No. 20-1063

IN THE
Supreme Court of the United States

SHKELZËN BERISHA,
Petitioner,

v.

GUY LAWSON, ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., AND RECORDED BOOKS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is the son of the former Albanian Prime Minister with 100% name recognition in that country. In 2008, it was widely reported that he was part of an arms dealing cabal within the Albanian government involving state-owned weapons. The same cabal reportedly defrauded the U.S. government by setting up a kickback scheme through which Petitioner and others profited from the sale of Albanian ammunition stockpiles needed to equip the Afghan security forces. Seven years later, in 2015, Respondents published a book that criticized the U.S. government's lax procedures for procuring weapons to fight wars in Iraq and Afghanistan – including a description of the fraud perpetrated by the Albanian cabal. The courts below dismissed Petitioner's libel suit against Respondents because the record contains substantial, unrebutted evidence that he is a public figure who cannot establish actual malice. Petitioner does not challenge those holdings. Instead, he argues that this Court should overrule decades of precedent requiring public figure libel plaintiffs to prove actual malice. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The question presented is:

Should this Court overrule *Curtis* and its progeny, and hold that there is no First Amendment requirement for a public figure to prove actual malice to prevail in a libel suit against the publishers of a book criticizing his involvement in political corruption?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of this Court, Respondent Simon & Schuster, Inc. states that its direct parent entity is French Street Management LLC and its indirect parent entities are CBS Operations Investments Inc. and ViacomCBS Inc. ViacomCBS Inc. is a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of ViacomCBS Inc. ViacomCBS Inc. is not aware of any publicly held entity owning 10% or more of its total common stock, *i.e.*, Class A and Class B on a combined basis.

Respondent Recorded Books, Inc., a non-governmental entity, certifies that it is 100% owned by Recorded Books Holdings, Inc. and that no publicly held corporation owns 10% or more of Recorded Books' stock.

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INTRODUCTION

Petitioner asks the Court to overrule an unbroken line of cases holding that the First Amendment requires public figure libel plaintiffs to prove actual malice. He seeks this result in a defamation lawsuit against Respondents for publishing a book that accuses him of engaging in political corruption. The book critiques the U.S. government for adopting weapons procurement policies during the War on Terror that resulted in corrupt arms deals – including a deal to buy state-owned ammunition from a cabal with links to the Albanian government, which included the son of the then-Albanian Prime Minister (*i.e.*, Petitioner). There is no question that Petitioner is a public figure under current law. Nor can he establish actual malice because the book's reporting was informed by voluminous news reports about Petitioner's corrupt activities, debates on the floor of the Albanian Parliament denouncing Petitioner, diplomatic cables from the U.S. Embassy in Albania and interviews with witnesses.

Petitioner aims to rescue his lawsuit – and lower the bar for future libel suits involving public figures – by reversing fifty years' worth of precedent. The Petition invites the Court to radically reimagine its watershed *New York Times Co. v. Sullivan* decision as a narrow holding that limits the application of the actual malice standard to public officials only. To this end, Petitioner seeks to overrule the Court's decisions extending *Sullivan*'s actual malice standard to public figures, starting with *Curtis*. And he does so even though this Court has repeatedly reaffirmed those

decisions and despite the absence of any calls to adopt Petitioner's novel proposal from lower courts.

There is no compelling reason to reconsider the public figure standard. There is no circuit split or other reviewable issue emanating from lower courts. Petitioner's proposal finds no support in this Court's decisions interpreting the First Amendment. Nor can Petitioner overcome *stare decisis* and reverse a half-century of precedent applying the actual malice standard to public officials and public figures alike. Above all, the Petition should be denied because "the constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari) (citing *Sullivan*, 376 U.S. at 270). The narrow interpretation of *Sullivan* proposed by Petitioner – *i.e.*, actual malice safeguards apply to libel suits filed by public officials but nobody else – would contradict the Court's "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Sullivan*, 376 U.S. at 270.

This case is an exceedingly poor vehicle for reconsidering the actual malice standard because it involves political speech. Respondents were sued for publishing a critique of government ineptitude and corruption involving Petitioner. Since Petitioner is an obvious public figure in this context, the facts do not offer a meaningful opportunity to reconsider the outer boundaries of the public figure standard. And even if the Court abolished the First Amendment protections

that Respondents currently enjoy, Petitioner's claims would still be dismissed under the applicable law of New York.

For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background.

1. On June 15, 2015, Simon & Schuster published *Arms and the Dudes* (the "Book"), a work of investigative journalism by Lawson. The Book reports how three twenty-something "stoner dudes" won "a Department of Defense contract to supply $300 million worth of ammunition to the Afghanistan military." Respondents' Appendix ("RA") 1-3.[1]

2. The Book reports that the "dudes" – Diveroli, Packouz and Podrizki – started a company, AEY, to bid on arms procurement contracts put out for open tender on the "fedbizopps" website. App. 2. Despite its lack of *bona fides*, AEY was chosen to equip the Afghan security forces, which it sought to do by procuring AK-47 ammunition from state-owned stockpiles in Albania. *Id.* at 3. The Book chronicles how the "dudes" tried (and failed) to fulfill their contract – including interactions with indifferent U.S. government officials, dealings with corrupt Albanian

[1] Respondents have attached an Author's Note as an appendix to this brief. *See* 37 *infra*. A full copy of the Book is available on the District Court docket. *Berisha v. Lawson*, 17-cv-22144-MGC, Dkt. 126-1 (S.D. Fla.).

functionaries and the implosion of AEY following an FBI investigation. *Id*. at 3-4.

3. As Lawson explained, the picaresque journey of the "three stoners from Miami Beach … into the innermost reaches of the world of international arms dealing … also had a serious side, with important political and legal implications." RA 7.

4. Of particular relevance to these issues is the relationship between AEY and a "mafia" with links to the Albanian government, from whom it sought to purchase weapons. App. 4-6. Diveroli and Podrizki attended several meetings in Albania to renegotiate the price AEY would pay for the ammunition, which included kickbacks for Albanian officials. *Id*. The Book identified Petitioner as a participant in one of those meetings and a member of the arms-dealing cabal. *Id*.

5. In 2008, the *New York Times* reported that "Army contracting officials, under pressure to arm Afghan troops, allowed an immature company [*i.e.*, AEY] to enter the murky world of international arms dealing on the Pentagon's behalf – and did so with minimal vetting and through a vaguely written contract with few restrictions." C.J. Chivers, *Supplier Under Scrutiny on Arms for Afghans*, N.Y. TIMES (Mar. 27, 2008), available at https://www.nytimes.com/2008/03/27/world/asia/27ammo.html.

6. The *New York Times* article also reported that a whistleblower, Kosta Trebicka, had secretly recorded a phone call in which Diveroli – the AEY founder – who told him that the corruption "went up to the prime minister [of Albania] and his son." *Id*.

7. The article also reported on a related incident in the Albanian village of Gerdec. Workers were dismantling state-owned artillery shells for scrap when they exploded, killing 26 people. *Id*. It was widely reported that the tragedy stemmed from another corrupt deal brokered by the same players that sold AK-47 ammunition to AEY, including Petitioner. *Id*.

8. The AEY and Gerdec controversies caused a political scandal. The Albanian media used the headline "Political Hiroshima" to describe reports that Petitioner, the son of the then-sitting prime minister, participated in the corruption. App. 42. Two of the individuals who brokered the deals were jailed. App. 94. Others – like Petitioner and the Albanian Defense Minister (a close family friend) – were linked to the crimes, but never charged. *Id*.

9. Petitioner's involvement was debated on the floor of the Albanian parliament – as were claims that his father's government covered up his crimes. App. 46. For his part, Petitioner implored "media representatives" to "publish a statement presenting what he called the 'truth [of] accusations against me,' which explicitly 'encourage[d] the press to follow this story to the end and investigate it.'" App. 13.

10. Petitioner also "admits that he privately met with Kosta Trebicka in an effort to convince him that he was not involved in the AEY matter – and that shortly thereafter Trebicka produced a statement 'to the media' retracting his allegations." App. 13. Trebicka died in a car accident not long afterwards. *Id*. at 6. The *New York Times* reported suspicions that Trebicka had "been murdered – perhaps with the

involvement of the Berisha family – to prevent him from testifying about the AEY and Gerdec matters." *Id*.

11. Petitioner's role in the scandals garnered significant press – including scores of articles in Albania, multiple *New York Times* reports, a prize-winning *Rolling Stone* feature article by Lawson, two books and a half-hour documentary by *Al Jazeera* that meticulously connected the dots between Petitioner, AEY and Gerdec. App. 12-13.

12. The accusations against Petitioner were also discussed in diplomatic cables written by the U.S. Ambassador at the time, who reported that the former head of the Albanian army sought his help "out of fear for his own safety, stating that [Petitioner] had put him under '[direct] pressure' to continue delivering 'high caliber ammunition to Gerdec.'" App. 69-70.

13. Back in the United States, federal agents shut down AEY and charged the "dudes" with fraud. App. 7. Diveroli, Packouz and Podrizki were all convicted. *Id*.

14. The Book contributes to the public debate by presenting an overview of the facts and offering its verdict on the U.S. government's handling of the War on Terror. Per the Book, the U.S. government "used a string of brokers like [the 'dudes'] to insulate it[self] from the dirty work of arms dealing in the Balkans – the kick-backs and bribes and double dealing." RA 7. By "turn[ing] a blind eye to rampant fraud," the "government of the United States had turned itself into the biggest gunrunning organization on the planet." *Id*.

B. Procedural Background.

1. On June 8, 2017, Petitioner filed a complaint in the Southern District of Florida alleging that the Book defamed him by reporting that he engaged in corrupt arms dealing as part of a government-linked cabal. App. 275-363.[2]

2. On December 21, 2018, the District Court granted Respondents' motion for summary judgment because Petitioner "is a limited public figure" who could not establish actual malice based on the factual record. App. 38-73. Petitioner appealed to the Court of Appeals for the Eleventh Circuit.

3. On September 2, 2020, the panel unanimously affirmed summary judgment in favor of Respondents in an opinion by Judge O'Scannlain, sitting by designation. *Id*. at 1-37.

4. The Court of Appeals held that Petitioner was a limited purpose public figure based on a series of unrebutted facts. App. 12-15. *See also McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) (describing "classification as a limited purpose public figure" to be a "factbound question").

5. The Court of Appeals determined that there was an existing controversy around "a corrupt scheme to defraud the United States in conjunction with certain Albanian government officials" and that Petitioner

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[2] Respondents assumed the falsity of these statements for the purposes of their summary judgment motion only and never conceded that they were false. App. 206, 209-11.

"place[d] himself in the public eye regarding the Albanian arms-dealing scandal." App. 12-13.

6. Noting that Petitioner's "purported role in that scheme was covered by news media in both Albania and the United States," the Court of Appeals held that "if the many press reports about his involvement in that affair are true, then there can be no doubt he entered into the matter voluntarily" as a public figure. *Id*. at 12-13.

7. But even assuming Petitioner had not participated in corrupt arms dealing, he would still be a public figure based on evidence that he "forced himself into the *public debate* over his supposed involvement." *Id.* at 13. Petitioner contacted "media representatives" and asked them to present the "truth of the accusations against me" – *i.e.*, a version of the story favorable to Petitioner. *Id*. at 13. Petitioner also met with Trebicka "in an effort to convince him that he was not involved in the AEY matter – and that shortly thereafter Trebicka produced a statement 'to the media' retracting his allegations." *Id.* (citing *Turner v. Wells*, 879 F.3d 1254, 1272 (11th Cir. 2018)).

8. The Court of Appeals made an ancillary holding that Petitioner would be a public figure even assuming *arguendo* that he "never voluntarily sought public attention." App. 14. As explained, "the 'purpose served by [actual malice] would often be frustrated if the subject of publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow.'" App. 14 (quoting *Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978)). Here,

"[t]he purposes underlying the public figure doctrine apply unequivocally" because Petitioner:

> was widely known to the public, he had been publicly linked to a number of high profile scandals of public interest, he availed himself of privileged access to the Albanian media in an effort to present his own side of the story, and he was in close proximity to those in power.

App. 15.

9. Having determined that Petitioner was a public figure, the Court of Appeals held that "Lawson's reliance on … many independent sources should defeat any claim of actual malice" and thus requires dismissal. App. 19.

REASONS FOR DENYING THE PETITION

In an effort to salvage his claims, Petitioner asks this Court to "overrule the First Amendment 'actual malice' requirement imposed … on public figure defamation plaintiffs." Pet. 6. Petitioner seeks this radical result primarily based on his observation that we live in a "world of ubiquitous social media postings" that risks "tagging anyone as a 'public figure'" (*id.* 5) – even though Petitioner's public figure status never depended on his social media use. The Petition fails, however, to provide any solid grounds for the Court to reverse its longstanding commitment to the actual malice standard and the free speech principles it embodies, particularly the right to criticize political corruption.

The radical novelty of Petitioner's call to rewind the actual malice standard is at odds with the settled nature of the Court's libel jurisprudence. In *Curtis*, the Court carefully balanced First Amendment principles with the reputational interests of libel plaintiffs and held that the actual malice requirement announced in *Sullivan* must apply to public figures. In the decades that followed, the Court reaffirmed the public figure standard at least a dozen times and extended it repeatedly to new factual scenarios.[3] By asking the Court to now limit the actual malice requirement to public officials, Petitioner effectively asks the Court to reverse the entire body of First Amendment law that it incrementally built upon *Sullivan* over decades.

In light of the unambiguous and solid precedent at issue, certiorari should be denied. First, there is no circuit split or other compelling reason that justifies reversing the unbroken line of public figure decisions. Petitioner's belated proposal to apply the actual malice standard exclusively to public officials would produce inconsistent and illogical results, leading to

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[3] *See Masson v. New Yorker*, 501 U.S. 496, 508 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 659 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Philadelphia Newspaper v. Hepps,* 475 U.S. 767, 773 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979); *Wolston v. Readers Digest Ass'n*, 443 U.S. 157, 168-69 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

suppression of political speech. By contrast, applying the actual malice requirement to public officials and public figures alike is consistent with the First Amendment, *Sullivan* and the Court's commitment to protecting speech about political and social issues.

Next, *stare decisis* bars Petitioner's demand that this Court reverse *Curtis* and its progeny. All the relevant factors weigh against overruling the actual malice requirement for public figures: the Court has confirmed the correctness of that holding by reaffirming it multiple times; application of the actual malice standard to public figures is consistent with other First Amendment decisions; the standard has proven to be workable for over fifty years; and there is great reliance on the current standard, which has only increased over time due to technological developments.

Finally, this case is a poor vehicle for this Court to reconsider *Curtis*, let alone reverse it. It does not present issues that would help the Court redraw the boundaries of the public figure class, if it were inclined to do so. Indeed, Petitioner remains a public figure according to the logic of his own interpretation of *Sullivan*. He accepts the actual malice standard is properly "undergirded by a judgment that the First Amendment guaranteed the right to critique the government." Pet. 19. Yet he suggests constitutional protection should not apply to a Book criticizing the U.S. government's arming of troops in Afghanistan – including Petitioner's role in corrupt arms deals. Finally, review would be improvident even if this Court were inclined to revisit *Curtis* because Petitioner's defamation claims fail under state law.

I. There Is No Circuit Split or Compelling Reason to Grant Certiorari.

The Court should deny the Petition because Petitioner has not presented a "compelling reason" to justify certiorari. *See* Supreme Court Rule 10. The Petition identifies no circuit split over the application of the actual malice requirement to public figure libel plaintiffs. Nor does it identify any judicial decisions refusing to apply the actual malice standard as directed by this Court. The Petition does not even cite a single lower court opinion calling for this Court to overrule or reconsider the actual malice standard.

In the absence of pressure from courts below, Petitioner proposes a theory of his own devising: the actual malice standard recognized in *Sullivan* applies exclusively and strictly to public officials. He concedes that *Sullivan* was decided correctly because "the First Amendment guarantee[s] the right to critique the government," but argues that the Court took a "wrong turn" by extending the actual malice requirement to public figures. Pet. 19, 23. Petitioner suggests that the Court can correct itself, and reaffirm the true meaning of *Sullivan*, by overruling *Curtis*. In reality, Petitioner's proposal – which is not supported by any authority – requires this Court to eviscerate the protections that *Sullivan* promises to the "good-faith critic of government." *Sullivan*, 376 U.S. at 292. Petitioner's cramped reading of *Sullivan* would also undermine this Court's decisions extending *Sullivan*'s free-speech principles beyond the facts of that case, including an unbroken line of precedent holding that the actual malice requirement for public figures is necessary to protect "robust and uninhibited debate

on important political and social issues." *Mann*, 140 S. Ct. at 346. And, as a practical matter, Petitioner's proposal would make it easier to stifle critics of political corruption and commentators on significant public events. This Court should reject it.

A. No Court Has Ever Called for Petitioner's Narrow and Illogical Interpretation of *Sullivan*.

The Petition does not identify any lower court opinions asking this Court to abrogate *Sullivan* or adopt the untenable proposal Petitioner advances – which is to simultaneously reaffirm *Sullivan* and overrule *Curtis*. This argument contradicts itself. In reality, a decision from this Court limiting the actual malice requirement to public officials would defeat the purpose of *Sullivan*, undermine the rights of citizens to contribute to debates on important public issues, lead to absurd results and require this Court to overrule a large swath of First Amendment decisions.

1. The Petition subverts the central meaning of *Sullivan*. In *Sullivan*, the Court began the process of installing "the proper safeguards" that the First Amendment requires for libel cases. *Sullivan*, 376 U.S. at 265. A politician secured libel damages against the *New York Times* based on factual mistakes in an advertisement listing abuses against civil rights protestors. *Id*. at 259-65. This Court rejected that result, noting that it was based on an inadvertent error. The Court recognized that "an expression of grievance and protest on one of the major public issues of the time, would seem clearly to qualify for … constitutional protection." *Id*. at 271. Unless there was some heightened standard for libel suits, "the pall

of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id*. at 278. Thus, in the libel context, "[t]he constitutional guarantees require … a 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.'" *Id*. at 279-80.

2. Petitioner purports to accept the validity of *Sullivan*'s premise, which is that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." Pet. 4 (quoting *Sullivan*, 376 U.S. at 273). But, he argues, *Curtis* "transmuted that premise" when it extended its holding to public figures. *Id*. There is nothing in *Sullivan* to suggest that the Court intended to limit the actual malice standard to public officials. To the contrary, the text of *Sullivan* demonstrates that the Court intended the actual malice standard to expand as needed to fulfill the promise of the First Amendment. Future courts were invited to "specify [other] categories of persons who would or would not be included." *Sullivan*, 376 U.S. at 283 n.23. And, quoting a decision from the turn of the twentieth century, *Sullivan* recognized the "importance of protecting public criticism of government and its actors" (Pet. 29) which "more than counterbalance[s] the inconvenience of *private persons* whose conduct may be involved." *Sullivan,* 376 U.S. at 281 (emphasis added) (quoting *Coleman v. MacLennan,* 98 P. 281, 286 (Kan. 1908)). If the Court had intended to limit the decision to public officials, it would not have spoken of "private persons" whose

reputational rights must be balanced with the right to criticize the government. *Id.*

Within three years of deciding *Sullivan*, the Court put this issue to rest by rejecting the strict demarcation between public officials and public figures that Petitioner urges this Court to adopt. Chief Justice Warren explained why the actual malice standard needs to extend beyond public officials in order to protect the right to criticize the government or freely opine on other issues of public interest:

> Increasingly in this country, the distinctions between government and private sectors are blurred.… In many situations, policy determinations which traditionally were channeled through formal institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions.… Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'

Curtis, 388 U.S. at 163-64 (Warren, C.J., concurring). The actual malice standard should be "[e]venly applied to cases involving 'public men' – whether they

be 'public officials' or 'public figures' – [in order to] afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect." *Id.* at 164-65.

In the fifty-plus years that followed *Curtis*, the Court reaffirmed the public figure standard more than ten times – each time rejecting Petitioner's argument that the principles of *Sullivan* apply exclusively to public officials. *See* note 3 *supra*. As this Court has made clear, "there is no question that public figure libel cases are controlled by the [actual malice] standard." *Harte-Hanks Commc'ns*, 491 U.S. at 666.[4]

3. Petitioner seeks to reverse the logical extension of actual malice to public figures and replace it with an illogical double standard. Under Petitioner's regime, public officials must prove actual malice. But there would be no First Amendment protection against libel suits filed by private individuals (like Petitioner) who are nonetheless "intimately involved

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[4] In the decades since *Curtis* political power has continued to overflow from the borders of traditional government institutions. Influence peddling by non-officials has proliferated and, underscoring the key rationale for *Curtis'* extension of actual malice, private citizens and corporations have increasingly sought to control political outcomes. *See, e.g.*, Michael Scherer, *Mike Bloomberg to spend at least $100 million in Florida to benefit Joe Biden*, WASH. POST (Sept. 12, 2020), available at https://www.washingtonpost.com/politics/bloomberg-money-florida-biden/2020/09/12/af51bb50-f511-11ea-bc45-e5d48ab44b9f_story.html; Jane Mayer, *The Reclusive Hedge-Fund Tycoon Behind the Trump Presidency*, THE NEW YORKER (Mar. 17, 2017), available at https://www.newyorker.com/magazine/2017/03/27/the-reclusive-hedge-fund-tycoon-behind-the-trump-presidency.

in the resolution of important public questions." *Curtis*, 388 U.S. at 163-64. The grave risk of this proposal is apparent from the fact that Petitioner's version of the "First Amendment … right to critique the government" would not extend to the Book – which criticizes the U.S. government for entrusting multi-million dollar arms procurement contracts to unqualified "stoner dudes" and Petitioner for being part of the corrupt government-linked cabal supplying those contracts. Constitutional protections for the "prized American privilege to speak one's mind" about matters of public concern would be worthless if they did not encompass public figures like Petitioner. *Sullivan,* 376 U.S. at 269.

Consider how Petitioner's interpretation of *Sullivan* would affect the challenged statement that the corruption "went all the way up to the prime minister and his son." As the law stands, the First Amendment requires Petitioner and his father to prove actual malice in order to prevail on a libel claim based on this statement. Under Petitioner's proposal, Respondents will lose their constitutional protection against a libel claim filed by Petitioner – even though he is the one accused of engaging in political corruption. Yet the actual malice standard would continue to apply to a lawsuit challenging the very same statement if it was filed by Petitioner's father, the Albanian Prime Minister. Under this chaotic system, the First Amendment would guard against libel claims from public officials (at least in theory) but would offer no protection for critiques of non-officials, like Petitioner, who orchestrate government

corruption or otherwise have an oversize influence on the public sphere.[5]

4. A decision overruling the public figure standard would also have ramifications outside the libel context because it would imperil other free-speech precedents. As Justice Scalia wrote in an opinion cited in the Petition, "[i]t is perhaps our most important constitutional task to ensure freedom of political speech." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 503 (2007) (Scalia, J., concurring). This Court has recognized *Sullivan* as a cornerstone of the doctrines it developed to fulfil this purpose.[6] Giving *Sullivan* its narrowest possible

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[5] Recent history teaches that a rule excluding non-officials from the actual malice standard could be abused. In the run up to the 2020 election, for example, a series of lawsuits were filed by proxies for government officials seeking to restrain or punish speech critical of the government – which would evade any First Amendment protection under Petitioner's proposal. *See Trump v. Trump*, 128 N.Y.S.3d 801, 822 (Sup. Ct. Dutchess Cty. 2020) (application for prior restraint brought by President's brother against publication of critical book); *Donald Trump for President, Inc. v. Northland Television, LLC*, No.20-cv-00385-WMC, Dkt. 1-2 (W.D. Wisc. Apr. 27, 2020) (lawsuit alleging television station defamed presidential campaign committee); *Donald J. Trump for President, Inc. v. CNN Broad., Inc.*, 2020 WL 6608327, at *5-6 (N.D. Ga. Nov. 12, 2020) (defamation lawsuit against publisher of opinion article about presidential candidate).

[6] *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (striking down law banning individuals from falsely claiming military honors); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (striking down electoral "matching funds provision that inhibit robust and wide-open political debate"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (First Amendment protects the right of religious group to engage in hateful speech at military funerals); *Citizens United v. Fed.*

reading (as Petitioner suggests) would undermine the decisions that built upon *Sullivan*'s right to engage in "uninhibited, robust and wide-open" debate on "the major public issues of our time." *Sullivan*, 376 U.S. at 270-71. The Court should not upend its First Amendment jurisprudence, particularly since there is no concerted pressure from the lower courts calling for it to do so.

B. Petitioner Cites No Authority that Actually Supports His Novel Proposal.

Petitioner cites no lower court decisions calling for the actual malice standard to be reformed – let alone in the manner Petitioner suggests.

1. Instead, Petitioner tries and fails to bolster his case with originalist arguments. But there is nothing in the historical record supporting his position that *Sullivan* was correctly decided as to public officials but wrongly extended to public figures. To the contrary, commentators have long recognized that the laws "governing the right of discussion of public men are conceived in no narrow spirit." George Chase, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 346, 367 (1889). As one contemporary scholar quoted in the Petition notes, early nineteenth-century libel cases show that "judicial action imposing liability for speech is covered by constitutional free-expression provisions, regardless of whether the plaintiff himself was acting for the state." Eugene Volokh, *Tort Liability and the Original Freedom of*

Elec. Comm'n, 558 U.S. 310, 352-53 (2009) (First Amendment protects corporate expenditures on political campaigns).

Speech, Press, and Petition, 96 IOWA L. REV. 249, 254 (2010).

2.a. The other authorities Petitioner cites also do not support his argument and often contradict it. For instance, Petitioner quotes Justice White's dissent in *Gertz* to suggest that he "highlighted [a] disconnect" between *Sullivan*'s actual malice rule for public officials and subsequent extensions of that rule to public figures. Pet. 4. But this misrepresents what Justice White wrote. Justice White dissented against the majority's holding in *Gertz* that the First Amendment displaced common law rules allowing private defamation plaintiffs to recover damages without proving fault, but even in dissent Justice White unequivocally stated that he "continue[s] to subscribe to the New York Times decision and those decisions extending its protection to defamatory falsehoods about public persons." 418 U.S. at 398-99. Petitioner also ignores that Justice White joined Chief Justice Warren's concurrence extending the actual malice requirement to public figures and signed onto opinions reaffirming that extension.[7]

b. Despite repeated citation to Justice Thomas' concurrence in *McKee*, which suggests that the actual malice standard should be overruled in its entirety, Petitioner pointedly distances himself from this view.[8]

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[7] *See, e.g.*, *Curtis*, 388 U.S. at 164, 172; *Hepps*, 475 U.S. at 775.

[8] Although Justice Thomas' arguments are not at issue, Respondents disagree that the actual malice standard enjoys no historical support. Recent scholarship has shown that the founders of this nation had a broad view of press freedom consistent with First Amendment limitations on libel suits brought by public officials and figures. *See, e.g.*, Wendell Bird,

Petitioner defends the holding in *Sullivan* as a valid "judgment that the First Amendment guaranteed the right to critique the government" (Pet. 19), whereas Justice Thomas calls *Sullivan* a "policy-driven decision[] masquerading as constitutional law." *McKee*, 139 S. Ct. at 676. *Compare* Pet. 29 (citing evidence from "near the time of the First Amendment's ratification" that justifies application of an actual malice standard) *with McKee*, 139 S. Ct at 682 (arguing there "is little historical evidence" to support *Sullivan*). Justice Thomas' concurrence thus contradicts the arguments in the Petition far more than it supports them.

c. Petitioner also cites a 1993 law review article by Justice Kagan, but this too contradicts his argument. While Justice Kagan questions "whether the Court … has extended the *Sullivan* principle too far," she acknowledged that "*Sullivan* may well have relevance beyond its boundaries, because libel of government officials may share sufficiently important traits with other instances of libel to justify the extension of the actual malice rule to the latter." Elena Kagan, *A Libel Story*, 18 LAW AND SOCIAL INQUIRY 197, 205, 212 (1993). However Justice Kagan would ultimately draw the boundaries of the class of libel plaintiffs required to prove actual malice, there can be little doubt that Petitioner – the son of a prime minister suing over a Book accusing him of political corruption – falls into that category.

The Revolution in Freedoms of Press and Speech (2020); Wendell Bird, *Criminal Dissent: Prosecutions under the Alien and Seditions Acts of 1798* (2020).

C. Weakening the Actual Malice Standard Will Chill Political Debate.

Petitioner misleadingly positions himself as a protector of free speech by purporting to speak for "those who deign to vocally comment or participate in matters of public concern" (Pet. 26), but in reality this lawsuit is an effort to change libel law to make it harder to criticize powerful individuals. The actual malice standard is a tool that courts have used for decades to ensure that dissenting or critical voices are not crowded out of public debate by powerful actors like Petitioner. This established doctrine – which has been used to police the boundaries between actionable and non-actionable speech in thousands of decisions – is not broken. This Court should not intervene to fix it.

1. Granting certiorari in this case would threaten the equilibrium that has allowed lower courts to apply defamation law in a consistent and non-partisan manner, while ensuring that proper First Amendment safeguards remain in place for debate about politics and other controversial issues. One of the greatest virtues of the current libel regime is that it is nonpartisan and generally perceived as such. *See Mann*, 140 S. Ct. at 346 (Alito, J.) (underscoring importance of apolitical defamation standards where "the controversial nature" of "a political or social issue … arouses intense feelings"). The actual malice standard applies equally to liberal and conservative speakers – as shown by the many decisions in which actors on both sides of the political spectrum benefitted from the actual malice defense or overcame

it.[9] The standard thus performs the function that this Court designed it to do – *i.e.*, to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Sullivan*, 376 U.S. at 269 (citation omitted) – and Petitioner has failed to identify any valid reason for this Court to change it.

2. Petitioner asks this Court to make it easier for the politically well-connected to sue for libel, but this risks replacing the current apolitical actual malice standard with a heavily politicized new rule that favors elite operators like Petitioner. This danger is underscored by a recent (and solitary) dissenting opinion by a Court of Appeals judge, who argues that the actual malice standard should be abolished to diminish the power of the press to report misconduct. *Tah v. Global Witness Publ'g*, 991 F.3d 231 (D.C. Cir. 2021) (Silberman, J., dissenting). The majority opinion was a routine application of this Court's actual malice precedent, affirming dismissal of libel

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[9] *See, e.g.*, *Palin v. N.Y. Times Co.*, 940 F.3d 804 (2d Cir. 2019) (reversing dismissal of defamation case brought by Sarah Palin); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012) (dismissing libel claim brought by Democratic Senate candidate against the Republican State Leadership Committee); *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002) (reversing dismissal of Gennifer Flowers' defamation claims against James Carville, the Clintons and George Stephanopoulos); *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir. 1989) (dismissing lawsuit brought by Republican staffer against Democrat); *Zervos v. Trump*, 94 N.Y.S.3d 75, 88 (App. Div. 2021) (affirming denial of President Trump's motion to dismiss defamation action for lack of actual malice); *Clifford v. Trump*, 339 F. Supp. 3d 915, 928 (C.D. Cal. 2018) (dismissing Stormy Daniels' libel suit against President Trump for lack of actual malice).

claims brought by public figures accused of corruption related to the sale of state-owned resources. *Id.* But the dissent railed that the actual malice requirement was a "threat to American democracy" because it exacerbates "bias against the Republican Party." *Tah*, 991 at F.3d 251. According to Judge Silberman, the supposed "one-party control of the press and media is a threat to a viable democracy" and the *Sullivan* actual malice standard should be overruled to avoid "enhanc[ing] the press' power." *Id.* at 256-57.[10]

3. The Petition, like the *Tah* dissent, seeks to diminish protections that make it possible to critique prominent individuals. But these arguments are extreme outliers and the few lower courts asked to abolish the actual malice standard gave that idea short shrift. For example, former Alaska Governor (and Vice-Presidential candidate) Sarah Palin and former Chief Justice of Alabama's Supreme Court (and Senatorial candidate) Roy Moore commenced libel suits against critical reporters and filed motions challenging the validity of the actual malice standard – which were denied. *See Palin v. N.Y. Times Co.*, 482 F. Supp. 3d 208, 214-15 (S.D.N.Y. 2020); *Moore v. Cecil*, 2021 WL 1208870, at *1 (N.D. Ala. Mar. 31, 2021). This Court should also ignore the demands of political actors (like Petitioner) to weaken the legal protections for government critics and commentators on significant issues – which would inevitably chill public debate.

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[10] The Petition does not cite this dissent, which was issued after the Petition was filed.

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Without citing a single authority calling for the actual malice standard to be limited to public officials, Petitioner asks this Court to radically reimagine the First Amendment. But changing the law to make it harder to defend a Book criticizing political corruption would contradict "our profound national commitment to … uninhibited, robust and wide open" debate. *Sullivan*, 376 U.S. at 270. The Petition should be denied.

II. Petitioner Cannot Overcome *Stare Decisis*.

Petitioner does not even attempt to demonstrate that he can meet the standard required to overrule this Court's multiple public figure libel decisions. Even if Petitioner had tried to establish the "special justification" required to overcome *stare decisis*, he would fail because no justification exists. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

1. The only mention of *stare decisis* in the Petition is a claim that the actual malice standard is "'offensive to the First Amendment'" and can be overruled because "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." Pet. 13 (quoting *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2478 (2018)). This turns the law on its head. Petitioner is not vindicating First Amendment rights that were "wrongly denied" to him; rather, Petitioner is asking the Court to "deny" Respondents' rights to engage in political speech. If *stare decisis* truly did apply with "least force of all" to its landmark actual malice

decisions, every other First Amendment decision would be left hanging by a thread.

2. In reality, *stare decisis* applies with full force. Petitioner needs to identify "strong grounds" to justify overruling the Court's public figure libel precedents. This he cannot do because the relevant factors weigh overwhelmingly in favor of respecting *stare decisis*. Specifically, (a) this Court has confirmed the correctness of the actual malice standard by affirming it repeatedly, (b) the application of the actual malice standard to public figures is consistent with this Court's expansion of First Amendment protections more generally, (c) the public figure standard has proven to be workable, and (d) there is a great reliance interest in continued application of the actual malice safeguards for public interest news reporting, which has only increased due to factual developments since *Curtis* was decided. *See Janus*, 138 S. Ct. at 4478-89.

a. The correctness of the actual malice standard for public figure libel plaintiffs – and the soundness of the reasoning behind it – is beyond dispute because this Court has applied the doctrine more than ten times without changing or questioning it. For decades, the public figure standard has been a keystone in the durable, uniform and reliable edifice of constitutional libel doctrine. As Justice Kagan wrote in the 2000 edition of the *Encyclopedia of the American Constitution*, the Court's "libel doctrine at the turn of the century seems settled" and "this very rootedness, with its attendant virtues, makes the prospects for … significant reforms … unlikely." Elena Kagan, *Libel and the First Amendment*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1609 (2000 ed.). Justice

Kagan's prediction was prescient. In the twenty years that have passed, this Court has declined to reconsider the actual malice standard – which has cemented the "air of permanence" around the law. *Id*.[11]

b. The expansion of the actual malice standard beyond public officials is also consistent with other decisions protecting political speech and the Court's broader First Amendment jurisprudence, which has been marked by the steady expansion of free-speech rights into factual scenarios the framers of the Constitution could never have imagined. *See* note 6 *supra*.[12] It would be jarring to buck this trend by overruling a doctrine that primarily benefits the press – a class of speakers expressly singled out for protection in the text of the First Amendment. *See Mann*, 140 S. Ct. at 347-48 (Alito, J., dissenting).

c. The fact that the public figure standard in libel cases has turned out to be workable for five decades is

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[11] The Court has uniformly denied petitions seeking certiorari for the purposes of reconsidering *Sullivan*. *See, e.g.*, *Horne v. WTVR, LLC*, 139 S. Ct. 823 (2019); *Cottrell v. Smith*, 137 S. Ct. 648 (2017); *Knight v. Chi. Trib. Co.*, 558 U.S. 817 (2009); *Gray v. St. Martin's Press, Inc.*, 531 U.S. 1075 (2001).

[12] *See also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2017) (First Amendment protects rights of baker to refuse to bake a cake for a same-sex wedding); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (First Amendment guarantees rights of convicted felons to go on the Internet); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790-99 (2011) (First Amendment protects publishers of violent video games); *United States v. Stevens*, 559 U.S. 460, 469-70 (2010) (First Amendment protects videos showing animal torture).

another compelling reason to keep it. As discussed, the Petition fails to identify a single lower court decision complaining that the public figure standard cannot be applied in practice. That is because the law gives courts the tools they need to maintain the correct balance between the First Amendment and the reputational interests of individual plaintiffs.

1. The familiar guideposts established in *Gertz* provide an appropriately flexible standard that allows courts to respond to – and overcome – each of the supposed practical problems raised in the Petition.[13] Petitioner contends that the public figure standard discourages "participation in the marketplace of ideas" by turning anyone "who deign[s] to vocally comment or participate in matters of public concern" into a public figure. Pet. 26. Petitioner cites no support for this concern and the law is to the contrary – as demonstrated by a recent Second Circuit decision. In that case, the plaintiff "spoke at a … city council meeting to oppose California's sanctuary-state law" and was photographed appearing to yell at a Latinx teenager. *La Liberte v. Reid*, 966 F.3d 79, 83-84 (2d Cir. 2020). Plaintiff sued a commentator who called her racist based on the viral photograph, but the court held that plaintiff was not a public figure because "[i]mposition of the actual malice requirement on people who speak out at government meetings would

[13] In *Gertz*, this Court identified two factors to help determine public figure status. Public figures "enjoy significantly greater access to the channels of effective communication" and "have assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 344-45.

chill public participation in politics and community dialogue." *Id*. at 91-92.

Other recent decisions have struck similar balances between free-speech guarantees and reputational interests. For instance, a cave diver accused of being a pedophile by Elon Musk was held to be a private figure despite playing a prominent role in the rescue of a boys soccer team trapped in a cave in Thailand, which attracted worldwide attention. *Unsworth v. Musk*, 2019 WL 8220721, at *9 (C.D. Cal. Nov. 18, 2019). Similarly, a famous record producer was held to be a private figure in his libel suit against a star artist who claimed he had raped her because "he never injected himself into the public debate about sexual assault or abuse of artists in the entertainment industry." *Gottwald v. Sebert*, 2021 WL 1567070, at *4 (N.Y. App. Div. Apr. 22, 2021).

2. There is also no basis for Petitioner's concern that "[t]oday's world of ubiquitous social media postings risks tagging anyone as a 'public figure.'" Pet. 5. Courts do not hold libel plaintiffs to be public figures merely because they use social media. *See, e.g.*, *Alharbi v. Theblaze, Inc.*, 199 F. Supp. 3d 334, 357-58 (D. Mass. 2016) (attending sporting event posting photo "on Facebook … with a gold-plated gun" does not qualify for public figure status); *D.C. v. R.R.,* 182 Cal. App. 4th 1190, 1229 (2010) (recognizing that "millions of teenagers use [social media] to display their interests and talents" and holding that does not make them public figures). To the extent that social media is relevant at all here, it reinforces the need to maintain the actual malice standard because it underscores the power of Petitioner's "access … to

mass media of communication." *Curtis*, 388 U.S. at 164. Indeed, Petitioner's influence and ability to control the public discourse is so great that even his mundane "Facebook posts are … picked up and published by media outlets" in Albania. *Id*. at 48, 137-38.

3. Petitioner also overstates the difficulty of satisfying the actual malice standard. Pet. 5. While the hurdles to establishing actual malice are "significant given the First Amendment interests at stake," they "are by no means insurmountable." *Biro v. Condé Nast*, 807 F.3d 541, 545 (2d Cir. 2015). Petitioner's suggestion that the actual malice standard is practically impossible to overcome is belied by the many large jury awards in libel cases and numerous decisions denying summary judgment on actual malice grounds.[14]

d. The Court should also consider the enormous reliance interest journalists, commentators and publishers have in the current actual malice standard

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[14] *See, e.g.*, *Eramo v. Rolling Stone L.L.C.*, 2016 WL 6649832 (W.D. Va. Nov. 7, 2016) ($3 million jury verdict); *Liew v. Eliopoulos*, 84 N.E.3d 898 (Mass. App. Ct. 2017) (upholding $2.9 million jury verdict); *Kelley v. Sun Publ'g Co.*, 2014 WL 3513555 (S.C. Ct. Common Pleas May 8, 2014) ($650,000 jury verdict); *Armstrong v. Shirveli*, 2012 WL 4059306 (E.D. Mich. Aug. 16, 2012) ($750,000 jury verdict for "defamation with actual malice" plus $500,000 for "negligent defamation"); *Palin*, 482 F. Supp. 3d at 208 (denying summary judgment motion arguing case should be dismissed for lack of actual malice); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) (same); *Stern v. Cosby*, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) (same).

– which increased due to technological developments since *Curtis* was decided.

The constitutional actual malice requirement makes it possible for nationwide press coverage to exist in this country. One of the practical effects of *Sullivan* was to limit the ability of state governments to use libel suits to prevent national newspapers from reporting on local abuses of protestors during the civil rights movement. *See* Kagan, *A Libel Story* at 203-04. Revoking uniform protections for journalists against libel claims would unleash chaos by forcing news providers to contend with a patchwork of state laws setting different minimum requirements for libel cases. In an age of ubiquitous online publication, every news article is equally available in every state – which makes forum shopping inevitable and would put journalists at the mercy of the most punitive libel laws available, even if they were based in states that retained the actual malice standard. The result would be a resurgence of the climate of uncertainty and censorship that *Sullivan* aimed to resolve by imposing a minimum national standard for libel cases, as required by the First Amendment.

III. This Case Is a Poor Vehicle for the Court to Review the Actual Malice Standard.

Even if the public figure libel doctrine warranted reconsideration, this case hardly warrants this Court's review because (a) Petitioner misstates the record in an attempt to disguise the fact that he is a public figure under any conceivable standard and (b) state law requires dismissal.

A. Petitioner Is a Public Figure Under Any Standard.

This case is a poor vehicle to reconsider the boundaries of the class of public figures who must establish actual malice because Petitioner is a public figure under any reasonable definition of that term. Moreover, the Petition shades the facts to suggest that this case raises different issues than it actually does.

1. The Petition downplays the significance of the Book's reporting about Petitioner's involvement in serious political corruption. Petitioner suggests that his role in the Book "stems from the book's telling of how three Miami youngsters … became international arms deal[ers]" (Pet. 7) – but does not mention that he is part of this story because it was widely reported that he exploited political connections to engage in corrupt arms deals. Petitioner also ignores that his reported involvement caused the deaths of Albanian citizens in Gerdec, sparked "Political Hiroshima" headlines in the Albanian press, was debated in Albanian parliament and prompted the U.S. Ambassador to discuss the rampant allegations of corruption against him in diplomatic cables. App. 19. The "right to critique the government" Petitioner claims to recognize (Pet. 19) would be worthless if these reports of political corruption do not receive First Amendment protection.

2. Petitioner also suggests that this case demonstrates "[t]oday's world of ubiquitous social media postings risks tagging anyone as a 'public figure.'" But Petitioner is not just "anyone." He has 100% name recognition in Albania, which lends him power and influence beyond what an ordinary person

might expect, and marks him out as a public figure. Indeed, the court below left open the possibility (App. 12) that Petitioner's pervasive fame could make him a "public figure for all purposes and in all contexts." *Gertz*, 418 U.S. at 351.

Petitioner chides the District Court for considering his "Facebook posts" and relationship with "a former Miss World contestant with approximately one million social media followers." Pet. 24. Social media has little relevance to the decisions below. But to the extent that Petitioner's social media presence is relevant, it is further proof of his tremendous influence and ability to make his voice heard. *See* 29-30 *supra*. Accordingly, this is not the case framed in the Petition, where an anonymous social media user inadvertently becomes a public figure. If the Court were interested in considering such a case, this is not the vehicle to do so.

3. Finally, Petitioner mischaracterizes the rulings below as to the grounds for his public figure status, stating that "[t]he Eleventh Circuit below deemed petitioner a public figure precisely because he exercised his right to engage in spirited commentary through international media channels." Pet. 28.

In reality, the Eleventh Circuit held Petitioner to be a public figure in large part because he "forced himself into the *public debate* over his supposed involvement" in corrupt arms dealing. App. 13. Petitioner went far beyond merely responding to a request for comment. He told a group of "media representatives" – who would pay attention to him because of his pervasive fame – to publish the "truth [of] the accusations against me" and "follow this story

to the end and investigate it." App. 13. Petitioner also convinced Trebicka, the first person to publicly reveal Petitioner's involvement in a corrupt government-linked arms dealing cabal, to make a public statement recanting his story – which Trebicka did shortly before his death in a suspicious car accident linked to the Berisha family.

B. Petitioner's Claims Are Dismissible on Alternate Grounds.

This case is also a poor vehicle for review because Petitioner's defamation suit would be dismissed on state law grounds, even if this Court were to overrule the actual malice requirement for public figures.

Petitioner suggests the actual malice standard is exclusively "a creature of federal constitutional law, not state law" (Pet. 33), but his claims are barred by the state constitution of New York. If the First Amendment actual malice standard is overruled, New York law controls. *See* App. 28 n.9. While New York courts have not had occasion to declare whether the state constitution requires public figures to prove actual malice separate and apart from the current First Amendment requirements, it is highly likely that it would. As New York's highest court has made clear, "the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (internal citation omitted). Further, New York requires libel plaintiffs suing over any statement "arguably within the sphere of legitimate public concern" to establish "that the publisher acted in a grossly irresponsible

manner." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975). There is no dispute that Petitioner's involvement in corrupt arms dealing is a matter of "legitimate public concern" and, given the wealth of prior reports that Respondents relied on, Petitioner cannot establish gross irresponsibility.

New York's anti-SLAPP statute also requires dismissal of Petitioner's defamation claim. That statute was amended, with retroactive effect, in order to impose a substantive requirement on libel defendants to establish actual malice in any case challenging a statement made "in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a. *See also Palin v. N.Y. Times Co.*, 2020 WL 7711593, at *3-4 (S.D.N.Y. Dec. 29, 2020). There is no dispute that the Book relates to a matter of public interest. Nor is there any dispute that Petitioner cannot establish actual malice. Therefore, his claim will be dismissed under New York law even if this Court overrules the First Amendment actual malice requirement for public figures.

Requiring Respondents to continue this litigation when Petitioner has no chance of success would exacerbate the fear recognized in *Sullivan* that "would-be critics of official conduct may be deterred from voicing their criticism … because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan* 376 U.S. at 279. Respondents have expended significant resources defending the Book against meritless claims. This Court would create a chilling effect by requiring Respondents to spend even more only to give

Petitioner a slim chance of winning a Pyrrhic victory.[15]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[15] Another reason to deny certiorari is Petitioner's failure to raise the constitutional issues below, which deprived the Court of "a properly developed record on appeal." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Plaintiffs in other pending libel cases raised these issues in order to preserve them. *Palin*, 482 F. Supp. 3d at 214-15; *Moore*, 2021 WL 1208870, at *1. Petitioner's failure to do so requires denial of the Petition.

RESPONDENTS' APPENDIX