No. 20-1537

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES W. McGLOTHLIN ,
Plaintiff-Appellant

v.

KEVIN N. HENNELLY,
Defendant-Appellee.

On Appeal from the
United States District Court for the District of South Carolina at Beaufort
No. 9:18-cv-00246-DCN

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1537 Caption: McGlothlin v. Hennelly

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reporters Committee for Freedom of the Press; ALM Media, LLC; Courthouse News Service; First Look Media Works, Inc.; The International Documentary Association; The Media Institute; The Foundation for National Progress, dba Mother Jones;

(name of party/amicus)

National Press Photographers Association; The News Leaders Association; Radio Television Digital News Association; Society of Environmental Journalists; Society of Professional Journalists; and The South Carolina Press Association

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: August 26, 2020

Counsel for: Amici Curiae

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No. 20-1537 Caption: McGlothlin v. Hennelly

Pursuant to FRAP 26.1 and Local Rule 26.1,

The E.W. Scripps Company
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

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Signature: /s/ Bruce D. Brown Date: August 26, 2020

Counsel for: Amici Curiae

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No. 20-1537 Caption: McGlothlin v. Hennelly

Pursuant to FRAP 26.1 and Local Rule 26.1,

POLITICO LLC; The Tully Center for Free Speech
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

POLITICO LLC's parent corporation is Capitol News Company.
The Tully Center for Free Speech is a subsidiary of Syracuse University.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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Signature: /s/ Bruce D. Brown Date: August 26, 2020

Counsel for: Amici Curiae

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Amici are the Reporters Committee for Freedom of the Press, ALM Media, LLC, Courthouse News Service, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., The Media Institute, Mother Jones, National Press Photographers Association, The News Leaders Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, South Carolina Press Association, and Tully Center for Free Speech.

Amici are news organizations and organizations that advocate on behalf of journalists and the press. Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The lower court misapplied the public figure standard in a manner that will allow powerful figures to silence vital journalism and undermine the press's ability

to report on business projects like the proposed rezoning of Hilton Head National Golf Course ("Hilton Head National"). While the lower court's judgement in favor of Defendant-Appellee Kevin Hennelly was ultimately the right result, amici write to offer alternative grounds to affirm that judgment. This Court should affirm on the basis that Plaintiff-Appellant James W. McGlothlin is a public figure who has not established actual malice, as required by the First Amendment. The district court's holding McGlothlin is a private figure who is not required to prove actual malice will have deleterious effects on reporting in the public interest, is contrary to First Amendment precedent, policy, and history, and should be reversed.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Trial courts must take the wealth, power, and influence of defamation plaintiffs into account in determining whether they are public figures subject to the First Amendment's actual malice standard. Contrary to long-recognized principles, that did not happen in this case. While amici agree with the district court's ultimate judgment, which found no defamation liability, this Court's de novo review of the public figure status of McGlothlin provides an opportunity to reverse the district court's legal error and affirm its judgment on the alternative grounds that McGlothlin is a public figure.

In *New York Times Co. v. Sullivan*, the Supreme Court held that under the First Amendment, public officials cannot recover damages for defamatory falsehoods relating to official conduct unless they demonstrate actual malice, *i.e.*, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Three years later, in *Curtis Publishing Co. v. Butts*, a majority of the Court joined a portion of a concurrence authored by then-Chief Justice Warren, which reasoned that the actual malice standard applies to "public figures" as well. 388 U.S. 130, 162 (1967) (Warren, C.J., concurring) (stating that "differentiation between 'public figures' and 'public officials' and adoption of

separate standards of proof for each have no basis in law, logic, or First Amendment policy").

Both *Sullivan* and the Warren concurrence in *Butts* recognized that a central purpose of the First Amendment is to protect criticism of powerful individuals; the *Butts* concurrence, specifically, was grounded in an understanding that a the First Amendment's guarantees must cover the "rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds." *See Butts*, 388 U.S. 130, 163 (Warren, C.J., concurring). *Butts* clarified the "normative focus for extending the constitutional privilege in public figure libel cases," wrote one commentator a quarter-century after the decision. Lee Levine, *Implied Label, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 Iowa L. Rev. 237, 325 n.81 (1993) "The Chief Justice recognized that distinctions between the public and private sector had become blurred in modern society; extension of the *New York Times* privilege, even for false and defamatory speech harmful to the reputation of public figures would 'afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.'. . . To the extent that a state's common law interferes with [the democratic values of the First Amendment], it must give way." *Id.* Under this

Supreme Court precedent, the district court erred in holding that McGlothlin is not a general-purpose public figure subject to the actual malice standard.

The district court made a second error in finding that McGlothlin is not a limited-purpose public figure for purposes of the controversy surrounding the rezoning of Hilton Head National. The district court relied on a dearth of public statements made by McGlothlin regarding the rezoning. However, under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the law of this Circuit, the appropriate inquiry to determine whether a plaintiff is a limited-purpose public figure is whether that plaintiff, by virtue of his influence or attempted influence over a matter of public concern, volunteered himself as a subject of debate. Even if this Court concludes that McGlothlin is not a general-purpose public figure, it should repudiate the district court's unsupported view on the limited-purpose public figure question that public silence by a powerful person or about his or her conduct is a reason to deny critics of that person the constitutional protections afforded by the actual malice standard.

Lastly, the district court's decision to label McGlothlin a private figure contravenes public policy. The actual malice standard recognized by the Supreme Court in *Sullivan* "was fashioned to assure the [First Amendment's guarantee of] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," even when those ideas are "vehement, caustic, and

sometimes unpleasantly sharp." *Sullivan*, 376 U.S. at 270 (internal quotation marks omitted). This principle stood in contrast to the English common law tradition of libel law as a tool of social control intended to protect the church, the crown, and the wealthy landed gentry. *Butts*, 388 U.S. at 151.

The distinction between these diverging visions of free expression should not be lost on this Court. Before the constitutionalization of American libel law, the English common law tradition permitted powerful interests—both governmental and in the private sector—to shut down essential avenues of public debate. In the 1830s, for example, wealthy slaveowners attempted to stop abolitionists from distributing and printing their literature by claiming in the legislature and in the courts that the writings were insurrectionist and a danger to public safety. And during the civil rights era, Southern powerbrokers brought a series of suits, including the *Sullivan* case itself, that were designed to suppress criticism of Jim Crow laws. In light of this history, this Court should protect the flow of information to the public by correcting the district court's errors and holding that McGlothlin is a public figure whose libel suit fails because he cannot meet the daunting standard of actual malice.

ARGUMENT

I. The district court erred in its general-purpose public figure analysis by failing to consider the extent to which the First Amendment protects criticism of individuals like McGlothlin exercising power through wealth in the private sector.

In the district court's analysis, McGlothlin lacked the "level of notoriety" necessary to establish him as a general-purpose public figure in the community in which he conducted business, especially as compared to "a well-known athlete or entertainer," of indeterminate wealth. *McGlothlin v. Hennelly*, No. 9:18-CV-00246-DCN, 2020 WL 1876275, at *5–6 (D.S.C. Apr. 15, 2020) (hereinafter "District Court Order") (citing *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987)).[1] This ruling fails to account for the fact that the Supreme Court extended First Amendment protections for criticism of public officials to all types of public figures (not just athletes and entertainers) with the express goal of shielding journalism about powerful people in the business community just like McGlothlin. *Butts*, 388 U.S. 130 (1967) (Warren, C.J., concurring). Indeed, the Court's holdings in *Sullivan* and *Butts* require trial courts to recognize that criticism of those who wield clout and influence, whether in government or in the private sector, is constitutionally protected as long as it is not made with actual malice.

[1] This Court's review of the public figure determination is a question of law that is conducted de novo. *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001).

The Court in *Sullivan* recognized that the First Amendment protected criticism of power in all forms. The case set forth the actual malice standard, which "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 . . . knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279–80. In a majority opinion for the Court, Justice Brennan wrote that a controversy over the Sedition Act 1798 began to "crystalize[] a national awareness of the central meaning of the First Amendment," part of which was "the people's distrust of concentrated power, *and of power itself at all levels*." *Sullivan*, 376 U.S. at 274 (emphasis added). Though the holding of *Sullivan* was limited to public officials, the Court would soon explicitly acknowledge that power is wielded outside of government as well.

Specifically, in a concurrence in *Curtis Publishing Co. v. Butts* that was joined by a majority of the Court, and adopted by the Court in *Gertz*, 418 U.S at 336, then-Chief Justice Warren extended the actual malice standard from *Sullivan* to non-governmental public figures. Chief Justice Warren's concurrence made clear that "uninhibited debate" about powerful individuals in the private sector—whether in academia, the non-profit sphere, the business world (as with McGlothlin), or elsewhere—"is as crucial as it is in the case of 'public officials.'" *Butts*, 388 U.S. at 163 (Warren, C.J., concurring). Chief Justice Warren noted that

"the distinctions between governmental and private sectors are blurred," especially due to the "rapid fusion of economic and political power . . . and a high degree of interaction between the intellectual, governmental, and business worlds" that took place over in America following the depression and World War II. *Id.* Indeed, an array of non-government entities and individuals—including businesspeople—had concentrated power:

> While these trends and events have occasioned a consolidation of governmental power, *power has also become much more organized in what we have commonly considered to be the private sector*. In many situations, policy determinations which traditionally were channeled through formal political 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 or, by reason of their fame, shape events in areas of concern to society at large.

Id. at 163–64 (emphasis added). The upshot of these societal developments, for a majority of the Court, was that "public figures"—those powerful individuals in the private sector who "play an influential role in ordering society"—could both influence public affairs and access the channels of communication as effectively as governmental officials. *Id.* at 164. As Chief Justice Warren concluded:

> 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.' The fact that they are not amenable to the restraints of the political process only underscores

> the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Butts, 388 U.S. at 163–64 (1967) (Warren, C.J., concurring).

The district court mistakenly relied on *Tavoulareas v. Piro*, 817 F.2d at 772, to support its determination that McGlothlin is not a general purpose public figure. It characterized *Tavoulareas* as "finding the plaintiff," the president and CEO of Mobil Oil, then the nation's third-largest corporation, "to be a 'highly prominent individual, especially in business circles, but his celebrity in society at large does not approach that of a well-known athlete or entertainer—apparently the archetypes of the general-purpose public figure.'" District Court Order at *5–6 (citing *Tavoulareas*, 817 F.2d at 772). But contrary to this dicta in *Tavoulareas*, there is no reading of Chief Justice Warren's careful and enduring explanation in *Butts* that extends the actual malice standard to a libel plaintiff who is a "well-known athlete or entertainer," but not to one who is an influential and wealthy businessperson.[2] The district court's determination that McGlothlin was not a general-purpose public figure should be rejected by this Court.

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[2] Beyond his power and influence, McGlothlin was certainly "well-known," as he was described precisely that way in a *Washington Post* article incorporated in his complaint. J.A. 40. Similarly, though he was not quoted in either *Island Packet* article, both made named reference to McGlothlin as the person behind the rezoning project. *See* J.A. 23; J.A. 613g.

II. A businessperson who influences a public controversy behind the scenes is no less a limited-purpose public figure for that controversy than one who partakes in public debate.

Even if the Court concludes that McGlothlin is not a general-purpose public figure, it should reverse the district court's determination that the actual malice standard does not apply in this case because McGlothlin is a limited-purpose public figure for purposes of the rezoning of Hilton Head National.[3] As this Court

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[3] The allegedly defamatory statements in this case are a pair of comments that Hennelly posted online in response to coverage by The Island Packet (Hilton Head's local newspaper) of the rezoning application. The first, posted on May 14, 2017, as a comment on the Island Packet's website, stated:

> It looks like they left out a few pertinent facts. The most glaring is the corrupt people involved. This guy Kent was Chief of Staff to the corrupt Governor of Virginia. he [sic] has never built a swing set never mind a 300m dollar city!!! James Woodrow McGlothlin gave the corrupt Governor McDonald [sic] of Virginia [sic] wife a "no show" job. The McDonalds [sic] never reported the income, $36,000. These guys are crony capitalists and will break every rule in the book to get a government favor or handout. Let's vote NO to zoning change and send these carpetbaggers packing. Let's tell them loud and clear our elected officials are not for sale and are above reproach. Let's support our honest elected officials and send these crooks back to Bristol[,] Virginia.

The second, posted on May 23, 2017, on Facebook, stated:

> The Island Packet gets an "incomplete" grade on their coverage of the issue. For some reason the [sic] refused to print the documented corruption of the owners of United Company. Martin Kent and James McGlothlin were up to their eyeballs in the recent scandals in Virginia with the Governor and his wife. McGlothlin gave the Governors [sic] wife a no show job at the heart of the ethical and criminal activity.

has explained, "Even though a person is not a public official or general public figure, an individual may have cast himself into the forefront of a public issue so as to become a limited public figure." *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982) (citing *Gertz*, 418 U.S. at 345. Here, the district court erred in concluding that McGlothlin's lack of public comment about the rezoning application necessarily meant he was a private figure.

The district court's determination that McGlothlin was not a limited-purpose public figure pivoted on its assumption "that behind-the-scenes involvement alone is [not] sufficient to find that a person is a limited-purpose public figure." District Court Order, 2020 WL 1876275, at *7. The record is clear that McGlothlin owned Hilton Head National through his subsidiaries. *Id.* at *7. One of those subsidiaries submitted the rezoning application—the very subject of this controversy:[4]

District Court Order, 2020 WL 1876275, at *2.

[4] Amici agree with Hennelly's argument before the district court that, in the alternative, McGlothlin would also be a limited-purpose public figure for purposes of the controversy surrounding payments made to the wife of the former Virginia Governor Bob McDonnell. *See* District Court Order, 2020 WL 1876275, at *2–3, *9. Because McGlothlin disputed that the McDonnell scandal was the appropriate controversy for the district court to use in its analysis, but conceded that the Hilton Head National rezoning controversy was appropriate, amici, like the district court, focus on the Hilton Head National rezoning.

> Here McGlothlin is United Company's sole shareholder, has been the chairman of its board since the company was formed, and serves as the company's CEO. McGlothlin Depo. 8:11–9:12. United Company is the parent company of Scratch Golf, which is the company that submitted the rezoning application for Hilton Head National.

Id. at *7. The district court also recognized that McGlothlin was directly "involved in the decision to try to rezone Hilton Head National," *id.*, and worked behind the scenes (including by placing a call to the chairman of the Beaufort County council about the rezoning, *see* J.A. 332–34, by and instructing his direct reports to speak to the local newspaper about the controversy, *see* J.A. 177–78 at 8:20–9:6) to support the rezoning. *Id* at *8.

The district court's determination that McGlothlin was a private figure was a misapplication of law. In *Fitzgerald*, 691 F.2d at 668, this Court listed the five factors to consider in determining whether a defamation plaintiff is a limited-purpose public figure:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy;[5] (3) the plaintiff sought to influence the

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[5] McGlothlin has conceded that the rezoning of Hilton Head National "more than likely constitutes a public controversy." Plaintiff-Appellant Br. at 11 n.2. Though McGlothlin attempts to "reserve[] the right to argue to the contrary, if necessary," he has waived that argument both by not contesting it before the district court and by failing to develop it in his opening brief. *See* District Court Order, 2020 WL 1876275, at *6 ("McGlothlin does not dispute that the issue is a public controversy for the purposes of the limited-purpose public figure test."); *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to

> resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

The second and third factors have been called "the heart" of this test and are "sometimes combined into the question of 'whether the plaintiff has voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy.'" *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001) (quoting *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 709 (4th Cir.1991) (en banc)). Notably, in either formulation, the central inquiry is what *role* the plaintiff has voluntarily assumed in the public controversy, not whether the plaintiff has made public statements.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), the Supreme Court provided a two-fold rationale for why defamation liability for public figures must be governed by actual malice. *First*, public figures "usually enjoy significantly greater access to the channels of effective communication than private individuals normally enjoy," *id.*, and thus are more able to counteract false statements made about them, if they wish.[6] That reasoning underlies the first factor of this Court's

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develop [its] argument—even if [its] brief takes a passing shot at the issue.") (internal quotation marks omitted).

[6] It appears to be uncontested that Hennelly had such access. *See* District Court Order at 11; *see also* J.A. 82–85.

five-part test.[7] *Second*, because private figures have not "accepted public office or 'assumed an influential role in ordering society,'" they are more deserving of recovery when defamed. *Id*. at 345 (quoting *Butts*, 388 U.S. at 164). This rationale underlies the second and third factors of this Court's five-part test.

The phrase "assumed an influential role in ordering society" comes from Chief Justice Warren's concurrence in *Butts*. *See id.* at 164. The "heart" of this Court's limited-person public figure test is not whether the plaintiff offers his or her *thoughts* on a public controversy in a public forum, but whether the plaintiff voluntarily attempts to influence the *outcome* of that controversy. *See Gertz*, 418 U.S. at 345 ("Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and *public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them*.") (emphasis added).[8]

The district court erred in focusing on McGlothlin's public statements about Hilton Head National to the exclusion of his power and influence over its rezoning. The district court noted, in holding that McGlothlin was a private figure, that he

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[7] Both the Supreme Court and this Court identify this inquiry as less important than the plaintiff's role in and influence over the public controversy. *See Gertz*, 418 U.S. at 344; *Carr v. Forbes, Inc.*, 259 F.3d at 280.

[8] McGlothlin is not an "involuntary public figure," who has "become a public figure through no purposeful action of his own." *See Gertz*, 418 U.S. at 345. His attempts to rezone Hilton Head National were all voluntary.

"did not attend any meetings about the rezoning in Beaufort County," that "there is no evidence in the record to suggest that he ever published any editorials or the like," and that he "reach[ed] out to a public official to garner support for the rezoning . . . only once." District Court Order, 2020 WL 1876275, at *16–17. But McGlothlin's wealth—in particular, his ownership through subsidiaries of Hilton Head National—and his work behind the scenes demonstrate his special role in and influence over the zoning controversy far more than the lack of evidence in the record "that McGlothlin was ever quoted in the media about the rezoning during the controversy or published any editorials about the issue" refutes it. *Id.* at *16.

Amici recognize that in *Time, Inc. v. Firestone*, the Supreme Court found that Mary Alice Firestone, the ex-wife of "the scion of one of America's wealthier industrial families" was not a public figure for the purposes of her libel suit against *Time* magazine. 424 U.S. 448, 454–55 (1976). However, Firestone was not conducting herself as a businesswoman nor had she attempted to wield power of any sort in the private sector. *See id.* at 453 ("Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society."). Moreover, that case has no application to the analysis of McGlothlin as a limited-purpose public figure because unlike here where McGlothlin has conceded that the Hilton Head National rezoning is a public controversy, the Court found in *Firestone* that the controversy at issue—the Firestone divorce—was a

private matter. *See id.* at 454 ("Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."). Indeed, the Supreme Court's decision in *Firestone* drives home the point that a key facet of the public figure analysis in this case is McGlothlin's power and influence in the private sector.

Reversing the district court and finding that that McGlothlin is a limited-purpose public figure would harmonize with a number of other cases in which federal appellate courts applied the actual malice standard to coverage of businesspeople exerting influence over matters of public controversy, including *Tavoulareas*, 817 F.2d at 774 ("[W]e conclude that Tavoulareas was a public figure for purposes of this publication, and that the *Post* was therefore 'entitled to act on the assumption that [he] voluntarily exposed [himself] to increased risk' of critical comment and publicity."), *Carr*, 259 F.3d at 275 (4th Cir. 2001) (finding "engineer who develops privately financed public infrastructure projects" to be a limited purpose public figure), and *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1300 (D.C. Cir. 1980) (finding former president and CEO of Greenbelt Consumer Services to be a limited purpose public figure for purposes of article stating that "Greenbelt 'has been losing money the last year and retrenching.'")

In *Carr,* this Court concluded that the plaintiff—who did not even own the business whose conduct was at the heart of the case as compared to McGlothlin's top perch at Hilton Head National—was a limited-purpose public figure because he was "a strong and influential" force upon the controversy. *Id.* at 281. While extensive news coverage of a plaintiff's involvement in a public controversy might demonstrate that a defamation plaintiff is a limited-purpose public figure, a lack of news coverage does not prove the opposite. A reclusive billionaire who manages to keep his name out of the press while simultaneously directing activity impacting communities far and wide could, incongruously, claim to be a private figure under the district court's erroneous analysis. This Court must now intervene to discard an aberrational ruling undercutting well-established constitutional rules protecting the flow of information to the public.

III. Proper application of the actual malice standard is essential to protect public criticism of powerful individuals and institutions.

At times, those with a high degree of influence over the outcome of public controversy may attempt to use that influence to avoid criticism entirely. Historically, suppressing criticism of the powerful in order to maintain the social order was an explicit purpose of the English common law. *See McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari). To the extent this objective survived for powerful private sector individuals in the American courts, it curtailed important social discourse—for example, by

suppressing the publication of abolitionist literature in South Carolina and elsewhere. *See, e.g.*, Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995). The *Sullivan* lawsuit itself, in which the Supreme Court dramatically broke with that English common law tradition, was part of a campaign of libel suits against the press in order to suppress speech critical of Jim Crow laws. *Sullivan*, 376 U.S. 254, 294–95 (1964) (Black, J., concurring). Given this history, as a matter of policy, plaintiffs such as McGlothlin should be required to prove actual malice in recognition of their ability to shape the public controversies in which they voluntarily engage.

A. At English common law, the wealthy and powerful were protected from criticism to achieve the policy goal of maintaining the social order.

At English common law, Justice Thomas recently wrote, "libels against public figures [were deemed], if anything, *more* serious and injurious than ordinary libels." *McKee v. Cosby*, 139 S. Ct. at 679 (Thomas, J., concurring in denial of certiorari) (citing 3 W. Blackstone Commentaries 124 ("Blackstone")). It is worth considering who some of these public figures were at common law, and why they received such protection, both through the ability to bring a civil libel action based on a damage to their estates, and (for public officials) through the crime of *scandalum magnatum*. Blackstone drew a distinction between a person of

prototypically high virtuousness but low wealth—a clergyman—to a member of the wealthy landed gentry:

> [I]f I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can sh[o]w some special loss by it. . . . In like manner to slander another man's title, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard) is actionable, provided any special damage accrues to the proprietor thereby; as he loses an opportunity of selling the land.

3 Blackstone 124. Of course, public officials, too, received that protection, as "derogation of a peer, a judge, or other great officer of the realm" was considered "more heinous" than that of a person without title. 3 Blackstone 123. Such derogation "would not be actionable in the case of a common person, yet when spoken in disgrace of such high and reputable characters, [it] amounts to an atrocious injury." *Id.*

In other words, libel against nobility and the wealthy was proscribed specifically to protect what was theirs by right of birth—their titles and estates. The goal of libel at English common law was maintenance of the social order; this is evident in view the fact that truth was no defense for criminal libel—"the provocation, and not the falsity, is the thing to be punished." 4 Blackstone 150–51; *see McKee v. Cosby*, 139 S. Ct. at 678 ("[T]ruth traditionally was not a defense to libel prosecutions—the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement."); *Butts*, 388 U.S. at 151 ("The history

of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. . . . [Its function] was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions"). Given the priorities exemplified by this policy, it is little surprise that powerful figures at English common law received protection from criticism by the less powerful.

B. Suppressing criticism of powerful private-sector interests in order to maintain norms is deleterious to social and political discourse.

Two chapters in American history demonstrate the risks to an informed electorate and the free dissemination of information when private wealth and power are brought to bear in libel suits against critics of the system.

The colonial courts[9] and the Framers[10] abhorred the English tradition that criticism of the crown and peerage (i.e., public officials) was more punishable than that of criticism of members of the public. Yet the protection provided at English common law to a plaintiff "who hath land by descent" (i.e. private-sector power) remained in South Carolina, and several of the other states of this Circuit, through

[9] *See Sullivan*, 376 U.S. at 274 (quoting The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721–722 (1735)).

[10] *Id.*

efforts to prevent or punish speech in the decades leading up to the Civil War criticizing the landed gentry of the antebellum south, the slave-owning class.

In that time, suppression of abolitionist speech was viewed as a necessary tool for social control. Amos Kendall, the Postmaster General for Andrew Jackson, described the penalties some Southern states exercised to prohibit the printing and circulation of abolitionist papers as a measure taken "to insure the safety of their people." *See* Curtis, *supra*, at 806–07. Kendall also advised the Postmaster of Charleston, South Carolina that Kendall "would not order the delivery" of abolitionist papers, as he understood they were "incendiary, and insurrectionary in the highest degree." Similarly, "a committee of the legislature in South Carolina demanded that officials in the free states recognize the difference 'between the freedom of discussion and the liberty to deluge a friendly and coterminous state with seditious and incendiary tracts.'" Norman L. Rosenberg, *Protecting the Best Men* 150 (1986). In this way, essential critique of a private-sector interest—slavery—was suppressed under the guise of maintaining the peace.

This policy view favoring suppression of speech was not confined to the legislative and regulatory realms—the courts also viewed libel law as a tool for social control when abolitionists attempted to challenge the slave trade. *See* Amy Reynolds, Article, *William Lloyd Garrison, Benjamin Lundy and Criminal Libel: The Abolitionists' Plea for Press Freedom*, 6 Comm. L. & Pol'y 577, 593 (2001)

("Judges and juries who heard libel cases at this time did not typically consider the 'inherent value of expression' but instead looked at 'motive and justification to determine the value of expression as *a means to achieve certain public policy goals*.'") (emphasis added).

But, beginning with *Sullivan*, the Supreme Court definitively recognized that the First Amendment does not countenance use of libel law to maintain social order by preventing criticism of the powerful. As Justice Brennan wrote:

> 'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.' . . . The structure of the government dispersed power in reflection of *the people's distrust of concentrated power, and of power itself at all levels*. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects.

376 U.S. at 272, 274 (emphasis added) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)). Rather than turning upon "the truth, popularity, or social utility of the ideas and beliefs which are offered," *id.* at 271 (internal quotation marks omitted), the actual malice safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 269.

Indeed, *Sullivan* itself was a prototypical example of an effort by powerful interests to maintain the status quo by attempting to suppress speech through the courts. That case was just one amongst a spate of libel lawsuits brought by

southern powerholders in an attempt to prevent reporting on Jim Crow laws and the civil rights movement. *See* Bryan Stevenson, *Just Mercy* 208–09 (2014) ("It was a common tactic used by Southern politicians during civil rights protests: Sue national media outlets for defamation if they provide sympathetic coverage of activists or if they characterize Southern politicians or law enforcement officers unfavorably. . . . [T]he defamation lawsuits chilled sympathetic coverage of civil rights activism."); Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 42 (1991) ("By the time the Supreme Court decided the Sullivan case, in 1964, Southern officials had brought nearly $300 million in libel actions against the press"); Rosenberg, *supra*, at 236 ("[T]he pressure of protracted litigation threatened to pressure even the largest media corporations to self-censor their coverage from the Deep South."). Although the *Sullivan* case was a lawsuit by a public official—the plaintiff was an elected city commissioner of Montgomery, Alabama—public figures sued over press coverage of society under Jim Crow laws as well, including Edwin Walker, whose Texas libel verdict totaling $800,000 against the Associated Press for its coverage of his participation in a riot against integration at the University of Missouri was overturned by the Supreme Court in an opinion delivered with *Butts*. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 142 (1967). *See also* Aimee Edmondson, *A Pulitzer from the North, A Libel Suit from the South: Reaction to Four Southern Editors' Civil Rights Coverage, 1954-1967*,

12 First Amend. L. Rev. 461, 464, 485–95 (2014) (Describing libel lawsuit brought by Imperial Wizard of the Ku Klux Klan against the Tuscaloosa News and its reporter and noting, "[d]uring the civil rights movement, any journalist who threatened the status quo in the South could become a target of a libel action.") (emphasis added).

The *Sullivan* Court was well aware of this fact. In a concurrence, Justice Black wrote:

> [S]tate libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs . . . . Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state news-papers easy prey for libel verdict seekers.

Sullivan, 376 U.S. 254, 294–95 (1964) (Black, J., concurring). Given this history, and McGlothlin's attempt to suppress criticism of the way he exerts power over public life from his base in the private sector, amici urge the Court to recognize that McGlothlin is a public figure.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment of no liability for Hennelly but reverse the district court's holding as to McGlothlin's status as a plaintiff and find him a public figure.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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