No. 26-122

IN THE

Supreme Court of the United States

ROY STEWART MOORE,
Petitioner,

v.

SENATE MAJORITY PAC,
Respondent.

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

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of this Court, Petitioner Roy Stewart Moore respectfully petitions for rehearing of this Court's October 5, 2026 order denying his petition for a writ of certiorari to review the judgment in *Moore v. Cecil*, 174 F.4th 862 (11th Cir. 2026). Rehearing is warranted because of the vital, recurrent, and continuing question of the constitutional validity of the actual malice rule. Because the original Petition for Writ of Certiorari focused on the Eleventh Circuit's errors under the existing standard, the question was raised there but not briefed. The question deserves reanalysis and decision by this Honorable Court. The Court should grant rehearing and grant the Petition for certiorari in this case, or hold it pending until such time as the Court addresses the question.

REASONS FOR GRANTING REHEARING

Justices of this Honorable Court have been subjected to lies that were corrected during their respective confirmation hearings, and so understand the importance of the ability to defend reputation:

> "Senator, I would like to start by saying unequivocally, uncategorically, that I deny each and every single allegation against me . . . I think that this today is a travesty. I think that it is disgusting. I think that this hearing should never occur in America. . . . How would any member on this committee, any person in this room, or any person in this country, would like sleaze said about him or her in this fashion? Or this dirt

> dredged up and this gossip and these lies displayed in this manner? How would any person like it?"
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> Hon. Clarence Thomas, Statement Before the Senate Judiciary Committee, October 11, 1991.[1]
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> ". . . We live in a country devoted to due process and the rule of law. That means taking allegations seriously. But if the mere allegation, the mere assertion of an allegation, a refuted allegation from 36 years ago is enough to destroy a person's life and career, we will have abandoned the basic principles of fairness and due process that define our legal system and our country."
>
> Hon. Brett Kavanaugh, Statement Before the Senate Judiciary Committee, September 27, 2018.[2]

Justice Elena Kagan recognized that the *Sullivan* rule had a "dark side":

> "The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other

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[1] American Rhetoric, *Clarence Thomas: Statement to the Senate Judiciary Committee* (Oct. 11, 1991), https://www.americanrhetoric.com/speeches/clarencethomashightechlynching.htm.

[2] *Read Brett Kavanaugh's Complete Opening Statement*, N.Y. Times (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaughs-complete-opening-statement.html.

> effective remedy. . . . Is uninhibited defamatory comment an unambiguous social good?"
>
> Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 Law & Soc. Inquiry 197, 205-06 (1993).

Rule 44.2 permits rehearing from the denial of certiorari when the petition is limited to "other substantial grounds not previously presented." That standard is satisfied here. Petitioner won at trial on the question of actual malice, found by the jury and supported by the 104-page, well-reasoned decision of the trial court upholding that verdict.[3] The original petition addressed the validity of the actual malice standard in only two sentences.[4] Nor did that petition present the dissent from denial of certiorari in *Dershowitz v. Cable News Network, Inc.*, the founding-era evidence, or the separate opinions of Chief Justice Burger and Justices Black and White discussed below. This is a recurring question of national importance, and the Court's failure to resolve it is contributing to the decline in American culture and politics.

Truth is important. As noted by Justices Thomas and Kavanaugh, the publication of some lies is so devastating to reputation that they must be confronted and repudiated. For a person before the public, the inability to redress lies in the courts means the lies become the "truth" that is known. In a republic, deliberate lies about candidates can

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[3] *Moore v. Senate Majority PAC*, No. 4:19-cv-01855-CLM, 2023 WL 7220943 (N.D. Ala. Sept. 29, 2023).

[4] Petition for Writ of Certiorari at 31.

effectively ruin careers and reputations built over decades of public service.

History, precedent, and common sense indicate that lying is simply not within "the freedom of speech." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The founding fathers did not believe that libel would be protected by the First Amendment. Requiring proof of subjective intent in order to allow "public figures" to obtain redress for false and defamatory publications has no basis in the Constitution and has evolved into an arbitrary and impossible burden.

The "actual malice" standard for public figures "bears 'no relation to the text, history, or structure of the Constitution.'" *Dershowitz v. Cable News Network, Inc.*, 146 S. Ct. 2356 (2026) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (quoting *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari), in turn quoting *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)); *see also Gertz*, 418 U.S. 323 at 370-71, 380-81 (White, J., dissenting).

While *Dershowitz* involved the Eleventh Circuit's upholding of summary judgment, the case at bar deals with the Eleventh Circuit replacing the findings of the jury and trial judge with its own judgment.[5] This is independent review run amok.[6]

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[5] While Petitioner asked both the Court of Appeals and this Court to view the actual video, which was admitted into evidence, the analysis of the evidence on appeal was clearly done by parsing the words of the ad. The video, which Petitioner again implores the Court to watch, is located online

The "actual malice" standard elevates the value of defamatory statements, diminishes the role of judge and jury as factfinders, and allows political actors to publish false statements so long as their lawyers have instructed them never to admit their intent. The Eleventh Circuit, in its existence, has never upheld a jury determination of "actual malice."[7] The "actual malice" rule has evolved from being "difficult," [8] and "almost impossible" [9] to truly impossible, at least in the Eleventh Circuit.

Justice Thomas, concurring in the denial of certiorari in *McKee v. Cosby*, 586 U.S. 1172, 139 S.

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at https://www.youtube.com/watch?v=2SCI7ZQ1ZY4, the address cited by the Eleventh Circuit at note 4 of its opinion; counsel has also preserved a copy at https://www.youtube.com/watch?v=ft2z-L-G6_4. Petitioner avers that no English-speaking person could mistake the message intended by the ad. The Eleventh Circuit admits: "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." *Moore v. Cecil*, 174 F.4th 862 at 886 n.19. Of course the jury and the trial judge considered all of the evidence together and reached a completely different result. While *Sullivan* was a rule originally directed toward freedom of the press to criticize public officials, the defendant in the case at bar was not the press, but a political action committee, which one would ordinarily presume to have a disposition to say nothing positive about the Petitioner.

[6] *Moore v. Cecil*, 174 F.4th 862 at 883-87.

[7] Counsel's personal survey of 292 cases in the Eleventh Circuit revealed no public figure defamation verdicts affirmed on appeal.

[8] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 (1985) (White, J., concurring in the judgment).

[9] *Dun & Bradstreet*, 472 U.S. 749 at 771 (White, J., concurring in the judgment).

Ct. 675 (2019), gave an excellent exposition on the history and rationale of the "actual malice" rule and why the rule is unconstitutional. Alabama follows the Supreme Court and differentiates between defamation and "constitutional malice."[10] The rule makes it impossible for the public figure plaintiff to prevail absent an actual confession of intent, either privately and revealed in discovery, or publicly. Because of pleadings rules,[11] even the expensive discovery required to uncover such a confession cannot be undertaken without a factual predicate to sustain it in the original pleading.[12]

Alabama has no independent "actual malice" rule, so this case is a good vehicle for confronting the federalization and usurpation of state defamation law and the common law of defamation, and prioritizing the truth over protected pernicious lies. The case is also fitting because Alabama was where the *New York Times v. Sullivan* "actual malice" rule originated.

Justice Thomas has written that *Sullivan* and "the Court's decisions extending it were policy-driven decisions masquerading as constitutional law," *McKee*, 139 S. Ct. 675 at 676 (Thomas, J., concurring in denial of certiorari), and that "[p]ublic figure or private, lies impose real harm," so that those who "perpetrate lies" should receive "only the protection the First Amendment requires," *Berisha*, 141 S. Ct. 2424 at 2425 (Thomas, J., dissenting from denial of

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[10] *Wiggins v. Mallard*, 905 So. 2d 776, 784-86 (Ala. 2004).
[11] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[12] *See Trump v. Dow Jones & Co.*, 833 F. Supp. 3d 1359, 1372-74 (S.D. Fla. 2026).

certiorari). Justice Gorsuch has added that a rule adopted "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 2429 (Gorsuch, J., dissenting from denial of certiorari), and that the "momentous changes in the Nation's media landscape since 1964" warrant this Court's renewed attention, *id.* at 2430.

The *Sullivan* "actual malice" rule has been criticized for decades. Chief Justice Burger observed that *New York Times* "equates 'reckless disregard of the truth' with malice," and continued:

> "[T]his should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of *New York Times* in this way, I agree with Justice White that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well."[13]

Justice Black, in the original *New York Times* opinion, concurred and criticized the Court's actual malice standard, contending that such a standard was an "elusive, abstract concept" that was "hard to

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[13] *Dun & Bradstreet*, 472 U.S. 749 at 764 (Burger, C.J., concurring in the judgment).

prove and hard to disprove."[14] Many justices have criticized the rule. Too many injured parties have suffered horrible libels without redress.

The Framers did not believe the First Amendment allowed for unfettered libel. Justice Scalia once stated that the Framers "would have been appalled at the notion that they could be libeled with impunity."[15] For example, Benjamin Franklin wrote:

> "If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus'd myself."
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> Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz. The Court of the Press* (1789), in 10 *The Writings of Benjamin Franklin* 36, 38 (Albert Henry Smyth ed.,

[14] *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

[15] *The Kalb Report: Justices Scalia and Ginsburg on the First Amendment* (C-SPAN broadcast Apr. 17, 2014), https://www.c-span.org/program/public-affairs-event/justices-scalia-and-ginsburg-on-the-first-amendment-and-freedom/344099 (last visited Oct. 28, 2026).

1907) (quoted in *Gertz*, 418 U.S. 323 at 383-84 n.19 (White, J., dissenting)).[16]

Similarly, Justice White, dissenting in *Gertz*, noted:

> "Jefferson endorsed Madison's formula that 'Congress shall make no law . . . abridging the freedom of speech or the press' only after he suggested: 'The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . . .'"
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> *Gertz*, 418 U.S. 323 at 384 (White, J., dissenting) (quoting Frank Luther Mott, *Jefferson and the Press* 14 (1943)).

Justice White, describing the Court's extension of *Sullivan* in *Gertz*, called it "a near absurdity to so deprecate individual dignity . . . and to leave the people at the complete mercy of the press."[17]

Alternatives are available. A cogent law review article suggests that "several alternatives to the *Sullivan* actual malice standard have been suggested by lawmakers, legal scholars, and Justices of the Court."[18] The clearest path would be to simply reject

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[16] Available at https://archive.org/details/bwb_C0-ACA-861_10/page/38/mode/2up.

[17] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 263 (1974) (White, J., concurring).

[18] Mckenzy C. Smith, *Defamation and the "Actual Malice" Standard: Has Justice Black's Concurrence in New York Times Co. v. Sullivan Become the Reality of Defamation Law?*, 55 Cumb. L. Rev. 159, 187 (2025) (surveying alternatives at 187-200).

the standard and return to the common law rules that governed defamation prior to *Sullivan*.[19]

CONCLUSION

As Justice Thomas has stated, "The proliferation of falsehoods is, and always has been, a serious matter. 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."[20] Justice Gorsuch, in speaking of freedom of the press, stated:

> "Like most rights, this one comes with corresponding duties. . . . The right to speak freely includes the duty to allow others to have their say. From the outset, the right to publish was no different. At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence."[21]

Judge Roy Moore is an honorable man who has had his life and career destroyed by a series of defamatory statements publicized for the first time on the eve of an important national election. Because

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[19] Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782, 814-15 (1986).

[20] *Berisha*, 141 S. Ct. 2424 at 2425 (Thomas, J., dissenting from denial of certiorari).

[21] *Berisha*, 141 S. Ct. 2424 at 2426 (Gorsuch, J., dissenting from denial of certiorari).

of the nature of the allegations and the age of their alleged origin, it was difficult to prove most of them false. In the case before the Court, he did prove them false and defamatory to a jury and judge, but has no recourse because of a standard that is apparently impossible to meet in the Eleventh Circuit. The Court has long known that the only defense of the standard is that it exists, and that courts will continue to apply it as long as it does, by their own lights, until such time as the Court sees fit to amend it or reverse it. In the meantime, truth, political discourse, and justice will suffer.

The Court should grant rehearing, vacate its order denying certiorari, and grant the petition to finally address the problems created by the expanding actual malice doctrine. Justice and truth demand it.

Respectfully submitted,

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October 29, 2026

CERTIFICATE OF COUNSEL

As required by Supreme Court Rule 44.2, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and that it is presented in good faith and not for delay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2026.

/s/ Jeffrey Scott Wittenbrink
JEFFREY S. WITTENBRINK
Counsel of Record