No. 21-802

IN THE
Supreme Court of the United States

CORAL RIDGE MINISTRIES MEDIA, INC., D/B/A D. JAMES KENNEDY MINISTRIES, *Petitioner*,
v.
SOUTHERN POVERTY LAW CENTER, *Respondent*.

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

Brief *Amicus Curiae* of Public Advocate of the United States, America's Future, Free Speech Coalition, Free Speech Defense & Education Fund, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, Leadership Institute, Intercessors for America, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner

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December 30, 2021

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States, Free Speech Coalition, and Eagle Forum are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). America's Future, Free Speech Defense and Education Fund, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Eagle Forum Foundation, One Nation Under God Foundation, Leadership Institute, Intercessors for America, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating 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, and other exempt purposes. Some of these *amici* filed an *amicus curiae* brief in this case in the Eleventh Circuit on February 6, 2020.

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[1] It is hereby certified that counsel for Petitioner and for Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; 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.

STATEMENT OF THE CASE

The Eleventh Circuit affirmed the district court's opinion, which was grounded in this Court's First Amendment jurisprudence on common law claims for defamation against a public figure. *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1252 (11th Cir. 2021). Petitioner's complaint alleged that respondent Southern Poverty Law Center ("SPLC") either knew or recklessly disregarded the fact that petitioner is not a "hate group," but nevertheless the district court granted SPLC's 12(b)(6) motion. *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1278-79 (2019). However, the district court took the position that there is no commonly understood meaning of "hate group" and that Coral Ridge believed dismissal to be required by *New York Times v. Sullivan*, 276 U.S. 254 (1964) for insufficiently pleading facts demonstrating "actual malice." *Id.* at 1275-76, 1278-79. Petitioners seek reconsideration of the "actual malice" standard established in *Sullivan*. Petition for Certiorari at i.

SUMMARY OF ARGUMENT

The court of appeals affirmed the district court's grant of a motion to dismiss, shutting the courthouse door on petitioner's seemingly well-drafted complaint. The principal authority relied on was *New York Times v. Sullivan* — which, over the past half-century, has paved the way for the nation to suffer an unending torrent of defamatory statements destroying the reputations of good people without recourse.

This Court's decision in *Sullivan* has allowed the courts below to end defamation cases against public officials on a motion to dismiss before discovery which could have directly established what was alleged. *See* Section I. Protected from the consequences of its actions by pleading requirements drawn from *Sullivan*, SPLC has defamed and endangered numerous Christians and conservatives. At the same time, SPLC has used its "hate group" designations to raise hundreds of millions of dollars. *See* Section II. In *Sullivan*, this Court usurped power it did not have to constitutionalize the common law of defamation — a decision which requires re-examination. *See* Section III.

As Justice Clarence Thomas has correctly observed: "The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm." *McKee v. Cosby,* 139 S. Ct. 675, 677 (Feb. 19, 2019) (Thomas, J., concurring in denial of certiorari). He urged that in an appropriate case, the current doctrine should be reconsidered to ascertain whether the Court's prior decisions are "policy driven or constitutional law." *Id.* This case provides a suitable vehicle for that reconsideration.

ARGUMENT

I. THIS COURT'S DEFAMATION JURISPRUDENCE HAS ENCOURAGED DEFAMATION BY CREATING AN INSURMOUNTABLE BARRIER TO PLEADING DEFAMATION.

Before addressing the disconnect between the First Amendment and *Sullivan* and its progeny, it is instructive to see what respondent SPLC has done under *Sullivan's* protection. The district court summarized the complaint's allegations against SPLC as follows:

> SPLC is a nonprofit organization that, among a range of activities, disseminates a "**Hate Map**" that lists groups that it designates as "hate groups," including Coral Ridge.... SPLC's Hate Map is located on its website, and defines "**hate groups**" as groups that "have beliefs or practices that malign or attack an entire class of people, typically for their **immutable characteristics**." ... SPLC has disseminated the Hate Map in fundraising efforts and in its reports, training programs, and other informational services....
>
> **SPLC designated Coral Ridge as a hate group because of its espousal of biblical views concerning human sexuality and marriage** — that is, because of its religious beliefs on those topics. [*Coral Ridge*, 406 F. Supp. 3d at 1269 (emphasis added).]

The district court was not troubled the claim that petitioner being defamed solely for embracing Biblical morality. *See Romans* 1:22-27. Likewise, the Eleventh Circuit saw no problem.

The district court quoted language from the SPLC website indicating that, in classifying hate groups, SPLC was not just offering another opinion, but rather was rendering a considered judgment because, as its website put it, SPLC is "the 'premier U.S. nonprofit organization monitoring the activities of domestic hate groups and other extremists.'" *Coral Ridge*, 406 F. Supp. 3d at 1273, n.11.

According to the district court, the statement that petitioner is a hate group is so debatable, loose, and varying that it cannot be proved false and, therefore, SPLC could not possibly have known the statement to have been false and thus could not recklessly disregard the truth or falsity of the accusation. *See id.* at 1276.

The district court admitted that it "does not go so far as to hold that a 'hate group' label can ***never* be provable as false**." *Id.* at 1277, n.17 (emphasis added). If not never, then context is key. But the district court would not allow petitioner to prove context, because the issue is a constitutional one and therefore, is for the court, not for a jury, to decide.

Furthermore, the district court insisted that: "[t]he bottom line is that, regardless of the commonly understood meaning of 'hate group,' Coral Ridge does not plausibly allege that SPLC's subjective state of mind was sufficiently culpable." *Id.* at 1280. The

district court appears to base that conclusion on its belief that SPLC had its own "sincerely held view of the meaning of 'hate group'" which meaning is not defamatory. *Id*. at 1279. Surely that cannot be the standard. The district court assumed that words have no meaning other than that with which they are imbued by the person uttering the challenged statement.

The district court never even required SPLC to explain itself — to contend that it had some benign definition in mind when it called Coral Ridge Ministry a "hate group." The district court did all the work for the SPLC — assuming, on defendant's behalf, that it had a benign subjective mindset — based on nothing more than theoretical arguments in a lawyer's memorandum of points and authorities. The district court defended SPLC's freedom to use defamatory words in new ways as "advocating new conceptions of terms like 'terrorist'" and asserted that failure to allow a speaker to change the meaning of the words he used "would be anathema to the First Amendment." *Id*. at 1280. That would appear to be circular reasoning which, when invoked, would empower the court to bar arbitrarily any action for defamation.

Beyond introducing that curious loophole into defamation law, the district court found that petitioner had failed to allege facts demonstrating "SPLC's subjective state of mind." *Id*. In truth, petitioner's allegations were quite specific. The amended Complaint alleged the false identification of a Christian ministry as a "hate group," and this designation is used by SPLC for fundraising.

Amended Complaint at ¶¶ 74, 93-95. It attributed to SPLC the statement: "[s]ometimes the press will describe us as monitoring hate groups. I want to say plainly that **our aim in life is to destroy these groups — completely destroy them**." *Id*. at ¶ 79 (emphasis added).

Petitioner's Complaint alleged, "[o]n information and belief, because the U.S. federal government has finally come to understand that SPLC's hate group designations are **factually inaccurate** and are merely a form of reputational terrorism, the Department of Defense and the F.B.I. recently stopped making use of SPLC's Hate Map and hate group-based training materials and services." *Id*. at ¶ 77 (emphasis added). It alleged "SPLC entertained serious doubts as to the truth of the hate group designation at the time it was published...." *Id*. at ¶ 111. It alleged "SPLC's very purpose for placing the Ministry on the Hate Map was to harm the reputation of the Ministry as to lower it in the estimation of the community and to deter third persons from associating or dealing with the Ministry." *Id*. at ¶ 95. The Eleventh Circuit agreed that the complaint was insufficient.

Exactly what else could petitioner, as the district court put it, "plausibly allege that SPLC's subjective state of mind was sufficiently culpable," without discovery? In truth, there was no failure of pleading. The district court stopped the case before it could begin. The true nature of the SPLC never came before the district court. So long as district court judges dismiss defamation cases brought by those deemed "public figures" immediately after a complaint is filed,

organizations like SPLC will continue to be emboldened to hurl accusations that not only harm the reputation of others, but also can jeopardize lives.

II. SPLC IS A POLITICAL ORGANIZATION THAT HAS BECOME FABULOUSLY WEALTHY WHILE DEFAMING CHRISTIANS AND CONSERVATIVES, DAMAGING REPUTATIONS AND ENDANGERING LIVES.

The district court prevented a record from being developed to establish actual malice. However, the effect of the SPLC's ever-growing "hate group" designations is known.

A. *Amicus* Public Advocate's President Was Placed in Danger of Being Shot by a Person Guided by SPLC's Hate Group Map.

Amicus Public Advocate is an organization sharing Petitioner's position on Biblical morality, and thus has been labeled as a "hate group" by SPLC. On August 15, 2012, Floyd Lee Corkins II, armed with 15 Chick-Fil-A sandwiches, a 9mm handgun, and a list of organizations designated by SPLC on its website as "hate groups," traveled to Washington, D.C. where he entered the headquarters of Family Research Council ("FRC") with murder on his mind, seeking to reduce the number of persons associated with SPLC-designated "hate groups."[2] Corkins told the Family

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[2] *See United States v. Corkins*, Statement of Offense (D.D.C. 12-cr-182).

Research Council unarmed security guard, "I don't like your politics," before opening fire and shooting the guard. Heroically, even though wounded, the guard was able to wrestle Corkins and disarm him before he could harm or kill someone else.

The President of FRC later asserted that Corkins:

> was responsible for the wounding of one of our colleagues and one of my friends yesterday here at the Family Research Council.... I believe he was given a license by a group such as the Southern Poverty Law Center, who ... labeled us a hate group because we defend the family and we stand for traditional, orthodox Christianity.[3]

Shortly after the shooting at Family Research Council, an FBI agent traveled to *amicus* Public Advocate's offices to inform Public Advocate that it had been included on the list of targets that Corkins had on his person at the time of the FRC shooting. An employee of Public Advocate subsequently identified Corkins as a person she had seen acting suspiciously near Public Advocate's office. Prior to Corkins' shooting, the President of Public Advocate had been shown on Washington, D.C. area television news, stating that he would appear regularly at the same Chick-Fil-A restaurant to support the company and to oppose protests aimed against it for its founder's

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[3] M. Weinger and K. Klueck, "Suspect: 'I don't like your politics,'" *Politico* (Aug. 15, 2012); M. Weinger, "FRC head puts blame on Law Center," *Politico* (Aug. 16, 2012).

opposition to same-sex marriage. The chicken sandwiches in Corkins' possession had been purchased at a Chick-Fil-A location near the home of Public Advocate's President.

Corkins later was conferred with the distinction of being the first person convicted under the domestic terrorism statute enacted in the District of Columbia. Corkins obtained his "hit list" from the "hate list" on the SPLC website, locating "hate groups" physically proximate to each other using the SPLC "hate map," but its website is still operating. Because the present case was dismissed, there is no way to know whether SPLC even paused to rethink what it was doing in publishing its lists and maps, and the consequences of declaring others to be associated with "hate groups," even after the SPLC defamatory website clearly had guided the violent plan of this convicted domestic terrorist.

B. SPLC Put *Amicus* Public Advocate's President in Danger of what a Federal District Judge in Colorado Termed "Politically-Motivated Harassment, or Even Violence."

Well before the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Public Advocate was an active supporter of traditional, Biblical marriage, and an active opponent of so-called "same-sex marriage." As part of its efforts, in 2012, Public Advocate sent approximately 7,000 mailers as part of its opposition to same-sex marriage in Colorado. On behalf of a photographer and persons in

a photograph in the mailer, the Deputy Legal Director of SPLC filed a copyright infringement suit against Public Advocate and other parties based on the use of a particular photograph in Public Advocate's mailer.

SPLC listed Public Advocate's business address twice in its complaint, yet chose to file a motion seeking to protect the home addresses of the plaintiffs in that case to avoid harassment, together with a certificate of service evidencing service of that motion on Public Advocate's President Eugene Delgaudio at his home address. This disclosure occurred even when the memory of the shooting at the Family Research Council offices in Washington, D.C. was fresh in everyone's minds.

SPLC's intentional disclosure on the public record of the home address of Public Advocate's President required Public Advocate to file a motion (on November 20, 2012) to strike that address. Public Advocate argued:

> The Southern Poverty Law Center (SPLC) targets organizations that disagree with its political views and labels them as "Hate Groups" on its web site. **Ironically for an organization that says it opposes hatred, SPLC specifically incites others to hate those who have the temerity to disagree with it....** [*Id*. at ¶ 8 (emphasis added).]

The district court in Colorado agreed that SPLC had put its political adversary in danger, finding that there was a "risk that public disclosure of these home

addresses could subject ... Defendant's President to politically-motivated harassment, or even violence...." and ordered the address be struck. *Hill v. Public Advocate*, 12-cv-2550, Order at 2 (D. Colo. 2012).

C. SPLC Has Done Untold Damage to Others as Well.

It has been reported that the man who shot conservative Congressman Steve Scalise at the Congressional baseball practice in Arlington, Virginia, on June 14, 2017, was connected to SPLC on social media.[4] If one shooting is an incident, and two shootings is a pattern, must conservative and Christian organizations demonized by SPLC just wait for the next shooting, where the next innocent victim may be mortally wounded?

In 2015, the SPLC made national headlines when it put famed pediatric surgeon Dr. Ben Carson, later Secretary of Housing and Urban Development, on its Extremist Watch List — as another "hater" — while he was running for President. As the SPLC explained: "Extremists in the U.S. come in many different forms — white nationalists, anti-gay zealots, black separatists, racist skinheads, neo-Confederates and more."[5]

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[4] P. Bedard, "Support for Southern Poverty Law Center links Scalise, Family Research Council shooters," *Washington Examiner* (June 14, 2017).

[5] *See* J. Chasmar, "Ben Carson placed on Southern Poverty Law Center's 'Extremist Watch List'," *Washington Times* (Feb. 8, 2015)

A lengthy study in the publication Current Affairs explained:

> The Southern Poverty Law Center perfectly shows social change done wrong. It was a top-down organization controlled by an incompetent and venal leadership. It was hypocritical in the extreme, preaching anti-racism while fostering a racist internal culture and being led by men whose own commitment to equality was questionable.[6]

D. SPLC Ignores Violent Groups of the Left.

Anyone who may have the false impression that SPLC is focused on hate would need to explain why true purveyors of crime and violence in America, such as left-wing Antifa, have never been listed by the SPLC as a hate group. SPLC addresses this issue on its website in answering the question, "Does the SPLC list any far-left hate groups?":

> Our goal is to identify all U.S.-based groups that meet our definition of a hate group regardless of whether one would think of the group as being on the left or the right.... But, as a general matter, **prejudice** on the basis of factors such as race **is more prevalent on**

(emphasis added).

[6] N.J. Robinson, "The Southern Poverty Law Center Is Everything That's Wrong With Liberalism," *Current Affairs* (Mar. 26, 2019).

> **the far right than it is on the far left**. [Frequently Asked Questions About Hate Groups, SPLC website (accessed Feb. 5, 2020) (emphasis added).]

SPLC's definition of a "hate group" stands the world on its head — groups which espouse violence are not hateful, but those that peacefully embrace traditional marriage are. SPLC operates in the world of the "upside-down."[7]

E. SPLC's Leadership Has Failed the Organization, Except in Fundraising Excellence.

Morris Dees co-founded the SPLC in 1971. He "was fired from the SPLC" in March 2019 "amid reports the watchdog group has been grappling with gender and race complaints within the organization."[8] SPLC President Richard Cohen took over leadership of the organization. On March 22, 2019, it was reported that SPLC's legal director, Rhonda Brownstein, resigned.[9] Associate Legal Director Meredith Horton resigned, "sending a letter with complaints regarding

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[7] *See Isaiah* 5:20: "Woe unto them that call evil good, and good evil; that put darkness for light, and light for darkness; that put bitter for sweet, and sweet for bitter!"

[8] *See* B. Feuerherd, "Southern Poverty Law Center co-founder fired amid gender, race-complaints," *New York Post* (Mar. 14, 2019).

[9] *See* M. Brown, "A week after SPLC shake-up, legal director resigns," *Montgomery Advertiser* (Mar. 22, 2019).

sexual harassment and racial discrimination."[10] Also on March 22, 2019, it was reported that Richard Cohen announced his resignation after 18 years as President after an exposé in the *New Yorker* was published. The troubled history of the SPLC, whose endowment had reached $471 million,[11] also was documented in a lengthy story in the liberal *New York Times*.[12]

A former SPLC staffer, Bob Moser, published an expose in a liberal publication — *The New Yorker*. *See* Bob Moser, "The Reckoning of Morris Dees and the Southern Poverty Law Center," *The New Yorker* (Mar. 21, 2019). Considering just two quotations from that story, this court can draw its own conclusion as to whether fighting hate is the principal activity of the SPLC:

- "[T]hough the center claimed to be effective in fighting extremism, 'hate' always continued to be on the rise, more dangerous than ever, with each year's report on hate groups. **'The S.P.L.C. — making hate pay,'** we'd say."

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[10] T. O'Neil, "SPLC President Richard Cohen Steps Down Amid Scandal as Investigation Begins," *PJ Media* (Mar. 22, 2019).

[11] It is not at all clear why SPLC has transferred much of its wealth off-shore. *See, e.g.,* V. Richardson, "SPLC transferring millions to offshore tax havens: Report," *Washington Times* (Sept. 1, 2017).

[12] A.D.S. Burch, A. Blinder and J. Eligon, "Roiled by Staff Uproar, Civil Rights Group Looks at Intolerance Within," *New York Times* (Mar. 25, 2019).

- "But it was hard, for many of us, not to feel like we'd become pawns in what was, in many respects, **a highly profitable scam**." [Emphasis added.]

Sullivan may have been well intended, but it has allowed SPLC to enrich itself while defaming and endangering petitioner and others without consequence.

III. *SULLIVAN* ERRONEOUSLY IMPOSED THE FIRST AMENDMENT UPON THE COMMON LAW OF DEFAMATION.

SPLC's labeling of petitioner's ministry as a "hate group" may constitute "speech," but such phraseology does not by any means trigger the protections of "the freedom of speech," which may not be abridged under the First Amendment. While this principle of constitutional law may seem strange today, in 1942, a unanimous Supreme Court emphatically affirmed that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Among Justice Murphy's list of five enumerated classes, two stand out — the obscene and the libelous. The Court proclaimed that neither is an "essential part of any exposition of ideas," but rather they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

This Court's constitutionalization of the law of obscenity and pornography is similar to its treatment of defamation. Fifteen years later, the Supreme Court reiterated its view that even though "obscenity [like libel] was outside the protection intended for speech and press," it asserted a new predicate: that it was for the Court to define "obscenity." *See Roth v. United States*, 354 U.S. 476, 483 (1957). Prior to *Roth*, however, it was assumed that obscenity, a common law offense, was governed by state law, not by federal law. *See Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (1815).[13] Before *Roth*, definitions of what constituted obscenity varied, the most widely of which was the Hicklin test, allowing a finding of obscenity based upon the effect of "isolated passages on the most susceptible readers or viewers." *See Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930); *Commonwealth v. DeLacey*, 271 Mass. 327, 171 N.E. 455 (1930). Rejecting the Hicklin test, the U.S. District Court for the Southern District of New York "adopted instead a standard focusing on the effect on the average person of the dominant theme of the work as a whole." *See United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

In his *Roth* opinion, Justice William J. Brennan, who also wrote for the Court in *Sullivan*, leveraged this modernized test into a First Amendment rule, thereby launching the Court on a constitutional

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[13] This statement and the following narrative is a paraphrase of a note on obscenity appearing on p. 1203 of G. Stone, *et al.,* Constitutional Law (2d ed. Little, Brown: 1991).

odyssey searching for a principled definition of obscenity. By 1964, the Court quest was in such disarray that Justice Potter Stewart gave up the quest entirely, urging his colleagues to censor only "hard-core pornography," all the while reassuring them that: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

While this Court was still entangled in the bramble bush of obscenity, that same year — 1964 — it decided *New York Times v. Sullivan*. This time, Justice Brennan took his colleagues into the thornbush of Alabama libel law as applied to a government official in his official capacity. *Id.* at 267.

At the outset of his discussion of the merits 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." *Id.* at 268. "Those statements do not," Justice Brennan continued, "foreclose our inquiry here." *Id.* Instead of conducting 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). "Libel" — a mere "epithet"!?[14] According to Blackstone, libel was not a mere label, but a well-established common law

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[14] *Webster's Third International Dictionary* at 765 (1981) defines "epithet" as a "disparaging or abusive word."

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. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment and another by action ... the defendant, on an indictment for publishing a libel, is not allowed to alledge the truth of it by way of justification. But in the remedy of action on the case, which is to repair the *party* for the injury done him, the defendant may ... justify the truth of the facts, and show that the plaintiff has received no injury .... [3 Blackstone's Commentaries on the Laws of England 125-26 (U. Chi. Press, Facsimile ed. 1765).]

Undeterred by this English common law pedigree and her American counterpart,[15] 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:

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[15] *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).]

The quoted citation was to none other than *Roth v. United States*, decided just seven years before in the case that revolutionized the law of obscenity, now put to use by the Court to justify a brand new federal rule in libel cases, one 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." 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 designed 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.

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 and 235. This same protection was afforded the American people's representatives by Article II, 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 actions that called 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, things 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 edt: 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 historic, textual 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 phrase, 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 one addressing the impermissible protection of the government's reputation and the other designed to protect the good reputations of individual persons. *See McKee* at 679-82.

The Supreme Court's effort to ignore the historic meaning of "the freedom of speech," begun by Justice Brennan, has 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.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted to reconsider and reform this Court's defamation jurisprudence.

Respectfully submitted,

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December 30, 2021