No. 25A1396

Supreme Court of the United States

ROY STEWART MOORE,
Applicant,
v.
SENATE MAJORITY PAC,
Respondent.

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO STAY THE MANDATE PENDING PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent mischaracterizes applicant's position as seeking to "engage [in] a sort of garden variety correction of purported error" in this case. Opp. 11. While the applicant does seek to correct the Eleventh Circuit's error and restore the jury verdict upheld by the trial court, the central issue before this Court is the urgent need to resolve the profound conflict between an Appellate Court's Independent Review and the Seventh Amendment, particularly regarding the deference owed to a jury's factual determinations. The Eleventh Circuit has apparently never affirmed a jury verdict for damages in favor of a public figure after reviewing for "actual malice."[1] Here, the Eleventh Circuit not only reversed the trial court but remanded and entered judgment for the Defendant. Numerous courts of appeals have recognized that actual malice may be inferred where a publisher of defamatory content removes context from a photograph, alters a video clip to change its meaning, takes quotes out of context, deletes exculpatory language, or omits information that would disprove a defamatory statement. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 514–17 (1991); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692–93 (1989); *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992). This is the same common-sense analysis applied in

[1] In every case reaching this Court on appeal after a public-figure plaintiff obtained a jury damages award, the Eleventh Circuit either reversed outright, vacated, or remanded for a new trial, each time concluding that the evidence was insufficient to establish actual malice by clear and convincing evidence. The three principal cases documenting this pattern are *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983), *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1999), and *Moore v. Cecil*, 174 F.4th 862 (11th Cir. 2026).

Masson and *Harte-Hanks*, serving as controlling precedent, yet the Eleventh Circuit refuses to adopt this approach.

Respondent oversimplifies and misstates the opinion of the trial court, giving insufficient weight to that court's thorough analysis under *Harte-Hanks* and *Masson*. The Eleventh Circuit failed to properly analyze and defer to the jury's findings, which appropriately considered all of the evidence in concluding that actual malice was proven by clear and convincing evidence when viewed as a whole, including the video evidence as presented, rather than as reduced to a dry textual presentation. Even the Eleventh Circuit's analysis of the written words fails to recognize that the omission of context altered the meaning of the quoted assertions.

Furthermore, SMP is not entitled to a presumption of *good faith* in its own presentation of "fact-checking" efforts, a presumption granted by the Eleventh Circuit but rejected by the jury. Remarkably, the Eleventh Circuit stated that because SMP failed to fact-check the one implication the video presentation plainly makes, allegedly because its employees simply did not *realize* it existed. *Moore*, 174 F.4th at 862, 887. A reporter for a newspaper or television program may be entitled to credit for fact-checking undertaken to publish what it believes to be true, *see Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971); but whether SMP, a political action committee, is entitled to such a credit is a question for the jury, a credibility determination, not a legal presumption. SMP is an independent political action committee whose objective is to win elections. As its president testified, on video

and before the jury, SMP "do[es] what it takes to win."[2] (testimony of J.B. Poersch) [record cite to be supplied]. With that objective before it, the jury could readily find that SMP's approach to "fact-checking," as a political operative, was to determine what it could say and get away with. The jury obviously reached that conclusion.

As in most reported defamation cases, the question of actual malice is a mixed question of fact and law. Respondent's primary contention nonetheless rests on the premise that the decision below presents only a question of law: whether the trial record contained legally sufficient evidence of actual malice. On that premise, respondent maintains, the Eleventh Circuit was free to resolve the question *de novo* and without deference to the jury's verdict, so that applicant's objection reduces to mere disagreement with a legal conclusion. Opp. 11–13. The premise conflates two distinct inquiries. The legal sufficiency of the evidence is a question of law; but what a defendant knew and intended when it published is a question of historical fact, *see Harte-Hanks*, 491 U.S. at 694 (White, J., concurring in the judgment), and this Court has never held that an appellate court may, in the name of "independent review," redetermine facts against a jury that found them on proper instructions and by clear and convincing evidence.

The Eleventh Circuit's opinion illustrates the conflation. It deferred, as it had to, to the jury's determination that the SMP witnesses were not credible, holding that "the jury must have discredited and rejected the SMP witnesses' testimony" that they did not intend the advertisement's defamatory meaning, and treating that

[2] Quote from the original trial transcript from a video shown to the jury on cross-examination. The transcript will be appended to the application for a Writ of Certiorari.

credibility finding as binding because SMP had "not shown [it is] clearly erroneous." App. A[3] ("11th Cir. Op.") 37–38; *see* Opp. 2, 8. But the jury found more than that the SMP witnesses had *lied*. The Appellate Court agreed that in order to prove actual malice in this case, the jury was instructed that Moore had to prove SMP "intended to convey that Moore solicited sex from Wendy Miller when she was 14, or . . . recklessly disregarded" that the advertisement conveyed that meaning, 11th Cir. Op. 34–35 & n.17, the jury found that intent by clear and convincing evidence. *Moore v. Cecil*, 174 F.4th 862, 888 (11th Cir. 2026) (Jury Verdict Form). To that finding the panel gave no deference. It independently weighed the evidence and pronounced SMP's conduct in framing the ad as "a poor choice of words" and "a negligent error at best." 11th Cir. Op. 43. Substituting an appellate court's assessment of a defendant's state of mind for the jury's is not legal review of the verdict's sufficiency; it is the redetermination of a historical fact found by the jury.

The record, in any event, supports the verdict. SMP did not make the "erroneous statement . . . inevitable in free debate" that *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964), protects. The undisputed evidence, credited by the jury, was that SMP reviewed its sources line by line, knew they reported only that Moore told a fourteen-year-old she "looked pretty," and then juxtaposed two accurate quotations to assert what no source had said: that Moore solicited sex from

[3] Citations to "11th Cir. Op." and "Dist. Ct. Op." are to the appendix to the Emergency Application, which is not reattached to this reply. App. A: Opinion, *Moore v. Cecil*, 174 F.4th 862 (11th Cir. Apr. 24, 2026); App. 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); App. C: Order Denying Stay of the Mandate (11th Cir. June 8, 2026); App. D: The Shopping Mall Ad (television advertisement), reproduced frame by frame.

that child. The judge who presided over the trial described the advertisement precisely: it "wasn't commenting on a story; it was *creating* a story." App. B ("Dist. Ct. Op.") 1. That is the deliberate manufacture of a false meaning, the wrong this Court addressed in *Masson*, 501 U.S. at 517. On materially indistinguishable facts, courts applying *Harte-Hanks* have sustained jury findings of actual malice, recognizing that a publisher may not "publish an accusation that it knows has no evidence behind it as a fact to fit its desired storyline and then cloak itself in the First Amendment." *Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 548 (6th Cir. 2013).

The deference owed a jury's findings on independent review is, as the Eleventh Circuit has acknowledged, a question this Court "has not resolved," *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1230 n.27 (11th Cir. 1999); and it is outcome-determinative here, for the trial court, conducting the same independent review, found the evidence "sufficient to support the jury's finding of actual malice," 11th Cir. Op. 14. That unresolved conflict, the panel's departure from the deference *Harte-Hanks* requires, and applicant's irretrievable loss of the only security for an $8.2 million judgment together satisfy every requirement for a stay.

ARGUMENT

I. THE COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE.

A. The panel did not decide a question of law; it independently re-examined the historical fact of SMP's intent that the jury found on proper instructions.

Respondent's argument is that the panel did exactly what this Court's precedents require: it deferred to the jury's credibility findings but reviewed the

"ultimate" question of actual malice *de novo*, "as a matter of law." Opp. 11–13. The Eleventh Circuit deferred to the jury's credibility determination, accepting that the jury "must have discredited and rejected the SMP witnesses' testimony" and treating that determination as binding because SMP had "not shown [it is] clearly erroneous." 11th Cir. Op. 37–38. Respondent concedes the point. Opp. 2, 8.

The jury, however, found more than that the SMP witnesses had lied. On the district court's instructions, it found that SMP "intended to convey that Moore solicited sex from Wendy Miller when she was 14, or . . . recklessly disregarded" that the advertisement conveyed that meaning. 11th Cir. Op. 34–35 & n.17. That finding of intent is the gravamen of the verdict, and the panel did not defer to it. It independently re-examined the record and concluded that SMP's juxtaposition was, at most, "a poor choice of words"—"a negligent error at best." 11th Cir. Op. 43. Whatever else that is, it is not legal review of the verdict's sufficiency. It is the panel's own resolution of the historical question the jury had already resolved: what SMP actually intended when it assembled the advertisement.

The trial court provided a thorough analysis of the actual-malice findings in its 104-page opinion upholding the jury verdict, at pages 56–58, in the section entitled *"De Novo Review of Actual Malice Verdict."* There the court drew on record quotes from both the undisputed facts and the jury's findings and summarized:

> 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 was soliciting Miller for sex, "the conclusion that [SMP] acted with actual malice inexorably follows."
>
> Dist. Ct. Op. 58 (*quoting Harte-Hanks*, 491 U.S. at 691).

That is precisely the holistic, record-as-a-whole assessment this Court's cases require, and the panel set it aside.

Respondent recharacterizes the panel's resolution as a "pure question of law," and on that basis dismisses applicant's Seventh Amendment authorities as "wholly irrelevant." Opp. 12 & n.2. The question of whether the evidence is legally sufficient to meet the actual-malice standard is a matter of law. But the antecedent fact of what a defendant knew and intended is a historical one, as respondent's own principal authority confirms. In *Harte-Hanks*, Justices White and Rehnquist explained that "witness credibility and knowledge of falsity are 'historical facts' that must be reviewed for clear error under Rule 52." 491 U.S. at 694 (White, J., concurring in the judgment). A defendant's intent to convey a defamatory meaning is no less a historical fact than its knowledge of falsity; both describe a state of mind that existed at the moment of publication. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). When a court redetermines that fact in order to set aside a verdict, it has "re-examined" a "fact tried by a jury." U.S. Const. amend. VII. And whether such jury-found facts are owed deference, or may be redetermined *de novo*, is the precise question the Eleventh Circuit has admitted this Court "has not resolved." *Levan*, 190 F.3d at 1230 n.27.

This redetermination of *mens rea* is a problem the plaintiff in *Harte-Hanks* himself raised, as Professor Nathan Chapman has observed. Connaughton argued that the independent-review doctrine was "practically infeasible" because it required an appellate court to determine *mens rea* on contested evidence, and "constitutionally troublesome" when applied to a jury judgment "because the Seventh Amendment prohibits reexamination of any fact found by a jury."

As Professor Chapman explains:

> So long as the trial judge assigns responsibility to the jury for determining whether there was actual malice, rather than asking the jury to return a special verdict determining the facts of the case, a reviewing court applying the *Harte-Hanks* methodology (if not its dicta) would be bound by the jury's reasonable determination of actual malice. . . . Instead, it took the jury's application of the actual malice standard at face value and worked backwards from there, as a court ordinarily would do when reviewing a jury verdict. Regardless of the Court's dicta in *Bose* and its declaration in *Harte-Hanks* that actual malice is a question of law, the Court's actions in *Harte-Hanks* clearly demonstrate deference to a jury's reasonable application of constitutional doctrine.
>
> Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 Ala. L. Rev. 189, 232–33 (2015).

Even on respondent's own premise that the panel could review the ultimate question independently, the panel departed from this Court's method. The panel recited the governing framework but honored only part of it. Independent review carries two further commands, both drawn from the very decisions the panel cited, and the panel observed neither. First, independent review does not authorize a court to substitute its own finding of intent for the jury's; it proceeds "on the assumption that the jury made all the supportive findings it reasonably could have

made." *Harte-Hanks*, 491 U.S. at 700 (Scalia, J., concurring in the judgment); *see id.* at 688 (majority op.).

The supportive finding here is plain: that SMP intended the implication its own line-by-line vetting had shown no source supported. The panel found the opposite. Second, independent review weighs the record "in its entirety." *Id.* at 693. In *Harte-Hanks*, the Court combined the jury's disbelief of the defendant's witnesses with the affirmative evidence of "purposeful avoidance of the truth" and held that a finding of actual malice "inexorably follow[ed]." *Id.* at 692–93. The panel instead divided applicant's proof into three isolated parts—the jury's disbelief, the advertisement, and SMP's vetting—and rejected each as insufficient standing alone. 11th Cir. Op. 37–43. It never asked whether the evidence, taken together, supported the jury's finding.

The consequences of getting the deference question wrong are not abstract. The district court, conducting the same independent review the panel later performed, found that "the jury's fact findings and credibility determinations [were] not clearly erroneous" and that "Moore presented sufficient evidence to support the jury's finding of actual malice." 11th Cir. Op. 14. Two courts independently reviewed one record and divided. The difference was not the evidence; it was the deference, the question respondent insists is settled.

B. Respondent's "mere disbelief" argument ignores the affirmative evidence the jury credited: the classic Harte-Hanks scenario.

Respondent, like the panel, recasts applicant's case as one of "mere disbelief," urging that "a libel plaintiff must present affirmative evidence" and that "mere

disbelief of SMP's witnesses is not sufficient." Opp. 14 (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), and *Bose*, 466 U.S. at 512). The principle is sound; its application here is not. *Anderson* itself asks only whether "a reasonable jury could" find actual malice by clear and convincing evidence, with the evidence and all justifiable inferences taken in the verdict-winner's favor, 477 U.S. at 252, 255; it does not license a reviewing court to weigh the proof and supply findings of its own. And this was never a case of disbelief standing alone.

Bose held that an appellate court may not infer actual malice from a witness's refusal to admit a mistake about an ambiguous fact, there whether sound "tended to wander 'about the room,'" a description this Court found to be "one of a number of possible rational interpretations of an event that bristled with ambiguities." 466 U.S. at 512. *Harte-Hanks* fixed the rule's limit, accepting that the defendant's witness was not credible but, "[u]nlike the District Court," declining to rest a malice finding on disbelief alone. 491 U.S. at 511–12. The teaching is narrow: disbelief of a witness's account of an ambiguous matter is not, by itself, proof of knowing falsehood. It says nothing of a case in which the plaintiff also proves, through undisputed evidence, that the defendant knew the truth and published its opposite.

The record contains exactly that additional proof, and it comes from SMP. Its research director testified, and the jury credited, that SMP's staff reviewed the advertisement "line by line by line" to confirm that "every single thing was factually accurate," pairing each assertion with its source. 11th Cir. Op. 16–18. That process told SMP precisely what its sources did and did not say: that when Wendy Miller

was fourteen, Moore told her she "looked pretty," and that no source reported he solicited sex from her. Dist. Ct. Op.; *see* 11th Cir. Op. 13–14 (Miller testifying she "never said" Moore solicited her). SMP then assembled two accurate quotations into the charge that he had. A jury may treat that sequence—knowledge of what the sources said, followed by publication of what they did not—as affirmative evidence of intent, precisely as *Harte-Hanks* treated the newspaper's deliberate refusal to hear the tapes that would have confirmed or dispelled the charge. 491 U.S. at 692.

Respondent's answer, taken from the panel, is that a defendant's verification efforts "militate against a finding of actual malice." Opp. 14–15 (*quoting Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971)). That rule protects a publisher whose checking gives it reason to believe its statement is true; *Pape*'s concern was liability for "errors that nonetheless occur" despite a "standard of care . . . to avoid knowing falsehood." 401 U.S. at 291. On the jury's findings, SMP's review did not produce an inadvertent error. It produced knowledge. To label the resulting juxtaposition "a negligent error at best," 11th Cir. Op. 43, is to make a finding about SMP's state of mind, the finding the jury made the other way and the one independent review was bound to assume in the verdict's favor. A defendant "cannot . . . automatically [e]nsure a favorable verdict by testifying" to its own good faith; whether to credit that testimony is for the jury. *St. Amant*, 390 U.S. at 732.

The panel reasoned that, because the advertisement only "could convey" the implication, it could not establish that SMP "intended that implication." 11th Cir. Op. 40–41. The premise, that actual malice is subjective and turns on the

defendant's state of mind rather than the audience's impression, is correct. *See Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 680–81 (9th Cir. 1990); *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988). But it cuts the other way. Because the inquiry turns on what SMP actually intended, and intent can seldom be proven except by inference from circumstantial evidence, it is a paradigmatic jury question wherever the evidence permits the inference. *See Palmtag v. Republican Party of Neb.*, 999 N.W.2d 573 (Neb. 2024). The panel itself acknowledged that "the publication itself" can demonstrate intent to defame "even when . . . the defendant denies such an intent." 11th Cir. Op. 41 n.19. Whether this advertisement did so was a question for the jury, not for an appellate court re-reading a cold record. The panel's contrary course converted a contested jury question into a directed verdict.[4]

The case is, moreover, governed by *Masson*, which respondent and the panel misread. Respondent insists this is not a *Masson* case because "SMP did not alter any quotes" and "accurately cited" each source. Opp. 19–20. But *Masson* did not turn on tampering with the letters of a quotation; it held that an alteration supports a finding of actual malice when it "result[s] in a material change in the meaning conveyed." 501 U.S. at 517. The wrong is the manufacture of a meaning the source never conveyed—in *Masson*, by fabricating quotations; here, by juxtaposing two true ones to assert a charge no source had made. The trial court understood the case in exactly those terms, instructing the jury that Moore had to prove SMP "knew

[4] Applicant suggests that the viewing of the video, the actual advertisement in question, makes talk of "inference" seem superfluous. Combining the evidence of the video, the accurate quotes that were excerpted and meshed, and the highly improbable explanation of SMP's employees and representatives that they did not "intend" the result all combined to make the jury's verdict eminently correct.

that it was materially changing the meaning of the quotes to convey false information about Moore," or recklessly disregarded that risk. 11th Cir. Op. 34–35 & n.17. The jury found that material change of meaning. Respondent's reading would immunize the assembly of accurate quotations to fabricate a falsehood, conduct more deliberate than the altered quotation *Masson* condemned, because the publisher cannot even claim it was faithfully reporting what a source said. Its remaining distinctions—that SMP's witnesses said their intent was "to amplify existing reporting," Opp. 20, and that the advertisement carried citations, Opp. 19—are merits points the jury resolved against it.

Finally, respondent's invocation of *Sullivan*'s "breathing space" for "erroneous statement . . . inevitable in free debate," Opp. 18, ignores the line *Sullivan* drew. The actual-malice standard shields the "erroneous statement . . . honestly made," *Sullivan*, 376 U.S. at 278; it does not shield the calculated falsehood. "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government," and "calculated falsehood[s]" enjoy no constitutional protection. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *accord Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The jury found that SMP did not err. It manufactured its own story, and the *Sullivan* decision was never meant to immunize that.

C. The question is unsettled and the subject of an open division, as the Eleventh Circuit itself has recognized.

Respondent meets the cert-worthiness of the deference question by showing that the courts of appeals agree on the *elements* of a defamation-by-implication claim. Opp. 16–18. They do, and applicant does not contend otherwise. *See Kendall*

v. Daily News Publ'g Co., 716 F.3d 82, 90 (3d Cir. 2013). That consensus is beside the point, because applicant's question is not what a plaintiff must prove; it is how much deference a jury's finding that the plaintiff proved it commands when an appellate court conducts independent review. On that question the law is unsettled, and the Eleventh Circuit has said so. It has "recognize[d] . . . 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. Respondent's assertion that the question is settled cannot be reconciled with the Eleventh Circuit's own statement that it is not.

The uncertainty is not academic. Applying the same independent-review standard to jury verdicts of actual malice, courts reach opposite results according to the deference they extend the jury, and they do so, repeatedly, over dissent. Some sustain the verdict. *See Young*, 734 F.3d at 548; *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007); *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992); *Duc Tan v. Le*, 300 P.3d 356 (Wash. 2013) (en banc). Others independently re-weigh the evidence and reverse. *See Reuber v. Food Chem. News, Inc.*, 925 F.2d 703 (4th Cir. 1991) (en banc) (over the dissent of four judges); *Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992) (over dissent). This case is itself the clearest illustration: the trial judge and the panel, reviewing one record under one standard, divided on the result. A question that recurs in every public-figure defamation appeal, governs the allocation of authority between judge and jury, and

remains expressly open is the hallmark of an issue warranting review, not the "garden variety" error correction respondent describes. Opp. 11.[5]

II. THE LIKELIHOOD OF IRREPARABLE INJURY IS APPARENT AND STRONG.

A. Respondent is a Super PAC with no productive means of income and no permanent assets.

SMP is unique among the defendants that appear before this Court in that it owns no material or intellectual property that could be seized to collect a judgment. Everything SMP owns is liquid and is spent during each election cycle. Its funds are not the product of labor to create a product or service but are voluntary donations given to win elections, not to pay for lawsuits.

B. Respondent spends all of its money each election cycle and ends in debt.

As cited in the application, SMP's own records show that it has ended recent election cycles millions, sometimes tens of millions, of dollars in debt. *See* Federal Election Commission, Senate Majority PAC, Committee ID C00484642 (year-end reports, 2022 and 2024 cycles*).* The cash SMP currently holds is dedicated to electing candidates in the upcoming midterm elections and will almost certainly be depleted there. *See* Opp. 24–25 (SMP reporting more than $74 million in cash on hand and contributions exceeding $300 million per cycle). Without a bond in place, applicant faces a significant risk that SMP will become insolvent and that its principals will simply change its official name to the longer form of the acronym.

[5] *Compare Manzari v. Associated Newspapers, Ltd.*, 830 F.3d 881 (9th Cir. 2016); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988); *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969).

That risk is why the supersedeas bond matters. Applicant is not a judgment debtor who might have difficulty "recouping funds" he has paid; that is the posture of the cases respondent cites. *See* Opp. 25–26. He is the prevailing party who, at respondent's insistence, was required to be secured by an $8.2 million bond and who stands to lose that security the moment the mandate issues. Respondent does not dispute that the bond will then be released; it argues only that a stay "would . . . prevent the district court from releasing the bond." Opp. 26. The unrecoverable loss of secured funds is the paradigm of irreparable harm. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304–05 (2010) (Scalia, J., in chambers). The bond was required precisely because a money judgment against a Super PAC whose finances "fluctuate with the election cycle," Opp. 24, is at risk; the question is not whether SMP is solvent today but whether the only security for the judgment will survive long enough for this Court to act.

III. APPLICANT HAS SATISFIED EVERY REQUIREMENT FOR A STAY; RESPONDENT OVERSTATES THE STANDARD.

Respondent's remaining submissions concern the stay standard and its proposed alternative grounds for affirmance. Neither defeats a stay. The alternative grounds, that the falsity component is unmet and that the advertisement's "gist" is true, Opp. 21–22, were not reached by the panel, which expressly declined to decide them, 11th Cir. Op. 29 n.15, 44 n.20, and they turn on the same contested questions the jury resolved against SMP. They do not diminish the fair prospect of reversal; they are additional issues a reversal would leave open on remand.

A. The governing standard is the four-factor balance, not the near-impossibility respondent demands.

A stay pending certiorari turns on a reasonable probability that four Justices will grant review, a fair prospect that a majority will conclude the decision below was erroneous, and a likelihood of irreparable harm absent a stay, weighed together with "the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). The first two factors are the most critical. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Respondent does not engage that balance. It demands instead that applicant prove recoupment of a money judgment would be "impossible," Opp. 26 (*quoting Conkright*, 556 U.S. at 1403), and that any lesser showing is a mere "possibility" that "weighs heavily against" relief, Opp. 25 (*quoting Sampson v. Murray*, 415 U.S. 61, 90 (1974)). That framing mistakes the nature of the harm, which Part II addresses.

B. The first two and most critical factors are satisfied.

For the reasons in Part I, there is a reasonable probability of certiorari: the deference owed a jury's finding of subjective intent is an important question the Eleventh Circuit admits this Court has not resolved, *Levan*, 190 F.3d at 1230 n.27, and on which courts—and the two courts in this case—divide. And there is a fair prospect of reversal: the panel set aside a jury verdict by independently re-finding a historical fact the jury found on proper instructions, in conflict with the deference *Harte-Hanks* and *Bose* require and contrary to the assumption, even on independent review, that the jury made the supportive findings it reasonably could have made.

Respondent's contrary submission rests on the same "question of law" recharacterization refuted above.

C. The balance of harms and the public interest favor a brief stay.

The equities are one-sided. The only harm respondent identifies is the continued premium on a bond it has already posted, an expense fully recoverable from applicant if the judgment is reversed, as respondent concedes. Opp. 26 (*citing* Fed. R. App. P. 39(f)(3)). Against that recoverable cost stands applicant's irretrievable loss of an $8.2 million security. The public interest favors a stay as well. Respondent says only that the mandate should issue "in the usual course," Opp. 27, but identifies no public interest served by dissolving the security for a jury's verdict before this Court can decide whether that verdict was wrongly set aside. The public interest lies in the integrity of jury verdicts in the area where this Court has demanded the most searching constitutional review, and in preserving, for the brief interval the certiorari process requires, the status quo that has held throughout this litigation. It is served, too, when a powerful political action committee is held accountable for falsehoods used to gain power, by the only means that reaches it: the loss of the funds that fuel that power, through payment of the damages a jury awarded the person it wronged. Every *Conkright* factor, and the public interest, supports the stay.

CONCLUSION

The Eleventh Circuit's decision conflicts with the proper analysis of the actual malice rule when dealing with misused quotations, the removal of context, or

the omission of information that would disprove defamatory content. *See Masson*, 501 U.S. at 517. It grants a legal presumption for "fact-checking" that is instead a jury question, and it conflicts with the Seventh Amendment's instruction to refrain from reexamining facts found by a jury. For these reasons, reversal is likely. Without a stay, the loss of the security for the judgment would create irreparable harm, given the nature of respondent's operations and its lack of permanent assets. For all of these reasons, the application for a stay of the mandate should be granted.

Respectfully submitted,

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