No. 22-1125

IN THE
Supreme Court of the United States

DON BLANKENSHIP,
Petitioner,
v.
NBCUNIVERSAL, LLC, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Free Speech Coalition, Free Speech Defense and Education Fund, America's Future, Public Advocate of the United States, Constitution Party National Committee, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Free Speech Coalition, Free Speech Defense and Education Fund, America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Constitution Party National Committee is a national political party. Restoring Liberty Action Committee is an educational organization. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Petitioner Don Blankenship served as CEO of Massey Energy Co. at the time of an explosion at the company's Upper Big Branch mine which resulted in 29 deaths. Federal prosecutors brought both numerous felony and misdemeanor charges against Blankenship, who was acquitted by a jury of all felony charges, while being convicted of one misdemeanor:

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

conspiracy to violate federal mine safety laws and regulations. *Blankenship v. NBCUniversal, LLC*, 60 F.4th 744, 750 (4th Cir. 2023).

After his release from prison in 2017, Blankenship sought the Republican nomination for U.S. Senate from West Virginia in 2018. During his campaign, a number of media organizations reporting on the race falsely referred to Blankenship as a "felon" and "convicted felon," and having been convicted of manslaughter. He was unable to obtain retractions of those claims before the primary election. Blankenship filed multiple defamation lawsuits against 16 media defendants, but the district court granted summary judgment to most of the defendants, and three cases were consolidated on appeal in the Fourth Circuit, which affirmed the district court rulings in all respects. *Blankenship* at 751-755.

SUMMARY OF ARGUMENT

The highly defamatory statements by major media conglomerates against Petitioner as alleged in his complaint, and clearly set out in the Fourth Circuit opinion below, are not disputed. Two of the most powerful elected officials in the country (President Trump and Senator Mitch McConnell) urged Rupert Murdoch of Fox News to "dump on" and defeat Petitioner Blankenship then running in the Republican Primary to represent West Virginia in the U.S. Senate. That message was relayed from Murdoch to senior executives, and on numerous occasions, Blankenship was falsely accused by anchors and commentators of being a "felon" and "convicted felon."

Judge Andrew Napolitano's plea to correct his own defamatory statements made on air was denied by Fox News producers, and the charges were corrected only after the primary election had resulted in Petitioner's loss. By any standard, this case presented an exceptionally strong circumstantial showing of "actual malice," and if these facts were not sufficient to avoid summary judgment, this Court's test in *New York Times v. Sullivan* is hopelessly flawed.

A person's reputation is his most valuable asset, and defamatory charges, particularly charges of the commission of a crime, can destroy a reputation and derail a candidacy for office. Removing the remedy for a violation of this right undermines the nation's claim to be ruled by laws, not men. False allegations that a person has committed a felony have long been not just defamation, but defamation *per se*, making it easier to bring even without actual damages. Yet here, as in so many defamation cases, *New York Times* was interpreted by the lower courts as erecting a nearly insurmountable barrier, and summary judgment was granted to the defendants.

In *New York Times*, Justice Brennan justified imposing the "actual malice" standard in a case involving criticism of government officials because it was like seditious libel. Sadly, that exemption from liability was expanded to prevent claims by public figures, and here allowed actual government officials to participate in defaming those who would challenge their power.

Few Supreme Court cases have received the degree of criticism that *New York Times* has received, most notably including Justice Byron White's recanting of his participation in that radical decision in 1985. Justice Kagan's 1993 article discussed the decision in its historical context, observing that "the factual situation before the Court pushed legal questions to the margin: the adoption of the actual malice rule ... may in fact have *resulted from* the extraordinary circumstances of the case."[2] She recognized "[t]he obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without ... effective remedy." *Id.* at 205. Justice Gorsuch described how *New York Times* has allowed victims of defamation to be destroyed without redress. Justice Thomas has convincingly demonstrated that the actual malice rule is in no way connected to the text or history of the First or Fourteenth Amendments. For all of these reasons, it should be re-examined, and this case is an excellent vehicle by which to do so.

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[2] E. Kagan, "A Libel Story: Sullivan Then and Now," 18 LAW & SOC. INQUIRY 197, 202-03 (1993).

ARGUMENT

I. *NEW YORK TIMES v. SULLIVAN* WAS APPLIED BELOW TO IMMUNIZE MEDIA CONGLOMERATES WORKING AT THE BEHEST OF GOVERNMENT OFFICIALS TO DESTROY PETITIONER'S REPUTATION AND UNDERMINE HIS CAMPAIGN FOR FEDERAL OFFICE.

Petitioner Blankenship was the victim of a high-tech digital political assassination by some of the nation's most powerful media conglomerates, performed at the behest of powerful federal government officials. Petitioner was then left without remedy due to this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Petitioner's situation is not unique, as *New York Times,* and the doctrines it has spawned during its half-century reign, have allowed and thus actually encouraged powerful media forces to damage the reputation of untold numbers of Americans.

Petitioner's defamation claims make this case an excellent vehicle to reconsider *New York Times* and its progeny because the shocking list of both false and serious accusations leveled against Petitioner are undisputed, all having been carefully memorialized by the Fourth Circuit. Additionally, these charges were leveled against him as part of a partially revealed conspiracy to defeat his 2018 campaign for federal office. In this section, these *amici* address only the defamatory statements of Fox News:

- On April 25, 2018, Judge Andrew Napolitano of Fox News stated on air a gross falsehood — that Blankenship "went to jail for **Manslaughter** after people died in a mine accident." The truth was that Blankenship had never been convicted of manslaughter, but rather of "conspiracy to violate federal mine safety laws and regulations." The Blankenship campaign demanded a correction, which Judge Napolitano wanted to broadcast, but **his producers at Fox News refused**. *See Blankenship* at 751 (emphasis added).

- On May 3, an aide to **Senator Mitch McConnell** emailed Martha MacCallum of Fox News because McConnell was "'pretty ticked' about Blankenship making public comments attacking Chao, McConnell's wife." "On May 6, Fox News Chairman **Rupert Murdoch** emailed two senior executives at the network, writing: 'Both **Trump** and **McConnell appealing for help to beat** unelectable former mine owner who served time. Anything during day helpful but Sean and Laura **dumping on him hard** might save the day.'" *Id*. (emphasis added).

- "On May 7, anchor Neil Cavuto discussed Blankenship [saying] ... 'Of course, he's a **convicted felon**.'" Cavuto previously had received a briefing packet that explained the conviction was only for a misdemeanor. *Id*. (emphasis added).

- "Between May 7 and May 9, **four** other Fox commentators also referred to Blankenship as a '**felon**' or '**convicted felon**' on air." *Id.* at 752 (emphasis added).

- Requests for correction by Fox were either denied or disregarded. Only **after the primary election**, and the character assassination had contributed to defeating Blankenship, when he was interviewed by Cavuto professing ignorance as to what a felony was, Fox News began to make clear that Blankenship's conviction was for a misdemeanor. *See id.*

Even in the face of these damning allegations, the district court was quick to excuse Fox News anchors and commentators for making these false accusations, and the circuit court readily agreed. Although the circuit court admitted that "Murdoch and McConnell wished to damage Blankenship's Senate candidacy[,] [that fact] 'is not dispositive standing alone.'" *Id.* at 760. But it was not "standing alone." The court of appeals disregarded the cumulative effect of: (i) a demand by the President and the Senate Minority Leader, two of the most powerful people in the country, that Rupert Murdoch use Fox News airtime to damage Blankenship's candidacy; (ii) Murdoch's relaying that direction to two "senior executives"; (iii) multiple Fox anchors and commentators acting consistent with that direction to "dump on" Blankenship "hard"; (iv) the fact that Neal Cavuto was known to have had a memo explaining that Petitioner committed a misdemeanor before he reported he committed a felony, explaining

it away because he was "not a lawyer" even though he was staffed by an army of lawyers; and, perhaps most importantly, (v) the refusal of Fox News to honor Judge Napolitano's requests to go on air to correct the false charge he had leveled at Petitioner.

In sum, the circuit court treated the professional anchors and commentators at Fox as though they had the intellect of Will Ferrell's character in the movie *Anchorman*, and even being backed by an army of Fox News lawyers, had no idea what a misdemeanor and a felony were. The circuit court apparently believed "actual malice" could only be established if there was clear proof that "Murdoch instructed anchors to falsely call Blankenship a felon...." *Id*. at 761. Multiple repetitions of a serious, false character assassination, combined with clear motive to carry out a political hit, meant nothing to the circuit court. If this Court's precedents were correctly applied below, they are in desperate need of re-examination by this Court.

II. THE DEFAMATION SUFFERED BY PETITIONER CONSTITUTED DEFAMATION *PER SE*.

The false allegations waged against Blankenship asserted that he was: a "felon," a "convicted felon," and that he had been convicted of "Manslaughter." These specific libelous and slanderous charges have historically been considered among the most egregious types of defamation which have been actionable "*per se*" — without having to prove actual damages.

> The essence of slander *per se* is the publication by spoken words of [i] **false statements imputing to a person a criminal offense**; [ii] a loathsome disease; [iii] matter affecting adversely a person's fitness for trade, business, or profession; or [iv] serious sexual misconduct. [*Carey v. Piphus*, 435 U.S. 247, 262 n.18 (1978) (emphasis added).]

There were good reasons for adopting this special rule lowering the bar to bring defamation actions for these heinous offenses, as this Court has explained:

> those forms of defamation that are actionable per se are virtually certain to cause **serious injury** to reputation, and ... this kind of injury is **extremely difficult to prove**.... Moreover, statements that are defamatory *per se* by their very nature are likely to cause **mental and emotional distress**, as well as injury to **reputation**, so there arguably is little reason to require proof of this kind of injury either. [*Id.* at 262.]

West Virginia, where Petitioner resides, adopts the view that the false accusation of either a felony or a misdemeanor gives rise to a defamation claim. "Written words charging a person with the commission of any crime, whether a **felony** or a misdemeanor, are actionable, without allegation or proof of special damages." *Milan v. Long*, 78 W. Va. 102, 104 (W. Va. 1916) (emphasis added).

Accusing Blankenship of committing a felony is much more damaging to his reputation than correctly reporting he committed a misdemeanor. For example, a New York court has found a Class A misdemeanor not to constitute a "**serious crime**" for defamation purposes, while a **felony** would be. *Jackson v. Gannon-Jackson*, 2021 N.Y. Misc. LEXIS 4800, at *18-19 (N.Y. Sup. Ct. 2021 (Erie Co.)) (emphasis added). In North Carolina, a crime that is "only a misdemeanor, not a **felony**," is not an "'**infamous** crime'" and is "not libel per se." *Lippard v. Holleman*, 271 N.C. App. 401, 450 (N.C. Ct. App. 2020) (emphasis added).

The media conglomerates which slandered Blankenship hid behind the notion that the distinction between a felony and a misdemeanor is a confusing technicality. Illinois courts previously addressed that argument:

> [w]hile most persons would be unable to give a precise legal definition of the terms "misdemeanor" or "felony," we have no doubt that the **prevailing view** would be that a **misdemeanor is a minor offense** and a **felony is a serious crime**.... The likelihood of **damage to one's reputation** by the false attribution of **felonious** conduct **approaches a near certainty**. [*Myers v. Tel.*, 332 Ill. App. 3d 917, 922 (Ill. Ct. App. 5th Dist. 2002) (emphasis added).]

Rejecting this consensus based on *New York Times*, the Fourth Circuit cavalierly shrugged off the deeper defamatory sting of Respondents' false felony

allegations against Petitioner. The court asserted that "no reasonable jury could find by clear and convincing evidence that Cavuto, who is not a lawyer, understood it was inaccurate to describe Blankenship as a 'convicted felon'" (*Blankenship* at 759), and it assumed that "[Kevin] McLaughlin, a non-lawyer, simply did not understand the legal distinction between a felony and a misdemeanor in this case." *Id*. at 763-764. But it is clear that Respondents were attempting to convey that Petitioner had committed a serious crime. CNN's S.E. Cupp stated of Petitioner, "'you're a convict, you're a felon. Oh my God.'" *Id.* at 753. MSNBC's Chris Hayes, likewise, stated, "'A slap on the wrist for a dude who killed 29 people ... Very disappointing ... he's killed more people than most terrorists ever do.'" *Id.* at 763. Clearly, inflicting the defamatory sting from using the word "felon" was intended, but under *New York Times v. Sullivan*, accountability for making a damaging falsehood was removed and further libels and slanders thereby encouraged.

III. *NEW YORK TIMES v. SULLIVAN* IMMUNIZES THE BEARING OF FALSE WITNESS AND THE THEFT OF REPUTATION.

The district court correctly understood that Petitioner Blankenship's "claims for defamation, false light invasion of privacy, and civil conspiracy" were brought because defendants had "caused him injury by damaging his **reputation** and contributing to his **defeat** in the 2018 primary." *Blankenship* at 755 (emphasis added). However, after that opening statement, the court made not one reference to

Blankenship's reputation, and scant reference to the plan to defeat his candidacy and the effect of the defamation on his campaign, other than to state he "lost the primary election...." *Id.* at 750.

The court of appeals focused rather on the unfairness of holding major news media figures accountable for what clearly would have been defamatory statements, but for the *New York Times* decision. In constitutionalizing most assaults on the reputation of government officials, and later, of public figures, this Court's jurisprudence appears to treat damage to the reputation of plaintiffs as not all that significant — unavoidable "collateral damage" necessary to giving robust meaning to the First Amendment. However, until 1964, a person's reputation was understood in the legal world to be an immensely valuable commodity — a protected property right.

Holy Writ affirms the great value ascribed to each individual's reputation. *See Proverbs* 22:1 ("A good name is rather to be chosen than great riches...."). To protect an individual's good name, the Ninth Commandment prohibits use of falsehoods to injure the reputation of another. *See Exodus* 20:16 ("Thou shalt not bear false witness against thy neighbour."). If that Commandment is violated by the utterance of defamatory words, those words become irretrievable, because once a defamatory thought is placed in the mind of another person, that becomes the lens through which that person will be viewed. *See Proverbs* 18:8 ("The words of a talebearer are as wounds, and they go down into the innermost parts of the belly.").

Immunizing professional news anchors and commentators from accountability for repeating and leveling serious charges before confirming them to be true actually encourages that shameful behavior. *See Proverbs* 18:13 ("He that answereth a matter before he heareth it, it is folly and shame unto him.").

To be sure, we are warned not to automatically believe the accusation against a person without hearing the other side. *See Proverbs* 18:17 ("He that is first in his own cause seemeth just; but his neighbour cometh and searcheth him."). But in political campaigns, voters are predisposed to believe negative information about those whom they oppose when received from media sources with which they agree, whether the charges be true or false. To be sure, lies do not prevail in the end. *See Proverbs* 12:19 ("The lip of truth shall be established for ever: but a lying tongue is but for a moment."). However, campaigns end on election day, and corrections to defamation made thereafter[3] may help mitigate long-term damage, but do nothing to remedy the immediate injury.

Shakespeare wrote, "Who steals my purse steals trash. 'Tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed."[4]

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[3] *See* post-election interview of Blankenship by Cavuto. *Blankenship* at 752.

[4] William Shakespeare, Othello, act 3, scene 3.

One of the drafters of Pennsylvania's constitution, William Lewis, observed:

> the injuries which could be done to any other property, might be repaired; but reputation was not only the most valuable, but, likewise, the most delicate of human possessions. It was the most difficult to acquire; when acquired, it was the most difficult to preserve; and when lost, it was never to be regained. [*Respublica v. Oswald*, 1 U.S. 319, 329 (Pa. 1788).]

In his Commentaries on the Laws of England, Sir William Blackstone observed that "it is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and **every injury it's proper redress**." III W. Blackstone, Commentaries on the Laws of England at 109 (Univ. of Chi. Press: 1979) (emphasis added). And it was in response to this observation that Chief Justice Marshall wrote his now famous paean about the legal system of the newly formed United States of America:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish **no remedy for the violation of a vested legal right**. [*Marbury v. Madison*, 5 U.S. 137, 163 (1803) (emphasis added).]

Plaintiff was repeatedly defamed by being described as a "felon," or a "convicted felon" by media defendants hostile to his campaign to serve the people

of West Virginia in the U.S. Senate. The resulting reputational loss was nationwide, but the short term effect on his political candidacy in West Virginia likely was devastating. Yet the pernicious effects of *New York Times* and its progeny effectively "closed the courthouse door" to Blankenship, thereby ensuring that there would be no judicial remedy for these wrongs. The district and circuit courts have followed this Court's lead to deny a remedy to this injured Petitioner as well as many others and must be corrected.

IV. THE CIRCUIT COURT UNDERSTOOD *NEW YORK TIMES v. SULLIVAN* AND ITS PROGENY TO PROTECT BOTH SEDITIOUS LIBEL AND LIBEL AGAINST OTHERS.[5]

At the outset of his discussion of the *New York Times*' First Amendment claim, Justice Brennan acknowledged that the Alabama courts had relied "on statements of this Court to the effect that the Constitution does not protect libelous publications." *New York Times* at 268. He then pivoted: "[t]hose statements do not," Justice Brennan continued, "foreclose our inquiry here." *Id.* Instead of conducting

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[5] Many of the concepts set out in this section were developed in an important paper by founding Dean of Regent Law School, Herbert W. Titus, "Defamation: Corrupting the First Amendment," *Forecast*, Vol. 3, Nos. 10-11 (1996) and in *an amicus* brief (Feb. 6, 2020) filed in the Eleventh Circuit by some of these same *amici* in *Coral Ridge Ministries Media v. Amazon & SPLC*, 6 F.4th 1247 (11th Cir. 2021) and in an *amicus* brief (Dec. 30, 2021) filed in support of a petition for certiorari in that case, U.S. Supreme Court, Docket No. 21-802.

a careful inquiry, Justice Brennan offered only a very brief survey of case precedents concerning libels of public officials before concluding that "we are compelled by neither precedent nor policy to give any more weight to the **epithet** 'libel' than we have to other 'mere labels' of state law." *Id.* at 269 (emphasis added). Before Justice Brennan's opinion, libel law may never before have been described by a judge as a mere "epithet" (*i.e.*, a disparaging or abusive word). According to Blackstone, libel was a well-established common law cause of action with specified elements, including burdens of proof as to the truth or falsity of the defamatory statements at issue:

> A second way of affecting a man's reputation is by printed or written libels ... which set him in an odious or ridiculous light, and thereby diminish his reputation. [III Blackstone's Commentaries on the Laws of England at 125.]

Undeterred by this English common law pedigree and its American counterpart,[6] Justice Brennan asserted that "libel can claim no talismanic immunity from constitutional limitations[,] [but] must be measured by standards that satisfy the First Amendment." *New York Times* at 269. And what were those standards, and where might they be found? Justice Brennan began not with the text, but with the atextual label "freedom of expression."

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[6] *See* W. Prosser, Law of Torts at 737-801 (4th ed. 1971).

> The general proposition that **freedom of expression** upon public questions is secured by the First Amendment has long been **settled by our decisions**. The constitutional safeguard, **we have said**, "was fashioned to assure **unfettered** interchange of ideas for the bringing about of political and social changes desired by the people." [*Id.* (emphasis added).]

As authority, the opinion for the Court by Justice Brennan cited his own opinion for the Court in *Roth v. United States*, 354 U.S. 476 (1957), decided just seven years before in the case that revolutionized the law of obscenity. The *Roth* decision was put to use by the Court to upend libel law by adopting a new federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the 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." *New York Times* at 279-80.

In James Madison's initial draft submitted to the First Congress, the speech guarantee stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments...." *See* Sources of Our Liberties at 422 (R. Perry and J. Cooper, eds., ABA Found.: 1978). Therefore, Madison's open-ended "right to speak, to write, or to publish" was reduced in Committee to read simply — "**the freedom of speech**." (Emphasis added.) According to *Webster's 1828 Dictionary*, the word "the" was commonly used "before nouns ... to limit their signification to a specific

thing or things." The manifest purpose of the change in Madison's broad-based first draft, then, was to limit its reach, not to enlarge it. Furthermore, by using the definite article, the framers indicated that they had something definite and certain in mind, thereby indicating that the free speech guarantee was a pre-existing right that was discoverable from antecedent texts and from history. (An understanding of the meaning of "the freedom of speech" could never be found in musings by a modern judge pondering what should be protected by the atextual historically empty phrase "freedom of expression." Such judicial sleight-of-hand allows judges to make radical changes in law while maintaining the illusion of constitutional fidelity.)

Like so many of our constitutional rights, "the freedom of speech" is traceable to England. *See United States v. Johnson*, 383 U.S. 169, 177-78 (1966). Section 9 of the 1689 English Bill of Rights secured "the freedom of speech, and debates or proceedings in parliament [and] ought not to be impeached or questioned in any court or place out of parliament." Sources at 247. The adoption of the English Bill of Rights secured to the English people's elected representatives in Parliament assembled protection against the king's misuse of power through tyrannical laws prohibiting "stirring up sedition" and seditious libel for impugning the reputation of the king. Sources at 228, 235. This same protection was afforded the American people's representatives by Article I, Section 6 of the U.S. Constitution, which provides jurisdictional immunity for both Senators and

Representatives in Congress "for any Speech or Debate in either House."

As for the English people themselves, they remained accountable for calling into question the reputations of their rulers. Sources at 306. The English common law against seditious libel remained:

> If people should not be called to account for possessing the people with an ill opinion of the Government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has been looked upon as a crime, and no government can be safe without it. [*Rex v. Tutchin*, 14 State Trials 1095 (1704), quoted in F.S. Siebert, Freedom of the Press in England, 1476-1776 (Univ. of Ill. Press: 1952).]

But, both in England and in America, prosecutions for seditious libel were hotly contested. Sources at 307-08. In America, matters came to a head with the enactment of the Sedition Act of 1798 which prohibited, in part, "false, scandalous, and malicious writings against the government ... with intent to defame or to bring them [into] contempt or disrepute...." *See* G. Stone, Constitutional Law at 1015 (2d ed.: Little, Brown: 1991). The statute was a classic example of a seditious libel law, and it prevailed in courts, only to fail politically with the election of

President Thomas Jefferson who, in 1801, pardoned everyone who had been convicted and fined.

In 1919, Justice Oliver Wendell Holmes, Jr., wrote:

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. [*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).]

Justice Holmes was right. Both Thomas Jefferson and James Madison led the Republican resistance to the Sedition Act on already-established American constitutional grounds. As Madison wrote in support of the resistance to the Sedition Act, in America, the People are sovereign, not Parliament, and that "the great and essential rights of the people are secured against legislative as well as executive ambition." J. Madison, Report on the Virginia Resolutions quoted in Sources at 425-26. Thus, "the freedom of speech," which had been secured only to English parliamentarians, was now vested in the People by the First Amendment.

In contrast to this textual and historic approach, Justice Brennan used Holmes' views to launch an attack on common law defamation. Relying on his *Roth* obscenity opinion that "the freedom of speech" was anchored "to assure unfettered interchange of

ideas for the bringing about of political and social changes desired by the people" (*Roth* at 484; *New York Times* at 269), Justice Brennan forged a contemporary marketplace of ideas based on practical realities as he saw them — not enduring principles. By reinterpreting the First Amendment through his prism of pragmatism, Justice Brennan then took the liberty to fashion his own view of that Amendment, unhindered by historical precedent or by the constitutional text. In doing so, Justice Brennan erased the original historical and textual distinction between **seditious libel** and **libel** — the former addressing the impermissible protection of the **government's reputation** and the latter designed to protect the good **reputations of individual persons**. *See McKee v. Cosby*, 139 S. Ct. 675, 679-82 (2019) (Thomas, J., concurring in the denial of certiorari).

Supreme Court decisions which have ignored the historic meaning of "the freedom of speech," begun by Justice Brennan, have led us to where we are today. Defamation, particularly against public figures, is given such strong protection that lower courts routinely do what the district court below did — dismiss a complaint for failing to meet an unachievable standard of specificity of allegation.

V. *NEW YORK TIMES v. SULLIVAN* IS AMONG THIS COURT'S MOST ROUNDLY CRITICIZED DECISIONS.

Only rarely do individual Justices seek opportunities to admit error, but Justice Byron White, part of the *New York Times* majority in 1964, did just

that. First, in 1974, Justice White noted the radical transformation that *New York Times* had imposed on the nation. He reflected on the state of the law before that historic case: "[f]or some 200 years — from the very founding of the Nation — the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures." *Gertz v. Robert Welch*, 418 U.S. 323, 369-370 (1974) (White, J., dissenting).

Then, two decades after *New York Times*, Justice White reversed position: "I have ... become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 767 (1985) (White, J., concurring). "[T]he reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results." *Id.* at 769.

How this radical change in law occurred was addressed by now Justice Kagan in a 1993 article where she described the Court's invention of a brand-new "actual malice" standard as "puzzling," and fitting "the square pegs of many defamation cases into the

round holes of *Sullivan*."[7] Justice Kagan credibly speculated that "the adoption of the actual malice rule by Justice Brennan, and the Court's ready and unquestioning acceptance of it, may in fact have *resulted from* the extraordinary circumstances of the case." *Id.* at 202-203. Likely, the claims against *New York Times* fell victim to Justice Oliver Wendell Holmes's truism: "hard cases make bad law." *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904).

Although originally defended as a protection for attacks on "public officials," *New York Times* was soon expanded to "public figures," leading Justice Gorsuch to add another criticism:

> Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.... Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as limited purpose public figures too.... [The actual malice standard] has come to leave far more people without redress than anyone could have predicted. [*Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from denial of certiorari).]

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[7] E. Kagan, "A Libel Story" at 199.

As Justice Gorsuch pointed out, the confluence of media conglomeration, online social media, and *New York Times'* results-oriented departure from constitutional protections, has left millions of victims such as Petitioner destroyed — politically, reputationally, financially — with no hope of redress. The reality is that "[p]ublic figures are powerless to resist a mass media oligopoly that controls the airwaves and buys ink by the barrel." Pet. for Cert. at 30.

Just two years ago, Justice Thomas offered the most succinct reason for the Court to re-examine *New York Times*: "This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears 'no relation to the text, history, or structure of the Constitution.'" *Berisha* at 2425 (Thomas, J., dissenting from denial of certiorari). Justice Thomas also noted the damage caused by the atextual "actual malice" standard, and its devaluing of the reputational rights of defamation plaintiffs.

> The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm.... [*Id.* at 2425 (Thomas, J., dissenting) (citation omitted).]

Justice Thomas had also observed that neither *New York Times* nor its progeny have ever "made a sustained effort to ground their holdings in the

Constitution's original meaning. As the Court itself acknowledged, 'the rule enunciated in the *New York Times* case' is 'largely a judge-made rule of law,' the 'content' of which is 'given meaning through the evolutionary process of common-law adjudication.'" *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in the denial of certiorari). Justice Thomas undertook a thorough survey and concluded that "[h]istorical practice further suggests that protections for free speech and a free press — whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment — did not abrogate the common law of libel." *Id*. at 681. Remedies were not limited to civil recovery. He noted that after the First Amendment's adoption, "[t]he States continued to criminalize libel, including of public figures." *Id.* In fact, "[a]s of 1952, every American jurisdiction ... punish[ed] libels directed at individuals." *Id.* (internal quotation omitted). "Congresses, during the period while [the Fourteenth] Amendment was being considered or was but freshly adopted, approved Constitutions of 'Reconstructed' States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain." *Id.* (internal quotation omitted). "In short," Justice Thomas concluded, "there appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment." *Id.* at 682.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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