No. 24-829

IN THE

Supreme Court of the United States

STEVE WYNN

Petitioner,

v.

THE ASSOCIATED PRESS, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA

AMICUS CURIAE BRIEF OF DON BLANKENSHIP IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

We live in a day and age where the once noble profession of journalism has been hijacked by zealots using the flagships of American media to exhort their own personal and political biases and opinions to destroy the hard earned reputations of public figures, rather than striving for neutrality and truth.[1] This Court's decades of Herculean efforts to protect the marketplace of ideas and the First Amendment rights of journalists, are now daily exploited and abused by a ubiquitous group of "journalists", to destroy public figures with whom they disagree, and at times, even hate. The end result is that the Constitution now is regularly relied on by skilled attorneys to destroy good, decent and honest Americans when they seek judicial redress for reputational and soul crushing lies.

The standards sought to be vacated by the instant case, render victims of ruthless defamation powerless to overcome unnecessary and extra-Constitutional First Amendment protections. There is room in both the legal and media universes to reign in extra-Constitutional legal protections that currently shield those who daily undermine their once noble profession.

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[1] No counsel for any party to this action authored any portion of this brief. No party to this action made any monetary contribution which funded (or was intended to fund) the preparation or submission of this brief. No monetary contributions were made by anyone for the preparation of this brief. Timely notice of the intent to file this Amicus brief was made to all parties at least ten (10) days prior to filing.

Like Steve Wynn ("Wynn"), *Amicus Curiae* Don Blankenship ("Blankenship") is a public figure who was targeted by outrageous media smears, which he ultimately attempted to vindicate in this Court by challenging the actual malice standard applied to public figures in defamation cases, and the clear and convincing evidence standard applied to pre-trial motions in such cases. However, as Justice Thomas explained in his comments on the denial of *certiorari* for Blankenship's case, a nuance of West Virginia law prevented the consideration of his claims in this Court. *Blankenship v. NBCUniversal, LLC*, 144 S.Ct. 5 (2023) (Mem). Blankenship maintains that the actual malice and, at the pre-trial stage, clear and convincing evidence standards are deeply flawed and should be abandoned by the Court. He is pleased to provide this ***Amicus*** brief in support of Wynn.

In the present case, Wynn was outrageously defamed as a "rapist". Blankenship was repeatedly and outrageously defamed as a "convicted felon" by the legacy media (including MSNBC, Fox News and CNN), who were pushed behind the scenes by the professional political class that sought to derail Blankenship's 2018 run for West Virginia U.S. Senator. Much like Wynn has never committed such a heinous act, Blankenship was ***never*** convicted of any felony whatsoever. *Blankenship v. NBCUniversal*, LLC, 60 F.4th 744, 750-54 (4th Cir. 2023). To the contrary, in a high profile criminal trial (covered by all of these same news organizations), Mr. Blankenship had been ***acquitted*** of all felony charges and convicted only of a misdemeanor. *Blankenship*, 60 F.4th at 750.

Because the truthful terms "convicted misdemeanant" were not going to derail a Senate campaign, the legacy media (and their behind the scenes elected official enablers) ran wild with the "convicted felon" lie. One might ask – why not, given that the legacy media had, and continue to have, almost complete cover in such reputation and career crushing lies, thanks to *New York Times v. Sullivan* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and their progeny.

By this ***Amicus*** brief, Blankenship lends his support to Wynn, to protect public figures in this day and age of hyper-partisan purported "journalists" who lie with impunity while shielded by existing case law which harkens back to a time when "journalism" was still considered a noble profession, and when journalists worked hard to maintain neutrality, independence and truth. No more.

In sum, Blankenship and Wynn share the fate of being public figures who provided overwhelming evidence that they were defamed at the pre-trial stages of their cases, but whose claims were cut off by the untenable actual malice and clear and convincing evidence standards, employed to protect the purported First Amendment rights of those whose wrongdoing must no longer be shielded by extra-Constitutional legal principles.

STATEMENT OF THE CASE

In 2018 there were national reports accusing Wynn of terrible misconduct. *Wynn v. Associated Press*, 555 P. 3d 272, 275-76, 140 Nev. Adv. Op 56 (2024). An AP reporter, Regina Garcia Cano ("Garcia Cano") obtained two citizen complaints purporting to allege sexual assault by Wynn in the 1970's. *Id.* One of the complaints, which claimed a pregnancy, was self-evidently absurd, and included a bizarre description of a baby delivered in a gas station bathroom, including the woman's use of her teeth to open a "water bag" and the birth of a "doll". Wynn Petition For Writ of Certiorari at 7. After reading the complaint she had received, even reporter Garcia Cano told her supervisor at the Associated Press ("AP") (together the "AP Parties") that, "One of [the complaints] is crazy." *Id.*

Nonetheless, less than an hour after obtaining the complaints, the AP published an article accusing Wynn of rape without any factchecking or asking Wynn for comment. *Id.*

SUMMARY OF ARGUMENT

Wynn's case presents, in the starkest fashion, the infirmities of *New York Times v. Sullivan*'s actual malice standard. Even though the Associated Press admits that the story it published was "crazy", and that AP knew it before publication, the courts ruled on a pre-trial anti-SLAPP motion because of *Sullivan* and *Anderson*, that Wynn could not establish by clear and convincing evidence the AP knew that its statements were false or acted with reckless disregard for the truth.

The Nevada Supreme Court upheld the lower court's finding in favor of the AP Parties on their anti-SLAPP motion. *Wynn*, 555 P. 3d at 280. The Nevada Supreme Court concluded that the case was governed by the *Sullivan* actual malice standard and that pursuant to the *Anderson* standard Wynn was required to show, by "clear and convincing evidence" that the AP's statement was "published with knowledge that it was false or with reckless disregard for its veracity." *Id.* at 279-80.

Wynn argued that requiring him to meet the "clear and convincing" standard at the anti-SLAPP stage violated his right to a civil jury trial. *Id.* The Nevada Supreme Court disagreed and held that the proper measure of Wynn's claim, even at this preliminary stage of the proceedings, was the full actual malice standard, including the requirement that it be established by clear and convincing evidence. *Id.*

Amicus Curiae asserts below that (1) the application of the "clear and convincing" standard, at any non-jury stage of a defamation case, is fundamentally unworkable and unconstitutional; and (2) that the actual malice standard should be abandoned.

ARGUMENT

I. THE CLEAR AND CONVINCING PROOF REQUIREMENT SHOULD BE ABANDONED FOR ALL PRE-TRIAL PROCEEDINGS TO WHICH *NEW YORK TIMES* APPLIES

The seminal decision upholding use of the "clear and convincing" standard in a pre-trial proceeding is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ("Anderson"). The Court framed the question in *Anderson* as follows:

"This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." *Anderson*, 477 U.S. at 244. The Court then noted that "The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage." *Id.* (citing *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (DC Cir. 1984) *vacated*, 477 U.S. 242 (1986).)

Anderson held that "a court ruling on a motion for summary judgment must be guided by the New York Times 'clear and convincing' evidentiary standard in determining whether a genuine issue of

actual malice exists - that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." *Id.* at 257.

Anderson reasoned that there was nothing that precluded a trial judge from applying the "clear and convincing" standard at summary judgment:

"Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158–159, 90 S.Ct., at 1608–1609."*Anderson*, 477 U.S. at 255.

The present case was not decided at the summary judgment stage but via an anti-SLAPP proceeding. However, the Nevada Supreme Court employed the identical reasoning as *Anderson* in holding that Wynn could not prevail against the anti-SLAPP motion unless he could provide evidence "sufficient for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice." *Wynn v. Associated Press*, 555 P. 3d 272, 277-78 (2024).

Anderson was wrongly decided and this Court should reverse *Anderson* such that the clear-and-convincing requirement is only applicable to the weighing of evidence by juries, and not by a judge ruling on an anti-SLAPP or summary judgment or any other pre-trial determination of the merits.

Justice Scalia was correct when, writing for the DC Circuit, he concluded that the imposition of the clear-and- convincing standard changed the inquiry from one searching for a "bare minimum" of facts to the weight of those facts. *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). He reasoned that imposing the clear-and-convincing evidence burden of proof during summary judgment in public figure defamation cases "change[s] the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts." *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). A public figure plaintiff is "effectively force[d] . . . to try his entire case in pretrial affidavits and depositions." *Id.* The increased burden of proof "is simply incompatible with the preliminary nature of the summary judgment inquiry." *Id. at* 1571.

Justice Scalia could have just as well been writing about the Nevada Supreme Court's anti-SLAPP analysis in *Wynn*. His fear that the clear-and-convincing standard is incompatible with a preliminary assessment of a case, is exemplified by the Nevada Supreme Court finding that a party

burdened only with making a "prima facia" showing, is nonetheless required to produce clear-and-convincing evidence sufficient to persuade a jury. *Wynn, 555 P.3d* at 279. The concepts of making a "prima facia" showing by clear-and-convincing evidence are diametrically opposed.

Justice Scalia's concerns were echoed in the *Anderson* dissents. Justice William Rehnquist predicted that "engraft[ing] the standard of proof applicable to a factfinder onto the law governing the procedural motion for summary judgment [would] do great mischief, with little corresponding benefit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 272 (1986) (Rehnquist, J., dissenting). Justice Brennan, also dissented in *Anderson* and rejected the application of the clear-and-convincing standard at summary judgment: "Moreover, I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 257-58 (Brennan J. dissenting.)

Purportedly, the clear-and-convincing standard of proof "by no means authorizes a trial of affidavits." *Anderson,* 477 U.S. at 255. Yet this ostensibly prohibited course of action has been systemically adopted by judges when granting summary judgment and preliminary determinations on the merits against public figure plaintiffs, including Wynn. The defendant routinely prevails on summary judgment (or against an anti-SLAPP) by having the speaker sign an affidavit denying that the

defamatory statement was published with knowledge of its falsity. The equities of a trial by affidavit are overwhelmingly in favor of the defendant. Making matters worse for Wynn, Nevada tracks California law which prevents merits discovery from being taken while an anti-SLAPP motion makes its way through the court. *Wynn* at 278. The plaintiff is left to put forth clear-and-convincing evidence of the defendant's actual malice, with both hands effectively tied behind his back, with no ability to even conduct discovery to obtain the evidence to satisfy these incredibly onerous standards. Thus, the current state of the law encourages, rather than discourages, today's brand of so-called "journalists" to lie, lie and lie some more about public figures.

Judge Jerome Frank wrote: "The liar's story may seem uncontradicted to one who merely reads it, yet it be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his features, and the like—all matters which 'cold print does not preserve and which constitute 'lost evidence' so far as the upper court is concerned.'" *Broadcast Music v. Havana Madrid Restaurant Corp.,* 175 F.2d 77, 80 (2d. Cir. 1949).

Judge Frank's prescient words have now largely fallen on deaf ears. Today, judges in public figure defamation cases evaluate the evidentiary sufficiency of an affidavit without hearing or seeing the affiant. There is no observation of the affiant's voice tone, facial expressions, body language, attitude, hesitancy of speech, or other non-verbal cues. There is no confrontation of the adverse witness

or testing of the evidence by cross-examination. There is no means for clarification or recantation. There is only a piece of paper to ponder.

These out-of-court statements are prepared by lawyers who frequently employ deceptive and dilatory tactics to evade production of discoverable inculpatory evidence. For example, in *Amicus Curiae's* case, the Fox News legal team exploited every procedural loophole at its disposal to avoid production of intra-executive communications, including a critically important directly relevant email drafted and sent by Rupert Murdoch. The magistrate judge presiding over discovery wrote that it was "inconceivable why the production of those materials" had not timely taken place. *Don Blankenship v. Fox News Network, LLC,* No. 2:19-cv-00236, 7 (S.D.W. Va. July 8, 2021).

In addition to being potentially liable for considerable monetary damages, a media defendant's shareholder value, business model, corporate reputation, and journalistic credibility are at stake. Similarly, the speaker's job security, financial status, professional reputation, and journalistic integrity are at risk. These concerns provide irrepressible motivation to procure or sign a false affidavit – which under Nevada's anti-SLAPP law, gets submitted to judges, without any ability to cross-examine the affiant.[2] App. 336-340.

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[2] Abby Grossberg, a former Fox News booking producer for hosts Maria Bartiromo and Tucker Carlson, alleged in a lawsuit against Fox News that the Fox News legal team "coerced" her into giving misleading testimony in the Dominion Voting

The "we'll take your word for it" approach to affidavits when deciding pre-trial motions, especially in the context of the onerous *Sullivan* standard, is a golden gift, wrapped with a bow by the Court, that protects the current generation of biased, opinionated zealots posing as "journalists."

A. The Summary Judgment Framework In Public Figure Defamation Cases Must Be Changed.

When determining whether there is a genuine issue for trial, a judge is not to "weigh the evidence and determine the truth of the matter." *Anderson,* 477 U.S. at 249. Furthermore, the Court cautioned that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. Distinguishing questions of law from questions of fact is a "vexing" process. *Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1983). The

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Systems lawsuit. According to Grossberg, Fox News lawyers "coerced, intimidated, and misinformed" her during deposition preparation sessions and "were 'displeased' that she was being 'too candid and forthcoming.'" Grossberg also averred that she was coached by Fox News attorneys to "respond with a generic 'I do not recall' to as many questions as possible during a September 2022 deposition." *See* Melissa Quinn, *Fox News producer alleges network "coerced" her into giving misleading testimony in Dominion suit,* CBS News (Mar. 21, 2023), https://www.cbsnews.com/news/fox-news-dominion-suit-abby-grossberg-producer-maria-bartiromo-tucker-carlson-testimony/. Karrah Levine, a former Fox News booking producer for host Martha MacCallum, repeatedly answered "I don't know," "I don't remember," "I don't recall" to questions asked during an April 2021 deposition in Blankenship's case.

evaluation of facts "depends on the nature of the materials" and "may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy." *See Baumgartner v. United States,* 322 U.S. 665 (1944).

The proof of *mens rea* in public figure defamation cases is intrinsically subtle. How can a judge possibly evaluate the sufficiency of actual malice evidence without determining credibility, ascribing weight, or drawing inferences? She cannot. This conundrum was echoed by Justice William Brennan: "I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Anderson,* 477 U.S. at 258 (Brennan, J., dissenting).

The "conflicting signals" sent by the Court in *Anderson* are exceedingly difficult, if not impossible, to actually follow. *Id.* at 265. Justice Brennan elaborated:

> I simply cannot square the direction that the judge "is not himself to weight the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount "required," could *only* be performed by weighing the evidence.

Id. at 266. Justice Brennan shared Justice Scalia's concern that summary judgment procedure would devolve into "a full-blown paper trial on the merits" and violate a public figure's constitutional right to a jury trial. *Id.* at 266-67.

B. The Reasonable Jury Standard Is Now A Masquerade For A Judge's Own Opinion.

"Judges use the reasonable jury standard to decide motions for summary judgment, the directed verdict, and judgment as a matter of law." Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of Evidence,* 97 Judicature 222 (2014). The Court has interchangeably used different terms such as "reasonable jury" and "rational factfinder" when discussing the reasonable jury standard. *Id.* at 225. These labels have become camouflage for the judge's own views given the current pre-trial standards in defamation cases. As Justice Benjamin N. Cardoza explained: "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." Benjamin N. Cardoza, *The Nature of the Judicial Process,* 12-13 (1921).

The concerns published by Justices Scalia, Rehnquist and Brennan many years ago, have become even more relevant and insightful today than they were then. The Wynn case is a perfect example of that. *Anderson's* clear-and-convincing standard for pre-trial motions should be overturned and vacated.

II. THE ACTUAL MALICE REQUIREMENT SHOULD BE ABANDONED

A. Defamation Was Not Protected By The First Amendment Prior To *Sullivan*.

The actual malice rule "is not rooted in the longstanding tradition of American defamation law." Carson Holloway, *Malice Toward All, Defamation for None?*, Law & Lib. (Dec. 20, 2022). App. 258-264. "Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." *Herbert v. Lando,* 441 U.S. 153, 158 (1979). Prior to *Sullivan*, defamatory publications were not deemed by the Court to be among the "well defined and narrowly limited classes of speech the prevention and punishment of which has never been to raise any Constitutional problem." *Beauharnais v. Illinois,* 343 U.S, 250, 255-56 (1952) (citing *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942)); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 384-85 (1974) (White, J., dissenting) ("The Court's consistent view prior to *Sullivan* was that defamatory utterances were wholly unprotected by the First Amendment.") (internal citation omitted).

Simply put, "[the] 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 v. Lawson,* 141 S. Ct. 2424, 2425, 210 L.Ed.2d 991 (2021) (Thomas, J., dissenting) (citing *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021)) (emphasis deleted).

B. The Media Has Changed Since *Sullivan*.

As stated by *Amicus Curiae* in the Complaint filed in his case against a large swath of the media:

> The mainstream media and much of the political establishment today routinely, and with actual malice, set out to destroy public figures with outright lies. The competition for viewers is intense and nothing brings in eyeballs like scandal and degradation. So too is the establishment media's bloodthirsty desire to destroy those with whom they disagree politically. We live in an age of weaponized defamation where lies can be repeated in more ways at more times in more places with more speed than anyone could possibly have imagined even five years ago, much less in 1964 when the seminal case in the area of defamation of public figures was decided.[3]

"*Sullivan* rested on a political economy of public discourse that no longer exists." David McGowan, *A Bipartisan Case Against New York*

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[3] *See, Blankenship v. NBCUniversal et al.*, Case number 2:20-cv-00278, Dkt. 1 at page 2.

Times v. Sullivan, 1 J. Free Speech L. 509, 528 (2022). Advertising revenue depends on ratings and website traffic. Sensationalism garners more eyeballs and clicks than factual news reporting. The truth be damned.

C. There Are Multifarious Reasons To Rethink *Sullivan*.

Justice Byron White joined the judgment and opinion in *Sullivan* but later concluded 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, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749, 767 (1985) (White, J., dissenting). He also recognized unintended effects of the actual malice standard:

> The *New York Times* rule countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the 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.

Justice Scalia was a critic of *Sullivan*. In *Ollman v. Evans,* 750 F.2d 970, 1036 (D.C. Cir. 1984), Justice Scalia (then Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit) disapproved of the "expectation" that those who enter the "political arena" must be predisposed to "public bumping" (which is "fulsomely assured by the Court's decision in *Sullivan*"). He believed that *Sullivan* gave the press "too much license to destroy the reputations of public officials." James Brian Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court,* 314 (2006). Scalia observed that the press is "capable of holding individuals up to public obloquy from coast to coast" and "reap financial rewards commensurate with that power." *Ollman,* 750 F.2d at 1039.

In an undated White House memorandum titled *New York Times v. Sullivan: A Blight on Enlightened Public Discourse and Government Responsiveness to the People,* Chief Justice John Roberts (then Associate Counsel to President Ronald Reagan) wrote that *Sullivan*: "crown[s] the media with virtual absolute immunity for falsely assailing public officials" and "obstructs the ability of the president and other public officials to recruit talented and loyal supporters." Adam Liptak, *Clues on How Roberts Might Rule on Libel,* The N.Y. Times, A22 (Sept. 27, 2005).[4]

[4] https://www.nytimes.com/2005/09/27/us/clues-on-how-roberts-might-rule-on-libel.html.

Justice Elena Kagan (then a University of Chicago Law School professor) has questioned whether "uninhibited defamatory comment" promotes the social good. Elena Kagan, *A Libel Story: Sullivan Then and Now* (reviewing Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)), 18 Law & Soc. Inquiry 197, 206 (1993). She further observed that "[t]oday's press engages in far less examination of journalistic standards and their relation to legal rules" and "reflexively asserts constitutional insulation from any and all norms of conduct." *Id.* at 207. In that regard, Justice Kagan questioned whether *Sullivan* "bears some responsibility" for "increased press arrogance." *Id.* at 208. Perhaps most notably, she opined that *Sullivan* "may differ too greatly from most (or many) libel cases to provide a sensible doctrinal base." *Id.* at 215.

Justice Clarence Thomas has denounced *Sullivan* and its various extensions as "policy-driven decisions masquerading as constitutional law." *McKee v Cosby,* 139 S. Ct. 675, 676 (2019) (Thomas, J., dissenting). He has further decried the "lack of historical support for the actual malice doctrine" and has stressed that the Court's "reconsideration is all the more needed because of the doctrine's real-world effects." *Berisha,* 141 S. Ct. at 2425.

Justice Neil Gorsuch has focused on the radical shifting of the media landscape, the decline of the institutional press, and the emergence of 24-hour cable news and online media platforms as reasons to

revisit *Sullivan*. *Berisha,* 141 S. Ct. at 2427. He has noted that "[a] study of one social network reportedly found that 'falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.'" *Id.* Justice Gorsuch has additionally bemoaned the actual malice standard as "an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable." *Id.* at 2428. "The bottom line? It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy. Under the actual malice regime as it has evolved, 'ignorance is bliss.'" *Id.*

Justice Sonia Sotomayor has deemed the widespread publication of false statements on social media as "a true threat to our national security." Devin Dwyer, *Justices Sonia Sotomayor and Neil Gorsuch agree: Misinformation is threat to America,* ABC News, (Apr. 14, 2021).[5] App. 265-268.

Justice Samuel Alito has emphasized that "[t]ime and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value." *United States v. Alvarez,* 567 U.S. 709, 746 (2012) (Alito, J., dissenting).

Justice Amy Coney Barrett (then a University of Notre Dame Law School professor) did not include *Sullivan* among the cases deemed as "super

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[5] https://abcnews.go.com/Politics/justices-sonia-sotomayor-neil-gorsuch-agree-misinformation-threat/story?id=77078448.

precedents"[6] in constitutional law. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711, 1734-35 (2012-2013).

D. The Actual Malice Standard Contravenes The Security Of Reputation.

Sullivan "runs counter to one of the basic aims of American government: to secure the natural rights of all."[7] Carson Holloway, *Rethinking Libel, Defamation, and Press Accountability: Provocations #4,* The Claremont Institute Center for the American Way of Life, (Sept. 21, 2022). App. 295-311. Security of reputation was "commonly understood" by our nation's Founders to be a natural right and "deserves to be classed" as such. *Id.* "[W]e are all losers when the law becomes so distorted as to eliminate all manner of accountability for those who would recklessly damage personal reputations ostensibly in the name of freedom of speech or freedom [of] the press." *Reighard v. ESPN, Inc.,* No. 355053 (Mich. Ct. App. May 12, 2022) (Boonstra, P. J., concurring). The actual malice rule is a discriminatory legal precept that denies security of reputation to public figures.

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[6] "Super precedents" are "cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711, 1734 (2012-13).

[7] https://dc.claremont.org/rethinking-libel-defamation-and-press-accountability/.

Public figures are powerless to resist a mass media oligopoly that controls the airwaves and buys ink by the barrel. Most experienced First Amendment litigation lawyers work for firms who defend these behemoths. Contingency fee arrangements are not available. Proving a speaker's *mens rea* is onerous. Public figure defamation cases rarely prevail (or survive summary judgment).[8] Consequently, journalists have little legal incentive to ensure accuracy.

Journalism has become a "privileged profession" under the *Sullivan* regime. Holloway, *supra,* (Sept. 21, 2022). Journalists "carry practically no liability for their negligence." *Id.* In contrast, doctors, lawyers, accountants, and other professionals are subject to liability for their errors and omissions. "It is a violation of the principle of equality that all Americans are answerable for their negligence except for journalists." *Id.* 14. No legitimate constitutional interest is served by absolving journalists from professional misconduct.

The press survived and thrived for 173 years without the actual malice requirement from December 15, 1791, when the First Amendment was ratified, until March 9, 1964, when *Sullivan* was decided. Jury awards to defamed public figure

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[8] "The public is left to conclude that the challenged statement was true after all." *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749, 768, 105 S.Ct. 2939 (1985). Wynn should not have to go to the grave smeared as a "rapist".

plaintiffs rarely pose an existential threat to the press. Disney, Comcast, Warner Bros. Discovery, CBS, CNN, NBC, Fox Corporation, and Paramount Global have sustainable revenue streams from a diversified portfolio of global businesses and brands. Wealth is synonymous with power. With great power comes great responsibility. "[T]hose exercising the freedom of the press [have] the responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they cause." *Berisha,* 141 S. Ct. at 2426.

CONCLUSION

The *Sullivan* framework for "actual malice" in public figure defamation cases should be abandoned altogether. And, at a minimum, this Court should preclude application of the *Anderson* standard in any

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pre-trial "actual malice" determination and hold that this measure of the evidence must be left only to a jury.

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March 3, 2025

Respectfully submitted,

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