No. 21-1543

In The
Supreme Court of the United States

JANE DOE aka BEEISM,

Petitioner,

v.

JOMY STERLING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there should be a single, all-encompassing standard applied by courts when considering claims of anonymity under the First Amendment—regardless of the nature of the speech or right at issue.

2. Whether every state's anti-SLAPP law should apply in federal diversity actions—regardless of the divergent nature of these laws.

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INTRODUCTION

Jomy Sterling sued Petitioner for defamation after Petitioner falsely and publicly accused Ms. Sterling of being a pedophile and abusing her husband. Petitioner made these statements over the internet using a pseudonym. When Ms. Sterling obtained subpoenas to compel disclosure of Petitioner's identity, Petitioner moved to quash the subpoenas based on a purported First Amendment right to anonymity. A magistrate judge denied the motion to quash, the district court overruled Petitioner's objections to the order, and the court of appeals denied mandamus relief.

Petitioner now asks this Court to develop a single, all-encompassing standard for evaluating claims of anonymity. Petitioner does so even though this Court has never recognized a freewheeling right to anonymous speech and has consistently evaluated First Amendment claims using different standards depending on the nature of the speech or right at issue.

Petitioner also asks this Court to decide whether every state's anti-SLAPP law should apply in federal diversity actions—even though those laws vary significantly from state to state. Moreover, Petitioner specifically asks this Court to decide the applicability of California's anti-SLAPP law even though this is a diversity action governed by Florida law.

This Court should not entertain Petitioner's requests. Besides the obvious failings noted above, Petitioner ignores the mandamus standards that would necessarily cabin this Court's review. Petitioner also

fails to mention that her identity has all but been disclosed below. This case is a poor vehicle for examining any rights to anonymous speech.

STATEMENT OF THE CASE

I. Factual and procedural background

Roblox is an online game platform. Respondent, Jomy Sterling, makes a living as a Roblox developer, publisher, and personality. She is known in the Roblox community as the persona Pixelated Candy.

Petitioner is also involved in the Roblox community. Although Petitioner's identity is not publicly disclosed, Petitioner is known as the persona Beeism.

In 2017, Petitioner began publishing defamatory statements about Ms. Sterling to others in the Roblox community. Three years later, Petitioner publicly accused Ms. Sterling of engaging in pedophilic conduct. For example, on July 4, 2020, Petitioner published the following tweet about Ms. Sterling to Petitioner's then-80,000-some Twitter followers:

> & yea, when some1 in her mid 30's invites a 15 yo she met on roblox to her house for overnite visits OF COURSE I'M GONNA SAY SOMETHIN. never called her a pedo but I 100% stand by the fact someone in their 30's should not invite minors to their house for overnite disneyworld trips

Pet. App. 48.

Before publishing the tweet, Petitioner was told that the tweet was based on false information. This did not dissuade Petitioner, who was determined to publish something "shady" about Ms. Sterling. *See* Pet. App. 50, ¶¶ 8–9. Indeed, Petitioner repeatedly confided to an associate that Petitioner could "ruin [Ms. Sterling] with one tweet." Pet. App. 51, ¶ 9.

Also on July 4, 2020, Petitioner published a tweet communicating that Ms. Sterling is someone who abuses her husband, Taylor Sterling. The tweet said that police went to the Sterlings' home to make sure Mr. Sterling was alive:

> there was a wellness check for tay cuz no one had seen or heard from him since his meltdown, and we're alllll witnesses to pix's behavior the last few weeks. the chick is coming undone. tay didn't get swatted, a cop knocked on his door to make sure he was alive

Pet. App. 53.

In fact, police did visit the Sterlings' home on July 4, 2020. But Mr. Sterling was perfectly fine—Ms. Sterling does not abuse him in any way. The incident traumatized Mr. Sterling and his entire family, including his seven-year-old child and his elderly grandmother.

Ms. Sterling has alleged that Petitioner caused the police to visit the Sterlings' home. Doc. 37 at 6, ¶ 24.[1] Even though Petitioner regularly communicated with one of Mr. Sterling's coworkers, Petitioner never asked

[1] "Doc." refers to filings in the district court's docket.

the coworker about Mr. Sterling's wellbeing. Instead, the police were falsely told that Mr. Sterling's friends and coworkers had not heard from him in two months. This type of harassment—called swatting—is common in online communities. *See*, FBI, *The Crime of 'Swatting'* (Sep. 3, 2013), https://www.fbi.gov/news/stories/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences1.

Petitioner's defamatory statements damaged Ms. Sterling's reputation, business, and relationships—particularly with her family and others in the Roblox community. The statements also caused Ms. Sterling to suffer mental and emotional pain.

Ms. Sterling sued Petitioner in the Middle District of Florida for defamation and trade libel. She then moved for leave to subpoena Twitter and Roblox so she could identify Petitioner and serve the complaint. A magistrate judge granted the motion, ruling that "good cause" existed to identify Petitioner because Ms. Sterling pleaded prima facie claims. Pet. App. 28. The magistrate judge also determined that Petitioner's expectation of privacy did not outweigh Ms. Sterling's need to identify Petitioner. *Id.*

Petitioner moved to quash the subpoenas, arguing that Ms. Sterling failed to state a cause of action and thus could not override Petitioner's "right to anonymity." Pet. App. 83. Petitioner also argued that the action was a strategic lawsuit against public participation (SLAPP) in violation of Florida and California law. *Id.*

The magistrate judge denied Petitioner's motion, noting its prior ruling that Ms. Sterling pleaded prima facie claims. Pet. App. 21. The magistrate judge also ruled that the state anti-SLAPP laws were inapplicable. Pet. App. 21–23. Petitioner objected to the magistrate judge's order. Pet. App. 130–49.

The district court overruled Petitioner's objections. Pet. App. 3–17. The court concluded that both tweets referenced in the complaint could support a prima facie claim of defamation. Pet. App. 9. The court also concluded that the magistrate judge did not clearly err in ruling that the state anti-SLAPP laws were inapplicable. Pet. App. 12.

Petitioner did not appeal the district court's order. Instead, Petitioner sought a writ of mandamus in the court of appeals. The court of appeals denied the petition for a writ of mandamus because Petitioner failed to show the "extraordinary circumstances" required for such relief. Pet. App. 1–2.

On May 10, 2022—almost one month before Petitioner filed the petition in this Court—Ms. Sterling moved for leave to file an amended complaint that identified Petitioner as Madilynn De La Rosa. Doc. 34. As it turns out, Petitioner had tweeted a "selfie" (i.e., a picture of oneself) that matched the profile picture on Ms. De La Rosa's social-media page. Doc. 34-1. In response, Petitioner "neither confirm[ed] nor den[ied]" that she is Ms. De La Rosa. Doc. 35 at 2.

On May 27, 2022—still before Petitioner filed the petition in this Court—the district court granted leave

to amend. Doc. 36. Ms. De La Rosa later moved to dismiss the amended complaint, declaring under penalty of perjury that she is not Petitioner. Doc. 41. However, Ms. Sterling responded to the motion with additional evidence indicating that Ms. De La Rosa is in fact Petitioner. Doc. 44. That evidence included multiple pictures tying Ms. De La Rosa to Petitioner's twitter account. *Id.* at 5–6.

The district court recognized that Ms. Sterling's evidence "might undercut [Ms.] De La Rosa's attestations." Doc. 58 at 4. Nevertheless, the court ultimately stayed the case, deferring ruling on Ms. De La Rosa's motion to dismiss pending the resolution of Petitioner's petition for a writ of certiorari in this Court. *Id*. at 4–5. "If the resolution of the petition affords such an opportunity," the district court "plans to ensure the anonymity of [Petitioner] by reviewing *in camera* the responses to any issued third-party subpoenas." *Id.* at 4.

II. Legal background

A. All speech is not treated equally.

"The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech." *New York v. Ferber*, 458 U.S. 747, 763 (1982) (citation omitted). Indeed, " '[f]rom 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content' " of certain categories of speech. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation omitted). These categories include

obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.*

Even protected speech is not treated equally. For instance, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–65 (1983). Meanwhile, political speech "warrant[s] the highest constitutional protection." *See FEC v. Mass. Cit. for Life, Inc.*, 479 U.S. 238, 260 (1986).

This Court has therefore applied different tests for different types of speech. Laws that burden political speech are subject to "strict scrutiny," *Az. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citation omitted), or "exacting scrutiny," *Burson v. Freeman*, 504 U.S. 191, 198 (1992). By contrast, laws that burden commercial speech are subject only to "intermediate scrutiny." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022).

In short, speech has never been—and should never be—subject to a one-size-fits-all analysis. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and in the judgment) ("[T]he same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test."); *Barr. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2361 (2020) (Breyer, J., joined by Ginsburg and Kagan, JJ., concurring) ("[O]ur entire First Amendment jurisprudence creates a

regime based on the content of speech." (citation omitted)).

B. Defamatory speech has historically been unprotected.

Defamatory speech has historically been considered "no essential part of any exposition of ideas" and "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). As such, it was historically "not . . . within the area of constitutionally protected speech." *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

"[This Court's] decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation. . . ." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Notably, this Court held that the First Amendment protects defamatory speech about a public official unless the speech is made with "actual malice."[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

New York Times v. Sullivan is not without its critics. Justice Thomas has explained that "*New York Times* and the Court's decisions extending it were

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[2] The protection extends to claims for damages; this Court has not addressed whether the protection also extends to claims for declaratory or injunctive relief. *See* Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in its Proper Place*, 101 Harv. L. Rev. 1287, 1289–91 (1988).

policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring). Justice Gorsuch has questioned the decision's continued viability. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2427–30 (2021) (Gorsuch, J., dissenting). And the late Judge Silberman said the holding "has *no relation* to the text, history, or structure of the Constitution." *Tah v. Glob. Witness Publ'g*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

C. This Court's decisions on anonymous speech.

This Court has addressed the issue of anonymous speech in four decisions. None holds that the First Amendment protects anonymous *defamatory* speech.

First is *Talley v. California*, 362 U.S. 60 (1960), which concerned political speech. The petitioner distributed handbills urging readers to help an organization—the "National Consumers Mobilization"—boycott certain businesses for anti-discrimination reasons. *Id.* at 61. The handbills also invited readers to enroll in the organization and thereby affirm their belief "that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth." *Id.* The petitioner was later convicted of violating an ordinance that prohibited the distribution of anonymous handbills, and he challenged his conviction on First Amendment grounds. *Id.* at 61–62.

In declaring the ordinance void, this Court recounted the history of government critics in England and colonial America, explaining that "[p]ersecuted groups . . . throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 64. This Court then noted two recent cases in which it held "that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Id.* at 65 (citing *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).[3] This Court explained that "[t]he reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65. Because the ordinance in *Talley* was "subject to the same infirmity," this Court declared it void. *Id.*

Importantly, this Court emphasized that the ordinance was not limited to "providing a way to identify those responsible for . . . libel." *Id.* at 64. This Court therefore did "not pass on the validity of an ordinance limited to prevent [that] . . . evil[ ]." *Id.* In the same year that *Talley* was decided, this Court explained that it invalidated the ordinance "because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose." *Shelton v. Tucker*, 364 U.S. 479, 489 (1960).

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[3] In *Bates*, members of the NAACP were convicted for refusing to give membership lists to state officials. 361 U.S. at 517. In *Patterson*, the NAACP itself was held in civil contempt for refusing to give a membership list to a state official. 357 U.S. at 451.

Second is *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), which also concerned political speech. The case involved a woman who distributed leaflets at a public meeting about an upcoming referendum. *Id.* at 337. The leaflets urged readers to "vote no." *Id.* at 337 n.2. The woman was ultimately fined for violating a statute that prohibited distribution of anonymous leaflets designed to influence voters in an election. *Id.* at 338 & n.3.

On review, this Court explained that it needed to decide "whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." *Id.* at 344. In doing so, this Court repeatedly emphasized the heightened nature of the political speech at issue, stating that it "occupies the core of the protection afforded by the First Amendment," is "the essence of First Amendment expression," and that "no [other] form of speech is entitled to greater constitutional protection." *Id.* at 346–47. This Court therefore applied "exacting scrutiny." *Id.* at 347. Concluding that the statute was not narrowly tailored to serve an overriding state interest, this Court reversed the state court's judgment affirming the fine. *See id.* at 347–57.

In a concurrence, Justice Ginsburg explained that this Court did "not . . . hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring). And in separate opinions, Justices Thomas and Scalia disagreed about whether the First Amendment, as originally understood,

protected anonymous political speech. *Compare id.* at 371 (Thomas, J., concurring) (concluding that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion"), *with id.* at 371–74 (Scalia, J., dissenting) (questioning Justice Thomas's historical analysis). Neither Justice, however, even remotely suggested that anonymous *defamatory* speech would be protected. After all, *McIntyre* did not concern defamatory speech. *Id.* at 337 ("There is no suggestion that the text of her message was false, misleading, or libelous."). And Justice Thomas has noted that defamatory speech was not historically protected. *See McKee*, 139 S. Ct. at 679–81 (Thomas, J., concurring).

Third is *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which again concerned political speech. The plaintiffs claimed that certain laws governing Colorado's initiative-petition process violated their right to free speech. *Id.* at 187–88. In relevant part, this Court held that the law requiring petition circulators to wear a name badge was invalid because it "discourage[d] participation in the petition circulation process by forcing name identification without sufficient cause." *Id.* at 200. Critically, however, this Court did not hold that the circulators had a right to anonymity. To the contrary, this Court left intact the requirement that circulators sign an affidavit that "reveals the name of the petition circulator and is a public record." *See id.* at 198.

Also at issue was a law requiring initiative proponents to disclose, in monthly and final reports, the name and address of each paid circulator and the names of the proponents. *Id.* at 201–05. This Court concluded that requiring disclosure of only paid circulators (but not volunteer circulators) was at most "tenuously related to the substantial interest disclosure serves" and thus the law failed exacting scrutiny. *Id.* at 204. This Court did not, however, invalidate the requirement that proponents' names be disclosed. *Id.* at 202–03.

Fourth, and finally, this Court last addressed the issue of anonymous speech in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). The petitioners were legal organizations that facilitated the preaching activities of Jehovah's Witnesses. *Id.* at 153. They challenged an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering for and receiving a permit. *Id.*

This Court began its analysis by recognizing "the value of the speech involved," noting that hand distribution of religious materials is a "form of religious activity" that "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *See id.* at 161. Without deciding the appropriate level of scrutiny, this Court said it had to consider "the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental

interests that the ordinance purports to serve." *Id.* at 164–65.

Ultimately, this Court concluded that the ordinance was invalid because of its "breadth" and because it was "not tailored to the [government's] stated interests." *See id.* at 168. In discussing breadth, this Court noted that "there are a significant number of persons who support causes anonymously," the registration requirement "necessarily results in a surrender of that anonymity," and thus the ordinance could discourage some persons "from canvassing for unpopular causes." *Id.* at 166–67. Nevertheless, this Court acknowledged that "[s]uch preclusion may well be justified in some situations" depending on the governmental interest at stake. *Id* at 167.

Although this Court was concerned that the ordinance could discourage canvassing for unpopular causes, that was not the sole, much less primary, reason for invalidating the ordinance. Rather, this Court was particularly concerned that the ordinance acted as a prior restraint. *See id.* at 167–68. Indeed, this Court stressed that "requiring a permit as a *prior condition* on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views." *Id.* at 167 (emphasis added). This Court also explained that there was "a significant amount of spontaneous speech that is effectively banned by the ordinance" given the steps required to obtain a permit before canvassing. *Id.*

* * *

In sum, this Court has addressed the issue of anonymous speech in four cases. The first three—*Talley*, *McIntyre*, and *Buckley*—concerned political speech. The fourth, *Watchtower*, concerned religious canvassing. None held that a party has a freewheeling right to anonymous speech—let alone a right to anonymous *defamatory* speech.

ARGUMENT

I. Petitioner incorrectly assumes that this Court has recognized a freewheeling right to anonymous speech.

As discussed in the prior section, this Court has addressed the issue of anonymous speech in four cases. Petitioner cites just one of them, *McIntyre*, for the proposition that "[t]he First Amendment protects a right to speak anonymously online." Pet. 7.

McIntyre did not—and could not—produce such a holding. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. 265, 399 (1821) (Marshall, C.J.). *McIntyre* concerned anonymous political handbilling, and this Court's analysis focused on that issue. 514 U.S. at 336–57.

Indeed, the author of this Court's decision in *McIntyre*—Justice Stevens—confirmed that the decision "posited no . . . freewheeling right [to anonymous

speech].” *John Doe 1 v. Reed*, 561 U.S. 186, 218 n.4 (2010) (Stevens, J., joined by Breyer, J., concurring in part and concurring in the judgment). After all, the Constitution protects the “freedom of speech.” *Id.* “The right . . . is the right to speak, not . . . the right to speak anonymously.” *Id.* “The silliness that follows upon a generalized right to anonymous speech has no end.”[4] *McIntyre*, 514 U.S. at 381 (Scalia, J., dissenting).

Petitioner also cites *Reno v. ACLU*, 521 U.S. 844 (1997). Pet. 7. But that case did not concern anonymous speech (of any kind)—it concerned “two statutory provisions enacted to protect minors from ‘indecent’ and ‘patently offensive’ communications on the Internet.” 521 U.S. at 849. This Court applied established First Amendment principles and analyzed whether the provisions were sufficiently tailored to the government’s interest. *Id.* at 871–82. Because the provisions were not sufficiently tailored, this Court held that they violated the First Amendment. *See id.* at 849, 879. Nowhere in the decision did this Court address the issue of anonymous speech. *Id.* at 849–85.

Petitioner does not ask this Court to recognize a freestanding right to anonymous speech. Rather, Petitioner incorrectly assumes that such a right already exists—though this Court has never held as much. Petitioner then asks this Court to answer the ancillary

[4] Justice Scalia believed that “Mrs. McIntyre sought a general right to ‘speak’ anonymously about a referendum.” *Reed*, 561 U.S. at 220 (Scalia, J., concurring in the judgment). Justices Stevens and Breyer disagreed. *Id.* at 218 n.4 (Stevens, J., joined by Breyer, J., concurring in part and concurring in the judgment).

question regarding the appropriate standard to apply in determining whether a party may obtain a subpoena compelling the identification of an anonymous speaker. Pet. i. This Court should not grant certiorari to answer an ancillary question that depends on an incorrect assumption. *Cf. Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 353 (1937) ("Constitutional questions are not to be decided hypothetically.").

Of course, this Court "often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). But that makes sense only when resolution of the antecedent issue is not *necessary* to the decision. *See id.* (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980), as an example of a case where it assumed an antecedent proposition); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) (explaining that the assumption in *Thiboutot* was not "necessary" to the decision). It does not make sense for this Court to do what Petitioner asks: establish a standard that is premised on a nonexistent right.

Even if Petitioner's primary assumption—that "[t]he First Amendment protects a right to speak anonymously online," Pet. 7—were correct, other antecedent issues would remain. As noted *supra* pp. 6–8, all speech is not treated equally. Accordingly, the notion that there can be a single standard to determine the protection afforded anonymous speech is misplaced. Just as in all free-speech cases, the nature of the underlying speech—political, commercial, etc.—should drive the

contours of the decisional standard. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011) ("[T]he nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.").

For example, if Ms. Sterling were running for political office and Petitioner criticized Ms. Sterling's politics, one standard might apply. By contrast, if Ms. Sterling and Petitioner were business competitors and Petitioner attacked the quality of Ms. Sterling's products, another standard might apply. Finally, if Petitioner were to post obscene things online about Ms. Sterling, a third standard might apply. This case—by failing to categorize the nature of the allegedly protected speech—is a poor vehicle for deciding a First Amendment standard, as this Court has never created a universal standard to apply to all types of speech. What's more, "setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Grumet*, 512 U.S. at 718 (O'Connor, J., concurring in part and in the judgment).

Finally, even if this Court were to limit its analysis to purely defamatory speech like Petitioner's, other antecedent issues would still remain. For instance, this Court would have to decide whether: (1) Ms. Sterling is a public figure and, if so, whether Petitioner acted with actual malice; (2) Petitioner's speech concerned a matter of public interest and, if so, whether Petitioner acted with fault; and (3) whether a plaintiff has the burden to prove falsity in a defamation action against a non-media defendant. *See Milkovich v. Lorain J. Co.*,

497 U.S. 1, 14–16 (1990) (discussing these requirements); *see also id.* at 20 n.6 (noting that this Court has reserved judgment on the third question). This Court would also have to decide whether to reconsider its caselaw imposing these requirements. *See supra* pp. 8–9. Petitioner has not identified, let alone addressed, any of these issues. Pet. 1–27.

At bottom, this Court should not decide a question "if it has not been cleanly presented." *Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., joined by Scalia, J., concurring); *accord Comcast Corp. v. Behrend*, 569 U.S. 27, 40 (2013) (Ginsburg and Breyer, JJ., joined by Sotomayor and Kagan, JJ., dissenting). For the reasons discussed above, the question presented in this case is anything but clean.

II. Petitioner ignores the mandamus standards.

Petitioner ignores the elephant in the room: this case was brought to the court of appeals through a petition for a writ of mandamus. This Court's review would therefore be constrained by the strict standards that govern mandamus relief.

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for the D.C.*, 542 U.S. 367, 380 (2004) (citation omitted). "Only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* (cleaned up). There are three requirements for the writ to issue: (1) "the party

seeking issuance of the writ must have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380–81 (cleaned up).

The first requirement—a lack of other adequate means for relief—illustrates why this case is a poor vehicle to address the questions presented. Instead of seeking mandamus relief, Petitioner could have appealed the district court's order under the collateral-order doctrine. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010) (holding that an order denying a motion to quash a subpoena compelling disclosure of the defendant's identity was appealable under the collateral-order doctrine); *see also*, *e.g.*, *In re Grand Jury Proc.*, 142 F.3d 1416 (11th Cir. 1998) (appeal from order denying motion to quash subpoena compelling disclosure of privileged information).

Alternatively, instead of moving to quash the subpoenas in the district court, Petitioner could have simply moved to proceed under a pseudonym. *E.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. Bondi*, No. 4:18cv137, 2018 WL 11014101 (N.D. Fla. May 13, 2018) (considering such a motion). Multiple circuits recognize that a denial of such a motion is also appealable under the collateral-order doctrine. *See generally* Chloe Booth, *Good Things Don't Come to Those Forced to Wait: Denial of A Litigant's Request to Proceed Anonymously Can Be Appealed Prior to Final Judgment in the Wake*

of Doe v. Village of Deerfield, 58 B.C.L. Rev. E Supp. 205, 205 (2017) ("The Seventh Circuit joined the Fourth, Fifth, Ninth, Tenth and Eleventh Circuits in holding that this type of order, examined categorically, satisfies the rigorous requirements of the collateral order doctrine.").

If Petitioner had used these other means of relief and appealed under the collateral-order doctrine, the court of appeals would not have been constrained by the mandamus standards that apply here. Nor, in turn, would this Court be subject to that baggage. A case appealed under the collateral-order doctrine would provide a better vehicle to address the questions presented.

Finally, "[i]t is a well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive." *Hurd v. Hodge*, 334 U.S. 24, 30 n.6 (1948). Instead of answering the constitutional questions presented by Petitioner, this Court could decide this case by holding that Petitioner failed to satisfy any one of the mandamus requirements. *Infra* § VI. at 32–33. There is no need for this Court to accept certiorari when the principle of constitutional avoidance would prohibit this Court from addressing the question presented.

III. There is no material conflict on the first question.

For the first question, Petitioner asks this Court to develop a uniform "standard" to be used any time an

anonymous speaker's identity is subject to disclosure. Pet. i, 16–17. Petitioner claims that courts are conflicted as to the appropriate standard. *See* Pet. 7, 9–15. Yet, Petitioner acknowledges that "there is limited appellate precedent" on point. Pet. 9.

Petitioner's attempt to manufacture a conflict based on district court and state intermediate court decisions is unavailing. Only decisions of "a United States court of appeals" or a "state court of last resort" matter. *See* Sup. Ct. R. 10. As set forth below, those courts are not in conflict. Petitioner's concern about forum-shopping is therefore ill-founded.

A. The courts of appeal are not in conflict.

Petitioner cites just three published circuit court decisions: *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987); *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010); and *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011). Pet. 7–17. These decisions are not in conflict.

The first case, *Grandbouche*, concerned a claim that an organization's members had been harassed and thereby caused to leave the organization. 825 F.2d at 1464–65. To prepare their defense, the defendants sought discovery of the organization's membership and mailing lists. *Id.* at 1465–66. The plaintiff—the organization's founder—objected that producing this information "would infringe upon his First Amendment right of association." *Id* at 1466. The district court

ruled that the First Amendment "ha[d] no application" and ordered the plaintiff to produce the materials. *Id.*

The Tenth Circuit reversed, concluding that the district court "erred in failing to consider the merits of [the plaintiff's] claim of a First Amendment privilege." *Id*. It therefore remanded for the district court to both "determine the validity of the claimed First Amendment privilege" and conduct a "balancing test." *Id.* at 1466–67. The factors to be balanced included: "(1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information." *Id.* at 1466.

The second case, *Arista*, concerned a claim of copyright infringement. 604 F.3d at 113. The plaintiffs subpoenaed an internet service provider to identify the defendants, whom plaintiffs knew only by IP address. *Id.* The district court applied a balancing test and denied the defendants' motion to quash the subpoena. *Id.* at 114–15. The factors considered by the court included "the defendants' expectation of privacy, the prima facie strength of plaintiffs' claims of injury, the specificity of the discovery request, plaintiffs' need for the information, and its availability through other means." *Id.* at 114.

The Second Circuit affirmed, noting that the balancing test used by the district court was "an *appropriate* general standard." *Id.* at 119 (emphasis added). The court did not, however, adopt that standard or hold that it was required, because the defendant did not

raise that issue on appeal. *Id.* ("On this appeal, Doe 3 does not contend that the . . . standard used by the district court here was an erroneous legal standard."). Nor did the court decide whether the standard "would be satisfied by a well-pleaded complaint unaccompanied by any evidentiary showing." *Id.* at 123.

The final case, *In re Anonymous Online Speakers*, concerned a business dispute between two companies. 661 F.3d at 1171. The district court ordered a witness to testify about the identity of certain anonymous speakers who were believed to be the defendant's employees or agents. *See id.* at 1172. The speakers then petitioned for a writ of mandamus in the court of appeals. *Id.*

The Ninth Circuit denied the speakers' petition. *Id.* at 1178. It noted that the district court applied a heightened standard that originated in a case concerning political speech. *Id.* at 1176–77. The Ninth Circuit deemed that standard inapplicable because no political speech was at issue, and it reasoned that "the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." *Id.* at 1177. Nevertheless, the court concluded that mandamus relief was inappropriate because the district court did not commit clear error. *Id.*

In sum, only one court of appeals—the Tenth Circuit in *Grandbouche*—actually adopted a required standard. 825 F.2d at 1466. And it did so in a case where the nature of the First Amendment claim was

materially different; it concerned the "right of association." *Id.* No such claim is asserted here.

The Second Circuit, by contrast, did not need to adopt a standard because that issue was not raised on appeal. *Arista*, 604 F.3d at 119. And the Ninth Circuit did not adopt a standard either; it merely concluded there was no clear error warranting mandamus relief. *In re Anonymous Speakers*, 661 F.3d at 1177. Obviously, courts cannot be in conflict about standards they did not adopt.

What's more, all three circuits recognized that the *nature* of the speech—political, commercial, etc.—or right at issue must be considered. *See Grandbouche*, 825 F.2d at 1466 (requiring the district court to "determine the validity of the claimed First Amendment privilege"); *Arista*, 604 F.3d at 118 (explaining that a party has a right to anonymity only to the extent the party's speech is protected by the First Amendment); *In Re Anonymous Online*, 661 F.3d at 1177 ("[T]he nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes."). Any perceived conflict between the decisions is thus not a result of conflicting standards; rather, it is a result of the different speech or right involved in each case.

B. The state courts of last resort are not in conflict.

Petitioner cites just two decisions of state courts of last resort: *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and

Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009). Pet. 7–17. These decisions are not in conflict.

The first case, *Cahill*, "involve[ed] political criticism of a public figure." 884 A.2d at 457. Specifically, a city councilman sued for defamation after an anonymous internet user criticized his performance. *Id.* at 454. The trial court denied the defendant's motion to prevent disclosure of his identity, and the defendant appealed, arguing that the trial court applied an incorrect standard. *Id.* at 455. The Supreme Court of Delaware reversed, holding that the trial court should have applied a "summary judgment standard." *Id.* at 460.

The second case, *Solers*, involved a defamation claim by a corporation against an anonymous internet user. 977 A.2d at 944–46. Faced with an issue of first impression, the D.C. Court of Appeals considered which standard to apply when a plaintiff seeks to discover an anonymous person's identity. *Id.* at 950. The court ultimately adopted a test that the court said "closely resembles the 'summary judgment' standard articulated in *Cahill*." *Id.* at 954.

Despite being described as only "closely resembl[ing]" the *Cahill* standard, *id.*, the *Solers* standard is effectively equivalent. There is no meaningful distinction between the two standards. *Compare Cahill*, 884 A.2d at 460–61, *with Solers*, 977 A.2d at 954. Obviously, courts are not in conflict when they adopt equivalent standards.

IV. There is no material conflict on the second question.

For the second question, Petitioner asks this Court to decide "the proper application of state anti-SLAPP laws in federal diversity actions." Pet. 26. Petitioner claims that courts of appeal are conflicted on this issue. *Id.*

The claimed conflict is a result of the differences in the state laws—not differences in the way that courts of appeals have analyzed the legal question of what law to apply. More than 30 states have anti-SLAPP laws, and "protections vary significantly from state to state." Reporters Committee for Freedom of the Press, *Anti-SLAPP Legal Guide*, https://www.rcfp.org/anti-slapp-legal-guide/ (last visited February 28, 2023); *see also Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012) (noting that "there are significant differences" between anti-SLAPP laws "so that each state's statutory scheme must be evaluated separately"), *superseded by statute on other grounds as stated in Wynn v. Bloom*, 852 F. App'x 262, 262 n.1 (9th Cir. 2021). Indeed, even Petitioner concedes that "[t]he variation in state anti-SLAPP laws . . . contributes to the laws disjointed application in federal courts." Pet. 23.

Consider, for instance, the Second Circuit's decision in *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020). The court was confronted with the question whether California's anti-SLAPP law applies in a federal diversity action. *Id.* at 83. The court held that the law was

inapplicable "because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56." *Id.*

The appellee claimed that the Second Circuit had already decided—in *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014)—that state anti-SLAPP laws *were* applicable in diversity actions. *Id.* at 86 n.3. But the Second Circuit explained that *Adelson* was "inapposite" because it involved the anti-SLAPP law of another state, Nevada, that was "quite different." *Id.* Notably, the Nevada law "d[id] not establish a 'reasonable probability of success' standard that must be met without discovery, like the California Anti–SLAPP law." *Id.* (citation omitted). *See also Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1362 (11th Cir. 2014) (distinguishing caselaw about other states' anti-SLAPP laws because the law at issue in the case was "distinct" from those other states' laws).

Given the patchwork nature of state anti-SLAPP laws, this Court cannot answer—in one fell swoop—Petitioner's broad question about "the proper application of state anti-SLAPP laws in federal diversity actions." Pet. 26. That question is better addressed to Congress, which can create its own federal anti-SLAPP regime. *See*, *e.g.*, SLAPP Protection Act of 2022, H.R. 8864, 117th Cong. (2022).

Nor should this Court narrow the question to the two anti-SLAPP laws mentioned in the petition (Florida's and California's). There is no need to address that

narrower question because there is no conflict as to those laws.

Indeed, no court of appeals has addressed whether Florida's anti-SLAPP law applies in federal diversity actions. In the only court-of-appeals decision to even cite that law, the Eleventh Circuit did not address the question because it was forfeited by the appellant. *Parekh v. CBS Corp.*, 820 F. App'x 827, 836 (11th Cir. 2020) (unpublished). This Court would be better served by awaiting percolation on that issue in the courts of appeals. *See California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., joined by Brennan and Marshall, JJ., dissenting) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." (citation omitted)).

Although two courts of appeal have addressed the applicability of California's anti-SLAPP law, those courts are not in conflict. Again, the Second Circuit held that "California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56." *La Liberte*, 966 F.3d at 83. The Ninth Circuit has effectively reached the same conclusion. *CoreCivic, Inc. v. Candide Grp.*, 46 F.4th 1136, 1143 (9th Cir. 2022) ("[W]e have made clear that challenges to the legal sufficiency of a defamation claim made pursuant [to] California's anti-SLAPP statute must be analyzed under the same standard as Rule 12(b)(6) motions to dismiss,

and challenges to factual sufficiency under the same standard as Rule 56 motions for summary judgment.").

Even if there were a conflict about the applicability of California's anti-SLAPP law, there would be no need to resolve that conflict in this case, which is governed by the substantive law of *Florida*. After all, this case was filed as a diversity action in the Middle District of Florida, so Florida's choice-of-law rules apply. *E.g.*, *Cassirer v. Thyssen-Bornemisza Coll. Found.*, 142 S. Ct. 1502, 1509 (2022). Those rules call for the application of Florida law in a defamation action such as this—one where the plaintiff resides in Florida and no other state has a more significant relationship to the occurrence and the parties. *See generally State Farm Mut. Ins. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) (noting that, for torts, Florida uses the significant relationships test set forth in the Restatement (Second) of Conflict of Laws); Restatement (Second) of Conflict of Laws § 150(2) (1971) ("When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state."); *see also Ranbaxy Labs., Inc. v. First Databank, Inc.*, No. 3:13–cv–859, 2014 WL 982742, at *5 (M.D. Fla. Mar. 12, 2014) (concluding that "Florida choice of law provisions would not apply the California anti-SLAPP statute" in a case where the plaintiff did not reside in California). As the magistrate judge noted below, Petitioner "d[id] not explain

why California law would apply in this action." Pet. App. 21.

V. The factual developments below make this case a poor vehicle to decide the first question.

Petitioner asks this Court to develop a standard for identifying an anonymous speaker. Pet. i, 16–17. But there is one important detail the petition leaves out: Petitioner's identity has all but been disclosed. The factual developments below therefore make this case a poor vehicle to address the question presented.

Indeed, Ms. Sterling submitted compelling evidence that Petitioner is Madilynn De La Rosa. Doc. 34-1. Although Ms. De La Rosa denies that she is Petitioner, Ms. Sterling has presented additional evidence that, according to the district court, "might undercut [Ms.] De La Rosa's attestations." Doc. 58 at 4; *see also* Doc. 44 at 5–6. Further, any concern about Petitioner's anonymity is obviated by the fact that the district court "plans to ensure the anonymity of [Petitioner] by reviewing *in camera* the responses to any issued third-party subpoenas." Doc. 58 at 4.

VI. The lower courts did not err.

Neither the district court nor the court of appeals erred below. A decision from this Court is therefore unnecessary.

For its part, the district court correctly denied Petitioner's motion to quash. Although a court must quash a subpoena that "requires disclosure of privileged or other protected matter," Fed. R. Civ. P. 45(d)(3)(iii), it was Petitioner's burden to prove that a privilege applied, *e.g.*, 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2463.1 (3d ed. updated Oct. 20, 2022) ("Whoever asserts privilege has a burden of proof when information subject to a subpoena is withheld on that claim of privilege."). Petitioner failed to do so. As the district court found, Petitioner's statements were arguably defamatory. Pet. App. 9. The First Amendment does not confer a privilege to anonymously defame others (nor does Petitioner argue otherwise).

The district court also correctly denied relief under Florida's and California's anti-SLAPP laws. Florida's law applies only if the lawsuit is "without merit." § 768.295(3), Fla. Stat. (2021). In other words, it subjects a plaintiff to the same standard as an ordinary motion to dismiss. *Lam v. Univision Commc'ns*, 329 So. 3d 190, 193–97 (Fla. Dist. Ct. App. 2021). California's anti-SLAPP law is inapplicable because this action is governed by the substantive law of Florida. *Supra* § IV. at 30–31. But even if California's law were to apply, it would also merely subject Ms. Sterling to the ordinary standard governing motions to dismiss. *Supra* § IV. at 29–30. The district court correctly concluded that Ms. Sterling's claims were sufficiently pleaded to withstand dismissal. Pet. App. 7–9.

Even if the district court had erred, the court of appeals did not err in denying mandamus relief. Mandamus was improper because Petitioner had other

adequate means of relief: an appeal under the collateral-order doctrine or an appeal of a motion to proceed pseudonymously. *Supra* § II. at 20–21. Mandamus was likewise improper because Petitioner failed to show a "clear and indisputable" right to relief. *Cheney*, 542 U.S. at 381. After all, even Petitioner concedes that "there is limited appellate precedent regarding the identification of anonymous speakers in defamation actions." Pet. 9. There can be no "clear and indisputable" right to relief when courts have not spoken on the issue.

CONCLUSION

Defamatory speech deserves no protection. Although they may seem harmless from behind a computer screen, "online posts falsely labeling someone as . . . a pedophile can spark the need to set up a home-security system." *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting) (citation omitted). This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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