

No. 21-802

IN THE

Supreme Court of the United States

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a
D. JAMES KENNEDY MINISTRIES,
Petitioner,

v.

SOUTHERN POVERTY LAW CENTER,
Respondent.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit*

**BRIEF OF THE FAMILY ACTION COUNCIL OF
TENNESSEE AND CONSTITUTIONAL
GOVERNMENT DEFENSE FUND AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST
OF AMICI CURIAE¹**

The Family Action Council of Tennessee, Inc., is a state-based non-profit organization that seeks to educate citizens and state legislators on public policies that address most closely who we are as human beings.

Constitutional Government Defense Fund is a Tennessee-based non-profit litigation organization whose efforts aim to vindicate the historic constitutional role and jurisdiction of the state to protect innocent human life, the institution of marriage and family, and other community interests served by traditional state police power regulations.

Framing *Amici*'s educational and advocacy work is the anthropology acknowledged and resident in customary and natural law, respectively. *Amici* seek to urge citizens, policy makers, and judicial bodies in Tennessee to give proper regard to the fundamental and absolute rights of persons at common law. Consequently, when this Court in its decisions forecloses or defeats common law principles and standards by operation of the Court's constitutional rights interpretations, as it did in *New York Times v.*

¹ Pursuant to Rule 37.6, the undersigned certifies that no counsel for a party authored any part of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. *Amici curiae* provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

Sullivan, 376 U.S. 254 (1964), the legal context for *Amici*'s respective missions is compromised.²

Amici are sympathetic to the concern behind petitioner's claim in this case, having had their own uninvited experience with respondent Southern Poverty Law Center (SPLC). On June 12, 2017, SPLC published in its "Hate Watch" report "a list of activities and events of anti-LGBT organizations." Therein SPLC described in detail the activities of *amici* Family Action Council of Tennessee and the Constitutional Government Defense Fund, condemning their efforts to promote the natural family and religious liberty. The SPLC's report of *Amici*'s activities was sandwiched between reports on the activities of two other public policy organizations—American Family Association and the Family Research Council—that SPLC publicly describes as "hate groups."

² Another prominent example of a somewhat different kind that eliminated state common law rights and authority is *Roe v. Wade*, 410 U.S. 113 (1973) with its interpretation of persons and liberty in the Fourteenth Amendment's Due Process Clause to deny the fundamental right to life at common law.

SUMMARY OF ARGUMENT

The long-neglected Ninth Amendment to the Constitution presents in its single sentence a vital standard of interpretation informing both the scope and character of the provisions of the Bill of Rights. The Ninth Amendment instructs that enumerated constitutional rights shall not be interpreted to diminish the unenumerated rights retained by the people.

The unfortunate absence of attention in this Court's jurisprudence to the Ninth Amendment's rule of construction has enabled the Court to misconstrue enumerated rights in a way serving to eliminate common law rights. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court interpreted the First Amendment's freedom of speech and of the press in a manner effectively removing "common-law protections for the 'core private righ[t]' of a person's "uninterrupted enjoyment of . . . his reputation.""
McKee v. Cosby, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring) (*quoting* Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 567 (2007) (*quoting* 1 *Blackstone* *129)).

The Court should remediate this error of interpretation, grant the Ninth Amendment its rightful guiding role in the Court's rights jurisprudence, and restore the fundamental common law right of a person to defend and vindicate in law his reputation against defamation.

ARGUMENT

I. The Ninth Amendment provides a rule of construction for the Bill of Rights.

The Ninth Amendment establishes that “the enumeration of certain rights herein shall not be construed to deny or disparage other rights retained by the people.” U.S. Const. amend. IX.

Because the Ninth Amendment’s text bespeaks a common group of rights divided only by whether they are enumerated in the Constitution, it implies that all the rights possessed by the people share a common provenance. This, in turn, suggests that both the enumerated rights and the “others retained by the people” are to carry forward the substantive meaning they had under the source of law from which they were derived, namely, the common law.

The common law background for the Constitution’s provisions, secured by the Ninth Amendment, is a fact this Court often acknowledges and on which it relies. “The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.” *Smith v. Alabama*, 124 U.S. 465, 478 (1888). Thus, this Court has continued to turn to the common law to interpret the Constitution’s provisions. *See, e.g., Ramos v. Louisiana*, 130 S. Ct. 1390 (2020) (investigating the common law right to trial by jury to interpret the constitutional right to jury trial); *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (analyzing the common law to determine the meaning of “same offense” in the Fifth Amendment).

This the Court must also do regarding the relationship between the enumerated rights and the unenumerated and retained rights of the people carried forward from the common law by the Ninth Amendment.

II. The Ninth Amendment precludes an interpretation of the freedom of speech and of the press that would deny or disparage the fundamental right at common law to be secure in one's reputation.

Integrity in reputation is the predicate to social opportunity of every sort. As Blackstone summarized, “The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right.” 1 William Blackstone, *Commentaries on the Laws of England* *134.³

Yet in *New York Times v. Sullivan*, this Court promulgated an unprecedented rule that altered the ancient and fundamental common law right to vindicate one's security in reputation. The *Sullivan* ruling, along with its progeny, have declared that defamed public figures must prove not only the falsity of the reproach on their character, but that the

³ “Personal security” was one of the three absolute rights at common law and “the preservation of these [three] inviolate, may justly be said to include the preservation of our civil immunities... .” 1 Blackstone's *Commentaries* *125. “The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.” *Id.* (emphasis added).

defendant acted with an interior and elusive “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false[.]” 376 U.S. at 280; *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 351 (1974) (expanding *Sullivan*’s “new standard to those who have achieved ‘pervasive fame or notoriety’ and those ‘limited’ public figures who ‘voluntarily injec[t]’ themselves or are ‘drawn into a particular public controversy.’”)

The common law standard for libel operable when both First and Fourteenth Amendments were ratified knew nothing of *Sullivan*’s “actual malice” gloss; it “did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages.” *McKee v. Cosby*, 39 S. Ct. at 678. (Thomas, J. concurring in denial of certiorari). *Sullivan*’s novel deconstruction of the right to be secure in one’s reputation imposed on such plaintiffs the burden of proving an adversary’s condition of mind, effectively putting out of reach the common law right to vindicate one’s reputation. *See* Pet.Br. at 17.

As Justice Gorsuch recently observed, *Sullivan*’s interpretive innovation has “evolved into a subsidy for published falsehoods on a scale no one could have foreseen,” and “has come to leave far more people without redress than anyone could have predicted.” *Berisha v. Lawson*, 141 S. Ct. at 2424 (Gorsuch, J., dissenting from denial of certiorari).

Of course, the problem with the *Sullivan* rule is not that its “cost-benefit analysis was too skimpy,” *Ramos*, 130 S. Ct. at 1402, but that it “subjected the ancient guarantee of” security in one’s reputation, as entailed in the unenumerated right of personal security, to a

“functionalist assessment in the first place.” *Id.*⁴ It is not the province of the federal judiciary to “distinguish between the historic features of common law” that “serve ‘important enough’ functions” to be deemed worthy of retaining and “those that don’t.” *Id.* at 1400.

When the American people ratified the Bill of Rights, including the Ninth Amendment with its structuring conception of law and rights, “they weren’t suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children’s children would enjoy the same hard-won liberty they enjoyed.” *Id.* at 1402.

The Ninth Amendment forecloses to the Court any interpretive authority to determine that the fundamental common law right to personal security in reputation should be “disparaged or denied” in order to facilitate a substantive expansion of enumerated First Amendment rights.

Though “[i]t cannot be presumed that any clause in the constitution is intended to be without effect,” *Marbury v. Madison*, 5 U.S. 137, 174 (1803), this Court has never ruled on the Ninth Amendment’s relevance to its methods of construing enumerated constitutional rights. This case presents just such an opportunity, for *Sullivan*’s mistake derived precisely

⁴ “Personal security” was one of the three absolute rights at common law and “the preservation of these inviolate, may justly be said to include the preservation of our civil immunities...” 1 Blackstone’s *Commentaries* *129. “The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.” *Id.*

from neglect of the Ninth Amendment's rule of construction.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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