No. 19-14125

In the
United States Court of Appeals for the Eleventh Circuit

CORAL RIDGE MINISTRIES MEDIA, INC. D/B/A D. JAMES KENNEDY MINISTRIES,
Plaintiff-Appellant,
v.
AMAZON.COM, INC., AMAZONSMILE FOUNDATION, AND
SOUTHERN POVERTY LAW CENTER, INC.,
Defendants-Appellees.

On Appeal from the
United States District Court for
the Middle District of Alabama, Northern Division

Brief *Amicus Curiae* of Public Advocate of the United States, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, I Belong Amen Ministries, Pass the Salt Ministries, and Restoring Liberty Action Committee in Support of Plaintiff-Appellant and Reversal

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The movants *amici curiae* herein, Public Advocate of the United States, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, I Belong Amen Ministries, Pass the Salt Ministries, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3.

Public Advocate of the United States, One Nation Under God Foundation, Pass the Salt Ministries, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. I Belong Amen Ministries is a ministry and Restoring Liberty Action Committee is an educational organization, and they are not publicly traded corporations, nor do they have a parent company which is a publicly traded corporation.

The following is a complete list of trial judges, attorneys, persons, associations, firms, partnerships, or corporations that have an interest in the outcome of this matter, including subsidiaries, conglomerates, affiliates, parent

corporations, any publicly held corporation that owns 10% or more of the party's stock, or other identifiable legal entities related to a party:

1. Amazon.com, Inc., AMZN (Defendant/Appellee)
2. AmazonSmile Foundation (Defendant/Appellee)
3. Baker, David A. (United States Magistrate Judge)
4. Conservative Legal Defense and Education Fund (Movant *Amicus*)
5. Copeland Franco Screws & Gill, P.A. (Counsel for Defendant/Appellee Southern Poverty Law Center, Inc.)
6. Coral Ridge Ministries, Inc. dba D. James Kennedy Ministries (Plaintiff/Appellant)
7. Cunningham, Tim (Counsel for Defendant/Appellee AmazonSmile Foundation and Amazon.com, Inc.)
8. Davis Wright Tremaine LLP (Counsel for Defendants/Appellees Amazon.com, Inc. and AmazonSmile Foundation)
9. Doran, Ambika K. (Counsel for Defendants/Appellees Amazon.com, Inc. and AmazonSmile Foundation)
10. Doyle, Stephen Michael (United States Magistrate Judge)
11. Gibbs, David C., III (Counsel for Plaintiff/Appellant)

12. Hall, Charles E., Jr. (Counsel for Plaintiff/Appellant)

13. Holliday, Shannon L. (Counsel for Defendant/Appellee Southern Poverty Law Center, Inc.)

14. I Belong Amen Ministries (Movant *Amicus*)

15. Johnson, Bruce E.H. (Counsel for Defendants/Appellees Amazon.com, Inc. and AmazonSmile Foundation)

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18. Maxymuk, Benjamin W. (Counsel for Defendant/Appellee Southern Poverty Law Center, Inc.)

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21. Morgan, Jeremiah L. (Counsel for Movants *Amici* Public Advocate of the United States, *et al*.)

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24. One Nation Under God Foundation (Movant *Amicus*)

25. Pass the Salt Ministries (Movant *Amicus*)

26. Pate, R. Ashby (Counsel for Defendants/Appellees Amazon.com, Inc. and AmazonSmile Foundation)

27. Prater, Harlan I., IV (Counsel for Defendants/Appellees Amazon.com, Inc. and AmazonSmile Foundation)

28. Public Advocate of the United States (Movant *Amicus*)

29. Restoring Liberty Action Committee (Movant *Amicus*)

30. Segall, Robert D. (Counsel for Defendant/Appellee Southern Poverty Law Center)

31. The National Center for Life and Liberty, Inc. (Counsel for Plaintiff/Appellant)

32. The Southern Poverty Law Center, Inc. (Defendant/Appellee)

33. Thompson, Myron H. (United States District Judge)

34. Titus, Herbert W. (Counsel for Movants *Amici* Public Advocate of the United States, *et al*.)

35. William J. Olson, P.C. (Counsel for Movants *Amici* Public Advocate of the United States, *et al*.)

s/William J. Olson
William J. Olson

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SUMMARY OF ARGUMENT

Despite plaintiff having filed a well-pleaded complaint, specifically alleging that defendant SPLC either knew or recklessly disregarded the fact that plaintiff CRM is not a "hate group," the district court below erroneously granted SPLC's 12(b)(6) motion on the sole ground that there is no commonly understood meaning of the term. In so ruling, the court deprived CRM of any opportunity to discover whether SPLC knowingly used that term falsely or with reckless disregard of its truth or falsity. The long record of behavior by the SPLC endangering others, discussed in Section II, supports plaintiff's effort to proceed to discovery. The district court also erred by its ruling that CRM's only "hope for a remedy lies in the 'marketplace of ideas,'" not a defamation action. Current Supreme Court precedents governing defamation actions erroneously give constitutional protection to defamation that the First Amendment was never designed to protect, but even under those precedents, this case should proceed. As Justice Clarence Thomas recently urged, in an appropriate case, the current doctrine should be reconsidered to ascertain whether the Court's prior decisions are "policy driven or constitutional law." To that end, *amici* have submitted Section III herein.

ARGUMENT

I. THE DISTRICT COURT WRONGFULLY DENIED PLAINTIFF ITS DAY IN COURT.

A. The District Court's Opinion Assumes the Legitimacy of SPLC's Classification of "Anti-LGBT Hate Groups."

The district court described the Southern Poverty Law Center ("SPLC") as being:

> a nonprofit organization that, among a range of activities, disseminates a "**Hate Map**" that lists groups that it designates as "hate groups," including Coral Ridge.... SPLC's Hate Map is located on its website, and defines "**hate groups**" as groups that "have beliefs or practices that malign or attack an entire class of people, typically for their **immutable characteristics**." ... SPLC has disseminated the Hate Map in fundraising efforts and in its reports, training programs, and other informational services.... SPLC designated Coral Ridge as a hate group because of its espousal of **biblical views** concerning human sexuality and marriage — that is, because of its religious beliefs on those topics. [Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 2019 U.S. Dist. LEXIS 159685 at *6-*7 (M.D. Ala. 2019) (emphasis added).]

The district court appeared to adopt SPLC's view that sexual orientation such as homosexuality is an "immutable" characteristic, thereby making SPLC's classification of "anti-LGBT" organizations as "hate groups" both rational and reasonable, and making those espousing Biblical teaching on sexuality and morality to be motivated only by hate. The Court never considered the

possiblility that Christians could oppose homosexuality out of love, seeking to persuade persons from entering that destructive lifestyle. *See Romans* 1:22-27. As just one example, the Christian ministry led by former transgender prostitute David Arthur, *amicus* I Belong Amen Ministries, illustrates the consequences that can follow adoption of the LGBT lifestyle, as well as the path out of that lifestyle. The view that sexual orientation is immutable is rejected not just by Christians, but also by many LGBT supporters who consider orientation "fluid."[1] The view that sexual orientation is not genetic (*i.e.*, there is no gay gene) has strong support. *See, e.g.,* D. Thompson, "There Is No 'Gay Gene,' Major Study Concludes," *WebMD.com* (Aug. 29, 2019). The fact that the district court never paused to consider the validity of SPLC's basic justification for its classification of plaintiff as an "anti-LGBT hate group" — based on "immutable characteristics" — undermines its opinion.

The SPLC's ability to evaluate, judge, and categorize its political opponents is not limited to anti-LGBT groups. SPLC's "hate map" displays that its "expertise" in hatred extends far beyond that, to include: Anti-Immigrant, Anti-LGBT, Anti-Muslim, Black Nationalist, Christian Identity, Hate Music,

[1] M.C. LaSala, "Sexual Orientation: Is It Unchangeable?" *Psychology Today* (May 17, 2011).

Holocaust Denial, Ku Klux Klan, Male Supremacy, Neo-Confederate, Neo-Nazi, Racist Skinhead, Radical Traditional Catholicism, and White Nationalist. SPLC then adds one more category, just in case there was anyone SPLC chose to denigrate that did not fit into an existing category — "General Hate."

The district court quoted language from the SPLC website indicating that, in classifying hate groups, SPLC was not just offering another opinion, but rather was rendering a considered judgment — a reliable organization dealing in unquestionable facts — as its website put it, SPLC is "the 'premier U.S. nonprofit organization monitoring the activities of domestic hate groups and other extremists.'" Coral Ridge at *26, n.18.

B. The District Court Establishes an Impossibly High Bar for Pleading Specificity.

According to the district court, the statement that Coral Ridge is a hate group is so debatable, loose, and varying that it cannot be proved false and, therefore, SPLC could not possibly have known the statement to have been false and thus could not recklessly disregard the truth or falsity of the accusation. *See* Coral Ridge at *21-*22.

The district court admits that it "does not go so far as to hold that a 'hate group' label can ***never*** **be provable as false**." *Id*. at *22, n.17 (emphasis

added). If not never, then context is key. Just because "hate group" does not draw its meaning from "'commonly understood' social norms" (*id.* at 21) does not mean "hate group" has no meaning. But the district court would not allow plaintiff to prove context, because the issue is a constitutional one and therefore, for the court, not for a jury to decide. Otherwise, our speech rights would be decided by a randomly picked body of ordinary Americans.

Furthermore, the district court insisted that: "[t]he bottom line is that, regardless of the commonly understood meaning of 'hate group,' Coral Ridge does not plausibly allege that SPLC's subjective state of mind was sufficiently culpable." *Id.* at *27. The district court appears to base that conclusion on its belief that SPLC had its own "sincerely held view of the meaning of 'hate group'" which meaning is not defamatory. *Id.* at 26. Surely that cannot be the standard. Applying that analysis to a hypothetical set of facts, if SPLC falsely accused a person of having a "loathsome disease" (thus presenting a classic type of defamation *per se*), that charge would not be actionable if the court believed that the SPLC harbored a "sincerely held view" that "loathsome disease" included a common cold. Stated another way, the district court assumed that

words have no meaning other than that with which they are imbued by the person uttering the challenged statement.

The district court never even required SPLC to explain itself — to contend that it had some benign definition in mind when it called Coral Ridge Ministry a "hate group." The district court did all the work for the SPLC — assuming, on defendant's behalf, that it had a benign subjective mindset — based on nothing more than theoretical arguments in a lawyer's memorandum of points and authorities. The district court defended SPLC's freedom to use defamatory words in new ways as "advocating new conceptions of terms like 'terrorist'" and asserted that failure to allow a speaker to change the meaning of the words he used "would be anathema to the First Amendment." *Id*. at *27. That would appear to be circular reasoning which, when invoked, would empower the court to bar arbitrarily any action for defamation.

Beyond introducing that curious loophole into defamation law, the district court found plaintiff had failed to allege facts demonstrating "SPLC's subjective state of mind" (*id.* at *27). In truth, Coral Ridge's allegations were quite specific. The amended Complaint alleged the false identification of a Christian ministry as a "hate group," and this designation is used by SPLC for fundraising.

Amended Complaint at ¶¶ 93-95, 74. It attributed to SPLC the statement: "[s]ometimes the press will describe us as monitoring hate groups. I want to say plainly that **our aim in life is to destroy these groups — completely destroy them**." *Id*. at ¶ 79 (emphasis added). It alleged, "[o]n information and belief, because the U.S. federal government has finally come to understand that SPLC's hate group designations are **factually inaccurate** and are merely a form of reputational terrorism, the Department of Defense and the F.B.I. recently stopped making use of SPLC's Hate Map and hate group-based training materials and services." *Id*. at ¶ 77 (emphasis added). It alleged "SPLC entertained serious doubts as to the truth of the hate group designation at the time it was published…." *Id*. at ¶ 111. It alleged "SPLC's very purpose for placing the Ministry on the Hate Map was to harm the reputation of the Ministry as to lower it in the estimation of the community and to deter third persons from associating or dealing with the Ministry." *Id*. at ¶ 95.

Exactly what else could plaintiff, as the district court put it, "plausibly allege that SPLC's subjective state of mind was sufficiently culpable," without discovery? In truth, there was no failure of pleading. The district court stopped the case before it could begin. The true nature of the SPLC was never before the

district court, which not only took the issue of actual malice away from the jury — but it also decided the case in a way that did not even require the SPLC to answer the complaint against it, or respond to discovery, or be cross-examined at a hearing. So long as district court judges dismiss defamation cases brought by public figures immediately after a complaint is filed, organizations like SPLC will continue to be emboldened to hurl accusations that not only harm the reputation of others, but also can threaten lives.

II. DEFENDANT SPLC IS AN POLITICAL ORGANIZATION THAT HAS BECOME FABULOUSLY WEALTHY BY DEMONIZING CHRISTIANS AND CONSERVATIVES, NOT JUST DAMAGING REPUTATIONS, BUT ALSO ENDANGERING LIVES.

Although, like plaintiff, these *amici* do not have emails between SPLC executives of the sort that could be obtained through discovery or hidden video footage to share, it is hoped that this *amicus* brief will attempt to provide the circuit court with a better understanding of the nature and history of the SPLC than that provided by the district court's opinion, to provide a context to SPLC's ever-growing number of "hate group" designations.

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

On August 15, 2012, Floyd Lee Corkins II, armed with 15 Chick-Fil-A sandwiches, a 9mm handgun, and a list of organizations designated by SPLC on its website as "hate groups," traveled to Washington, D.C. where he entered the headquarters of Family Research Council ("FRC") with murder on his mind, seeking to reduce the number of persons associated with SPLC-designated "hate groups."[2]

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

The President of FRC later asserted that Corkins "was responsible for the wounding of one of our colleagues and one of my friends yesterday here at the Family Research Council … I believe he was given a license by a group such as

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

the Southern Poverty Law Center, who … labeled us a hate group because we defend the family and we stand for traditional, orthodox Christianity."[3]

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

Corkins later was conferred with the distinction of being the first person convicted under the domestic terrorism statute enacted in the District of Columbia. Corkins obtained his "hit list" from the "hate list" on the SPLC

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

website, locating "hate groups" physically proximate to each other using the SPLC "hate map," but its website is still operating. Because the present case was dismissed, there is no way to know whether SPLC even paused to rethink what it was doing in publishing its lists and maps, and the consequences of declaring others to be associated with "hate groups," even after the SPLC website had facilitated the violent plan of this convicted domestic terrorist.

B. SPLC Put *Amicus* Public Advocate's President in Danger of what a Federal District Judge in Colorado Termed "politically-motivated harassment, or even violence."

Well before the U.S. Supreme Court's decision in Obergefell v. Hodges, 135 S.Ct. 2584 (2015), Public Advocate was an active supporter of traditional, Biblical marriage, and an active opponent of so-called "same-sex marriage." As part of its efforts, in 2012, Public Advocate sent approximately 7,000 mailers as part of its opposition to same-sex marriage in Colorado. On behalf of a photographer and persons in a photograph in the mailer, the Deputy Legal Director of SPLC filed a copyright infringement suit against Public Advocate and other parties based on the use of a particular photograph in Public Advocate's mailer.

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

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

> Prior to filing this motion, plaintiffs' counsel had reason to know that the publication of Public Advocate President's home address could expose his family to great personal danger. The Southern Poverty Law Center (SPLC) targets organizations that disagree with its political views and labels them as "Hate Groups" on its web site. **Ironically for an organization that says it opposes hatred, SPLC specifically incites others to hate those who have the temerity to disagree with it….** SPLC lumps in organizations like Public Advocate — whose only act of "hatred" was to disagree with SPLC's political views — with actual hate groups, in a cynical effort to discredit Public Advocate and others by associating them with actual hate groups. [*Id*. at ¶ 8 (emphasis added).]

The district court agreed that SPLC had put its political adversary in danger, finding that there was a "risk that public disclosure of these home addresses could subject … Defendant's President to politically-motivated

harassment, or even violence…." and ordered the address be struck. Hill v. Public Advocate, 12-cv-2550, Order at 2 (D. Colo. Dec. 14, 2012).

C. *Amicus* One Nation Under God Foundation Has Not Yet Been Targeted by SPLC as an "Anti-LGBT Hate Group."

Amicus One Nation Under God Foundation ("ONUG") was founded in 2002 and is exempt from federal income taxation under IRC section 501(c)(3). It works closely with similar organizations like the Illinois Family Institute, which the SPLC has designated as an "anti-LGBT hate group." Thus far, to its knowledge, it has not yet been listed by the SPLC as an "anti-LGBT hate group," but could be so designated at any time — not because it has ever acted based on hatred, but solely because it is a Christian organization, strongly pro-life, which supports traditional marriage and opposes same-sex marriage. Certainly joining this *amicus* brief could trigger the SPLC to list ONUG, at least if this Court continues to allow SPLC to defame without consequence those Christian and conservative organizations that do not embrace SPLC's pro-LGBT agenda.

D. SPLC Has Done Untold Damage to Many Other Christian and Conservative Organizations as Well.

The shooting at the Family Research Council by Corkins was not an isolated event. The SPLC hate group designation has provoked others to violence as well. It has been reported that the man who shot conservative Congressman Steve Scalise at the Congressional baseball practice in Arlington, Virginia, on June 14, 2017, was connected to SPLC on social media.[4] If one shooting is an incident and two shootings is a pattern, must conservative and Christian organizations demonized by SPLC just wait for the next shooting, where the next innocent victim may be mortally wounded?

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

> When embracing traditional Christian values is equated to hatred, we are approaching the stage where **wrong is called right and right is**

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

> **called wrong**. It is important for us to once again advocate true tolerance. That means being respectful of those with whom we disagree and allowing people to live according to their values **without harassment**. It is nothing but **projectionism when some groups label those who disagree with them as haters**.[5]

A lengthy study in the publication Current Affairs exposed how the SPLC made decisions based on dubious information, calling the hate map an "outright fraud." Author Nathan J. Robinson explained:

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

E. SPLC Ignores Violent Groups of the Left.

Anyone who may have the false impression that SPLC is focused on hate would need to explain why true purveyors of crime and violence in America, such as left-wing antifa, have never been listed by the SPLC as a hate group. SPLC addresses this issue on its website in answering two Frequently Asked Questions:

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

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

> Why doesn't the SPLC list antifa as a hate group?
>
> The SPLC condemns violence in all its forms, including the violent acts of far-left street movements like antifa (short for anti-fascist). But **the propensity for violence**, though present in many hate groups, **is not among the criteria for listing**. Also, antifa groups do not promote hatred based on race, religion, ethnicity, sexual orientation or gender identity….
>
> Does the SPLC list any far-left hate groups?
>
> Our goal is to identify all U.S.-based groups that meet our definition of a hate group regardless of whether one would think of the group as being on the left or the right…. But, as a general matter, **prejudice** on the basis of factors such as race **is more prevalent on the far right than it is on the far left**.
>
> This does not mean that extremism and violence on the far left are not concerns. But groups that engage in anti-fascist violence such as Antifa, for example, differ from hate groups in that they are **not typically organized around bigotry** against people based on the characteristics listed above. [Frequently Asked Questions About Hate Groups, SPLC website (accessed Feb. 5, 2020) (emphasis added).]

SPLC turns a blind eye to left-wing antifa, even though during the Obama Administration: "As early as 2016, the Department of Homeland Security and the FBI warned state and local officials that antifa had become increasingly confrontational and were engaging in 'domestic terrorist violence.'"[7] Thus, SPLC's definition of a "hate group" stands the world on its head — groups

[7] K.B. Williams, "Antifa activists say violence is necessary," *The Hill* (Sept. 14, 2017).

which espouse violence are not hateful, but those that peacefully embrace traditional marriage are. SPLC operates in the world of the "upside-down."[8] However, the principles of defamation law need not be inverted to accommodate that organization. This Court should not follow SPLC into the abyss.

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

If it is true that an organization's tone is set at its top, then one can understand the approach of the SPLC based on the actions of two persons who have led and guided its activities (and its fundraising) for decades: Morris Dees and Richard Cohen. Morris Dees co-founded the SPLC in 1971. He "was fired from the SPLC" in March 2019 "amid reports the watchdog group has been grappling with gender and race complaints within the organization."[9] SPLC President Richard Cohen took over leadership of the organization. On March 22, it was reported that SPLC's legal director, Rhonda Brownstein, resigned.[10]

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

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

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

Associate Legal Director Meredith Horton resigned, "sending a letter with complaints regarding sexual harassment and racial discrimination."[11] Also on March 22, 2019, it was reported that Richard Cohen announced his resignation after 18 years as President after an exposé in the *New Yorker* was published.

The long-standing problems at SPLC were well documented. "A 1994 investigative report by the *Montgomery Advertiser* had alleged discriminatory treatment of black employees within the advocacy group…. Staffers at the time accused Morris Dees, the center's driving force, of being a racist and black employee[s] have felt threatened and banded together." (Internal quotation marks omitted.) A columnist in *Nonprofit Quarterly* asked a question about SPLC that went beyond Dees and Cohen: "why was the board so unaware that its house was in serious disarray?"[12]

The troubled history of the SPLC, whose endowment had reached $471 million,[13] was documented in a lengthy story in the liberal *New York Times*.

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

[12] M. Levine, "SPLC in Turmoil: As Problems Festered, Where Was the Board?" *Nonprofit Quarterly* (Mar. 25, 2019).

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

That article stated: "the center has come under scrutiny from conservative groups who have accused the organization of maligning them for political differences." At the same time, "leadership seemed to show little interest in engaging with, or even acknowledging, the organization's own internal biases…."[14]

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

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

- "The annual hate-group list, which in 2018 included **a thousand and twenty organizations**, both small and large…."

- "The new money pushed the center's endowment past **four hundred and fifty million dollars**…. But none of that has slackened its constant drive for more money."

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

- "Were we complicit, by taking our paychecks and staying silent, in **ripping off donors** on behalf of an organization that never lived up to the values it espoused?"

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

III. THE U.S. SUPREME COURT HAS ERRONEOUSLY IMPOSED THE FIRST AMENDMENT'S FREEDOM OF SPEECH GUARANTEE UPON ALABAMA'S COMMON LAW OF DEFAMATION.

SPLC's labeling of Plaintiff's ministry as a "hate group" may constitute "speech" — even "free speech" or be subsumed under the atextual term "freedom of expression" — but such phraseology does not by any means trigger the protections of "the freedom of speech," which may not be abridged under the First Amendment. While this principle of constitutional law may seem strange today, in 1942, a unanimous[15] Supreme Court emphatically affirmed that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

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[15] The Court was composed of justices from across the "liberal/conservative" spectrum, with Chief Justice Harlan Fiske Stone presiding, and Associate Justices Owen Roberts, Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, James Byrne, Robert Jackson, and Frank Murphy sitting. Justice Murphy wrote the opinion. Two years later, Justice Murphy wrote one of two dissenting opinions in Korematsu v. United States, 323 U.S. 214 (1944).

problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). Among Justice Murphy's list of five enumerated classes, two stand out — the obscene and the libelous. The Court proclaimed that neither is an "essential part of any exposition of ideas," but rather they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

Fifteen years later, the Supreme Court reiterated its view that "obscenity, [like libel] was outside the protection intended for speech and press," but then asserted a new predicate: that it was for the Court to define "obscenity." *See* Roth v. United States, 354 U.S. 476, 483 (1957). Prior to Roth, however, it was assumed that obscenity, a common law offense, was governed by state law, not by federal law. *See* Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (1815).[16] Before Roth, definitions of what constituted obscenity varied, the most widely of which was the Hicklin test, allowing a finding of obscenity based upon the effect of "isolated passages on the most susceptible readers or viewers." *See* Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930); Commonwealth

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

v. DeLacey, 271 Mass. 327, 171 N.E. 455 (1930). Rejecting the Hicklin test, the U.S. District Court for the Southern District of New York "adopted instead a standard focusing on the effect on the average person of the dominant theme of the work as a whole." *See* United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), aff.'d, 72 F.2d 705 (2d Cir. 1934). In his Roth opinion Justice William J. Brennan leveraged this modernized test into a First Amendment rule, thereby launching the Court on a constitutional odyssey searching for a principled definition of obscenity. By 1964, the Court was in such disarray that Justice Potter Stewart gave up the quest entirely, urging his colleagues to censor only "hard-core pornography," all the while reassuring them that: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

While the Court was still entangled in the bramble bush of obscenity, that same year — 1964 — the Supreme Court decided New York Times v. Sullivan, 376 U.S. 254 (1964). This time, Justice Brennan took his colleagues into the thornbush of Alabama libel law as applied to a government official in his official capacity, emphasizing three points: (a) that the plaintiff must establish that the published words damaged his individual reputation, imputing misconduct in his

office (libelous *per se*); and, if so, (b) then it was incumbent upon the maligned government official to prove that the charges leveled against him were untrue; and (c) if the defendant could not persuade the jury that his publication was true in all of its particulars, then general damages would be presumed. *Id.* at 267.

At the outset of his discussion of the merits of the New York Times' First Amendment claim, Justice Brennan acknowledged that the Alabama courts had relied "on statements of this Court to the effect that the Constitution does not protect libelous publications." *Id.* at 268. "Those statements do not," Justice Brennan continued, "foreclose our inquiry here." *Id.* Instead of conducting a careful inquiry, Justice Brennan offered only a very brief survey of case precedents concerning libels of public officials before concluding that "we are compelled by neither precedent nor policy to give any more weight to the **epithet** 'libel' than we have to other 'mere labels' of state law." *Id.* at 269 (emphasis added). "Libel" — a mere "epithet"!?[17] According to Blackstone, libel was not a mere label, but a well-established common law cause of action with specified elements, including burdens of proof as to the truth or falsity of the defamatory statements at issue:

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

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

Undeterred by this English common law pedigree and her American counterpart,[18] Justice Brennan asserted that "libel can claim no talismanic immunity from constitutional limitations[,] [but] "must be measured by standards that satisfy the First Amendment." New York Times at 269.

And what were those standards and where might they be found? Justice Brennan began:

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

The quoted citation was to none other than Roth v. United States, decided just seven years before in a case that revolutionized the law of obscenity, now put to

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

use by the Court to justify a brand new federal rule in libel cases, one that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times at 279-80. As Justice Clarence Thomas has observed, "*New York Times* was 'the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.'" McKee v. Cosby, 139 S. Ct. 675, 677 (2019) (Thomas, J. concurring in denial of certiorari). Justice Thomas forthrightly proclaimed that: "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." McKee at 676. Thus, Justice Thomas urged that it was time to "apply[] the First Amendment as it was understood by the people who ratified it," not as the Court had "fashioned its own '"federal rule[s]"' by balancing the 'competing values at stake in defamation suits.'" *Id.* Along these lines, these *amici* submit the following analysis of the pertinent section of the First Amendment that there "shall [be] no law … abridging **the** freedom of speech…."

In James Madison's initial draft submitted to the First Congress, the speech guarantee stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments…." *See* Sources of Our Liberties at 422 (R. Perry and J. Cooper, eds., ABA Found: 1978). Therefore, Madison's open-ended "right to speak, to write, or to publish" was reduced in Committee to read simply — "the freedom of speech." According to *Webster's 1828 Dictionary*, the word "the" was commonly used "before nouns … to limit their signification to a specific thing or things." The manifest purpose of the change in Madison's broad-based first draft, then, was designed to limit its reach, not to enlarge it. Furthermore, by using the definite article, the framers indicated that they had something definite and certain in mind, thereby indicating that the free speech guarantee was a pre-existing right that was discoverable from antecedent texts and from history.

Like so many of our constitutional rights, "the freedom of speech" is traceable to England. *See* United States v. Johnson, 383 U.S. 169, 177-78 (1966). Section 9 of the 1689 English Bill of Rights secured "the freedom of speech, and debates or proceedings in parliament [and] ought not to be impeached or questioned in any court or place out of parliament." Sources at

247. The adoption of the English Bill of Rights secured to the English people's elected representatives in Parliament assembled protection against the king's misuse of power through tyrannical laws prohibiting "stirring up sedition" and seditious libel for impugning the reputation of the king. Sources at 228 and 235. This same protection was afforded the American people's representatives by Article II, Section 6 of the U.S. Constitution, which provides jurisdictional immunity for both Senators and Representatives in Congress "for any Speech or Debate in either House."

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

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

But, both in England and in America, prosecutions for seditious libel were hotly contested. Sources at 307-08. In America, things came to a head with the enactment of the Sedition Act of 1798 which prohibited, in part, "false,

scandalous, and malicious writings against the government … with intent to defame or to bring them [into] contempt or disrepute…." *See* G. Stone, Constitutional Law at 1015 (2d edt: Little, Brown: 1991). The statute was a classic example of a seditious libel law, and it prevailed in courts, only to fail politically with the election of President Thomas Jefferson who, in 1801, pardoned everyone who had been convicted and fined.

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

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

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

to English parliamentarians, was now vested in the People by the First Amendment.

In contrast to this historic, textual approach, Justice Brennan used Holmes' views to launch an attack on common law defamation. Relying on his Roth obscenity opinion that the freedom of speech was anchored "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (Roth at 484; New York Times at 269), Justice Brennan forged a contemporary marketplace of ideas based on practical realities as he saw them — not enduring principles. By reinterpreting the First Amendment through his prism of pragmatism, Justice Brennan then took the liberty to fashion his own view of that phrase, unhindered by historical precedent or by the constitutional text. In doing so, Justice Brennan erased the original historical and textual distinction between seditious libel and libel, the one addressing the impermissible protection of the government's reputation and the other designed to protect the good reputations of individual persons. *See* McKee at 679-82.

The Supreme Court's effort to ignore the historic meaning of "the freedom of speech," begun by Justice Brennan, has led us to where we are today. Defamation, particularly against public figures, is given such strong protection

that lower courts routinely do what the district court below did — dismiss a complaint for failing to meet an unachievable standard of specificity of allegation. The decision below should be reversed, and ultimately the Supreme Court's defamation jurisprudence should be reconsidered and reformed.

CONCLUSION

These *amici* urge this Court to reverse the district court's dismissal of plaintiff's Count I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Plaintiff-Appellant, was made, this 6th day of February 2020, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Plaintiff-Appellant and Reversal complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 6,469 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 16.0.0.428 in 14-point CG Times.

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