No. 25A___

Supreme Court of the United States

Roy Stewart MOORE, Plaintiff-Appellee,

Applicant,

v.

Senate Majority PAC, "SMP", Defendant-Appellant,

Respondent.

ON APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EMERGENCY APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PENDING WRIT OF CERTIORARI

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PARTIES AND RELATED PROCEEDINGS

Applicant Roy Stewart Moore was the plaintiff in the United States District Court for the Northern District of Alabama and the appellee in the United States Court of Appeals for the Eleventh Circuit. Respondent Senate Majority PAC was a defendant in the district court and the sole appellant in the court of appeals. Guy Cecil and certain other individuals and entities were named as defendants in the district court; the claims against them were resolved before trial, and they are not parties to this application. The appeal was captioned *Moore v. Cecil* in the Court of Appeals. Specifically, Guy Cecil, Priorities USA, Bully Pulpit Interactive LLC, and Waterfront Strategies were dismissed on March 31, 2021, upon the partial grant of the defendants' motion to dismiss, and Senate Majority PAC stood as the sole defendant at trial, for good cause.

<u>The proceedings directly related to this application are:</u>

Moore v. Senate Majority PAC. No. 4:19-cv-01855-CLM (N.D. Ala.) (jury verdict for the plaintiff entered August 12, 2022 (Doc. 207)); (opinion and order denying the renewed motion for judgment as a matter of law entered September 29, 2023 (Doc. 252)).

Moore v. Cecil, No. 23-13531 (11th Cir. Apr. 24, 2026) (reported at 174 F.4th 862; opinion reversing and remanding with instructions to enter judgment for respondent.)

Relevant orders:

Moore v. Cecil, 488 F. Supp. 3d 1144 (N.D. Ala. 2020) (granting in part and denying in part motion to dismiss; allowing defamation and defamation-by-implication claims based on the "Shopping Mall" advertisement to proceed).

Moore v. Cecil, No. 4:19-cv-01855-CLM, 2021 WL 1208870 (N.D. Ala. Mar. 31, 2021) (granting in part motion to dismiss; dismissing certain defendants and claims, leaving Senate Majority PAC as sole remaining defendant).

Moore v. Senate Majority PAC, No. 4:19-cv-01855-CLM, 2023 WL 7220943 (N.D. Ala. Sept. 29, 2023) (denying renewed motion for judgment as a matter of law and motion for new trial after jury verdict for Moore on defamation-by-implication and false-light claims).

Moore v. Cecil, 109 F.4th 1352 (11th Cir. 2024) (affirming dismissal of social-media, press-release, and digital-advertisement claims; holding no specific personal jurisdiction over Cecil based on social-media activity; remaining challenges deemed abandoned).

Moore v. Cecil, 174 F.4th 862 (11th Cir. 2026) (reversing Moore's post-trial judgment; holding actual malice in public-figure defamation-by-implication requires proof of intent to convey the defamatory implication, not merely knowledge of or reckless disregard for falsity; remanding with instructions to enter judgment for Senate Majority PAC).

Moore v. Cecil, No. 23-13531 (11th Cir. June 8, 2026) (denying motion to stay mandate).

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Rules 22 and 23 of the Rules of this Court, applicant Roy Stewart Moore respectfully applies for a stay of the mandate of the United States Court of Appeals for the Eleventh Circuit pending the timely filing and disposition of his petition for a writ of certiorari. Applicant first sought this relief in the court below, as Rule 23.3 requires, and the Eleventh Circuit denied it by order entered June 8, 2026. App. C. Unless the mandate is stayed, it will issue on or about June 15, 2026, seven days after the order denying the stay. See Fed. R. App. P. 41(b). Issuance will direct the district court to enter judgment for respondent Senate Majority PAC ("SMP") and will permit release of the $8.2 million supersedeas bond that presently secures the jury's judgment in applicant's favor. The relief requested is therefore unavailable from any other court, and only a stay from this Court or the Circuit Justice can preserve the status quo while applicant seeks certiorari.

BACKGROUND

This case arises from a campaign advertisement that falsely portrayed Roy S. Moore as a man who solicited sex from a fourteen-year-old girl. That accusation was not true. It was not what the underlying source material said. And it was not an innocent mistake. As Moore proved at trial, Senate Majority PAC ("SMP") took statements from different reports, cut them apart, and reassembled them to create a far more horrifying accusation than any source had actually made. A jury saw the ad, heard the evidence, and found that SMP published that falsehood with actual malice, awarding Moore $8.2 million in damages. Trial Court Opinion, App. B.

This case, therefore, does not involve a public figure trying to relitigate a political controversy. It involves a deliberate cinematic fabrication that branded Moore, falsely, as a predator of children at the most critical moment of a United States Senate race. For more than forty years, Moore had been a visible figure in Alabama public life. He had served his State in multiple roles, stood repeatedly before Alabama voters, and lived under the scrutiny that comes with public office. But even the maliciousness of American politics does not permit a political committee to invent a false accusation of child sexual misconduct and broadcast it statewide. That is what the jury found happened here. App. B.

In 2017, Roy Moore was the Republican nominee in Alabama's special election for the United States Senate. By then, he had spent decades in public service and public controversy alike, and he was one of the best-known political figures in Alabama.

In the closing days of that election, when the damage from a false charge would be greatest and the chance to rebut it smallest, SMP aired what became

known as the "Shopping Mall" ad.[1] App. D.

The ad was designed to communicate one devastating message to viewers: that Moore had solicited sex from a fourteen-year-old girl working as Santa's helper at the Gadsden mall, and was banned from the mall for doing so. That accusation is not merely harsh. It is ruinous. It marks a man as morally depraved, criminal, and beyond redemption. And in this case, it was false. Moore's position has always been that he is innocent of that accusation, that the underlying source materials did not make that charge, and that SMP manufactured it anyway. The jury agreed. App. B. The falsity here lies in the way the ad was made. SMP did not simply quote one source accurately and allow viewers to reach their own conclusions. What the Defendants referred to as "The Shopping Mall Ad" accused him as follows:

> "Roy Moore 'was banned from the Gadsden Mall . . . for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.' " [1]
>
> App. D.

The ad fused separate reports and cut and added language into a single accusation that Moore had solicited sex from a fourteen-year-old Santa's helper and had been banned from the mall for doing so.

That was the lie. It said it through sequence, juxtaposition, pacing, and visual presentation. It took separate pieces and welded them into one false charge that no

[1] The full video of the Shopping Mall Ad is available at https://www.youtube.com/watch?v=2SCI7ZQ1ZY4. Applicant *implores* the Court to watch and listen to the actual ad, rather than the dissected version that appears when the frames are printed in written argument. It is the opinion of the author that the use of the written and printed version of the ad, a medium for which it was never published- is literally the only way it can be misinterpreted. The ad itself was entered into evidence as Joint Exhibit 1, and the trial court and appellate court both cited to it by .url link.

source had actually made. The point was not subtle. Any ordinary viewer would come away believing that Moore had propositioned a fourteen-year-old child for sex at the mall and got banned from the mall for doing it. That is exactly the understanding SMP intended to create. And according to the jury verdict and the trial court's rulings below, SMP created that understanding knowing it was false or with reckless disregard for whether it was false. App. B.

Because the defamatory meaning arises from the ad's cinematic assembly, this case cannot be fairly understood from a transcript alone. The publication here is the video itself. The falsehood is in what the viewer sees and hears together. A transcript strips away the timing, the transition, the emphasis, and the cumulative effect that made the accusation so powerful and so poisonous. That is why Moore respectfully submits that any court reviewing this case should watch the advertisement itself, not merely read isolated words on a page. The video itself is the defamatory publication, and, when considered with the jury's findings and the trial record, supplies powerful evidence of actual malice. App. D.

That distinction mattered from the beginning. The district court recognized at the pleading stage that the ad could reasonably be understood to convey the false implication that Moore solicited sex from a fourteen-year-old girl and that Moore had plausibly alleged actual malice under *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991). App. B. The case then proceeded through discovery and trial on precisely that theory. At trial, Moore did not ask the jury to speculate about political tone or campaign rhetoric. He asked the jury to do something simpler and more concrete: watch the ad, compare it to the source material, and decide whether SMP had fabricated a false accusation of monstrous misconduct against an innocent man. After hearing the testimony and viewing the evidence, the jury found for Moore on

his defamation and false-light claims and awarded $8.2 million in compensatory damages. App. B. The district court denied post-trial relief and left the verdict in place. App. B.

That verdict reflected a quintessential jury determination. The jurors were entitled to evaluate what the ad conveyed to ordinary viewers, whether that meaning was false, and whether SMP published it with constitutional actual malice under New York Times Co. v. Sullivan, 376 U.S. 254 (1964). They found that SMP did not merely repeat controversy surrounding a candidate. They found that SMP went further and manufactured a false allegation that Moore had committed an unspeakable act against a child. App. B.

On April 24, 2026, the Eleventh Circuit reversed and remanded with instructions to enter judgment for SMP. App. A. In substance, the court of appeals treated the ad too much like text and too little like the audiovisual attack piece the jury actually evaluated. It discounted the central theory on which the case was tried: not that SMP repeated an existing accusation word for word, but that SMP created a new, false accusation by splicing together separate reports to convey a defamatory meaning that was both unmistakable and untrue. In doing so, the court of appeals displaced the jury's role in deciding how ordinary viewers would understand the ad and whether SMP acted with actual malice in publishing that message. But this case turns on human meaning, not mechanical transcription. The question is what the ad communicated in the form SMP chose to broadcast to voters. The jury answered that question after seeing the full publication as it was actually aired. App. D.

The case is in an emergency posture. The court of appeals denied a stay on June 8, 2026. App. C. Its mandate is set to issue on June 15, 2026. App. C. Once the mandate issues, the supersedeas bond securing Moore's $8.2 million judgment will be released. App. C. If

that occurs before Moore can file his petition for a writ of certiorari and seek this Court's review, the judgment he obtained after trial will be lost as a practical matter before this Court can determine whether review is warranted.

This application seeks only to preserve the status quo. Under Nken v. Holder, 556 U.S. 418 (2009), a stay is warranted where there is a reasonable probability that certiorari will be granted, a fair prospect that this Court will reverse, a likelihood of irreparable harm absent relief, and where the balance of equities and the public interest favor preserving this Court's ability to review the case in a meaningful way. Here, unless a stay issues immediately, the bond will be released within days and Moore's judgment will be effectively extinguished before this Court can act.

ARGUMENT

A Circuit Justice may stay a judgment pending certiorari upon a showing of a reasonable probability that four Justices will vote to grant certiorari, a fair prospect that a majority of the Court will reverse the judgment below, and a likelihood of irreparable harm absent a stay; in a close case the Justice balances the equities. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*); *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers); *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); see also *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). Each requirement is satisfied here. This Court has recited the same traditional factors and held that "the first two factors … are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

I. There Is a Reasonable Probability That Four Justices Will Grant Certiorari

A. The deference owed to a jury's actual-malice findings is an unsettled Seventh Amendment question that the panel resolved against the jury.

The petition will present how much deference the Seventh Amendment requires a reviewing court to give a jury's findings of fact and credibility in a public-figure actual-malice case. That question is unsettled. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a case tried to the bench, requires independent appellate review and states that the responsibility "cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge," *id.* at 501, while *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), holds that a jury's "credibility determinations are reviewed under the clearly-erroneous standard" and are owed "special deference," *id.* at 688, 690.

The Eleventh Circuit has candidly acknowledged that, after those decisions, "the law is unsettled as to the deference that we give to 'facts' found by the jury." *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 & n.27 (11th Cir. 1999). The district court said the same in its 104-page opinion. Trial Court Opinion 29–35. The panel resolved that unsettled question against the jury, reviewing the ultimate finding de novo and expressly rejecting applicant's argument that the jury's reasonable verdict was entitled to deference under Federal Rule of Civil Procedure 50. *Moore v. Cecil*, 174 F.4th at 878–79 & n.13. Whether the Seventh Amendment permits an appellate court to displace a jury's verdict in that manner, on a paper record, is an important and recurring question. See U.S. Const. amend. VII; *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446–49 (1830); Sup. Ct. R. 10(c).

The stakes of that question are not abstract. The district court explained that its deferential framework was required in part because "the jury's verdict should mean something," and it asked, quoting a commentator, "if the whole fact-finding exercise at trial is nothing more than a dry run for the court of appeals," then why do we "send a constitutional question to the jury in the first place?" Trial Court Opinion 35–36 (quoting Nathan S. Chapman, The Jury's Constitutional Judgment, 67 Ala. L. Rev. 189, 206 (2015)). Because the jury here was asked the intent question directly and answered it, the panel's reversal was not the correction of an instructional error; it was the re-examination of a fact tried by a jury, conducted on a record the panel encountered only on paper.

The Reexamination Clause is among the most categorical commands in the Constitution, and this Court has enforced it at every level of the federal judiciary. "[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them," for "the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'" *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 358–59 (1962). The Clause "bears not only on the allocation of trial functions between judge and jury"; it "also controls the allocation of authority to review verdicts." *Gasperini*, 518 U.S. at 432–33. And the exception it preserves is for the correction of legal error alone.

At common law "no review of jury verdicts was permitted except upon writs of error, which were limited to questions of law," and the Seventh Amendment "incorporated this principle, forbidding any reexamination of a jury's determination of the facts," while leaving courts free to correct "legal error." *Johansen*, 170 F.3d at 1330–31 (citing *Gasperini*, 518 U.S. at 452). The line that matters is therefore the line between the correction of legal error

and the re-examination of facts. The panel identified no legal error in this trial. It did not hold the instructions defective, and it expressly declined to reach SMP's challenges to them. *Moore v. Cecil*, 174 F.4th at 880 n.15. What it rejected were the jury's findings themselves.

Bose itself respects that line. Its independent review exists to correct "errors of law, including those that may infect a so-called mixed finding of law and fact," 466 U.S. at 501, and it rests on the rule of *Fiske v. Kansas* that facts may be analyzed only where "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Id.* (quoting *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927)). Even then, "due regard" for the factfinder's opportunity to observe the witnesses survives, because "the constitutionally-based rule of independent review permits this opportunity to be given its due." *Id.* at 499–500. Justice Scalia described the resulting method precisely: the Court "accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." *Harte-Hanks*, 491 U.S. at 698 (Scalia, J., concurring in the judgment); accord Trial Court Opinion 34 (observing that the other concurring Justices agreed with that analysis).

The Eleventh Circuit's own precedent is to the same effect: "a de novo review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice." *Levan*, 190 F.3d at 1239. Independent review, in short, is a targeted constitutional inquiry that takes the jury's credibility determinations as given and asks whether the credited evidence clears the constitutional threshold. It is not a license to make an original appraisal of the record, to draw different inferences about a defendant's state of mind, or to measure the verdict against substantive elements this Court never

adopted. A reversal that does those things is not the correction of legal error; it is the re-examination of jury-found facts under another name, and it is precisely what the Seventh Amendment forbids.

B. Whether the First Amendment permits a heightened intent element for a manufactured false statement that *Sullivan* and *Masson* already govern is a substantial and unresolved question.

This Court has twice supplied the rule that governs SMP's conduct. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), defines actual malice as publication with knowledge of falsity or reckless disregard for the truth. *Masson* applies that rule to a manufactured falsehood: a defendant's deliberate alteration of a statement so that it "results in a material change in the meaning conveyed" is itself knowledge of falsity, and no separate proof of an intent to defame is required. 501 U.S. at 517. As *Masson* observed, "[q]uotations may be a devastating instrument for conveying false meaning." *Id.* The district court applied exactly that standard, asking whether SMP knew it was materially changing the meaning of the quotes to create a false statement. Trial Court Opinion 16–17, 40.

Because SMP's witnesses denied that intent, the panel imposed a different and heavier burden. It held that Moore had to prove, in addition to knowledge of falsity, subjective intent to communicate the defamatory meaning; and it treated SMP's deliberate assembly of the false statement, even coupled with its knowledge of the truth, as insufficient to satisfy that added element. *Moore v. Cecil*, 174 F.4th at 883, 885–87. The panel acknowledged that this element comes not from this Court but from four courts of appeals. *Id.* at 883.

The panel also held *Masson* "inapposite" on the ground that SMP had "accurately" quoted each source and therefore had not altered "the verbatim words of a single source." *Id.*

at 886. But *Masson*'s concern was "the meaning conveyed," not the mechanics of single-source alteration, and a falsehood assembled by juxtaposing edited quotations changes meaning as surely as one assembled by rewording a single quote. Whether the First Amendment permits, or forecloses, the panel's expansion of *Sullivan*, and whether *Masson* governs a falsehood manufactured from composite quotation, are important and unresolved questions of national constitutional law.

The panel's new element also slights the premise on which *Masson* rests. This Court has held that "there is no constitutional value in false statements of fact," because neither "the intentional lie" nor "the careless error" "materially advances society's interest in 'uninhibited, robust, and wide-open' debate." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). A fabricated accusation that a man solicited sex from a child is the intentional lie *Gertz* describes. By requiring a defamed plaintiff to prove a separate intent beyond knowing falsity, the panel extended First Amendment protection to precisely the speech this Court has said the Constitution does not value, and it did so to overturn a jury's finding that the lie was knowing.

Nor is the added element one the jury failed to find. The jury was instructed on precisely that element. The district court charged that applicant "must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14, or SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14." *Moore v. Cecil*, 174 F.4th at 884 n.17 (quoting the charge); Trial Court Opinion 40.

The panel itself recounted that "the jury was charged with determining whether, when SMP juxtaposed frames 2 and 3 back-to-back, SMP intended or recklessly disregarded that it was materially changing the meaning of the quotes to convey a new implied message

about Moore that it knew was false and defamatory." *Id.* at 883–84. The jury answered yes, and the district court catalogued the findings embedded in that answer: that the advertisement "communicated, and was meant to communicate," that applicant solicited sex from the fourteen-year-old Santa's Helper, and that SMP knew the articles it quoted reported no such thing yet intended to convey that message or recklessly disregarded that it was doing so. Trial Court Opinion 38, 41. The reversal therefore did not rest on any failure of proof directed to an unsubmitted element, and it did not rest on trial error, for the panel expressly declined to reach SMP's challenges to the instructions and the award. *Moore v. Cecil*, 174 F.4th at 880 n.15.

The panel simply substituted its own reading of a cold record for the jury's answer to the very question the panel said mattered. A decision that announces a new constitutional element, and then refuses to accept the jury's finding of that element under a proper *Masson* charge, decides "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). That conflict, and not any mere misapplication of settled law, is what makes this Court's review necessary.

The panel reasoned that the claim was one for defamation by implication because applicant had pleaded it as such and the jury was instructed on the meaning the advertisement "conveyed." *Id.* at 883 n.16. But the governing First Amendment standard turns on the nature of the speech, not on a label in a complaint.

The heightened intent element developed for cases in which a defendant publishes true facts that a reader might construe to imply something false, so that a publisher of truthful speech is not held liable for every unintended inference. That rationale has no application where, as here, the statement the defendant created is itself false. The element rests on the premise that an implied statement "has defamatory and nondefamatory

meanings," *Kendall v. Daily News Publishing Co.*, 716 F.3d 82, 90 (3d Cir. 2013), quoted in *Moore v. Cecil*, 174 F.4th at 883, and so assumes genuine ambiguity. There is none here. After watching the advertisement, the district court explained, through the ordinary grammar of the narration, that the juxtaposition carries one obvious meaning, that applicant solicited sex from a fourteen-year-old, and it found that the advertisement "creat[ed] a story" rather than commenting on one. Trial Court Opinion 1, 18–19.

This Court's interest in the actual-malice framework confirms that review is reasonably probable. The panel itself acknowledged "criticism of the actual malice standard," collecting the opinions in which Members of this Court have urged its reconsideration, including *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from the denial of certiorari), *id.* at 2426–30 (Gorsuch, J., dissenting from the denial of certiorari*), McKee v. Cosby*, 586 U.S. 1172 (2019) (Thomas, J., concurring in the denial of certiorari), *Counterman v. Colorado,* 600 U.S. 66, 105–06 (2023) (Thomas, J., dissenting), before concluding, "unless and until the Supreme Court decides to revisit the actual malice standard, it must continue to apply it." *Moore v. Cecil*, 174 F.4th at 878 n.12.

Justice White, who joined the unanimous opinion in *Sullivan,* likewise came to question the balance that decision struck. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765–74 (1985) (White, J., concurring in the judgment). Around the rule of *Sullivan* the lower courts have accreted a series of judge-made doctrines, none reviewed by this Court, that narrow a defamed public figure's ability to obtain relief; this case applied several at once to overturn a jury's verdict of knowing falsity. Whether that accretion has tilted the balance *Sullivan* struck too far is itself a question of national importance.

Those opinions are not passing remarks, and their authors did not speak in generalities. Justice Thomas wrote that the actual-malice rule "bears no relation to the text,

history, or structure of the Constitution," that "[t]he lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine," and that "reconsideration is all the more needed because of the doctrine's real-world effects," for "[p]ublic figure or private, lies impose real harm." *Berisha,* 141 S. Ct. at 2425 (Thomas, J., dissenting from the denial of certiorari) (quotations omitted). He concluded: "Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari." *Id.*

Justice Gorsuch explained that what "started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable," *id.* at 2428 (Gorsuch, J., dissenting from the denial of certiorari) (citation omitted), a doctrine that "has come to leave far more people without redress than anyone could have predicted," *id.* at 2429. Drawing on the scholarship of then-Professor Elena Kagan, he observed that "it's hard not to ask whether [the standard] now even 'cut[s] against the very values underlying the decision.'" *Id.* at 2428 (quoting Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993)).

Justice Thomas had earlier put the point more starkly still, writing that "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 586 U.S. 1172, 1173 (2019) (Thomas, J., concurring in the denial of certiorari). This case is the vehicle those opinions describe. The real-world effects Justice Thomas identified are concrete here: a political action committee fabricated an accusation that a candidate solicited sex from a child, aired it about 533 times in the final days of a United States Senate election, and was held liable by a jury whose verdict

the trial judge sustained after clear-error review of every credibility finding.

The lie was proved, the harm quantified, and the traditional remedy Justice Thomas invoked, a libel suit tried to a jury, ran its course, only to be undone by a new judge-made element applied on a cold record. These questions come on a complete trial record, are outcome-dispositive, and are paired with a Seventh Amendment issue that invites resolution through the constitutional text and history that Members of this Court have said should govern. A petition presenting them in this posture has a reasonable probability of attracting four votes.

II. There Is a Fair Prospect That the Court Will Reverse.

A. The panel decided the case under a standard this Court has not adopted.

Under the rule this Court has actually established, the jury's verdict stands. *Masson* holds that the deliberate creation of a falsehood by materially changing the meaning of quoted material is itself actual malice. 501 U.S. at 517. SMP spliced edited quotations into a statement that no source made, and the jury found, and the district court independently confirmed, that SMP knew it was doing so. Trial Court Opinion 2, 40–44. Nothing more was required.

The panel reversed only by adding an element this Court has never imposed, a separate intent to communicate the defamatory meaning, and by treating SMP's deliberate assembly and knowledge of the truth as insufficient to prove it. *Moore v. Cecil*, 174 F.4th at 883, 885–87. Because that added element appears nowhere in *Sullivan* or *Masson*, and because the panel applied it to overturn a verdict that the correct standard sustains, there is a fair prospect that a majority of this Court will reverse.

The added element does not fit this case in any event. It assumes an implied statement with "defamatory and nondefamatory meanings," *Kendall*, 716 F.3d at 90, so that

knowledge of falsity alone cannot show intent. Where the false meaning is the single obvious reading of a juxtaposition the publisher deliberately assembled, as the district court found here, a conclusion that the publisher did not intend that meaning cannot stand. The panel reached that conclusion on a paper record, extending the element past the ambiguity rationale that alone justifies it.

B. The panel displaced both the jury and the trial judge on a cold record.

The trial judge occupied a position the appellate court could not. He "sat through the trial, heard the testimony, [and] observed the witnesses," and on review a court "will not second guess the judge who sat through the trial … and had the 'unique opportunity to consider the evidence in the living courtroom context' while [the reviewing court has] only the 'cold paper record.'" *Johansen v. Combustion Engineering, Inc.,* 170 F.3d 1320, 1335 (11th Cir. 1999) (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437 (1996)). That deference is "even more significant" where findings rest on credibility. *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)).

The district court stressed that the advertisement could not be assessed from stills:

> "Watch the Ad. Pictures may be worth a thousand words, but no amount of screen shots can replicate the tone, the pacing, or the cinematic editing of the Shopping Mall Ad." Trial Court Opinion 16; see App. D.

Having watched it, the court found that the ad "wasn't commenting on a story; it was creating a story," *id.* at 1, and, "[u]sing its independent judgment," that "Moore proved actual malice," *id.* at 2.[2] The panel reached the contrary conclusion on the paper record, setting aside both the jury's verdict and the trial court's independent confirmation of it.

[2] Trial Court Opinion, App. B, pp. 28–58.

That approach is in tension with *Harte-Hanks*, which sustained a jury's actual-malice verdict after independent review by according the jury's credibility findings their due weight. 491 U.S. at 688–90. *Harte-Hanks* shows what a genuine independent review looks like. This Court accepted the jury's credibility determinations, combined them with the undisputed evidence, and concluded that a finding of actual malice "inexorably follows." *Harte-Hanks*, 491 U.S. at 690–91. Applied here, that method sustains the verdict rather than overturning it, for the jury's credibility findings survived clear-error review and the undisputed documents showed that SMP possessed the true story before it aired the false one. Trial Court Opinion 39–44.

C. The panel's actual-malice reasoning conflicts with this Court's precedents.

The panel reasoned that SMP's "thorough vetting process is inconsistent with and belies any allegations of intentional or reckless publication," and that SMP's "failure to fact-check the veracity of the [statement] shows that SMP did not know that the [statement] even existed." *Moore v. Cecil*, 174 F.4th at 887. That inverts this Court's law. "[P]urposeful avoidance of the truth" may establish actual malice, *Harte-Hanks*, 491 U.S. at 692, and a defendant's "[p]rofessions of good faith" do not prevail "where there are obvious reasons to doubt the veracity" of what is published, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). A publisher that verifies every statement except the most damaging one it has assembled cannot claim ignorance of it; the more thorough its vetting, the less credible its professed surprise. The record, moreover, contained affirmative evidence rather than mere disbelief.[3]

The jury credited the testimony of SMP's own research director that SMP read the

[3] Over 200 articles and ads were admitted into evidence; the actual quotes came from only two sources. The other articles and ads were not admitted for their truth, but only for whether or not their existence made SMP's actions "reasonable."

source articles before approving the advertisement, and those articles reported only that applicant told the fourteen-year-old she "looked pretty," not that he solicited sex from her. Trial Court Opinion 41, 43–44; cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). That is affirmative proof of subjective knowledge of falsity, which the panel passed over by treating the jury's rejection of SMP's witnesses as nothing more than discredited testimony. *Moore v. Cecil*, 174 F.4th at 885.

III. Applicant Will Suffer Immediate and Irreparable Harm Absent a Stay.

Once the mandate issues, the district court will enter judgment for SMP and will be free to release the $8.2 million supersedeas bond, which is the only security for applicant's judgment. SMP, an independent Super PAC, does not hold any assets other than cash, which it spends down every election cycle, and runs into debt. It has no source of income other than voluntary contributions. If this Court then grants certiorari and the judgment is ultimately restored, applicant may be unable to collect.[4]

SMP's own reports to the Federal Election Commission reflect a financial position that fluctuates with the election cycle. SMP reported approximately $15 million in debt against roughly $10 million in cash on hand at the close of the 2022 cycle, and approximately $25 million in debt against roughly $9.17 million in cash on hand at the close of the 2024 cycle, returning to a positive year-end balance only in 2025. See Federal Election Commission, Senate Majority PAC, Committee ID C00484642 (year-end reports, 2022 and 2024 cycles).

The loss of secured funds that cannot afterward be recovered is the paradigm of

[4] FEC filings show SMP being millions of dollars in debt prior to the most current election cycle, and presently have much less cash on hand than traditionally at this time in the election cycle. Election tides determine their completely voluntary income. https://www.fec.gov/data/committee/C00484642/?cycle=2022; https://www.fec.gov/data/committee/C00484642/?cycle=2024; https://www.fec.gov/data/committee/C00484642/?cycle=2026

irreparable harm. As Justice Scalia explained, although "[n]ormally the mere payment of money is not [ordinarily] considered irreparable . . . but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304–05 (2010) (Scalia, J., in chambers) (citations omitted). That describes this case precisely, because applicant's concern is not an eventual judgment but the loss, during the certiorari window, of the security that makes the judgment collectible.

IV. The Equities and the Public Interest Favor a Stay.

The balance of harms is one-sided. A stay costs SMP only the continued premium on a bond it already posted, an ordinary and fully recoverable expense. See *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Applicant, by contrast, faces the unrecoverable loss of the only security for an $8.2 million judgment. Maintaining the bond merely preserves the status quo that has held throughout the appeal. The public interest points the same way.[5]

The questions presented concern the constitutional limits on defamation liability and the deference the Seventh Amendment secures to a jury's verdict, and they reach far beyond these parties. A brief stay, bounded by the ninety-day certiorari period, is a measured way to allow this Court to consider those questions before the panel's judgment takes irreversible effect.

[5] Applicant's final response was given little to no consideration by the Court of Appeals. The Appellate court record showed that Applicant's final response was filed at 12:00 a.m., the denial was filed at 8:19 a.m.

CONCLUSION

The Court should enter an immediate stay while applicant prepares and files, and the Court considers, a petition for a writ of certiorari. The application for a stay of the mandate of the United States Court of Appeals for the Eleventh Circuit, pending the timely filing and disposition of a petition for a writ of certiorari, should be granted. The existing bond already secures the judgment, so no additional security is necessary. See Fed. R. App. P. 41(d)(3). Should the Circuit Justice conclude that the matter warrants the attention of the full Court, applicant respectfully requests that the application be referred to the Court. See Sup. Ct. R. 22.

Respectfully submitted,

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APPENDICES

Appendix A: Opinion, *Moore v. Cecil*, 174 F.4th 862 (11th Cir. Apr. 24, 2026)

Appendix B: Opinion and Order Denying Judgment as a Matter of Law, *Moore v. Senate Majority PAC*, No. 4:19-cv-01855-CLM (N.D. Ala. Sept. 29, 2023) (Doc. 252)

Appendix C: Order Denying Stay of the Mandate (11th Cir. June 8, 2026)

Appendix D: The Shopping Mall Ad (television advertisement), reproduced frame by frame; full video at https://www.youtube.com/watch?v=2SCI7ZQ1ZY4

APPENDIX "A"
OPINION OF THE 11TH CIRCUIT

FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13531

ROY STEWART MOORE,

Plaintiff-Appellee,

versus

GUY CECIL, et al.,

Defendants,

SENATE MAJORITY PAC,
"SMP",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:19-cv-01855-CLM

Before JILL PRYOR, BRANCH, and HULL, Circuit Judges.

BRANCH, Circuit Judge:

In 2017, Roy Moore ran as the Republican nominee in a special election to fill an open seat for one of Alabama's United States senators. In the final weeks before the election, multiple news outlets reported that several women had accused Moore of inappropriate sexual conduct with them when they were young. Senate Majority PAC ("SMP") grabbed onto the news reports and ran a campaign ad that stated, among other things, in separate individual frames that (1) "'Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls,'" and (2) "[o]ne he approached 'was 14 and working as Santa's helper.'" SMP ran the ad hundreds of times, and Moore eventually lost the election.

Moore sued SMP for defamation and false-light invasion of privacy under Alabama law, arguing in relevant part that the two statements above when read together created the false defamatory implication that he had solicited the 14-year-old girl working as Santa's helper for sex.[1] Those two claims proceeded to a jury trial. The jury found SMP liable for defamation and false-light invasion of privacy, and it awarded Moore $8.2 million in compensatory damages. The district court denied SMP's renewed motion for judgment as a matter of law or for a new trial, and SMP appealed.

SMP raises several issues on appeal, including that the district court erred in denying its renewed motion for judgment as

[1] We note that Moore sued other defendants as well and raised additional claims, but for purposes of this appeal we discuss only SMP and the relevant defamation and false-light invasion of privacy claims.

a matter of law because Moore is a public figure and he failed to present clear and convincing evidence that SMP published the implication in the ad with actual malice as required under the *New York Times v. Sullivan* standard. 376 U.S. 254 (1964).[2] After careful review and with the benefit of oral argument, we agree with SMP. Accordingly, we reverse the district court's order denying SMP's renewed motion for judgment as a matter of law, and remand with instructions for the district court to enter judgment for SMP.

I. Background

We divide our background discussion into three main sections. The first section provides the factual background relevant to understanding the claims at issue on appeal, including the substance of the news articles that led to SMP's ad and the ad's contents. The second section addresses the relevant procedural history leading up to the trial. Finally, the third section discusses the relevant trial proceedings.

A. Factual Background

1. News reports leading up to SMP's ad

In 2017, Jeff Sessions resigned as one of Alabama's United States Senators, and Moore secured the Republican Party's

[2] In *New York Times v. Sullivan*, the Supreme Court held that the First Amendment requires a public-figure plaintiff to demonstrate by clear and convincing evidence that the alleged defamatory "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." 376 U.S. at 279–80. We discuss the actual malice standard at length later in the opinion.

nomination for the special election to fill the empty seat. In the final weeks leading up to the special election, multiple news organizations reported that a number of women had accused Moore of improper sexual conduct.

On November 9, 2017, the *Washington Post* published an article involving allegations by Leah Corfman and others. Corfman said that she met Moore when she was 14 years old and waiting to enter a courtroom to attend a child custody hearing with her mother. Moore, then a 32-year-old assistant district attorney for Etowah County, Alabama, offered to watch Corfman while her mother attended the hearing. Corfman's mother accepted. While Corfman's mother was in the hearing, Moore talked alone with Corfman, eventually asking for her phone number. Corfman obliged. Days later, Moore picked Corfman up around the corner from her house, "drove her about 30 minutes to his home in the woods, told her how pretty she was[,] and kissed her." "On a second visit . . . , he took off her shirt and pants and removed his clothes. He touched her over her bra and underpants . . . and guided her hand to touch him over his underwear." Corfman eventually asked Moore to take her home, and he did.

The article then provided accounts from three other women that said that "Moore pursued them when they were between the ages of 16 and 18 and [Moore] was in his early 30s." Unlike Corfman, though, "[n]one of the three women sa[id] that Moore forced them into any sort of relationship or sexual contact." First, Wendy Miller said "she was 14 and working as a Santa's helper at

the Gadsden Mall when Moore first approached her, and 16 when he asked her on dates, which her mother forbade."[3] Second, Debbie Wesson Gibson said that "she was 17 when Moore spoke to her high school civics class and asked her out on the first of several dates that did not progress beyond kissing." And third, Gloria Thacker Deason said that "she was an 18-year-old cheerleader when Moore began taking her on dates that included bottles of wine."

The article also reported that Moore denied the allegations in a written statement. Specifically, Moore asserted that "[t]hese allegations are completely false and are a desperate political attack by the National Democrat Party and the Washington Post on this campaign." In another statement, Moore's campaign called the allegations and news reports "garbage [that] is the very definition of fake news."

The *Washington Post* story led to a flood of additional reporting about Moore's alleged improper relations with young girls. The *New American Journal* published an article on November 12, 2017, with the headline, "Politics Makes Strange Bedfellows, but Jesus. Not this." The article stated that "[r]umors of Moore's dalliances with teenagers have been floating around for a long time," but clarified that none of the allegations involved "actual sexual intercourse or rape." The article also quoted a former

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[3] Wendy Miller's allegations are the main focus of this suit. As we explain in greater detail below, she was the 14-year-old Santa's helper that the ad referenced.

deputy district attorney as saying: "It was common knowledge that Roy dated high school girls, everyone we knew thought it was weird." The article also stated: "Sources tell me Moore was actually banned from the Gadsden Mall and the YMCA for his inappropriate behavior of soliciting sex from young girls. If Moore keeps lying, that story will soon come out in a big way too."

The day after the *New American Journal* article, on November 13, 2017, AL.com published an article with the headline: "Gadsden locals say Moore's predatory behavior at mall, restaurants not a secret." As for Moore's conduct at the Gadsden Mall, the article mentioned Wendy Miller's report that she "was 14 and working as Santa's helper" when Moore first approached her and "told her she looked pretty." The article recounted that two years later, "when [Miller] was 16, he asked her out on dates," but her mother would not allow her to date him. The article also reported that witnesses claimed that Moore would often go to the mall and "flirt with all the young girls." At least one witness claimed to have been told that mall employees stayed on the lookout for Moore, "who was known to pick up younger girls." And another witness who owned a store at the mall claimed specifically that an off-duty police officer named J.D. Thomas told the witness that he should "look out" for Roy Moore. When the witness asked J.D. Thomas what Roy Moore did, Thomas responded: "If you see him, let me know. I'll take care of it." The article ended by quoting five other Gadsden residents, all of whom said something similar to the following: "[Moore] liking and dating young girls was never a secret in Gadsden   "

The same day that AL.com published its article, the *New Yorker* and the *New York Times* each published an article about Moore. The *New Yorker* article claimed—based on interactions "with more than a dozen people," including "a major political figure in the state"—that Moore "had been banned from the mall because he repeatedly badgered teen-age girls." The article cautioned, though, that a former mall manager did not remember Moore being on the mall ban list. And the *New York Times* article stated that a fifth woman, Beverly Nelson, had come forward and claimed that Moore had also inappropriately touched her. According to Nelson's allegations in the *New York Times* article, Moore assaulted 16-year-old Nelson one night after one of her shifts working at a restaurant. Nelson stated to reporters at a press conference: "I tried fighting him off, while yelling at him to stop, but instead of stopping, he began squeezing my neck, attempting to force my head onto his crotch ”

Two days later, on November 15, 2017, the *New York Times* ran another article with the headline: "4 More Women Accuse Roy Moore of Misconduct." The allegations from the four new women raised the number of alleged victims to nine (the original *Washington Post* story had four victims, the first *New York Times* article added another, and this *New York Times* article added four more). This article reported that Moore engaged in varying degrees of inappropriate behavior, including flirting with young girls at the mall, groping one of the women's buttocks, and giving another woman a "forceful" kiss when she was 18.

Moore generally denied all the articles' allegations of improper conduct with young girls. Moore also "said that he couldn't be expected to remember every woman he'd ever dated," explaining that "'[a]fter [his] return from the military,' . . .'[he] dated a lot of young ladies.'"

To be sure, not all press coverage was against Moore. As mentioned, news reports generally reported Moore's denials of wrongdoing. And multiple sources reported that Moore was never banned from the Gadsden Mall for improper relations with young girls.

2. The SMP ad

Based on the above reporting, SMP created a political campaign ad targeting Moore's run for the United States Senate. The television ad ran approximately 533 times between November 27 and December 6, 2017.

The ad comprised six frames, with each frame displaying text and a voice-over simultaneously reading the displayed text.[4] For convenience, we reproduce each frame below:

[4] The video of the full ad is located at https://www.youtube.com /watch?v=2SCI7ZQ1ZY4.

What do people who know Roy Moore say?

"Moore was actually banned from the Gadsden Mall...
for soliciting sex from young girls."
New American Journal, 11/12/2017

One he approached "was 14
and working as Santa's helper."
AL.com, 11/13/2017

"These stories have been going around
this town for 30 years."
Blake Usry, AL.com, 11/13/2017

"These women are being skewered for the truth."
Teresa Jones, AL.com, 11/13/2017

The only frames relevant to this appeal are the second and third. The second frame directly quotes the *New American Journal* article and states: "'Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls.'" The third frame then partially quotes the AL.com article and states: "One he approached 'was 14 and working as Santa's helper.'" Each of the frames includes a citation to the respective source and date of the statement.

B. Procedural History

Following publication of SMP's ad and SMP's refusal to pull the ad, Moore sued SMP, asserting claims under Alabama law for defamation, defamation by implication, and invasion of privacy (false-light). As relevant here, Moore alleged that the ad defamed him and portrayed him in a false light by (1) falsely stating that he had been banned from the Gadsden Mall and (2) "deceptively juxtapos[ing]" the quotations in frames 2 and 3 "to create a false

impression" that Moore "solicited sex from young girls at the Gadsden Mall."

After SMP's unsuccessful motion to dismiss, SMP moved for summary judgment. The district court treated Moore's defamation and defamation-by-implication claims as a single claim because Alabama law does not recognize defamation-by-implication as a distinct tort. Instead, Alabama law recognizes a single tort of defamation that can be proved through various means, such as an express defamatory meaning, "defamatory implication," and "defamatory innuendo." *Finebaum v. Coulter*, 854 So. 2d 1120, 1124–25 (Ala. 2003).

The district court then determined as a matter of law that only frames 2 and 3 of SMP's ad could support Moore's claims for defamation and false-light invasion of privacy.[5] Specifically, the court explained that the statement in frame 2—that Moore was "actually banned from the Gadsden Mall . . . for soliciting sex from young girls"—was non-actionable standing alone because Moore could not show actual malice given that "previous reports support[ed] [the] statement that authorities banned Moore from the mall, in part, because Moore solicited young girls."

However, the district court reasoned that a reasonable jury could find that the juxtaposition of the statements in frames 2 and

[5] The district court noted that the statements in frames 4, 5, and 6 of the ad could not form the basis for Moore's claims because, among other things, Moore did not allege in his complaint that the statements were false or were made with actual malice. Moore has not challenged that ruling on appeal.

3 when read together could produce a potentially defamatory implication—"that Moore was banned from the mall for soliciting sex from a 14-year-old Santa's Helper"—when "there was no prior report that Moore asked Wendy Miller for sex" during the time that she worked as a Santa's helper at the mall. Instead, the relevant news article asserted that Moore approached Miller and told her she was pretty when she was 14 years old and working as Santa's helper and that Moore asked Miller out on dates two years later. Accordingly, the district court denied SMP's motion for summary judgment, and the case proceeded to a jury trial.[6]

C. The Jury Trial

As an initial matter, it was not disputed at trial that Moore was a public figure. Moore thus had to prove by clear and convincing evidence that SMP acted with actual malice when it published the statements in question in order to succeed on his defamation and false-light invasion of privacy claims. *See N.Y. Times*, 376 U.S. at 279–80; *see also Finebaum*, 854 So. 2d at 1124–25 (explaining that the actual malice standard applies to defamation under Alabama law); *Smith v. Huntsville Times Co., Inc.*, 888 So. 2d 492, 496 n.1 (Ala. 2004) (explaining that the constitutional actual

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[6] As described later, the case did not proceed to trial based on each of the two statements in frames 2 and 3 separately creating a defamation claim. Rather, the case was submitted to the jury only under the narrower theory that those two statements juxtaposed together back-to-back created a new message that was false and defamatory. Specifically, the juxtaposition of these two statements back-to-back allegedly implied that Moore solicited sex from Wendy Miller when she was 14 years old and working as Santa's helper.

malice standard applies to claims for false-light invasion of privacy). Whether Moore presented sufficient evidence to support the jury's finding of actual malice—under the clear and convincing evidence standard—is the key issue in this appeal. Thus, our discussion of the trial focuses solely on the evidence related to the issue of actual malice.

1. Testimony related to the meaning of and intent behind SMP's ad

Three witnesses testified about the ad and its preparation. The first witness was Adam Muhlendorf, who was a spokesperson for Highway 31, a PAC created for the special election that was "part of" SMP. The second witness was J.B. Poersch, the president of SMP. And the third witness was Diana Astiz, SMP's research director. We discuss each witness's testimony in turn.

To begin, Muhlendorf testified that he had no knowledge of how the ads were created, and he did not play any role in decisions related to the contents of the ad. Rather, "all [he] did was talk to the media." As to the ad's meaning, Muhlendorf testified that he did not believe that the ad conveyed the message that Moore complained of—*i.e.*, that Moore solicited sex from Miller when she was 14 years old and working as Santa's helper. Instead, Muhlendorf testified that he "read [frames 2 and 3] separately in that . . . the first slide says [Moore] was banned from the Gadsden Mall for soliciting sex from young girls, and the second slide refers to him approaching a 14-year-old working as Santa's helper." According to Muhlendorf, the intention of the ad was not to imply

that Moore solicited sex from Miller. Rather, he stated that "the intention of [the] ad was to take stories that were in the public domain, share them with the general public, and have [the public] make a decision on whether or not they wanted to support Roy Moore."

As for whether Muhlendorf believed the truth of the assertions in the ad, he testified that he did. He believed that the statement that Moore was banned from the mall was true. And, even assuming that the statements in frame 2 and frame 3 implied that Moore solicited sex from Miller, Muhlendorf testified that he believed such an assertion would be a "reasonable conclusion" given that there were news articles circulating at the time that "did show that [Moore] was soliciting sex from 14-year-olds and 16-year-olds." In sum, Muhlendorf testified that at the time the ad was published, he "did not have any doubts" that the ad was true.

J.B. Poersch, the president of SMP, also testified. Poersch "ha[d] input personally into whether or not the ad[] would be published," and was "one of the people that approved th[e] ad to go out." Poersch—like Muhlendorf—testified that SMP did not intend to imply that Moore solicited sex from Miller when she was 14 and working as Santa's helper, and he did not believe the ad did so. Rather, he claimed that frames 2 and 3 were "separate frames and separate parts of the ad." As for the truth of the ad, Poersch testified that he indeed believed that Moore was banned from the mall for soliciting sex from young girls.

Next, Diana Astiz, SMP's research director, testified that she was responsible for making sure that "all of the communications that came from" SMP—including the ad here—were "factually accurate." Astiz described SMP's process for creating and fact-checking ads as follows: Once the media consultant team drafted a script for an ad, it would be sent to Astiz and her team, who would "go through . . . line by line by line by line and make sure that every single thing was factually accurate." In doing this, they would generate a document with the assertions made by the ads coupled with the documents or sources supporting those assertions. If Astiz and her team found something inaccurate, they would make the necessary edits; once she and her team were done, Astiz would send the ad off to lawyers for another round of approvals. Once the lawyers approved the ad, the media consultant team would produce the ad, incorporating any edits from Astiz, her team, and the lawyers. The produced ad would then be reviewed again by Astiz and her team, who would again "go through it line by line by line" to confirm its accuracy. If they discovered anything inaccurate, they would make a correction "and make it accurate." The ad would then undergo one more round of review with the lawyers before it was finally published.

When fact-checking the ad at issue here, Astiz and her team created a "research backup" document. As depicted in the selected images below,[7] each row represents a different frame in the ad.

[7] We include only the portions of the research backup document that are relevant to frames 2 and 3 of the ad.

The left column contains the text and voiceover for each of the ad's individual frames. And the right column contains the supporting sources.[8]

V/O: Roy "Moore was actually banned from the Gadsden Mall…for soliciting sex from young girls." TEXT: "Moore was actually banned from the Gadsden Mall…for soliciting sex from young girls." CITE: New American Journal, 11/12/17	**New American Journal: "Moore Was Actually Banned From The Gadsden Mall…For Soliciting Sex From Young Girls."** "Sources tell me Moore was actually banned from the Gadsden Mall and the YMCA for his inappropriate behavior of soliciting sex from young girls." [New American Journal, 11/12/17] **ABC News: Alabama Woman Said Moore Was Banned From Gadsden Mall After Repeated Unwanted Advances.** "An Alabama woman who has accused Republican U.S. Senate candidate Roy Moore of sexually harassing her in the late 1970s said he was banned from the mall where she worked after she complained about his repeated, unwanted advances toward her. 'I went to my manager and talked to him about it and asked him, basically, what could be done," Becky Gray told ABC News late Wednesday night. 'Later on, he…came back through my department and told me that [Moore] had been banned from the mall." [ABC News, 11/16/17] **New Yorker: "Moore Had Been Banned From The Mall Because He Repeatedly Badgered Teen-Age Girls."** "This past weekend, I spoke or messaged with more than a dozen people—including a major political figure in the state—who told me that they had heard, over the years, that Moore had been banned from the mall because he repeatedly badgered teen-age girls. Some say that they heard this at the time, others in the years since. These people include five members of the local legal community, two cops who worked in the town, several people who hung out at the mall in the early eighties, and a number of former mall employees." [New Yorker, 11/13/17] **Retired Alabama Police Officer: "We Were Advised That He Was Being Suspended From The Mall."** "A retired Alabama police officer said police were told in the 1970s to make sure now-GOP Senate candidate Roy Moore stayed away from high school cheerleaders. Former Gadsden police officer Faye Gary told MSNBC that the 'rumor mill was that he liked young girls.' 'We were advised that he was being suspended from the mall because he would hang around the young girls that worked in the stores and, you know, really got into a place of where they say he was harassing,' former Gadsden police officer Faye Gary told MSNBC on Tuesday." [The Hill, 11/22/17] **AL.com: Mall Employees Warned About Moore, Who "Often Walked Alone Around The Gadsden Mall."** "Colleagues and others who knew Moore told the Washington Post that he often walked alone around the Gadsden Mall…Jason Nelms, who now

[8] We note that the various news articles were submitted as evidence at trial.

	lives in Tennessee but grew up in nearby Southside, was a regular at the mall when he was a teenager. He recalled being told by a mall employee that they kept watch for an older guy who was known to pick up younger girls. Nelms said he was told later by a concession worker at the mall that it was Roy Moore." [AL.com, 11/13/17] • **AL.com: Mall Security Guard Told Mall Employee To Alert Security If Moore Was Seen.** "Legat, now 59, said an off-duty Gadsden police officer named J.D. Thomas told him about various people he should look out for when he was working. This was around 1981, and Thomas worked security at the mall. One of the people was a pickpocket, he said, while another was someone prone to pick fights. One was Roy Moore. 'I asked him, 'What did he do?' Legat recalled. 'He said, 'If you see him, let me know. I'll take care of it.'" [AL.com, 11/13/17]
V/O: One he approached "was 14 and working as Santa's helper." TEXT: One he approached "was 14 and working as Santa's helper." CITE: AL.com, 11/13/17	**AL.Com: Moore Flirted With Girl At Mall Who "Was 14 And Working As Santa's Helper."** "Colleagues and others who knew Moore told the Washington Post that the often walked alone around the Gadsden Mall…Wendy Miller told The Post that she was 14 and working as Santa's helper at the Gadsden Mall in 1977 when Moore first spoke with her and told her she looked pretty." [AL.com, 11/13/17] • **Girl Was Approached By Moore At Age 14, Asked Out On Dates At Age 16.** "Wendy Miller says she was 14 and working as a Santa's helper at the Gadsden Mall when Moore first approached her, and 16 when he asked her on dates, which her mother forbade." [Washington Post, 11/09/17]

As to the meaning of the ad, like the others, Astiz testified that the intent of the ad was to "amplify all of the different news articles that were coming out" and make the public aware of the allegations concerning Moore's "misconduct with girls." She did not believe that the ad conveyed the message that Moore solicited Miller for sex when Miller was 14 and working as Santa's helper. She added that even if the ad did convey that message, based on all the reporting about Moore and the seemingly credible allegations from multiple women about Moore's inappropriate behavior, she thought it was reasonable to conclude that Moore approached Miller to tell her she was pretty "for a reason" and "it seemed to be sexual in nature." Accordingly, Astiz stood by everything in the ad and maintained that she believed that everything contained in the ad was true.

2. Testimony about Moore's conduct

Several witnesses testified about whether Moore ever inappropriately interacted with young girls and whether he was banned from the Gadsden Mall. First, and most relevant here, Wendy Miller testified that Moore never solicited her to have sex with him. Additionally, Miller stated that Moore never made her feel "uncomfortable physically" or "traumatized." But she also said that she thought Moore was "probably" flirting with her and that, as she got older, she began to believe that Moore approached her and asked her on dates "for the purposes of making sexual advances." But she did not realize Moore's intentions when she was 14.

Becky Gray, who worked at the mall during relevant periods, testified that Moore gave her "the creeps" because he was an older man trying to talk and flirt with young girls. Gray stated that Moore's conduct made her so uncomfortable that she complained about Moore to her manager, who then told her that Moore had been banned from the mall.

J.D. Thomas, who worked as a security guard at the mall, testified that during a period of a month to six weeks, he received about 10 complaints about Moore's conduct at the mall. Thomas explained that the complaints came "mostly [from] young girls, teenage girls, saying that he was asking them out, maybe talking inappropriately." Thomas testified that eventually he had to tell Moore to "cool it" and that at one point he told Moore that he was banned from the mall.

Finally, Moore testified and denied that he was ever banned from the mall or had solicited sex from young girls.[9] With regard to Miller, he denied any memory of telling her she was pretty or asking her out at 16. Yet, despite having no recollection, he testified that he knew he "didn't do that." He asserted that the allegations were entirely false and politically motivated, emphasizing that he had been an upstanding member of the legal and judicial community for a number of years before running in the 2017 special election. He also testified that the SMP ad "destroyed" his reputation.

After instructing the jury on the basic elements of a defamation claim under Alabama law, the district court instructed the jury that Moore had to prove by clear and convincing evidence "that SMP published the statement with actual malice."[10] Following deliberations, the jury returned a verdict in favor of Moore on both the defamation and false-light invasion of privacy claims and awarded him $8.2 million in damages.

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[9] Several other witnesses, including members of Moore's family, also testified that Moore was never banned from the mall.

[10] Notably, both the jury charge and the verdict form used the singular term "the statement" because there was only one statement allegedly implied by the juxtaposition of frames 2 ("Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls.") and 3 ("One he approached was '14 and working as Santa's helper.'"). Moore's appeal is thus about only the implied statement that Moore solicited sex from Wendy Miller when she was 14 and working as Santa's helper.

The jury completed a verdict form (attached in Appendix I), which asked the jury to answer four questions about each claim. Three of those eight questions are relevant to actual malice. We recount those three questions and answers.

As to the defamation claim, the verdict form asked: "Do you find that Roy S. Moore proved by clear and convincing evidence: That SMP published the statement with actual malice (that is, SMP knew that a statement was false or acted with reckless disregard to whether a statement was false)?" The jury circled "YES."

This same test for actual malice was also used in two jury questions on the verdict form as to Moore's false-light invasion of privacy claim. One question on the verdict form asked: "Do you find that Roy S. Moore proved by clear and convincing evidence: That SMP published information that it knew was false or SMP acted with reckless disregard about whether the information was false?" The jury circled "YES." Another question asked: "Do you find that Roy S. Moore proved by clear and convincing evidence: That SMP knew the information would place Moore in a false light, or SMP acted in reckless disregard to whether Moore would be placed in a false light?" The jury again circled "YES."

SMP initially moved for judgment as a matter of law during the trial, which was denied. After trial, SMP renewed its motion for judgment as a matter of law and alternatively moved for a new trial. SMP argued, in relevant part, that Moore failed to establish

by clear and convincing evidence that SMP had the requisite actual malice when it published the ad.[11]

The district court conducted an independent review and found that: (1) "the jury's fact findings and credibility determinations [were] not clearly erroneous;" (2) "Moore presented sufficient evidence to support the jury's finding of actual malice;" and (3) "denying SMP's motions to set aside the verdict [would] not have an undue chilling effect on protected speech." The district court denied SMP's renewed motion for judgment as a matter of law and its motion for a new trial. SMP timely appealed.

II. Standard of Review

Ordinarily, after a jury verdict, "we review the denial of a motion for judgment as a matter of law *de novo*. In doing so, we draw all reasonable [evidentiary] inferences in favor of the nonmoving party." *Top Tobacco, L.P. v. Star Imps. & Wholesalers, Inc.*, 135 F.4th 1344, 1349 (11th Cir. 2025) (citation and quotations omitted); *Henderson v. Ford Motor Co.*, 72 F.4th 1237, 1244 (11th Cir.

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[11] Because the actual malice standard is the same for defamation and false-light invasion of privacy claims brought under Alabama law, the district court below performed one actual malice analysis for both claims, and the parties on appeal present a single actual malice argument for both claims. *See Finebaum*, 854 So. 2d at 1124–25 (explaining that the actual malice standard applies to defamation claims brought under Alabama law); *Smith*, 888 So. 2d at 496 n.1 (explaining that the constitutional actual malice standard applies to claims for false-light invasion of privacy). So we too perform one actual malice analysis for both claims.

2023) (stating the same). "Where no legally sufficient evidentiary basis exists for a reasonable jury to find for that party on that issue, judgment as a matter of law is proper." *Henderson*, 72 F.4th at 1244 (quotations omitted).

However, because the jury verdict in this case concerns a defamation claim by a public figure, we also have a unique constitutional duty in reviewing this verdict. Specifically, the Supreme Court has established a constitutional rule, based on the First Amendment, requiring a public-figure plaintiff to establish actual malice by the defendant by clear and convincing evidence in order for the public figure to succeed on his defamation claim.[12] *See N.Y. Times*, 376 U.S. at 279–80. In order to ensure that the actual malice standard has been met, the Supreme Court has mandated

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[12] We acknowledge that there has been criticism of the actual malice standard itself. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from the denial of *certiorari*) (emphasizing that the actual malice standard is a policy driven, judicially created doctrine that "bears no relation to the text, history, or structure of the Constitution" (quotations omitted)); *id.* at 2426–30 (Gorsuch, J., dissenting from the denial of *certiorari*) (explaining that due to modern developments of how news is delivered and how private citizens can easily become public figures on social media, the policy based actual malice standard likely no longer serves its intended goals); *McKee v. Cosby*, 586 U.S. 1172, 1173 (2019) (Thomas, J., concurring in the denial of *certiorari*) (discussing how the actual malice standard has no basis in the Constitution and urging the Court to return to the original meaning of the First Amendment); *Counterman v. Colorado*, 600 U.S. 66, 105–06 (2023) (Thomas, J., dissenting) ("*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." (quotations omitted)). However, unless and until the Supreme Court decides to revisit the actual malice standard, we must continue to apply it.

that, in defamation cases brought by public figures, appellate courts have a constitutional duty to "make an independent examination of the whole record," and "determine whether the record establishes actual malice with convincing clarity" so that we may be "assure[d] . . . that the judgment . . . does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508, 514 (1984) (quotations omitted). Importantly, this "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Id.* at 501 (conducting independent review of whether there was sufficient clear and convincing evidence of actual malice following a bench trial); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688–93 (1989) (conducting an independent review of whether the constitutional actual malice standard had been established by clear and convincing evidence in a jury trial); *see also Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1239, 1239–44 (11th Cir. 1999) (conducting independent review of whether the evidence was sufficient to support the jury's finding of actual malice). This requirement of independent appellate review is a rule of federal constitutional law which "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 510–11. Thus, it necessarily follows from this requirement that "[t]he question [of] whether the evidence in the record . . . is of the convincing clarity required to strip the

utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511.

In sum, "whether the evidence . . . in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks*, 491 U.S. at 685. In this regard, the Supreme Court has explained that:

> This [standard] is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"—and, more particularly, "reckless disregard"—however, is not readily captured in one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards.

Id. at 685–86 (citations and quotations omitted). Accordingly, "judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Id.* at 686 (alteration adopted) (quotations omitted).

"In determining whether the constitutional [actual malice] standard has been satisfied," as part of our independent review, we

first "must consider the factual record in full." *Id.* at 688. In doing so, we fully accord the jury's credibility determinations the special deference to which they are entitled.[13] *See id.* at 689–92 (conducting an independent review that included the jury's answers to special interrogatories, the facts not in dispute, and certain defense testimony "the jury *must* have rejected," and upholding the jury verdict for the plaintiff); *see also id.* at 700 (Scalia, J., concurring in the judgment) ("I would . . . mak[e] our independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it reasonably could have made."); *Levan*, 190 F.3d at 1239, 1244 (reversing a jury verdict for the plaintiffs, and stating that although "[w]e are required to make an independent examination of the entire record," we still consider the evidence "in the light most favorable to" the prevailing party at trial).

Next, we answer the question of law as to whether the record evidence is sufficient to support the jury's finding of actual malice by clear and convincing evidence.[14] *See Harte-Hanks*, 491

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[13] To the extent Moore suggests at times in his briefing that, under Federal Rule of Civil Procedure 50(a) and (b), we must also defer to the jury's ultimate actual malice finding so long as it was reasonable, Moore's position is inconsistent with the Supreme Court's independent review directive in *Bose Corp.*, *Harte-Hanks*, and our *Levan* precedent. Accordingly, we reject it.

[14] "The 'clear and convincing' standard [is] an intermediate standard of proof that lies between proof by a preponderance of the evidence and proof beyond a reasonable doubt." *Fults v. GDCP Warden*, 764 F.3d 1311, 1314 (11th Cir. 2014). It requires "proof that a claim is highly probable." *Id.* (alterations adopted) (quotations omitted).

U.S. at 693 (concluding after a jury trial that "the evidence in the record in this case, when reviewed in its entirety, is 'unmistakably' sufficient to support a finding of actual malice"); *Levan*, 190 F.3d at 1244 (concluding after a jury trial that "the evidence in the record before [the Court], when considered in the light most favorable to [the plaintiffs], was insufficient to demonstrate the existence of actual malice by clear and convincing evidence"); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 564 (5th Cir. 1997) (concluding that "insufficient evidence" supported the jury's finding of actual malice and thus, "the district court erred in entering judgment for [the plaintiff] on its defamation claims"); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997) (concluding after a jury trial that "intentional conduct [described in evidence of the case] satisfie[d] the 'actual malice' standard, permitting a [jury] verdict for [the plaintiff]"); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 679 (9th Cir. 1990) ("We conclude that the jury verdict cannot stand because the evidence fails to prove constitutional malice with 'convincing clarity.'"); *see also Bose*, 466 U.S. at 513 (reviewing a judgment for the plaintiff after a bench trial, and affirming the First Circuit's vacatur of that judgment because "as a matter of law . . . the record d[id] not contain clear and convincing evidence that [the defendants] prepared the [complained-of] article with knowledge that it contained a false statement, or with reckless disregard of the truth"); *Berisha v. Lawson*, 973 F.3d 1304, 1309–10, 1312, 1316 n.8, 1321 (11th Cir. 2020) (asking in a summary judgment appeal "whether the record could allow a reasonable juror to conclude (clearly and

convincingly) that [the defendant author] held serious doubts about the truth of the book's portrayal of [the plaintiff]" and concluding, *inter alia*, that "the evidence [was] insufficient to support a conclusion that [any defendant] acted with actual malice").

Finally, we note that when, as here, the alleged defamation is related to a political candidate for an elective office, the case "presents what is probably the strongest possible case for application of the *New York Times* rule, and the strongest possible case for independent review." *Harte-Hanks*, 491 U.S. at 686–87 (citation and quotation omitted).

III. Discussion

SMP argues that Moore failed to meet the demanding constitutional actual malice standard; therefore, Moore's defamation and false-light invasion of privacy claims necessarily fail as a matter of law. Specifically, SMP argues that Moore did not present clear and convincing evidence that SMP subjectively knew or recklessly disregarded that its ad (frames 2 and 3 read together) implied that Moore solicited sex from Wendy Miller when she was 14 years old and working as Santa's helper. For the reasons that follow, we agree that the record does not contain sufficient clear and convincing evidence to support the jury's actual malice finding. We thus vacate the jury's verdict, reverse the denial of

SMP's motion for judgment as a matter of law, and remand for entry of judgment in favor of SMP.[15]

We divide our discussion into two sections. First, we set forth the relevant legal framework for defamation (here, defamation by implication) cases. Second, we engage in an independent review as outlined above to determine if the record contains clear and convincing evidence to support the jury's finding that SMP acted with actual malice. *See Harte-Hanks*, 491 U.S. at 690–91.

A. The relevant legal framework for actual malice in a defamation by implication case requires clear and convincing evidence of both actual falsity and subjective intent to communicate the defamatory implication

As noted previously, Alabama law recognizes a single tort of defamation that can be proved through various means, such as an express defamatory meaning, "defamatory implication," and "defamatory innuendo." *Finebaum*, 854 So. 2d at 1124–25. To establish a false-light invasion of privacy claim, a plaintiff must show that (1) the defendant gave "publicity to a matter concerning

[15] SMP also argues that: (1) the ad was not materially false; (2) the jury instructions were erroneous and prejudicial and allowed Moore to establish liability and damages based on non-actionable statements; and (3) the jury's award was excessive. However, because we agree with SMP that Moore failed to present clear and convincing evidence of actual malice, we do not reach these other issues.

another that places the other before the public in a false light," (2) "the false light in which the other was placed would be highly offensive to a reasonable person," and (3) "the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Flickinger v. King*, 385 So. 3d 504, 517 (Ala. 2023) (quotation and emphases omitted). The constitutional actual malice standard applies to both defamation and false-light invasion of privacy claims under Alabama law. *Finebaum*, 854 So. 2d at 1124–25 (defamation); *Smith*, 888 So. 2d at 496 n.1 (false-light invasion of privacy).

Actual malice means that the plaintiff must prove that "the defendant made the alleged defamatory statement with . . . knowledge that it was false or with reckless disregard of whether it was false or not." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1252 (11th Cir. 2021) (quotations omitted). The actual malice test is subjective, meaning that we focus only on the defendant's actual state of mind. *N.Y. Times*, 376 U.S. at 279–80; *Coral Ridge Ministries*, 6 F.4th at 1252 ("This actual malice test is subjective; the public-figure plaintiff must show that the defendant *in fact* entertained serious doubts as to the truth of the statement." (emphasis in original) (quotations omitted)); *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702–03 (11th Cir. 2016) ("The test is not an objective one and the beliefs or actions of a reasonable person are irrelevant."). Under this subjective test, the plaintiff must show that (A) the defendant knew the alleged defamatory statement was in fact false; or (B) "actually entertained

serious doubts as to the veracity of the published account, or was highly aware that the account was probably false"—*i.e.*, the defendant acted with reckless disregard of whether the statement was false or not. *Michel*, 816 F.3d at 703; *see also Harte-Hanks*, 491 U.S. at 667 (explaining that reckless disregard for the truth at a minimum means that "the defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication" (quotations and citation omitted)). In other words, "[t]o be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that [the] publication is false." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). Importantly, "[i]ll-will, improper motive or personal animosity plays no role in determining whether a defendant acted with actual malice." *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 n.17 (11th Cir. 1999) (quotations omitted); *see also Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."). Nevertheless, "[t]he defendant in a defamation action brought by a public official cannot . . . automatically [e]nsure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

In sum, in the typical express defamation case, the constitutional actual malice standard requires that the plaintiff establish by clear and convincing evidence the defendant's actual state of mind concerning the veracity of the alleged defamatory

statement. And by showing that the defendant knew the statement was false or that the defendant acted with reckless disregard to its falsity, the plaintiff necessarily shows that the defendant had an intent to defame. *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 90 (3d Cir. 2013) ("In ordinary defamation cases, intent to defame can be established solely through knowledge that the statement was false. After all, if the defendants knew that the statement made was false and defamatory, then they must have intended to defame."). Thus, the defendant's intent to defame is a necessary and inherent part of the Supreme Court's actual malice standard.

Moore's case, however, involves an allegation of defamation-by-implication (or as Moore puts it, the statement that resulted from the juxtaposition of frames 2 and 3 of SMP's ad),[16]

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[16] Again, Moore's theory was that the statement in frame 2 that he "was actually banned from the Gadsden Mall . . . for soliciting sex from young girls," when combined with the statement from frame 3 that "[o]ne he approached 'was 14 and working as Santa's helper,'" falsely created "a new statement" that he solicited sex from Wendy Miller when she was 14 years old and working as Santa's helper. To the extent that he asserts that his claim is not about defamation by implication, we disagree. First, the record belies Moore's contention that this case was not about defamation by implication. Moore pleaded and labeled the present claim as a defamation-by-implication claim, and he asserted that frames 2 and 3, when read together, "convey[ed] the implication that [he] had solicited sex from young girls at the Gadsden Mall, including one that was 14 years old." Second, the jury instructions discussed the statement "conveyed" (*i.e.*, implied) by the ad. And third, the "juxtaposition" of words is encompassed within the ambit of defamation by implication. *See* 50 Am. Jur. 2d *Libel and Slander* § 161. Thus, no matter whether it is phrased as the juxtaposition of words or defamation by implication, Moore's claim is in fact an implication claim.

not express defamation. Defamation-by-implication is fraught with subtle complexities and is more nuanced than express defamation. "'Defamation by implication' occurs when a defendant juxtaposes a series of facts to imply a defamatory connection between them." 50 Am. Jur. 2d *Libel and Slander* § 161. Thus, "a defamation by implication stems not from what is literally stated but from what is implied." *Id.* Because the defamatory meaning is *implied* as opposed to explicitly stated, it necessarily follows that the challenged statement could have multiple meanings—some defamatory and some not. Accordingly, because the challenged statement in a defamation-by-implication case has multiple meanings, the question that necessarily follows is whether showing known falsity or reckless disregard of the falsity of the implied defamatory statement is enough to show the necessary intent to defame for purposes of the actual malice standard.

Although we have not addressed this question, several of our sister circuits have, and they have concluded that, in a defamation-by-implication case, showing that the defendant knew that the implied defamatory statement was false or acted with reckless disregard to its falsity alone is not enough to establish the necessary intent to defame. *See, e.g.*, *Kendall*, 716 F.3d at 90–91. We agree. Unlike in express defamation cases, "in defamation-by-implication cases, showing known falsity [of the implication] alone is inadequate to establish an intent to defame" because the challenged statement "has defamatory and nondefamatory meanings," which means that we can "no longer presume with

certainty that the defendant knew they were making a defamatory statement." *Id.* at 90.

Accordingly, in a defamation-by-implication case, to show the necessary intent to defame inherent in the actual malice standard, the "plaintiff[] must show something that establishes [the] defendant['s] intent to communicate the defamatory [implied] meaning" or that the defendant acted with "reckless disregard for the defamatory [implied] meaning." *Id.* at 90–91. Consequently, in a defamation-by-implication case, the plaintiff must show by clear and convincing evidence not only (1) that the defendant knew of or recklessly disregarded the falsity of the implied defamatory statement, but also (2) that the defendant "inten[ded] to communicate the defamatory meaning" or recklessly disregarded the defamatory meaning—*i.e.*, "the defendant[] knew that the defamatory meaning was not just possible, but likely, and still made the statement despite their knowledge of that likelihood." *See id.*

This approach is consistent with that of our sister circuits. *See, e.g.*, *id.* (holding that in order to show actual malice in a defamation-by-implication case, the plaintiff must show the defendant's "intent to communicate the defamatory meaning" and that the defendant either knew that the defamatory meaning was false or acted in reckless disregard to its falsity); *Compuware Corp. v. Moody's Invs. Servs.*, 499 F.3d 520, 526, 528–29 (6th Cir. 2007) ("[W]here the plaintiff is claiming defamation by innuendo [or implication], he must show with clear and convincing evidence

that the defendant intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." (alterations adopted) (quotation omitted)); *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002) (explaining that "where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant's article, he must show with clear and convincing evidence that the defendant intended or knew of the implications that the plaintiff is attempting to draw" (alteration adopted) (quotation omitted)); *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1317–18 (7th Cir. 1988) ("If a plaintiff official is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.").

Consistent with the framework above, the jury in this case was instructed that in order to prove actual malice, Moore had to show by clear and convincing evidence that (1) SMP knew the implied statement in the ad was false or SMP recklessly disregarded its falsity (the falsity component of actual malice); and (2) SMP intended the ad to convey that Moore solicited sex from Miller when she was 14, or SMP recklessly disregarded that the ad conveyed the implication that Moore solicited sex from Miller when she was 14 (the intent component of actual malice).[17] In

[17] The district court charged the jury, *inter alia*, that "Moore must prove it is highly probable that, when SMP juxtaposed quotes in the Shopping Mall ad, SMP knew that it was materially changing the meaning of the quotes to convey false information about Moore," or alternatively, "that SMP acted with

other words, the jury was charged with determining whether, when SMP juxtaposed frames 2 and 3 back-to-back, SMP intended or recklessly disregarded that it was materially changing the meaning of the quotes to convey a new implied message about Moore that it knew was false and defamatory.

With this legal framework in mind, we now turn to our independent review of whether Moore's evidence was sufficient to support the jury's finding of actual malice by clear and convincing evidence. *See Harte-Hanks*, 491 U.S. at 690–91. The parties focus primarily on whether Moore established by clear and convincing evidence that SMP intended or recklessly disregarded the ad's alleged defamatory implication. So we begin with that question as well.

B. Moore failed to present clear and convincing evidence that SMP intended or recklessly disregarded the ad's alleged defamatory implication and therefore insufficient evidence exists to support the jury's finding of actual malice

SMP contends that Moore failed to prove by clear and convincing evidence that it intended or recklessly disregarded that

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reckless disregard to whether it was materially changing the meaning of the quotes to convey false information about Moore." The district court then clarified that the instructions meant "Moore must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14, or SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14."

its ad implied that Moore solicited sex from Miller when she was 14 years old and working as Santa's helper at the Gadsden Mall. Moore, on the other hand, argues that he established SMP's intent to defame based on three facts: (1) the jury's disbelief of the SMP witnesses' testimony that they did not intend the implication or otherwise believe that the ad implied that Moore solicited sex from 14-year-old Miller; (2) the ad itself; and (3) the fact that SMP vetted the ad before publishing it, which necessarily confirmed that Miller never said Moore solicited her for sex. After careful review, we conclude that none of the three facts relied on by Moore give rise to the necessary intent to defame for actual malice.

We begin with the jury's rejection of the SMP witnesses' testimony and whether that rejection is enough to demonstrate by clear and convincing evidence that SMP intended the ad's defamatory implied meaning or that SMP acted with reckless disregard to the defamatory implied meaning. Every SMP witness who took the stand testified that he or she did not intend for the ad to imply that Moore solicited sex from Miller when she was 14 years old. SMP thus argues that this unrebutted testimony clearly precludes a finding of the necessary intent to defame for actual malice. The jury, however, was entitled to disbelieve this testimony, and given the district court's instructions—that Moore had to "prove that SMP intended [in the ad] to convey that Moore solicited sex from Wendy Miller when she was 14, or SMP recklessly disregarded the possibility" that the ad conveyed this implication—and the jury's verdict in favor of Moore, we agree that the jury must have discredited and rejected the SMP witnesses'

testimony. *See Harte-Hanks*, 491 U.S. at 690. "When the testimony of a witness is not believed, the trier of fact may simply disregard it." *Bose Corp.*, 466 U.S. at 512. We must give these credibility findings deference as SMP has not shown they are clearly erroneous. *See Harte-Hanks*, 491 U.S. at 690.

Even so, the jury's rejection of the SMP witnesses' testimony about the intent of the ad is not itself clear and convincing evidence of actual malice. The Supreme Court has explained that "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion" and finding actual malice. *Bose Corp.*, 466 U.S. at 512; *see also Newton*, 930 F.2d at 680 (holding it was error under *Bose* to conclude "that the jury could have based a finding of actual malice on a determination that the journalists' testimony about their state of mind was not credible"); *Kendall*, 716 F.3d at 93 ("Mere disbelief of a defendant's statement ordinarily is insufficient to establish malice."). Accordingly, the fact that the jury disbelieved the SMP witnesses' testimony that SMP did not intend for the ad to imply that Moore solicited sex from Miller and that SMP did not view the ad as making this implication "does not establish that [SMP] realized [(*i.e.*, intended) or recklessly disregarded that the implication existed] at the time of publication." *Bose Corp.*, 466 U.S. at 512; *see also Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980)[18] (holding that, given the lack of

[18] Decisions of the former Fifth Circuit rendered "prior to the close of business" on September 30, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

"documentary evidence" showing actual malice, even "conflicting accounts" of the defendant's intent could not show actual malice clearly and convincingly). In short, to establish actual malice by clear and convincing evidence, Moore needed more evidence than just the jury's disbelief of SMP's witnesses to establish that SMP intended the defamatory implied meaning in the ad or acted with reckless disregard to the defamatory implied meaning.

Next, Moore argues that SMP's intent or recklessness can be inferred from the ad itself. According to Moore, "the phrase 'One he approached'" in frame 3 "necessarily refers back" to the statement in frame 2, that "'Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls.'" Thus, he maintains that in reading these two frames together "[i]t is impossible that an average viewer of that ad would *not* believe that Moore solicited sex from Wendy Miller when she was 14." In other words, Moore contends that the defamatory implication is the "most obvious message of the ad," and SMP therefore must have intended the defamatory implication or otherwise acted with reckless disregard to it. Moore's contention, however, conflicts with the Supreme Court's directives concerning actual malice.

Again, the actual malice standard is deliberately subjective. *See N.Y. Times*, 376 U.S. at 279–80; *Harte-Hanks*, 491 U.S. at 688. As a result, "constitutional malice does not flow from a finding . . . [that] the [ad] may be capable of supporting the impression [the plaintiff] claims." *Newton*, 930 F.2d at 681; *see also Dunn*, 193 F.3d at 1200 (explaining that "[i]t is the Defendants'

subjective view" at the time the communication was made, not the plaintiff's "subjective impression" of that communication, "that determines whether [the communication was] issued with actual malice"). This principle holds true even if the "impressions were clear and unescapable." *Newton*, 930 F.2d at 680 (quotations omitted). "Simply because a statement reasonably can be read to contain a defamatory inference does not mean" that "the publisher of the statement either intended the statement to contain such a defamatory implication or even knew the readers could reasonably interpret the statements to contain the defamatory implication." *Saenz*, 841 F.2d at 1318 (quotation omitted); *see also Kendall*, 716 F.3d at 91–93. To conclude otherwise would allow a defamation plaintiff to hold a defendant liable for defamatory implied statements *negligently* conveyed, rather than only for defamatory implied statements the defendant knowingly intended to convey or recklessly conveyed, which would eviscerate the First Amendment protections that the Supreme Court established in *New York Times* and its progeny. Thus, although we agree that the statements in frames 2 and 3 of SMP's ad *could* convey the implication that Moore solicited sex from Miller when she was 14 and working at the mall as Santa's helper, that fact is not clear and convincing evidence that SMP intended that implication or recklessly disregarded that the ad conveyed that implication, which is the critical inquiry. *See Newton*, 930 F.2d at 681; *Saenz*, 841 F.2d at 1318; *Kendall*, 716 F.3d at 91–93.

Moore resists this conclusion by arguing that the ad itself establishes the requisite intent for actual malice because this case is

in reality "an altered quote case" akin to the Supreme Court's decision in *Masson*. We are unpersuaded. In *Masson*, the defendant reporter interviewed the plaintiff for an article in *The New Yorker*. 501 U.S. at 500. The final article purported to quote statements the plaintiff made during the interview, but in doing so, the author had materially altered the plaintiff's words. *See id.* at 502–08, 522–25. The Supreme Court held that the alterations of the quotes that "materially alter[ed]" the meaning of the plaintiff's statements could support a finding of actual malice, and it remanded the case to the Ninth Circuit to consider whether actual malice had been established in the first instance. *Id.* at 522–25.

Moore's case is not like *Masson*. Here, frame 2 of SMP's ad contained the following quote: "Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls." The frame included a citation for the quote, and Moore admits that this quote is an accurate excerpt from the cited article. Frame 3 contained the following language: "One he approached 'was 14 and working as Santa's helper.'" The frame included a citation for the direct quote, and Moore does not dispute that the directly quoted phrase—"was 14 and working as Santa's helper"—was an accurate excerpt from the AL.com article. Accordingly, unlike in *Masson*, Moore's claims do not turn on the alteration of direct quotes from the news reports on which SMP relied. *Masson* is thus inapposite and does not compel the conclusion that the ad itself demonstrates actual malice.

Moreover, we cannot ignore that SMP included citations to the news articles that it relied on in the ad itself. "Where a publisher gives readers sufficient information to weigh for themselves the likelihood of [a statement's] veracity, it reduces the risk that readers will reach unfair (or simply incorrect) conclusions, even if the publisher itself has." *Michel*, 816 F.3d at 703. Thus, SMP's inclusion in the ad of citations to the news articles on which it relied not only allowed viewers to verify the ad's contents (or any resulting implications from the ad as a whole) but also further undermines Moore's contention that the ad itself demonstrates actual malice.[19]

Lastly, Moore contends that SMP must have intended or recklessly disregarded that the ad conveyed the defamatory implication because SMP vetted or fact-checked the ad before publishing it. Moore asserts that because SMP's research team "read all of the articles" cited in the ad and attempted to ensure the ad's accuracy, and none of the articles supported the assertion that Moore solicited a 14-year-old girl working at the mall for sex, it necessarily follows that SMP intended, or recklessly disregarded, the ad's defamatory implication. We disagree.

---

[19] To be clear, our conclusion that the ad itself does not establish SMP's intent does not mean that, in another case, the defendant's intent to defame could never be inferred from the allegedly defamatory implied statement. There might be circumstances where the publication itself could demonstrate the requisite intent to defame even when, as here, the defendant denies such an intent. We need not determine what those circumstances might be, because the ad before us does not allow for such an inference.

A defendant's efforts to verify the accuracy of its statements militates against a finding of actual malice. *See Levan*, 190 F.3d at 1242 (crediting the defendant for "double-check[ing] with numerous" sources to verify the accuracy of a report). After all, "[t]he publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability." *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971). Here, as shown by SMP's "research backup document," Astiz and her team fact-checked each frame of the ad and attempted to ensure its accuracy. It is true that SMP did not fact-check the implied assertion that Moore solicited sex from Miller when she was 14 years old and working as Santa's helper. But the fact that SMP did not do so does not show that SMP intended or recklessly disregarded that the implied statement in the ad. Indeed, one could argue that, given SMP's detailed fact-checking of the other statements in the ad, SMP's failure to fact-check the veracity of the implication shows that SMP did not know that the implication even existed. SMP's thorough vetting process is inconsistent with and belies any allegations of intentional or reckless publication of the defamatory implication, and so it cannot provide sufficient evidence of SMP's intent. *See Time, Inc.*, 401 U.S. at 291. At most, it shows that SMP made a poor choice of words in frame 3—a negligent error at best. And a negligent error is not a basis for a finding of actual malice. *See id.*; *see also Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 2016) ("We believe that the First Amendment cautions courts against intruding too

closely into questions of editorial judgment, such as the choice of specific words.").

In sum, Moore points to, and our independent review has revealed, no other evidence in the record showing that SMP intended or recklessly disregarded that its ad implied that Moore solicited sex from Miller when she was 14 and working as Santa's helper. Because the evidence discussed above is inadequate to support a finding of the necessary intent to defame for purposes of actual malice in a defamation-by-implication case, Moore's defamation and false-light claims necessarily fail.[20] As a result, the jury verdict cannot stand.

III. Conclusion

For these reasons, we reverse the district court's order denying SMP's renewed motion for judgment as a matter of law, and remand with instructions for the district court to enter judgment for SMP.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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[20] Because we conclude that the record evidence is insufficient to establish the intent component of the actual malice standard, we do not reach whether Moore established that SMP knew or recklessly disregarded that the implied statement was false.

Appendix I

FILED
AUG 12 2022
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

JURY VERDICT FORM

Count 1: Defamation (pages 7-11)

Do you find that Roy S. Moore proved by a preponderance of the evidence:

1. That SMP made a false statement about Moore? (YES) NO
2. That the statement was defamatory? (YES) NO
3. That SMP published the statement to another person? (YES) NO

Do you find that Roy S. Moore proved by clear and convincing evidence:

4. That SMP published the statement with actual malice (that is, SMP knew that a statement was false or acted with reckless disregard to whether a statement was false)? (YES) NO

Count 2: Invasion of Privacy, False Light (pages 11-13)

Do you find that Roy S. Moore proved by a preponderance of the evidence:

1. That SMP intentionally publicized false information about Moore? (YES) NO
2. That the information placed Moore in a false light in the public eye and the false light would be highly offensive to a reasonable person? (YES) NO

Do you find that Roy S. Moore proved by clear and convincing evidence:

3. That SMP published information that it knew was false or SMP acted with reckless disregard about whether the information was false? (YES) NO
4. That SMP knew the information would place Moore in a false light, or SMP acted in reckless disregard to whether Moore would be placed in a false light? (YES) NO

APPENDIX “B”
ORDER OF TRIAL COURT
DENYING DISMISSAL AND NEW TRIAL

FILED
2023 Sep-29 PM 04:29
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ROY S. MOORE,
Plaintiff,

v.

SENATE MAJORITY PAC,
Defendant.

Case No. 4:19-cv-1855-CLM

ORDER

Pedophile.	Child Predator.	Child molester.
Despicable.	Comic book villain.	Sexually assaulting pedophile.
Skunk.	Probably racist.	Terrible human being.

People called Roy Moore many things after adult women accused Moore of sexual misconduct when they were teens. This court held that each of these comments, and others like them, were based on media reports and thus protected by the First Amendment.

This portion of SMP's Shopping Mall Ad is the only statement the court advanced to trial:

> 'Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.'

SMP's statement about Moore approaching Santa's Helper, Wendy Miller, was different because no media outlet reported that Moore solicited Miller for sex when she was 14 and working as Santa's Helper. Rather, the media reported that, when Miller was 14, Moore told Miller that she looked pretty. Two years later, Moore asked Miller out on a date. She said no. End of story.

In short, the Shopping Mall Ad wasn't commenting on a story; it was *creating* a story. At least, a reasonable juror could find that it was.

The First Amendment does not protect the alteration of quotes if the alteration materially changes the story. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991). So the court allowed this claim to proceed to trial. *See* Doc. 45, pp. 40-48 (denying motion to dismiss); doc. 149, pp. 5-7 (denying summary judgment).

At trial, Moore told the jury that he never solicited sex from Miller. (Trans. 465-66). Miller also told the jury that Moore never solicited sex from her, and that she never told the media that he did:

> Q: Ms. Miller, you [sic] told the reporter or anyone else that Roy Moore solicited sex from you, did you?
>
> A: I never said that.
>
> Q: You never said that. And that didn't happen, did it?
>
> A: No.

(Trans. 744). Assuming the jury believed them, the trial boiled down to what the jury believed the Shopping Mall Ad said (*i.e.*, falsity) and what SMP intended the ad to say (*i.e.*, actual malice).

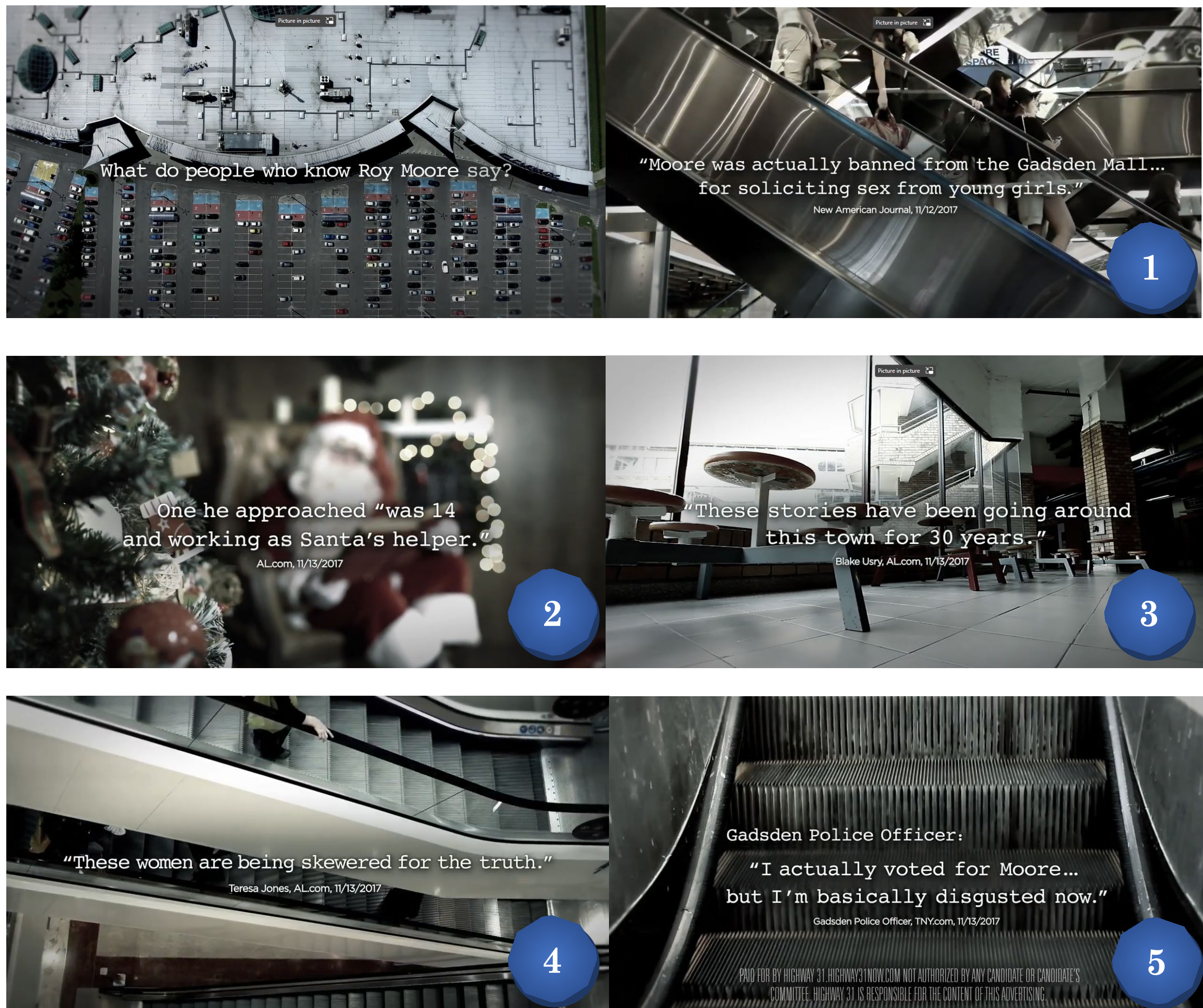
Moore played the ad for the jury and argued that SMP obviously meant for viewers to believe that Moore was banned from the mall for asking young girls at the mall to have sex, including Wendy Miller when she was 14. SMP's witnesses testified that was not their intent, but if that's the message that viewers took from the ad, it was true.

The jury agreed with Moore and awarded him $8.2 million in damages. (Doc. 207). SMP asks the court to set aside the jury's verdict and give it judgment as a matter of law. (Doc. 216). In the alternative, SMP asks the court to reduce the jury's award or order a new trial. (*Id.*).

The court **denies** SMP's motion in all respects. The court finds that the jury's finding of falsity and its award amount are supported by trial evidence and are thus entitled to deference. Using its independent judgment, the court finds that Moore proved actual malice.

Background

The Shopping Mall Ad consists of a narrator reading parts of five media quotes, as those quotes appear over various scenes from a mall:



(Ex. 1) (numbers added). Don't worry; the court will enlarge the pictures and quotes in the pages to come. For now, just notice the theme: SMP's "Shopping Mall Ad" takes place at a shopping mall.

Below, the court recounts the media coverage that led to each quote in the Shopping Mall Ad, paying special attention to reports about Moore being banned from the Gadsden Mall (Quote #1) and Moore's interaction with Wendy Miller, the 14-year-old who was working at the mall as Santa's Helper (Quote #2).

A. The *Washington Post* Allegations

In February 2017, Jeff Sessions resigned as one of Alabama's United States Senators to become Attorney General. Roy Moore won the Republican nomination to fill Sessions' seat, and he squared off against Democratic nominee Doug Jones on December 12, 2017.

On November 9, 2017—33 days before the special election—the *Washington Post* published an article in which four women accused Moore of approaching them when Moore was in his 30s and the women were teenagers. (Ex. 2). Leigh Corfman levied the most serious allegation. Corfman told the *Post* that she met Moore in the hallway of the Etowah County Courthouse when she was 14 and Moore was a 32-year-old assistant district attorney. Moore struck up a conversation with Corfman and her mother, then offered to watch Corfman while her mother went into the courtroom for a child custody hearing. Corfman said that Moore asked for her phone number, which she provided.

Days later, Moore picked Corfman up at her home, and drove her to Moore's home in the woods about 30 minutes away. Corfman told the *Post* that on this first trip, Moore "told her how pretty she was and kissed her." (Ex. 2, p. 2). On her second visit, Corfman says that Moore "took off her shirt and pants and removed his clothes"; then, "touched her over her bra and underpants . . . and guided her hand to touch him over his underwear." (*Id.*, p. 6). Corfman asked Moore to take her home, which he did. (*Id.*). Corfman said that she did not have sex with Moore.

The other three women—Wendy Miller, Debbie Wesson Gibson, and Gloria Thacker Deason—told the *Post* that Moore also "pursued them when they were between the ages of 16 and 18 and [Moore] was in his early 30s[.]" (*Id.*, p. 2). But none of the three said that "she had sexual contact with Moore that went beyond kissing." (*Id.*).

B. Wendy Miller

Wendy Miller was one of the four women cited in the *Post*'s November 9th article. Because the third quote in the Shopping Mall Ad relates to Moore's interaction with Miller at the mall, the court quotes the entire portion of the *Post* article about Miller:

> Around the same time that Deason says she met Moore at the jewelry counter [*i.e.,* 1979], Wendy Miller says that Moore approached her at the mall, where she would spend time with her mom, who worked at a photo booth there. Miller says this was in 1979, when she was 16. She says that Moore's face was familiar because she had first met him two years before, when she was dressed as an elf and working as a Santa's helper at the mall. She says that Moore told her she looked pretty, and that two years later, he began asking her out on dates in the presence of her mother at the photo booth. She says she had a boyfriend at the time, and declined.
>
> Her mother, Martha Brackett, says she refused to grant Moore permission to date her 16-year-old daughter.
>
> "I'd say, 'You're too old for her . . . let's not rob the cradle,'" Brackett recalls telling Moore.
>
> Miller, who is now 54 and still lives in Alabama, says she was 'flattered by the attention.'
>
> 'Now that I've gotten older,' she says, 'the idea that a grown man would want to take out a teenager, that's disgusting to me.'

(*Id.*, p. 9). Four days after the *Post* article, online news source al.com recounted Miller's story like this:

> Wendy Miller told The *Post* that she was 14 and working as Santa's helper at the Gadsden Mall in 1977 when Moore first spoke with her and told her she looked pretty. Two years later, when she was 16, he asked her out on dates, although her mother wouldn't let her go.

(Ex. 5, p. 2) (highlight added). SMP used the highlighted portion of the al.com story in the Shopping Mall Ad, and cited al.com as its source:

(Ex. 1). Neither the al.com article that SMP cited in the ad (Ex. 5), nor the *Washington Post* article that al.com relied on (Ex. 2), reported that Moore solicited sex from Miller.

C. The Mall Ban Allegation

Two of the four women cited in the original *Post* article (Miller and Deason) said they first met Moore while they were working at the Gadsden Mall. (Ex. 2, pp. 7, 9). And "several women who worked there at the time" told the *Post* that Moore "often walked, usually alone, around the newly opened Gadsden Mall—6 feet tall and well-dressed in slacks and a button-down shirt." (*Id.*, p. 5).

Independent journalist Glynn Wilson took the mall story to the next level three days later when he wrote this on his website:

> **BREAKING NEWS**: Sources tell me Moore was actually banned from the Gadsden Mall and the YMCA for his inappropriate behavior of soliciting sex from young girls. If Moore keeps lying, that story will soon come out in a big way too.

(Ex. 3, p. 2) (highlight added). SMP later used the highlighted pieces of Wilson's post to form the first quote in the Shopping Mall Ad:

(Ex. 1). Wilson did not mention Wendy Miller in his post. (Ex. 3).

The New Yorker reprinted Wilson's "Breaking News" post about a mall ban the next day. (Ex. 4, p. 2). Wilson would not disclose his sources to the New Yorker's reporter, Charles Bethea. (*Id.*). But Bethea said that he "spoke or messaged with more than a dozen people—including a major political figure in the state—who told me that they had heard, over the years, that Moore had been banned from the mall because he repeatedly badgered teen-age girls. Some say that they heard this at the time, others in the years since." (*Id.*, p. 1).

One of Bethea's sources was Greg Legat, who worked at the mall in the early 1980s. (*Id.*, p. 2). Legat said that he was told about the ban by police officer J.D. Thomas, who worked security at the mall. (*Id.*). Bethea called Thomas, who declined to comment for the story. (*Id.*).

Bethea talked to an unnamed former mall manager, who confirmed that the mall kept a ban list but did not remember Moore being on the list. (*Id.*).

Bethea also talked to two unnamed police officers who said that "they have long heard stories about Moore and the mall." (*Id.*, p. 3). One of the officers said, "I was told by a girl who worked at the mall that he'd been run off from there, from a number of stores. Maybe not legally banned, but run off." (*Id.).* The other unnamed officer said that "[a] friend of mine told me he was banned from there." (*Id.*). The second officer then said this about Moore, related to an interview Moore gave to Fox News host Sean Hannity: "I actually voted for Moore. I liked him at one time. But I'm basically disgusted now, to be honest with you. Some of the things he's said recently, I've changed my tune completely about this guy." (*Id.*) (highlight added). SMP used the highlighted part of this quote to end the Shopping Mall Ad:

(Ex. 1).

Stories about the mall quickly spread. The same al.com story that mentioned Wendy Miller (Ex. 5) included new quotes from Greg Legat. Like he told the New Yorker, Legat told al.com that J.D. Thomas "told him about various people he should look out for when he was working. … One was Roy Moore." (*Id.*, p. 3). According to Legat, Officer Thomas said, "If you see him, let me know. I'll take care of it." (*Id.*).

The al.com article reached beyond the mall to local restaurants. (*Id.*, p. 4). After recounting new allegations from two servers, al.com quoted this Tweet from former deputy District Attorney Teresa Jones: "As a Deputy DA in Gadsden when Roy Moore was there, it was common knowledge about Roy's propensity for teenage girls. I'm appalled that these women are being skewered for the truth." (*Id.*, p. 4) (highlight added). SMP used the highlighted part of this quote in the Shopping Mall Ad:

(Ex. 1). The al.com article also included the following commentary, which includes a quote from a local resident:

> And yet people who lived in Etowah County during that time have said Moore's flirting with and dating much younger women and girls was no secret.
>
> 'These stories have been going around this town for 30 years,' said Blake Usry, who grew up in the area and lives in Gadsden. 'Nobody could believe they hadn't come out yet.'

(Ex. 5, pp. 1-2) (highlighting added). SMP used the highlighted part of

Usry's comment in the Shopping Mall Ad:

(Ex. 1).

In sum, this November 13th al.com article was the source of three of the five quotes in the Shopping Mall Ad. The article never mentioned the words "ban" or "banned" and did not include an allegation that Moore solicited sex from a girl at the Gadsden Mall, including Miller.

D. Other articles and allegations

SMP pulled quotes only from the three sources detailed above to create the Shopping Mall Ad. But the hits kept coming.

On November 13, Beverly Young Nelson held a press conference to levy new allegations against Moore. (*See* Exs. 72, 90, p. 4, 183, 198). Nelson alleged that, when she was a teen, she met Moore at a Gadsden restaurant where she worked as a waitress. Nelson said that, one night after her shift, Moore sexually assaulted her in the back seat of his car. According to Nelson, Moore "began squeezing my neck, attempting to force my head onto his crotch." (Ex. 72, p. 1). Nelson said that "I thought

he was going to rape me." (*Id.*). Moore denied the allegation, calling Nelson's attorney Gloria Allred "a sensationalist leading a witch hunt," who was "only around to create a spectacle." (*Id.*, p. 2).

Two days later, the *Washington Post* released an article titled, "Two more women describe unwanted overtures by Roy Moore at Alabama mall." (Ex. 90). In it, two new women said that, when Moore was in his 30s, Moore approached them while they worked at the mall. (*Id.*). Gena Richardson was a high school senior when she said that Moore first approached her while she was working at Sears. (*Id.* at 3). Moore then called her at school. (*Id.*). Richardson said that she ultimately went on a date with Moore, which she said ended with Moore giving her "an unwanted 'forceful' kiss that left her scared." (*Id.*). Becky Gray said that she was 22 when Moore started asking her out on dates. (*Id.*, p. 6). Gray said that she "became so disturbed that she complained to the Pizitz manager," and that the store manager responded that it was "not the first time" he heard that complaint. (*Id.*).

In this article, the *Post* recounted its earlier reporting about Wendy Miller:

> At the center of the mall was a photo booth, where Wendy Miller earlier told The Post her mother worked. Miller said she hung out there with her mom when she was 16 and that Moore repeatedly asked her out on dates, which her mother forbade. Miller's mother, Martha Brackett, confirmed her account.

(*Id.*, p. 7). None of the women in the *Post* article—including Miller—said that Moore asked them to have sex when he approached them at the mall. And Moore's campaign released three statements from former mall employees that refuted the "mall ban" allegation. (*See, e.g.*, Exs. 34, 36). Multiple outlets reported the refutations. (*See* Exs. 28-39). And al.com carefully noted on November 21 that it "did not report that Moore had been banned from the mall but has reported that he spent time at the mall while working as a prosecutor in Gadsden." (Ex. 34, p. 1).

But the mall ban story wouldn't die. For example, the *Post* printed an editorial titled, "If Moore could be banned from the mall, he can be kept out of the Senate." (Ex. 97). In it, columnist Jennifer Rubin said, "[t]he sad reality is that the recollection of crusty retired police officers who recall talk of a 'ban' at the mall probably carries more weight with some voters than women accusers." (*Id.*, p. 2).

The *New York Times* published an article on November 15 that included this statement from Karen Lancaster: "I've known for 20 years that he was a predator, that he preyed upon girls in the mall. . . . It's common knowledge." (Ex. 120, p. 2). The *Times* also reported that Moore (who in his 30s) told Kelly Harrison Thorp (then 17) that "I go out with girls your age all the time." (*Id.*, p. 3).

The next day, *ABC News* published a story that it titled, "Roy Moore Accuser, I Got Him Banned From the Mall." (Ex. 100). In it, *ABC* interviewed Becky Gray about her allegations to the *Post*. Gray told *ABC News* that, after complaining to her store manager, the manager told her that Moore "had been banned from the mall." (*Id.*, p. 1).

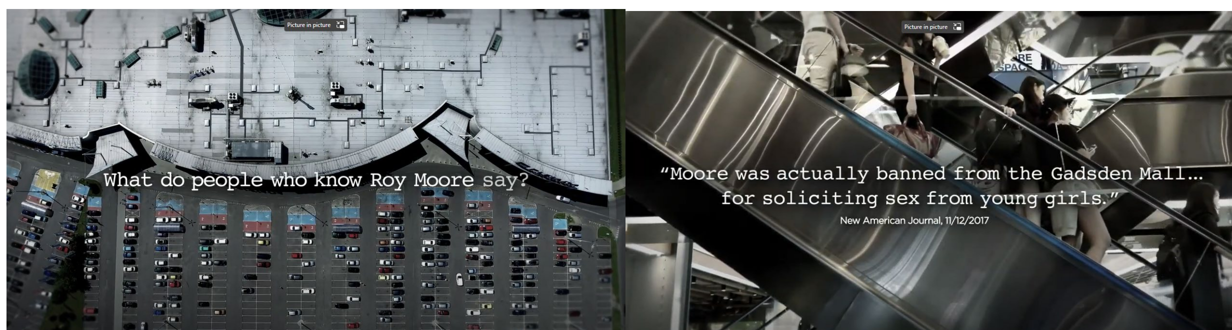
Then, on November 17, the *New York Times* reported that former store manager Glenn Day "recalled that Mr. Moore had such reputation for approaching young women that the mall guard asked him to let security know whenever he saw Mr. Moore there." (Ex. 232, p. 4). But the *Times* also noted that, "[a]s with everything concerning Mr. Moore, accounts vary." (*Id.*). As proof, the *Times* quoted former mall manager Terry White as saying, "Nobody, as far as I know, ever complained." (*Id.*).

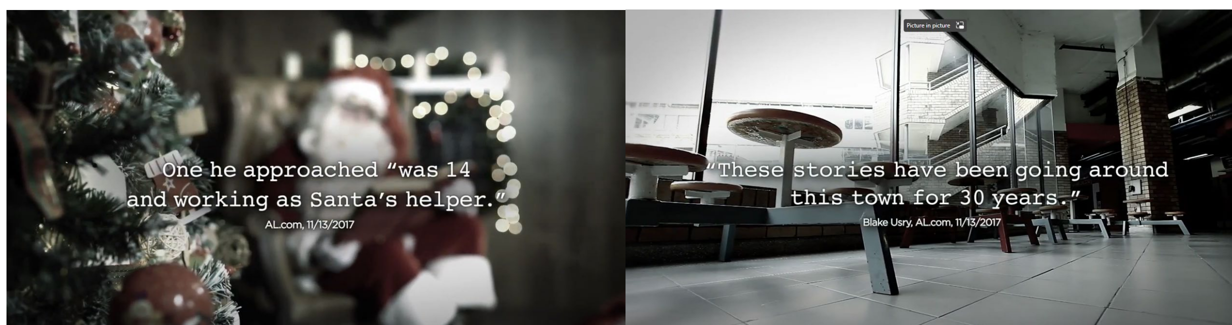
The *Times* was right; accounts varied over the next few weeks. But one thing was consistent: Each day before the election, Moore was the subject of news reports and political ads, and the butt of jokes on late night television. SMP introduced more than 100 articles and videos at trial to prove the point. (*See, e.g.*, Exs. 40-65, 67-93, 95-172, 174, 177-196, 198-212, 215-240, 242-243, 246-253).

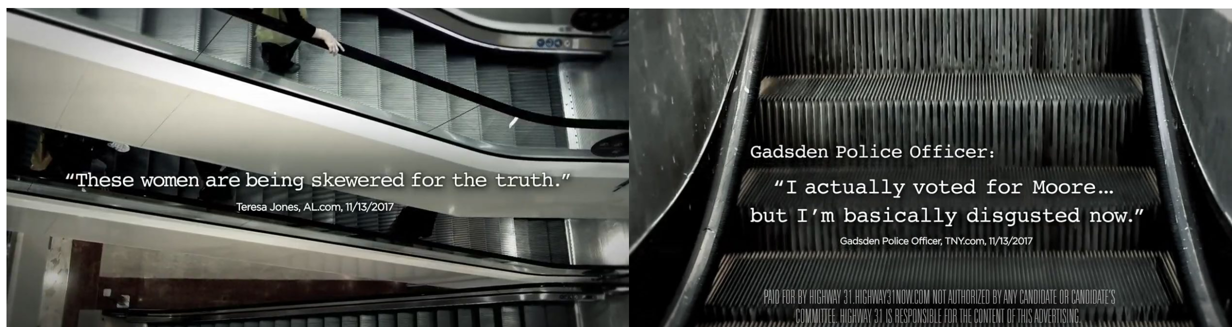
E. Highway 31 & the Shopping Mall Ad

SMP is a super PAC based in Washington, D.C. SMP and others created the Highway 31 PAC in November 2017 to publish ads that would help Doug Jones defeat Moore in the December 2017 election. While Highway 31 was an independent PAC with a Birmingham address, SMP's research team decided Highway 31's ad content, SMP's creative team wrote and produced Highway 31's ads, and SMP President J.B. Poersch approved the ads. (Trans. 70, 74, 110).

SMP's Shopping Mall Ad started with a narrator asking the question, "What do people who know Roy Moore say?" The narrator then read the five quotes already discussed:







Using Highway 31 and its media buyer, Waterfront Strategies, SMP spent $574,754 to air the Shopping Mall Ad on Alabama network television stations 533 times between November 27 and December 6. (Trans. 541). Moore lost the election to Doug Jones on December 12. SMP disbanded Highway 31 shortly after.

F. The lawsuit

Moore sued SMP, Waterfront Strategies, and others for defamation, intentional infliction of emotional distress, and invasion of privacy (false light). (Docs. 1, 47). Moore based his claims on many press releases, tweets, and ads—not just the Shopping Mall Ad.

Over three opinions, the court dismissed all counts against all Defendants except the claims against SMP and Waterfront Strategies based on the Shopping Mall Ad. (*See* docs. 45, 61, 149). As the court explained in those opinions, while Moore might prove that calling him a "pedophile," a "child molester," and the like was false and defamatory, Moore could not prove actual malice under *New York Times v. Sullivan*, 376 U.S. 254 (1964), because two women had publicly accused Moore of sexually assaulting them when they were 14 years old (Corfman) and 15 years old (Nelson). Those allegations—which both women maintain today—were a legitimate basis to place the alleged defamatory labels on Moore, at least for First Amendment purposes.

The Shopping Mall Ad was different because it conveyed a message that a reasonable juror could find was not supported by any published report—*i.e.*, Moore was banned from the Gadsden Mall for soliciting sex from young girls, including Wendy Miller when she was just 14 years old and working as Santa's Helper. When SMP published the Shopping Mall Ad, no woman had alleged that Moore asked her to have sex while at the Gadsden Mall. And, as detailed above, Wendy Miller told the media that, when she was 14, Moore told her that she looked pretty, and when she was 16, he asked her out on a date. Moore never asked Miller for sex.

G. The trial

The court limited Moore to proving whether this part of the Shopping Mall Ad was false, defamatory, and made with actual malice:

> 'Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.'

(Doc. 196, pp. 3-4) (pretrial order); *see also* (docs. 45, pp. 40-48; 61, pp. 5-8; 149, pp. 5-7) (explaining why the juxtaposition of the first two quotes in the ad could prove actual malice).

The court dismissed Moore's claims against Waterfront Strategies after Moore's case in chief because Moore offered no evidence that Waterfront Strategies helped create the Shopping Mall Ad. (Trans. 555).

The jury then found that Moore proved SMP defamed him (Count 1) and invaded his privacy by placing him in a false light (Count 2). (Doc. 207) (jury verdict form). The jury awarded Moore $8.2 million in damages "for the emotional distress, mental anguish, and lessened reputation caused by the Shopping Mall Ad." (Doc. 206, p. 14) (jury instruction on damages).

SMP asks for judgment under Rule 50(b) on the falsity and actual malice elements. (Doc. 216). Alternatively, SMP asks for a new trial under Rule 59(a) because, it argues, the evidence contradicts the jury's findings of falsity and actual malice. (*Id.*).

In the same motion, SMP asks for a new trial based on (1) Moore's alleged use of inadmissible evidence, (2) arguments made by Moore's attorney during closing arguments, and (3) the excessive nature of the jury's $8.2 million damage award. Alternatively, SMP asks the court to order remittitur and declare the proper damage amount is $1.

DISCUSSION

Watch the Ad. Pictures may be worth a thousand words, but no amount of screen shots can replicate the tone, the pacing, or the cinematic editing of the Shopping Mall Ad. Moore's case—and thus SMP's motion—hinges on (a) the message a reasonable viewer took from watching the Shopping Mall Ad and (b) the message SMP intended the viewer to take as he watched the Ad. So before you start reading the court's analysis on the next page, watch the Ad. For reviewing courts, it's Trial Exhibit 1. For the public, the court embeds a link **here**.[1]

Once you have watched the Ad, ask yourself: Did I just hear that Roy Moore got banned from the mall for soliciting sex from young girls at the mall, including a 14-year-old Santa's Helper?

That's what Moore heard, and what he believes everyone else heard. But SMP's witnesses told the jury that SMP neither intended to connect, nor actually connected, Santa's Helper to the swarming sex allegations. In fact, they testified, the Shopping Mall Ad wasn't about events at the mall; it was about allegations from all over the Gadsden community.

The jury watched the Shopping Mall Ad, rejected SMP's testimony, and found that SMP knew that it linked Santa's Helper to the burgeoning sex scandal. The court's first task is to decide whether enough evidence supports the jury's choice.

[1] The YouTube link is https://youtu.be/2SCI7ZQ1ZY4.

1. Sufficiency of the evidence

The jury found that Moore proved both defamation (Count 1) and invasion of privacy, false light (Count 2). SMP argues that Moore failed to provide enough evidence on two elements common to both counts: falsity and actual malice. The court addresses each below.

A. Falsity

To find falsity in an altered quote case, you first have to determine "the meaning a statement conveys to the reasonable reader," or here, the reasonable television viewer. *Masson*, 501 U.S. at 515, 517. The message conveyed by the altered quote "is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 517.

Here is the statement that SMP created by combining quotes from the New American Journal (Quote #1) and al.com (Quote #2):

> 'Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.'

(Ex. 1). The jury found that Moore proved by a preponderance of the evidence that this statement was false. (Doc. 207 at 1). Applying *Masson*, that means the jury determined that the Shopping Mall Ad told a different story about Moore than the stories published by the New American Journal and al.com, and that SMP's version of the story was false.

1. Standard of review: SMP argues that Moore failed to present enough evidence to support that verdict and asks for alternative forms of relief. First, SMP asks for judgment under Rule 50(b), which requires SMP to show that, if you view "all the evidence in the light most favorable to [Moore]," no reasonable person could have found that the juxtaposed statement was false. *Bogle v. Orange Cnty. Bd. Of Cnty. Comm'rs,* 162

F.3d 653, 656 (11th Cir. 1998). Alternatively, SMP asks for a new trial under Rule 59, which requires SMP to show that the jury's verdict is "contrary to the great weight of the evidence." *Dudley v. Wal Mart Stores, Inc.*, 166 F.3d 1317, 1320 n.3 (11th Cir. 1999). To avoid duplication, the court applies both standards below.

2. Interpreting the Ad: Judging whether Moore proved the falsity of the juxtaposed quotes requires two steps. First, what statement did SMP make by juxtaposing the quotes in the Shopping Mall Ad? *See Masson, supra.* Second, did Moore prove that statement was different from the source material? *Id.* We start with the first question.

As the court instructed the jury, Moore claimed that the juxtaposed quotes told television viewers that he was "banned from the Gadsden Mall for soliciting sex from young girls, including a 14-year-old working as Santa's Helper"—*i.e.*, Wendy Miller. (Doc. 206 at 7). SMP doesn't attack this interpretation of the Shopping Mall Ad's message in its argument about falsity; choosing instead to argue that it proved "substantial truth" by producing evidence that Moore was banned from the mall for soliciting sex from girls, including Miller. (*See* Doc. 216 at 27-31). So the court finds that SMP has waived the argument as it pertains to falsity.

The court would also reject the argument, if SMP preserved it. SMP gives its interpretation of the juxtaposed quotes when arguing that Moore failed to prove actual malice:

> SMP has repeatedly asserted that, to the extent the second quotation refers to the first, it did so only to connect the word 'one' in the second quotation to the first quotation's mention of "young girls," not girls from whom Moore was 'soliciting sex.' …
>
> Instead, the TV Ad's creators intended the Ad to convey what it said: that "Moore approached a 14-year-old girl" at the mall

when he was in his thirties.

(*Id.* at 20-21). In other words, SMP says that no reasonable viewer could watch the Shopping Mall Ad and believe that Moore solicited sex from Santa's Helper. The Santa's Helper was simply a young girl that Moore approached in the mall, with no regard to sex or a mall ban.

That's not how pronouns work. Take this hypothetical news article for example:

> A dog was euthanized Monday after he bit four young girls. One he approached was 3 years old and playing hopscotch on the sidewalk.

No reasonable reader would assume that the militant dog "approached" the 3-year-old but moved on without biting her. The reasonable reader would understand the second sentence to say that the 3-year-old is "one of the four girls the dog bit" because that's how we use the pronoun "one." Besides, if the dog didn't bite the 3-year-old girl, then why would the author add her to the story immediately after reporting that the dog was put down for biting four young girls?

A reasonable viewer would apply the same logic to the Shopping Mall Ad: "One he approached" means "one of the young girls that Moore solicited sex from." Like the dog bite story, there's no reason to mention a 14-year-old girl that Moore *didn't* ask for sex immediately after saying that Moore was banned from the mall "for soliciting sex from young girls." Well, there is one reason: you're trying to trick the viewer into connecting things that aren't factually connected. But that gets us into actual malice, which is still a few pages away. *See infra* at 29.

For now, it is enough to say that a reasonable juror who watched the Shopping Mall Ad could interpret that Ad to say that, when Moore approached the 14-year-old Santa's Helper, he solicited sex from her, and he was banned for that encounter and others. The question now is

whether Moore sufficiently proved that message "would have a different effect on the mind of the [viewer]" than the message portrayed in the articles that contained the juxtaposed quotes. *Masson*, 501 U.S. at 517.

3. Evidence of Falsity: The combined quotes suggest two distinct facts: (1) Moore was banned from the Gadsden Mall for soliciting sex from young girls; and (2) Moore solicited sex from a 14-year-old working as Santa's Helper. Falsity is a required element for all plaintiffs who allege defamation or invasion of privacy under Alabama law; not a Constitutional requirement for public figures imposed by *New York Times v. Sullivan* and its progeny. So Moore could prove falsity by showing that either factual statement was false, and Moore presented evidence to prove that both were false. SMP, in turn, argued that both factual statements were true or substantially true, and SMP presented evidence to support both.

Of course, the defamatory fact that matters most is whether Moore solicited sex from Wendy Miller when she "was 14 and working as Santa's Helper," because that's the statement the court instructed the jury could support a finding of actual malice:

> In other words, Moore must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14, or SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14.

(Doc. 206 at 13). If Moore proved that he did not solicit sex from Wendy Miller when she was 14 and working as Santa's Helper, then Moore could move on to actual malice without proving that he was not banned from the mall for soliciting sex. So the court starts with Wendy Miller.

A. ***Wendy Miller:*** Miller told the *Washington Post* that, when she was 14 and working at the mall as Santa's Helper, "Moore told her she looked pretty." (Ex. 2 at 9). Miller then said that, "two years later, he

began asking her out on dates in the presence of her mother at the photo booth." (*Id.).* She told *The Post* that "she had a boyfriend at the time, and declined." (*Id.*).

Al.com then recounted the story Miller told *The Post*, writing the phrase that SMP would later impose behind "One he approached":

> Wendy Miller told The Post that she was 14 and working as Santa's helper at the Gadsden Mall in 1977 when Moore first spoke with her and told her she looked pretty. Two years later, when she was 16, he asked her out on dates, although her mother wouldn't let her go.

(Ex. 5 at 2) (highlight added). Neither of these articles, nor any other article produced at trial, reported that Moore solicited sex from Wendy Miller when she was 14—or at any age.

SMP called Wendy Miller to testify at trial. On direct, Miller testified that *The Post* correctly recounted her story about Moore approaching her when she was 14 and working as Santa's Helper, and she testified that her story to *The Post* was true. (Trans. 729). Miller testified that, at the time, she did not think that Moore was making sexual advances. Rather, she thought that Moore talking to such a young girl "was sort of a joke." (Trans. 731-32). But as she got older, she thought that Moore talked to her "for the purposes of making sexual advances." (Trans. 732).

On cross-examination, Miller reiterated that she didn't think Moore had done anything wrong at the time, and she added that Moore didn't do anything that made her "uncomfortable physically." (Trans. 738-39). She then ended her testimony like this:

> Q: Ms. Miller, you [sic] told the reporter or anyone else that Roy Moore solicited sex from you, did you?
>
> A: I never said that.

> Q: You never said that. And that didn't happen, did it?
>
> A: No.

(Trans. 744).

When Moore testified, he denied that any part of Miller's story to *The Post* was true. (Trans. 465-66).

In short, both Moore and Miller testified that Moore didn't solicit sex from Miller when she was 14 and working as Santa's Helper. Miller's denial was especially compelling because Miller admitted her disdain for Moore; she admitted she didn't vote for Moore; and she admitted that talking to *The Post* in the weeks just before the election "wouldn't hurt" her hope that Moore would lose the election. (Trans. 736-41).

So SMP had a steep hill to climb to prove its statement about Wendy Miller was true or substantially true. To do so, SMP called a forensic psychiatrist, Dr. Barbara Ziv, to opine that Moore's interactions with Miller exhibited "grooming behaviors" that were consistent with Moore's behavior with Leigh Corfman and Beverly Nelson, two women who allege that Moore sexually assaulted them as minors. According to Dr. Ziv, the similarities between Moore's interaction with Miller, Corfman, Nelson, and other girls showed that Moore's "grooming [was] for the purposes of sex." (Trans. 699).

At best, SMP's theory that grooming behaviors—*e.g.*, an adult man telling teenage girls they look pretty, buying them cokes, and asking them on dates—is the same as "soliciting sex from young girls" created a jury question on falsity. It was not so powerful that it prevented a reasonable juror from finding that SMP's statement about Moore soliciting sex from Miller was false, as required for judgment under Rule 50. Nor did it render the jury's verdict contrary to the great weight of evidence, as required for a new trial under Rule 59. So SMP is not entitled to judgment or a new trial on falsity.

B. ***The Mall Ban**:* While the court's finding that Moore sufficiently proved that SMP made a false statement about Moore's interaction with Wendy Miller is enough to move on to actual malice, the court also addresses the parties' arguments about the truth of SMP's statement that "Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls," because the mall ban drives the parties' arguments on other issues.

At trial, Moore testified that he was never banned from the mall, and he opined that Glynn Wilson (the independent journalist who first published the claim) likely concocted the story because Moore once had him removed from a speaking engagement. (Trans. 333). Moore's younger sister, Toni Martin, and her friend, Genia Craft, testified that Moore often took them to the mall as a chaperone when they were teenagers in the mid-1970s. Terry White, who worked security at the mall "off and on" from 1973 to 2000, testified that he used to walk and talk with Moore in the mall, and he never heard that Moore solicited sex from girls or that Moore had been banned from the mall. (Trans. 271, 275-78). Johnny Adams, who worked maintenance and security at the mall from 1987 to 2010, similarly testified that he never heard about Moore being banned from the mall. (Trans. 207-10).

SMP countered with Becky Gray, who testified that Moore used to flirt with her and other young girls that worked at the mall and that she told security about it. (Trans. 647-48, 670). As discussed, Wendy Miller testified that Moore told her she looked pretty, offered to buy her Cokes, and asked her out on a date when she worked at the mall. Miller also testified that her mother "probably" told mall security officers J.D. Thomas or Jimmy McKinnon about Moore's advances. (Trans. 731-32). J.D. Thomas testified that "after [receiving] so many complaints" from young girls about Moore, he told Moore to "kind of cool it." (Trans. 752). When Moore didn't cool it, Thomas testified that he told Moore "that we've had so many complaints, that I'm going to have to ban [you] from the mall," and Moore left. (Trans. 753). Thomas testified that he wasn't

sure if he made a written record of the ban, and that if he didn't write it down, it was likely to protect Moore's reputation. (Trans. 755). Thomas said he couldn't remember if he told anyone about the ban, but if he did, "it would have possibly been Terry White." (Trans. 772). (White testified that he never heard about a ban.). Lastly, Thomas testified that he heard the word "sex" mentioned only once, either by Wendy Miller or her mother. (Trans. 770).

Finally, Moore retook the stand and testified that he never talked to Thomas about complaints from girls; Thomas never banned him from the mall; he never stopped going to the mall; and if what Thomas said was true, "I would have lost my job." (Trans. 798-99).

The court recounts the back-and-forth to show that whether Moore was "actually banned from the Gadsden Mall" is the quintessential jury question. It depends on who the jury believed: Roy Moore or J.D. Thomas. Although, even if the jury believed that Thomas banned Moore from the mall, that doesn't mean the jury found that the ban resulted from Moore "soliciting sex from young girls." Thomas testified that he only heard "sex" mentioned once, from either Wendy Miller or her mother. And both women who testified that Moore flirted with them at the mall testified that Moore never solicited sex from them. (Trans. 667, 744).

In short, the mall ban evidence was not so strong that it prevented a reasonable juror from finding that SMP's statement that "Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls" was false, as required for judgment under Rule 50. Nor did it render the jury's verdict contrary to the great weight of evidence, as required for a new trial under Rule 59. The jury could have gone either way on the falsity of SMP's quote about a mall ban. Plus, even if the jury believed that Thomas orally banned Moore from the mall, the evidence didn't tie that ban to Moore soliciting sex from a 14-year-old Santa's Helper. That fact alone supports the jury's verdict on falsity.

4. Gist/Substantial Truth vs. Interpretation: Finally, SMP argues that, even if it stretched the truth a little about Moore soliciting sex from Miller when she was working as Santa's Helper, the jury could not find falsity because the Shopping Mall Ad got the "sting" about Moore's interactions with Miller and other girls correct. As SMP puts it:

> Considered as a whole, the Ad's "sting" is that Moore was well known in Gadsden for trying to pick up and develop sexual relationships with teenage girls, including at the Gadsden Mall. SMP proved this was true. Becky Gray testified that Moore sexually harassed her at the mall and that she often saw Moore inappropriately flirting with other young girls. J.D. Thomas testified that he banned Moore from the mall after receiving at least ten complaints about this behavior. Miller herself testified that Moore made sexual advances at her at the mall. But even if that were not the case, what Moore did specifically with Miller was a minor detail that did not change the TV Ad's sting. Moore's specific interaction with one girl at the mall would not change the TV Ad's assertion that he was well known for seeking sexual relationships with young girls.

(Doc. 216, p. 31) (internal quotes omitted).

But the Ad didn't say Moore was "trying to pick up and develop sexual relationships with young girls" in various places, including the mall.[2] *Id.* The Ad quoted "people who know Roy Moore" as saying that Moore was "actually banned from the Gadsden Mall for soliciting sex from young girls," one of whom was "14 and working as Santa's Helper."

[2] SMP stretches Miller's testimony. At trial, Miller affirmed a leading question by SMP's counsel that, "as [she] got older," she believed that when Moore told her she looked pretty when she was 14, then asked her on dates at 16, was "for the purposes of making sexual advances." (Trans. 732). Miller then testified on cross that, when she was 14, she "didn't think about" her interactions with Moore as being sexual. (*Id.*). And Miller answered her last question by confirming that Moore did not solicit her for sex. (Trans. 744).

Quoting "people who know Roy Moore" to say that Moore solicited sex from Miller when she was 14 is very different than SMP saying that Moore told Miller she looked pretty, then asked her out on dates two years later, because he hoped their relationship would turn sexual.

This chart uses the Supreme Court's labels to describe Moore's interaction with Miller when she was 14 and working as Santa's Helper:

Published story	Substantial Truth/ The Gist	Rational Interpretation
Moore approached Miller and told her she looked pretty.	Moore flirted with Miller and other girls at the mall.	Moore was grooming Miller and other girls at the mall for sex.

SMP's argument falls in the latter category; it's SMP's interpretation of Moore's interactions—not the published story or its gist. Sometimes, a rational interpretation is protected. But SMP's decision to use other persons' ***quotes*** to convey its interpretation, rather than to use its own words, removed the "rational interpretation" defense. The Supreme Court made this point in *Masson* when it reversed the Ninth Circuit for concluding that "an altered quotation is protected so long as it is a 'rational interpretation' of an actual statement." 510 U.S. at 518. As the Court put it:

> The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential "direct account of events that speak for themselves." *Time, Inc. v.*

> *Pape*, *supra*, 401 U.S., at 285, 91 S.Ct., at 637. More accurately, the quotation allows the subject to speak for himself.

Id. at 519 (highlight added). The Court later concluded, "[w]e doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational interpretation of the speaker's words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here." *Id.* at 520.

In short, because SMP ***quoted*** "people who know Roy Moore" to say that Moore "solicited sex from young girls," one of whom was "14 and working as Santa's Helper," SMP cannot defend the Shopping Mall Ad by relying on its interpretation that Moore was grooming a 14-year-old Miller in the hopes that she would have sex with him two years later when Moore would ask her out on a date—even if SMP's interpretation is reasonable. *Id.* at 519-20.

—

To sum up, the jury determined (a) that a reasonable viewer of the Shopping Mall Ad understood the Ad to say that Moore solicited sex from Wendy Miller when she was 14 and working as Santa's Helper and (b) that message was false. Viewing the trial evidence in a light most favorable to Moore, a reasonable person could agree with the jury's finding of falsity. So the court **denies** SMP's motion for judgment under Rule 50(b). The court further finds that the jury's verdict on falsity is not against the great weight of the trial evidence when the evidence is viewed as a whole. So the court **denies** SMP's motion for a new trial under Rule 59.

The question now is whether Moore sufficiently proved that SMP made the false statement with actual malice.

B. Actual Malice

Quotations may be a devastating instrument for conveying false meaning.
—*Masson*, 501 U.S. at 517

This line from *Masson* sums up Moore's case for actual malice: SMP wanted to change the perception of the mall ban story from an unsubstantiated rumor to a proven, well-known fact. So SMP selectively edited five unconnected quotes and stitched them together to tell a cohesive story about Moore being banned from the mall for asking young girls for sex. SMP added the opening phrase "What do people who know Roy Moore say?" to make the story personal and thus believable. To add sizzle, SMP enhanced Wendy Miller's story from Roy Moore told a young girl that she looked pretty to Roy Moore asked Santa's Helper to have sex—and got banned from the mall for doing so.

To prove actual malice, Moore had to provide clear and convincing evidence that SMP *meant* to change the published narrative, or that SMP was recklessly indifferent to the likelihood that television viewers would see the Ad as Moore did. *Masson*, 501 U.S. at 510. Moore's best evidence of SMP's intent or indifference was the Ad itself, as every SMP and Highway 31 witness denied Moore's interpretation of the Ad.

The court determines whether Moore presented enough evidence of actual malice below. But first, the court discusses the "unsettled" standard for reviewing the jury's verdict. *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999); *see also Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544 (6th Cir. 2013) (panel disagreeing on the standard); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (calling application of its "deferential-yet-de-novo" standard of review a "difficult business"); Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 Ala. L. Rev. 189 (2015) (discussing the evolution of the standard of review).

1. Standard of Review

Two standards are settled: (1) Moore had to prove actual malice with clear and convincing evidence, and (2) determining whether Moore's evidence was clear and convincing is a question of law. *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 659, 686 (1989). The "unsettled" point is what deference to give the jury's fact findings and credibility determinations. *Levan*, 190 F.3d at 1239.

Cutting to the chase, this court will decide both SMP's Rule 50(b) and Rule 59 motions using these steps:

1. Using its jury instructions, the court identifies the fact findings and credibility determinations that underpin the jury's verdict;

2. The court reviews the jury's credibility determinations for clear error;

3. Using the jury's credibility determinations that survive Step 2, plus any undisputed facts, the court decides de novo whether Moore offered clear and convincing evidence of actual malice; and,

4. The court decides de novo whether affirming the jury's verdict would have a chilling effect on protected speech, rather than speech that can be regulated.

At first blush, the court's consideration of the jury's findings when judging SMP's Rule 50(b) motion seems to violate the rule that "[t]he jury's findings should be excluded from the decision-making calculus on a Rule 50(b) motion, other than to ask whether there was sufficient evidence, as a legal matter, from which a reasonable jury could find for the party who prevailed at trial." *Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007). But as the court describes further below, the Supreme Court has created a special rule for judging the sufficiency of

evidence in First Amendment cases. The most notable of these cases is *Harte-Hanks*, which rose from the denial of a Rule 50(b) motion after a jury's verdict for the plaintiff—*i.e.*, the same scenario involved here. The Eleventh Circuit has cited this line of cases to substitute the normal Rule 50(b) standard for the Supreme Court standard the court describes below. *See, e.g.*, *Bruan v. Soldier of Fortune Mag., Inc.*, 968 F.2d 1110, 1120-21 (11th Cir. 1992). But the deference given to the jury's findings when applying this standard is unsettled. So the court starts with some needed background.

A. *Deference to the jury's fact findings*

Article III, Section II of the Constitution gives the Supreme Court "appellate jurisdiction, both as to law and fact." The Seventh Amendment was added, in part, to quell complaints that creating appellate jurisdiction over fact findings would emasculate juries. The Amendment says: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII; *see also Parsons v. Bedford*, 28 U.S. 433, 446-49 (1830) (Justice Story explaining the Seventh Amendment).

In *New York Times Co. v. Sullivan*, the Supreme Court said in a footnote that the Seventh Amendment's Reexamination Clause applies to cases like this—*i.e.,* libel and slander cases brought under state common law. 376 U.S. at 285 n. 26. But that footnote was attached to this sentence: "We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285 (citation omitted). This line created the "Constitutional facts" or "independent review" doctrine that trumps the general standard for judging Rule 50 and Rule 59 motions. The Supreme Court applied the doctrine most notably in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Harte-Hanks*, *supra.*

B. Bose *and the standard for bench trials*

Bose sued Consumer Reports for disparaging its speaker system in a published review. The district court held a bench trial that resulted in a verdict for Bose that included a finding of actual malice. The district court found as matters of fact that the review's author, an engineer, falsely said that sound "tended to wander 'about the room,'' rather than "along the wall" as he perceived, and that Consumer Reports published the false statement "with the knowledge that it was false or with reckless disregard of its falsity." 466 U.S. at 490-91. The Circuit Court affirmed the falsity finding but reversed on actual malice.

In its opinion, the Circuit Court said that *New York Times Co. v. Sullivan* required it to ignore Rule 52(a)'s requirement that a district court's fact findings "must not be set aside unless clearly erroneous," but the Court would honor the same rule's requirement that "the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." The Supreme Court granted cert to determine if this was correct.

The Court affirmed 6-3, with Justice Stevens writing the majority opinion. The Court started by acknowledging that Rule 52(a) and *New York Times Co. v. Sullivan* "point in opposite directions," *id.* at 498, and that the Court's "standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co. v. Sullivan*." *Id.* at 499.

The Court then identified five facts that it believed "may be fairly read" into the district court's opinion, including the district court's finding that the engineer was not credible when he testified that he did not know why he chose to write "about the room," even though he perceived sound to move "along the wall." *Id.* at 511-12. The Court held that this was not enough to prove actual malice because the author's choice of words "was one of a number of possible rational interpretations of an event that bristled with ambiguities." *Id.* at 512.

The Court ended by answering the question presented:

> We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id. at 514 (footnote omitted).

Justices Rehnquist, O'Connor, and White dissented. In a nutshell, they said that the Court should look for clear error when reviewing a district court's fact findings and credibility determinations, as required by Rule 52(a), rather than conduct a de novo review. Calling something a "Constitutional fact" should not vitiate Rule 52, particularly because appellate courts are "simply ill-prepared" to question "findings about the mens rea" of the defendant because appellate judges aren't present at trial. *Id.* at 515-16 (Rehnquist, J., dissenting).

C. *Harte-Hanks and the standard for jury trials*

While *Bose* involved a bench trial (thus the focus on Rule 52(a)), the majority opinion stated in dicta that "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Id.* at 501. So it seemed after *Bose* that courts would give no deference to a jury's fact findings or credibility determinations either.

Then came *Harte-Hanks*.

Daniel Connaughton (the Plaintiff-Respondent) ran for municipal judge. A month before the election, a member of the opponent's staff was arrested on bribery charges. A grand jury was convened.

One week before the election, a local newspaper published by Harte-Hanks ran a front-page story that alleged Connaughton used "dirty tricks" and bribery to thank two grand jury witnesses for helping with the investigation. Connaughton sued Harte-Hanks. At trial, the jury heard live testimony plus taped conversations from the time in question. The jury was given a special verdict form with three questions, and it found that Connaughton proved the article was (1) false, (2) defamatory, and (3) published with actual malice.

The Sixth Circuit affirmed. It applied the clearly erroneous standard to the jury's findings of falsity and defamation. For actual malice, the Circuit Court conducted a four-part review:

1. It noted the disparities in the parties' evidence;

2. It inferred from the jury's answers to the special verdict form what facts the jury found and who it believed;

3. It judged the facts and credibility determinations inferred in Step 2 under a clearly erroneous standard; and,

4. It exercised "its independent judgment" by applying the facts that survived Step 3 to the actual malice standard.

Harte-Hanks, *supra* at 662-63. The Supreme Court granted cert, in part, to decide whether the Circuit Court correctly reviewed the jury's fact findings for clear error rather than de novo in light of *Bose* and conflicting circuit precedent. *Id.* at 697 (Scalia, J., concurring).

The Supreme Court unanimously affirmed, with Justice Stevens again writing the majority opinion. While the Court agreed with the Circuit Court's outcome, it took a slightly different approach. The Supreme Court affirmed that the jury's "credibility determinations are reviewed under the clearly erroneous standard." *Id.* at 688. The court then accepted the Circuit Court's decision to infer the jury's fact findings, but limited its set of inferred facts to three credibility determinations

necessary to answering the questions on the verdict form. *Id.* at 690. The Court then combined these three credibility findings to the "undisputed evidence," which resulted in a conclusion that a finding of "actual malice inexorably follows." *Id.* at 690-91.

Justices White and (now Chief) Justice Rehnquist, who dissented in *Bose*, reiterated their view that witness credibility and knowledge of falsity are "historical facts" that must be reviewed for clear error under Rule 52. *Id.* at 694 (White, J., concurring).

Justice Scalia, who was appointed after *Bose*, also wrote a concurrence. In it, he described the majority's analysis like this:

> This analysis adopts the most significant element of the Sixth Circuit's approach, since it accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony. Of course the Court examines the evidence pertinent to the jury determination—as a reviewing court always must—to determine that the jury could reasonably have reached that conclusion.

Id. at 698 (Scalia, J., concurring). Justice Scalia said that he "entirely agree[d] with this central portion of the Court's analysis," *id.*, he simply disagreed with the majority's decision to limit the deference to the three credibility determinations necessary to answering the special verdict form, rather than "all the reasonably supported findings the jury could have made." *Id.* at 699. The other three concurring Justices (Kennedy, Rehnquist, and White) all agreed with Justice Scalia's analysis, and the majority opinion did not say that Justice Scalia misread its analysis.

In short, *Harte-Hanks* seemed to backtrack on *Bose's* dicta that appellate courts would conduct de novo review of facts found by a judge or jury. At the very least, *Harte-Hanks* says that courts must review the jury's credibility determinations that lead to a finding of actual malice

for clear error, not de novo.

D. *The Eleventh Circuit*

The Eleventh Circuit has not opined on the deference given to the jury's findings after *Harte-Hanks*; choosing instead to simply note that "[w]e recognize, therefore, that the law is unsettled as to the deference that we give to 'facts' found by the jury." *Levan*, 190 F.3d at 1230 n. 27.

—

Now, back to this case. Based on *Harte-Hanks's* majority opinion, the court will apply this framework to review the jury's finding of actual malice:

1. Using its jury instructions, the court identifies the fact findings and credibility determinations that underpin the jury's verdict;

2. The court reviews the jury's credibility determinations for clear error;

3. Using the jury's credibility determinations that survive Step 2, plus any undisputed facts, the court decides de novo whether Moore offered clear and convincing evidence of actual malice; and,

4. The court decides de novo whether affirming the jury's verdict would have a chilling effect on protected speech, rather than speech that can be regulated.

The court uses this deferential framework, rather than a pure de novo review, for three reasons. First, it mirrors the analysis conducted by the majority in *Harte-Hanks*. Second, it satisfies the Seventh Amendment's requirement that courts not reexamine the jury's fact findings outside the "rules of the common law," which do not support de novo review of the jury's fact findings and credibility determinations. Third, the jury's

verdict should mean something. As one commentator put it, "if the whole fact-finding exercise at trial is nothing more than a dry run for the court of appeals (or the Supreme Court)," then why do we "send a constitutional question to the jury in the first place?" Chapman, *supra*, at 206.

2. The jury's fact findings and credibility determinations

Here are the special questions and answers on the verdict form:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

<u>**Count 1: Defamation**</u> (pages 7-11)

Do you find that Roy S. Moore proved by a preponderance of the evidence:

1. That SMP made a false statement about Moore? (YES) NO
2. That the statement was defamatory? (YES) NO
3. That SMP published the statement to another person? (YES) NO

Do you find that Roy S. Moore proved by clear and convincing evidence:

4. That SMP published the statement with actual malice (that is, SMP knew that a statement was false or acted with reckless disregard to whether a statement was false)? (YES) NO

<u>**Count 2: Invasion of Privacy, False Light**</u> (pages 11-13)

Do you find that Roy S. Moore proved by a preponderance of the evidence:

1. That SMP intentionally publicized false information about Moore? (YES) NO
2. That the information placed Moore in a false light in the public eye and the false light would be highly offensive to a reasonable person? (YES) NO

Do you find that Roy S. Moore proved by clear and convincing evidence:

3. That SMP published information that it knew was false or SMP acted with reckless disregard about whether the information was false? (YES) NO
4. That SMP knew the information would place Moore in a false light, or SMP acted in reckless disregard to whether Moore would be placed in a false light? (YES) NO

(Doc. 207). The court starts from the top.

Questions 1 and 2 on both counts asked the jury if SMP made a false statement about Moore that was also defamatory (Count 1) or highly offensive (Count 2). For falsity, the court instructed the jury:

> Moore says that SMP published the Shopping Mall television ad about Moore, which juxtaposed these two quotes:
>
> > "Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls." One he approached "was 14 and working as Santa's Helper."
>
> Moore says that SMP combined these quotes to create a false statement that defamed him. Moore says that he was not banned from the Gadsden Mall for soliciting sex from young girls, including a 14-year-old working as Santa's Helper.
>
> SMP says that the Shopping Mall ad was true or substantially true. …
>
> Under the first element, Moore must prove that the statement I showed you was about him, and it was false. The statement can identify Moore by name or in a way that a reasonable person would identify Moore as the person the statement is about.
>
> SMP says that the statement is substantially true. If SMP proves to your reasonable satisfaction from the evidence that the statement is substantially true, then Moore cannot recover. The term substantially true does not mean somewhat true or partially true. It does not mean the statement is true in every possible and unimportant respect. It means the statement is true without qualification in all material respects. What is material is what would naturally and

> probably affect Moore's reputation in the mind of the average lay viewer.

(Doc. 206, pp. 7-8). Later, when discussing the defamatory element, the court instructed the jury that:

> You must determine whether, in fact, the statement was defamatory. You will do this according to two rules:
>
> 1. You must review and interpret the statement in its entirety and in relation to the conception and opinion of the public at the time and in the community in which the statement appeared. You do not focus just on part of it.
>
> 2. You will give the statement its natural meaning, and according to the sense in which the statement appears to have been used and the idea it was meant to communicate to those who saw it. It must be construed and determined by the natural and probable effect on the mind of the average viewer.

(Doc. 206, pp. 7-8). Based on these instructions and the parties' arguments, the jury made these fact findings (at least) when it circled "yes" on Questions 1 and 2 on both counts:

- The Shopping Mall Ad was about Moore.
- The Shopping Mall Ad communicated, and was meant to communicate, that Moore solicited sex from a 14-year-old working as Santa's Helper (*i.e.,* Wendy Miller).
- Moore did not solicit sex from Wendy Miller when she was 14 and working as Santa's Helper.[3]

---

[3] The jury could have also found that Moore was not banned from the Gadsden Mall. But that finding was unnecessary to the rest of the jury's verdict, so following the majority's lead in *Harte-Hanks*, this court will not consider this fact further. *See Harte-Hanks*, 491 U.S. at 689-90 (considering only fact testimony that the jury "*must* have rejected," rather than

These findings mean the jury made these credibility determinations:

- Wendy Miller was credible when she testified that Moore did not solicit her for sex (Trans. 744);
- Adam Muhlendorf, Highway 31's spokesman, was not credible when he testified that the Ad did not convey that Moore solicited sex from girls at the mall, rather than elsewhere (Trans 85-87);
- Diana Astiz, SMP's research director, was not credible when she testified that the Ad did not convey that Moore solicited sex from girls at the mall, rather than elsewhere (Trans 597-98, 604, 627);
- Muhlendorf was not credible when he testified that the Ad did not tie the 14-year-old Santa's Helper, Wendy Miller, to the young girls that Moore solicited for sex (Trans. 75-76);
- Astiz was not credible when she testified that the Ad did not tie the 14-year-old Santa's Helper to the young girls that Moore solicited for sex because the quotes were on separate frames (Trans. 622-24); and,
- J.B. Poersch, SMP's President, was not credible when he testified that the Ad did not tie the 14-year-old Santa's Helper to the young girls that Moore solicited for sex because the quotes were on separate frames (Trans. 117).

Question 4 on Count 1 and Questions 3-4 on Count 2 asked the jury to determine whether SMP either knew that the Shopping Mall Ad contained a false defamatory message or recklessly disregarded that possibility; that is, did SMP act with actual malice? The court instructed the jury on actual malice:

> Let me start by explaining that ill-will, improper motive, and

considering "subsidiary facts that the jury 'could have' found").

> personal animosity are not proof of actual malice. Nor is the republication of other media reports, standing alone, proof of actual malice.
>
> Rather, actual malice means proof that SMP knew that the Shopping Mall ad conveyed a false statement about Moore, or that SMP published the Shopping Mall ad with reckless disregard to whether the ad conveyed a false statement. …
>
> Here, Moore says that SMP's juxtaposition of quotes from different media reports within the Shopping Mall ad proves that SMP knew or recklessly disregarded that the Shopping Mall ad conveyed a false statement about Moore. The law says that you can find that SMP's juxtaposition of quotes from other sources proves SMP's knowledge of falsity or reckless disregard only if SMP's alteration of the quotes results in a material change in the meaning conveyed by the quotes.
>
> So to prove the fourth element, Moore must prove that it is highly probable that, when SMP juxtaposed quotes in the Shopping Mall ad, SMP knew that it was materially changing the meaning of the quotes to create a false statement about Moore or that SMP acted with reckless disregard to whether it was materially changing the meaning of the quotes to create a false statement about Moore. In other words, Moore must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14, or SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14.

(Doc. 206, pp. 9-11) (highlights added). The court adds the blue highlight to show that it tweaked the pattern instruction to instruct the jury on the *Masson* standard. *See Masson*, 501 U.S. at 517 ("We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate

with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, and *Gertz v. Robert Welch, Inc.*, unless the alteration results in a material change in the meaning conveyed by the statement.") (citations omitted). The yellow highlight shows the instruction that SMP requested (Trans. 867), which is helpful because it ties the jury's verdict directly to SMP's statement about Moore's interaction with Wendy Miller.

Based on these instructions, the jury made these fact findings (at least) when it circled "yes" on Question 4 for Count 1 and Questions 3-4 on Count 2:

- SMP knew that the articles that it pulled quotes from did not report that Moore solicited sex from Wendy Miller when she 14 and working as Santa's Helper; and,
- SMP intended to convey that Moore solicited sex from Miller when she was 14 and working as Santa's Helper; or,
- SMP recklessly disregarded that the Shopping Mall Ad conveyed that Moore solicited sex from Wendy Miller when she was 14 and working as Santa's Helper.

These findings mean the jury made these credibility determinations:

- Astiz was credible when she testified that everyone at SMP read the news clip emails (Trans. 566-67), which included the articles that reported Moore told Miller that she was pretty—not that he solicited sex from her. (Ex. 40, 62, 63).
- Astiz was not credible when she testified that the Shopping Mall Ad was not limited to events at the mall; rather, the Ad "was about the allegations as a whole that were coming out about [Moore's] behavior which seem[ed] to have occurred all throughout the community." (Trans. 597-98).

- Astiz was not credible when she testified that SMP did not intend to connect Moore's approach of Santa's Helper with the allegation that he was banned for soliciting sex from young girls (Trans. 622-24); and,

- Poersch was not credible when he testified that SMP "did not intend to imply" that the 14-year-old Santa's Helper was one of the young girls that Moore solicited for sex (Trans. 118);

3. Clear error review of credibility determinations

The court now reviews these credibility determinations for clear error. *See Harte-Hanks*, 491 U.S. at 688 ("credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses").

A. *The jury believed Miller and Moore's testimony that Moore did not solicit sex from her.*

Miller finished her testimony by confirming that Moore did not solicit her for sex. (Trans. 744). Miller's testimony adhered to her story to the *Washington Post* that Moore told her she looked pretty when she was 14 and asked her on dates when she was 16. (Ex. 2, p. 9). It also resembled Becky Gray's trial testimony that, while Moore would "flirt and talk to" her at the mall (trans. 648), Moore never solicited her for sex. (Trans. 667).

SMP offered no evidence that Moore asked Miller for sex when she was 14 and working as Santa's Helper. Instead, SMP presented expert opinion testimony that Moore was grooming Miller for sex, presumably two years later when he asked her on dates (trans. 692-99), and Miller's testimony that, looking back as an adult, she now believes that Moore talking to her and asking her on dates was "for the purpose of making sexual advances." (Trans. 732).

Having heard the testimony live, and having seen no evidence that Moore asked Miller for sex when she was 14, the court finds no clear error in the jury's determination that Miller and Moore testified truthfully that Moore did not solicit sex from Miller when she was 14.

B. *The jury believed Astiz's testimony that SMP read the articles that detailed Miller's story.*

Diana Astiz was SMP's research director. Astiz testified that her team was responsible for sending out relevant news clips. (Trans. 565-69). Astiz testified that everyone at SMP was expected to read the news clips before meetings about Senate races and possible ads. (Trans. 567).

Astiz testified that she read and distributed the original *Washington Post* article (trans. 574-76), and SMP introduced the news clips that included *The Post* article. (Ex. 40). Astiz testified that she remembered reading *The Post* article, including the part that discussed Wendy Miller:

> So I think Wendy Miller was the first time we had heard about—or the first report of activity that started at the Gadsden Mall, which later became a larger story. But Wendy Miller detailed a story where she was working at the mall starting when she was 14 years old. Roy Moore flirted with her. I think he called her pretty. And then he asked her out on a date when she was 16 years old, and her mother refused because she said he was too old.

(Trans. 576). Astiz also confirmed that she distributed the later al.com article that included the quote "was 14 and working as Santa's Helper." (Trans. 579-81; Ex. 63). Astiz testified that she remembered the article to say that Moore had a "penchant for flirting with teen girls," and that the article mentioned Wendy Miller. (Trans. 580-81).

SMP presented no evidence that suggested that SMP's research or creative teams had not read the *Washington Post* or al.com articles about Wendy Miller before publishing the Shopping Mall Ad.

Having heard Astiz's testimony live, and having seen no evidence to the contrary, the court finds no clear error in the jury's determination that Astiz truthfully testified that she and other SMP employees involved in making and approving the Shopping Mall Ad had read and understood the details of the story Miller told the *Washington Post*.

—

In short, the jury did not clearly err when it believed testimony that tended to show that Moore didn't solicit sex from Miller, and that SMP *knew* that Moore didn't solicit sex from Miller when it wrote the Shopping Mall Ad.

The court now reviews the testimony that the jury rejected—*i.e.,* SMP's witness testimony about the Ad's content and intended message. Before it does, though, the court notes that neither party called the media consultant who ***wrote*** the Shopping Mall Ad—*i.e.*, the person who selectively edited and combined the quotes about Moore soliciting sex from young girls and Moore approaching Wendy Miller (trans. 622). So the best evidence of the author's intended message is the Ad itself.

C. *The jury disbelieved Astiz's and Muhlendorf's testimony that the Shopping Mall Ad had no intended message and wasn't just about a shopping mall.*

One of SMP's defenses was that, when the Shopping Mall Ad talked about Moore being banned from the mall for soliciting sex, the Ad wasn't talking about solicitation at the mall—making the connection to Santa's Helper irrelevant. Instead, the Shopping Mall Ad referred to allegations generally, thus expanding the Ad's scope beyond the mall.

SMP's research director, Astiz reviewed and approved the Shopping Mall Ad after it was written. (Trans. 568-73, 611). On direct, SMP's counsel asked Astiz if she believed the Shopping Mall Ad had a message, and if the ad was just about the shopping mall:

> Q. What was your understanding of the message that this ad was trying to convey?
>
> A. It's an interesting question because I don't know that there was really a message other than, Look at all this news, and look at all of these allegations. So I think what it was trying to do was to amplify all of the different news articles that were coming out with these allegations.
>
> Q. And it contained five quotes; is that right?
>
> A. I would have to go back and look at it to remember the exact number at this point. Sorry.
>
> Q. That's fine. Your memory is very good. Sorry. Was it SMP's intention that all of the quotes in this ad would be about the Gadsden Mall exclusively?
>
> A. No.
>
> Q. Can you tell me a little bit more about that?
>
> A. Well, a lot of the stories seemed to come out of the Gadsden Mall. And by "stories," I mean the allegations from these women. But they certainly weren't all from the Gadsden Mall. You know, the story that we started with from The Washington Post with the allegations from Leigh Corfman, that started at the courthouse.
>
> Gloria Deason, you know, that started at the mall. In the middle, it was in her principal's office.

> Debbie Gibson, I mean, he came to the school during a civics lesson.
>
> And then you had these other people that just talked about how it was really well-known in the community. So while a number of the stories were mall-based, they certainly weren't all about the mall, and so the ad was about the allegations as a whole that were coming out about his behavior which seem to have occurred all throughout the community.

(Trans. 597-98). Later in direct, Astiz reaffirmed her belief that the "intention of the TV ad was never to be exclusively about Mr. Moore's conduct at the Gadsden Mall." (Trans. 604). Rather, "[t]he ad was about broadly all of the allegations that were coming out about his misconduct with girls." (*Id.*).

Muhlendorf similarly testified that he believed the Shopping Mall Ad did not focus on the mall; rather, the ad conveyed a message about Moore's solicitation of sex in the broader community:

> Q. Did you—did you ever think: Well, he solicited sex from girls elsewhere but not at the mall?
>
> A. I don't know if I understand.
>
> Q. Well, so do you think that this statement means that he was banned from the mall for soliciting sex from young girls at the mall? It doesn't say "at the mall," but would you read that to say "at the mall"?
>
> A. No, sir. I mean, he was—it says that he was banned from Gadsden Mall, and part of the reason why he was banned from the Gadsden Mall was for soliciting sex.
>
> Q. Okay. So you want to tell the ladies and gentlemen of this

> jury that the intent of this ad was not to say that he was banned from the mall for soliciting sex from young girls at the mall, but it may have been banned for soliciting sex from young girls somewhere else?
>
> A. No, sir. Once again, the intent of the ad was to take stories that had already been printed and curate those stories that we have accumulated and share them with the general public so that they could make a decision on whether or not to support Mr. Moore.
>
> Q. Wouldn't it be fair to make—give the public all of the information? In other words, if you say, Moore was actually banned from Gadsden Mall for soliciting sex from young girls, do you think a reasonable person would interpret that to mean it was at the mall that he was soliciting sex?
>
> A. We provided the citation from where the quotes were pulled from, and we invited people to investigate, read more, learn more for themselves.

(Trans. 86-87).

The jury disbelieved Astiz and Muhlendorf's testimony that the Shopping Mall Ad was not about "Mr. Moore's conduct at the Gadsden Mall" (trans. 604), but the community at large, with good reason.

Let's start with the obvious: SMP called its commercial "the Shopping Mall Ad." SMP's counsel called it the "Shopping Mall ad" in opening statements (trans. 51) and closing arguments (trans. 903, 919). SMP's counsel called it the "Shopping Mall ad" when questioning Muhlendorf, (trans. 99), Kayla Moore (trans. 254-55), and Roy Moore (trans. 424, 431, 469). SMP's counsel even called it the "Shopping Mall ad" to Astiz—*twice*—right after Astiz testified that the ad wasn't about a shopping mall. (Trans. 604-05).

It also hurt that Poersch, SMP's President, changed his earlier position and admitted that the Ad implied Moore was soliciting sex from girls at the mall, rather than elsewhere:

> Q. Okay. Continue your answer.
>
> A. Yes, sir. [Quoting from deposition testimony.] 'There were — the mall banned him for soliciting sex, but I don't think, you know, from what's in the ad, that he, that Judge Moore solicited sex at Gadsden Mall. I think I'm being clear sir.'
>
> Q. Okay. So before you got here today and after you took this deposition — so your position now is that the ad does say that he was banned for soliciting sex at the Gadsden Mall; is that correct?
>
> A. I saw it on the screen, sir.
>
> MR. WITTENBRINK: Can you put it on the screen?
>
> Q. Okay. Read the first line.
>
> A. "Moore was actually banned from the Gadsden Mall for soliciting sex from young girls."
>
> Q. Okay. Do you believe that that ad implies that he was soliciting sex from young girls at the mall?
>
> A. I do.

(Trans. 116).

Finally, the ad speaks for itself. Every second takes place in or around a shopping mall: It starts in a mall parking lot, travels down a mall escalator, scrolls around a mall Christmas tree, through a food court, back to the escalator, then back to the parking lot. (Ex. 1).

Having heard Astiz and Muhlendorf's testimony live, and having viewed the Shopping Mall Ad many times, the court finds no clear error in the jury's determination that both witnesses testified incredibly that the Shopping Mall Ad was conveying a message that Moore solicited sex away from the mall—*i.e.*, at Moore's home (Corfman), in Moore's car (Nelson), and at school (Deason and Gibson)—rather than at the mall.

D. *The jury disbelieved Astiz, Poersch, and Muhlendorf's testimony that the Shopping Mall Ad did not convey that Moore solicited sex from a 14-year-old Santa's Helper.*

Finally, the jury had to decide whether SMP knew or was reckless for not knowing that the Shopping Mall Ad falsely conveyed that Moore solicited sex from a 14-year-old working as Santa's Helper. That question boiled down to whether SMP knowingly or recklessly chose the phrase "one he approached" to connect these two quotes:

(Ex. 1). Moore's theory was simple: SMP used the pronoun "one" to falsely link Santa's Helper (Wendy Miller) to the young girls Moore asked for sex. Here's how Moore's counsel put it to the jury:

> [SMP's counsel] has talked about putting those two things together and said that they are separate. Who does the 'one' in the second sentence refer to? 'One' what?
>
> It says, 'Roy Moore was banned from the Gadsden Mall for soliciting sex from young girls. One' — what one? That's not in the quote. That's outside the quote. One what? You can only

> think that it means one of the young girls. That's all you can think. 'One he approached was a Santa's Helper.'
>
> Ladies and Gentlemen of the jury, that's what the ad says. You can watch it. Please do watch it. Please do read the quotes and look at how they are put together.
>
> The statement is false. The statement was intentional. They knew what they were doing. They knew the impression that they were trying to make in using regular language, normal common sense.

(Trans. 926). So from the jury's perspective, SMP had to plausibly answer one question: ***One what?*** If SMP did not intend to link the 14-year-old Santa's Helper with girls Moore asked for sex—a link SMP's President admitted was not backed by reporting (trans. 119)—then what did SMP mean when it chose the phrase "One he approached"?

Muhlendorf, SMP's spokesman, went first:

> Q. Wait. Okay. Stop with "looked pretty." That is when she was 14. Does anything in that sentence look to you, Mr. Muhlendorf, like Mr. Moore was soliciting sex?
>
> A. The ad doesn't say he was soliciting sex from the 14-year-old at the mall.
>
> Q. Well, the ad says — go back to the ad. The ad says, 'One he approached was 14 and working as Santa's helper.' Are you telling the jury, the ladies and gentlemen of the jury, that that sentence does not refer to the immediately previous sentence that he was banned from the mall for soliciting sex from young girls?
>
> A. That's not how I read it.
>
> Q. So you read the second sentence as completely a

> standalone, and you are going to tell these ladies and gentlemen of the jury that the 14-year-old that's referred to here was not one of the young girls that he was banned from the mall for soliciting sex from?
>
> A. No, sir. What I am going to say is I read these posts separately in that he was banned — the first slide says he was banned from the Gadsden Mall for soliciting sex from young girls, and the second slide refers to him approaching a 14-year-old working as Santa's helper.
>
> [Video replayed and paused at counsel's request.]
>
> Q. So you are telling the ladies and gentlemen of the jury that you don't read those two sentences together and think that it makes one statement?
>
> A. I do not believe it makes one statement.
>
> Q. Okay. And that's — that was not the intention of Highway 31 when they put out that ad?
>
> A. I believe the intention of this ad was to take stories that were in the public domain, share them with the general public, and have them make a decision on whether or not they wanted to support Roy Moore.
>
> Q. You don't think the placement of those two things together make a statement that he was soliciting sex from young girls and that one of them was the 14-year-old Santa's helper?
>
> A. I believe that what the ad says is that he was soliciting sex from young girls, and I believe it says that he approached a 14-year-old as well.

(Trans. 75-77).

Poersch, SMP's President, went next:

> Q. All right. The next line says — read the next line for the jury, please.
>
> A. 'One he approached was 14 and working as Santa's helper.'
>
> Q. Now, in your mind, Mr. Poersch, does that say that he was soliciting sex from that young girl who was 14 and a Santa's helper?
>
> A. It doesn't. These are separate frames and separate parts of the ad.
>
> Q. Okay.
>
> A. No, it doesn't, sir.
>
> Q. I know that there's a big line on there, on this slide, but if I were to represent to you that the ad, when played, does not show a line or separation there but runs those two statements pretty quickly back to back, do you think that it is fair that a reasonable person would assume that what you were saying is he was banned from the Gadsden Mall for soliciting sex from young girls and one he approached was 14 and working as a Santa's helper? Do you think that is a fair interpretation of that statement?
>
> A. It wasn't the intention of the ad, sir. Those are two separate quotes given there, two separate frames in the ads.
>
> Q. I see they are two separate quotes.
>
> A. Two separate frames in the ad, too, sir.
>
> Q. Okay. So your statement to the jury is that SMP, which approved the ad is what you said, did not intend to imply

> to anyone that the 14-year-old working as Santa's helper was one of the young girls he solicited for sex?
>
> A. Yes, sir.
>
> Q. Okay. So anybody inferring that, they were just mistaken?
>
> A. That's — it wasn't the intention of the ad, sir, no.

(Trans. 118).

Finally, Astiz, SMP's research director, and Moore's counsel went round and round over the issue:

> Q. Okay. I have got to ask you the question again — and I can't show you the ad — but I am going to ask you, Ms. Diana, the first word is "one." My question is: One what? In the context of the ad, one what?
>
> A. One girl he approached was Wendy Miller.
>
> Q. Well, so one girl, then, would not refer to the other girls that are mentioned in the ad?
>
> A. Yeah. I think that one was specifically about Wendy Miller, and I know we don't have it on screen, but I think it was about how she was wearing a Santa's — or an elf costume and was Santa's helper. And so that story was specifically about her.
>
> Q. I know that the story was specifically about her. The phrasing of your ad refers to one, and you just said it was one girl. Now, the first sentence is: "He was banned for soliciting sex from young girls." In the next sentence you said it should say, "One girl was Wendy Miller." Wouldn't that be a reference to the previous sentence?

A. I'm a little confused. I'll be honest. But I think what, again, the ad was, was distinct statements, one and another. I think later on in the ad, someone said something like, "These stories have been going around 30 years." Were all of the stories in the ad going along for 30 years? I don't know, but the point of the ad was specific point by specific point, specific quotation by specific quotation.

Q. So it is your testimony as you are sitting here today and you are talking to these ladies and gentlemen of the jury that those two sentences are not meant to be heard together or read together, and it is not meant to be a referent when the ad talks about Wendy Miller being one he approached as one of the girls that he was banned from the mall for soliciting sex from?

A. The second line was not, in my understanding, meant to be referring to the first line. I will tell you the whole ad was meant to be viewed together as, like, a broad, holistic — not holistic, because there are more allegations that weren't included in the ad — but a broad overview of the allegations as they existed against Roy Moore.

Q. But never intended — so the whole ad is meant to be heard together but not the part about Wendy Miller. That's separate?

A. No. They are two specific — they are two different questions that you are asking me. The first one is: Did the second line refer to the first line?

Q. Right.

A. My understanding, all these things are distinct, but, again, the purpose of the ad, as we discussed, was to amplify all

> of these different news stories that all had very troubling information in them.

(Trans. 623-25).

The jury disbelieved all three witnesses' testimonies that, when SMP chose the phrase "One he approached," SMP did not intend to link the 14-year-old Santa's Helper with the young girls the Ad just said Moore solicited for sex.

A reasonable juror could have made this credibility determination for at least three reasons. First, SMP has an obvious bias on the issue. Second, a reasonable English-speaking juror could have found that the pronoun "one" referred to the young girls that Moore solicited for sex in the preceding sentence, especially when SMP's witnesses could not offer a plausible alternative reading of the word. Third, the jury could have found Muhlendorf and Astiz incredible on the key issue because neither would concede more obvious points, such as the "Shopping Mall Ad" being about events that happened in a shopping mall.

Whatever the reason(s), having heard the testimony live, and having viewed the Shopping Mall Ad many times, the court finds that the jury did not clearly err in determining that SMP's witnesses were not credible when they testified that SMP did not intend to link these sentences with the phrase "One he approached":

> 'Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.'

(Ex. 1). The Ad speaks for itself; and the jury did not clearly err in hearing a message that SMP disavowed at trial.

—

In review, the court finds that the jury did not clearly err when it made these credibility determinations:

1. Wendy Miller and Roy Moore truthfully testified that Roy Moore did not solicit Miller for sex.

2. Diana Astiz truthfully testified that SMP read the articles containing Wendy Miller's statements to the media.

3. Diana Astiz and Adam Muhlendorf were not credible when they testified that the Shopping Mall Ad was intended to convey, and actually conveyed, information about Moore soliciting girls for sex at places other than a shopping mall. The jury instead believe J.B. Poersch's testimony that the Ad implied that Moore was soliciting sex at the mall.

4. Diana Astiz, Adam Muhlendorf, and J.B. Poersch were not credible when they testified that SMP neither intended to convey, or actually conveyed, that Roy Moore solicited sex from a 14-year-old working as Santa's Helper (*i.e.* Wendy Miller).

4. De Novo Review of Actual Malice verdict

The *Harte-Hanks* majority opinion next requires the court to determine de novo whether the combination of undisputed facts plus the jury's credibility determinations supports the jury's verdict that Moore proved actual malice by clear and convincing evidence. *See Harte-Hanks*, 491 U.S. at 688-690.

Here again is the relevant part of the jury instruction on actual malice, which this court crafted from the Supreme Court's decision *Masson* (the first paragraph) and SMP's requested rephrasing of the *Masson* standard (the second paragraph):

> So to prove this fourth element, Moore must prove that it is highly probable that when SMP juxtaposed the quotes in the shopping mall ad, SMP knew that it was materially changing the meaning of the quotes to create a false statement about

> Moore or that SMP acted with reckless disregard to whether it was materially changing the meaning of the quotes to create a false statement about Moore.
>
> In other words, Moore must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14 or that SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14.

(Trans. 879); *see also* Doc. 203 at 13 (SMP's proposed instruction); (Trans. 867-68)(parties' agreement on final language).

Here are the relevant undisputed facts from the pretrial order (doc. 196), plus the jury's credibility determinations:

Undisputed Fact or Jury Credibility Determination	**Source**
Wendy Miller told the *Washington Post* that she "was 14 and working as a Santa's Helper at the Gadsden Mall when Moore first approached her," and told her she looked pretty."	Undisputed Fact #9
Wendy Miller told the *Washington Post* that, two years later, Mr. Moore again approached her at the mall and asked her on dates in the presence of her mother.	Undisputed Fact #10
SMP read the *Post* article, and the follow-up al.com articles, and thus knew that Miller did not say that Moore solicited her for sex.	Jury Credibility Determinations (Astiz, Poersch)
SMP told viewers in the Shopping Mall Ad that, "people who know Roy Moore say," that "Moore was 'actually banned from the Gadsden Mall …	Undisputed Facts #4, 6, 7

for soliciting sex from young girls.' One he approached was 14 and working as Santa's Helper.'"	
With these words, SMP intended for viewers to believe that Moore solicited sex from Wendy Miller when she was 14 and working as Santa's Helper, or SMP recklessly disregarded that viewers would believe that Moore solicited sex from Wendy Miller when she was 14 and working as Santa's Helper.	Jury Credibility Determinations (Astiz, Muhlendorf, Poersch,)
Moore did not solicit Miller for sex.	Jury Credibility Determinations (Miller & Moore)

Combining the undisputed facts and credibility findings tells a cohesive story of actual malice: SMP knew that Wendy Miller did not tell the media that Moore solicited her for sex when she was 14 but, to add sting to the Shopping Mall Ad, SMP meshed Miller's quote about being approached as Santa's Helper with a quote from Glynn Wilson's blog post about a sex-based mall ban to make the viewer believe that someone who knew Roy Moore said that Moore solicited sex from Miller when she was 14 and working as Santa's Helper. Or, using the Supreme Court's phrasing in *Harte-Hanks*, when you read the news articles that do not mention Moore soliciting Miller for sex in the light of the jury's credibility determination that SMP knew that it was saying Moore solicited Miller for sex, "the conclusion that [SMP] acted with actual malice inexorably follows." *Harte-Hanks*, 491 U.S. at 691.

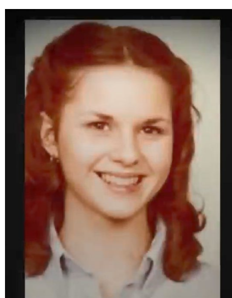
As a result, under de novo review, the court finds that Moore presented clear and convincing evidence that supports the jury's finding of actual malice on both counts.

5. Chilling effect on Public Discussion

"Public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule, and the strongest possible case for independent review." *Id.* at 686-87 (citation omitted). After an independent review of the facts and caselaw, I find that affirming the jury's finding of actual malice would not have an undue chilling effect on public discussion about a candidate's general qualifications or sexual abuse allegations made against him.

First, we must define the type of protected speech the jury's verdict could chill. At trial, Astiz testified that "[t]he ad was about broadly all of the allegations that were coming out about his misconduct with girls." (Trans. 604). In its post-trial brief, SMP says that "the Ad's 'sting' is that Moore was well known in Gadsden for trying to pick up and develop sexual relationships with teenage girls, including at the Gadsden Mall" and "the TV Ad's assertion [was] that he was well known for seeking sexual relationships with young girls." (Doc. 216, p. 31). So the question is whether affirming the jury's verdict could chill political ads that comment on sex abuse allegations against a political candidate.

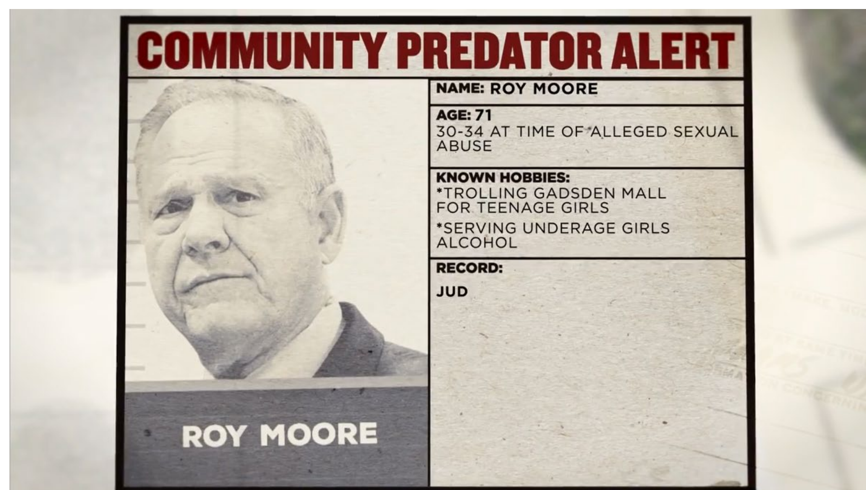
SMP's evidence proves that political opponents and rival PACs can publish biting ads that do not violate *New York Times* and *Masson*. For example, SMP introduced a television ad from Moore's opponent, Doug Jones, that read the names and showed the childhood pictures of Moore's accusers, then ended with a collage and voiceover:



Narrator:	They were girls when Roy Moore immorally pursued them. Now they are women; witnesses to us all of his disturbing conduct. Will we make their abuser a U.S. Senator?

(Ex. 223). You can watch the ad **here**. (last visited Sept. 29, 2023).

American Bridge 21st Century PAC, which touts itself as the "largest research, tracking, and rapid response operation in the Democratic Party," released an ad featuring an alert siren over these images, with a narrator commenting that Moore's "rap sheet reads like a serial sexual predator":



(Ex. 212); American Bridge PAC, www.americanbridgepac.org/about-us/ (last visited Sept. 29, 2023). You can watch the ad **here**. (same).

Both ads stung Moore by highlighting allegations that Moore pursued underage girls. But unlike the Shopping Mall Ad, neither ad made up a story. They stuck to commenting on the published allegations; Jones' ad said Moore "immorally pursued" young girls, while American Bridge said that Moore was "trolling for teenage girls."

The same can be said for the other ads that Moore challenged in his complaint, plus the 200+ articles, television news reports, and late night talk show clips that SMP introduced at trial. *See* Exs. 42-254. People called Moore a pedophile, a child predator, a child molester, a terrible human being, and other defamatory names, and one of two things happened: Moore did not sue them, or the court dismissed Moore's claims as protected by the First Amendment. *See, e.g.,* (Docs. 45, 61).

As a result, the court finds that affirming the jury's verdict will not chill protected political commentary and rhetoric. If the verdict has any effect, it will be as a reminder that the *New York Times* decision does not protect those who knowingly alter others' stories or quotes to create a new defamatory story. *See Masson*, 501 U.S. at 517 ("We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co.* and *Gertz*

unless the alteration results in a material change in the meaning conveyed by the statement") (internal citations omitted).

—

To sum up, the court finds that the jury's fact findings and credibility determinations are not clearly erroneous; Moore presented sufficient evidence to support the jury's finding of actual malice; and, denying SMP's motions to set aside the verdict will not have an undue chilling effect on protected speech. As a result, the court **denies** SMP's motions to set aside the jury's verdict under Rules 50(b) and 59(a).

2. Inadmissible evidence

SMP next argues that it is entitled to a new trial under Rule 59 because Moore introduced inadmissible evidence about (a) a mall ban and (b) a polygraph result. *See* (Doc. 216 at 32-37).

A. Evidence about a mall ban

SMP first argues that the trial "turned into a sideshow over the non-actionable question of whether Moore was banned from the mall." *Id.* at 33. SMP says that the jury "was confused by all this," wrongly believing that "the TV Ad's first statement was the ultimate issue in this case, not Moore's theory about how two separate lines of the Ad should be read together to suggest that he solicited sex from Miller." *Id.*

SMP is wrong for three reasons: (a) the mall ban was relevant to disputed issues; (b) the court properly instructed the jury to eliminate any confusion among the issues; and, (c) SMP was not prejudiced because it too introduced evidence about a mall ban.

1. *Relevance of mall ban*

SMP says that actual malice—*i.e.*, whether it knowingly or recklessly combined quotes about the mall ban and Moore's interaction with Wendy Miller to create a false story—was the "ultimate issue." *Id.* SMP is correct only to the extent that "ultimate" means final. Actual

malice was not the *only* issue at trial. As explained, actual malice is a federal requirement that the Supreme Court has tacked on to state-law claims. A plaintiff doesn't get to actual malice unless he first proves each element of his state-law claim.

In Count 1, Moore pleaded a state law defamation claim, which requires proof of (a) a false statement, (b) defamation, and (c) publication by the defendants. *See* (Trans. 876-878)(instructing the jury on the state law elements). Again, the relevant statement was

> 'Moore was actually banned from the Gadsden Mall … for soliciting sex from young girls.' One he approached 'was 14 and working as Santa's Helper.'

(Trans. 875) (final jury instruction). That means, before he could get to actual malice, Moore had to prove the falsity of the statement that he was banned from the mall for soliciting sex from young girls, including Miller when she was 14 and working as Santa's Helper:

Count 1: Defamation (pages 7-11)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Do you find that Roy S. Moore proved by a preponderance of the evidence:

1. That SMP made a false statement about Moore?	(YES)	NO
2. That the statement was defamatory?	(YES)	NO
3. That SMP published the statement to another person?	(YES)	NO

Do you find that Roy S. Moore proved by clear and convincing evidence:

4. That SMP published the statement with actual malice (that is, SMP knew that a statement was false or acted with reckless disregard to whether a statement was false)?	(YES)	NO

Not only was Moore required to prove falsity, under Alabama law, "truth is a complete and absolute defense to defamation." *Ex parte Bole*, 103 So.3d 40, 51 (Ala. 2012). SMP pleaded truth as a defense in its answer (doc. 65 at 17); at the Rule 12 stage (doc. 25 at 17-18); and in the pretrial order (doc. 196 at 10-11).

SMP also pleaded a substantial truth defense in the pretrial order, specifically saying that it would prove Moore was banned from the mall:

4. **Gist or Substantial Truth:** Even if the juxtaposition of the two statements quoted in the Ad did imply that Mr. Moore was soliciting sex from Wendy Miller by approaching her when she was 14 years old and telling her she was pretty, the implication is not actionable as a matter of the law because the "gist" or "sting" of the implication is substantially true. *Moore v. Lowe*, No. 4:20-CV-124-CLM, 2022 WL 759525, at *11 (N.D. Ala. Mar. 11, 2022) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)); *see also Jensen v. Sawyers*, 130 P.3d 325, 342 (Utah 2005).
   a. Considered as a whole, the TV Ad's sting is that Mr. Moore was well known in Gadsden for trying to pick up teenage girls at the mall, and for attempting to have a sexual relationship with teenage girls.
   b. The assertion that Moore was banned from the Gadsden Mall for soliciting sex from young girls is true.
   c. The assertion that Moore approached Wendy Miller when she was a 14-year-old working as a Santa's helper is true (and Moore does not deny it).
   d. The suggestion that Moore specifically solicited sex from Wendy Miller, as opposed to any other young girl, does not alter the substantial truth of the TV Ad.

Id. Under Alabama law, this defense required SMP to show that the Ad was "true without qualification in all material respects." Ala. Pattern Jury Instruction 23.07 (3d ed. 2019)(Truth—Affirmative Defense).

In short, *both* parties made the existence of a mall ban relevant, and thus made it impossible (or at least impractical) for the court to cherry-pick whose testimony about the mall ban was relevant and whose testimony was inadmissible. So the court allowed both sides to introduce evidence about the alleged mall ban and instructed the jury on how to properly consider the evidence.

2. *Jury instructions*

The court properly instructed the jury on the elements and thus eliminated the confusion SMP alleges. In its preliminary instructions—given before either party made its opening statement—the court played the Shopping Mall ad, then told the jury (a) that the case focused on the combination of two quotes and (b) that the parties disputed the truth of the mall ban allegation in the first part of the combined quote:

> Moore's lawsuit focuses on the juxtaposition, which means the combination of these two quotes: Moore was actually banned from the Gadsden Mall for soliciting sex from young girls. One he approached was 14 and working as Santa's helper.
>
> Moore denies that he solicited sex from any girl at the Gadsden Mall, including a 14-year-old working as Santa's helper, and he denies that he was banned from the Gadsden Mall.
>
> Moore alleges that when the defendants combined these quotes, they created a false statement that defamed him and put him in a false light.
>
> Moore seeks compensatory damages for the emotional distress and mental anguish that the defendants' ad caused.
>
> The defendants say that Moore's claims fail for any of these reasons: First, the shopping mall ad was true or it was substantially true.

(Trans. 29). Minutes later, the court introduced the parties' joint exhibits and gave this instruction about their admissible purpose:

> The purpose of the articles is to prove or disprove that the defendants knew — and I am going to put it back up on the screen — that the defendants knew that the combination of

> these two quotes conveyed a message that was either false or they were reckless in disregarding the falsity of this statement. That is the limited purpose for which you are to consider the articles that I have just admitted.

(*Id*. at 59). So before the jury heard the first witness, it knew (a) that the case was about the combined quote and (b) that the parties disputed the truth about the mall ban.

After the parties closed their cases, the court gave its final instructions, which distinguished between proving falsity and actual malice. The court introduced Moore's defamation claim like this:

> Moore's first claim is that SMP defamed him. Moore says that SMP published the shopping mall television ad about Moore which juxtaposed these two quotes: "Moore was actually banned from the Gadsden Mall for soliciting sex from young girls; one he approached was 14 and working as Santa's helper."
>
> Moore says that SMP combined these quotes to create a false statement that defamed him. Moore says that he was not banned from the Gadsden Mall for soliciting sex from young girls, including a 14-year-old working as Santa's helper.
>
> SMP says the shopping mall ad was true or substantially true, and SMP says it did not act with actual malice when it created and published the shopping mall ad because it relied on quotes from published reports.

(Trans. 875-76).

The court then instructed the jury on the falsity element, including an instruction on SMP's affirmative defense of truth:

> Under the first element, Moore must prove that the statement I showed you was about him and it was false. The statement could identify Moore by name or in a way that a reasonable person would identify Moore as the person that the statement is about.
>
> SMP says the statement is substantially true. If SMP proves to your reasonable satisfaction from the evidence that the statement is substantially true, then Moore cannot recover. The term "substantially true" does not mean somewhat true or partially true. It does not mean the statement is true in every possible and unimportant respect. It means the statement is true without qualification in all material respects. What is material is what would naturally and probably affect Moore's reputation in the mind of the average lay person.

(Trans. 876-77).

After instructing the jury on the defamation and publication elements, the court then instructed on actual malice:

> Now, if Moore proves these first three elements by a preponderance of the evidence, then he must prove a fourth element by clear and convincing evidence.
>
> Four, that SMP published the statement with actual malice. Let me start by explaining that ill will, improper motive, and personal animosity are not proof of actual malice, nor is the republication of other media reports standing alone proof of actual malice. Rather, actual malice means proof that SMP knew that the shopping mall ad conveyed a false statement about Moore or that SMP published the shopping mall ad with reckless disregard to whether the ad conveyed a false statement. . . .

> Here, Moore says that SMP's juxtaposition of quotes from different media reports within the shopping mall ad proves that SMP knew or recklessly disregarded that the shopping mall ad conveyed a false statement about Moore. The law says you can find that SMP's juxtaposition of quotes from other sources proves SMP's knowledge of falsity or reckless disregard only if SMP's alteration of the quotes results in a material change in the meaning conveyed by those quotes. So to prove this fourth element, Moore must prove that it is highly probable that when SMP juxtaposed the quotes in the shopping mall ad, SMP knew that it was materially changing the meaning of the quotes to create a false statement about Moore or that SMP acted with reckless disregard to whether it was materially changing the meaning of the quotes to create a false statement about Moore. In other words, Moore must prove that SMP intended to convey that Moore solicited sex from Wendy Miller when she was 14 or that SMP recklessly disregarded the possibility that an average viewer of the ad would believe that Moore solicited sex from Wendy Miller when she was 14.

(Trans. 878-79).

The court recites these instructions to show that, from beginning to end, the jury was told why the parties were arguing about the mall ban (*i.e.*, proof of falsity versus truth or substantial truth) and was told the limit on the proof of actual malice (*i.e.*, knowledge that the juxtaposed quote changed the meaning of published stories). The court thus rejects SMP's argument that "[t]he jury was plainly confused by all this" and that "the jury was given the impression that the TV Ad's first statement was the ultimate issue in this case[.]" (Doc. 216 at 37). The court properly instructed the jury, and it is required to assume the jury followed its instructions.

3. *Lack of Prejudice*

Finally, the court finds that even if it wrongly allowed Moore to introduce evidence that the mall ban allegation was false, and failed to properly instruct the jury about the mall ban, the court finds its error was harmless because the court allowed SMP to introduce evidence that the mall ban existed to prove SMP's truth defense.

Most notably, SMP called J.D. Thomas, who worked security at the Gadsden Mall during the relevant period. Thomas testified that teenage girls complained to him that Moore "was asking them out, maybe talking inappropriately." (Trans. 752). Thomas testified that he had a one-on-one conversation with Moore about the complaints and told Moore "that I'm going to have to ban him from the mall." (*Id.* at 753). Thomas further testified that he heard the word "sex" mentioned only once—from Wendy Miller or her mother. (*Id.* at 770).

In closing, SMP's counsel told the jury that Thomas was "the most important witness you heard from because he had no reason to lie." (Trans. 910). Then, after recounting Thomas's testimony about Miller's mother using the word "sex" to complain about Moore (*id.* at 915), counsel argued, "You know what that is? That is Mr. Moore being actually banned from the Gadsden Mall. That is the evidence. That's the piece of the puzzle that hadn't been reported before." (*Id.* at 916).

In short, SMP used its opportunity to introduce evidence about a mall ban (to prove its truth defense) and to link the mall ban to soliciting sex from Miller (to disprove actual malice). So the court rejects SMP's complaint that allowing the parties to introduce evidence to prove or disprove the mall ban prejudiced SMP in relation to Moore.

—

For these reasons, individually and collectively, the court **denies** SMP's Rule 59 motion based on the introduction of evidence about a mall

ban. SMP made the mall ban relevant when it tied Moore's interaction with Wendy Miller to the alleged mall ban, and thus SMP made it practically impossible for the court to exclude evidence about a mall ban from a trial about a statement that Moore was banned from the mall for soliciting sex from a 14-year-old Santa's Helper. The court sees no way to re-try this case without allowing the parties and their witnesses to discuss whether Moore was banned from the mall.

B. Polygraph evidence

Moore voluntarily took a polygraph test as part of his defamation lawsuit against one of his accusers, Leigh Corfman. SMP argues that it is entitled to a new trial because Moore testified during this trial that he voluntarily took that polygraph test. (Doc. 216 at 37-39). The court denies SMP's motion because (a) Moore's testimony, and the court's jury instruction, complied with circuit precedent and (b) any error was harmless because Wendy Miller and Becky Gray both testified that Moore did not solicit sex from them at the mall.

1. *The Smart decision*: Before Moore testified, the court and the parties discussed whether Moore could testify about the polygraph test, and if so, what the limits on his testimony would be. (Trans. 307-16). We based our discussion on the Eleventh Circuit's opinion about the use of polygraph tests in a civil case, *Smart v. City of Miami*, 740 Fed. App'x 952, 966-69 (11th Cir. 2018).

Taiwan Smart was charged with murdering two men in his apartment. *Id*. at 955-57. Smart sat in jail for 19 months before the State released him. One of the stated reasons for Smart's release was that Smart passed a polygraph exam nine days earlier. *Id*. at 957.

Smart sued the City for false arrest and false imprisonment. At trial, Smart testified that he offered 85 times to take a polygraph test and was released shortly after he did. *Id*. at 966-67. According to Smart, he needed to testify about the polygraph test during trial to respond to the

City's evidence that "cast[] him as a lying thug and a murderer." *Id.* at 966. Neither side offered expert testimony that interpreted the results of the polygraph test.

Like SMP, the City sought a new trial under Rule 59, arguing that Smart's testimony was prejudicial. The district court denied the motion, and the Eleventh Circuit affirmed. The Circuit Court noted that, in our circuit, "evidence regarding polygraph examinations is not *per se* inadmissible." *Id.* at 967 *citing United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (en banc). The Court noted that admission "'is left entirely to the discretion of the trial judge,'" *id. quoting Piccinonna*, 885 F.2d at 1535, and the district court did not abuse its discretion because (a) the court limited testimony to Smart's willingness to take the test, not its results, and (b) the court instructed the jury how to consider Smart's testimony. *Id.* at 968-69.

2. *The court's ruling*: Based on *Smart*, the court told both parties that, if SMP attacked Moore's credibility, the court would allow Moore to testify that he would take a polygraph test and took a polygraph test. (Doc. 222 at 308-09, 312). SMP told the court that it would attack Moore's credibility, so Moore's counsel could elicit that testimony on direct. (*Id.* at 309). So the court informed Moore's counsel that he could ask the question on direct, and the court would promptly instruct the jury using language similar the language used in *Smart*. (*Id.* at 316). SMP agreed with the proposed instruction and asked the court to give it as soon as Moore testified about the polygraph. (*Id.*).

3. *Moore's testimony*: Moore did not testify about the polygraph on direct. Rather, he brought it up (unsolicited) during cross-examination:

> Q. They were all teenagers when they say that you either dated, hugged, or kissed them, right?
>
> A. They were all teen — I did not date, hug, or kiss Leigh Corfman or Beverly Nelson. I have publicly denied as false

> their accusations. And I cannot go further than that because I have a conspiracy case filed —
>
> Q. Whoa, whoa.
>
> A. — filed in Etowah County against these people. And I can't talk about it.
>
> MR. RAGSDALE: Your Honor –
>
> A. I have denied it. And furthermore, I was willing to take a polygraph. And, in fact, I did take a polygraph.

(Trans. 401). At SMP's request, the court promptly instructed the jury:

> Mr. Moore has testified that he requested to take and in fact did take a polygraph test. I am going to allow this evidence for the limited purpose of proving or disproving Mr. Moore's credibility, and you must consider it only for that limited purpose.
>
> The results of a polygraph test are not admissible to prove the truth or falsity of the statements that Mr. Moore made during any polygraph examination, and you should not assume that polygraphs are scientifically reliable, nor should you speculate what the results of any test might have been.

(Trans. 403). SMP then immediately asked Moore whether he tried "to enter any polygraph test into this case," and Moore confirmed that he had not. (Trans. 403-04). A few minutes later, while still on cross-examination, Moore again mentioned the polygraph test:

> Q. Now, Mr. Moore, just to be clear, because we spent a lot of time talking about whether you were banned from the mall, that's not the worst thing you got accused of in November of 2017, is it?

> A. It's a pretty bad thing to tell a national audience that you were actually banned from a mall. That's enough to lose your job then. It was never reported anywhere in any paper by anyone.
>
> Q. Mr. Moore, it wasn't the worst thing you got accused of —
>
> A. There's other things I've been accused of, yes. They're all bad. I admit that.
>
> Q. Okay. In fact, you were accused of sexually molesting a 14-year-old before anybody mentioned you being banned from the mall.
>
> A. And as I said, I was willing to and did take a polygraph test.
>
> Q. And where is that test, Mr. Moore? Because it's not in this case.
>
> A. It's on public record.
>
> Q. It is not, Mr. Moore, and that's —
>
> A. No, it is.

(Trans. 439). The court immediately called counsel to a sidebar and told counsel that the court would allow no more comments about the polygraph test. (*Id.*).

While still on cross-examination, SMP asked Moore about Beverly Nelson Young's allegations:

> Q. And she gave an account of that in published articles that were published around that time, November 13th, right?
>
> A. I can't speak anymore. She's also part of the conspiracy suit, and I agreed to take a polygraph test, which I did take.

> THE COURT: Ask your next question.
>
> MR. RAGSDALE: Yes, sir.
>
> Q. Is it your position you can't talk about any of the 12 other lawsuits that you filed?
>
> A. Not when there's a lawsuit pending and not when I have taken a polygraph that you don't know the results.
>
> THE COURT: All right. Mr. Moore, as I have instructed the jury, we cannot introduce into evidence results either way of a polygraph, nor can we assume that they are scientifically reliable.
>
> THE WITNESS: Yes.

(Trans. 448).

That was the last mention of a polygraph at trial. No other witness mentioned a polygraph. Neither side mentioned a polygraph during closing argument. And neither party asked the court to repeat its limiting instruction during final instructions, *see* (docs. 203, 205), so the court did not mention it during final instructions.

4. *No error*: The court finds no error that affected SMP's substantial rights. *Peat, Inc. v. Vanguard Rsch., Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004) (only errors that affect "substantial rights" or cause "substantial prejudice" warrant a new trial). The Circuit Court has said that district courts have discretion whether to allow testimony about a polygraph in a civil case. *See Smart*, 740 Fed. App'x at 967. This court used its discretion by following the Circuit's decision in *Smart*: once SMP attacked Moore's credibility, the court allowed Moore to testify only that he offered to take a polygraph test and that he took a polygraph test, then the court give a limiting instruction.

While Moore mentioned the polygraph three times, he followed the court's limitation with one exception: Moore testified that the test was in the public record when SMP's counsel asked "where is that test, Mr. Moore? Because it's not in this case." (Trans. 439). Even if Moore erred in stating that he filed the test in another case[4], SMP invited the error by asking Moore where the test result was. *Id.* Plus, the court instructed the jury using the language approved in *Smart*, and the court must assume the jury followed its instruction. *See Smart*, 740 Fed. App'x at 969 *citing United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011).

5. *No prejudice*: The court also finds that SMP did not suffer substantial prejudice and justice does not require a new trial under Rule 61. Moore mentioned the polygraph test only in response to SMP's questions about the sexual assault allegations made by Leigh Corfman and Beverly Nelson Young—allegations about events that did not occur at the mall. Whether Moore assaulted either of those women away from the mall was irrelevant to deciding falsity or actual malice here. As a result, Moore's testimony about a polygraph test was relevant only to proving or disproving Moore's credibility, just as the court instructed the jury. (Trans. 403).

To decide falsity, the jury had to decide whether Moore was banned from the mall for soliciting sex from Wendy Miller and other young girls at the mall. Both women who testified about Moore's actions at the mall, Wendy Miller and Becky Gray, testified that Moore did ***not*** solicit them for sex. (Trans. 667, 744). So even if the jury ignored the court's instruction and considered Moore's testimony that he took a polygraph test as substantive evidence of falsity, that evidence was cumulative to the accusers' testimonies, which was sufficient to support the jury's finding that Moore did not solicit sex from young girls at the mall and thus SMP's juxtaposed statement was false.

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[4] Moore filed an affidavit describing the results, not the expert's report. (Doc. 246-1). The jury did not see this document.

3. Counsel's argument

SMP next argues that it is entitled to a new trial under Rule 59 because Moore's counsel made improper statements during his closing argument. The court reviews each statement below.

A. Leigh Corfman

SMP first argues that Moore's counsel improperly implied that Moore won his lawsuit against Leigh Corfman during his rebuttal closing argument. (Doc. 216 at 37). The court finds no error, and if error occurred, SMP invited it. The court starts with backstory.

1. *Before closing argument*: As described *supra* at 4, Corfman alleged that Moore sexually assaulted her at Moore's home. Corfman sued Moore for defamation in state court; Moore filed a counterclaim for defamation; and, the jury found that neither party proved defamation.

Before trial, the court ordered that neither party could discuss the *Corfman* litigation, but Corfman could testify. (Doc. 200). Specifically, the court said that SMP could call Corfman during its case to support (a) SMP's theory that Moore's grooming behavior amounted to 'soliciting sex' and (b) other allegations damaged Moore before SMP released the Shopping Mall Ad. (Trans. 13-17, 384-89).

SMP did not call Corfman at trial. But SMP did ask Kayla Moore about her testimony in the *Corfman* litigation, without mentioning Corfman by name. (Trans. 258). SMP then asked Moore's daughter, Heather Mayo, about her testimony in the *Corfman* litigation; this time mentioning that the case involved Corfman. (Trans. 300). When Roy Moore testified, SMP directly asked him about the counterclaim he filed against Corfman and a separate conspiracy lawsuit Moore filed against a group of persons that includes Corfman. (Trans. 467-75). SMP's counsel questioned Moore about the *Corfman* trial at length. (*Id.*).

SMP brought up the *Corfman* litigation each time to show that the Moores had alleged that other Defendants, through other publications, had damaged Moore—not SMP in the Shopping Mall Ad. And it worked. Moore admitted that "it's not all SMP's fault, but a big part of it is, yes." (Trans. 475). About the *Corfman* litigation, Moore testified that "I didn't say Leigh Corfman was all of the problem. I said Leigh Corfman was a problem, as is SMP, as is the Jones campaign, as is the whole political thing that's involved in it." (Trans. 473).

2. *Closing arguments*: Moore's counsel did not mention Corfman or her lawsuit during his initial closing argument. (Trans. 884-98). SMP, on the other hand, said this during its argument:

> Now, one thing he does not tell you is that he fought tooth and nail to keep Leigh Corfman from coming in here to testify. Fought us on it. Objected to it. One of the times you had to go out and wait for us is because we were fighting over that very issue, because he didn't want you to listen to Leigh Corfman.

(Trans. 906).

The argument that SMP now objects to (highlighted) was part of counsel's rebuttal to SMP's statement:

> Everything that he's brought up there, all those witnesses, all those women, they weren't here. He told you about Leigh Corfman, that we fought about Leigh Corfman not being here. Now, here's the thing: Leigh Corfman couldn't have possibly had anything to do with this ad. Leigh Corfman's allegations 40 years before, her and the other person that alleged assault said they never told anybody. They never told anybody. So how could that possibly have anything to do with a mall ban at any time? It didn't. That is why we fought Leigh Corfman coming in. Now, he brought up Leigh Corfman. There was another whole trial with Leigh Corfman. She sued my client

> because –
>
> MR. RAGSDALE: Your Honor –
>
> MR. WITTERNBRINK: He brought it up, Judge.
>
> THE COURT: Hold on. State your objection.
>
> MR. RAGSDALE: My objection, Your Honor, is that we have talked about the fact that the results of that trial or references to that trial, other than to impeach witnesses, are not to come into evidence.
>
> THE COURT: That is sustained. You may talk about testimony that has been shown during the trial but not any results. You may continue.
>
> MR. WITTENBRINK: You do know that Leigh Corfman was part of another suit. We can't tell you about the results. But she had nothing to do with whether or not Roy Moore was actually banned from the Gadsden Mall for soliciting sex from young girls. Nothing. Because she never told anybody. Neither did Beverly Nelson. The people that alleged assault didn't have anything to do with that ban.

(Trans. 923-24) (highlighting added). When SMP objected to the highlighted statements outside the jury's presence, the court (a) agreed with Moore that SMP opened the door by saying that Moore fought to keep Corfman from testifying and (b) said the court would instruct the jury to disregard the attorneys' arguments and not consider them to be evidence. (Trans. 930). And that's what the court did:

> I just have a few more instructions to give you, and then we will allow you to deliberate.
>
> Before I do, just a reminder, now that closing arguments are over, anything the lawyers said during closing arguments

> about the evidence or about legal proceedings is not evidence in this case. It is not binding on you, and you cannot consider it.

(Trans. 931).

3. *No Error*: The court rejects SMP's arguments for three reasons. First, Moore's counsel did not violate the court's order because he did not mention the results of the *Corfman* trial. Counsel simply said that Corfman sued Moore—an undisputed fact that SMP first raised—then parroted the court's instruction seconds earlier that he could not mention the results of that lawsuit. (Trans. 923-24). Second, SMP invited any error when it told the jury that Moore was hiding the fact that "one of the times you had to go out and wait for us," was so that Moore could argue to prevent Corfman from testifying. (Trans. 906). When it violated the rule against telling the jury what is discussed outside its presence, SMP opened the door to Moore's response. Third, the court promptly instructed the jury that it could not consider either attorney's argument as evidence, and the court must presume the jury followed its instruction. *Lopez*, 649 F.3d at 1237.

B. Damages for losing the election

SMP next claims that Moore improperly asked the jury to compensate him for losing the Senate election. (Doc. 216 at 41-42). The court finds this argument lacks merit.

1. *Background*: Moore sought compensatory damages for "damage to his reputation and suffering in the form of mental anguish and emotion distress," plus punitive damages. (Doc. 47 at 45 ¶ 107). The court granted SMP's motion to preclude Moore's request for punitive damages for failure to comply with Ala. Code § 6-5-186. (Doc. 200 at 4). So Moore was left with his claims for reputational damage plus mental and emotional distress.

During opening statements, Moore's counsel told the jury that Moore would present evidence that "even though he was far ahead in the election race" before the Shopping Mall Ad aired, Moore "lost the race by a small margin and that the effect of these advertisements being run caused him to lose that election and to lose his reputation forever probably." (Trans. 40).

Citing this statement, SMP raised a concern that Moore would ask the jury to award damages for losing the election. (Trans. 268). Moore's counsel said that the point of mentioning Moore's election loss was to help prove reputational damage—*i.e.*, that Moore ultimately lost an election that he once led in the polls tends to prove that the Ad hurt his statewide reputation. (*Id.*). The court instructed Moore that he could make that argument, "[t]o the extent that you make it clear to the jury that the point is … proof of loss of reputation, which caused emotional damages. But you cannot ask them to award him anything because he lost." (*Id.*).

In closing, Moore's counsel argued:

> He was ahead of the polls by double digits. The campaign started — toward the end of — in November, November 9th, these allegations started coming out. And what happened is this ad came up and sealed the deal.
>
> Now, for it to have had no effect at all, Judge Roy Moore would have lost by a landslide. I mean — excuse me. For it to have no effect at all — Judge Roy Moore only lost by 20,000 votes. If the ad had any effect, a minute effect, it's going to be worth those 20,000 votes in that last part of the election.
>
> There is not enough money that you can pay to Judge Roy Moore to get his name back, but there is something that you can do. You can award him enough money for this false and defamatory statement to make the media pay attention. Part of the proof that Judge Roy Moore has been harmed is there's

> not a single camera out here. There's no newspaper reporters lining up at the door. Before this stuff happened, people followed him everywhere he went. There's nobody here. I would suggest if you give a small award, no one will ever hear about it. In order to help Roy Moore reclaim his reputation, you've got to come back with an amount of money that will make the media pay attention.

(Trans. 897-98). When counsel finished arguments, SMP asked the court to instruct the jury that it could not award damages for losing the election. (Trans. 929). The court did:

> And, again, as I instructed you earlier, Moore seeks damages for emotional distress, mental anguish, and lessened reputation. Those are the only categories for which you can give him damages. For example, you cannot give damages for losing an election or other political reasons. The damages must come from proof of emotional distress, mental anguish, or lessened reputation.

(Trans. 935) (highlighting added).

2. *No error*: The court finds no error that affected SMP's substantial rights for two reasons. First, counsel stayed within the bounds of the court's instruction: he related the election loss to reputational damage, rather than asking for money to compensate for the election loss. Second, the court promptly instructed the jury that it could not award damages for losing an election, and the court must assume that the jury followed this instruction. *Lopez*, 649 F.3d at 1237. Both reasons preclude the granting of a new trial.

C. Punitive damages

As stated, the court dismissed Moore's claim for punitive damages for failing to comply with Ala. Code § 6-5-186. (Doc. 200 at 4). SMP argues that the highlighted portion of Moore's closing argument violated the court's order by asking for punitive damages:

> There is not enough money that you can pay to Judge Roy Moore to get his name back, but there is something that you can do. You can award him enough money for this false and defamatory statement to make the media pay attention. Part of the proof that Judge Roy Moore has been harmed is there's not a single camera out here. There's no newspaper reporters lining up at the door. Before this stuff happened, people followed him everywhere he went. There's nobody here. I would suggest if you give a small award, no one will ever hear about it. In order to help Roy Moore reclaim his reputation, you've got to come back with an amount of money that will make the media pay attention.

(Trans. 897-98) (highlighting added). SMP did not raise this objection at the end of closing statements (trans. 929-31), so the court finds that SMP waived it.

Alternatively, the court finds no error (plain or otherwise). Moore's counsel followed up the challenged statements with the proper use of his evidence: "In order to *help Roy Moore reclaim his reputation*, you've got to come back with an amount of money that will make the media pay attention." (Trans. 898) (emphasis added). And the court instructed the jury that it could only award damages for emotional distress, mental anguish, and lessened reputation before (trans. 882) and after (trans. 935) counsel made the challenged statements. The court must assume that the jury followed its instructions. *Lopez*, 649 F.3d at 1237. All these reasons preclude the granting of a new trial.

D. Deceptive Campaign Finance tactics

Finally, SMP argues that Moore's counsel improperly implied that Highway 31—the SMP-funded PAC that aired the Ad—violated campaign finance laws, in violation of this court's order. (Doc. 216 at 44). The court finds that SMP waived this argument, and it is meritless.

1. *Background*: The court's pretrial order precluded Moore from offering evidence about Highway 31, including other Highway 31 ads, that were not relevant. (Doc. 200 at 2). The court said that it would allow the parties to tell the jury how many times the Shopping Mall Ad aired and much money Highway 31 spent cumulatively on the special election. *Id.*

SMP claims that the highlighted part of counsel's closing argument violates the court's order:

> I would submit to you that these defendants have shown from the beginning that they don't care about the truth. And we can show that from the very beginning of their insertion into the state of Alabama that they don't care about the truth. How do we do that? Highway 31 (indicating). That's the company that published this ad under the auspices of the Senate Majority PAC. Highway 31 was, quote, based in Alabama. And what was that base? What did Adam Muhlendorf tell you? He told you that the base was a P.O. box. And it was him and Mr. Still, who did not appear, who was the treasurer.
>
> Mr. Muhlendorf told you that nobody at Highway 31 had any discretion, any authority, made any decisions, nothing was done in the state of Alabama. In truth and in fact, he told you that the research department, the editorial department, the creative department, all the aspects of this ad were controlled by the Senate Majority PAC from Washington DC and other places around the country. None of it was done here. None of

> it was controlled here. The very existence of Highway 31 was a lie meant to influence the Alabama people.
>
> The big ad — I mean, excuse me. The ad itself was the big lie. The ad plays in 30 seconds, and it says a continuous narrative. It is a very professional, very well put together, and very effective ad.

(Trans. 885-86) (highlighting added).

2. *No error*: The court denies SMP's request for two reasons. First, SMP did not raise this objection at the close of arguments (trans. 929-31), so SMP waived the argument. Second, Moore's counsel said nothing about campaign finance violations, either expressly or impliedly. Once you read counsel's highlighted statements in context, this was his argument: If SMP is willing to lie to the people of Alabama by making Highway 31 sound local, even though it was controlled out of state, then SMP is likely willing to create a false ad about Moore. This is proper argument for actual malice.

—

To sum up, SMP points to no statement that counsel made during opening or closing argument that was "plainly unwarranted and clearly injurious." *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1282 (11th Cir. 2008). Nor did counsel make any error that wasn't cured by one of the court's instructions. As a result, the court **denies** SMP's motion for a new trial based on counsel's arguments to the jury.

4. Cumulative effect of errors

SMP next argues that the cumulative effect of the arguments addressed so far entitles it to a new trial. (Doc. 216 at 44-45). But as explained, SMP has pointed to no errors that may have impacted the jury's verdict or affected SMP's substantial rights. *See* Fed. R. Civ. P. 61. The court thus rejects SMP's cumulative impact argument.

5. Excessive damage award

Finally, SMP challenges the jury's $8.2 million verdict as "grossly excessive." (Doc. 216 at 45-53). SMP asks the court to either order a new trial or remit the jury's award (preferably to $1).

Because the court is exercising diversity jurisdiction over Moore's state-law claims, the court applies Alabama law to its review of the jury's award. Alabama law allows a trial court to set aside or remit a jury's damage award for only two reasons: (1) the jury based its number on "bias, passion, prejudice, corruption, or other improper motive," or (2) the number "is totally unsupported by the evidence." *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378 (Ala. 1986); *see also* Jennelle Mims Marsh, *Alabama Law of Damages*, § 7:6 (6th ed. 2012) ("Verdict—Remittur and new trial," same). When looking for these reasons, courts must presume that the jury's verdict is correct, and we "must consider the evidence in the light most favorable to the prevailing party." *Ala. River Grp., Inc., v. Conecuh Timber, Inc.*, 261 So.3d 226, 263 (Ala. 2017). If the losing party cannot sufficiently prove either reason, the state constitution requires courts to respect the jury's verdict, as is. *Hammond*, 493 So. 2d at 1378 *citing* Ala. Const. Art. I, § 11 (1901).

SMP argues both reasons. The court addresses them in the order SMP presents them.

A. Bias, passion, prejudice, or other improper motive

SMP created the Shopping Mall Ad to help Democrat Doug Jones defeat Republican Roy Moore in the 2019 special election. SMP argues that Moore's counsel inflamed the juror's passions by leaning into the politics. SMP points to three examples that it says proves the jury acted out of political bias and passion when it rendered an excessive award.

1. *"The Big Lie"*: SMP first cites former President Donald Trump's 2022 lawsuit against CNN, in which the former President claimed that

CNN defamed him by comparing him to Hitler and likening his complaints about the 2020 election to Nazi propagandist Joseph Goebbels' infamous line, "If you tell a lie big enough and keep repeating it, people will eventually come to repeat it." (Doc. 216 at 46) *citing Trump v. CNN, Inc.*, Case No. 22-61842-CIV (S.D. Fla).

To be clear, no one said anything about the CNN lawsuit during trial because the court would not have allowed it. Rather, SMP claims that counsel was projecting a "clear appeal to partisan politics," (doc. 216 at 46), when he said this during closing argument:

> Mr. Muhlendorf told you that nobody at Highway 31 had any discretion, any authority, made any decisions, nothing was done in the state of Alabama. In truth and in fact, he told you that the research department, the editorial department, the creative department, all the aspects of this ad were controlled by the Senate Majority PAC from Washington DC and other places around the country. None of it was done here. None of it was controlled here. The very existence of Highway 31 was a lie meant to influence the Alabama people.
>
> The big ad — I mean, excuse me. The ad itself was the big lie. The ad plays in 30 seconds, and it says a continuous narrative. It is a very professional, very well put together, and very effective ad. J.B. Poersch's staff, Mr. Putnam, he said, This ad will rock Alabama.

(Trans. 886) (highlighting added). As you can see, counsel called the Shopping Mall Ad "the big lie" immediately after arguing that SMP and others created Highway 31 as a lie to deceive Alabama voters—harkening back to Moore's earlier testimony: "The bigger the lie, the more believable it is, and that was — that was the case in this. They took from a blog and repeated it, but they didn't repeat everything." (Trans. 364). Neither Moore nor counsel mentioned President Trump or CNN, nor did SMP object to this argument in the moment or after counsel finished.

2. *"Me too"*: SMP next points to counsel's reference to the 'Me Too' movement during his rebuttal closing argument:

> She didn't think telling her story would be any big deal. Wendy Miller was used by those folks to create a narrative that wasn't real. She was used and she was hurt.
>
> Now, here, she did come forward, and why did she come forward and why was she happy to tell her story? The whole thing – in the Me Too movement, you know, and Believe the Women, what happens? Everybody in this world wants to be part of something big. They want to be part of something important. We want to have meaning in our lives.
>
> And I've got to tell you: Wendy Miller told you that she was angry with Roy Moore. She didn't like Roy Moore. And in fact, her whole countenance changed when we brought up those subjects. She was angry with Roy Moore about the Ten Commandments. She thought he didn't obey the law; he thought he was above the law. She was angry about the same-sex marriage issue, and she told you that. And she said, Well, I didn't think it would hurt for me to tell them that. Maybe it would keep him out of the Senate. She frankly told you she had a political motivation.

(Trans. 927-28). Counsel mentioned 'Me Too' as part of his rebuttal argument that Wendy Miller's allegation lacked credibility because of Miller's admitted disdain for Moore. While counsel's statement may have lacked tact, it was relevant to a material question of fact, and SMP did not object to the argument as it happened or after arguments closed.

3. *SMP's resources*: Finally, SMP points to the highlighted portion of counsel's argument:

> It is a very special time. Not many cases in our court system

get to trial. Very few cases of all the cases overall get to be actually put in front of a jury. It is very difficult, and it takes a lot of time and preparation to bring these things and actually be able to get a jury picked and bring the evidence before you. So you get an opportunity here to do something that, one, not a lot of people get to do and, two, to really help our government, our state, and the United States of America.

It is difficult to get — especially very powerful people or individuals or companies — to court. They spend a lot of money, they spend a lot of resources, and they do a lot of work to make sure that that is difficult.

J.B. Poersch, the president of the Senate Majority PAC, told you from the stand that they are a super PAC. That means they have a lot of money to devote to opposing these kinds of cases, and that's one of the reasons it's difficult to get here.

Why would they spend the time and the effort that they did? Why would they say these things even if they know that they convey a false impression? Why would they do this? Why would they spend, Mr. Poersch said $5 million overall, over half a million dollars on this particular ad? Why would they do that?

Ladies and gentlemen of the jury, people spend millions of dollars because there are 100 senators, and those senators control billions and trillions of dollars. There is not an end to the effort that will be spent to get a Senate seat. I would submit to you that these defendants have shown from the beginning that they don't care about the truth. And we can show that from the very beginning of their insertion into the state of Alabama that they don't care about the truth. How do we do that? Highway 31 (indicating). That's the company that published this ad under the auspices of the Senate Majority

> PAC.

(Trans. 884-85) (highlighting added). In context, counsel was not pointing out that SMP has deep pockets to pay a large damages award. Rather, counsel was transitioning from his introduction to his argument that SMP had the incentive and ability to create false or reckless advertising to win Senate elections. This argument was relevant to a material issue, and SMP did not object to the argument as it happened or after arguments closed.

The court watched the jury from voir dire through its verdict and finds no evidence that the jury voted based on political passion or bias rather than reason and evidence. As for SMP's cited statements, each was made during a relevant argument, and none was prejudicial enough for SMP to object. Further, just after counsel finished their closing arguments, the court instructed the jury about the proper use of the attorneys' statements and the (non) role of politics in deciding the case:

> [J]ust a reminder, now that closing arguments are over, anything the lawyers said during closing arguments about the evidence or about legal proceedings is not evidence in this case. It is not binding on you, and you cannot consider it. Again, you must only consider the evidence that I have admitted either from the witness stand or as exhibits. . . .
>
> And, again, as I instructed you earlier, Moore seeks damages for emotional distress, mental anguish, and lessened reputation. Those are the only categories for which you can give him damages. For example, you cannot give damages for losing an election or other political reasons. The damages must come from proof of emotional distress, mental anguish, or lessened reputation.

(Trans. 931, 935). The court must assume the jury followed these instructions. *Lopez*, 649 F.3d at 1237.

As for the attorneys mentioning politics, the court cannot try a case about a political action committee spending a half million dollars on an ad accusing its political opponent of soliciting sex from a minor without allowing some mention of politics. The case is *about* politics.

The court has considered the arguments SMP cites, alongside counsel's other arguments, the trial evidence, and the factors announced by the Alabama Supreme Court in *Hammond* and subsequent cases. *See Hammond*, 493 So.2d at 1379. Having done so, the court does not find that the jury based its award on an improper motive, rather than basing it on application of the facts to the court's instructions. The court thus **denies** SMP's motion for a new trial or remittitur on this ground.

B. Unsupported by the evidence

SMP also claims that the jury's damage award was "totally unsupported by the evidence." *Hammond*, 493 So. 2d at 1378. SMP does not argue that Moore suffered no emotional or reputational damage once the initial allegations hit on November 9, 2017. He did.

Rather, SMP points out two reasons why Moore might fail to prove that the Shopping Mall Ad—as opposed to other sources—caused $8.2 million worth of emotional and reputational damage:

1. Moore likely suffered the brunt of his emotional and reputational damage in the 18 days between the initial *Washington Post* article and the release of the Shopping Mall Ad; and,

2. Even if Moore suffered emotional and reputational damage after SMP released the Shopping Mall Ad, it is hard to differentiate the damage caused by the Shopping Mall Ad versus any other source.

SMP made these points in two ways. First, SMP introduced 200+ articles, web posts, and videos that repeated the allegations against Moore, many of which were published before the Shopping Mall Ad. *See* Exs. 42-254.

Second, SMP got Moore to acknowledge that, during the earlier Leigh Corfman defamation trial, Moore testified that Leigh Corfman and the *Washington Post* damaged him—without mentioning SMP. (Trans. 470-72). That admission led to this exchange:

> Q. But did you tell the jury when you swore to tell the whole truth, did you tell them, Leigh Corfman is only part of the problem? Or did you say, Leigh Corfman and The Washington Post is all of the problem?
>
> A. I didn't say Leigh Corfman was all of the problem. I said Leigh Corfman was a problem, as is SMP, as is the Jones campaign, as is the whole political thing that's involved in it. It was all one effort.
>
> Q. One big ball of –
>
> A. To defeat my – yeah, one big ball.
>
> Q. One big ball of emotional distress, right?
>
> A. (Witness nods head.)
>
> Q. Right?
>
> A. Yeah.
>
> Q. And it all started on November 9th with The Washington Post; isn't that right?
>
> A. It started on November 9th, yes, but it went clean through until eventually people were painting things on the outside of my driveway, and my children and my grandchildren were – yes.
>
> Q. So are you telling this jury that they should take into account other people that made other allegations that

caused you emotional distress and not just SMP?

A. If I were telling this jury what should be responsible, I'd tell them that there were other ads run with participation with SMP –

Q. No, sir.

A. that were negative –

Q. There are other people.

A. No, I'd say – well, there are entities, yes.

Q. Okay. So you want this jury to be honest – you're being honest with this jury, aren't you?

A. Of course I'm being honest with the jury.

Q. I'm not doubting you. I just want you to say that. You're being honest with this jury. You want this jury to take into account that you have claimed in other cases that other people are partly responsible –

A. Partly responsible, yes.

Q. Okay.

A. Yes.

Q. And that it all started on November 9th?

A. Yes.

(Trans. 472-74). As Moore acknowledged, his emotional and reputational damage started 18 days before SMP released the Shopping Mall Ad and was caused in part by persons and entities other than SMP.

As a result, the jury's task was to quantify the part of Moore's "big ball of emotional distress" and reputational damage attributable to the Shopping Mall Ad. It decided $8.2 million.

The court's task is not to determine whether it agrees with that number. Rather, the court must determine whether the jury's award is "totally unsupported by the evidence." *Hammond*, 493 So. 2d at 1378. As explained below, this is a very deferential standard under state law.

1. *Standard of Review / Alabama Law*

Six points of Alabama law guide this court's decision whether to set aside or remit the jury's award based on insufficient evidence.

First, mental anguish/emotional distress and reputational damages are distinct categories of damage, with the former looking at the internal damage Moore suffered and the latter looking externally at Moore's loss of standing in the community. *See Liberty Nat'l Life Ins. Co. v. Daugherty*, 840 So. 2d 152, 162 (Ala. 2002). Moore's failure to prove one does not mean that he failed to prove the other. *See id.* ("even if Daugherty's evidence concerning his good character negated any injury to his reputation, because the defamation involved in this case was slander per se, the law recognizes a right to recover for mental anguish").

Second, because the jury issued a general verdict on compensatory damages, the court cannot guess how the jury apportioned its award between Moore's reputational damage and his mental and emotional damage—or whether the jury awarded the entire amount for one category. *See Merchants FoodService v. Rice*, 286 So.3d 681, 701-02 (Ala. 2019). That means the court must affirm the jury's award if sufficient evidence supports ***either*** reputational damage or mental and emotional damage. *See id.* at 702 ("even if Merchants' arguments as to the sufficiency of the evidence did undermine one aspect of the compensatory-damages award, we still must affirm the judgment entered on that verdict because we cannot discern whether any damages were

awarded as to that aspect of the award"); *Guyoungtech USA, Inc. v. Dees*, 156 So.3d 374, 384 (Ala. 2014) (recounting other cases where the court refused to speculate the apportionment of damages in a general verdict); *City Realty, Inc. v. Continental Cas. Co.*, 623 So.2d 1039, 1045-46 (Ala. 1993) (refusing to review an allegation that the jury's damages award was excessive because the award could have been appropriate or excessive depending on how the jury had apportioned damages).

Third, the court must presume that SMP caused Moore *some* damage in both categories (reputational and emotional) because the jury found that SMP committed 'libel per se' under Alabama law. "In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se." *Gary v. Crouch*, 867 So. 2d 310, 316 (Ala. 2003) *quoting Marion v. Davis*, 114 So. 357, 359 (Ala. 1927). Once a plaintiff proves libel or slander per se, "the law presumes injury to reputation *and* mental suffering."[5] *Daugherty*, 840 So. 2d at 162. Put another way, "[w]ords found to be slander per se 'relieve the plaintiff of the requirement of proving 'actual harm to reputation or any other damage' in order to recover nominal or compensatory damages.'" *Id.* at 157 *quoting Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085, 1092 (Ala.1988).

Fourth, the standard for reviewing an award for mental anguish and emotional distress is very deferential. "We recognize that mental anguish and emotional distress are not items for which a precise amount of damages can be assessed; thus, in considering whether a jury verdict for compensatory damages is excessive, we must view the evidence from the plaintiff's perspective and determine what the evidence supports in

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[5] For public figures like Moore, the Supreme Court has held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch*, 418 U.S. 323, 349 (1974). Because the jury found SMP acted with "knowledge of falsity or reckless disregard for the truth" (*i.e.*, actual malice), *id.*, Alabama's presumption of injury is Constitutionally permissible, despite Moore's status as a public figure. *Id.*

terms of the plaintiff's suffering." *Merchant FoodService*, 286 So.3d at 703 *quoting AutoZone, Inc. v. Leonard*, 812 So.2d 1179, 1184 (Ala. 2001). "[O]nce the plaintiff has presented some evidence of mental anguish, the question of damages for mental anguish is for the jury." *Merchant FoodService*, 286 So.3d at 703 *quoting Nat'l Ins. Ass'n v. Sockwell*, 829 So.2d 111, 133-34 (Ala. 2002).

Fifth, if any evidence supports the award, trial and appellate courts will not disturb the award unless it shocks the conscience. *See, e.g., Hornady Truck Line, Inc. v. Meadows*, 847 So.2d 908, 923 (Ala. 2002) (affirming award for physical and mental suffering that "clearly did not shock the conscience of the trial court"); *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166, 179 (Ala. 2000)(affirming compensatory award for mental anguish because "[t]he jury's award does not shock the conscience of this Court"); *AutoZone Inc.*, 812 So.2d at 1183 (despite no finding of juror misconduct or improper juror motive, affirming remittitur because the jury's award for mental anguish damages "evidently shocked the conscience of the trial court"); *see also Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1305-06 (11th Cir. 1984)(affirming the district court's use of the "shocks the conscience" test, rather than the "maximum recovery" rule, to affirm award for loss of services and consortium that the trial court found "slightly shocking" but not "totally shocking"). Under this standard, the Alabama Supreme Court has affirmed multiple damage awards that it or the trial court expressly disagreed with, including:

- Affirming the trial court's denial of a motion to remit an award of mental anguish damages, even though "the jury's verdict is higher than a Justice of this Court, sitting as a juror, might have awarded," *Daughtery*, 840 So.2d at 163;

- Denying a request to remit an award of mental anguish damages on appeal because, even though "the damages award is high and borders on excessive," it did not "shock the

conscious of this Court," *Goodman*, 789 So.2d at 179-80;

- Affirming the denial of a motion to remit an award of physical injury and mental anguish that did not "shock[] the conscience of this Court," even though *both* the trial court and the supreme court said they might have awarded a different amount if the judges were the fact finders, *Norfolk S. Ry. Co., Inc. v. Bradley*, 772 So.2d 1147, 1154-56 (Ala. 2000); and,

- Reversing the trial court's remittitur of mental anguish award that shocked the trial court's conscious because, "although they are high in most instances and very, very high with respect to Joyce, we cannot say that this Court's conscious is shocked—but we hasten to add that the verdicts are on the borderline of excessive," *Daniels v. E. Alabama Paving, Inc.*, 740 So.2d 1033, 1050 (Ala. 1999).

In short, at least four times, the Alabama Supreme Court has refused to remit an award of mental or emotional damages it disagreed with—twice calling those awards borderline excessive—because those awards did not shock the court's conscious.

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Applying these state-law standards, the court assumes that the Shopping Mall Ad injured Moore's reputation and mental health but does not assume what amount of damage the Shopping Mall Ad caused (beyond $1 in nominal damages) because of the many other reports that Moore acted inappropriately around teenage girls. The court thus determines whether Moore presented any evidence that would allow a jury to find that the Shopping Mall Ad—separate and apart from any other report or advertisement—damaged Moore's reputation or his mental and emotional health. If the court finds that Moore presented evidence that attributes reputational, mental, or emotional injury to the Shopping Mall Ad, the court will then decide whether the jury's award of

$8.2 million shocks the court's conscience and must therefore be remitted.

2. *Reputational damage*

The court finds that Moore presented evidence that, when viewed in a light favorable to Moore, supports the jury's finding that the Shopping Mall Ad injured Moore's reputation, separate and apart from other reports or advertisements.

While Moore admitted that other reports also damaged him, Moore testified that the Shopping Mall Ad particularly damaged his reputation:

> Q. Okay. So you can't very well tell this jury that the mall ad is what killed your campaign. You can't make that claim.
>
> A. I can tell you that the mall ad destroyed my reputation. I surely can.
>
> Q. Well, I'm taking them one step at a time, Mr. Moore. As far as the election is concerned, you can't honestly tell this jury that the mall ad is what made you drop in the polls compared to Doug Jones, can you?
>
> A. I can tell you that the mall ad hurt my reputation badly.

(Trans. 459). Moore was later asked to explain why the Shopping Mall Ad damaged him worse than other reports and ads:

> Q. What do you think was the effect the mall's ad — the mall ad had on your campaign and your reputation versus allegations that were out there before?
>
> A. Well, that's for the jury to decide, but in my opinion, this is the most disgusting thing that people would believe. If somebody prints something in the paper, that's one thing. When they run it over and over and over and say he was actually banned when that's not what the sources of the

> news even said. If it said "sources tell me" — they didn't say that. If they had put "sources tell me," I'd have been more satisfied with it because, you know, "sources tell me" doesn't tell you who's saying it. When it says you were actually banned, that's the business. It looks like it was something that was official. And then they say, "For soliciting sex with young girls," and then they don't stop there. "One of whom was Wendy Miller" who said that I approached her and said she was pretty and at 14, asked her for a date in front of her mother, which I don't — wouldn't do. But that's devastating.
>
> Q. Okay.
>
> A. And it was just repeated it over and over and over, 533 times over different areas of the state where voters are polled and know what affects them. It was very damaging.

(Trans. 488-89). *See also* (Trans. 874) (stipulation that the Shopping Mall Ad ran about 533 times and cost Highway 31 $574,754).

Kayla Moore testified that the Shopping Mall Ad "murdered" her husband's "good name." (Trans. 265). She too was asked how she knew that the Shopping Mall Ad hurt her husband, as opposed to other reports:

> Q. Can you tell the Court how you distinguish just the general run-of-the-mill things that happened — I mean the things that happened initially with the initial allegations, and the difference between that and what happened after this shopping mall ad came about?
>
> A. I think that everybody recognized it for what it was when the allegations broke. And then I think that they didn't get what they wanted out of it, the impact, so they began to — you know, we even said, well, they'll probably add more

> people, and then they added more people. And then — you know, it's like they weren't getting the impact that they wanted. And then they started running the ads, and then the ads exacerbated –
>
> Q. Can you tell the Court, you know — did the ad come into your home? Did you see it at your house? What happened with that?
>
> A. The ad went everywhere. It went on social media. It went on television. It went everywhere. I had people calling me asking me, Who is Highway 31? Where are these people? Where are they from? What is this? Why are they doing this?
>
> Q. Did you have any idea at the time?
>
> A. I didn't.
>
> Q. It wasn't until later that you found out who Highway 31 was?
>
> A. Correct.

(Trans. 244-45) (highlighting added). Kayla later testified that no one had called her home to ask about the allegations before SMP—through Highway 31—released the Shopping Mall Ad. (Trans. 264-65).

Moore pointed to his drastic political fall as evidence of reputational damage. Moore was twice elected Chief Justice of the Supreme Court of Alabama (2000 and 2012) and had won the Republican primary against 10 opponents, including Alabama's sitting Senator, earlier in 2017. (Trans. 362). But after the Ad's release, Moore lost the 2017 Special Election and failed to make it out of the primary when he ran for the same seat two years later. (Trans. 366, 475). Moore said he lost the latter election because "[m]y reputation was destroyed," as was his financial

backing due to his "destroyed reputation." (*Id.*). When asked if he blamed those problems on SMP, Moore responded, "[i]t's not all SMP's fault, but a big part of it is, yes." (*Id.*).

Moore also testified that his speaking opportunities disappeared after the 2017 election. According to Moore, he "used to speak all over the country" before SMP released the Shopping Mall Ad. (Trans. 366). Moore's wife and daughter also testified about Moore's travels to speak before large crowds, particularly at churches. (Trans. 217-18, 293). But when Moore ran for Senate again two years later, only one church invited him to speak—then pulled the invitation because the pastor "said he was just threatened by others if I were to appear." (Trans. 366).

Finally, Moore elicited testimony that SMP created Highway 31 after the *Washington Post* released the initial allegations (trans. 63), and paid $573,754 to run the Shopping Mall Ad 533 times from November 27 through December 6, 2017 (trans. 488, 874), to defeat Moore. Viewing these facts in a light most favorable to Moore, the jury could have found that SMP believed that, while Moore's reputation was bleeding from the first two weeks of allegations, it had enough life left to win a majority of votes statewide. That's why SMP spent a half million dollars to create and spread the false impression that Moore was banned from the local mall for asking Santa's Helper to have sex—*i.e.*, to eliminate the remaining shreds of Moore's reputation so he would lose. And it worked.

In sum, the court finds that Moore presented evidence that supports a finding that the Shopping Mall Ad damaged his reputation, separate and apart from other reports about the allegations, and that the reputational damage is likely permanent. As Moore testified:

> Q. Do you think it is possible that you could regain your good name?
>
> A. No. Go look at Twitter. Go look at — every time I am mentioned in the paper, every time something comes up,

> there's opposition. You get blistered again. They get attacked. I don't think I can. If I could, I would be glad to. If it hadn't happened, I would be glad it didn't happen.

(Trans. 368).

3. *Emotional distress / mental anguish*

The court finds that Moore presented evidence that, when viewed in a light favorable to Moore, supports a jury finding that the Shopping Mall Ad caused Moore mental anguish and emotional distress.

The mall allegations affected the Moore family. Kayla Moore testified that after the Shopping Mall Ad, media waited for the Moores at the end of their driveway. (Trans. 242). Kayla and Heather Mayo, Moore's daughter, both testified that, after the Shopping Mall Ad, people spray-painted 'pedophile' on their street and hung underwear on the fence and gates so the Moore family had to drive by it.[6] (Trans. 242, 295, 305). Deputies had to drive the Moore grandchildren to school. (Trans. 242). Members of the press and public called various members of the family, including the Moores' grandchildren. (Trans. 242-43, 245).

Mayo also testified that, before the allegations, Moore was "a very outgoing person." (Trans. 298). But after, Moore "didn't want to leave the house even to celebrate a birthday. He just wanted to stay home." (*Id.*).

Kayla Moore testified that she and her husband struggled to leave their home. They could not go to church. (Trans. 243). Nor could they go to the mall. (*Id.*). When they did go to the mall movie theater, "people looked at us like, Why are you here?" (*Id.*). Kayla said that people were "staring and pointing and humiliating." (*Id.*). Kayla also testified that

[6] Mayo testified that she knew the road was painted and underwear hung right after SMP released the Shopping Mall Ad because of a family trip. (Trans. 295, 304-06). While SMP offered prior testimony to impeach Mayo, the court must assume the facts in a light favorable to Moore—meaning that the court assumes Mayo correctly tied the underwear and painting incident to the Shopping Mall Ad. *Alabama River Group, Inc.*, 261 So.3d at 263.

people made terrible comments online, including death threats to Kayla for staying with her husband. (Trans. 244).

Both women testified that these events affected Moore. (Trans. 243, 298). Moore confirmed that he suffered emotionally as watched his family suffer. (Trans. 367). As Moore put it, "when you do something that causes detrimental harm to your family, it's about as bad as it can be." (*Id.*).

As discussed, Moore admitted that he was damaged by others, not just SMP. (Trans. 487, 489). But Moore testified that the Shopping Mall Ad was particularly "devastating" because it looked official, so people believed it. (Trans. 488).

In sum, the court finds that Moore presented evidence that supports a finding that the Shopping Mall Ad caused Moore mental anguish and emotional distress, separate and apart from other reports about the allegations. Based on the Moore's testimony (trans. 244, 368), and having viewed the witnesses' demeanors, the court further finds that Moore still suffers some emotional damage that relates back to 2017.

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To sum up, the court finds that Moore presented evidence that allowed the jury to find some amount of damage for lost reputation and mental anguish/emotional distress. Under Alabama law, once the court makes this finding for *either* category, quantifying the amount of damage is for the jury, not the court. *Merchant FoodService*, 286 So.3d at 701-03. All that's left for the court is to determine whether the jury's chosen amount shocks the conscience.

4. *Shocks the conscience*

The court was surprised, but not shocked, by the jury's award. Moore surely suffered great (and likely permanent) mental, emotional, and reputational damage in late 2017. But the Shopping Mall Ad was not the sole cause.

SMP showed many others pilloried Moore before SMP released the Shopping Mall Ad. *See* Exs. 42-254. SMP got Moore to admit to the jury that others harmed him, and that SMP was just part of "one big ball of emotional distress." (Trans. 473). In the court's opinion, SMP's evidence, plus Moore's admissions, greatly mitigate the reputational damage SMP caused. It has less effect, however, on the mental anguish and emotional distress that SMP caused. Getting kicked while you're down hurts just as bad as getting kicked when you're standing tall.

Of course, that is how I would weigh the facts, and my opinion does not matter here. All that matters is whether the jury's award shocked my conscience. My answer to that question mirrors the answer of my predecessor (the Honorable Robert B. Probst), who said this when faced with the same scenario:

> If this court were awarding damages, after a finding of liability, it would [award a different amount]. However, the court cannot say that the difference is indicative of bias, passion, prejudice, or corruptness or, in this day and time, that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption. The court thus does not conclude that the verdict is excessive.

Jackson, 742 F.2d at 1306. Like Judge Probst, while I would have chosen a different number, "in this day and time," I do not find the jury's award "totally shocking." *Id.* Nor do I find that the jury's award was based on anything other than an application of the law to the facts. SMP effectively tried to pin Moore's damage on others during its cross-examination of the Moores (trans. 252-64, 394-476), and this court properly instructed the jury that its compensatory award must compensate Moore for the damage "caused by the shopping mall ad." (Trans. 882-83). That the jury attributed a greater percentage of Moore's reputational, mental, or emotional damage to the Shopping Mall Ad than others might is no reason to upset the jury's verdict, which is supported by evidence.

In sum, Alabama law requires the court to affirm a jury's compensatory award if it (a) is based in evidence and (b) does not shock the conscience. *See Daugherty, Goodman, Bradley,* and *Daniels, supra.* The court finds that both requirements are met and thus **denies** SMP's motion to set aside or remit the jury's compensatory award. *See Jackson*, 742 F.2d at 1307 (affirming the jury's compensatory award because even though the district court had "doubts as to the size of the award," it properly applied the "shocks the conscience" standard).

CONCLUSION

For these reasons, the court **denies** SMP's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial. (Doc. 216).

DONE and **ORDERED** on September 29, 2023.

COREY L. MAZE
UNITED STATES DISTRICT JUDGE

APPENDIX "C"
ORDER OF 11TH CIRCUIT DENYING STAY OF MANDATE

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13531

ROY STEWART MOORE,

Plaintiff-Appellee,

versus

GUY CECIL, et al.,

Defendants,

SENATE MAJORITY PAC,
"SMP",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:19-cv-01855-CLM

ORDER:

The motion of Appellee Roy Stewart Moore to stay the issuance of the mandate pending a petition for writ of certiorari is DENIED.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

APPENDIX “D”
SHOPPING MALL AD

The Shopping Mall Ad consists of a narrator reading parts of five media quotes, as those quotes appear over various scenes from a mall: