one believes that false campaign speech is of any benefit to voters, but the First Amendment provides a far better remedy. False speech can be corrected by true speech, and those who disseminate falsehoods are exposed as not credible in the process. The First Amendment is designed to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *McCullen v. Coakley,* 573 U.S. 464, 476 (2014)).

Respondents did not silence Grayson or prevent him from responding to their campaign speech by defending himself and his record. Robust debate, rather than silencing criticism, allows voters to make intelligent choices at the ballot box. Grayson's call to allow post-election sour-grapes litigation does not do that. Grayson's proposed cure of loosening First Amendment protections to allow defamation claims without

requiring proof of actual malice is worse than the problem that he seeks to fix.

Finally, Grayson argues that the Court should reconsider *Sullivan* "as applied to 'non-Press' defendants," claiming that this Court has long recognized that "that the law for Press and non-Press defendants cannot be the same." Pet.22–23. Grayson should know better because Respondents quoted this Court squarely rejecting this claim in its brief to the Eleventh Circuit. Respondents.CA11.Br.37. This Court has been emphatic that the First Amendment treats all speakers equally: "There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. *We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers*." *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (emphasis added; cleaned up); *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting claim that "the institutional press is entitled to greater constitutional protection").[7]

[7] Grayson provides only one citation in support of his fictitious distinction favoring the press over actual citizens, but that case does not address a distinction between the press and non-press. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761 (1985). Rather, that case discussed the "reduced constitutional value of speech involving no matters of public concern," as opposed to campaign speech that does involve a matter of public concern. *Id.* That is a distinction based on the content of the speech, not the speaker.

III. Grayson Requests An Improper Advisory Opinion In Seeking To Have *Sullivan* Overruled

It is firmly established that this Court may not issue "an advisory opinion without the possibility of any judicial relief." *California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (internal quotation omitted); *see Biden v. Texas*, 142 S. Ct. 2528, 2561 (2022) (Barrett, J., dissenting) ("[T]he redressability requirement of Article III itself establishes a tie between jurisdiction and remedies, because a court's inability to order effective relief deprives it of jurisdiction to decide the merits of a question otherwise within its competence."). Nevertheless, that is what Grayson seeks here because overruling *Sullivan* would not help him redress his alleged injury for two reasons.

1. If the Court were to overrule *Sullivan*, it could only do so prospectively. To strip Respondents of *Sullivan*'s First Amendment shield and impose retroactive liability would violate fundamental due process notice protections. The Court could alter First Amendment rights prospectively, but the Due Process Clause precludes "stripping a [person] of his rights" retroactively. *A.B. Small Co. v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *see, e.g.*, *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2229, 2309 (2022) (Kavanaugh, J., concurring) (explaining that overruling *Roe v. Wade* could not be used to support a claim against anyone who had an abortion when it was a recognized constitutional right); *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964) (Due process precludes retroactive judicial expansion of a statute for lack of fair warning). For example, in *Marks v. United States*, 430 U.S. 188 (1977), this Court recognized that

it had made a "significant departure" from its prior First Amendment precedent that "expanded criminal liability" under obscenity laws for conduct that previously was "constitutionally protected." *Id.* at 194. Nevertheless, this Court held that the prior, overturned case law still must be applied to conduct when it was in effect because defendants did not have "fair warning" that the Court would change its standard. *Id.* at 195.

Overturning *Sullivan* prospectively will not redress Grayson's alleged injury of past defamation. It is true that Grayson's complaint made a passing reference to injunctive relief, but such relief is unavailable here. Under Florida law, Grayson waived his right to this relief because he never moved for injunctive relief. *See, e.g.*, *Illoominate Media, Inc. v. CAIR Florida, Inc.*, 2022 WL 4589357, at *3 (11th Cir. Sept. 30, 2022). Moreover, consistent with the common law[8] and the First Amendment's prohibition against prior restraints, Florida law has long prohibited enjoining defamation. *See, e.g.*, *Moore v. City Dry Cleaners & Laundry, Inc.*, 41 So.2d 865, 873 (Fla. 1949) ("[A] court of equity will not enjoin the commission of a threatened libel or slander; for the imposition of judicial restraints in such a case would clearly amount to prior censorship, a basic evil denounced by both the Federal and State constitutions. An action at law will ordinarily provide a full, adequate an[d] complete remedy in such cases. . . ."); *Reyes v. Middleton*, 17 So. 937, 939

[8] The common law prohibition against enjoining defamation has endured for centuries. *See, e.g.*, *Francis v. Flynn*, 118 U.S. 385, 389 (1886); *Respublica v. Oswald*, 1 U.S. 319, 324–25 (Pa. 1788).

(Fla. 1895) ("It seems to be well settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering . . . , but that in such cases the remedy, if any, is at law . . . ."). Not surprisingly, Florida courts reject as a "frivolous claim" an action to enjoin defamation because "[i]t is a 'well established rule that equity will not enjoin either an actual or a threatened defamation.'" *Demby v. English*, 667 So.2d 350, 355 (Fla. 1st DCA 1995) (quoting *United Sanitation Servs., Inc. v. City of Tampa*, 302 So.2d 435, 439 (Fla. 2d DCA 1974)). Additionally, Grayson has not alleged that he has been defamed in more than four years, so there is no imminent harm that would warrant an injunction. *See, e.g.*, *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49, 59–62 (1975).

Nor would overturning *Sullivan*'s protections under the federal Constitution be of any help to Grayson because Grayson's claims arise under Florida law, and Florida's Constitution, Article I, Section 4, provides the same protection afforded by *Sullivan*. Florida courts explain that the freedom of speech protected by the First Amendment and Florida's Constitution are presently "merge[d]" so that they are now treated as equivalent. If this Court were to overrule *Sullivan*'s understanding of the federal Constitution, that would not compel Florida's Supreme Court to do the same under Florida's Constitution. *Fla. Canners Ass'n v. State Dep't of Citrus*, 371 So. 2d 503, 517 (Fla. 2d DCA 1979), *accord Dep't of Ed. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982). As with this Court's decisions, any change by the Florida Supreme Court would occur only prospectively to protect the rights of those who relied upon prior law. *See, e.g.*, *Maronda Homes Inc. v. Lakeview*

Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1272 (Fla. 2013); *Martinez v. Scanlan*, 582 So. 2d 1167, 1175 (Fla. 1991); *In re Fla. Bar*, 301 So. 2d 451, 453–54 (Fla. 1974). Consequently, even overturning *Sullivan* would not save Grayson's case.

IV. The Lower Courts Correctly Decided That Grayson Failed To Satisfy *Sullivan*'s Actual Malice Standard

In addition to asking this Court to overrule *Sullivan*, Grayson argues that he met *Sullivan*'s actual malice standard. If this were so, it would create substantial tension with his claim that *Sullivan* should be overruled because it is too difficult a standard to meet. But this scenario is merely hypothetical, as Grayson plainly failed to satisfy *Sullivan*'s actual malice standard. The District Court found "there is not even a scintilla of evidence showing—much less clear and convincing proof of—actual malice." Pet.App.27a. On de novo review, the Eleventh Circuit unanimously affirmed, finding that "Grayson submitted no evidence from which a jury might plausibly infer that the defendants distributed statements 'with knowledge that [the statements] were false or with reckless disregard of whether [they were] false or not'" because "defendants' mailings and online postings cite source materials, including an official congressional report, articles in well-known newspapers and magazines, and police reports." Pet.App.6a (quoting *Sullivan*, 376 U.S. at 279–80). That Respondents vetted their statements through legal counsel and an opposition researcher further undermines Grayson's claim that they acted with actual malice. Pet.App.24a n.19.

This Court states that "[a] petition for a writ of certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Grayson's petition asking this Court to correct non-existent errors is particularly unworthy of review.

V. There Is No Reason For This Court To Consider Grayson's Waiver Of His Meritless Claims

Grayson's argument that his failure to replead his invasion of privacy, cyberstalking, and fraudulent transfer claims did not result in the abandonment of those claims rests on a fundamental misunderstanding about why those claims were dismissed. Grayson argues that he is not required to replead claims that are dismissed without prejudice for legal, as opposed to technical pleading defects, but his claims were dismissed for technical defects. *See supra* at 13–14. Under those circumstances, even Grayson seems to acknowledge that his claims were abandoned.

But there is no reason for this Court to consider whether Grayson's claims were abandoned because overcoming the abandonment hurdle would not save Grayson's claims. Apart from the technical pleading defects, the claims are legally implausible.

Grayson has not offered a cogent explanation for how he could plead an invasion of privacy claim since it was dismissed. Such a claim requires a disclosure of "private facts," as opposed to a matter of public concern, but Grayson has not identified any private facts that Respondents disclosed. Instead, Grayson acknowledges that Respondents' statements were made in opposing his candidacy for election, which necessarily makes this a case involving a matter of public concern. Moreover, each of Respondents'

statements were previously disclosed publicly and widely reported in the press.

Grayson's defense of his cyberstalking claim is among his most bizarre. That claim was dismissed because Grayson failed to allege that any of Respondents' messages were directed at him, as opposed to being messages designed to reach others. *See supra* at 14. Grayson still does not dispute any of that, but he maintains that his claim is viable based on an amendment to the cyberstalking statute made in June 2021 (effective October 2021) that was made more than six months after the claim was dismissed concerning alleged conduct in 2018. *See* 2021 Fla. Sess. Law Serv. Ch. 2021-220 (C.S.H.B. 921) (West). This amendment does not create retroactive liability and would violate due process if it did.

Grayson's effort to craft a damages remedy out of the statute also fails because the statute does not provide a damages claim at all. It is a criminal statute. The statute allows a cyberstalking victim to obtain a restraining order in some circumstances, Fla. Stat. § 784.0485(1), but Grayson never even sought relief under that section, and it is inapplicable here. Additionally, the cyberstalking statute is explicitly inapplicable to protected constitutional activities, including campaign speech. Fla. Stat. § 784.048(1)(b) & (d).

Grayson's fraudulent transfer claim is no better. It provides a remedy for someone who is a creditor that is seeking to prevent a debtor from fraudulently transferring assets that are owed to creditors. But Grayson did not plead that he was a creditor of Respondents, just that he hoped to win a judgment against Respondents (that he never won) that would *someday* make him a creditor. Thus, Grayson could

not plead that he is now a creditor. Grayson does not suggest to this Court how this claim could survive, even if it had not been abandoned.

CONCLUSION

Grayson's petition for a writ of certiorari should be denied. If the Court is inclined to review the issues that Grayson raises, surely it can find a better vehicle.

Respectfully submitted,

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
Counsel of Record
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
202-282-5622
Cman@winston.com

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