No. 25-770

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 Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Treatises

ARGUMENT IN REPLY

CNN's brief in opposition does not and cannot dispute two findings below: that Professor Alan Dershowitz never said a President could commit bribery or extortion without consequence, and that CNN's commentators falsely told millions of viewers that he had. Judge Lagoa found that CNN had "defamed" Petitioner "under any common understanding of that term[,]" and concluded that "the only thing standing between Dershowitz and justice" was not Florida law, but *Sullivan* itself. Pet.App.19a. She emphasized that CNN "simply lied about what Dershowitz had said." *Id.* The District Court examined the full record and concluded that Dershowitz "said nothing of the kind" attributed to him. Pet.App.71a. Those conclusions reflect a broader pattern in which courts acknowledge defamation, yet find themselves bound by *Sullivan* and its progeny to rule in favor of those who lied. CNN's response is a series of false vehicle objections that demonstrate precisely why this Court should intervene.

I. CNN'S VEHICLE OBJECTIONS CONFIRM THE NEED FOR THIS COURT'S REVIEW.

First, **Professor Dershowitz is not a public official.** CNN's most ambitious argument is that Dershowitz, having represented President Trump, occupied a quasi-governmental role. On the contrary, Dershowitz was a private attorney arguing a constitutional position. He wielded no governmental power, enjoyed no governmental immunity, possessed no privileges, performed no traditional governmental functions, and could command no government resources to respond. In *Gertz v. Robert Welch, Inc.*,

this Court rejected an argument that an individual's "appearance at the coroner's inquest rendered him a 'de facto public official.' Our cases recognize no such concept." 418 U.S. 323, 351 (1974). "Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition." *Id.* The same applies here. The constitutional rule cannot be that some lawyers get more legal protections than others, depending on the public office of their client.

CNN's argument conflates two distinct propositions. The first is that the public may attribute an attorney's legal arguments to his client. That proposition is uncontroversial. The second proposition, smuggled in without justification, is that an attorney with a public figure client *himself* thereby loses his status as a private citizen for defamation purposes. These are entirely separate questions. Public officials possess "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Dershowitz has no such responsibility or control.

CNN invokes *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). But *Link* simply recognized that a client is bound by the litigation conduct of his attorney. It says nothing about whether an attorney, by representing a government official, becomes a public official for First Amendment defamation purposes. If defending the President's constitutional rights in an impeachment trial subjects an attorney's defamation claims to the same standard as the President's, then the rule applies to every lawyer who

represents a government official, every consultant a public official retains, and ultimately anyone who contracts with a government official. CNN offers no principled stopping point. The entire *Gertz* framework, based on protections of speech about "the official conduct of a government officer[,]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 298 (1964) (Goldberg, J., concurring), collapses.

Public officials receive reduced defamation protection under *Sullivan* because they possess corresponding advantages: governmental resources, official press offices, the presumptive authority of their office, and qualified immunity. Dershowitz had none of these. He was a private attorney retained only for a specific proceeding, representing his client in a personal capacity.[1] In *Hutchinson v. Proxmire*, 443 U.S. 111, 133–36 (1979), this Court confirmed that proximity to government does not confer public figure status, holding that a scientist who received federal grants and worked with government agencies was nonetheless a private figure. A privately retained attorney with no governmental authority, compensation, or accountability stands outside the *Sullivan* rule.

CNN's argument would impose the burdens of public official status, plus near-insurmountable proof requirements, without the corresponding benefits.

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1 For example, his client from that impeachment proceeding is not paying Dershowitz's fees and costs in this present defamation case, nor did the government pay for legal fees in the original representation. The absence of any ongoing financial relationship confirms Dershowitz retained the status of a private citizen, not a government agent.

CNN emphasizes the importance of the subject matter, an impeachment trial. But the public's intense interest in what Dershowitz argued makes accurate reporting of his words crucial.

Second, **Florida law is no independent barrier here.** CNN never argued below that the courts should not reach *Sullivan* in light of Florida law; indeed, the courts below ruled on *federal constitutional* law grounds, not state law. As Judge Lagoa put it, "the only thing standing between Dershowitz and justice" was *Sullivan*. Pet.App.19a. Furthermore, to the extent Florida embraces *Sullivan*, it is under compulsion from *Sullivan*. *See Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239, 240 (Fla. 1984) ("Prior to *New York Times* in 1964, Florida common law governed all defamation actions[.]"); *see also Mastandrea v. Snow*, 333 So. 3d 326, 328 (Fla. Dist. Ct. App. 2022) (Thomas, J., concurring) ("I concur because I am bound by the decision of *New York Times v. Sullivan*."); *Alexander v. Trump*, 404 So. 3d 425, 435 (Fla. Dist. Ct. App. 2025) (Artau, J., concurring) ("[U]nless and until the Supreme Court overturns *New York Times Co. v. Sullivan*, the actual malice standard, . . . must apply.").

Review is warranted where the state court "'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.'" *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). Even if this case turned on state law—which it did not—that rule would apply here.

While a pre-*Sullivan* qualified privilege did exist in Florida law, it was qualitatively different. CNN's cited authority—*White v. Fletcher*, 90 So. 2d 129 (Fla. 1956)—required a different element: "express malice." *See Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984) ("[T]he 'actual malice' necessary to overcome the 'constitutional privilege' of *New York Times Co. v. Sullivan* is different from the express malice necessary to avoid the common-law qualified privilege."). It existed "long before the creation of the remedy fashioned in *New York Times v. Sullivan*." *Id.* at 810. It was an objective test that protected specifically "fair comment" on the conduct of "public officials" and "public men." *White*, 90 So. 2d at 131. Unlike *Sullivan*'s clear and convincing standard, "[t]he plaintiff need only show this fact by a preponderance of the evidence, the ordinary standard of proof in civil cases." *Nodar*, 462 So. 2d at 806–07. Florida's pre-*Sullivan* common law is not the standard Florida courts apply today under *Sullivan*'s compulsion.

In contrast, in *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring in denial of certiorari), a West Virginia decision genuinely developed a standard like *Sullivan*. *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 565 (W. Va. 1996). CNN cannot point to a Florida equivalent. On the contrary, Florida courts have expressly emphasized the distinction between *Sullivan* and their common law tradition.

The question whether Florida courts would apply a different, lesser standard absent *Sullivan* was never addressed below. Moreover, if the compulsion of a

state to follow federal precedents immunized rulings implementing that federal precedent, the validity of *Sullivan* could never be reached, as every state has had no choice but to follow it under the Supremacy Clause. CNN's Florida law argument cannot be limited to this case. Under its logic, this Court could never reconsider its precedents, because state court decisions would always be compelled to conform to those same Supreme Court precedents.

Third, **CNN is wrong that Dershowitz presented "no evidence" of actual malice.** BIO 2, 3, 4, 16. CNN's argument begs the first Question Presented: whether a defendant's systematic *omission* of qualifying language from a recorded statement *can constitute evidence* of actual malice. If it can—as the Second, Third, Fifth, and Ninth Circuits have held—then Dershowitz had substantial evidence, not just of omission but of misrepresentation:

- **CNN possessed the complete video and transcript** of Dershowitz's Senate floor statement from the outset. Pet.App.10a.
- **The crucial qualifying language omitted was unambiguous.** Dershowitz expressly stated that conduct motivated by "personal pecuniary interest"—including bribery and extortion—would remain impeachable. Pet.App.15a. The omission of this caveat did not merely truncate his position; it inverted it.
- **Paul Begala** declared that under the invented "Dershowitz Doctrine," "[c]ampaign finance laws: out the window. Bribery statutes: gone. Extortion: no more." Pet.App.17a. In his deposition, Begala

himself admitted Dershowitz "didn't say anything like that[.]" Pet.App.76a.

- **John Berman's on-air statement** claimed Dershowitz said "a President is running for re-election because he thinks getting elected will help America, he can do anything, anything." Pet.App.17a–18a. Berman's internal email to his producer carried the subject line "Dersh-o-nuts . . . need this for all panels." Pet.App.75a.
- **Anne Milgram** declared that Dershowitz said "it doesn't matter what the quid pro quo is as long as you think you should be elected," directly erasing the personal-pecuniary-interest exclusion Professor Dershowitz had articulated. Pet.App.16a.
- **CNN President Jeff Zucker,** within hours of Dershowitz's statement, convened a call for producers, executives, and news gatherers with the message: "Trump legal team making argument that a President is King & can do whatever he wants." Pet.App.8a.

The District Court found that the record "establish[ed] foolishness, apathy, and an inability to string together a series of common legal principles." Pet.App.67a. And it found that Dershowitz "said nothing of the kind" attributed to him—not that his statement was ambiguous or subject to competing interpretations. Pet.App.71a. Nonetheless, the District Court concluded that "*Sullivan* and its progeny allows the news media to ignore a fuller

context," Pet.App.72a, and denies juries the authority to consider these findings as evidence of malice.[2]

Credibility determinations, the weighing of evidence, and the drawing of inferences from those facts are jury functions under the Seventh Amendment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The District Court substituted its own judgment for the jury's. The Eleventh Circuit affirmed that substitution.

Whether systematic mischaracterization of a verifiable public statement *can* ever constitute reckless disregard is a legal question on which the court below erred (and conflicted with other circuits, *see infra*). Whether CNN *in fact* engaged in such mischaracterization is quintessentially a jury question. CNN possessed Dershowitz's complete statement. Yet it attributed to him a position—that bribery and extortion are not impeachable—that he had expressly disclaimed. It did so uniformly, and in coordination. A jury was entitled to weigh those facts, evaluate the credibility of CNN's commentators' professions of good faith, and determine whether the pattern of conduct reflected reckless disregard for truth.

Fourth, **the challenged statements are not protected opinion** under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). BIO 16–18. This

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2 Moreover, under *Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974), CNN had no duty to give Dershowitz the chance to correct the coverage. And CNN giving him that opportunity does not undo defamation under Florida law. *See, e.g.*, *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950).

argument was not addressed below. And the District Court's findings foreclose this defense. *Milkovich* protects evaluative judgment and opinion. It does not protect factually false attribution of a specific position to a named individual: CNN "simply lied about what Dershowitz had said." Pet.App.19a.

CNN's commentators attributed to him specific propositions he did not utter. That is attribution, not characterization. A claim that a named person argued a specific legal position, when the tape of that person proves he argued the opposite, has "a provably false factual connotation[.]" *Milkovich*, 497 U.S. at 20. Wrapping a false factual assertion in "analysis" does not strip it of its factual character. The District Court found that Dershowitz "said nothing of the kind[]" attributed to him. That is, the statements were factually false. Pet.App.71a.

For example, Dershowitz stated that a President who demands a foreign leader "build a hotel with my name on it" and "give me a million-dollar kickback[]" acts from "purely private interest[]" and commits an impeachable offense. Pet.App.93a. Yet CNN's commentators told their audience the precise opposite—that under the "Dershowitz Doctrine," bribery statutes were "gone." Pet.App.95a. CNN's commentators attributed to him a specific factual position that he had expressly rejected.

II. THE CIRCUIT SPLIT IS REAL.

CNN contends there is no circuit split because the Eleventh Circuit rejected the premise that CNN "intentionally hid information." But that conclusion was not a factual determination but a *legal* holding that omission of vital caveats from, and

misrepresentation of, a person's communication is categorically insufficient for malice—directly contrary to *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969); *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988); *Block v. Tanenhaus*, 867 F.3d 585 (5th Cir. 2017); and *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881 (9th Cir. 2016).

The Eleventh Circuit did *not* find that CNN's commentators had no knowledge of the qualifying language. CNN aired the complete statement. Its commentators watched it. The court concluded that this sequence was categorically insufficient to establish actual malice because CNN's commentators *testified* they believed their characterizations accurate. Pet.App.7a–8a, 10a. That is a legal holding.

The rule the Eleventh Circuit applied—that a defendant's subjective testimony of belief defeats actual malice as a matter of law, regardless of the objective circumstantial record—is precisely the rule the Second, Third, Fifth, and Ninth Circuits have rejected. As discussed in the petition, those circuits have held that a defendant who possesses exculpatory information and systematically omits it may face a jury finding of malice, notwithstanding protestations of good faith. The conflict is between legal rules, not factual records.

CNN's argument reduces to this: because it broadcast Dershowitz's complete statement live, it cannot have "intentionally hid information" within the meaning of *Goldwater, Schiavone, Block, and Manzari*. This is wrong as a matter of both logic and law. The omission CNN's commentators made was not in the original broadcast of the Senate hearing. It

was in their subsequent commentary—the analysis, the column, the on-air interpretation that told viewers what Dershowitz supposedly had argued.

The conflict is not about whether "no evidence" cases result in summary judgment—of course they do. The conflict is about whether omission of crucial qualifying language can constitute evidence of actual malice that must go to a jury. The Second, Third, Fifth, and Ninth Circuits say yes. The Eleventh Circuit said no. That conflict is real and it calls for this Court's resolution.

III. THIS COURT SHOULD RECONSIDER *SULLIVAN*.

CNN's defense of *Sullivan*—that it reflects a "continuation" of common law privilege development rather than a "sharp and unexplained break" with it—does not work. BIO 27.

CNN argues that because some pre-*Sullivan* state courts recognized privileges for criticism of public officials, *Sullivan* was a natural constitutional codification of existing doctrine. BIO 26–28. But there is a categorical difference between a common law privilege—which a legislature may modify, which courts may develop, and which varies by jurisdiction—and a constitutional rule that displaces state law nationwide and cannot be altered except by this Court or constitutional amendment. *Sullivan* did not merely constitutionalize a common law principle; it imposed a uniform federal standard that wiped away two centuries of varying state experimentation with defamation law. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765–66 (1985) (White, J., concurring). That transformation requires

constitutional justification, not just common law precedent.

CNN points to *Counterman v. Colorado*, 600 U.S. 66 (2023), and *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025), as evidence that *Sullivan* is embedded in this Court's First Amendment jurisprudence. BIO 21–22. But these cases referenced *Sullivan*; they did not validate its constitutional foundations. *Counterman* extended a recklessness standard to true threats by analogy to defamation, saying nothing about whether *Sullivan* itself was correct. *E.M.D. Sales* referenced *Sullivan*'s clear-and-convincing standard only in passing, not adopting its analysis. 604 U.S. at 50. Citing *Sullivan* does not answer whether it was correctly decided.

CNN notes that this Court has repeatedly denied certiorari to petitioners seeking *Sullivan*'s reconsideration. BIO 19. But the persistence of those petitions, with opinions by Justices Thomas and Gorsuch expressing sympathy for reconsideration, demonstrates not that *Sullivan* is settled, but that its costs have become increasingly impossible to ignore. "In an appropriate case," Justice Thomas wrote, "we should reconsider *New York Times*[.]" *Blankenship*, 144 S. Ct. at 6 (Thomas, J., concurring in denial of certiorari). This is that case.

CNN argues Dershowitz offers no limiting principle for rolling back *Sullivan*. BIO 22. He does: the distinction between *public officials*, who wield governmental power and warrant robust public scrutiny of its exercise, and *private citizens* who achieve prominence through voluntary participation in public life. That is the line the common law itself

drew. *See* H. Folkard, Starkie on Slander and Libel *332 (H.G. Wood ed., 4th ed. 1877) (common law privilege applied to criticism of a "public man in a public capacity" and not "to a private individual"). *Sullivan* adopted that distinction in its core holding, but *Gertz* and its successors abandoned it without adequate justification. Returning to it is not a novel proposition; it is a restoration.[3] This is an ideal case because it presents the Court with a variety of options: outright overruling of *Sullivan*, limiting it to its original holding, revising some of its most extreme aspects, or holding that the facts here require a jury trial even under *Sullivan*.

3 Another more limited holding would be rejecting the "clear and convincing standard," which was unmoored from the common law's traditional burdens of proof. Pet. § III.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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