

No. 25-770

IN THE
Supreme Court of the United States

ALAN M. DERSHOWITZ,

Petitioner,

v.

CABLE NEWS NETWORK, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the actual-malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which applies independently in this case as a matter of state law, should be overruled or modified.

2. Whether a plaintiff may survive summary judgment on the theory that a defendant's purportedly "systematic omission of qualifying and limiting language" constitutes actual malice when both courts below determined that the plaintiff in fact has "no evidence" that the defendant "intentionally hid information."

RULE 29.6 STATEMENT

Respondent Cable News Network, Inc. is ultimately a wholly owned subsidiary of Warner Bros. Discovery, Inc., a publicly traded company (NASDAQ: WBD). Warner Bros. Discovery, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

| | Page |
|--|-------------|
| INTRODUCTION..... | 1 |
| STATEMENT | 6 |
| REASONS FOR DENYING THE PETITION..... | 11 |
| I. This petition is a fundamentally flawed vehicle to consider overruling or modifying <i>New York Times v. Sullivan</i> | 12 |
| A. Florida law independently requires proof of actual malice..... | 12 |
| B. Dershowitz would not benefit from a narrower definition of public figure..... | 14 |
| C. Dershowitz loses under any evidentiary standard because he had no evidence of actual malice..... | 16 |
| D. Dershowitz targets protected opinions or interpretations of ambiguous remarks..... | 16 |
| II. The Court should not revisit <i>Sullivan</i> in any event. | 19 |
| A. <i>Sullivan</i> is a cornerstone of free speech and democracy that ensures adequate recourse for defamation plaintiffs..... | 20 |
| B. <i>Sullivan</i> was correctly decided. | 26 |
| III. The decision below did not create any conflict as to the application of the actual-malice standard..... | 32 |
| CONCLUSION | 35 |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|----------------|
| <i>Addington v. Texas</i> , 441 U.S. 418 (1979)..... | 31 |
| <i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)..... | 16 |
| <i>Blankenship v. NBCUniversal, LLC</i> , 144 S. Ct. 5 (2023)..... | 3, 12 |
| <i>Block v. Tanenhaus</i> , 867 F.3d 585 (5th Cir. 2017)..... | 32 |
| <i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485 (1984)..... | 20, 27 |
| <i>Byrd v. Hustler Magazine, Inc.</i> , 433 So. 2d 593 (Fla. Dist. Ct. App. 1983)..... | 17 |
| <i>Carroll v. Trump</i> , 124 F.4th 140 (2d Cir. 2024)..... | 25 |
| <i>Chiles v. Salazar</i> , 146 S. Ct. 1010 (2026)..... | 21, 24 |
| <i>Citizens United v. Federal Election Comm’n</i> , 558 U.S. 310 (2010)..... | 21, 26 |
| <i>Coleman v. MacLennan</i> , 98 P. 281 (Kan. 1908)..... | 27, 30 |
| <i>Coogler v. Rhodes</i> , 21 So. 109 (Fla. 1897) | 13 |

| Cases (continued) | Page(s) |
|---|----------------|
| <i>Counterman v. Colorado</i> , 600 U.S. 66 (2023)..... | 5, 21, 22, 29 |
| <i>Crane v. Walters</i> , 10 F. 619 (C.C.D. Mass. 1882)..... | 30 |
| <i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)..... | 26, 29 |
| <i>Depp v. Heard</i> , 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022)..... | 25 |
| <i>Dodds v. American Broadcasting Co.</i> , 145 F.3d 1053 (9th Cir. 1998)..... | 34 |
| <i>Dongguk University v. Yale University</i> , 734 F.3d 113 (2d Cir. 2013) | 34 |
| <i>E.M.D. Sales, Inc. v. Carrera</i> , 604 U.S. 45 (2025)..... | 5, 31 |
| <i>Eramo v. Rolling Stone LLC</i> , 2016 WL 6649832 (W.D. Va. Nov. 7, 2016)..... | 25 |
| <i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938)..... | 14 |
| <i>Gamble v. United States</i> , 587 U.S. 678 (2019)..... | 20, 30, 31 |
| <i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)..... | 20, 23, 24, 28 |
| <i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)..... | 20, 22, 29 |

| Cases (continued) | Page(s) |
|--|----------------|
| <i>Glossip v. Gross</i> , 576 U.S. 863 (2015)..... | 34 |
| <i>Goldwater v. Ginzburg</i> , 414 F.2d 324 (2d Cir. 1969) | 10, 32 |
| <i>Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler</i> , 398 U.S. 6 (1970)..... | 15, 17, 20 |
| <i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 573 U.S. 258 (2014)..... | 24 |
| <i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657 (1989)..... | 23 |
| <i>Herbert v. Lando</i> , 441 U.S. 153 (1979)..... | 23, 28 |
| <i>Herring Networks, Inc. v. Maddow</i> , 8 F.4th 1148 (9th Cir. 2021) | 18 |
| <i>Hess v. Indiana</i> , 414 U.S. 105 (1973)..... | 29 |
| <i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988)..... | 21, 29, 30 |
| <i>Janus v. State, County, and Municipal Employees</i> , 585 U.S. 878 (2018)..... | 20, 22, 24 |
| <i>Jews for Jesus, Inc. v. Rapp</i> , 997 So. 2d 1098 (Fla. 2008) | 13 |

| Cases (continued) | Page(s) |
|---|----------------|
| <i>Kahl v. Bureau of National Affairs, Inc.</i> , 856 F.3d 106 (D.C. Cir. 2017)..... | 31 |
| <i>Link v. Wabash Railroad Co.</i> , 370 U.S. 626 (1962)..... | 15 |
| <i>Manzari v. Associated Newspapers Ltd.</i> , 830 F.3d 881 (9th Cir. 2016)..... | 32 |
| <i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496 (1991)..... | 20, 32 |
| <i>McDonald v. Smith</i> , 472 U.S. 479 (1985)..... | 27 |
| <i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974)..... | 21 |
| <i>Michigan v. Long</i> , 463 U.S. 1032 (1983)..... | 14 |
| <i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1. (1990)..... | 16, 17, 18 |
| <i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024)..... | 21 |
| <i>Nalle v. Oyster</i> , 230 U.S. 165 (1913)..... | 27 |
| <i>National Review, Inc. v. Mann</i> , 589 U.S. 1088 (2019)..... | 23 |

| Cases (continued) | Page(s) |
|---|--|
| <i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)..... | 1, 2, 5, 10, 11, 21, 22, 23, 26, 27, 29, 30, 31 |
| <i>O'Donoghue v. McGovern</i> , 23 Wend. 26 (N.Y. Sup. 1840)..... | 30 |
| <i>People v. Croswell</i> , 3 Johns. Cas. 337 (N.Y. 1804)..... | 28 |
| <i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986)..... | 20 |
| <i>Press Co. v. Stewart</i> , 14 A. 51 (Pa. 1888)..... | 30 |
| <i>Rosanova v. Playboy Enterprises, Inc.</i> , 580 F.2d 859 (5th Cir. 1978)..... | 34 |
| <i>Schiavone Construction Co. v. Time, Inc.</i> , 847 F.2d 1069 (3d Cir. 1988) | 10, 32 |
| <i>Shurtleff v. Stevens</i> , 51 Vt. 501 (1879) | 30 |
| <i>Smith v. California</i> , 361 U.S. 147 (1959)..... | 29 |
| <i>Smith v. Higgins</i> , 82 Mass. 251 (1860) | 28 |
| <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)..... | 2, 21 |

| Cases (continued) | Page(s) |
|--|----------------|
| <i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)..... | 20 |
| <i>State v. Burnham</i> , 9 N.H. 34 (1837) | 28 |
| <i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)..... | 20 |
| <i>Time, Inc. v. Pape</i> , 401 U.S. 279 (1971)..... | 17, 18 |
| <i>Trump v. United States</i> , 603 U.S. 593 (2024)..... | 15 |
| <i>Tucker v. Fischbein</i> , 237 F.3d 275 (3d Cir. 2001) | 34 |
| <i>Turner v. Wells</i> , 879 F.3d 1254 (11th Cir. 2018)..... | 13, 18 |
| <i>United States v. Alvarez</i> , 567 U.S. 709 (2012)..... | 23 |
| <i>United States v. Stevens</i> , 559 U.S. 460 (2010)..... | 26 |
| <i>Van Liew v. Eliopoulos</i> , 84 N.E.3d 898 (Mass. App. Ct. 2017) | 25 |
| <i>White v. Fletcher</i> , 90 So. 2d 129 (Fla. 1956) | 13, 30 |
| <i>White v. Nicholls</i> , 44 U.S. (3 How.) 266 (1845)..... | 27, 30 |

Constitutional Provisions

U.S. Const. Amend. I..... 26

Statutes

28 U.S.C. § 4102(a)(1) 24

47 U.S.C. § 230 24

Rules

Sup. Ct. R. 10(a) 14

Other Authorities

Bauder, Chase, and Mulvihill, *Fox, Dominion Reach \$787M Settlement over Election Claims*, Associated Press (Apr. 18, 2023) 25

Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346 (1889)..... 27

Liptak, *A Press Freedom Case in Peril, from a Lawyer Who Helped Write It*, N.Y. Times (Feb. 19, 2026) 4, 15, 31

Norwick, *The Empirical Reality of Contemporary Libel Litigation*, Media Law Resource Center (Mar. 2022) 25

Peltz, *Pop Star Kesha and Producer Dr. Luke Settle Longstanding Legal Battle over Rape, Defamation Claims*, Associated Press (June 22, 2023) 25

| Other Authorities (continued) | Page(s) |
|---|----------------|
| Schafer, <i>In Defense: New York Times v. Sullivan</i> , 82 La. L. Rev. 81 (2021) | 28 |

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BRIEF IN OPPOSITION

INTRODUCTION

A foundation stone of this Court's First Amendment precedents is *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Because civil tort liability can be used as an effective means to punish and chill speech on matters of public concern, the Court held long ago that a public official claiming defamation must prove knowledge or reckless disregard of the statement's falsity—also called actual malice. This Court has continually reaffirmed and reinforced that actual-malice standard, including by applying its protections to speech about public figures. And *Sullivan* today remains the bedrock for six decades of First Amendment decisions that have prevented censorship through fear

of liability, protected speech that some may find offensive or controversial, and shielded editorial discretion from government interference.

Through a series of misguided and misplaced objections, the petition in this case challenges our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Sullivan*, 376 U.S. at 270). Petitioner Alan Dershowitz is a famous law professor and lawyer who represented President Donald Trump against charges of impeachment for allegedly withholding military funds from Ukraine to coerce an investigation of his main political rival, then former Vice President Joseph R. Biden, and thereby aid his reelection chances. During publicly aired remarks on the Senate floor, Dershowitz argued that the corrupt mind necessary for an impeachable offense required actions taken “in the purely private interest.” Pet. App. 15a. A “political interest” to help one’s own reelection, Dershowitz contrasted, could not establish an impeachable offense. *Id.* at 13a-15a.

Respondent Cable News Network, Inc. aired Dershowitz’s full remarks. Pet. App. 10a. CNN later published commentary that criticized Dershowitz’s argument as allowing presidents to “do essentially whatever they want in order to get elected because it’s somehow in the public interest.” *Id.* at 16a; see *id.* at 16a-18a. When Dershowitz complained about the coverage, CNN had him on air, twice, to explain and defend his views. *Id.* at 5a.

Unsatisfied, Dershowitz sought to enlist the federal courts in punishing CNN for commentary that allegedly distorted his legal arguments. He protested that the implications of his arguments were not as

dire as commentators argued—that a broader range of conduct might support impeachment, if one pieces together his arguments to the Senate across two days. But the district court and a unanimous panel of the Eleventh Circuit all agreed that Dershowitz could not survive summary judgment because he had “no evidence” that any CNN commentators entertained serious doubts that they had accurately represented Dershowitz’s statements in the Senate. Pet. App. 2a, 7a, 9a, 10a, 11a, 67a, 68a. Having lost for lack of actual malice below, Dershowitz now comes to this Court seeking a drastic curtailment of the press’s and public’s freedom to discuss the President’s arguments for remaining in the highest office in the land.

Dershowitz is a uniquely unfit petitioner to force a constitutional showdown over *Sullivan*. The question whether the First Amendment compels an actual-malice standard is wholly academic in this case. As the Eleventh Circuit explained, Florida has “implemented that same standard as a matter of state law” for claims by public-figure plaintiffs. Pet. App. 7a. Dershowitz does not challenge the Eleventh Circuit’s determination, let alone explain why that state-law question would warrant this Court’s review. Because nothing that this Court could say about the First Amendment would change the bottom line that Dershowitz lacked evidence of a hardwired element of defamation under Florida law, his challenge to *Sullivan* never even gets off the ground. See *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring in denial of certiorari).

That is not even the only vehicle problem that dooms the petition. Dershowitz also criticizes the extension of the actual-malice standard to famous private citizens. But this is not an archetypical private-

citizen case: Dershowitz was speaking on behalf of the President as a participant in a Senate impeachment trial. His attack on the clear-and-convincing-evidence standard also lands wide of the mark because the Eleventh Circuit determined that he had “no evidence” of actual malice—a losing showing under any standard. Pet. App. 7a (emphasis added). Indeed, what Dershowitz challenges are not false statements of fact, but the protected opinions or at least supportable interpretations of commentators who (he asserts) misapprehended his arguments.

Even if this case turned on the First Amendment rules that Dershowitz challenges, this Court has seen and sent away many petitioners making the same arguments in recent years. Dershowitz recycles the same critiques of *Sullivan*. But he offers no special justification for disturbing *Sullivan*, which was unanimous in result and has been repeatedly fortified and expanded by this Court over six decades. In fact, Dershowitz is on record for arguing that *Sullivan* is wrong—because the majority opinion did not go as *far* as the concurrence in protecting speech. Liptak, *A Press Freedom Case in Peril, from a Lawyer Who Helped Write It*, N.Y. Times (Feb. 19, 2026), perma.cc/7JKJ-4Y4W. And every relevant *stare decisis* factor cuts against Dershowitz: The actual-malice standard is a pillar of modern First Amendment jurisprudence that safeguards the free speech necessary for self-determination in a democratic society while still ensuring effective recourse for public-official and public-figure plaintiffs. Because *Sullivan* is a cornerstone of modern constitutional law, this Court could not remove the decision without causing lasting damage to a wide range of precedent.

Dershowitz’s challenges are even less justified because this Court correctly decided the First Amendment issues in *Sullivan*. His shoddy historical analysis underscores that the myth of *Sullivan* as a policy-driven innovation has lost touch with reality. From the earliest decisions after the Revolution, courts have pruned oppressive aspects of English law before transplanting defamation concepts into the liberty-rich soil of American law. This Court in *Sullivan* recognized that the resulting body of common-law privileges provided strong historical support for adopting an actual-malice standard under the First Amendment. 376 U.S. at 280 n.20. Relying on *Sullivan*, this Court in *Counterman v. Colorado*, 600 U.S. 66 (2023), further entrenched its directive to provide breathing space to protected speech by requiring proof of a reckless state of mind. And the Court returned to *Sullivan* in *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025), as a prototypical example where the Constitution requires proof by clear and convincing evidence. In every way, Dershowitz’s position—not *Sullivan*—is the aberration.

Although Dershowitz opens with a purported split on whether the systematic omission of qualifying statements constitutes evidence of actual malice, that nonexistent conflict deserves only a few parting words. The Eleventh Circuit did not decide the question because it rejected the factual premise that CNN commentators had “intentionally hid information” that would have disproved their description of Dershowitz’s legal arguments. Pet. App. 10a. Dershowitz’s attempt to manufacture a circuit split by rewriting the decision below confirms that this Court should deny the petition.

STATEMENT

1. Dershowitz is a famous law professor emeritus at Harvard Law School. Pet. App. 2a. For decades, he has sought the public spotlight as an academic who routinely appears as a legal commentator on television. Pet. C.A. Reply Br. 19. He has also courted the notoriety that follows the representation of controversial clients, such as O.J. Simpson, Claus Von Bulow, and President Trump.

Dershowitz represented President Trump at his first impeachment trial in January 2020 against charges of withholding military funds to coerce Ukraine to investigate former Vice President Biden, a leading contender to challenge the President in the 2020 election. Pet. App. 58a-59a. On January 27, Dershowitz gave an opening statement on the Senate floor on behalf of President Trump. *Id.* at 2a. He returned to the Senate floor two days later to respond to Senators' questions. *Ibid.* CNN aired the entirety of the trial, including Dershowitz's full statements, live. *Id.* at 59a.

During the session of January 29, Senator 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?" Pet. App. 2a. Dershowitz began by stating that yesterday he "had the privilege of attending the rolling-out of a peace plan" by President Trump for "the Israel-Palestine conflict." *Id.* at 13a. Positing a situation in which a president of the other party withheld money from Israel to stop "settlement growth" or from Palestine to "stop paying terrorists," he surmised that "[t]here is no one in this Chamber who would regard that as in any way unlawful." *Ibid.* He added "[t]he only thing that would make a quid pro

quo unlawful is if the quo were in some way illegal.”
Ibid.

Pivoting to the topic of motive, Dershowitz outlined three categories: “public interest,” “political interest,” and “financial interest.” Pet. App. 13a. He argued to the Senate that:

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

Id. at 13a-14a.

Continuing, Dershowitz stated that an offense would be impeachable only if committed “solely” based on “corrupt motives,” which he equated with a “personal pecuniary interest.” Pet. App. 15a. He accepted that a president would commit an impeachable offense if he demanded that a foreign leader “build a hotel with my name on it” and “give me a million-dollar kickback” in a “purely private interest.” *Ibid.* But he argued that no impeachable offense would occur in a “complex middle case” where a president thinks to himself: “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.” *Ibid.* (brackets omitted); see *id.* at 62a & n.6.

Critical coverage was immediate and fierce across multiple outlets. See Pet. App. 62a-63a & n.7. For example, the Washington Post reported that “Dershowitz argues that a president is immune if he views

his reelection as in the public interest.” *Id.* at 3a. The New York Times tweeted that Dershowitz “argued that anything a president does to get re-elected could be considered in the nation’s interest and is therefore not impeachable.” D. Ct. Doc. 271-137 at 45 (Dec. 12, 2022). Summarizing the widespread, shared reaction, Business Insider observed that “legal experts and critics of the president immediately took issue with Dershowitz’s argument which suggested the president’s defenders believe Trump can do anything he wants in service of his own political interests.” D. Ct. Doc. 271-158 at 5 (Dec. 12, 2022).

CNN commentators interpreted Dershowitz’s remarks similarly. Pet. App. 16a-18a. That night, for instance, Anderson Cooper remarked on his online show that Dershowitz’s defense would mean that politicians “can do essentially whatever they want in order to get elected because it’s somehow in the public interest.” *Id.* at 16a. His guest, former New Jersey Attorney General Anne Milgram, concurred that “Dershowitz is essentially saying it doesn’t matter what the quid pro quo is as long as you think you should be elected.” *Ibid.* And Paul Begala penned an online column criticizing “[t]he Dershowitz Doctrine [that] would make presidents immune from every criminal act, so long as they could plausibly claim they did it to boost their reelection effort.” *Id.* at 17a.

After Dershowitz complained on Twitter that various media outlets had misunderstood his legal arguments, CNN invited him on air twice to elaborate on what he meant. Pet. App. 5a. Dershowitz participated in interviews on January 30 and January 31 to defend and clarify his response to Senator Cruz’s question. *Id.* at 65a-66a. He was on air for 30 minutes.

2. Dershowitz admits to “slipp[ing] up” in his remarks on the Senate floor. D. Ct. Doc. 287-9 at 397:8. He said, for example, that a quid pro quo is unlawful only when the “quo” is unlawful, even though he meant to say “quid or quo.” *Id.* at 397:9-10. He also acknowledges that “[i]t’s difficult to get all the nuances” of his arguments and that “people misunderst[oo]d” what he intended to convey. *Id.* at 415:23, 487:23. Still, Dershowitz filed this defamation action accusing CNN of intentionally mischaracterizing his legal arguments. Pet. App. 5a.

After “full discovery, extensive briefing, and oral argument,” the district court granted summary judgment to CNN. Pet. App. 55a-78a. The court addressed only whether Dershowitz had evidence capable of proving actual malice and did not address CNN’s other bases for summary judgment. *Id.* at 66a. As the court observed, “[t]his 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.’” *Id.* at 67a.

3. The Eleventh Circuit unanimously affirmed the judgment. Pet. App. 1a-53a.

a. The court of appeals held that the district court had properly granted summary judgment to CNN. Pet. App. 1a-12a. One of Florida’s “five elements for a defamation claim” is “‘knowledge or reckless disregard as to the falsity on a matter concerning a public official.’” *Id.* at 6a (citation omitted). A reasonable jury could not find that element, which is required “as a matter of state law,” because Dershowitz “presented no evidence that CNN’s commentators or producers acted with actual malice.” *Id.* at 7a. CNN also “offered unrefuted evidence that its commentators believed in

the truth of their statements,” and Dershowitz’s own evidence of an internal conference call to discuss Dershowitz’s arguments on the Senate floor “tend[ed] to support CNN’s position that the relevant speakers believed in the truth of their reporting.” *Id.* at 7a-8a.

The court of appeals recognized that “Dershowitz contends that * * * CNN ‘omitted key portions of what [he] said to make it sound like he said the precise opposite.’” Pet. App. 9a-10a (brackets in original). Rejecting that factual premise, the court explained: “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.” *Id.* at 10a. The court thus rejected Dershowitz’s attempts to analogize to out-of-circuit decisions involving defendants who had “intentionally hid information that would have proved the challenged claims untrue.” *Ibid.* (factually distinguishing *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), and *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969)).

Because the lack of actual malice alone sufficed to affirm, the court of appeals did not address whether Dershowitz had evidence capable of proving the other four elements of defamation under Florida law, including falsity and defamatory content. Pet. App. 6a.

b. Judge Lagoa concurred separately to call for reconsideration of the actual-malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which she viewed as a departure from the First Amendment’s original meaning and founding-era concepts of natural law. Pet. App. 19a-37a.

c. In a concurrence responding to Judge Lagoa, Judge Wilson explained that calls to overrule *Sullivan* ignore the decision’s deep historical roots, discount

the decision's enduring role in protecting free speech and democratic self-determination, and threaten to destabilize First Amendment jurisprudence. Pet. App. 38a-53a.

REASONS FOR DENYING THE PETITION

Vehicle problems pervade the petition. Dershowitz urges this Court to ditch the actual-malice standard, while ignoring that Florida law independently requires proof of actual malice as an element of his defamation claim. Pet. App. 6a-7a. He argues that this Court erred in extending *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), from speech about public officials to speech about high-profile private citizens, but that argument is misplaced given his role as the President's agent in one of the gravest ceremonials of the Republic—a proceeding to remove the President. He complains about the requirement of proof by clear and convincing evidence, but that heightened standard had no effect on the outcome because Dershowitz had “no evidence” of actual malice. Pet. App. 7a (emphasis added). On top of all that, Dershowitz's claims target not provably false statements of fact, but opinions and interpretations that the First Amendment protects separately from *Sullivan*.

At any rate, the questions presented meet none of this Court's criteria for granting certiorari. This Court has repeatedly rejected invitations to overrule or modify the First Amendment's actual-malice standard. Dershowitz identifies no recent development that warrants a different result for his petition, much less a special justification for overruling a lengthy line of precedent. Each *stare decisis* factor supports standing by *Sullivan* and its progeny. There also is no reason to grant review when *Sullivan* was correctly decided in the first place, as text, history, and precedent all

confirm. And although Dershowitz leads with a supposed split over whether the systematic omission of qualifying language can prove actual malice, he could have spared everyone the trouble by acknowledging that the Eleventh Circuit expressly rejected the factual premise that CNN “intentionally hid information” and thus never decided the question that he now presents. Pet. App. 10a.

This Court should deny the petition.

I. This petition is a fundamentally flawed vehicle to consider overruling or modifying *New York Times v. Sullivan*.

Four defects impede consideration of the questions presented: (A) Dershowitz lost because actual malice is an element of defamation under Florida law, not merely a constitutional requirement; (B) he would not benefit from a rule excluding speech about private citizens from *Sullivan*; (C) he loses under any evidentiary standard because he had no evidence; and (D) his claims masquerade opinions and interpretations as statements of fact. Dershowitz cannot paper over these flaws.

A. Florida law independently requires proof of actual malice.

Dershowitz ignores a fatal—and glaring—vehicle problem that derails his challenge to the First Amendment’s actual-malice standard: No matter what, Dershowitz loses under Florida’s parallel actual-malice standard. This Court should not even contemplate whether to modify *Sullivan* when the claims “are independently subject to an actual-malice standard as a matter of state law.” *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring in denial of certiorari).

This should not come as news to Dershowitz. The Eleventh Circuit clearly explained that, after this Court held that the First Amendment requires public officials and figures to prove actual malice for defamation liability, “Florida has since implemented that same standard as a matter of state law.” Pet. App. 6a-7a (citing *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008)). Knowledge or reckless disregard of falsity therefore is one of the “five elements for a defamation claim” against a public figure under Florida law. *Id.* at 6a (citing *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018)). Yet Dershowitz does not mention this independent state-law ground even once. Pet. 1-30.

To the extent that Dershowitz plans to argue belatedly that the Florida Supreme Court adopted the actual-malice standard solely to comply with *Sullivan*, that argument would fail. Florida never had a strict-liability or negligence standard for defamation claims by public figures. Even before *Sullivan*, Florida followed the “generally accepted rule” that a qualified privilege protects statements about “‘public officials’ or ‘public men’” unless the defendant acts with “express malice,” such as a lack of “belief of the truth of the published charges.” *White v. Fletcher*, 90 So. 2d 129, 131 (Fla. 1956) (citation omitted); see, e.g., *Coogler v. Rhodes*, 21 So. 109, 112-113 (Fla. 1897) (requiring candidate for public office to prove “malice” in addition to falsity). Florida has since made actual malice an element of defamation for public officials and public figures. *Jews for Jesus*, 997 So. 2d at 1106.

Even if the Florida Supreme Court had adopted its actual-malice standard solely to comply with the First Amendment, overruling or modifying *Sullivan* could not prompt a reconsideration of Florida law in

this case, which is not on direct review from the Florida Supreme Court. Cf. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). The Eleventh Circuit on remand would have no power to redefine the “five elements for a defamation claim” under Florida law. Pet. App. 6a. Dershowitz is stuck with Florida law, “as declared by its highest court.” *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 80 (1938).

Because Dershowitz does not challenge the Eleventh Circuit’s application of Florida’s actual-malice standard, and because that state-law question in any event would not warrant this Court’s review, see Sup. Ct. R. 10(a), this Court should deny the petition.

B. Dershowitz would not benefit from a narrower definition of public figure.

Dershowitz’s contention (Pet. 19) that this Court should roll back the actual-malice standard for “private citizens who happen to achieve prominence” is not only foreclosed by Florida law, but also mismatched with the facts of this case. Because Dershowitz actively participated in a high-stakes governmental proceeding as the President’s agent, this case is an exceedingly poor vehicle to consider limiting First Amendment protection to speech about public officials.

Dershowitz argues (Pet. 19) that “*Sullivan* was motivated by a desire to protect public criticism of *official* conduct and actions of public officials.” True, at least in part. But that’s exactly what CNN commentators did in stating that President Trump’s legal arguments would allow presidents to engage in misconduct in aid of reelection. The “very subject matter” of the commentary—the impeachment trial—makes this case “one of particular First Amendment concern.”

Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 11 (1970). Because Dershowitz was the President's lawyer at his impeachment trial, the public could attribute his statements to the President and accordingly comment on them with the same First Amendment protections that would apply if President Trump himself had made the same arguments in the Senate. Cf. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962).

Dershowitz also complains (Pet. 20) about a supposed inability to “hold press conferences in government buildings or [to] command coverage through official channels.” But Dershowitz was not a hapless private citizen thrust into the public spotlight. CNN's challenged statements described Dershowitz's arguments while he represented the most public official (the President) in the most public forum imaginable (an impeachment trial on the Senate floor), as he commanded nationwide coverage. Pet. App. 2a-4a. After he complained about the coverage, “CNN allowed him to go on air *twice*” to explain his legal arguments on the President's behalf. *Id.* at 5a (emphasis added). And he even treated the filing of his petition in this Court as an opportunity to rotate the public spotlight back in his direction. See Liptak, *supra*. Dershowitz's legal arguments inhabit an alternate universe of facts.

Nothing supports Dershowitz's position that the First Amendment's protections for speech about public officials should vanish for speech about influential participants in governmental proceedings who advocate for the President to remain in his “unique position in the constitutional scheme as the only person who alone composes a branch of government.” *Trump v. United States*, 603 U.S. 593, 610 (2024) (citations omitted). If *Sullivan* applies anywhere, it applies here.

C. Dershowitz loses under any evidentiary standard because he had no evidence of actual malice.

This case also does not implicate Dershowitz's further fallback argument (Pet. 22-25) that this Court should require public figures to prove actual malice only by a preponderance of the evidence. The Eleventh Circuit correctly identified the applicable standard as whether a reasonable jury could find actual malice by "clear and convincing evidence." Pet. App. 6a (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986)). But the gap between the preponderance and clear-and-convincing standards made no difference because, as both the court of appeals and district court repeatedly stressed, Dershowitz "presented *no* evidence that CNN's commentators or producers acted with actual malice." *Id.* at 7a (emphasis added); accord *id.* at 2a, 9a-11a; *id.* at 67a-68a. Because a whole lot of nothing does not satisfy *any* standard, Dershowitz's complaints about the heightened evidentiary standard are wholly academic in this case.

D. Dershowitz targets protected opinions or interpretations of ambiguous remarks.

Even aside from those defects, this case is an unsuitable vehicle for exploring the constitutional protections for "false statements of fact" under *Sullivan*. Pet. 17. Dershowitz's claim, at bottom, is that CNN misinterpreted his arguments on the Senate floor, not that it misrepresented them. The challenged statements are protected opinions that cannot support a defamation claim under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1. (1990). Alternatively, Dershowitz asserts "errors of interpretation or judgment," which would impede this Court's ability to reconsider the

protections for “errors of historic fact.” *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

1. Florida law requires proof of a “false statement of fact.” *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983). Florida law does not punish—and the First Amendment in any event would protect—pure opinion statements. *Milkovich*, 497 U.S. at 20-21. While Dershowitz accepts (Pet. 28) this “distinction between opinion and fact,” he ignores that the statements he challenges are expressions of opinion that (he agrees) cannot be challenged irrespective of *Sullivan*.

One of Dershowitz’s main grievances (Pet. 2, 7, 10-11) is that CNN published online commentary facetiously referring to a “Dershowitz Doctrine” that would immunize presidents from impeachment. Pet. App. 17a. Dershowitz retorts that “there is no Dershowitz Doctrine.” Pet. 2 (quoting Pet. App. 71a). But even if Dershowitz finds such a rhetorical flourish unflattering to his public image, “loose, figurative, or hyperbolic” statements about what is or is not a doctrine imply no “assertion of objective fact” and are off-limits for defamation liability. *Milkovich*, 497 U.S. at 18, 21. “[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole”—a “vigorous epithet” rather than the official unveiling of a new doctrine. *Greenbelt*, 398 U.S. at 14.

Dershowitz also quibbles with the *implications* of his arguments, such as whether political interest would always negate a corrupt mind for impeachment proceedings in the case of bribery or extortion. Pet. 3, 10-11. Because the CNN commentators’ opinions were “based on facts which are set forth in the publication [and programs] or which are otherwise known or available to the reader or listener as a member of the

public,” they offered pure opinion statements based on disclosed facts—the publicly available video of Dershowitz’s remarks. *Turner*, 879 F.3d at 1262 (applying Florida law); accord, *e.g.*, *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1159 (9th Cir. 2021). There is no “provably false factual connotation” whatsoever. *Milkovich*, 497 U.S. at 20.

2. Even if the statements were not protected opinions, this case would remain a poor vehicle for reconsidering the protections for false statements of fact. CNN’s commentary at worst “reflect[ed] a misconception” of Dershowitz’s arguments, which “bristled with ambiguities,” *Pape*, 401 U.S. at 290 (1971), or as Dershowitz might say, “nuances,” D. Ct. Doc. 287-9 at 487:23. At most, this defamation action challenges “the adoption of one of a number of possible rational interpretations” of Dershowitz’s remarks, not the “errors of historic fact” at the heart of *Sullivan*. *Pape*, 401 U.S. at 290.

Dershowitz’s inability to make up his mind as to what “critical qualifications” CNN allegedly omitted (Pet. 2) highlights the many ambiguities in the positions that he took on the Senate floor. In his operative complaint, Dershowitz complained that CNN omitted the line: “the only thing that would make a quid pro quo unlawful is if the quo were somehow illegal.” D. Ct. Doc. 66 ¶ 8 (Dec. 31, 2021). In opposing summary judgment, he faulted CNN for not informing viewers that, two days earlier on the Senate floor, he had said “that a crime or crime-like conduct is necessary for impeachment.” D. Ct. Doc. 260-1 at 10 (Nov. 11, 2022). On appeal, he shifted back, suggesting that CNN’s commentary omitted his “opening caveat that ‘The only thing that would make a quid pro quo unlawful is if the quo were in some way illegal.’” Pet.

C.A. Br. 11; see *id.* at 25, 44-46. And in his petition, he launches the brand-new theory CNN commentators intentionally omitted his statement that a President could be impeached if his motive for a quid pro quo was “personal pecuniary interest” or “purely private interest.” Pet. 2 (quoting Pet. App. 3a, 15a).

The scattershot theories of falsity confirm that Dershowitz’s arguments, both in the Senate and in this Court, are hardly a model of clarity. His real complaint is that his legal arguments “were misinterpreted by pundits.” Pet. App. 11a. That simply is not an actionable defamation claim.

II. The Court should not revisit *Sullivan* in any event.

This Court has recently and repeatedly denied petitions seeking the overruling or narrowing of *Sullivan*.^{*} This petition should meet the same fate. No development has newly unsettled this Court’s precedent. Each pertinent *stare decisis* factor counsels against reconsidering the actual-malice standard. And the Court’s decisions were correctly decided in the first place.

^{*} *E.g.*, Pet. at 18-23, *Centerline Logistics Corp. v. Inlandboatmen’s Union of the Pacific*, 146 S. Ct. 118 (2025) (No. 24-1320); Pet. at 13-25, *Wynn v. Associated Press*, 145 S. Ct. 1434 (No. 24-829); Pet. at 17-31, *Blankenship*, *supra* (No. 22-1125); Pet. at 7-23, *Grayson v. No Labels, Inc.*, 143 S. Ct. 2514 (2023) (No. 22-906); Pet. at 10-26, *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*, 142 S. Ct. 2453 (2022) (No. 21-802); Pet. at 7-12, *Pace v. Baker-White*, 142 S. Ct. 433 (2021) (No. 21-394); Pet. at 14-30, *Konowicz v. Carr*, 142 S. Ct. 86 (2021) (No. 20-1588); Pet. at 14-31, *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (No. 20-1063).

A. *Sullivan* is a cornerstone of free speech and democracy that ensures adequate recourse for defamation plaintiffs.

Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Gamble v. United States*, 587 U.S. 678, 691 (2019) (citation omitted). So “even in constitutional cases, a departure from precedent ‘demands special justification.’” *Ibid.* (citation omitted). Dershowitz not only lacks any special justification but also gives short shrift to the factors that powerfully support adhering to *Sullivan*.

1. Dershowitz cannot argue that developments since *Sullivan* have “‘eroded’ the decision’s ‘underpinnings’ and left it an outlier among [this Court’s] First Amendment cases.” *Janus v. State, County, and Municipal Employees*, 585 U.S. 878, 924 (2018) (citation omitted). Quite the contrary: Decision after decision has fortified the actual-malice standard as an indispensable protection against theories of defamation that risk censorship and chilling of protected speech. *E.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-773 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508-509 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-341 (1974); *Greenbelt*, 398 U.S. at 10-12; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

Sullivan also has served as a landmark that has guided this Court’s application of the First Amendment across a wide variety of contexts. When parties have

tried to silence criticism through other tort theories, the Court did not “blind[ly] appl[y]” *Sullivan* but instead made the “considered judgment” that the actual-malice standard was a true guide to ensuring “adequate ‘breathing space’ to the freedoms protected by the First Amendment.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); see, e.g., *Chiles v. Salazar*, 146 S. Ct. 1010, 1028 (2026) (reiterating that tort law must “provide sufficient breathing room for protected speech” (citation omitted)); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (relying on *Sullivan* and *Hustler* in holding that the First Amendment barred three state-law tort claims). When parties have tried to override editorial discretion on what speech sees the light of day, *Sullivan* taught that “[g]overnment-enforced right of access inescapably ‘dampens the vigor and limits the variety of public debate,’” *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (quoting *Sullivan*, 376 U.S. at 279), giving birth to a line of cases that this Court last revisited in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (relying on *Tornillo*). And when parties have asked for fine line-drawing that creates a “serious risk of chilling protected speech,” *Sullivan* stood as a continued reminder that “First Amendment standards * * * ‘must give the benefit of any doubt to protecting rather than stifling speech.’” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 327 (2010) (citation omitted).

Just three years ago, this Court unequivocally endorsed the rules laid down by *Sullivan* in *Counterman v. Colorado*, 600 U.S. 66 (2023). That case presented the same question for true threats that *Sullivan* answered six decades ago for defamation: whether the First Amendment requires proof that a person had a culpable intent as to the speech’s unprotected nature. Now, as then, prohibitions chill “speech outside their

boundaries” because people do not wish to test “the side of a line on which [their] speech falls” or bear “the expense of becoming entangled in the legal system,” resulting in “‘self-censorship’ of speech that could not be proscribed.” *Id.* at 75 (quoting *Gertz*, 418 U.S. at 340). The Court observed that *Sullivan* mitigates those “uncertainties and expense of litigation” by requiring “a subjective mental-state requirement”—at least “reckless disregard” of a statement’s falsity. *Id.* at 76 (quoting *Sullivan*, 376 U.S. at 280). And the Court chose to continue rather than scrap the project, adopting the same recklessness standard for true threats that has long protected speech in “*Sullivan*-type cases.” *Id.* at 81.

Dershowitz does not engage with the disruptive effect of overruling or modifying *Sullivan*, which is a bedrock precedent for multiple lines of First Amendment decisions. This Court and the other federal courts have cited *Sullivan* thousands of times. And a decision overruling *Sullivan* would itself be a marked outlier unless this Court also were to topple the mass of decisions that sit atop *Sullivan*. Because Dershowitz offers no limiting principle, overruling *Sullivan* could destabilize the Court’s entire body of First Amendment precedents.

2. Dershowitz also does not address the weighty reliance interests that would be upended by a retreat from the actual-malice standard. *Janus*, 585 U.S. at 926. For more than half a century, *Sullivan* has guaranteed the “breathing space” that has made this Nation’s tradition of free speech the envy of the rest of the world. 376 U.S. at 272. The public as a whole would suffer without a First Amendment rule that “eliminate[s] the risk of undue self-censorship and the suppression of truthful material” that inevitably occurs

when liability can exist without “some degree of culpability.” *Herbert v. Lando*, 441 U.S. 153, 172 (1979). People will bite their tongues to avoid being dragged before the “Ministry of Truth,” even when they do not believe their statements to be false. *United States v. Alvarez*, 567 U.S. 709, 723 (2012); accord *id.* at 751-752 (Alito, J., dissenting) (noting “that it is perilous to permit the state to be the arbiter of truth” without protections, including the actual-malice standard).

By ensuring breathing space for speech, *Sullivan* has served as a backbone of American democracy. *Garrison*, 379 U.S. at 74-75. The First Amendment’s “most important role is protection of robust and uninhibited debate on important political and social issues.” *National Review, Inc. v. Mann*, 589 U.S. 1088, 1091 (2019) (Alito, J., dissenting from denial of certiorari) (citing *Sullivan*, 376 U.S. at 270). But “[i]f citizens cannot speak freely and without fear about the most important issues of the day, real self-government is not possible.” *Ibid.* This Court has deemed the actual-malice standard to be “necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989). Dershowitz provides no reason for this Court to revisit that longstanding determination.

Overruling *Sullivan* also would subvert Congress’s expectations. Enacted in 2010, the SPEECH Act prevents U.S. courts from enforcing foreign judgments unless “the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the [F]irst [A]mendment” or the party opposing liability at least “would have been found liable for defamation by a domestic court apply-

ing the [F]irst [A]mendment.” 28 U.S.C. § 4102(a)(1). That provision effectively codified *Sullivan* and its progeny as a defense to foreign liability. But Dershowitz would reopen the door to foreign governments restricting what American citizens can say through libel law.

Dershowitz denigrates the First Amendment’s timeless protection for speech and self-government in lamenting (Pet. 18-19) changes in the “media landscape,” such as the rise of “bloggers and Twitter feeds” that operate without fact-checkers. But this case involves a cable news organization, not a blog or social media. The principal protections for online speech platforms also are statutory, not constitutional. 47 U.S.C. § 230. And if anything, modern media, including cable news and social media, makes it vastly *easier* for public figures to respond quickly to perceived falsehoods, as Dershowitz did here. Pet. App. 5a, 65a-66a.

Dershowitz’s objection is misdirected anyway. The First Amendment “does not protect the right of some to speak freely; it protects the right of all.” *Chiles*, 146 S. Ct. at 1024. The Court thus made clear shortly after *Sullivan* that the actual-malice standard protects the public’s (not just the press’s) right to criticize public officials, the better to serve the “paramount public interest in a free flow of information to the people concerning public officials.” *Garrison*, 379 U.S. at 77. Because this Court never understood the right to free speech as a license subject to revocation based on a judicial re-appraisal of fact-checking practices, Dershowitz’s “criticisms fail to take [*Sullivan*] on its own terms.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 271 (2014).

3. Dershowitz hardly contests the “workability” of *Sullivan*. *Janus*, 585 U.S. at 921. Aside from testing

the waters with a shallow, illusory circuit split, see pp. 32-34, *infra*, he does not argue that the actual-malice standard has eluded consistent application in the lower courts. His only argument (Pet. 17) is that *Sullivan* has worked too well: that it has “erected a near-insurmountable barrier” to recovery in defamation actions.

That hyperbole is unsupported—and unsupportable. One need only look at the many verdicts or settlements that public officials and other public figures have secured on defamation claims. *E.g.*, *Carroll v. Trump*, 124 F.4th 140, 153-154 (2d Cir. 2024); *Depp v. Heard*, 2022 WL 2342058, at *1 (Va. Cir. Ct. June 24, 2022); *Van Liew v. Eliopoulos*, 84 N.E.3d 898, 909-913 (Mass. App. Ct. 2017); *Eramo v. Rolling Stone LLC*, 2016 WL 6649832, at *1 (W.D. Va. Nov. 7, 2016); see also, *e.g.*, Peltz, *Pop Star Kesha and Producer Dr. Luke Settle Longstanding Legal Battle over Rape, Defamation Claims*, Associated Press (June 22, 2023), perma.cc/PHJ7-HGEA; Bauder, Chase, and Mulvihill, *Fox, Dominion Reach \$787M Settlement over Election Claims*, Associated Press (Apr. 18, 2023), perma.cc/2WZK-3JM5. Empirical research also finds no cause-and-effect relationship between the actual-malice standard and the decrease in the number of trials, which have fallen off for all kinds of civil cases. See Norwick, *The Empirical Reality of Contemporary Libel Litigation*, Media Law Resource Center (Mar. 2022), perma.cc/9YMV-67B4.

In short, defamation litigation is alive and well. Overruling *Sullivan* would fracture the current equilibrium and usher in a much less speech-protective era across the Nation.

B. *Sullivan* was correctly decided.

Even if there were a special justification to reconsider *Sullivan*, that reconsideration would lead nowhere new. Dershowitz protests that “*Sullivan* and its progeny are policy-driven decisions dressed up as constitutional law.” Pet. 12 (citation omitted). But as Judge Wilson explained, Dershowitz is the one who makes “a policy argument couched in history” of the law-office sort. Pet. App. 43a. His attacks on the actual-malice standard, its application to public figures, and the clear-and-convincing-evidence standard pay insufficient regard to text, history, and precedent.

1. The actual-malice standard properly polices the boundary of an exception to the prohibition on “abridging the freedom of speech.” U.S. Const. Amend. I. Any attempt to punish the content of speech is “presumptively invalid” outside of a “few limited areas” of historically unprotected speech. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). One such category is defamation. *Ibid.* Even so, the label of defamation “can claim no talismanic immunity from constitutional limitations.” *Sullivan*, 376 U.S. at 269.

Dershowitz gets off on the wrong foot by overlooking that the Framers did not usher English libel law back into America right after fighting a Revolution to banish it. Pet. App. 45a (Wilson, J., concurring). The First Amendment was a “response to the repression of speech and the press that had existed in England.” *Citizens United*, 558 U.S. at 353. And from the start, the “friction” between English common law and the “highly cherished right of free speech” has shaped libel law. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967) (citation omitted) (opinion of Harlan, J.).

That friction produced the actual-malice standard, which has a deep “common-law heritage.” *Bose Corp.*, 466 U.S. at 502; see *Sullivan*, 376 U.S. at 280-282 (citing *Coleman v. MacLennan*, 98 P. 281, 285-286 (Kan. 1908)). By the time the constitutional issue reached this Court in *Sullivan*, state courts in every corner of the country had adopted actual-malice protections in the process of reconciling English libel law with free-speech rights. 376 U.S. at 280 n.20 (citing decisions from Arizona, California, Kansas, Iowa, Michigan, Minnesota, New Hampshire, North Carolina, South Dakota, and West Virginia). *Sullivan* was a continuation of—not a “sharp and unexplained break with”—“a century and a half” of defamation law. Pet. 16; see *Sullivan*, 376 U.S. at 280 n.20 (citing Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346, 367-371 (1889)).

Early on, this Court articulated a qualified privilege for statements about public officials—there, a letter to the President impugning a customs collector’s conduct—that required “proof of malice” for defamation liability. *White v. Nicholls*, 44 U.S. (3 How.) 266, 291 (1845). A privileged statement was “not to be deemed malicious unless found to be false, as well as without probable cause” to support the defendant’s belief in its truth. *Nalle v. Oyster*, 230 U.S. 165, 182 (1913) (citing *White*, 44 U.S. (3 How.) at 290). And the Court has since equated the probable-cause standard from *White* with the actual-malice standard from *Sullivan*. *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

Operating under state constitutional guarantees of free speech, state courts likewise held that privileged statements were immune from defamation claims absent malice, defined in line with *Sullivan* as “the belief of the defendant in the truth of his statement.”

Herbert, 441 U.S. at 164. An early example is *State v. Burnham*, 9 N.H. 34 (1837), which held that a defendant could not be punished for defaming a public officer if he spoke “upon reasons which were apparently good, but upon a supposition which turns out to be unfounded.” *Id.* at 43. Several courts embraced this privilege. Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81, 121-125 (2021); see, e.g., *Smith v. Higgins*, 82 Mass. 251, 252-253 (1860) (requiring tax assessors to “offe[r] proof of actual malice” for false statements about maladministration). Even Dershowitz concedes (Pet. 20) the existence of this “common law privilege.” In view of that concession, his criticism (Pet. 17) of *Sullivan* as “[u]nmoored from history” is puzzling.

Conversely, other States focused on “the ill will which the defendant might have borne toward the plaintiff.” *Herbert*, 441 U.S. at 164. Dershowitz himself (Pet. 15) points to *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804), where Alexander Hamilton argued (and Justice Kent agreed) that a conviction for defaming President Jefferson could not be upheld under English libel law but that “the freedom of press” tolerated punishment of a “*false and malicious* writing, published *with intent* to defame.” *Id.* at 393. This Court has rejected the “ill-will” standard under the First Amendment. *Garrison*, 379 U.S. at 72. But despite some variation, decisions like *Croswell* further burnish the historical pedigree of rules conditioning liability for false speech about public officials on a heightened mental state.

In requiring proof of a heightened mental state, this Court aligned its approach to defamation with precedent on other categories of unprotected speech. *Sullivan* observed that the First Amendment protects

the purveyor of obscenity absent “proof of guilty knowledge” of the material’s character. 376 U.S. at 278 (citing *Smith v. California*, 361 U.S. 147, 153-154 (1959)). Speech advocating illegal acts also is unprotected incitement only if the speaker “intended” to produce imminent disorder. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam). And after surveying these decisions, the Court recently held that punishment for a true threat requires proof that the speaker recklessly disregarded the risk that others would be threatened. *Counterman*, 600 U.S. at 78-80.

Those decisions confirm that *Sullivan* is no aberration. The actual-malice standard is the “kind of ‘strategic protection’” that “features in [the Court’s] precedent concerning the most prominent categories of historically unprotected speech.” *Counterman*, 600 U.S. at 75 (quoting *Gertz*, 418 U.S. at 342). There is no sound reason why the Constitution would demand a subjective-intent element for obscenity, incitement, and threats but leave allegedly inaccurate statements about public officials uniquely exposed to civil and criminal liability. Cf. *id.* at 80 (refusing to “offer greater insulation to threats than to defamation”).

2. This Court’s numerous decisions applying the actual-malice standard to speech about public figures also were correctly decided. The “robust political debate encouraged by the First Amendment” has always “produce[d] speech that is critical of those who hold public office or those public figures who are ‘intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’” *Hustler*, 485 U.S. at 51 (quoting *Curtis Publishing*, 388 U.S. at 164 (Warren, C.J., concurring in result)). Those words are as true today as when Chief Justice Rehnquist, joined

by Justice Scalia, wrote them for the Court four decades ago, echoing what Chief Justice Warren said two decades before him.

Dershowitz challenges (Pet. 19-22) this settled understanding of the First Amendment with an incomplete historical account. From the Founding, people have exercised the “prerogative of American citizenship * * * to criticize public men and measures.” *Hustler*, 485 U.S. at 51; see *id.* at 53-55 (discussing political cartoons). That prerogative produced early decisions applying the common-law privilege to speech about “matters of public concern” and “public men.” *Sullivan*, 376 U.S. at 281-282 (quoting *Coleman*, 28 P. at 285); see, e.g., *Press Co. v. Stewart*, 14 A. 51, 53 (Pa. 1888) (schoolmaster); *Crane v. Walters*, 10 F. 619, 620 (C.C.D. Mass. 1882) (railroad tycoon); *O’Donaghue v. McGovern*, 23 Wend. 26, 33 (N.Y. Sup. 1840) (priest). Florida was no exception in requiring proof of “express malice” for false speech about “public men” in addition to “public officials.” *White*, 90 So. 2d at 131 (citation omitted). This Court does not “flatly overrule a number of major decisions” based on “ambiguous historical evidence.” *Gamble*, 587 U.S. at 691 (citation omitted).

3. Dershowitz’s challenges (Pet. 22-25) to the burden of proof are no worthier of this Court’s review.

He first contends (Pet. 23-24) that defendants should bear the burden of negating the existence of actual malice. But when the common-law privilege applied, courts “changed” the burden and “impose[d] it on the plaintiff * * * to bring home to the defendant the existence of malice as the true motive of his conduct.” *White*, 44 U.S. (3 How.) at 291; see, e.g., *Shurtleff v. Stevens*, 51 Vt. 501, 519 (1879).

Dershowitz next argues (Pet. 24-25) that this Court erred in requiring a plaintiff to prove actual malice with “convincing clarity.” *Sullivan*, 376 U.S. at 285-286. The choice of the standard of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). Because a mistaken finding of actual malice not only punishes the defendant for constitutionally protected speech but also deters others who are yet to speak, a “heightened” evidentiary standard “helps ‘prevent persons from being discouraged in the full and free exercise of their First Amendment rights.’” *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017) (Kavanaugh, J.) (citation omitted). *Sullivan* thus belongs to an established tradition of applying “a heightened standard of proof when the Constitution requires one.” *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 50 (2025) (citing *Sullivan*, 376 U.S. at 285-286); see, e.g., *Addington*, 441 U.S. at 425-427. Dershowitz offers no justification for this Court to revisit its established framework for determining appropriate standards of proof.

* * *

Even Dershowitz admits that his direct assault on *Sullivan* is a “tactical position” by a litigant whose heart still belongs to the even more speech-protective view of a *Sullivan* concurrence. Liptak, *supra*; see *Sullivan*, 376 U.S. at 298-299 (Goldberg, J., concurring in result). He supports his backup positions that this Court should eliminate protection for speech about public figures or change the burden of proof with at most “middling” historical evidence that falls far short of the clear-cut basis necessary to reconsider settled precedent. *Gamble*, 587 U.S. at 691. *Sullivan*

and its follow-on cases honor text, history, and precedent far better than Dershowitz's alternative rules do.

III. The decision below did not create any conflict as to the application of the actual-malice standard.

The circuit split that Dershowitz posits (Pet. 6-10) as to whether omissions that distort a statement's meaning can prove actual malice is nonexistent. All agree that a "deliberate alteration" that "results in a material change in the meaning conveyed by [the plaintiff's] statement" may "equate with knowledge of falsity." *Masson*, 501 U.S. at 517. Dershowitz manufactures the illusion of a conflict only by ignoring the Eleventh Circuit's case-dispositive holding that CNN in fact did not deliberately alter anything.

Dershowitz surveys (Pet. 8-9) a trickle of decisions over decades that upheld jury verdicts or allowed cases to go to trial when a defendant altered the plaintiff's statement or hid important context from the listener. In *Goldwater v. Ginzberg*, 414 F.2d 324 (2d Cir. 1969), the defendants concocted a "preconceived plan" to paint Senator Goldwater as clinically paranoid during his presidential run, fabricated sources, and even published a sham poll of psychiatrists. *Id.* at 331-334, 339-340. And in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), the defendant reported that the plaintiff had mafia connections based on an FBI memo while disregarding the memo's "exculpatory" disclaimer that no evidence suggested that the plaintiff had done anything criminal or had any ties to organized crime. *Id.* at 1074-1075, 1091; see also *Block v. Tanenhaus*, 867 F.3d 585, 591 (5th Cir. 2017) (defendant altered quote to state that plaintiff "considered chattel slavery to be 'not so bad'"); *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 892

(9th Cir. 2016) (defendant altered photograph caption to imply that plaintiff had tested positive for HIV).

Dershowitz then offers the flimsiest account of a conflict with those cases. He does not cite any judicial decisions or commentary recognizing entrenched disagreement on the role of deliberate omissions of exculpatory information in analyzing actual malice. He does not argue that the Eleventh Circuit adhered to a longstanding outlier position below. He does not even argue that any conflict preexisted this dispute. Instead, he stakes (Pet. 9-10) everything on the theory that the Eleventh Circuit created a *new* rift in this case.

Dershowitz’s description of the decision below does not withstand scrutiny. He contends that the Eleventh Circuit deemed it “insufficient to establish actual malice” that “CNN omitted key portions of what [he] said to make it sound like said he said the precise opposite.” Pet. 4 (quoting Pet. App. 10a) (some quotation marks omitted). Given Dershowitz’s professed concerns about doctored statements and distorted context, the irony is that the Eleventh Circuit held the precise opposite in its next sentence *rejecting* Dershowitz’s contention that CNN omitted portions of his statements: “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.” Pet. App. 10a.

The supposed conflict evaporates without the factual predicate of “systematic omission of qualifying and limiting language.” Pet. i. The Eleventh Circuit explained why Dershowitz had misplaced his reliance on factually off-point cases like *Goldwater* and *Schiavone*. Pet. App. 9a-10a. Dershowitz also never justifies why this Court should review the Eleventh Circuit’s

factbound determination that there was “no evidence here that [CNN] intentionally hid information that would have proved the challenged claims untrue.” *Id.* at 10a. Just as this Court does “not ‘lightly overturn’ the concurrent findings of the two lower courts,” *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (citation omitted), the Court should not grant review of the concurrent determinations of the courts below that actual malice was not a triable issue on this particular record.

When the circuits on Dershowitz’s side of the “split” have confronted cases like this one in which the plaintiff has no evidence that the defendant doubted the truth of its statements, they have done just what the Eleventh Circuit did here: affirm grants of summary judgment to the defendant. *E.g.*, *Dongguk University v. Yale University*, 734 F.3d 113, 126-127 (2d Cir. 2013); *Tucker v. Fischbein*, 237 F.3d 275, 286-287 (3d Cir. 2001) (Alito, J.); *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1060 (9th Cir. 1998); *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978). Different facts led to different outcomes—not to a circuit split on any important legal issue that this Court should decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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