No. _____

In the Supreme Court of the United States

ALAN M. DERSHOWITZ,
Petitioner,

v.

CABLE NEWS NETWORK, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As the District Court explained, "Of course, Dershowitz said nothing of the kind[.]" App. 71a. The court was referring to how CNN defamed Professor Alan Dershowitz by systematically distorting his Senate floor statement in deliberately omitting his crucial qualifying language. The result was to turn Dershowitz's meaning on its head. Yet the Eleventh Circuit ruled that CNN's omission of crucial portions of a statement could not establish actual malice. This holding creates a circuit split and highlights how *New York Times Co. v. Sullivan*'s actual-malice standard has devolved into near-absolute immunity for media defendants, even when they profoundly misrepresent verifiable public statements.

The questions presented are:

1. Whether a defendant's systematic omission of qualifying and limiting language from a plaintiff's recorded statement constitutes proof of actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), sufficient to survive summary judgment, as the Second, Third, Fifth, and Ninth Circuits have held, and contrary to what the Eleventh Circuit held below.

2. Whether the actual malice standard established in *Sullivan*, or as extended by its progeny, should be discarded altogether or at least as to private citizens who are public figures.

3. Whether this Court should modify *Sullivan*'s clear-and-convincing and burden-of-proof evidentiary standards.

STATEMENT OF RELATED PROCEEDINGS

The opinion of the Eleventh Circuit appears as *Dershowitz v. CNN, Inc.*, 153 F.4th 1189 (11th Cir. 2025), App. 1a. The Final Order issued by the District Court for the Southern District of Florida, granting summary judgment, appears as *Dershowitz v. CNN Inc.*, 668 F. Supp. 3d 1278 (Apr. 4, 2023), App. 79a. The Order issued by the District Court for the Southern District of Florida denying the Defendant's Motion to Dismiss appears as *Dershowitz v. CNN, Inc.*, 541 F. Supp. 3d 1354 (May 24, 2021), App. 80a.

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JURISDICTION

The Eleventh Circuit issued its judgment on August 29, 2025. On November 6, 2025, Justice Thomas extended the time to file until December 29, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

STATEMENT OF THE CASE

On January 29, 2020, Petitioner Alan Dershowitz, a Harvard Law School professor emeritus, appeared on the floor of the United States

Senate as counsel for President Donald Trump during the impeachment proceedings. In response to a question from Senator Cruz about a quid pro quo, Dershowitz delivered a careful statement addressing the constitutional standards for impeachment. He distinguished among three categories of presidential conduct: (1) actions motivated by the public interest, (2) actions motivated by electoral interest, and (3) actions motivated by "personal pecuniary interest." App. 3a.

Dershowitz emphasized that conduct falling into the third category would be "purely corrupt." App. 16a. "If a hypothetical President of the United States said to a hypothetical leader of a foreign country: Unless you build a hotel with my name on it and unless you give me a million-dollar kickback, I will withhold the funds. That is an easy case. That is purely corrupt and in the purely private interest." App. 15a. This qualification was a central point of his constitutional analysis, which distinguished between mixed electoral/public motives and impeachable corruption.

Within minutes of Dershowitz's remarks, Respondent Cable News Network, Inc. ("CNN") began broadcasting mischaracterizations of his statement that systematically omitted these critical qualifications. Paul Begala posted a CNN online commentary claiming that "[t]he Dershowitz Doctrine would make presidents immune from every criminal act . . . . Campaign finance laws: out the window. Bribery statutes: gone. Extortion: no more." App. 18a. As the District Court explained, "Of course, Dershowitz said nothing of the kind, there is no Dershowitz Doctrine[.]" App. 71a. Anne Milgram

declared, "Dershowitz is essentially saying it doesn't matter what the quid pro quo is as long as you think you should be elected." App. 16a. John Berman claimed that "[h]e says if a President is running for re-election because he thinks getting elected will help America, he can do anything, anything." App. 17-18a.

None of these characterizations mentioned Dershowitz's exclusion of conduct motivated by "personal pecuniary interest" from his analysis—which, of course, would preserve bribery and extortion as impeachable offenses. And Dershowitz emphatically did not say that the President "can do anything, anything"; he said the exact opposite. Though CNN indisputably possessed the complete video and transcript of his statement, App. 10a, its commentators systematically disregarded the qualifying language that gave Dershowitz's statement its true meaning, attributing to him a position he had expressly rejected: that presidents could engage in any conduct whatsoever, including bribery and extortion, without committing an impeachable offense.

Dershowitz filed suit in the United States District Court for the Southern District of Florida, alleging that CNN had defamed him under Florida law by deliberately and systematically misrepresenting his Senate floor statement. The District Court denied CNN's Motion to Dismiss, recognizing that Dershowitz had stated a colorable claim. App. 80a. But on CNN's Motion for Summary Judgment, the District Court ruled for CNN. The District Court acknowledged that "the evidence before the Court . . . establish[ed] foolishness, apathy, and

an inability to string together a series of common legal principles[.]" App. 67a. But under *Sullivan*, incompetence and negligence are not enough. The court concluded that "*Sullivan* and its progeny allows the news media to ignore a fuller context[.]" App. 72a.

The United States Court of Appeals for the Eleventh Circuit affirmed. The court acknowledged that Dershowitz "contends that . . . CNN 'omitted key portions of what [he] said to make it sound like he said the precise opposite.'" App. 10a. But that, the court concluded, was insufficient to establish actual malice because CNN's commentators testified that they personally and subjectively believed their characterizations were accurate. App. 7a-8a. The court thereby let one side's subjective testimony foreclose, as a matter of law, the crucial factual question of scienter.

Judge Lagoa filed a concurrence, arguing that *Sullivan* and its progeny "are policy-driven decisions dressed up as constitutional law, and they find little—if any—support in our history." App. 20a (Lagoa, J., concurring). She demonstrated that *Sullivan* departed dramatically from the First Amendment's original meaning and that "[t]he lasting effect of *Sullivan*, as anyone who ever turns on the news or opens a social media app knows well, is that media organizations can 'cast false aspersions on public figures with near impunity.'" App. 37a (quoting *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 254 (D.C. Cir. 2021) (Silberman, J., dissenting in part)). She concluded: "I agree with the district court that the only thing standing between Dershowitz and justice is *Sullivan*." App. 19a.

This petition followed.

REASONS FOR GRANTING THE PETITION

Over the course of six decades, *New York Times Co. v. Sullivan* has morphed into an impregnable fortress that protects media irresponsibility while denying public figures any remedy for egregious misrepresentations. As the media ecosystem has evolved into the internet age, the problems have skyrocketed. This case illustrates the problem: Dershowitz made a carefully qualified statement on the Senate floor. It was recorded for all to see and hear. Yet CNN systematically stripped away his calibrating statements and attributed to him a fundamentally different message. CNN "defamed" Dershowitz "under any common understanding of that term," App. 19a, yet *Sullivan*'s actual-malice standard was held to bar recovery, App. 12a. This is not what the Framers intended; it's not even what the *Sullivan* Court intended.

The First Amendment protects robust debate, not deliberate or reckless falsehoods, as *Sullivan* itself declared. For centuries, defamation law had balanced expression with accountability. However, after *Sullivan*, courts ran rampant by applying it to protect media defendants almost *carte blanche*. Feeling themselves untouchable, the media have grown disdainful of the truth. The internet has vastly exacerbated the harm. This Court should correct this imbalance—whether by resolving the circuit split on deliberate omissions as evidence of malice, reforming *Sullivan*'s evidentiary standard, limiting *Sullivan* to its core holding (public officials), or reconsidering *Sullivan* and its progeny altogether.

This case provides the ideal vehicle: There is no dispute that CNN had Dershowitz's full statement; the District Court found, regarding the distorted version CNN attributed to him, that Petitioner "said nothing of the kind[.]" App. 71a. If fundamental misrepresentation of verifiable public statements is entitled to constitutional protection, *Sullivan* has ceased serving any legitimate purpose.

I. THE COURTS OF APPEALS ARE SPLIT ON WHETHER DELIBERATE OMISSION OF EXCULPATORY INFORMATION IS EVIDENCE OF ACTUAL MALICE.

The circuits are divided on a fundamental question: whether a defendant's omission of crucial exculpatory or contextual information can support a jury finding of malice. The Second, Third, Fifth, and Ninth Circuits have all held that systematically disregarding material that would contradict or qualify defamatory statements can demonstrate at least the reckless disregard for truth required by *New York Times Co. v. Sullivan*. The Eleventh Circuit alone held here that omitting key qualifying language from a public figure's statement is not sufficient to present the question of actual malice to the jury. This conflict calls for this Court's resolution.

A. The Second, Third, Fifth, and Ninth Circuits Hold That Deliberate Omission of Exculpatory Information Can Establish Actual Malice.

Sullivan held that a plaintiff must show actual malice with "the convincing clarity which the constitutional standard demands." *Sullivan*, 376 U.S. at 285-86. But this Court has also emphasized that

questions of veracity, credibility, and motive "are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Finding malice is a question of fact and calls for reliance on circumstantial evidence because defamers will typically deny malice and victims can only establish this subjective mindset circumstantially. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions[.]" *Id.* This Court emphasized that "the judge's function is not himself to weigh the evidence and determine the truth of the matter[.]" *Id.* at 249. The Seventh Amendment and its history require this deference to the jury. *See* H. Folkard, *Starkie on Slander and Libel* at *606 (H. Wood ed., 4th Eng. ed. 1877).

Accordingly, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court held that deliberate alteration of a speaker's words can constitute actual malice if "the alteration results in a material change in the meaning conveyed by the statement." *Id.* at 517. Here, the District Court found that Dershowitz "said nothing of the kind" and "there is no Dershowitz Doctrine[.]" App. 71a. Fabrications and omissions create a question of fact for the jury. 501 U.S. at 522. Accordingly, multiple circuits have recognized what common sense dictates: When a defendant omits information that would disprove or materially qualify a defamatory statement, a jury may infer malice. *See also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989).

The Second Circuit embraced this principle shortly after *Sullivan* in *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969). Authors writing about Senator Barry Goldwater's fitness for the presidency systematically ignored materials that did not support their conclusion. When they found positive statements that expressly qualified derogatory ones, they published only the derogatory portions. *Id.* This, the Second Circuit held, supported actual malice: "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context." *Id.*

The Third Circuit confirmed this approach in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988). Defendant there published an article that deleted crucial exculpatory language from the discussion of a leaked memorandum. The Third Circuit held that "the jury could find by clear and convincing evidence that Time acted with *New York Times* actual malice" based on this deletion. *Id.* at 1073. The court explained that the omission "significantly altered the message," that "Time knew its implication was false," and that "Time intended that false implication." *Id.* at 1092. The "decision to simply delete language that cast a very different and more benign light on the facts he reported, could itself serve as a basis for a jury's finding by clear and convincing evidence that Time acted with knowledge of probable falsity." *Id.*

The Ninth Circuit also subscribes to this view. In *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 892 (9th Cir. 2016), the Daily Mail's employees

"actively removed key contextual information from [a] photograph" and "replaced this information with a caption" linking the individual in the photograph to the story. The Ninth Circuit held that this was evidence the defendant acted with "reckless disregard" for the truth. *Id.* at 893. Likewise, *Price v. Stossel*, 620 F.3d 992 (9th Cir. 2010), held that a broadcasting company could properly be held liable for omitting crucial context when the company used a clip of a sermon to suggest that a minister was boasting about his own wealth, when in fact "the Clip was excerpted from part of a longer sermon in which Price was speaking from the perspective of a hypothetical person who, though wealthy, was spiritually unfulfilled." *Id.* at 995.

The Fifth Circuit has adopted the same rule. *Block v. Tanenhaus*, 867 F.3d 585 (5th Cir. 2017), held that there was a genuine issue of fact where, "although [the plaintiff] used the words attributed to him by the NYT, there is a genuine issue of material fact as to whether the NYT distorted the meaning of his statements by omitting crucial context." *Id.* at 590. "[T]he omission of context can distort the meaning of a direct quotation[.]" *Id.* Whether it did or not was for the jury to decide. *Id.*

These circuits share a common understanding: Actual malice may be proven by a defendant's decision to suppress contextual or qualifying information. When a publisher knows facts that refute its assertions yet publishes its claims without them, that is proof of "actual malice." This case is far worse: Not only did CNN omit Dershowitz's qualifying language, thus distorting its meaning, but

CNN's commentators relied on that omission in claiming that, under their fabricated "Dershowitz Doctrine," bribery and extortion would not be impeachable offenses, when Dershowitz himself said they would be.

In New York, Philadelphia, Dallas, or San Francisco, a publisher who possesses exculpatory information yet systematically omits it may face liability for actual malice. In Atlanta, Miami, or Montgomery, not so. CNN was awarded summary judgment despite engaging in the very conduct that *Goldwater*, *Schiavone*, *Tanenhaus*, and *Manzari* deemed sufficient evidence of actual malice to get to a jury. These are not issues unique to Dershowitz's case.[1]

B. This Case Presents an Ideal Vehicle for Resolving the Split.

This case presents the circuit conflict without complicating factors. The statement at issue was made on the Senate floor, broadcast live, and preserved in multiple authoritative formats. There is no dispute about what Dershowitz said and that,

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[1] A prime example is the BBC's editing of remarks made by President Trump to misrepresent what he had actually said on January 6, 2021, mischaracterizing the remarks by changing the context, for which President Trump has filed a defamation suit in Florida federal court. *Trump Sues BBC For $10 Billion, Accusing It Of Defamation Over Editing Of President's Jan. 6 Speech*, Associated Press (Dec. 16, 2025), https://apnews.com/article /trump-bbc-lawsuit-defamation-a9fd196c4f242decd8f28e8d0ce74442. That lawsuit will be governed by the Eleventh Circuit's interpretation of *Sullivan* in this case.

regarding CNN's distortion, he said "nothing of the kind." App. 71a. The only question is whether CNN's repeated omission of his limiting language, and reference to a "Dershowitz Doctrine" that Dershowitz never articulated, can constitute sufficient evidence of actual malice. The Eleventh Circuit said no. The Second, Third, Fifth, and Ninth Circuits have said yes. This Court should grant review to resolve that circuit split.

II. *SULLIVAN* AND ITS PROGENY LACK CONSTITUTIONAL FOUNDATION AND SHOULD BE RECONSIDERED.

This Court's decision in *New York Times Co. v. Sullivan* constitutionalized, and revolutionized, defamation law in unwarranted, ahistorical, and ultimately harmful ways. *Sullivan*'s progeny extended that revolution further, exacerbating the cost for victims of defamation, especially public figures. This Court should either overrule *Sullivan* (*infra* § II) or, as explained below (*infra* § III), modify those aspects of *Sullivan* which aggravate the harms it inflicts on defamation plaintiffs.

Today, the consequences of *Sullivan* are starkly evident. Dershowitz made careful, qualified statements on the Senate floor. CNN systematically omitted the context and qualifiers in his statements and broadcast a fundamentally distorted message to millions of viewers. Paul Begala claimed on CNN that under Begala's fabricated "Dershowitz Doctrine," as to the President, "Bribery statutes [would be] gone." App. 17a. This characterization is the *opposite* of what Dershowitz said. He explicitly and directly stated that bribery would be impeachable as involving a

"personal pecuniary interest." App. 15a. As Judge Lagoa noted, CNN "defamed" Petitioner "under any common understanding of that term." App. 19a. Yet the lower courts held that *Sullivan*'s actual malice standard barred any remedy. This case thus presents an opportunity for the Court to reconsider *Sullivan*. Indeed, after more than half a century of experience with *Sullivan*, the time has come for this Court to overrule or limit *Sullivan* in light of experience and the vastly changed meaning of "press" in the internet age.

A. *Sullivan* Departed from the Original Meaning of the First Amendment.

The historical record is unequivocal: *Sullivan*'s actual malice standard has no basis in the Constitution's original meaning. As Judge Lagoa observed, "*Sullivan* and its progeny are policy-driven decisions dressed up as constitutional law, and they find little—if any—support in our history." App. 20a. From the Founding until *Sullivan*, defamation law operated under well-established common-law principles that applied equally to all plaintiffs, regardless of their public status. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring in judgment).

In the Founding era, it was well understood that the First Amendment did not abrogate the common law of defamation. Scholars and jurists agreed that even public officials could sue for libel "upon the same footing with a private individual" because "[t]he character of every man should be deemed equally sacred, and of consequence entitled to equal remedy." Tunis Wortman, *A Treatise, Concerning Political*

Enquiry, and the Liberty of the Press 259 (New York George Forman, ed., 1800). State courts were "open to all persons alike" for "redress for any false aspersion on their respective characters, nor is there any thing in our laws or constitution which abridges this right." St. George Tucker, *View of the Constitution of the United States with Selected Writings* 237-38 (Clyde N. Wilson, ed., 1999) (1803). Authorities universally agreed that the First Amendment was never intended to immunize defamatory falsehoods.

Justice Story, riding circuit in Rhode Island, declared it "as plain and well settled as any doctrine of the law" that, as to libel, "[t]he liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications." *Dexter v. Spear*, 7 F. Cas. 624, 624 (C.C.D. R.I. 1825) (No. 3867); *see also* Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz. the Court of the Press* (1789), reprinted in 10 *The Writings of Benjamin Franklin* 38 (Albert Henry Smyth, 1907) ("I, for my part, own myself willing to part with my Share of [the liberty of the press] when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus'd myself.").

Likewise, Story's commentaries emphasized that the Constitution was not designed to supplant the law of libel. "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational

man." 3 Joseph Story, *Commentaries on the Constitution of the United States* 731-32 (1st ed. 1833). Story's interpretation of the First Amendment was straightforward and, by his account, widely shared: "[T]hat the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation." *Id.* at 732. "[I]t has been repeatedly affirmed in several of the states." *Id.* at 742.

Early American courts rejected attempts to decimate libel law based on the First Amendment's state equivalents. The Pennsylvania Supreme Court explained when interpreting its analogue to the First Amendment: "The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motive of such publications[.]" *Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788). When it comes to "those which are intended merely to delude and defame," the court held "it is impossible that any good government should afford protection and impunity." *Id.*

In *Commonwealth v. Blanding*, the Massachusetts Supreme Judicial Court explained that "the liberty of the press" protected by the state constitution meant "not its licentiousness," and that this "is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who formed it, requires." 20 Mass. 304, 313-14 (1825). The court was crystal clear: "Nor does our

constitution or declaration of rights abrogate the common law in this respect, as some have insisted." *Id.* at 313.

Similarly, in *People v. Croswell*, the New York Supreme Court of Judicature, the highest court in New York at the time, emphasized that "The founders of our governments were too wise and too just ever to have intended by the freedom of the press . . . that the press should be the lawful vehicle of malicious defamation[.]" 3 Johns. Cas. 337, 393 (N.Y. 1804).

The understanding that defamation law remained compatible with the First Amendment persisted well into the period of the Fourteenth Amendment's ratification. Thomas Cooley, one of the most influential constitutional scholars of the Reconstruction era, explained: "It is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* *420 (5th ed. 1883) ("*Constitutional Limitations*").

For the first century and a half of this Court's existence, the Court consistently recognized that defamation law posed no constitutional problem. In *Near v. Minnesota*, the Court acknowledged "that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our [state and federal] constitutions." 283

U.S. 697, 715 (1931). *Sullivan* thus represented a sharp and unexplained break with a century and a half of constitutional interpretation.

B. *Sullivan* Represents Policy-Driven Judicial Decision-Making Masquerading as Constitutional Law.

Sullivan's departure from history would be troubling enough on its own terms. But *Sullivan*'s problems run deeper still. The decision misread the historical sources without meaningfully engaging with them at all. Instead, *Sullivan* represents "policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 586 U.S. 1172, 1173 (2019) (Thomas, J., concurring in denial of certiorari). *Sullivan* "overturn[ed] 200 years of libel law." *Dun & Bradstreet, Inc.*, 472 U.S. at 766 (White, J., concurring in the judgment). Indeed, this Court has since acknowledged that "the rule enunciated in the *New York Times* case . . . is . . . largely a judge-made rule of law," which "is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501-02 (1984).

Despite this nation's clear history and tradition, the *Sullivan* court seemed to think it was "writing upon a clean slate," 376 U.S. at 299 (Goldberg, J., concurring in result), free to "substantial[ly] abridge[]" the common law of libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974). The rule "has no relation to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication." *Tah*, 991 F.3d

at 251 (Silberman, J., dissenting in part). Unmoored from history, the *Sullivan* Court created a new rule that was driven solely by policy considerations that have proven to be unfounded and unwise.

Sullivan erected a near-insurmountable barrier that "allows grievous reputational injury to occur without monetary compensation or any other effective remedy." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc. Inquiry 197, 205 (1993). Under the actual-malice standard, the public's "only chance of being accurately informed is measured by the public [figure's] ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests." *Dun & Bradstreet, Inc.*, 472 U.S. at 768-69 (White, J., concurring in judgment). In short, "to the extent *Sullivan* decreases the threat of libel litigation, it promotes not only true but also false statements of fact—statements that may themselves distort public debate." Kagan, *supra*, at 206. *Sullivan*'s effects have been profound: "the press stops worrying about the accuracy of defamatory statements[.]" *Id.* at 207.

As Judge Silberman observed, *Sullivan* "allows the press to cast false aspersions on public figures with near impunity." *Tah*, 991 F.3d at 254 (Silberman, J., dissenting in part). Judge Lagoa likewise emphasized, "Jettisoning the original meaning of the First Amendment—and centuries of common law faithful to that meaning—has left us in an untenable place, where by virtue of having achieved some bit of notoriety in the public sphere, defamation victims are left with scant chance at recourse for clear harms." App. 37a. *Sullivan* has become a shield for harmful

falsehoods the First Amendment was never meant to protect.

Significantly, *Sullivan* rested on assumptions about the media landscape that are no longer valid. "It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy." *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original). These media tactics stack the deck "against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth." *Id.*

When *Sullivan* was decided, the press was "dominated" by "large companies" that "employ[ed] legions of investigative reporters, editors, and factcheckers." *Id.* at 2427. But now, "the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing." *Id.* at 2428. Accordingly, "our new media environment also facilitates the spread of disinformation." *Id.* at 2427. But, as the Chief Justice has noted, "In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital." Sup. Ct. of the United States, Year-End Report on the Federal Judiciary 2 (2019). In the end, "[w]hat started in 1964 with a decision to tolerate the occasional falsehood . . . has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously

unimaginable." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

In 1964, *Sullivan* addressed a world of wet ink and lead slugs, where a handful of professional news outlets operated under shared journalistic codes and faced significant distribution constraints. "Since 1964 . . . our Nation's media landscape has shifted in ways few could have foreseen." *Id.* at 2427 (Gorsuch, J., dissenting from denial of certiorari). With the advance of the internet, "virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world." *Id.* In a race with bloggers and Twitter feeds, traditional journalistic gatekeepers have disappeared, and the competition for clicks incentivizes sensationalism over accuracy. In short, the concerns that animated *Sullivan* no longer match the reality of modern media. *Sullivan* has outlived any claim to validity it might once have had.

C. Even If *Sullivan* Is Retained for Public Officials, Its Extension to Private Citizens Who Are Public Figures Should Be Reconsidered.

Whatever arguments might exist for special protections for criticism of government officials do not extend to private citizens who happen to achieve prominence. The distinction matters profoundly and was disregarded by this Court when it extended *Sullivan* to public figures in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and *Gertz*. *Sullivan* was motivated by a desire to protect public criticism of *official* conduct and actions of public officials. *Sullivan*, 376 U.S. at 282. In fact, the *Sullivan* Court relied on the common

law privilege that protected criticism of public officials, *id.* (citing *Coleman v. Maclennan*, 78 Kan. 711 (1908)), and explicitly developed a "privilege for the citizen-critic of government," *id.* But then, in *Hill*, the Court disregarded this reasoning, extending the *Sullivan* rule to any public figure.

Public figures possess no governmental authority. They cannot issue official statements backed by the government's imprimatur. They cannot hold press conferences in government buildings or command coverage through official channels. They possess no governmental immunities. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982) (qualified immunity for executive officials acting in their official capacity). They cannot rely on government lawyers and publicists to represent them for free. They must rely entirely on their own resources, their own reputations, and their own ability to correct falsehoods.

Hill and *Gertz* throw the policy-based *Sullivan* test in even sharper conflict with the common law, which had a privilege protecting criticism of public officials that "applied to a public man in a public capacity" and not "to a private individual." H. Folkard, *Starkie on Slander and Libel* at *332. The common law privilege was that "freedom of discussion should be allowed when the character and official conduct of one holding a public office is in question[.]" Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 218 (Chicago, Callaghan & Co. 1879). Common-law privileges specifically protected criticisms of government officials and officers, but did not target individual

citizens and their right to bring defamation actions against one another. *Palmer v. City of Concord*, 48 N.H. 211, 216 (1868) ("[I]n this country every citizen has the right to call the attention of his fellow citizens to the mal-administration of public affairs or the misconduct of public servants[.]"). The common law never protected defamation against anyone who might become a public figure, even through no voluntary action. *See, e.g.*, *Hill*, 385 U.S. 374 (family thrust into national news after being held hostage by escaped convicts must satisfy *Sullivan* standard). The damage caused by this doctrine is exemplified by the case of Nicholas Sandmann, a hapless high school student who smiled wanly when confronted by someone aggressively asserting political views with which he may not have agreed and may not even have understood. *See* Olivier Darcy, *CNN Settles Lawsuit With Nick Sandmann Stemming From Viral Video Controversy*, CNN (Jan. 7, 2020), https://www.cnn.com/2020/ 01/07/media/cnn-settles-lawsuit-viral-video. Yet the media—prominently including defendant CNN—transformed him into a public figure and defamed him to the world, all in a single stroke. While Dershowitz is not an involuntary public figure, many who do not voluntarily enter the public spotlight are targeted by the press, now more than ever in the age of the camera-enabled smartphone. The Court should reconsider the application of *Sullivan* to private parties who are or become public figures in light of these developments.

Even if some heightened protection for criticism of public *officials* might find policy support, *Sullivan*'s extension to private citizens who are public figures lacks any justification or historical anchor. Public

figures are private citizens who have the right to petition government officials, including the courts, for redress. They deserve the same protection from defamation as any other private citizen: no more, no less. Distinguishing the nebulous concept of public figures from the rest of humanity also poses impossible line-drawing problems that this Court and others have wrestled with. At minimum, this Court should reconsider *Hill* and *Gertz*'s application of *Sullivan*'s actual-malice standard to public figures who neither seek governmental office nor wield governmental power. While "the citizen has the privilege of criticizing his government and its officials," this Court should curtail the notion that the First Amendment acts "to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation[.]" *Gertz*, 418 U.S. at 387 (White, J., dissenting). The distinction between public *officials* and public *figures* reflects the fundamental difference between checking government power and making it easier to lie about private citizens. Public figures like Dershowitz lack the immunity, resources, and reach that this Court relied on when it created a rule applicable to public officials in *Sullivan*.

III. IN THE ALTERNATIVE, THE CLEAR-AND-CONVINCING EVIDENCE STANDARD AND PLACING THE BURDEN OF SHOWING MALICE ON PLAINTIFF SHOULD BE RECONSIDERED.

Sullivan imposed not one but two burdens on public-figure plaintiffs: a substantive requirement (actual malice) and a heightened evidentiary standard that requires the *plaintiff* to show not

merely falsity but actual malice, and to do so with "the convincing clarity which the constitutional standard demands." *Sullivan*, 376 U.S. at 285-86. This double hurdle has become virtually insurmountable, with the *Sullivan* standard thereby "protecting lies—by insulating those who spread them behind an iron barrier," App. 24a (Lagoa, J., concurring). These hurdles should be reconsidered.

A. The Burden of Proof as to Malice Should Shift to Defendants.

At common law, the burden rested on *defendants* to prove truth as an affirmative defense, not on plaintiffs to prove falsity or malice: A defamation claim could be defeated "if the defendant be able to justify, and prove the words to be true[.]" 3 William Blackstone, *Commentaries* *125. Defendants bore "the burden of proving the affirmative"; "the truth of the supposed slander is, in effect, a ground of justification, which must be substantiated by the defendant." H. Folkard, *Starkie on Slander and Libel* at *105; *see Sibley v. Lay*, 44 La. Ann. 936, 938 (1892) ("Having admitted that he made the charge, the burden of proof that he acted upon probable cause, in honest belief, based upon reasonable grounds, rests upon the defendant."); *see also King & Verplanck v. Root*, 4 Wend. 113, 135 (N.Y. 1829).

When questions of malice arose, they too were resolved with the burden on the defendant: "[T]he burden is upon him to prove, not only the truth of the charge, but also the 'good motives and justifiable ends' of the publication." Cooley, *Constitutional Limitations*, *464; *see Commonwealth v. Bonner*, 50 Mass. 410, 412 (1845) ("[T]he burden was on the defendant, not only

to prove the truth of the matter charged as libellous, but likewise that it was published with good motives, and for justifiable ends.").

This allocation of burdens made sense: The defendant, having chosen to publish, is in the best position to know and prove the truth of the publication and the thinking behind it. Shifting the burden to plaintiffs to *disprove* a defendant's good faith, charges the party with the least access to the relevant information and relieves the party with the most—essentially exclusive—access. Even if *Sullivan*'s substantive actual-malice standard were constitutionally required, the First Amendment does not mandate that plaintiffs bear the burden of proving it. The Court should restore the traditional allocation of burdens, treating the lack of actual malice under *Sullivan* as an affirmative defense that the defendant must establish.

B. The *Sullivan* Clear-and-Convincing Standard Lacks Historical Foundation and Should Be Modified.

Beyond the allocation of burdens, *Sullivan* imposed a heightened standard of proof. This clear-and-convincing evidence standard has no basis in the common-law tradition that informed the First Amendment's original meaning. At common law, defamation cases imposed no heightened burden of proof on the plaintiff; instead, as Justice Story explained, libel cases stood "upon the same general grounds as other rights of action for wrongs." *Dexter*, 7 F. Cas. at 624.

Whenever evidentiary questions about malice were raised, the standard remained the same. Starkie

emphasized that "if the words are such that the inference of malice may reasonably be drawn from them, they should be submitted to the jury." H. Folkard, *Starkie on Slander and Libel* at *606. The standard was explicitly one of preponderance:

> In order to entitle a plaintiff to have the question of malice submitted to the jury, it is not necessary that the evidence should be such as directly leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

Id. at *607.

Sullivan cited no historical justification for departing from this norm. The Court announced the heightened evidentiary standard without meaningful analysis. *See Sullivan*, 376 U.S. at 285-86.

The substantive actual-malice standard already provides extraordinary protection for speech. Requiring plaintiffs to prove that standard by clear-and-convincing evidence, rather than having defendants establish their good faith as an affirmative defense, exceeds any constitutional necessity. A preponderance standard, with the burden properly placed on defendants, would still protect legitimate journalism while allowing redress to defamation plaintiffs with meritorious claims. *Infra* p. 28.

IV. *STARE DECISIS* DOES NOT PRECLUDE MODIFYING OR OVERRULING *SULLIVAN*.

The Court has repeatedly emphasized that *stare decisis* carries less weight for constitutional decisions that Congress cannot correct through legislation. *Gamble v. United States*, 587 U.S. 678, 691 (2019). For a century and a half, states regulated defamation according to common law principles. *Sullivan* revolutionized this field without substantial constitutional foundation. When this Court errs in interpreting the Constitution—particularly when it concocts a constitutional rule with no anchor in the document's text or history—only this Court can correct the error. If *stare decisis* did not bind the *Sullivan* Court when it upended centuries of settled law, it does not prevent correction now.

Sullivan, as currently interpreted, is not merely wrong, but egregiously so. *See Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring) (asking, for stare decisis purposes, whether "the prior decision not just wrong, but grievously or egregiously wrong?"). As Justice Thomas observed, the Court "made little effort to ground [its] holdings in the original meaning of the Constitution." *McKee*, 586 U.S. at 1173 (Thomas, J., concurring in denial of certiorari). A decision this unmoored from constitutional text and history is not entitled to the mantle of *stare decisis*.

In addition, *Sullivan* has "caused significant negative jurisprudential or real-world consequences." *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring). Jurisprudentially, the decision has spawned a complex and often incoherent body of law. The actual-malice standard itself has proven nearly impossible to

satisfy, transforming a protection for good-faith mistakes into near-absolute immunity. Moreover, as discussed above, the circuits have divided over basic questions, such as whether deliberate omission of exculpatory information constitutes evidence of malice.

The real-world consequences are equally severe. As Judge Lagoa observed, *Sullivan* has enabled "media organizations [to] 'cast false aspersions on public figures with near impunity,'" causing "untold harm to public figures and the general public alike." App. 37a (Lagoa, J., concurring) (quoting *Tah*, 991 F.3d at 254 (Silberman, J., dissenting in part)). Again, Justice Gorsuch has noted that under *Sullivan*, "publishing without investigation, fact-checking, or editing has become the optimal legal strategy." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari). The result is a media landscape where falsehoods proliferate because defendants know they face virtually no risk of liability.

Finally, because *Sullivan* and its progeny have eliminated meaningful remedies for reputational harm, overturning the decision would not "unduly upset reliance interests." *See Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring). "This consideration focuses on the *legitimate* expectations of those who have reasonably relied on the precedent." *Id.* (emphasis added). It is not *legitimate* to expect to defame with impunity. As Justice White observed, under *Sullivan*, "the lie will stand, and the public continue to be misinformed about public matters." *Dun & Bradstreet*, 472 U.S. at 767-68 (White, J., concurring in judgment). This travesty serves no First

Amendment interest—it simply rewards profitable falsehoods at truth's expense, degrading public discourse.

For nearly two centuries, Americans relied on defamation law to provide meaningful remedies for reputational harm. *Sullivan* disrupted *that* reliance without constitutional warrant. The true reliance interest is the public's interest in a robust marketplace of ideas, where speakers are held accountable for injurious falsehoods so that vigorous debate prevails. This is the balance the Founders struck and that *Sullivan* discarded.

Under the common law, the media already can perform aggressive reporting without liability for *good-faith mistakes*, under common law privileges. *See* Cooley, *Constitutional Limitations*, *422. That freedom would remain fully protected without *Sullivan*. Truth would still remain a complete defense. 3 Blackstone *125; H. Folkard, *Starkie on Slander and Libel* at *105. The distinction between opinion and fact would remain unchanged. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20 (1990) (discussing common-law distinction). Strict liability would still be precluded. *Gertz*, 418 U.S. at 348. To the extent media organizations have relied on *Sullivan* as a license to lie, they have relied on a constitutional error and injustice.

"No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). When it comes to *stare decisis*, the "most important" interest is "the

reliance interests of the American people . . . in the preservation of our constitutionally promised liberties." *Ramos*, 590 U.S. at 110-11 (opinion of Gorsuch, J.). Whereas *Sullivan* undermined the liberty to petition for redress of reputational grievances, and diminished a defamation plaintiff's right to a jury, the people's reliance interest in constitutional fidelity outweighs any claimed reliance on a judicially created doctrine.

* * *

The circuit conflict at issue in this case warrants this Court's review. *Supra* § I. But that conflict grew out of the larger mess which this Court's *Sullivan* decision has created. This petition provides the vehicle for this Court to address *Sullivan*'s ill effects on defamation law, either by overruling it entirely (§ II) or by lopping off some particularly harmful outgrowths of that precedent (§ III). In any case, *Sullivan* cannot stand in the form embraced by the court below. As Judge Silberman stated in *Tah*, 991 F.3d at 252 (dissenting in part), "new considerations have arisen over the last 50 years that make [*Sullivan*] . . . a threat to American Democracy. It must go."

CONCLUSION

This Court should grant the petition for certiorari.

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December 29, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 23-11270

[Filed August 29, 2025]

ALAN M. DERSHOWITZ,
Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:20-cv-61872-AHS

Before GRANT, LAGOA, and WILSON, Circuit Judges.

GRANT, Circuit Judge:

While representing President Donald J. Trump in impeachment proceedings before the Senate, law professor Alan Dershowitz gave a statement about the scope of impeachable offenses. That statement proved controversial, with many reporters and commentators characterizing it as out of bounds. Dershowitz now claims that CNN in particular, along with its on-air personalities, defamed him—intentionally misrepresenting his comments to tarnish his reputation.

For a public figure like Dershowitz to prevail, defamation law has long required proof of a speaker's actual malice: knowledge of or reckless disregard for the falsity of a statement. But here, the available evidence points to the reporters' sincere—if mistaken or even overwrought—belief in the truth of their accusations. Dershowitz has presented no evidence that shows otherwise. We therefore affirm the district court's order granting summary judgment to CNN.

I.

Alan Dershowitz is a well-known professor emeritus at Harvard Law School. He is also a practicing criminal defense lawyer who made a name for himself representing prominent figures in some of the most infamous criminal trials in recent memory—O.J. Simpson and Jeffrey Epstein to name two. As Dershowitz admits, he has welcomed the notoriety that has followed.

The dispute here arises out of his representation of another household name—President Donald Trump. Dershowitz represented Trump in January 2020 during his first impeachment trial. In that role he spoke twice on the Senate floor, first giving an opening statement on January 27 and then returning for questions two days later.

Dershowitz's response to one of those questions sparked this dispute. Senator Ted Cruz asked: "As a matter of law, does it matter if there was a quid pro quo? Is it true that quid pro quos are often used in foreign policy?" Selections from Dershowitz's remarks are excerpted below, with the entirety in the Appendix.

> The only thing that would make a quid pro quo unlawful is if the quo were in some way illegal.
>
> Now, we talked about motive. There are three possible motives that a political figure can have . . . the second is in his own political interest . . . . I want to focus on the second one for just one moment.
>
> Every public official whom I know believes that his election is in the public interest. Mostly, you are right. Your election is in the public interest. If a President does something which he believes will help him get elected—in the public interest—that cannot be the kind of quid pro quo that results in impeachment. . . .
>
> [I]t cannot be a corrupt motive if you have a mixed motive that partially involves the national interest, partially involves electoral, and does not involve personal pecuniary interest. . . .
>
> [A] complex middle case is: I want to be elected. I think I am a great President. I think I am the greatest President there ever was, and if I am not elected, the national interest will suffer greatly. That cannot be [an impeachable offense].

A swift reaction followed in the news and on social media. Just moments after Dershowitz's remarks, the Washington Post's live-blog coverage of the impeachment trial featured a bracing headline: "Dershowitz argues that a president is immune if he views his reelection as in the public interest." Many

Twitter users reacted strongly as well.[1] One was Joe Lockhart, a CNN contributor, who posted that Dershowitz's argument was "crazy" and "corrupt." Paul Begala, an opinion columnist at CNN, had a similar reaction, tweeting that Dershowitz's statement was "[a]kin to Nixon telling David Frost, 'If the President does it, it isn't illegal.' Only this time it's 'If the President thinks it will help his re-election, and he thinks his re-elections [sic] helps the country, it isn't illegal.'"[2]

As for CNN itself, reporting about Dershowitz's statement began about twenty minutes after it took place, when a newsletter was sent out with a headline reading "Dershowitz argues that reelection of any politician is in the national interest, therefore as a motivation can't be impeachable." Within half an hour, a different headline was published on CNN's website: "Alan Dershowitz argues presidential quid pro quos aimed at reelection are not impeachable."

That night and through the next morning, several of CNN's broadcasts and publications criticized Dershowitz and his statement. The critics included Anderson Cooper, who on his online show "Anderson Cooper Full Circle" said of Dershowitz's statement:

---

[1] Since this suit began, Twitter has been merged into X Corp. and the platform now goes by the name "X." Because the platform was still Twitter when these events took place, we will proceed with that name. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1982 n.1 (2024).

[2] Quotations contained in the parties' filings have sometimes included minor and nonmaterial alterations to the content of the original sources. Here and throughout, we have directly quoted the sources underlying the claims in this case.

> He's essentially saying any politician, because it's so important that they get elected . . . that they decide that it's really important for everybody that they are elected, umm, they can do essentially whatever they want in order to get elected because it's somehow in the public interest.

And Begala wrote that "[t]he Dershowitz Doctrine would make presidents immune from every criminal act." The Appendix includes other examples—criticism of Dershowitz's comments was widespread at CNN.

Elsewhere too: Business Insider published an article titled "Trump lawyer Alan Dershowitz argues Trump can do whatever he wants to get reelected if he believes another term is in the public interest." MSNBC published a blog post titled "Dershowitz shocks with argument about Trump, political interests," in which the author called his statement "crazypants bonkers." And so on.

Dershowitz, unsurprisingly, was displeased with the coverage. After he complained on Twitter that the media had mischaracterized and distorted his statements, CNN allowed him to go on air twice to explain his position. He participated in interviews with CNN anchors Wolf Blitzer and Chris Cuomo on January 30 and 31, respectively.

Unsatisfied, Dershowitz sued CNN for defamation, alleging that the network had intentionally omitted key parts of his statement and perpetrated "a deliberate scheme to defraud its own audience" at his expense. The district court granted CNN's motion for

summary judgment, reasoning that Dershowitz could not establish that CNN had acted with actual malice.

II.

This Court reviews the district court's grant of summary judgment de novo, drawing "all reasonable inferences in the light most favorable to the nonmoving party." *Walker v. Life Ins. Co. of N. Am.*, 59 F.4th 1176, 1185 (11th Cir. 2023) (quotation omitted). In defamation cases like this one, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986).

III.

Florida law, which we apply here, requires five elements for a defamation claim: (1) publication; (2) falsity; (3) "knowledge or reckless disregard as to the falsity on a matter concerning a public official"; (4) actual damages; and (5) defamatory content. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018).

The third element resolves this case. The concept of actual malice was incorporated into constitutional law in *New York Times Co. v. Sullivan*, where the Supreme Court considered First Amendment limits on state-tort defamation liability for public officials. 376 U.S. 254, 256, 279–80 (1964). Public figures, the Court said, cannot recover damages for defamation unless they prove that an untrue statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. That is, "actual malice." *Id.* at 280. Florida has since

implemented that same standard as a matter of state law. *See Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

A showing of actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," or that he "acted with a high degree of awareness of probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (alteration adopted and quotation omitted). "Mere negligence" is not enough. *Masson*, 501 U.S. at 510. Instead, the speaker's conduct must rise to the level of recklessness. Nor should actual malice be confused with "evil intent or a motive arising from spite or ill will." *Id.* Speakers' feelings about their subjects are irrelevant—all that matters are the speakers' subjective beliefs about the truth of their own statements. *Turner*, 879 F.3d at 1273.

Dershowitz, who no one disputes is a public figure, has presented no evidence that CNN's commentators or producers acted with actual malice. To begin, CNN has offered unrefuted evidence that its commentators believed in the truth of their statements about Dershowitz; all of the journalists testified that they believed their statements were fair and accurate. And Dershowitz did not counter that evidence. Instead, he repeated a boilerplate objection that the testimony was "scripted and self-serving." Probably so. But that does not render it non-probative, and in the absence of contrary evidence, questioning the witnesses' credibility is not enough to create a factual dispute. *See Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010).

Dershowitz next points to a series of internal emails and phone calls at CNN, arguing that these show the network and its commentators collaborating to deceive their viewers and damage his reputation. For one, right after Dershowitz's statement a CNN correspondent emailed then–CNN President Jeff Zucker that Dershowitz had "gone crazy." "Yup," Zucker replied, "Him and Lindsay [sic] Graham." And later that afternoon, Zucker held a conference call with several producers, executives, and "news gatherers." One producer summarized that "very brief" meeting's takeaway as "Trump legal team making argument that a President is King & can do whatever he wants." Another producer echoed that characterization.

These communications suggest not conspiracy but sincerity, however misplaced. To start, it appears that none of the commentators who Dershowitz says defamed him participated in Zucker's conference call. And though Dershowitz argues that the emails reveal "marching orders about how the story should be spun," the emails themselves do not support that contention; they contain characterizations of Dershowitz's remarks, but no directives or orders. If anything, the communications tend to support CNN's position that the relevant speakers believed in the truth of their reporting.

What's more, the commentators all testified that they reached their conclusions about the newsworthiness and interpretation of Dershowitz's statement independently of any direction from Zucker or other leaders at CNN. Again, Dershowitz disputes this testimony as "scripted and self-serving," but without any evidence his objection cannot move the

needle. And at least two commentators—Joe Lockhart and Paul Begala—tweeted critically about Dershowitz's statement while he was still speaking or shortly after he concluded, refuting any contention that their opinions were formed a few hours later at Zucker's direction.

Dershowitz also contends that the similarity between the reporting of CNN's commentators is evidence that they "colluded with each other and CNN staff to smear Dershowitz, whom they all hated for sticking to his principles and defending Trump." Dershowitz's assessment of the CNN commentators' feelings about him may well be accurate—but it is also irrelevant. As we have explained, the question is not whether they disliked Dershowitz, Trump, or both; it is whether they knew their statements were false. *See Masson*, 501 U.S. at 510. Again, all of the commentators testified that they believed their statements were true, and Dershowitz offers no evidence to contradict that testimony. The fact that the CNN commentators all presented similar interpretations of Dershowitz's statements (as did many other news outlets at the time) speaks to ideological lockstep, not deliberate misrepresentation. Groupthink, however unwelcome, is not the same thing as actual malice.

In a final effort, Dershowitz points to two out-of-circuit cases that he says are highly analogous, but neither comparison holds water. The first is *Schiavone Construction Co. v. Time, Inc.*, in which the Third Circuit concluded that a magazine's decision to deliberately ignore exculpatory evidence was enough to show actual malice. 847 F.2d 1069, 1092 (3d Cir. 1988). Dershowitz contends that his case is just like

Schiavone—stronger, even—because CNN "omitted key portions of what [he] said to make it sound like he said the precise opposite." But that's not so. CNN aired the full video of Dershowitz's comments, and also invited him on air (multiple times) to clarify his position. And unlike *Schiavone*, we see no evidence here that the network intentionally hid information that would have proven the challenged claims untrue.

The second case Dershowitz offers is *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969). There, the authors of an article about Senator Barry Goldwater had predetermined their message: "Goldwater is so belligerent, suspicious, hot-tempered, and rigid because he has deep-seated doubts about his masculinity." *Id.* at 329. As research progressed, the authors ignored materials except those that were derogatory of Goldwater—even when complimentary statements expressly qualified the derogatory ones. *Id.* The authors also conducted a sham poll of psychiatrists, the result of which—of course—was highly critical of Goldwater. *Id.* at 329–32. The Second Circuit upheld a jury verdict in favor of Goldwater's defamation claim. *Id.* at 328. Dershowitz, unlike Goldwater, has offered no extrinsic evidence to show that the commentators at CNN acted without regard for the truth of their statements with the express purpose of destroying his reputation. Nor has he shown that leaders at CNN instructed them to report in a particular way as part of a scheme against him.

A better comparator than the ones Dershowitz proposes is this Court's recent decision in *Project Veritas v. Cable News Network, Inc.*, 121 F.4th 1267 (11th Cir. 2024). Anchors for CNN (also the defendant there) incorrectly reported that an investigative

journalistic organization had been suspended from Twitter for spreading *mis*information when the real violation was that it had allegedly posted *private* information.[3] *Id.* at 1271–79, 1283-84. But there, unlike here, the plaintiff offered ample evidence of actual malice, showing that the anchors had plenty of reasons to doubt what they reported. *Id.* at 1283–84.

To start, four days earlier, an article published on CNN's website had discussed the true cause for the suspension. *Id.* at 1272, 1283–84. And one CNN anchor who later echoed the misinformation claim had already reported that sharing of private information led to the suspension. *Id.* By relying on these contradictions in its complaint, the plaintiff had "shouldered its heavy burden" of alleging actual malice. *Id.* at 1283 (alteration adopted and quotation omitted). Here, in contrast, Dershowitz has offered no contradiction or other evidence that CNN's commentators doubted the truth of what they reported.

* * *

In his zealous and highly scrutinized representation, Dershowitz made a spontaneous series of remarks before Congress that, he says, were misinterpreted by pundits. But even if those commentators did report incorrectly on Dershowitz's statements, he has offered no evidence that they did so intentionally. If anything, the evidence shows that they believed in the truth of their reporting, and that they formed their opinions independently. Without

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[3] That, too, was flimsy because the "private information" was a house number in the background of a video. *Project Veritas*, 121 F.4th at 1272, 1283.

evidence of actual malice Dershowitz's defamation claim cannot go forward, so we **AFFIRM** the district court's grant of summary judgment to CNN.

Appendix

Dershowitz Statement:

> Yesterday, I had the privilege of attending the rolling-out of a peace plan by the President of the United States regarding the Israel-Palestine conflict, and I offered you a hypothetical the other day: What if a Democratic President were to be elected and Congress were to authorize much money to either Israel or the Palestinians and the Democratic President were to say to Israel "No; I am going to withhold this money unless you stop all settlement growth" or to the Palestinians "I will withhold the money Congress authorized to you unless you stop paying terrorists,["] and the President said "Quid pro quo. If you don't do it, you don't get the money. If you do it, you get the money"? There is no one in this Chamber who would regard that as in any way unlawful. The only thing that would make a quid pro quo unlawful is if the quo were in some way illegal.
>
> Now, we talked about motive. There are three possible motives that a political figure can have: One, a motive in the public interest, and the Israel argument would be in the public interest; the second is in his own political interest; and the third, which hasn't been mentioned, would be in his own financial interest, his own pure financial interest, just putting money in the bank. I want to focus on the second one for just one moment.
>
> Every public official whom I know believes that his election is in the public interest. Mostly, you are right. Your election is in the public interest. If a President does something which he believes will

help him get elected—in the public interest—that cannot be the kind of quid pro quo that results in impeachment.

I quoted President Lincoln, when President Lincoln told General Sherman to let the troops go to Indiana so that they could vote for the Republican Party. Let's assume the President was running at that point and it was in his electoral interests to have these soldiers put at risk the lives of many, many other soldiers who would be left without their company. Would that be an unlawful quid pro quo? No, because the President, A, believed it was in the national interest, but B, he believed that his own election was essential to victory in the Civil War. Every President believes that. That is why it is so dangerous to try to psychoanalyze the President, to try to get into the intricacies of the human mind.

Everybody has mixed motives, and for there to be a constitutional impeachment based on mixed motives would permit almost any President to be impeached.

How many Presidents have made foreign policy decisions after checking with their political advisers and their pollsters? If you are just acting in the national interest, why do you need pollsters? Why do you need political advisers? Just do what is best for the country. But if you want to balance what is in the public interest with what is in your party's electoral interest and your own electoral interest, it is impossible to discern how much weight is given to one or the other.

> Now, we may argue that it is not in the national interest for a particular President to get reelected or for a particular Senator or Member of Congress—and maybe we are right; it is not in the national interest for everybody who is running to be elected—but for it to be impeachable, you would have to discern that he or she made a decision solely on the basis of, as the House managers put it, corrupt motives, and it cannot be a corrupt motive if you have a mixed motive that partially involves the national interest, partially involves electoral, and does not involve personal pecuniary interest.
>
> The House managers do not allege that this decision, this quid pro quo, as they call it—and the question is based on the hypothesis there was a quid pro quo. I am not attacking the facts. They never allege that it was based on pure financial reasons. It would be a much harder case.
>
> If a hypothetical President of the United States said to a hypothetical leader of a foreign country: Unless you build a hotel with my name on it and unless you give me a million-dollar kickback, I will withhold the funds. That is an easy case. That is purely corrupt and in the purely private interest.
>
> But a complex middle case is: I want to be elected. I think I am a great President. I think I am the greatest President there ever was, and if I am not elected, the national interest will suffer greatly. That cannot be [an impeachable offense].

166 Cong. Rec. S650-51 (daily ed. Jan. 29, 2020) (statement of Alan Dershowitz).

CNN Commentary:

> He's essentially saying any politician, because it's so important that they get elected . . . that they decide that it's really important for everybody that they are elected, umm, they can do essentially whatever they want in order to get elected because it's somehow in the public interest.

Anderson Cooper, *Anderson Cooper Full Circle* (CNN online broadcast, aired Jan. 29, 2020, at 6:34 p.m.).

> This view of the executive, the executive power that Dershowitz basically announced today, would make the President a king. It would put the President beyond the rule of law, and . . . you and I are talking about a quid pro quo here of exchanging, withholding military aid, but we could think of a lot of other things that there's no version, you know, could you kill your opponent? Could you, you know, leak dirt on someone? There's countless[—]there's no limit to basically how badly behaved people could be, and they could actually commit crimes which we know, you know, Dershowitz is essentially saying it doesn't matter what the quid pro quo is as long as you think you should be elected.

Anne Milgram, *Anderson Cooper Full Circle* (CNN online broadcast, aired Jan. 29, 2020, at 6:35 p.m.).

> Having worked in about a dozen campaigns, there is always the sense that, boy, if we win, it's better for the country. But that doesn't give you license to commit crimes or to do things that are unethical.

> So, it was absurd. And what I thought when I was watching was this is un-American. This is what you hear from Stalin. This is what you hear from Mussolini, what you hear from authori—, from Hitler, from all the authoritarian people who rationalized, uhh you know, in some cases genocide, based on what was in the public interest.

Joe Lockhart, *Erin Burnett OutFront* (CNN television broadcast, aired Jan. 29, 2020, at 7:11 p.m.).

> I did not go to Harvard Law, but I did go to the University of Texas School of Law, where I studied criminal law and constitutional law, but never dreamed a legendary legal mind would set them both ablaze on the Senate floor.
>
> The Dershowitz Doctrine would make presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their reelection effort. Campaign finance laws: out the window. Bribery statutes: gone. Extortion: no more. This is Donald Trump's fondest figurative dream: to be able to shoot someone on Fifth Avenue and get away with it.

Paul Begala, *Presenting the Ludicrous 'Dershowitz Doctrine,'* (CNN online commentary, posted Jan. 29, 2020, at 9:11 p.m.).

> The President's defense team [Dershowitz] seems to be redefining the powers of the President, redefining them towards infinity. . . . If you look at what he says there it blows your mind. He says if a President is running for re-election because he

> thinks getting elected will help America, he can do anything, anything. And that redefines the presidency and, frankly, redefines America.

John Berman, *New Day* (CNN television broadcast, aired Jan. 30, 2020, at 6:17 a.m.).

LAGOA, Circuit Judge, concurring:

I concur with the majority because, under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), we are obliged to hold public-figure defamation plaintiffs to the actual-malice standard—a standard that "has *no relation* to the text, history, or structure of the Constitution." *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part). I write separately to explain my view of the harm *Sullivan* has caused in our First Amendment jurisprudence.

I.

As a preliminary matter, there can be little dispute that CNN "defamed" Alan Dershowitz under any common understanding of that term. CNN, through its various writers and anchors, repeatedly misrepresented statements that Dershowitz made on the floor of the Senate—that is, statements whose accuracy could easily be verified against the Senate transcript and video footage, and which CNN's employees all could have watched live. In some instances, they blurred the line between fact and commentary, and in others, they simply lied about what Dershowitz had said. And—though damages were not ultimately tested at trial—Dershowitz offered evidence at the summary-judgment stage to show that he was harmed as a result because news outlets he finds more desirable stopped inviting him to speak after the CNN coverage, and he was left with access only to platforms he found less desirable. All of this is to say, I agree with the district court that the only thing standing between Dershowitz and justice is *Sullivan*.

Sullivan and its progeny are policy-driven decisions dressed up as constitutional law, and they find little—if any—support in our history.[1] At common law, when the First and Fourteenth Amendments were ratified, public figures asserting libel claims were not held to any sort of heightened standard. *McKee v. Cosby*, 586 U.S. 1172, 1176–77 (2019) (Thomas, J., concurring in denial of certiorari). From the Founding until *Sullivan*, defamation and libel laws were "almost exclusively the business of state courts and legislatures," and "[u]nder the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring in judgment). Truth was a defense, as it is now, but "general injury to reputation" was presumed and additional showings were required only for special and punitive damages. *See id.*

Indeed, prior to *Sullivan*, instead of heightening the standard a plaintiff had to meet in defamation actions, we "deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels." *McKee*, 586 U.S. at 1177 (Thomas, J., concurring in denial of certiorari). Blackstone, for example, defined libel as "malicious defamation[] of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order

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[1] As the district court observed in the summary judgment order below, *Sullivan* is "a great example of how bad facts can contribute to the making of unnecessary law, and why judges and Justices should not be in the business of policy writing." *Dershowitz v. Cable News Network, Inc.*, 668 F. Supp 3d 1278, 1286 (S.D. Fla. 2023).

to provoke him to wrath, or expose him to public hatred, contempt, and ridicule." 4 William Blackstone, Commentaries *150. And—far from endorsing greater skepticism of public-figure defamation claims—Blackstone observed that "[w]ords also tending to scandalize a magistrate, or a person in public trust, are reputed more highly injurious than when spoken of a private man." 3 Blackstone *124. In 1808, the Supreme Judicial Court of Massachusetts explained why this was so, noting that "the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties." *Commonwealth v. Clap*, 4 Mass. (1 Tyng) 163, 169–70 (Mass. 1808); *see also*, *e.g.*, *Nev. State J. Publ'g Co. v. Henderson*, 294 F. 60, 63 (9th Cir. 1923) (affirming the propriety of a jury instruction that included, in part, the admonition that "[n]either the newspaper nor the citizen may with impunity falsely charge the candidate or the public officer with specific acts of criminality or shameful misconduct"). Justice Story, riding circuit in Rhode Island, declared it "as plain and well settled as any doctrine of the law" that, as to libel, "[t]he liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F. Cas. 624, 624 (C.C.D. R.I. 1825) (No. 3867).

II.

Sullivan, however, upended this "plain and well settled" model and took "the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring in judgment). In *Sullivan*, the Court usurped control over this field of speech-related torts and invented "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 367 U.S. at 279–80. Three years later, this same rule was extended to "public figures" in addition to public officials. *See Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring in judgment) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967)). Certain members of the Court attempted to extend this principle even further. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), for example, at least three Justices would have stretched *Sullivan* to apply to private plaintiffs, imposing an across-the-board actual-malice standard. *See Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring in judgment) (citing *Rosenbloom*, 403 U.S. at 52-57). Fortunately for private plaintiffs, the authoring Justices failed to secure a majority vote as to that point. Three years later, however, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held for the first time that falsity and harm were not enough, and even private plaintiffs must show some sort of "fault," negligence at the least, to recover for defamation. *See Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring in

judgment) (citing *Gertz*, 418 U.S. at 347, 350). And, even with that proof of culpable fault, damages were not presumed but had to be proven. *See id.* (citing *Gertz*, 418 U.S. at 349). Finally, *Gertz* established that no plaintiff could recover punitive damages for defamation without showing *Sullivan*-style malice. *See id.* (citing *Gertz*, 418 U.S. at 350). With this series of cases—*Sullivan*, *Curtis*, *Rosenbloom*, and *Gertz*—one generation of the Supreme Court succeeded in imposing federal constitutional limitations (seemingly untethered to the Constitution's original meaning) on all defamation claims brought by all manner of plaintiffs.

Justice White recognized the ill-fated trajectory of this line of cases after originally joining the majority in *Sullivan*. In his concurrence in *Dun & Bradstreet*, Justice White described his epiphany as follows:

> I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of

> those who have been defamed in vindicating their reputation.

472 U.S. at 767 (White, J., concurring in judgment). In the explanation that followed, Justice White elaborated on the central problem in *Sullivan*: A people who govern themselves, as the Founders intended us to do, are entitled to adequate information about their government and their representatives, and that essential flow of information warrants First Amendment protection; but protecting lies—by insulating those who spread them behind an iron barrier, to be breached only by a showing of actual malice—does nothing to support an informed populus and, instead, has the contrary effect of leaving lies uncorrected. *See id.* at 767–69; *see also id.* at 769 ("Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "'our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" (quoting *Gertz*, 418 U.S. at 341)).

As the Court concluded in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S. at 340. But that is precisely *Sullivan's* effect. Under the actual-malice standard, the public's "only chance of being accurately informed is measured by the public [figure's] ability himself to counter the lie,

unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests." *Dun & Bradstreet*, 472 U.S. at 768-69 (White, J., concurring in judgment); *see also Rosenbloom*, 403 U.S. at 46 ("While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."); *Gertz*, 418 U.S. at 370 (White, J., dissenting) ("As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such a wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.").

Quite the journey we have taken from *Sullivan's* attempt to protect the public's interest in being fully informed on matters of public import. But that, in fact, precisely identifies the error at the heart of *Sullivan*: In "federaliz[ing] major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States," *Gertz*, 418 U.S. at 370 (White, J., dissenting), the Court "made little effort to ground [its] holdings in the original meaning of the Constitution," *McKee*, 586 U.S. at 1173 (Thomas, J., concurring in denial of certiorari). As Justice Thomas pointedly observed in *McKee*, in its attempt to strike a balance between "the law of defamation and the freedoms of speech and press protected by the First Amendment," *Gertz*, 418 U.S. at 355 (Douglas, J., dissenting), the *Sullivan* Court consulted a wide variety of sources: "general

proposition[s]" about the value of free speech and the inevitability of false statements, *see Sullivan*, 376 U.S., at 269–72 & n.13; judicial decisions involving criminal contempt and official immunity, *id.* at 272–73, 282-83; public responses to the Sedition Act of 1798, *id.* at 273–77; comparisons of civil libel damages to criminal fines, *id.* at 277–78; policy arguments against "self-censorship," *id.* at 278–79; the "consensus of scholarly opinion," *id.* at 280 n.20; and state defamation laws, *id.*, at 280–82. *McKee*, 586 U.S. at 1175 (Thomas, J., concurring in denial of certiorari). But notably absent from this litany of sources is *anything* informing the original meaning of the First Amendment or the original understanding of the Fourteenth Amendment at the time of its ratification.[2] Thus although the Court declared that its actual-malice standard was "required by the First and Fourteenth Amendments," *Sullivan*, 376 U.S. at 283, "it made no attempt to base that rule on the original understanding of those provisions," *McKee*, 586 U.S. at 1175 (Thomas, J., concurring in denial of certiorari). On the contrary, the Court itself has subsequently acknowledged that "the rule enunciated

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[2] I recognize the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022); *see also United States v. Rahimi*, 602 U.S. 680 692 n.1 (2024) (same). As in *Bruen* and *Rahimi*, resolving this dispute is unnecessary here because the public understanding of the right to free speech was, for all relevant purposes, the same with respect to public figures at both movements in our constitutional history—and, as I explain throughout, the actual-malice standard did not emerge until a century after ratification of the Fourteenth Amendment.

in the New York Times case . . . is . . . largely a judge-made rule of law," which "is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501–02 (1984).

III.

What, then, does the original meaning of the First Amendment tell us about the propriety of an actual-malice standard? To understand the original meaning of the First Amendment is to understand law as those who ratified it did. Our starting place is, therefore, the natural law and our accompanying natural rights as they were understood pre-ratification. Natural rights are those that we possess innately as human beings; their existence does not depend on government endowment. *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 268-80 (2017). As to expression, our Founders recognized a variety of natural rights, including (as relevant here) speaking, writing, and publishing. *See id.* at 269; *see also*, *e.g.*, 4 Annals of Cong. 918 (1794) (statement of Rep. William Giles) (addressing the "the inalienable privilege of thinking, of speaking, of writing, and of printing"); Proposal by Roger Sherman to House Committee of Eleven (July 21-28, 1789), in The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 83 (Neil H. Cogan ed., 1997) ("Speaking, writing and publishing" are among "certain natural rights which are retained"); Resolution of the Virginia House of Delegates, Va. Gazette, & Gen. Advertiser (Richmond), Jan. 3, 1798, at 2 (referring to the "natural right of speaking and writing freely"); Letter from Thomas Jefferson to

David Humphreys (Mar. 18, 1789), *in* 14 The Papers of Thomas Jefferson, 676, 678 (Julian P. Boyd ed. 1971) ("[R]ights which it is useless to surrender to the government" include "the rights of thinking, and publishing our thoughts by speaking or writing"); Letter from Thomas Paine to Thomas Jefferson (Mar. 1788), *in* 13 The Papers of Thomas Jefferson at 4, 5 (1956) ("[N]atural rights" include "the rights of thinking, speaking, forming and giving opinions"). The "liberty of the press," meaning the freedom to print information, fell within the scope of natural rights that pre-existed our Bill of Rights. *See, e.g.*, James Alexander, Letter to the Editor, Pa. Gazette (Philadelphia), Nov. 24, 1737, *reprinted in* Freedom of the Press from Zenger to Jefferson, 62, 66 (Leonard W. Levy ed., 1996) (identifying "freedom of speech and liberty of the press" as "natural rights"). Closely related to freedom of the press—distinct, according to some; overlapping according to others—was the freedom to publish, most closely encapsulating that which we now think of as "journalism." *See* Campbell at 270 (first citing 8 Annals of Cong. 2147–48 (1798) (statement of Rep. Otis) (distinguishing "the liberty of writing, publishing, and speaking" from "the freedom of the press"), then citing *American Intelligence*, Indep. Gazetteer (Philadelphia), Jan. 5, 1789, at 3 ("Freedom of speech, which is nothing more than the freedom of press, is the great bulwark of liberty"), and then citing *Of the Liberty of the Press and Elections*, London Evening Post, Oct. 29, Nov. 9, Nov. 14, 1754, *reprinted in* 16 Scots Magazine 518–19 (1754) (referring generally to "the liberty of individuals to communicate their thoughts to the public")). There is little doubt, then, that our Founding generation recognized the freedoms to think, speak, write, print,

and share ideas as natural rights endowed in the people by their Creator, not their government.

With the natural right established, we turn to the limits the government was authorized to impose on speech.[3] Those limits turn on two central inquiries: the scope of the natural right and the extent to which we, as a people, agreed to some restraint of the natural right in exchange for the benefits that nationhood offered. Enter here the concept of natural law, which, at the least, provides the understanding that, regardless of any government structure, one individual may not interfere with another's natural rights. *See* Campbell at 271; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 922-30 (1993) ("[B]eing equally free, individuals did not have a right to infringe the equal rights of others, and, correctly understood, even self-preservation typically required individuals to cooperate—to avoid doing unto others what they would not have others do unto them." (citing John Locke, Two Treatises of Government 290 (Peter Laslett et., 2d ed. 1967) (bk. II, ch. ii, § 8))). As James Wilson explained it in his 1790 Lectures on Law, as to avoiding injury and injustice under the natural law, each person may act "for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours. This right is natural liberty." James Wilson, *Of the Natural Rights of Individuals*,

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[3] Hereinafter, I use "speech" as a catch-all term to encompass oral speech, printing, circulating, and otherwise expressing one's ideas to an audience.

in 2 Collected Works of James Wilson 1055–56 (Kermit L. Hall & Mark David Hall eds., 2007).

Consider also social-contract theory, or the idea that those who formed a body politic surrendered some of their liberty in doing so. Views on this were quite varied. *See* Campbell at 273-75. Blackstone, for one, believed that "every man, when he enters into society, gives up a part of his natural liberty." 1 Blackstone *125. Others viewed it as "necessary to give up [natural] liberty" or at least necessary to "surrender[] the power of controuling . . . natural alienable rights." 1 Zephaniah Swift, A Digest of the Laws of the State of Connecticut 15 (New Haven, S. Converse 1822); Theophilus Parsons, *Essex Result*, *reprinted in* Memoir of Theophilus Parsons 359, 366 (Boston, Ticknor & Fields 1861). At the other end of the spectrum were those who held fast that "the people surrender nothing" in establishing a nation. The Federalist No. 84, at 578 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

These competing views on the limits imposed by a social contract largely mirrored competing views on the scope of natural rights themselves: Thomas Jefferson, for one, maintained that "the idea is quite unfounded, that on entering into society we give up any natural right," but this view traveled hand in hand with his belief that natural rights were inherently limited by a bar on "commit[ting] aggression on the equal rights of another" and the "natural duty of contributing to the necessities of the society." Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), *reprinted in* 15 Writings of Thomas Jefferson 23, 24 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905); *see also* Campbell at

274. In other words, if the natural law already imposed measured limits on the exercise of a natural right, nothing additional need be sacrificed by entry into the social contract of a structured society.

Natural law scholar Jud Campbell has summarized the result of these tensions and balances, explaining that "whether inherently limited by natural law or qualified by an imagined social contract, retained natural rights were circumscribed by political authority to pursue the general welfare. Decisions about the public good, however, were left to the people and their representatives—not to judges—thus making natural rights more of a constitutional lodestar than a source of judicially enforceable law." Campbell at 276. Thus, the Founders simultaneously understood that freedom of speech was both a natural right not dependent on government creation, and also subject to certain limitations for the public good—so long as those limitations did not *abridge* the natural right as it existed in a system of natural law. And while the freedoms of speech and of the press were both viewed as natural rights, they were viewed as properly subject to different regulation, with recognition that written statements were "more extended" and "more strongly fixed," thus "posing a greater threat to public order." *Id.* at 280 (citing James Sullivan, Dissertation upon the Constitutional Freedom of the Press in the United States 12 (Boston, Joseph Nancrede ed.,1801)).

We turn next to the contours of the natural right and the natural law, and the types of restriction that were viewed as consistent with those boundaries. The Founders widely believed that "opinions," as James Madison observed to his colleagues, "are not the

objects of legislation." Annals of Cong. 934 (1794) (statement of Rep. James Madison); *see also* Francis Hutcheson, An Inquiry into the Original of Our Ideas of Beauty and Virtue: In Two Treatises 185 (Knud Haakonssen ed., 2004) (1726) (explaining that "the Right of private Judgment, or of our inward Sentiments, is unalienable; since we cannot command ourselves to think what either we our selves or any other Person please"). In other words, opinion, understood as non-volitional thought, was not subject to government regulation at the time of the Founding. *See* Campbell at 281 (first citing PA Const. of 1776, ch. 1, § 12 (protecting the freedom to express "sentiments"), and then citing PA Const. of 1790, art. IX, § 7 (enshrining freedom of "thoughts and opinions")); *see also* Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 The Papers of Thomas Jefferson, at 676, 678 (1958) (identifying "the rights of thinking, and publishing our thoughts by speaking or writing," as natural rights not surrendered to government restriction).

But the freedom of opinion raises another question: What forms an opinion? History confirms that the freedom to express opinions was, indeed, limited to *honest* statements and did not encompass dishonesty or deceit. For instance, even in the debates over the Sedition Act, a persistent and widespread consensus emerged that "well-intentioned statements of opinion, including criticisms of government, were constitutionally shielded." Campbell at 284; *see also* Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly, on the Proceedings of Sundry of the Other States in Answer to their Resolutions 42 (Philadelphia, Zachariah Poulson Jr., ed., 1800) ("[I]t is well known that, as by

the common law of England, so by the common law of America, and by the Sedition act, every individual is at liberty to expose, in the strongest terms, consistent with decency and truth all the errors of any department of the government.").

Consistent with the notion that the natural right to free speech coexisted with a limitation forbidding injurious lies, "10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression,[4] and 13 of the 14 nevertheless provided for the prosecution of libels.[5]" *Gertz*, 418 U.S. at 380-81 (White, J., dissenting) (citing *Roth v. United States*, 354 U.S. 476, 482 (1957)).

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[4] *See* Del. Const. 1792, Art. I, § 5; Ga. Const. 1777, Art. LXI; Md. Const. 1776, Declaration of Rights, § 38; Mass. Const. 1780, Declaration of Rights, Art. XVI; N.H. Const. 1784, Art. 1, § 22; N.C. Const. 1776, Declaration of Rights, Art. XV; Pa. Const. 1776, Declaration of Rights, Art. XII; S.C. Const. 1778, Art. XLIII; Vt. Const. 1777, Declaration of Rights, Art. XIV; Va. Bill of Rights, 1776, § 12.

[5] *See* Act to Secure the Freedom of the Press (1804), 1 Conn. Pub. Stat. Laws 355 (1808); Del. Const. 1792, Art. I, § 5; Ga. Penal Code, Eighth Div., § 8 (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md. Public General Laws 1096 (Poe 1888); *Commonwealth v. Kneeland*, 37 Mass. 206, 232 (Mass. 1838); Act for the Punishment of Certain Crimes Not Capital (1791), Laws of N.H. 253 (1792); Act Respecting Libels (1799), N.J. Rev. Laws 411 (1800); *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804); Act of 1803, c. 632, 2 Laws of N.C. 999 (1821); Pa. Const. 1790, Art. 9, § 7; R.I. Code of Laws (1647), Proceedings of the First General Assembly and Code of Laws 44-45 (1647); R.I. Const. 1842, Art. I, § 20; Act of 1804, 1 Laws of Vt. 366; *Commonwealth v. Morris*, 3 Va. (1 Va. Cas.) 176 (Va. 1811).

IV.

What do we take away from the original sources? As the Supreme Court observed in *Roth*, "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," 354 U.S. at 484, but such assurance focused on the exchange of ideas in service of advancing truth and imposed no additional burdens to recovery based on the harmed party's station in society. In a 1774 letter to the inhabitants of Quebec, the Continental Congress expressed the following objective:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

1 Journals of the Continental Congress 108 (1774). This statement from the Continental Congress, as the Court said in *Roth*, supports a conclusion that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Roth*, 354 U.S. at 484. Among those "excludable" expressions, we

can only conclude, are those that patently do not serve "the advancement of truth." *See* 1 Journals of the Continental Congress 108.

Notably absent from the historical discussion is anything resembling a heightened requirement making it *more* difficult to prosecute libel or slander directed at an official (much less a "public figure") rather than a private citizen. On the contrary, the accepted consensus was that public officials could sue for libel "upon the same footing with a private individual" because "[t]he character of every man should be deemed equally sacred, and of consequence entitled to equal remedy." Tunis Wortman, *A Treatise, Concerning Political Enquiry, and the Liberty of the Press* 259 (New York George Forman, ed., 1800); *accord* St. George Tucker, *View of the Constitution of the United States with Selected Writings* 237–38 (Clyde N. Wilson, ed., 1999) (1803) ("[T]he judicial courts of the respective states are open to all persons alike, for the redress of injuries of this nature; there, no distinction is made between one individual and another; the farmer, and the man in authority, stand upon the same ground: both are equally entitled to redress for any false aspersion on their respective characters, nor is there any thing in our laws or constitution which abridges this right.").

From all this, I conclude, as Justice White did in *Gertz*, that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers." 418 U.S. at 381 (White, J., dissenting). What the historical documents suggest is that, in its original context, the First Amendment was intended

to protect free dissemination of ideas—all manner of ideas, particularly those out of fashion or disfavored—but *not* the dissemination of lies. *See*, *e.g.*, 10 Benjamin Franklin Writings 38 (1907) ("If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abus'd myself."); Frank Luther Mott, Jefferson and the Press 14 (1943) (explaining that Thomas Jefferson endorsed the language of the First Amendment as ratified only after suggesting that "[t]he people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty or reputation of others").

And we held onto that principle for the first two centuries of our national existence. *See*, *e.g.*, *Near v. Minnesota*, 283 U.S. 697, 715 (1931) ("But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our [state and federal] Constitutions. The law of criminal libel rests upon that secure foundation." (citation omitted)).

Just a decade before *Sullivan*, the Supreme Court reiterated as much, explaining that "[l]ibelous utterances not being within the area of

constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'" *Beauharnais v. People of the State of Ill.*, 343 U.S. 250, 266 (1952). But, as we know, this interpretation of the First Amendment, true to its original meaning, fell apart shortly thereafter.

V.

As expressed by Justice White, *Sullivan* and its progeny represent "an ill-considered exercise of the power entrusted to [the] Court." *Gertz*, 418 U.S. at 370 (White, J., dissenting). The lasting effect of *Sullivan*, as anyone who ever turns on the news or opens a social media app knows well, is that media organizations can "cast false aspersions on public figures with near impunity," *Tah*, 991 F.3d at 254 (Silberman, J., dissenting in part), causing untold harm to public figures and the general public alike. Jettisoning the original meaning of the First Amendment—and centuries of common law faithful to that meaning—has left us in an untenable place, where by virtue of having achieved some bit of notoriety in the public sphere, defamation victims are left with scant chance at recourse for clear harms. But until the Supreme Court reconsiders *Sullivan*, we are bound by it, and I therefore must concur.

WILSON, Circuit Judge, Concurring:

I concur with the majority but write separately to express my reservations about suggestions that the Supreme Court should reconsider *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). "Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function." *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). I believe that *Sullivan* reflects "the accumulated wisdom of judges who have previously tried to solve the same problem," *Ramos v. Louisiana*, 590 U.S. 83, 115–16 (2020) (Kavanaugh, J., concurring).

To be sure, our understanding of the First Amendment should be guided by its original meaning and heed common law traditions. But "ambiguous historical evidence," *Gamble v. United States*, 587 U.S. 678, 691 (2019), does not justify casting aside a unanimous Supreme Court decision and nearly sixty years of settled precedent. The "real-world consequences" and reliance interests at stake counsel us to pump the brakes before calling to overrule *Sullivan*. *See Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring).

I.

Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). Stare decisis is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v.*

Hillery, 474 U.S. 254, 265-66 (1986); *accord*. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Indeed, "the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance." *Knick v. Twp. of Scott*, 588 U.S. 180, 224 (2019) (Kagan, J., dissenting).

"The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the 'judicial Power' and rooted in Article III of the Constitution." *Ramos*, 590 U.S. at 116 (Kavanaugh, J., concurring). Alexander Hamilton wrote that to "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Id*. (quoting The Federalist No. 78, p. 529 (J. Cooke ed. 1961)). Blackstone wrote that "it is an established rule to abide by former precedents," to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." *Id*. (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)).

Of course, Judges and even Justices, are fallible. *Cf*. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). And it is especially important for the Court to correct errors in constitutional rulings, which "Congress cannot override . . . by ordinary legislation." *Gamble*, 587 U.S. at 691. But even in constitutional cases, the Supreme Court "has always held that 'any departure'" from precedent "demands special justification." *Michigan*, 572 U.S. at 798 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). This is especially true when the constitutional protections recognized by the precedent have "become part of our

national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). The strength of the case for adhering to such decisions only grows in proportion to their "antiquity." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

In his concurring opinion in *Ramos v. Louisiana*, Justice Kavanaugh synthesized the Supreme Court's "varied and somewhat elastic *stare decisis* factors" into "three broad considerations" to determine what qualifies as a "special justification" or "strong grounds" to overrule a prior constitutional decision. 590 U.S. at 121.

First, the precedent must be "egregiously wrong as a matter of law." *Id*. at 122. "A garden-variety error or disagreement does not suffice to overrule." *Id*. at 121–22. The Court examines factors such as "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability." *Id*. at 122. Second, the Court considers whether "the prior decision caused significant negative jurisprudential or real-world consequences." *Id*. This includes both "jurisprudential consequences," such as "workability, . . . consistency and coherence with other decisions," and "the precedent's real-world effects on the citizenry." *Id*. Finally, the Court examines whether "overruling the prior decision unduly upset reliance interests." *Id*. "This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors." *Id*.

Using *Ramos* as my guide, I first inquire into "how wrong" *Sullivan* is as a matter of law before turning

to a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." *Id*. at 122-23 (quotation marks omitted).

A. Step One: Was Sullivan Wrongly Decided?

Before overturning a long-settled precedent like *Sullivan*, the Court requires more than "just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 266 (2014). The First Amendment's history and jurisprudence tell us *Sullivan* was, at the very least, not "egregiously wrong," *see* Ramos, 590 U.S. at 122 (Kavanaugh, J., concurring).

In *Sullivan*, a unanimous Supreme Court held that the First Amendment, as applied to the states through the Fourteenth Amendment, limits application of state libel and defamation laws. 376 U.S. at 283. The "constitutional guarantees" of free press required "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*. at 279–80.

Sullivan's "actual malice" requirement "has its counterpart in rules previously adopted by a number of state courts and extensively reviewed by scholars for generations." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984). The rule is premised both on "common-law tradition" and "the unique character of the interest" it protects. *Harte-*

Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685-86 (1989) (footnote omitted).

Sullivan was "widely perceived as essentially protective of press freedoms," and "has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures." *Herbert v. Lando*, 441 U.S. 153, 169 (1979). It "honored both the Court's previous recognition that 'libel' is not protected by the First Amendment and its concomitant obligation to determine the definitional contours of that category of unprotected speech." Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, 34 Commn's Law. 1, 2 (2019).

For decades after *Sullivan*, even as defamation plaintiffs petitioned the Court to limit or overrule the case, the Court refused. Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81, 84 & n.18 (2021). Although it faced some academic skepticism since the 1980s,[1] a "growing movement to engineer the overruling of *Sullivan*" has emerged in recent years, fueled by the idea that it represents an exercise of "judicial policymaking." *See* Samantha Barbas, New York Times v. Sullivan*: Perspectives from History*, 30 Geo Mason L. Rev. F. 1, 2 (2023).

These calls intensified in 2019, after Justice Thomas authored an opinion concurring in the denial of certiorari in *McKee v. Cosby* to question *Sullivan's* actual-malice requirement. 586 U.S. 1172, 1172 (2019). According to Justice Thomas, the unanimous

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[1] *E.g.,* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. Chi. L. Rev. 782 (1986).

Sullivan Court and the decades of Supreme Court caselaw that applied it failed to make "a sustained effort to ground their holdings in the Constitution's original meaning." *Id*. at 1175. In his view, these rulings "broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *Id*. at 1176. Rather, *Sullivan* "and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *Id*. at 1173. Justice Gorsuch later echoed this critique in *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from denial of certiorari).

In perhaps their own form of "ideological lockstep" or "unwelcome groupthink," others echoed this "originalist" interpretation of state libel law. *E.g.*, *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting). The district court here did the same, criticizing *Sullivan* as "a great example of how bad facts can contribute to the making of unnecessary law, and why judges and Justices should not be in the business of policy writing." *Dershowitz v. Cable News Network, Inc.*, 668 F. Supp. 3d 1278, 1286-87 (S.D. Fla. 2023).

But a policy argument couched in history is still a policy argument. And experience tells us that "disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history." *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting). *See*

generally Schafer, *supra*, at 132–44 (detailing the flaws in *McKee* and *Berisha's* historical analysis).[2]

History's flaws are especially apparent when confronting the law of libel in the United States, which "is not now, nor ever was, tidy." Schafer, *supra*, at 97. "The founding generation and the Congresses of the Reconstruction were not of one mind when it came to the common law of libel or the effect, if any, the First and Fourteenth Amendments had on it." *Id.* "We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment" when it comes to defamation actions. *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring). "But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of

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[2] *See also, e.g.*, Matthew L. Schafer, *In Defense*: New York Times v. Sullivan, 82 La. L. Rev. 81, 150 (2021) ("The freedom of the press that Thomas and Gorsuch espouse is not an originalist one; it is a monarchist's one, predating the Founding and purporting to import into the First Amendment today common law rules long ago rejected by the Founders and early courts. This approach, however, violates Thomas's own instruction that what matters for the purposes of an originalist inquiry is the 'founding era understanding.' Indeed, Thomas's view ignores that there was a Revolution, and that no small complaint of that Revolution was England's abuses of prosecutions of early American printers. It also ignores everything that happened between 1789 and 1868 when the Fourteenth Amendment made the First Amendment applicable as against the States. Thomas's failure to deal with this history draws into question his supposed commitment to it."); Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & Liberty 44, 54-55 (2019) (recognizing the Seditious Conspiracy Act provides "some originalist basis to impose a higher bar for libel suits filed by government officials").

political expression, which is commonly conceded to be the value at the core of those clauses." *Id*.

The Founders rejected early attempts to "transplant the English rule of libels on government to American soil." *See City of Chicago v. Trib. Co.*, 307 Ill. 595, 603 (1923). And "the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936). Rather, "[o]ne of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." Henry Schofield, *Freedom of the Press in the United States*, 9 Proc. Am. Soc. Soc'y 67, 76 (1914).

Conflicting history aside, "[i]t is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents." *Michael H. v. Gerald D.*, 491 U.S. 110, 138 (1989) (Brennan, J., dissenting). The Supreme Court's First Amendment jurisprudence "is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents." *Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996). *Sullivan* is part of a "judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment." *Ollman*, 750 F.2d at 995 (Bork, J., concurring).

The consistent, guiding principle since the Founding and throughout our country's history is that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the

welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The First Amendment "preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Our "profound national commitment to the free exchange of ideas . . . demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Commc'ns*, 491 U.S. at 686. Allowing states to punish all errors in statements about the official conduct of public figures would be antithetical to the First Amendment, because "[w]hatever is added to the field of libel is taken from the field of free debate." *Sullivan*, 376 U.S. at 272. We must "protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).

Playing a key role in the marketplace, the "press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). "Suppression of the right of the press to praise or criticize governmental agents . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Id.*

What was true in 1791, 1868, and 1964 remains true today: a libel law regime that allows public figures and officials to silence "speech that matters," *Gertz*, 418 U.S. at 340–41, absent complete accuracy,

"dampens the vigor and limits the variety of public debate" and is "inconsistent with the First and Fourteenth Amendments." *Sullivan*, 376 U.S. at 279.

B. Negative Jurisprudential or Real-World Consequences

At most, the complex history of libel law shows that *Sullivan's* interpretation of the First Amendment was a "garden-variety error or disagreement" not "egregiously wrong." *See Ramos*, 590 U.S. at 121–22 (Kavanaugh, J., concurring). So I move to whether the decision "caused significant negative jurisprudential or real-world consequences." *See id*. at 122. Again, the answer is no. *Sullivan's* actual-malice rule—shaped by the realities of libel litigation and refined by decades of precedent—represents a careful balance between the central First Amendment right to free discussion about matters of public concern and "the individual's interest in his reputation." *Herbert*, 441 U.S. at 169; *accord Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971).

Looking first to jurisprudential consequences, such as consistency and workability, *Sullivan's* actual-malice rule allows courts to "expeditiously weed out unmeritorious defamation suits" while "preserv[ing] First Amendment freedoms and giv[ing] reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth." *Kahl v. Bureau of Nat'l Affs., Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017) (Kavanaugh, J.).

A return to the common-law defense that "the alleged libel was true in all its factual particulars," rather than malice, would be nearly unworkable. *See Sullivan*, 376 U.S. at 279. The "difficulties of

separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz*, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Bose Corp.*, 466 U.S. at 513 (citation modified); *see also Sullivan*, 376 U.S. at 279 (citing examples). And hinging liability for public criticism on a judge or jury's determination of what is true deviates from the "marketplace of ideas" the First Amendment protects—where truth depends on an idea's competition with other ideas, not a government censor. Jane E. Kirtley, *Uncommon Law: The Past, Present and Future of Libel Law in a Time of "Fake News" and "Enemies of the American People"*, 2020 U. Chi. L.F. 117, 123 (2020); *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) ("For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.").

As far as "real-world effects on the citizenry," *Sullivan* allowed the public and the press to criticize public officials, 376 U.S. at 282–83, and public figures, *Gertz*, 418 U.S. at 351–52, and contribute to vital national dialogue without fear of unwarranted retaliation. Over the last sixty years, *Sullivan's* "actual malice" requirement has consistently "ensure[d] that debate on public issues remains uninhibited, robust, and wide-open," while balancing the individual's interest in his reputation. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (internal quotation marks omitted).

Although today's media landscape has changed, the interests on both sides of *Sullivan's* equation remain almost the same. On one side, *Sullivan*

safeguards a First Amendment right to public debate that is "not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Falwell*, 485 U.S. at 51 (quoting *Bose Corp.*, 466 U.S. at 503–04). Placing "the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result," and "would be antithetical to the First Amendment's" central protections. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777–78 (1986).

Constitutional safeguards that protect "the free flow of ideas and opinions on matters of public interest and concern," *Falwell*, 485 U.S. at 50, are just as critical today as they were sixty years ago.[3] Public and government officials continue to threaten libel suits, not for their common-law purpose of protecting one's character and image, but to threaten and silence dissenters and critics. *Sullivan's* longstanding protections are critical if the press is to continue its function as the "constitutionally chosen means for keeping officials elected by the people responsible to

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[3] During the Civil Rights Movement, libel suits became "formidable legal bludgeon[s]" for pro-segregation government officials "to swing at out-of-state newspapers whose reporters cover racial incidents." Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amici Curiae at 6, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39 & 40). By the time *Sullivan* reached the Supreme Court, national media outlets faced over $288 million in potential damages for their reporting on the Civil Rights Movement. Samantha Barbas, New York Times v. Sullivan: *Perspectives from History*, 30 Geo Mason L. Rev. F. 1, 5 (2023). *See generally* Christopher W. Schmidt, New York Times v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 Ala. L. Rev. 293 (2014).

all the people whom they were selected to serve." *Mills*, 384 U.S. at 219.[4]

On the other side, the concern about injuries to an individual's reputation are mostly unchanged. "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical" of public officials or public figures. *Falwell*, 485 U.S. at 51. And plaintiffs who cannot show "actual malice" may suffer some unwarranted reputational harm which cannot "easily be repaired by counterspeech." *Id.* at 52. Now, just as then, public figures "have a more realistic opportunity to counteract false statements than private individuals normally enjoy," and perhaps even more so with new technology creating new "channels of effective communication." *See Gertz*, 418 U.S. at 344.

Public criticism, even false criticism, "is not always a pleasant or painless experience, but it cannot be avoided if the political arena is to remain as vigorous and robust as the first amendment and the nature of our polity require." *Ollman*, 750 F.2d at 1002 (Bork, J., concurring). Two decades after *Sullivan*, Chief

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[4] American press freedoms once ranked among the broadest in the world, in part because of *Sullivan*. *See International Libel & Privacy Handbook* xv—xvi (Charles J. Glasser Jr. ed., 2d ed. 2009) ("In essence, the U.S. model is based on the press-friendly moral engine that drives American media law."). But "[a]fter a century of gradual expansion of press rights in the United States, the country is experiencing its first significant and prolonged decline in press freedom in modern history." World Press Freedom Index: United States, REPORTERS WITHOUT BORDERS, https://rsf.org/en/country/united-states#laws-19525. Int'l Women's Media Found., *Journalists Under Fire: U.S. Media Report Daily Threats, Harassment and Attacks at Home* 15 (2024) (documenting "surging harassment and threats against journalists" in the United States).

Justice Rehnquist, writing for a unanimous Supreme Court, reiterated that a state's "interest in protecting public figures from emotional distress" cannot justify denying First Amendment protection. *Falwell*, 485 U.S. at 50. Rather, the danger to reputation is one we have chosen to tolerate in pursuit of "individual liberty" and "the common quest for truth and the vitality of society as a whole." *Id.* at 50-51 (quoting *Bose Corp.*, 466 U.S. at 503–04). After all, "one of the prerogatives of American citizenship is the right to criticize public men and measures." *Id.* at 51 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)) (alteration adopted).

The "real world" consequences of stripping away *Sullivan's* protections in our current media climate would do the opposite of "preserve an uninhibited marketplace of ideas," *Red Lion Broad. Co.*, 395 U.S. at 390, and "muzzle[] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills*, 384 U.S. at 219.

C. Reliance Interests

Beyond *Sullivan's* correctness and its real-world implications, "the antiquity of the precedent" and the "reliance interests at stake" counsel us to proceed with caution before calling for the Court to overturn *Sullivan*. *See Montejo*, 556 U.S. at 792-93. *Sullivan* has "become part of the fabric of American law" and been "woven into a long line of federal and state cases." Roy S. Gutterman, *Actually . . . A Renewed Stand for The First Amendment Actual Malice Defense*, 68 Syracuse L. Rev. 579, 580, 602 (2018). Its "recognition that libel law could violate the First Amendment was the critical step that made possible

all the Court's subsequent defamation decisions and the many restrictions later imposed on libel law by state judges and legislatures." David A. Anderson, *The Promises of* New York Times v. Sullivan, 20 Roger Williams U. L. Rev. 1, 23 (2015).

The "evenhanded, predictable, and consistent development of legal principles" and "reliance on judicial decisions," *Payne*, 501 U.S. at 827, is "particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary." *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 686. First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *accord*. *Thomas v. Collins*, 323 U.S. 516, 529–30 (1945). "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 686.

Overruling *Sullivan* would be especially disruptive because the case defines "the central meaning of the First Amendment" and influenced "virtually all of the Supreme Court's subsequent First Amendment jurisprudence." Wermiel, *supra*, at 2. Casting the decision aside in favor of varied, plaintiff-friendly state libel laws would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Cf. Citizens United*, 558 U.S. at 327.

II.

Out of respect for unanimous Supreme Court precedent, and the press freedoms that played a critical role in securing the civil rights many in this country hold dear, judges should reconsider their calls for the Supreme Court to overrule *Sullivan*. "For it is hard to overstate the value, in a country like ours, of stability in the law." *Knick*, 588 U.S. at 224 (Kagan, J., dissenting).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 23-11270

[Filed August 29, 2025]

ALAN M. DERSHOWITZ,
Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC.
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:20-cv-61872-AHS

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 29, 2025

For the Court: DAVID J. SMITH, Clerk of Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-61872-CIV-SINGHAL/HUNT

[Filed April 4, 2023]

ALAN DERSHOWITZ,
Plaintiff,

v.

CABLE NEWS NETWORK, INC.
Defendant.

ORDER

THIS CAUSE is before the Court on Defendant Cable News Network, Inc.'s Motion for Summary Judgment (DC [213]). The matter is fully briefed, and the Court has heard argument of counsel. For the reasons discussed below, the Motion for Summary Judgment is granted.

I. Introduction

Plaintiff, Alan Dershowitz ("Dershowitz"), is a practicing criminal defense lawyer and professor emeritus at Harvard Law School. (DE [253]) ¶¶ 1, 3). In January 2020, Dershowitz represented then-President Donald J. Trump ("Trump") in impeachment proceedings before the United States Senate. *Id*. ¶ 20, 22. Defendant, Cable News Network, Inc. ("CNN") owns and operates news platforms, including the television network CNN and the website CNN.com. *Id*. ¶ 2.

Dershowitz has sued CNN for defamation arising from reporting and commentary by CNN commentators on remarks Dershowitz made while testifying before the Senate during his representation of Trump. (DE [66]). Jurisdiction is based upon diversity of citizenship and Florida law governs. 28 U.S.C. § 1332(a). (DE [1]). CNN moves for summary judgment.

II. LEGAL STANDARDS

A. Summary Judgment

Pursuant to Fed. R. Civ. P. 56(a), summary judgment "is appropriate only if 'the movant shows that there is no genuine [dispute] as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam) (quoting Fed. R. Civ. P. 56(a));[1] see also *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). An issue is "genuine" if a reasonable trier of fact, viewing all the record evidence, could rationally find in favor of the nonmoving party in light of his burden of proof. *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014). And a fact is "material" if, "under the applicable substantive law, it might affect the outcome of the

[1] The 2010 Amendment to Rule 56(a) substituted the phrase "genuine dispute" for the former "'genuine issue' of any material fact."

case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259–60 (11th Cir. 2004). "[W]here the material facts are undisputed and do not support a reasonable inference in favor of the non-movant, summary judgment may properly be granted as a matter of law." *DA Realty Holdings, LLC v. Tenn. Land Consultants*, 631 Fed. Appx. 817, 820 (11th Cir. 2015).

The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). However, to prevail on a motion for summary judgment, "the nonmoving party must offer more than a mere scintilla of evidence for its position; indeed, the nonmoving party must make a showing sufficient to permit the jury to reasonably find on its behalf." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015). "[T]his, however, does not mean that we are constrained to accept all the nonmovant's factual characterizations and legal arguments." *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994).

B. Defamation

The parties agree that Florida law applies to this dispute. In Florida, a defamation claim has "five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official . . . ; (4) actual damages; and (5) statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). A claim of defamation also requires a false statement of fact. *Id*. Statements of pure opinion are not actionable. *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986). "The distinction

between fact and opinion is not always easy to perceive." *Id*. "Thus, the law recognizes that some comments may be pure expressions of opinion whereas others may be mixed expressions of opinion." *Id*.

A mixed opinion is one "based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication." *LRX, Inc. v. Horizon Assocs. Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So. 2d 881, 885 (Fla. 4th DCA 2003). "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

Whether a challenged statement is one of fact or opinion is a question of law to be decided by the court. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018). "In assessing whether an allegedly libelous statement is opinion, the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication." *Rasmussen*, 946 So. 2d at 571 (citing *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984)).

III. UNDISPUTED FACTS

Trump's impeachment trial began on January 22, 2020. (DE [253] ¶ 22). The impeachment from the House of Representatives charged abuse of power and obstruction of Congress, arising from allegations that

Trump withheld military funds from Ukraine to coerce Ukraine's president to investigate Joe Biden, Trump's political rival. *Id.* ¶ 19. CNN aired and live-streamed the trial in its entirety. *Id.* ¶ 23. The impeachment trial was covered by news media from around the world. *Id.* ¶ 24.

Dershowitz spoke at the impeachment trial on January 27 and 29, 2020. *Id.* ¶¶ 26, 28. During his second appearance, at approximately 2:10 p.m. EST, Senator Ted Cruz asked Dershowitz, "As a matter of law, does it matter if there was a *quid pro quo*? Is it true that *quid pro quos* are often used in foreign policy?" *Id.* ¶ 30. Dershowitz responded as follows:

> Yesterday, I had the privilege of attending the rolling-out of a peace plan by the President of the United States regarding the Israel-Palestine conflict, and I offered you a hypothetical the other day: What if a Democratic President were to be elected and Congress were to authorize much money to either Israel or the Palestinians and the Democratic President were to say to Israel, "No; I am going to withhold this money unless you stop all settlement growth" or to the Palestinians, "I will withhold the money Congress authorized to you unless you stop paying terrorists, and the President said, "Quid pro quo. If you don't do it, you don't get the money. If you do it, you get the money"? There is no one in this Chamber who would regard that as in any way unlawful. The only

thing that would make a quid pro quo unlawful is if the quo were some way illegal.[2]

Now, we talked about motive. There are three possible motives that a political figure can have: One, a motive in the public interest, and the Israel argument would be in the public interest; the second is in his own political interest; and the third, which hasn't been mentioned, would be in his own financial interest, his own pure financial interest, just putting money in the bank. I want to focus on the second one for just one moment.

Every public official whom I know believes that his election is in the public interest. Mostly, you are right. Your election is in the public interest. If a President does something which he believes will help him get elected—in the public interest—that cannot be the kind of quid pro quo that results in impeachment.[3]

I quoted President Lincoln, when President Lincoln told General Sherman to let the troops go to Indiana so that they could vote for the Republican Party. Let's assume the President was running at that point and it was in his electoral interests to have these soldiers put at risk the lives of many, many other soldiers who would be left without their company. Would that be an unlawful quid pro

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[2] Dershowitz complains CNN omitted this sentence (referred to herein as the "Illegal Quo Line") from its clips and commentary.
[3] This paragraph contains what is referred to as the "Quid Pro Quo Argument."

quo? No, because the President, A, believed it was in the national interest, but B, he believed that his own election was essential to victory in the Civil War. Every President believes that. That is why it is so dangerous to try to psychoanalyze the President, to try to get into the intricacies of the human mind.

Everybody has mixed motives, and for there to be a constitutional impeachment based on mixed motives would permit almost any President to be impeached. Now, we may argue that it is not in the national interest for a particular President to get reelected or for a particular Senator or Member of Congress—and maybe we are right; it is not in the national interest for everybody who is running to be elected—but for it to be impeachable, you would have to discern that he or she made a decision solely on the basis of, as the House managers put it, corrupt motives, and it cannot be a corrupt motive if you have a mixed motive that partially involves the national interest, partially involves electoral, and does not involve personal pecuniary interest.[4]

But a complex middle case is: I want to be elected. I think I am a great President. I think I am the greatest President there ever was, and if I am not elected, the national interest

[4] This paragraph contains what is referred to as the "Sole Corrupt Motive Argument."

> will suffer greatly. That cannot be an impeachable offense.[5]

(DE [217], Ex. 12). The words "impeachable offense" were not included in the transcript in the Congressional Record, but the video recording of Plaintiff's answer clearly contains those words.[6] *Id.* Ex. 13.

Reaction to Dershowitz' comments appeared almost instantaneously online. At 2:15 p.m., the *Washington Post* live-blog coverage included a summary entitled "Dershowitz argues that a president is immune if he views his reelection as in the public interest." (DE [219], Ex. 51). Within minutes[7], multiple Twitter users honed in on the

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[5] The last argument is referred to as the "Greatest President Argument."

[6] Dershowitz disputes that the words "an impeachable offense" are clear on the video. The Court has reviewed the video and agrees with CNN that Dershowitz ended his statement with those words.

[7] For example, at 2:14 PM, Josh Rogin tweeted, "Dershowitz just argues that if Trump believed doing something corrupt was in the public interest because it would get him reelected, that makes it not corrupt." At 2:18 PM, Robert Draper tweeted, "By Dershowitz's logic, Nixon could not be impeached for instigating a cover-up of the Watergate burglary, since in Nixon's view that public stood to benefit from his re-election (by any means necessary)." At 2:23 PM, Mo Elleithee tweeted similarly: "Using Dershowitz's logic, couldn't Nixon have justified that both the break-in and the cover-up of Watergate (which were both purely for his political interest) as 'in the national interest' and therefore not impeachable?" At 2:29, Garry Kasparov tweeted, "Wow, Dershowitz is actually making the King Louis XIV argument right now! Trump is good for the country, so anything he does to stay in power is the national interest, even if corrupt or illegal. That's the language of every king & dictator: I am the end and

comment "[i] If a President does something which he believes will help him get elected—in the public interest—that cannot be the kind of quid pro quo that results in impeachment" with derision and ridicule. (DE [219], Ex. 57).

CNN's account of Dershowitz' testimony began at 2:36 p.m., when reporter Nikki Carvajal submitted a report titled, "Dershowitz argues that reelection of any politician is in the public interest, therefor as a motivation can't be impeachable[.]" (DE [253], p. 25). The headline was revised a few minutes later to read "Alan Dershowitz argues presidential quid pro quos aimed at reelection are not impeachable." *Id.* This account (the "CNN News Account") was posted on CNN.com and was widely disseminated internally to CNN producers and on-air personalities. *Id.*

Throughout the course of the evening of January 29, 2020, and the next morning, CNN broadcast and posted the accounts complained of by Dershowitz:

> "Having worked on about a dozen campaigns, there is always the sense that, boy, if we win, it's better for the country. But that doesn't give you license to commit crimes or to do things that are unethical. So, it was absurd. What I thought when I was watching it was this is un-American. This is what you hear from Stalin. This is what you hear from Mussolini, what you hear from authoritarians, from Hitler, from all the authoritarian people who rationalized, in some cases genocide, based what was in the

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the means justify me." (DE [219] Ex. 57). Similar comments by others were posted after CNN's first report was made.

public interest." – Joe Lockhart @ 7:11 p.m., January 29, 2020.

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"The President's defense team [Dershowitz] seems to be redefining the powers of the President, redefining them towards infinity. . . . If you look at what he says there it blows your mind. He says if a President is running for re-election because he thinks getting elected will help America, he can do anything, anything. And that redefines the presidency and America." – John Berman @ 6:17 a.m., January 30, 2020.

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"I did not go to Harvard Law, but I did go to the University of Texas School of Law, where I studied criminal law and constitutional law, but never dreamed a legendary legal mind would set them both ablaze on the Senate floor. The Dershowitz Doctrine would make presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their re-election effort. Campaign finance laws: out the window. Bribery statutes: gone. Extortion: no more. This is Donald Trump's fondest figurative dream: to be able to shoot someone on Fifth Avenue and get away with it." Paul Begala on CNN.COM, January 29, 2020 @ 9:11 p.m.

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Anderson Cooper: I want to play what he said . . . . He is essentially saying any politician, because it is so important that they get

> elected . . . that they decide it's really important for everybody that they are elected, they can do essentially whatever they want in order to get elected because it's somehow in the public interest. Then Anne Milgram says: This view of the executive, the executive power that Dershowitz basically announced today would make the President a king, it would put the President beyond the rule of law . . . and you and I are talking about a quid pro quo here of exchanging, withholding military aid but we could think of a lot of other things that there's no version you know, could you kill your opponent? Could you, you know, leak dirt on someone? There's countless . . . there's no limit to basically how badly behaved people could be and they can actually commit crimes which we know, you know, Dershowitz is essentially saying it doesn't matter what the quid pro quo is as long as you think you should be elected. (DE [66]).

Dershowitz complained about CNN's coverage and commentary on Twitter. (DE [253] ¶ 99. On January 30, 2020, Dershowitz appeared on CNN with Wolf Blitzer. (DE [219] Ex. 17). The next day he appeared on CNN again, this time with Chris Cuomo. On both shows he was interviewed about and discussed his response to Senator Cruz' question. *Id*., Ex. 20, 21. On Chris Cuomo's show, Dershowitz was asked whether it is his "position that a president can do whatever they want to secure their reelection as long as they think it is in the good of the people?" Dershowitz responded, "Chris, you know that's not my position . . . I never said that. I never implied it. I never suggested it. CNN, MSNBC and many other networks

deliberately and willfully distorted my words." *Id*., Ex. 20, p. 10.

IV. DISCUSSION

Dershowitz complains that he prefaced his remarks to the Senate by saying "[t]he only thing that would make a quid pro quo unlawful is if the quo were some way illegal," but the edited clips omitted that qualification. (DE [66] ¶ 18). Dershowitz argues that CNN's decision to omit the phrase, "the only thing that would make a quid pro quo unlawful is if the quo were somehow illegal," was done "intentionally and deliberately with knowledge and malice to facilitate its ability to falsely claim that plaintiff said the opposite of what he actually said." *Id*. ¶ 18. He contends that CNN "set in motion a deliberate scheme to defraud its own audience . . . at the expense of [his] reputation." *Id*. ¶ 11. Dershowitz alleges that if the entire clip had been played, no panel guest would have been able to credibly make the statements they did. *Id*. ¶ 9.

CNN moves for summary judgment on the grounds that (1) Dershowitz cannot prove that CNN acted with actual malice; (2) the published statements were non-actionable expressions of pure opinion; and (3) Dershowitz cannot prove damages. Because Dershowitz is a public figure, he must establish by clear and convincing evidence that CNN acted with actual malice. *Turner*, 879 F.3d at 1273; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "This is a subjective test, focusing on whether the defendant 'actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false.'" *Turner*, 879 F.3d at 1273 (quoting *Michel v. NYP Holdings, Inc.*, 816 F.3d 686,

702-03 (11th Cir. 2016) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964))). In cases such as this that involve "the area of tension between" the First Amendment and state defamation law," the question is whether the evidence in the record could "constitutionally support a judgment for the plaintiff." *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971). For the reasons that follow, the evidence before the Court—while establishing foolishness, apathy, and an inability to string together a series of common legal principles—does not establish actual malice under the *Sullivan* standard.

This record contains no proof that any of CNN's commentators or producers either entertained "serious doubts as to the veracity" of the reports or were "highly aware that the account was probably false." Rather, CNN has produced undisputed evidence that each of the challenged publications were individually edited and produced; there was no scheme to "falsely paint Dershowitz as a constitutional scholar and intellectual who had lost his mind." (DE [66] ¶ 8). The producers and hosts responsible for each of the four clips at issue all testified that they considered Dershowitz' comments newsworthy; they did not consider the Illegal Quo Line as a qualification or alteration of the Public Interest Argument; and they believed the clips as presented were fair and accurate. See (DE [214]) ¶¶ 41-49; 59-67; 74-81; 82-91). Dershowitz has not produced any evidence to contradict this.

Dershowitz disputes the credibility of the witness' testimony as "scripted and self-serving." This is not a proper factual or legal response to an asserted statement of undisputed fact. As the non-moving

party, Dershowitz must present evidence from which a jury could reasonably rule in his favor. Simply stating the evidence is "scripted and self-serving" does not meet that burden.

Dershowitz argues that a jury could reasonably rule in his favor because CNN had notice of Dershowitz' actual views on impeachment but failed to include them. Two days earlier, on January 27, 2020, Dershowitz told the Senate that "a crime or crime-like conduct is necessary for impeachment." But when Dershowitz spoke on January 29, 2020, he did not qualify his statements with what he said two days earlier;[8] CNN's failure to add a two-day old qualification is not evidence that would show actual malice. To the contrary, the evidence shows that CNN's decisionmakers considered Dershowitz' January 29 Corrupt Motive and Greatest President arguments to be new and newsworthy arguments against impeachment. There is no evidence that would contradict that conclusion.

As CNN aptly argued during the hearing on this case, there is no requirement under the First Amendment for a reporter to talk about everything Dershowitz has ever said about impeachment or even all the various ways one can be impeached. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (overturning a Florida statutory requirement of a right of reply by criticized persons). Thus, CNN's subjective view of Dershowitz' January 29 statements as new and newsworthy and different from his January 27 statements is what matters under the *Sullivan* standard. *Sullivan* was decided in 1964

[8] CNN argues that Dershowitz "never said a crime was *always* impeachable." (DE [263], p. 16).

when Justice Brennan created the actual malice standard, and is a great example of how bad facts can contribute to the making of unnecessary law, and why judges and Justices should not be in the business of policy writing.

Policy-based judicial opinions have had a twisted history in American jurisprudence. Some rulings are just ridiculously bad despite what common sense demands and what the author may have thought. *See Dred Scott v. Sanford*, 60 U.S. 393 (1857). Other decisions cause deep-rooted political and emotional turmoil by creating a "Constitutional right" that others then believe in, that isn't anywhere in the U.S. Constitution. *See Roe v. Wade*, 410 U.S. 113 (1973). And in the case of *New York Times v. Sullivan*, the United States Supreme Court's holding—while laudable in a different era—that the First Amendment requires public figures to establish actual malice simply has no basis in and "no relation to the text, history or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication." *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J. dissenting). But when judges write policy, the people expect them to keep doing so. And when times change and media delivery and access changes like it has over the past 60 years, the people wrongly look to the courts and not the legislature to fix what the courts themselves created. For this reason, these policy-based decisions are best left to the legislative branch, which is elected by the will of the people, and not to an un-elected judge who may be King or Queen for a day (or a lifetime). As many judges have previously noted, judicially created "doctrines" are typically cut from whole cloth. *Id*.

In *Sullivan*, an advertisement containing false information was published in the New York Times. In total the circulation of the paper in the entire state of Alabama—where the concerned parties' alleged injury occurred—was *394* copies. The Alabama court after a jury trial awarded the plaintiff $500,000[9] in damages. Perhaps had the trial court carefully addressed the damages issue, *Sullivan* never would have been written. Instead, any tension between the First Amendment (freedom of speech) and the Seventh Amendment (right to jury trial) was put to rest in the public figure defamation context. The *Sullivan* case, decided at a time when people got their news from Walter Cronkite or David Brinkley as opposed to Twitter, is the law of the land and this Court is duty bound to follow it.[10]

It is understandable why Dershowitz brings this case. Once Dershowitz responded to Senator Cruz' question, reporters and commentators from around the globe ran with his answer in today's "race to publish" world and spoke about his January 29 comments without contextualizing the comments with what had been said on January 27, and without any reference to impeachment law. And again, they were not required by law to do so. Yet, Paul Begala (after curiously stating that he went to law school) said the

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[9] In today's dollars, the judgment in *Sullivan* would exceed $4.7 million. Federal Reserve Bank of Minneapolis, INFLATION CALCULATOR, (April 4, 2023, 2:05 p.m., https://www.minneapolisfed.org/abuot-us/monetary-policy/inflation-calculator.

[10] For an excellent discussion on *Sullivan*, albeit one written nearly forty years ago, one need only look to Richard A. Epstein, "Was New York Times v. Sullivan Wrong?" 53 U. Chi. L. Rev. 782 (1986).

"Dershowitz Doctrine would make Presidents immune from every criminal act." Of course, Dershowitz said nothing of the kind, there is no Dershowitz Doctrine, and as most law students know, reading a brief doesn't tell you about the whole case. Joe Lockhart said Dershowitz okayed "commit[ting] crimes." John Berman said Dershowitz advocated that a President could "do anything, anything." Anderson Cooper reported that Dershowitz said "they can actually commit crimes." All this in the context of an answer to Senator Cruz' question, but none of it as the be all and end all on impeachment law analysis. Not one commentator reflected on whether Dershowitz' January 27 arguments or the law on impeachment regarding high crimes and misdemeanors[11] would invalidate any of their commentary.

And as Alexander Hamilton famously noted 235 years ago when discussing the concept of impeachment:

> The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

THE FEDERALIST No. 65 (Alexander Hamilton).[12] (emphasis in the original). This too was not something

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[11] U.S. Constitution Art. II, Sec. 4.

[12] The Court prefers the edition of THE FEDERALIST edited by Professor Benjamin F. Wright (Barnes & Noble ed., 2004). What an additional irony it would be if Professor Wright while at

CNN or any other network was required to report, and, indeed, it appears was not something considered. For Dershowitz' part, it was not responsive to Senator Cruz' specific quid pro quo question, so he didn't mention it either. But *Sullivan* and its progeny allows the news media to ignore a fuller context because there is no record evidence of actual malice. Dershowitz tries to identify actual malice through the text of his comments; he argues that on January 29 he "repeated his view that a quid pro quo arrangement with a foreign leader was impeachable if it involved unlawful, illegal or corrupt–in other words–criminal conduct," and that was enough for CNN and its commentators to doubt the veracity of their comments. (DE [252] p. 10). But the transcript and video of Dershowitz' response does not include this statement, nor does it tie any such qualification to a quid pro quo done to protect the president's own political interest. Indeed, Dershowitz specifically focused only on the president's own political interest scenario:

> Now, we talked about motive. There are three possible motives that a political figure can have: One, a motive in the public interest, and the Israel argument would be in the public interest; the second is in his own political interest; and the third, which hasn't been mentioned, would be in his own financial interest, his own pure financial interest, just putting money in the bank. *I want to focus on the second one for just one moment.*

University of Texas Law School actually taught Begala's Constitutional Law class.

> *Every public official whom I know believes that his election is in the public interest.* Mostly, you are right. Your election is in the public interest. If a President does something which he believes will help him get elected—in the public interest—that cannot be the kind of quid pro quo that results in impeachment. (DE [217] Ex. 12) (emphasis added).

Dershowitz focused on the political interest motive; CNN's commentators did too. The text of Dershowitz' January 29 statement does not support a finding that CNN acted with actual malice.

Dershowitz contends that CNN's reporting of his Senate comments violated the Society of Professional Journalists Code of Ethics, which he claims calls for journalism to be accurate and fair, provide context, and should not oversimplify or distort facts or context. (DE [253] Ex. 28). In support, Dershowitz submitted an unauthenticated documented entitled "SPJ Code of Ethics." He cites *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 765-66 (Mass. 2007) for support for his argument that evidence of breach of the Code can be considered in determining whether CNN acted with actual malice. He also notes that this Court has already determined that CNN's account was not accurate and fair.

The Court need not consider the Code of Ethics in this case. First, unlike the plaintiff in *Murphy*, Dershowitz has not presented expert testimony to explain how CNN's conduct fell below the standard of care for journalists. Neither Dershowitz nor this Court is qualified to opine on journalistic ethics. Second, the Code of Ethics itself specifically states

that "[i]t is not, nor can it be under the First Amendment, legally enforceable." (DE [253] Ex. 28). *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) ("public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule"). Third, the Court's Order (DE [28]) on CNN's Motion to Dismiss held that Florida's fair report privilege did not apply. The fair report privilege doctrine is a defense to defamation; it does not establish actual malice (but it is a doctrine). This Court never held that CNN's broadcasts violated professional standards. The Code of Ethics has no evidentiary value on the issue of actual malice.

Next Dershowitz argues that CNN had a "preexisting story line" in its "News Account" that would support a finding of actual malice. Evidence of a "story line" can show actual malice where "a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story." *Harris v. City of Seattle*, 152 Fed. Appx. 565, 568 (9th Cir. 2005) (quoting RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 3:67 (2005)).

The evidence in the record does not support a conclusion that CNN ran a "story line" that would establish actual malice. There was nothing "created" to fulfill a preconceived narrative; Dershowitz' statement was played in full and then subjected to independently developed commentary throughout the day and following morning. CNN producers identified the "angle" of the days' story to be the political interest motive for a quid pro quo (DE [253] ¶¶ 8-24). The producers and the on-air personalities involved in the

disputed comments independently identified the political interest motive as new and newsworthy. (DE [214] ¶¶ 42-76). Nothing in the "angle" or the "News Account" gives rise to the conclusion that any of the speakers had reason to doubt the veracity of their statements. Dershowitz has not complained that the initial "News Account" was defamatory and, further, not all the decisionmakers or speakers (including Lockhart, Milgram, and Harman) were included on the distribution. (DE [264]). Even considering the evidence in the light most favorable to Dershowitz, there was no issue of fact arising from the creation of a "story line" from which actual malice could be inferred.

Dershowitz cites an email between John Berman and his producer as evidence of actual malice. It is not. First, Dershowitz' claim that Berman cites a "made up quotation" is patently false. The words – "I want to be elected. I think I am a great President. I think I am the greatest President there ever was, and if I am not elected, the national interest will suffer greatly. That cannot be an impeachable offense" – were included in Berman's email to a producer. (DE [253] Ex. 22). Dershowitz claims it was "made up" but this quotation accurately reports Dershowitz' closing words to the Senate. (DE [217] Ex. 13). It is not a "made up quotation." Second, the subject line of the e-mail – "Dersh-o-nuts . . . need this for all panels" – establishes foolishness but does not support a finding of constitutional actual malice. Personal animosity does not establish actual malice. *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 (11th Cir. 1999) ("ill-will, improper motive, or personal animosity plays no role in determining whether a defendant acted with actual malice"). Additionally, Berman testified that he

was characterizing Dershowitz' argument and he did not bear any ill will towards Dershowitz. (DE [216] Ex. 6, pp. 154-157). Berman's email does not support a finding of actual malice.

Finally, Dershowitz argues that Paul Begala admitted that his statements about the Dershowitz Doctrine were false. In his post on CNN.com, Begala stated:

> The Dershowitz Doctrine would make Presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their reelection effort. Campaign finance laws: Out the window. Bribery statutes: Gone. Extortion: No more. This is Donald Trump's fondest dream, to literally be able to shoot someone on Fifth Avenue and get away with it.

Dershowitz claims that Begala stated in deposition that, "He [Dershowitz] didn't say anything like that" and, therefore, Begala presented known falsity. But Begala's actual answer explained: "I'm not quoting Professor Dershowitz. He didn't say anything like that, but what I'm saying is the argument he [laid] out will be abused to justify all manner of things by politicians seeking their reelection. I don't say Dershowitz says this. I say this is a doctrine that would do this. I think it's an important distinction." (DE [216] Ex. 5 pp. 105-06). The irony that Begala is the first person to "abuse" the doctrine he created but labeled with Dershowitz' name is not lost on this Court, but Dershowitz is clearly wrong in stating that Begala admitted speaking falsely. This is not evidence of actual malice.

It is undisputed that Dershowitz' statements were thoroughly newsworthy. Speech on the floor of the United States Senate during a president's impeachment trial ranks near the top of the scale of political speech. In this "information age" of instant communication, immediate and intense analysis is sure to follow any such speech. And it did. Begala issued comments over social media from an airplane! The record shows that mainstream media outlets, foreign media outlets, and private social media users highlighted and commented upon Dershowitz' arguments. (DE [219], Ex. 50, 51, 54, 55, 56, 57, 77, 78).

Dershowitz complains that he was defamed by the way CNN covered his arguments. The blurring of the distinction between "news" and "commentary" fosters sympathy for Dershowitz' position. Dershowitz's Complaint raised important issues and this Court determined at the motion to dismiss stage that Dershowitz should have the opportunity to develop evidence that would show that CNN's reporting met the *New York Times v. Sullivan* standard of actual malice. After full discovery, extensive briefing, and oral argument, the Court concludes that he has not. Accordingly, it is hereby

ORDERED AND ADJUDGED that CNN's Motion for Summary Judgment (DE [213]) is **GRANTED**. Pursuant to Fed. R. Civ. P. 58, a separate final judgment will be entered. The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any pending motions.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 4th day of April 2023.

/s/ Raag Singhal
RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-61872-CIV-SINGHAL/HUNT

[Filed April 4, 2023]

ALAN DERSHOWITZ,
Plaintiff,

v.

CABLE NEWS NETWORK, INC.
Defendant.

FINAL JUDGMENT

THIS CAUSE is before the Court following entry of the Order granting Defendant's Motion for Summary Judgment (DE [290]). The Court enters this separate final judgment pursuant to Fed. R. Civ. P. 58(a). Accordingly, it is hereby

ORDERED AND ADJUDGED that Final Judgment is entered in favor of Defendant Cable News Network, Inc., and against Plaintiff Alan Dershowitz. Plaintiff shall take nothing by this action.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 4th day of April 2023.

/s/ Raag Singhal
RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel via CM/ECF

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-61872-CIV-SINGHAL

[Filed May 24, 2021]

ALAN DERSHOWITZ,
Plaintiff,

v.

CABLE NEWS NETWORK, INC.
Defendant.

ORDER

THIS CAUSE is before the Court upon Defendant Cable News Network's Motion to Dismiss (DE [17]). The parties have fully briefed the Motion to Dismiss and the Court heard argument of counsel. For the reasons set forth below, the Motion to Dismiss is denied.

I. INTRODUCTION

Plaintiff Alan Dershowitz ("Dershowitz") has filed a Complaint (DE [1]) against Cable News Network, Inc. ("CNN") seeking damages for defamation. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

In January 2020, Dershowitz represented the President of the United States in an impeachment trial before the United States Senate. (*Id.* ¶ 6). This dispute concerns CNN's coverage of an argument

Dershowitz made to the Senate about whether a president can be impeached and removed from office if he takes any action that is motivated by a desire to be reelected. According to the Complaint, Dershowitz gave the following answer to a question by Senator Ted Cruz:

> The only thing that would make a quid pro quo unlawful is if the quo were somehow illegal. Now we talk about motive. There are three possible motives that a political figure could have. One, a motive in the public interest and the Israel argument would be in the public interest. The second is in his own political interest and the third, which hasn't been mentioned, would be his own financial interest, his own pure financial interest, just putting money in the bank. I want to focus on the second one just for one moment. Every public official that I know believes that his election is in the public interest and, mostly you are tight, your election is in the public interest, and if a president does something which he believes will help him get elected in the public interest, that cannot be the kind of quid pro quo that results in impeachment. (*Id*. ¶ 7)[1]

Following the day's impeachment proceedings, CNN aired a clip of this argument that featured only the last sentence and omitted Dershowitz' words that a quid pro quo would be unlawful if the quo were

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[1] The Complaint sets forth only an excerpt of Dershowitz' response. CNN has submitted the Congressional Record (DE [17-1] with the full transcript of Dershowitz' argument found at S650 and asks the Court to take judicial notice of the entirety of Dershowitz' comments.

somehow illegal.[2] (Id., ¶ 8). Dershowitz alleges that several CNN commentators responded to the truncated clip and "exploded into a one-sided and false narrative that Professor Dershowitz believes and argued that as long as the President believes his reelection is in the public interest, that he could do anything at all – including illegal acts – and be immune from impeachment." (*Id.*). Dershowitz alleges CNN commentators made the following defamatory statements[3] (DE [1], ¶ 13):

> Having worked on about a dozen campaigns, there is always the sense that, boy, if we win, it's better for the country. But that doesn't give you license to commit crimes or to do things that are unethical. So, it was absurd. What I thought when I was watching it was this is un-American. This is what you hear from Stalin, period. This is what you'll hear from Mussolini, what you hear from authoritarians, from Hitler, from all the authoritarian people who rationalized, in some cases, genocide, based on what was in the public interest." -- Joe Lockhart @ 7:11 p.m., January 29, 2020.
>
> The president's defense team [Dershowitz] seems to be redefining the powers of the president, redefining them towards infinity." . . . [truncated clip played]. . . "If you look at what he says there, it blows your mind. He says if a

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[2] The Complaint acknowledges that CNN aired the entire statement several times earlier in the day on shows hosted by CNN employees Wolf Blitzer and Jake Tapper. (DE [1] ¶ 9).

[3] In his Memorandum in Opposition (DE [21]), Dershowitz identified the underlined portions of these statements as those he alleges are defamatory.

> president is running for reelection because he thinks getting elected will help America, he can do anything, anything. And that redefines the presidency and America." – John Berman @ 6:17 a.m., January 30, 2020.
>
> I did not go to Harvard Law, but I did go to the University of Texas School of Law, where I studied criminal law and constitutional law, but never dreamed a legendary legal mind would set them both ablaze on the Senate floor. The Dershowitz Doctrine would make presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their reelection effort. Campaign finance laws: out the window. Bribery statutes: gone. Extortion: no more. This is Donald Trump's fondest figurative dream: to be able to shoot someone on Fifth Avenue and get away with it." -- Paul Begala on CNN.com, January 29, 2020 @ 9:11 p.m.

This narrative, claims Dershowitz, damaged his reputation as a legal scholar and subjected him to ridicule on news outlets, talk shows, and social media. (*Id.* ¶¶ 12, 13).

Dershowitz alleges that CNN knew or had serious doubts that its commentators' statements were false at the time they were made but nonetheless made and/or published the statements with an intent to indulge ill will, hostility, and an intent to harm. (*Id.* ¶ 20). Dershowitz asserts that CNN's airing of only a portion of his answer was done to falsely paint him "as a constitutional scholar and intellectual who had lost his mind" and that "[w]ith that branding, [his] sound and meritorious arguments would then be drowned

under a sea of repeated lies." (*Id*. ¶ 8). The result of omitting the words "[t]he only thing that would make a quid pro quo unlawful is if the quo were somehow illegal," says Dershowitz, is that CNN could "fool" its viewers into thinking "that the respected Alan Dershowitz believed that the President of the United States could commit illegal acts as long as he thought it would help his reelection and that his reelection was in the public interest, even though it was the opposite of what he said." (*Id*). Dershowitz alleges he has suffered and continues to suffer damage, including but not limited to damage to his reputation, embarrassment, pain, humiliation, and mental anguish and has sustained past and future loss of earnings. (*Id*. ¶ 19). He seeks $50 million in compensatory damages and $250 million in punitive damages from CNN.

CNN moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. (DE [17]). Fed. R. Civ. P. 12(b)(6). First, CNN contends its broadcasts are protected by the fair report privilege, which shields the press from liability for reporting information on official government proceedings. Second, CNN argues that the statements made by its commentators were non-actionable opinions based upon Dershowitz' public testimony. Finally, CNN asserts that Dershowitz has not and cannot plead that CNN acted with the actual malice required for a public figure to sustain a defamation claim. CNN asks the Court to dismiss Dershowitz' Complaint with prejudice.

II. LEGAL STANDARDS

A. Motion to Dismiss

To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002)). The court must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). But "[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1262 (11th Cir. 2004) (citation omitted); *see also Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

B. Defamation

The parties agree that Florida law applies to this dispute. In Florida, a defamation claim has "five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

CNN argues that its broadcasts concerning Dershowitz' statements are protected from liability by the fair report privilege. The fair report privilege is a qualified privilege given to news media "to accurately report on the information they receive from government officials." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993). "If the report of a public official proceeding is accurate or a fair abridgment, an action cannot be constitutionally maintained, either for defamation or for invasion of the right of privacy." *Id.* (quoting Restatement (Second) of Torts § 611, cmt. b (1977)). "The privilege extends to the publication of the contents of official documents, as long as the account is reasonably accurate and fair." *Rasmussen v. Collier County Publ. Co.*, 946 So. 2d 567, 571 (Fla. 2nd DCA 2006).

Next, CNN argues that its commentators offered opinions and, therefore, it cannot be liable for defamation. In Florida, a claim of defamation requires a false statement of fact. *Id.* Statements of pure opinion are not actionable. *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986). "The distinction between fact and opinion is not always

easy to perceive." *Id*. "Thus, the law recognizes that some comments may be pure expressions of opinion whereas others may be mixed expressions of opinion." *Id*.

A mixed opinion is one "based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication." *LRX, Inc. v. Horizon Assocs. Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So. 2d 881, 885 (Fla. 4th DCA 2003). "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

Whether a challenged statement is one of fact or opinion is a question of law to be decided by the court. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018). "In assessing whether an allegedly libelous statement is opinion, the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication." *Rasmussen*, 946 So. 2d at 571 (citing *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984)).

Finally, CNN challenges the sufficiency of Dershowitz' pleading of actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public figure must prove actual malice to succeed in defamation case). Actual malice "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v.*

New Yorker Mag., Inc., 501 U.S. 496, 500 (1991). Rather, actual malice refers to "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Id.* at 511. To avoid dismissal of a defamation claim, a public figure must plead facts sufficient to give rise to a plausible inference of actual malice. *Michel v. NY Post Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016). The pleading standards of *Iqbal* and *Twombly* apply to a public figure's allegations of actual malice. *Id.*

III. ANALYSIS

The Court must first address those items that it considered in resolving this Motion. CNN included numerous exhibits with its Motion to Dismiss and argues the Court may properly consider all of them when deciding the Motion. The Court disagrees. At the 12(b)(6) stage, the court may consider the allegations in the complaint as well as documents incorporated into the complaint by reference and matters of which it may take judicial notice. *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013) (citations omitted). These items are incorporated by reference in the Complaint and are properly considered at the motion to dismiss stage:

- CNN footage of the impeachment trial aired on January 29, 2020 (DE [17-6], ex. A);
- Transcript and footage of the January 29, 2020, episode of the program Erin Burnett Outfront (DE [17-6], ex. B);
- Transcript and footage of the January 20, 2020, episode of the program New Day (DE [17-6], ex. C); and
- Paul Begala article "Presenting the Ludicrous 'Dershowitz Doctrine'" published

January 29, 2020 on cnn.com (DE [17-6], ex. D)

In addition, the Court may take judicial notice of Congressional Record of January 29, 2020 (DE [17-1]). *See Coastal Wellness Centers, Inc., v. Progressive American Ins. Co.*, 309 F. Supp. 3d 1216, n.4 (S.D. Fla. 2018) ("The Court may take judicial notice of government publications and website materials."). The remaining items[4] – transcripts of shows broadcast by other media outlets, transcripts of interviews given by Dershowitz on January 30 and 31, 2020, and a copy of Dershowitz' book Defending the Constitution – fall outside the pleadings. "The clear rule in this Circuit is that consideration of material falling outside the pleadings converts a motion to dismiss into one for summary judgment. And in doing so, the judge must give notice to the parties and allow them 10 days in which to supplement the record." *Michel*, 816 F.3d at 701. The Court declines to make that conversion and, therefore, has only considered those items referenced in the Complaint.

A. Fair Report Privilege

CNN argues that its airing of verbatim statements that Dershowitz made on the floor of the United States Senate is unquestionably protected by the fair report privilege. *See Woodard*, 616 So. 2d at 502 ("The news media has been given a qualified privilege to accurately report on the information they receive from government officials."). "The fair report privilege is news media's qualified privilege 'to report accurately on information received from government officials.'"

[4] These items are attached to CNN's Motion to Dismiss (DE [17]) at DE [17-2]; [17-3]; [17-4]; [17-5]; [17-6], ex. E; and [17-6], ex. D.

Folta v. New York Times Co., 2019 WL 1486776, at *2 (N.D. Fla. 2019) (quoting *Rasmussen*, 946 So. 2d at 570-71). Clearly, a public broadcast concerning the impeachment trial of the President of the United States triggers the fair report privilege.

The next issue is whether the fair report privilege applies to CNN's broadcasts. The fair report privilege applies "[i]f the report of a public official proceeding is an accurate or a fair abridgment." *Folta*, 2019 WL 1486776, at *2 (quoting *Woodard*, 616 So. 2d at 502). CNN argues that it played a verbatim clip of Dershowitz' actual words spoken during a high-level government proceeding and, therefore, the fair report privilege applies. *See Jamason v. Palm Beach Newspapers, Inc.*, 450 So. 2d 1130, 1132 (Fla. 4th DCA 1984) ("accurate report of judicial proceeding" entitled to fair report privilege). Dershowitz does not dispute that the privilege would probably apply if CNN had merely played the truncated clip without further comment. But that is not Dershowitz' claim. The one-count Complaint alleges that the truncated clip was part of "a deliberate scheme to defraud" CNN's audience (DE [1], ¶ 11) that enabled Lockhart, Berman, and Begala to present Dershowitz's comments in a defamatory manner. Thus, for purposes of applying the fair report privilege the Court must consider the broadcasts and the clip as a whole and not as separate claims. And the question is whether CNN's broadcasts presented an accurate or fair abridgment of Dershowitz' comments to the Senate. To answer this, we must look to the source documents. *Folta*, 2019 WL 1486776, at *4 ("Determining whether a report is fair and accurate requires a close comparison of the report and the documents and information from which it is drawn.");

Stewart v. Sun-Sentinel Co., 695 So. 2d 360, 362 (Fla. 4th DCA 1997) (comparing defamatory information with official documents for "material differences" that would defeat the fair report privilege).

During the impeachment trial, Senator Ted Cruz submitted a question for Dershowitz to answer: "As a matter of law, does it matter if there was a quid pro quo? Is it true that quid pro quos are often used in foreign policy?" *Congressional Record*, 166:19 (Jan. 29, 2020), p. S650. (DE [17-1], p. 7). Dershowitz answered at length and gave several hypotheticals of quid pro quo that he considered would be lawful. At several points in his response, Dershowitz stated that a quid pro quo that is unlawful would be one based on an illegal motive. These points are highlighted below:

> I offered you a hypothetical the other day: What if a Democratic President were to be elected and Congress were to authorize much money to either Israel or the Palestinians and the Democratic President were to say to Israel "No; I am going to withhold this money unless you stop all settlement growth" or to the Palestinians "I will withhold the money Congress authorized to you unless you stop paying terrorists, and the President said "Quid pro quo. If you don't do it, you don't get the money. If you do it, you get the money"? There is no one in this Chamber who would regard that as in any way unlawful. *The only thing that would make a quid pro quo unlawful is that if the quo were in some way illegal.*
>
> Now, we talked about motive. There are three possible motives that a political figure can have: One, a motive in the public interest, and

the Israel argument would be in the public interest; the second is in his own political interest; and the third, which hasn't been mentioned, *would be in his own financial interest, just putting money in the bank*. I just want to focus on the second one for just one moment.

Every public official whom I know believes that his election is in the public interest. Mostly, you are right. Your election is in the public interest. If a President does something which he believes will help him get elected – in the public interest – that cannot be the kind of quid pro quo that results in impeachment . . . .

Everybody has mixed motives, and for there to be a constitutional impeachment based upon mixed motives would permit almost any President to be impeached.

How many Presidents have made foreign policy decisions after checking with their political advisers and their pollsters? If you are just acting in the national interest, why do you need pollsters? Why do you need political advisers? Just do what is best for the country. But if you want to balance what is in the public interest with what is in your party's electoral interest and in your own electoral interest, it is impossible to discern how much weight is given to one or the other.

Now, we may argue that it is not in the national interest for a particular President to get reelected or for a particular Senator or Member of Congress – and maybe we are right; it is not

in the national interest for everybody who is running to be elected – but for it to be impeachable, you would have to discern that he or she made a decision solely on the basis of, as the House managers put it, corrupt motives, and *it* cannot be a corrupt motive *if you have a mixed motive that partially involves the national interest, partially involves electoral, and does not involve personal pecuniary interest.*

The House managers do not allege that this decision, this quid pro quo, as they call it – and the question is based on the hypothesis that there was a quid pro quo. I am not attacking the facts. *They never allege that it was based on pure financial reasons. It would be a much harder case.*

If a hypothetical President of the United States said to a hypothetical leader of a foreign country: Unless you build a hotel with my name on it and unless you give me a million-dollar kickback, I will withhold the funds. *That is an easy case. That is purely corrupt and in the purely private interest.*

But a complex middle case is: I want to be elected. I think I am the greatest President there ever was, and if I am not elected the national interest will suffer greatly. That cannot be.

Congressional Record 166: 19 (Jan. 29, 2020) pp. S650-51 (emphasis added). (DE [17-1], pp. 7-8).[5]

To compare Dershowitz' answer with the comments made by CNN's commentators, those comments are set forth again, below:

> Having worked on about a dozen campaigns, there is always the sense that, boy, if we win, it's better for the country. But that doesn't give you license to commit crimes or to do things that are unethical. So, it was absurd. What I thought when I was watching it was this is un-American. This is what you hear from Stalin. This is what you hear from Mussolini, what you hear from authoritarians, from Hitler, from all the authoritarian people who rationalized, in some cases genocide, based what was in the public interest." -- Joe Lockhart @ 7:11 p.m., January 29, 2020.
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> The president's defense team [Dershowitz] seems to be redefining the powers of the president, redefining them towards infinity." . . . [truncated clip played] . . . "If you look at what he says there it blows your mind. He says if a president is running for re-election because he thinks getting elected will help America, he can do anything, anything. And that redefines the

[5] CNN argues that the paragraph breaks in the Congressional Record signify that Dershowitz is "manipulat[ing] his Senate arguments by merging together three separate paragraphs from the Congressional Record to make it appear as one thought." (DE [24], p. 5). The Court must consider the entirety of Dershowitz' remarks, and the editorial judgment of the Government Printing Office staff is not binding on this Court.

> presidency and America." – John Berman @ 6:17 a.m., January 30, 2020.
>
> **********
>
> I did not go to Harvard Law, but I did go to the University of Texas School of Law, where I studied criminal law and constitutional law, but never dreamed a legendary legal mind would set them both ablaze on the Senate floor. The Dershowitz Doctrine would make presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their re-election effort. Campaign finance laws: out the window. Bribery statutes: gone. Extortion: no more. This is Donald Trump's fondest figurative dream: to be able to shoot someone on Fifth Avenue and get away with it." -- Paul Begala on CNN.com, January 29, 2020 @ 9:11 p.m.

Dershowitz alleges he never said a president could commit illegal acts if he thought it would help his reelection and his reelection was in the public interest. (DE [1], ¶ 8). And he alleges that CNN, through its employee commentators, distorted the meaning of what he said to the Senate in the coverage on CNN.com and the two broadcasts. (DE [1], ¶ 10, 11). Dershowitz contends that by omitting the phrase, "the only thing that would make a quid pro quo unlawful is if the quo were somehow illegal," CNN presented Dershowitz' comments in a misleading context, which enabled the commentators to (falsely) assert that Dershowitz believed a president could extract a quid pro quo for any reason, including an illegal reason, if he believed it would help his re-election. Dershowitz alleges that if the entire clip had

been played, no panel guest would have been able to credibly make that statement. (DE [1], ¶ 9). Thus, Dershowitz argues, CNN presented an official proceeding in a misleading manner and the fair report privilege does not apply.

The Court agrees. CNN presented an abridgment of Dershowitz' answer to Senator Cruz' question. The abridgment is not accurate, to the extent that it omitted a crucial qualification: that an illegal motive for a quid pro quo would be corrupt. As a result, the commentators' statements – that Dershowitz believes a President can do anything, even commit crimes if it would help his re-election – are not based upon a fair and accurate summary of Dershowitz' statement to the Senate.

CNN argues that editors and publishers have great discretion to determine what information to publish. This is correct. But the qualified fair report privilege "merely means that the report of [official] proceedings must be correct." *Jamason*, 450 So. 2d at 1132 (quoting *Walsh v. Miami Herald Publishing Co.*, 80 So. 2d 669, 671 (Fla. 1955)).

CNN argues that Dershowitz' response to Senator Cruz' statement was ambiguous and that CNN was reasonable in its belief that Dershowitz argued "that presidents cannot be impeached for actions taken to win an election if the President believes his own victory would be in the public interest, regardless of the legality of those actions." (DE [17], p. 14). That is an argument that CNN may present to a jury. But because the broadcasts did not present a fair and accurate abridgment of Dershowitz' remarks, CNN cannot avail itself of the fair report privilege.

Finally, CNN argues that the media has no obligation to present additional information that would present a subject in a better light. This too is correct. *See Folta*, 2019 WL 1486776, at *5 (media has "the right to focus and color their report to capture and hold the readers' attention" provided the report is "substantially accurate"). Thus, in *Larreal v. Telemundo of Florida*, LLC, 489 F. Supp. 3d 1309 (S.D. Fla. 2020), the fair report privilege applied to a report that the plaintiff was arrested during a raid conducted as part of a long-term undercover narcotics investigation. The Telemundo report was one about the undercover raid and arrests. *Id*. The plaintiff sued Telemundo for defamation and alleged it omitted information that would have clarified that he was arrested on a traffic-related warrant. The court stated that "regardless of the charges against the other individuals, the fact that Larreal was arrested on a bench warrant alone does not rebut or undermine Telemundo's accurate reporting about the operation's arrests or change the gist of the story." *Id*. at *1322.

By contrast, the CNN broadcast segments set forth in Dershowitz' Complaint were focused specifically on Dershowitz' comments to the Senate and, as presented on air, changed the gist of what Dershowitz said. For the fair report privilege to apply a defendant must have "presented a fair and accurate report of the source documents." *Folta*, 2019 WL 1486776, at *6. The CNN broadcasts do not meet that standard.

B. Fact v. Opinion

CNN's next ground for dismissal is that the allegedly defamatory statements were non-actionable opinion. CNN argues that the statements at issue were made during commentary shows about the

impeachment proceedings and were "rhetorical hyperbole" protected by the First Amendment. *See Horsely v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (holding non-literal, figurative language not defamatory). Thus, CNN argues that statements referring to Dershowitz' arguments as "un-American," that he was "redefining the powers of the President," that his position "blows your mind," and that his argument "is what you hear from Stalin . . . what you hear from Mussolini, what you hear from authoritarians" are hyperbole for which there can be no liability.

Dershowitz agrees with CNN on the hyperbolic nature of the commentary and that no liability would attach to those kinds of statements. But he argues that the commentaries also contained untrue, defamatory factual comments – that Dershowitz said a President could do anything without liability (even commit crimes) if he thought it would help his reelection and was in the national public interest – that were contradicted by the full context of Dershowitz' answer to Senator Cruz' question. The Court concludes that the commentators' statements set forth in the Complaint were not pure opinion but instead were mixed expressions of opinion that could reasonably be construed as defamatory. *See Barnes v. Horan*, 841 So. 2d 472, 477 (Fla. 3rd DCA 2002) (the court must determine whether an expression of opinion can also contain a defamatory meaning due to assertion of undisclosed facts).

A mixed expression of opinion is not constitutionally protected. *Madsen v. Buie*, 454 So. 2d 727, 729 (Fla. 1st DCA 1984). "[A] statement that although ostensibly in the form of an opinion 'implies

the allegation of undisclosed defamatory facts as the basis for the opinion' *is* actionable." *Eastern Air Lines, Inc. v. Gellert*, 438 So. 2d 923, 927 (Fla. 4th DCA 1983) *disapproved on other grounds*, *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547 (Fla. 1986) (quoting Restatement (Second) of Torts § 566 (1977)) (emphasis in original). Further, "where the speaker or writer neglects to provide the audience with an adequate factual foundation prior to engaging in the offending discourse, liability may arise." *Zambrano*, 484 So. 2d at 607. The Complaint alleges that CNN's broadcasts lacked the "adequate factual foundation" that would have prevented the commentators from mischaracterizing Dershowitz' argument. The Court concludes that the Complaint plausibly alleges that the comments made on CNN and CNN.com were defamatory statements of mixed opinion.

CNN argues that because the impeachment trial was widely covered by it and other media outlets, the underlying facts were "known to the audience" and, therefore, a finding of pure opinion may still be made. *Id*. at 606-07; *Rasmussen*, 946 So. 2d at 571. The court must consider numerous factors in determining whether a comment or editorial is based upon publicly disclosed facts. *Rasmussen*, 946 So.2d at 571. These include construing "the statement in its totality," considering "the context in which the statement was published," and accounting for "all of the circumstances surrounding the publication, including the medium by which it was disseminated and the audience to which it was published." *Id*. Although some of these factors are alleged in the Complaint or are available to the Court at the motion to dismiss stage, other factors relating to the context of the broadcasts and its audience are not before the Court.

This requires a more fully developed record. At this stage, the Court concludes that Dershowitz' Complaint meets the plausibility standard for alleging a false statement of fact.

C. Actual Malice

CNN next moves to dismiss the Complaint for failure to plausibly allege the "actual malice" standard of fault applicable to public figures as required by *New York Times Co.*, 376 U.S. 254. The plausibility standard of *Iqbal* and *Twombly* applies to the actual malice standard in defamation proceedings. *See Michel*, 816 F.3d at 702. A public figure must, therefore, plead "facts giving rise to a reasonable inference that the defendant[] published the story knowing that it was false or with reckless disregard for whether it was false or not." *Id.* at 703. There must be some showing that the defendant intended "to avoid the truth." *Id.*

CNN argues that Dershowitz pleads only conclusory statements of actual malice and fails to "home to" the person(s) responsible for the alleged defamation. *New York Times Co.*, 376 U.S. at 287 (The state of mind required for actual malice must be "brought home" to the persons having responsibility for publishing the offending material). CNN also argues that it aired live Dershowitz' complete argument earlier in the day and, therefore, it is impossible for Dershowitz to plead actual malice with connection to the later showing of the truncated clip.[6]

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[6] The Court will not (at this time) entertain CNN's arguments concerning Dershowitz' subsequent appearances on shows with Wolf Blitzer and Chris Cuomo as those matters are outside the four corners of the Complaint.

Finally, CNN argues that Dershowitz' statement to the Senate was so ambiguous that any misinterpretation by CNN cannot be attributed to actual malice.

In deciding a motion to dismiss, the court must accept as true the plaintiff's well-pleaded facts and construe them in the light most favorable to the plaintiff. *Crawford's Auto Center, Inc. v. State Farm Mut. Auto. Ins. Co.*, 945 F.3d 1150 (11th Cir. 2019). Dershowitz alleges that, after the live broadcast, "CNN then went to work by assembling panels for programming throughout the day in which the hosts shared" only the truncated clip. (DE [1], ¶ 8). He alleges that CNN intentionally omitted the statement that a quid pro quo would be unlawful if the quo were illegal in order to "fool its viewers" into believing that Dershowitz actually said that a President could commit illegal acts so long as he thought it would help his reelection and that his reelection was in the public interest. (*Id.*). This was done, he alleges, "to falsely paint Professor Dershowitz as a constitutional scholar and intellectual who had lost his mind." (*Id.*). He alleges that CNN knew for certain that he had prefaced his remarks with the qualifier that a quid pro quo could not include an illegal act because it aired the entire statement earlier in the day, but that CNN knowingly omitted that portion when it played the truncated clip "time and again." (*Id.*, ¶¶ 9, 10). He alleges that the truncated clip was created "intentionally and deliberately with knowledge and malice to facilitate its ability to falsely claim that plaintiff said the opposite of what he actually said." (*Id.*, ¶ 18). And, finally, Dershowitz alleges that commentators made their statements with knowledge or reckless disregard that they were false. (*Id.*, ¶ 17).

These allegations, for purposes of surviving the Motion to Dismiss, plausibly plead a factual basis from which "actual malice" can be inferred. The Complaint alleges that CNN knew its reports were false, it explains the reasons CNN and its employees knew the reports were false, it explains the nature of the alleged falsehoods, and it alleges who made the false statements.

To the extent that the Complaint does not identify with specificity the persons (other than the commentators) within the CNN organization who were responsible for the broadcast decisions, that is a matter for discovery. The Court does not accept CNN's argument that a public figure defamation plaintiff must identify and plead (before discovery) each responsible decision maker within a news organization. The claims in *New York Times Co.*, 376 U.S. 254, went to a jury trial but the plaintiff ultimately failed to establish that the persons responsible for publication of the offending advertisement acted with actual malice. *Id*. at 287. In a case involving a large news organization where the responsible decision makers may not be otherwise known, a plaintiff must be permitted to plead the facts that would plausibly establish actual malice without identifying a specific person. It is then the plaintiff's burden to conduct the discovery necessary to identify and, to be successful, present record evidence that those individuals acted with actual malice. *See*, *id*. ("[T]he evidence against the Times supports at most a finding of negligence . . . and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.")

CNN cites the district court's dismissal in *Mejia v. Telemundo Mid-Atl., LLC*, 440 F. Supp. 3d 495, 497 (D. Md. 2020), for support of its argument that Dershowitz was required to plead that a specific individual acted with actual malice. But *Mejia* is inapposite. That case involved a private figure whose punitive damages claim required allegations that the defamer acted with actual malice. *Id*. at 499. The case was dismissed because the plaintiff failed to allege any facts that would establish the requisite fault (negligence). *Id*. at 501-502. The court's reference to actual malice, that the complaint contained "no factual allegations referring to the state of mind of the individual in charge of Defendant's banners," referred to the punitive damages claim.[7] *Id*. at 499, 502. *Mejia* has no bearing on the present case.

Next, the fact that CNN played Dershowitz' entire statement earlier in the day does not preclude Dershowitz from alleging that later broadcasts of the truncated clip (and the related commentary) were done with actual malice. Viewers who watched the earlier broadcasts may well have been able to put the truncated clip and the commentators' statements into context. But for those viewers who did not see the earlier broadcasts, Dershowitz' Complaint about the later broadcasts at least reaches the required level of plausibility to sustain his defamation claim. The earlier broadcasts and their effect on the issue of

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[7] In a later decision, the *Mejia* court granted leave to file a third amended complaint where the proposed pleading raised additional factual allegations sufficient to raise a plausible claim that the defendant acted negligently in allowing the false banner to be broadcast. The third amended complaint did not specify a particular individual. *Mejia v. Telemundo Mid-Atlantic* LLC, 2021 WL 594215, at *3 (D. Md. Feb. 16, 2021).

actual malice may be an issue for a jury to consider, but they have no bearing on the sufficiency of the pleadings.

Finally, CNN argues that Dershowitz' answer to the Senator Cruz' question was so "extravagantly ambiguous" that Dershowitz cannot establish that CNN acted with actual malice in airing the clip or discussing his arguments. Citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971), CNN contends that its commentators' analysis of Dershowitz' argument, even if incorrect, cannot create an issue of actual malice.

In *Pape*, the newsmagazine Time published an article about a report issued by the federal Civil Rights Commission. The report detailed numerous incidents of police brutality, including an incident in Chicago that gave rise to a federal lawsuit. But the Time article did not specify that the facts about the Chicago incident were taken from a civil complaint, rather than from an independent finding of the Commission. A police officer named in the report sued Time for defamation, and the issue was whether omission of the word "allegedly" from the Time account was enough to establish actual malice. The trial court entered a directed verdict in favor of the defendant, but the court of appeals reversed. The author of the Time article testified at trial that the context of the report indicated to him that the Commission believed that the incident occurred as described. After reviewing the totality of the underlying report *and the testimony of the Time writer*, the Supreme Court concluded that "[t]o permit the malice issue to go to the jury because of the omission of a word like 'alleged,' despite the context of

that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on error of fact." *Id*. at 290.

In the present case, the Court has before it only the allegations of the Complaint, which must be taken as true, and the substance of the broadcasts. Dershowitz has adequately pleaded actual malice to survive the Motion to Dismiss. Whether the evidence adduced will ultimately satisfy Dershowitz' burden of proving actual malice by clear and convincing evidence remains to be seen. But he has alleged enough to go forward.

VI. POLITICAL MALEVOLENCE

In a footnote, CNN argues that Dershowitz' "claims of disinterested political malevolence are insufficient" to establish actual malice. The Court agrees and, further, concludes that these allegations should be stricken as immaterial and impertinent. Fed. R. Civ. P. 12(f). In paragraph 14 of the Complaint, Dershowitz alleges:

> Professor Dershowitz was one of the most revered and celebrated legal minds of the past half century. His reputation relating to his expertise in criminal and constitutional matters was one that lawyers would only dream about attaining in their lifetimes. However, Professor Dershowitz appears to have made one mistake. He chose to defend the President of the United States and defend the U.S. Constitution at a moment in time where CNN has decided that doing so is not permitted. For

> this, CNN set out to punish him and destroy his credibility and reputation, and unfortunately, succeeded.

The Supreme Court has stated that "[a defendant's] motive in publishing a story ... cannot provide a sufficient basis for finding actual malice." *Harte-Hanks Communications., Inc. v. Connaughton*, 491 U.S. 657, 665 (1989). Indeed, a defamation claim cannot rest on the argument that "erroneous communications were motivated by differences in political opinions. Doing so would run afoul of the Supreme Court's landmark ruling in *New York Times Co. v. Sullivan*. *See* 376 U.S. at 271–72 (noting that errors are inevitable when there is free debate and that they too must be protected to give breathing room to those exercising their freedom of expression)." *Arpaio v. Robillard*, 459 F. Supp. 3d 62, 66 (D.D.C. 2020).

Paragraph 14 of Dershowitz' Complaint alleges that CNN was motivated by political animus. As Judge Lamberth noted in *Arpaio*, "Allegations of 'leftist enmity' cannot trump the guarantees of the First Amendment." *Id*. "Striking a pleading or a portion thereof is a drastic remedy to be resorted to only when required for the purposes of justice." *Sanchez v. Selective Ins. Co. of the Southeast*, 2019 WL 79282, at *2 (S.D. Fla. Jan. 2, 2019) (quotation omitted). Nevertheless, the allegations in paragraph 14 are immaterial to the claim and are an impertinent salvo that do not belong in this case. Rule 12(f)(1), Fed. R. Civ. P., gives the Court the power to strike such matters "on its own." *Sanchez*, at *3 (*sua sponte* striking plaintiff's request for interest). The Court will

exercise that power and strike paragraph 14 from the Complaint.

VII. CONCLUSION

For the reasons set forth above, the Court finds that Dershowitz has plausibly alleged facts sufficient to withstand CNN's Motion to Dismiss. The Court is in no way ruling on the merits of the case but concludes merely that Dershowitz has satisfied the pleading requirements of Rule 8(a)(2), Federal Rules of Civil Procedure. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (DE [17]) is **DENIED**. It is further **ORDERED** that paragraph 14 of Plaintiff's Complaint is **STRICKEN** pursuant to Fed. R. Civ. P. 12(f)(1).

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 24th day of May 2021.

/s/ Raag Singhal
RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel via CM/ECF