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NEW YORK TIMES V. SULLIVAN AT 60: WHERE DOES DEFAMATION LAW GO NOW?

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INTRODUCTION

In March 1964 the Supreme Court decided New York Times v. Sullivan, 1 a decision arising from the emerging civil rights movement of the late 1950s and early 1960s. The lawsuit filed in Montgomery, Alabama, in April 1960, by the three city commissioners, including Commissioner of Public Affairs, Lester B. Sullivan, against the New York Times was part of a broader strategy by some white Southerners to frighten the Northern press and blunt reporting on and criticism of their often-violent reaction to the demands of Blacks for equal rights. 2 That legal assault on the civil rights movement resulted in the Supreme Court’s unanimous decision to abandon long-standing common law principles

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3. See Barbas, supra note 1, at 1–3; see also Aimee Edmondson, In Sullivan’s Shadow: The Use and Abuse of Libel Law during the Long Civil Rights Struggle 1–16 (2019).
governing defamation and, in their place, to adopt the actual malice standard as the requirement for recovery in defamation cases brought by public officials. The decision proved to be crucial to the success of the civil rights movement by removing the threat of large libel judgments against those who criticized and acted against racial segregation. In the 1970s, the Court expanded the application of the actual malice standard from public officials to include public figures.

To recognize the 20th anniversary of the New York Times v. Sullivan opinion in 1984, we authored a retrospective analysis of the litigation that culminated in the Court’s decision. In that article, we examined in detail the historical background of the case, the genesis of the lawsuits filed in state and federal courts, the litigation strategies of the parties, the trials and appeals, and the ultimate decision of the Supreme Court. We concluded that the treatment of media defendants in defamation cases in the twenty years after Sullivan was decided indicated that the decision had produced a “rare and continuing consensus on the Court that the [F]irst [A]mendment requires that the media be given special protection in defamation cases.”

For the 50th anniversary of New York Times v. Sullivan in 2014, we wrote a second article that evaluated the continued expansion and impact of the actual malice standard during the five decades since it was decided. The Sullivan decision initially was the subject of high praise for its effect on the law of libel and on First Amendment rights, and for protecting newspapers and the civil rights movement from potentially stifling damage awards. Over the years, however, some critics asserted that Sullivan needlessly ignored common law standards, that it failed to stem the tide of large verdicts in libel cases, and that the actual malice standard operated as a catalyst for the expenditure of even greater defense costs. Despite those concerns, we found that the courts and Congress had applied the actual malice standard not only to the traditional media but had expanded its scope to protect freedom of expression in a variety of areas, including intentional infliction of emotional

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6. Id. at 779.
8. Id. at 27–36.
distress and labor cases, not contemplated by the Supreme Court in 1964. We concluded that the events of the first fifty years of the decision revealed that the actual malice standard had proven workable in the multifaceted areas in which it has been adopted by providing what the Court described as “breathing space” for a wide variety of communications made in the public interest.

As New York Times v. Sullivan approaches its 60th anniversary, the decision does not appear to be in immediate threat of reversal, as evidenced by the Supreme Court’s June 2023 decision in Counterman v. Colorado in which six Justices not only rejected a challenge to New York Times v. Sullivan, but cited it and drew on the actual malice test to hold that the First Amendment does not protect statements made by a defendant in a criminal case if they “consciously disregard[] a substantial risk that his communications would be viewed as threatening violence.” In October 2023, the Justices also denied the petition for a writ of certiorari in Blankenship v. NBCUniversal, where the petitioner asked the Court to overrule Sullivan. Despite those decisions, the actual malice standard, as the test in defamation cases involving public officials and public figures, is being challenged more now by political figures, judges, and scholars than at any time since Sullivan was decided. Former President Donald Trump and Florida Governor Ron DeSantis have called for the reversal of Sullivan. Legislation to do so was introduced in the Florida legislature in February 2023. Although the bills were withdrawn in May 2023, due to what were said to be time constraints and the pressure to deal with more immediate issues, Florida legislators have said they plan to reintroduce the bills.

In addition to the challenges raised by politicians and legislatures to Sullivan, the decision also has drawn criticism from two Supreme Court Justices. In June 2022, the Supreme Court reversed its fifty-year-old decision in Roe v. Wade in Dobbs v. Jackson Women’s Health Organization. In a concurring opinion in Dobbs, Justice Clarence Thomas took 9. Id. at 36–63.
10. Id. at 64.
14. See discussion infra, Part II.A.
15. See infra text accompanying notes 329–33.
the position that the Due Process Clause of the Fourteenth Amendment protects only procedural process and not substantive rights and expressed a willingness to reconsider other longstanding decisions that he felt were based on substantive due process. Justice Thomas has expressed his view that *New York Times v. Sullivan* should be reconsidered, if not overruled, in five decisions since 2019. In each of those cases, he either concurred with, or dissented from, the Court’s denial of writs of certiorari to review cases involving *Sullivan* or the Court’s use of *Sullivan* in reaching its decision. Justice Thomas consistently has based his argument on *originalism*, the theory that the Constitution has a fixed meaning based on the understanding of the words in the article or amendment at the time of its adoption. Justice Neil Gorsuch also expressed his view that *Sullivan* should be reconsidered in a dissent from a denial of a writ of certiorari. But, unlike Justice Thomas, Justice Gorsuch based his dissent on his view that *Sullivan* no longer may be needed because the media landscape has change drastically since 1964. Finally, over the past decade, numerous scholars have written either in support of *Sullivan* or calling for its reversal on the grounds espoused by Justices Thomas and Gorsuch.

The purpose of this Article is to examine where the *New York Times v. Sullivan* decision and defamation law might go in the next decade. To achieve this goal, we will address three major developments that could affect defamation and the actual malice standard. First, because the actual malice standard is required by *Sullivan* in cases involving public officials and public figures, this Article begins with an examination of the use of the standard in three recent high-profile defamation

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18. *Id.* at 330–36 (Thomas, J., concurring).


actions filed in federal and state courts. *Sarah Palin v. New York Times* was decided by a New York federal court jury in February 2022 in favor of the *Times* because Palin could not meet the evidentiary requirements of the actual malice standard. Among the issues in the case, which currently is on appeal to the U.S. Court of Appeals for the Second Circuit, is Palin’s request that the court overturn *Sullivan*. Regardless of how the appeals court decides that issue, it is likely that the Supreme Court again will be asked to review the validity of the *Sullivan* decision. Unlike the *Palin* case, in *Carroll v. Trump*, the plaintiff, a public figure, did not challenge the actual malice test. Instead, she was able to produce sufficient evidence that a New York jury concluded that she met the standard and awarded her $2.98 million in damages for defamation. However, that did not end the litigation. After Trump made further statements about Carroll that she alleged were defamatory, Carroll filed a second suit against Trump, resulting in a jury verdict of $83 million. That decision is being appealed by Trump. Finally, *U.S. Dominion, Inc. v. Fox News Network* was one of about twenty lawsuits filed as a result of allegations of fraud in the conduct of the 2020 presidential election. As in *Carroll, U.S. Dominion, Inc.* also did not

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22. The most extensive discussion of the facts in this case can be found in *Palin v. New York Times Co.*, 940 F.3d 804, 808–11 (2d Cir. 2019).


25. The most extensive discussion of the facts in this case can be found in *Carroll v. Trump*, 49 F.4th 759, 761–64 (2d Cir. 2022).


challenge the actual malice standard. During the discovery process, however, Dominion uncovered a large number of emails and text messages showing that Fox News commentators and officials knew their statements about Dominion’s conduct in counting the votes were false. On the day the case was scheduled to begin, the parties settled, and Fox News agreed to pay Dominion $787.5 million in damages.\(^{31}\)

After examining the three high-profile defamation cases and the role of the actual malice standard in each of them, this Article then will focus on political, legislative, judicial, and scholarly views that the First Amendment does not give the media any special protection in defamation cases. Finally, although those arguments are unlikely to result in the Supreme Court making any changes in the *Sullivan* decision, at least in the near future, this Article will conclude by examining what improvements can be made in defamation law without abolishing the actual malice standard.

I. The Actual Malice Standard: The Intersection of Law, Politics, and the Media

Despite the protection given to public officials and public figures by the actual malice standard in *New York Times v. Sullivan*, defamation cases have increased in recent years.\(^{32}\) In keeping with an argument made by many critics of *Sullivan* that the decision gives an unfair advantage to the media and enables it to get away with “sloppy” reporting,\(^{33}\) a few of the plaintiffs in these cases have challenged the constitutionality of the actual malice standard. This Part analyzes three recent high-profile defamation cases, all involving public figures as plaintiffs. In two of the cases, despite the protection given to public officials and public figures by the actual malice standard in *New York Times v. Sullivan*, defamation cases have increased in recent years.\(^{32}\) In keeping with an argument made by many critics of *Sullivan* that the decision gives an unfair advantage to the media and enables it to get away with “sloppy” reporting,\(^{33}\) a few of the plaintiffs in these cases have challenged the constitutionality of the actual malice standard. This Part analyzes three recent high-profile defamation cases, all involving public figures as plaintiffs. In two of the cases,
the defendants were media organizations. Although, in only one of the cases, which still is on appeal, did the plaintiff challenge the constitutionality of the actual malice standard. In the other two cases, the plaintiffs were able to marshal sufficient evidence to establish actual malice and, in one case, settle with the media for a record amount of damages.

A. Sarah Palin v. New York Times

In June of 2017, former Alaska Governor and 2008 Republican vice presidential candidate, Sarah Palin,34 filed suit against the Times for defamation.35 Later, in a 2019 Amended Complaint, she added the Times’s former opinion section editor, James Bennet, as an additional defendant.36 The basis of Palin’s defamation claim was that an editorial in the Times’s June 14, 2017 edition improperly tied her political statements to a 2011 shooting in Tucson, Arizona, that resulted in the deaths of six people and the wounding of thirteen others, including Democratic Representative Gabrielle Giffords.37

1. The Case Background

On January 8, 2011, Jared Lee Loughner fired on a political rally for Democratic Congresswoman Giffords causing a number of deaths.

34. Palin was Governor of Alaska from December 4, 2006, until July 26, 2009. After John McCain lost the 2008 Presidential election, Palin retained a following in the Republican Party and wrote a memoir, Going Rogue: An American Life (2009), which received mixed reviews. “Going Rogue” referred to a term used by a John McCain aide to describe Palin’s failure to follow the message during the presidential campaign. See Michiko Kakutani, Memoir Is Palin’s Payback to McCain Campaign, N.Y. Times (Nov. 14, 2009), https://www.nytimes.com/2009/11/15/books/15book.html. Ultimately, Palin lost ground and, despite inspiring a new political culture, was overshadowed by later Republican candidates. See Jeremy W. Peters, Sarah Palin Loses as the Party She Helped Transform Moves Past Her, N.Y. Times (Nov. 23, 2022), https://www.nytimes.com/2022/11/23/us/politics/sarah-palin-alaska-house-race.html. For another assessment of Palin, see T.A. Frank, Sarah Palin Has Long Been Ridiculed. I Want To Tell A Different Story, Wash. Post Mag. (July 12, 2022, 10:00 AM), https://www.washingtonpost.com/magazine/2022/07/12/sarah-palin-reconsidered/ [https://perma.cc/Q5TE-JJTW] (“The news media cannot be blamed for having probed Palin's understanding of national and international affairs and revealing it to be dangerously inadequate, or be faulted for reports on Palin’s ethics controversies and other baggage back in Alaska—this, after all, is the job of journalists. Nor can it be denied that Palin sometimes used the media to her advantage and played up a sense of injury whenever it seemed to work in her favor. What’s not clear, however, is why, if the truth was so damning, reporters needed to write so many falsehoods.”).


37. Id. at 211–12 n.3. For a copy of the editorial, see America's Lethal Politics, N.Y. Times (June 14, 2017), https://www.nytimes.com/2017/06/14/opinion/steve-scalise-congress-shot-alexandria-virginia.html.
On the evening of June 14, 2017, the Times published an editorial entitled “America’s Lethal Politics.” The editorial asserted that the two shootings illustrated the “vicious” side of American politics. Premised upon the Loughner shooting and the SarahPAC map, the editorial asserted that the “link to political incitement was clear . . . .” In so doing, the editorial pointed out that Palin’s political action committee “circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs,” promoting the idea that congressmembers were actually pictured on the map. Instead, the crosshairs were put on a map over the congressional districts and the name of the Congress members were listed at the bottom of the pages. The editorial also mentioned the Hodgkinson shooting that took place that day, declaring: “Though there’s no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right.”

The editorial caused immediate pushback. Before its publication, James Bennet, the top editor of the editorial page, had added language contending that there was a “clear” and “direct” link between the 2011 attack and the “political incitement” created by the crosshair’s graphic. The Times revised the editorial and made a correction within a day. It removed the language suggesting a connection between Palin and the Loughner shooting stating: “An earlier version of this editorial incorrectly stated that a link existed between political incitement and the 2011 shooting of Representative Gabby Giffords . . . In fact, no such
link was established.”\textsuperscript{44} “The Times [further] clarified that the SarahPAC map had [placed] crosshairs on Democratic congressional districts, not the representatives themselves.”\textsuperscript{45} On June 16, 2017, the Times published a print edition of its “Corrections.”\textsuperscript{46} However, within twelve days of the editorial’s publication, Palin filed suit against the Times for defamation and the paper responded with a motion to dismiss the complaint for failure to state a claim.\textsuperscript{47}

2. The Times’s Motion To Dismiss

The District Judge Jed S. Rakoff took the unusual step of holding an evidentiary hearing on the motion to dismiss. On August 29, 2017, Judge Rakoff granted the Times’s motion to dismiss with prejudice.\textsuperscript{48} Palin then sought reconsideration of the dismissal with a proposed amended complaint. When the motion for reconsideration and leave to refile were denied, Palin appealed to the U.S. Court of Appeals for the Second Circuit, which, on October 15, 2019, vacated the judgment of the district court, finding that Palin’s Proposed Amended Complaint “plausibly states a claim for defamation and may proceed to full discovery.”\textsuperscript{49} The related amended opinion acknowledged that: “First Amendment protections are essential to provide ‘breathing space’ for freedom of expression. But, at this stage, our concern is how district courts evaluate pleadings. . . . At the pleading stage . . . Palin’s only obstacle is the plausibility standard . . . She has cleared that hurdle.”\textsuperscript{50}

On June 12, 2020, the parties filed cross-motions for summary judgment which the court denied on August 28, 2020 and set the case for trial.\textsuperscript{51} Defendants later filed a motion for reconsideration premised

\textsuperscript{45} Palin, 940 F.3d at 808–09.
\textsuperscript{47} Palin, 940 F.3d at 809.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 808–09. The Amended Complaint was filed on December 30th, 2019, Palin v. New York Times Co., 482 F. Supp. 3d 208, 210, 213 (S.D.N.Y. 2020).
\textsuperscript{50} Palin, 940 F.3d at 816–17.
\textsuperscript{51} Judge Rakoff’s August 28th, 2020 Opinion and Order addressed issues at the core of Palin’s case. It stated:

Perhaps recognizing that this Court is not free to disregard controlling precedent even if it were so inclined . . . plaintiff offers what she calls an alternative argument: that “the actual malice rule arose from distinguishable facts and should not be applied” here. More precisely, plaintiff’s argument is that the actual malice rule, which was first articulated more than half a century ago in the days before the Internet and social media, has run its course and should no longer govern our contemporary media landscape.
on New York State’s November 10, 2020 amendment of its libel law to require a public figure like Palin to prove actual malice by clear and convincing evidence.52 The court granted the motion for reconsideration on December 29, 2020 and held the New York “Anti-SLAPP Statute” (Strategic Lawsuits Against Public Participation) applied to the case.53

3. The Trial

After a delay due to COVID-19, the trial began on February 3, 2022, and concluded on February 10.54 At the close of evidence, defendants sought judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a).55 The court reserved judgment on the motion and on the evening of February 11, 2022, the jury began deliberations. Then on Monday, February 14, Judge Rakoff found “that no reasonable jury could find that Palin had carried her burden to prove by clear and convincing evidence that [editor] Bennet had known or recklessly...

disregarded the Challenged Statements’ falsity prior to publication.” 56 He also permitted the jury to continue deliberations and the Rule 50 judgment would only be entered after a verdict was returned. 57 On the afternoon of February 15, 2022, the jury delivered a verdict for the defendants. 58 The court then told the jurors of its ruling on the Rule 50 motion. 59 The district court’s March 1, 2022 sixty-eight-page opinion concluded: “Palin adduced no affirmative evidence that Bennet knew that the Challenged Statements were false or recklessly disregarded their probable falsity. The Court is therefore bound to conclude that no reasonable jury could find that Bennet, and therefore the New York Times Co., published ‘America’s Lethal Politics’ with actual malice.” 60 Interestingly, the opinion added “the Court’s decision to enter judgment as a matter of law also reflected its duty to ensure that public figure libel actions with constitutionally inadequate evidence does not erroneously result in the imposition of liability that might chill protected speech.” 61 Sarah Palin filed post-trial motions and on March 17, 2022 filed a notice of appeal with the court. 62

56. Id. at 397. See Jeremy W. Peters, Judge Says Sarah Palin ‘Failed to Prove Her Case’ Against The Times, N.Y. TIMES (Mar. 1, 2022), https://www.nytimes.com/2022/03/01/business/media/sarah-palin-new-york-times-trial.html. Palin specifically alleged she was defamed by two paragraphs:

In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin’s political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.

Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They’re right. Though there’s no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask for the right.

Palin, 588 F. Supp. 3d at 384 (citation omitted). The cited paragraphs were the fifth and sixth paragraphs of the twelve-paragraph editorial. Id.

57. Id.

58. Peters, Sarah Palin’s Libel Claim Rejected by a Jury, supra note 23.

59. Some have reported that the jurors knew of the upcoming dismissal. See Katie Robertson, Jurors in the Sarah Palin Trial Said They Knew of the Judge’s Decision to Dismiss Before their Verdict, N.Y. TIMES (Feb. 16, 2022), https://www.nytimes.com/2022/02/16/business/media/sarah-palin-libel-new-york-times.html. The Brief of Appellant stated: “The Rule 50 decision was the subject of immediate news coverage and ‘push notifications’ while the jury was still deliberating, many of which revealed the District Judge’s decision to dismiss the case in their headlines.” Brief of Appellant at 19 [29]. Palin v. New York Times Co., No. 22-558 (2d Cir. Sept. 19, 2022), ECF No. 47 (citations omitted). Note that the numbers in brackets are the court filing page numbers found at the top of each page.

60. Palin, 588 F. Supp. 3d at 410.

61. Id. at 411.

4. **Ruling on Sarah Palin’s Post-Trial Motion**

Palin’s post-trial motions first sought the court’s retroactive disqualification or alternatively sought either a new trial or reconsideration of the court’s prior ruling in favor of defendants *Times* and James Bennet based on their Rule 50 motion for judgment as a matter of law. On May 31, 2022, Judge Rakoff ruled on Palin’s motion and denied it in its entirety.

The meritless accusations of impropriety in Palin’s motion cannot substitute for what her trial presentation lacked: proof of actual malice. This requires, under both Supreme Court precedent and New York State statutory law, clear and convincing evidence that Bennet and the Times published “America’s Lethal Politics” knowing that it was false or in reckless disregard of its falsity. And, as the Supreme Court has likewise held, this high standard cannot be satisfied simply by a negative inference drawn from discrediting Bennet’s denials. Here, Palin still cannot identify any affirmative evidence to support the essential element of actual malice. This absence is not a consequence of trial procedures, judicial bias, or adverse evidentiary rulings. It is, in the Court’s view, a reflection of the facts of the case. To be sure, as the Court itself recognized even it is [sic] initial statement of its Rule 50 decision, the evidence showed that Bennet and the Times’s Editorial Board made mistakes as they rushed to meet a print deadline, and that their editorial processes failed to catch those mistakes before publication. But in a defamation case brought by a public figure like Sarah Palin, a mistake is not enough to win if it was not motivated by actual malice. And the striking thing about the trial here was that Palin, for all her earlier assertions, could not in the end introduce even a speck of such evidence.

Before and during the trial, some commentators speculated that the Palin case could be a catalyst to unravel the *New York Times v. Sullivan* actual malice standard. However, the course of the case and Palin’s background have not stimulated any major changes in the law thus far.

64. Id. at 224 (emphasis added) (citations omitted).

The New York Times won a legal victory Tuesday against Sarah Palin’s libel suit, but the cost has been steep. Ms. Palin couldn’t get over the high legal bar of proving “actual malice” to a jury, but the case exposed slipshod editing and how a left-wing narrative skewed
As previously noted, Judge Rakoff held that New York’s newly amended anti-SLAPP law applied retroactively to the case.67 The revised statute requires that a plaintiff like Palin must prove actual malice under state law to prevail. Unless overruled on appeal, the ruling means that the case cannot be a basis for changing the actual malice rule.

5. Appeal to the U.S. Court of Appeals for the Second Circuit

The Second Circuit appeal was filed by Palin on March 17, 2022,68 and the Appellant’s Brief on September 19, 2022.69 The first and foremost issue raised was “[w]hether the District Court erred by requiring Appellant to prove actual malice as to falsity and defamatory meaning based on the First Amendment and under N.Y. Civil Rights Law § 76-a(2).”70 The Appellant’s Brief took the position that “the actual malice rule was judicially created in response to government officials using defamation lawsuits against members of the press to try to stifle the voices of Civil Rights leaders.”71 But, “[t]he rule, even if it has a valid textual basis in the First Amendment, is obsolete in the modern speech landscape.”72

The brief argued that actual malice rule should not have been applied by the district court “in substantially dissimilar circumstances to those present in New York Times v. Sullivan . . .”73 More pointedly, the brief asserted: “Continuing to apply the rule not only subverts fundamental constitutional rights and human dignity without justification, but also harms free expression, chills speech, and proliferated false information.”74

the publication’s commentary against an easy political target. In that sense the former Alaska Governor won even in defeat.

See also Seth Stevenson, Sarah Palin Wasn’t The Point, SLATE (Feb. 15, 2022, 5:25 PM), https://slate.com/news-and-politics/2022/02/sarah-palin-loses-new-york-times-lawsuit-verdict.html (“[I]t’s important to acknowledge, that no one deserves to be falsely accused of inciting murder. Even if the mistake is an honest one, and even if it was rapidly corrected, it was still a supremely awful error . . . The real question is: Where does this leave us? Where do we go from here?”).


69. Brief of Appellant, supra note 59, at 1.

70. Id. at 59.

71. Id. at 32.

72. Id. at 33.

73. Id.

74. Id. at 34.
The brief also sought to distinguish the original foundation of the rule—the impact of free and open debate. “We are worlds away from the days when a public figure was capable of meaningfully defending herself against defamation by using a press release or holding a press conference.”

Many of these arguments have been made by lower court judges and in Supreme Court Justice’s dissents or concurring opinions. But, whether Palin’s argument will gain traction in the Second Circuit remains to be seen.

The application of the New York amended anti-SLAPP statute also could impact the attack on the actual malice standard. For that reason, the Appellant’s Brief argued: “The actual malice rule should not have been applied under the First Amendment nor N.Y. Civil Rights L. § 76-a(2). The District Judge’s December 29, 2020 [] decision to require Appellant to also prove actual malice based on the retroactive application of New York’s amended Anti-SLAPP statute was clearly erroneous.” The brief argued the amendments were not remedial but instead “impact ‘substantive burdens and rights’” and are a “change in substantive law.” Consequently, the New York legislature “did not include an unequivocal text expression that the statute was intended to apply to past conduct . . . .”

The Brief of Appellees New York Times and its former opinion section editor Bennet addressed the application of the actual malice standard to Palin. First, appellees maintained that Palin waived any arguments that the requirements of actual malice were inapplicable. During the litigation from July 2017 until December 2019, “Palin failed to even argue that the actual malice standard of fault did not govern her claim.”

What Palin had asserted was that the Times standard was dated and “should not be applied in circumstances ‘substantially dissimilar’ from

75. Brief of Appellant, supra note 59, at 35.
76. See McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring). In his concurring opinion, Justice Thomas declared:

Like Justice White, I assume that New York Times and our other constitutional decisions displacing state defamation law have been popular in some circles, “but this is not the road to salvation for a court of law.” We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.

77. Brief of Appellant, supra note 59, at 35.
78. Id.
79. Id. at 36.
those that existed at the time *Sullivan* was decided.” 81 It seemed that the Palin brief was attempting to take advantage of the views of some Supreme Court Justices that the courts should rethink *Sullivan* because the news environment has changed markedly since it was decided in 1964. 82 Second, the appellees noted that Palin did not contest that she is a public figure and the facts of the case did not warrant a “different fault standard.” 83 Any societal changes had no relevance to her. The brief colorfully noted that: “As a former governor, candidate for vice president, and potential candidate for president who regularly seeks to influence politics and matters of public concern, Palin is the paradigmatic public figure to whom the holdings in *Sullivan* and its progeny apply.” 84

The appellees also argued in their brief that New York law requires application of the actual malice standard. According to their brief, Palin “objects only to the retroactive application of the statute to this action” filed before the amendment to the statute was effective. 85 However, “the overwhelming majority of courts to consider this question agreed with the district court’s reasoning in this case and ruled that the 2020 amendments apply retroactively to pending actions.” 86

Palin’s reply brief again challenged the application of the actual malice rule to her case, even though there was no doubt that she was a “public figure.” It declared:

> The actual malice rule should never have been imposed on Palin. This judicially created, policy-driven obstacle to vindicating reputational harm is a “substantial abridgment” of the fundamental constitutional right to protect one’s reputation. Although the Supreme Court counseled against the “blind application” of the rule, and its justifications indisputably have ceased to exist, its unreasoning application persists while undermining human dignity, harming free expression, encouraging the proliferation of false information, and shielding the enormously powerful fourth estate from legal responsibility for its actions. 87

6. **Palin’s Background as a Public Figure**

In its August 6, 2019 opinion, the U.S. Court of Appeals for the Second Circuit acknowledged that a plaintiff who is a “public figure” must prove

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81. *Id.* at 20 (citing Palin’s brief at 33).
82. *Id.*
83. *Id.* at 19–20.
84. *Id.* at 21 (emphasis in original) (citing Palin v. New York Times Co., 940 F.3d 804, 809–10 (2d Cir. 2019)).
85. *Id.* at 21.
that an allegedly defamatory statement was made with actual malice—knowledge that it was false or reckless disregard of whether it was true or false. Further, the Court declared: “[i]t is undisputed that Palin, a former governor of Alaska and Republican candidate for Vice President in 2008, is a public figure.” As Appellees’s Brief asserted, this is an understatement.

Palin was the youngest governor ever elected in Alaska and the first woman to serve in that position. She then was chosen by John McCain to serve as his presidential running mate in 2008. While losing to Barack Obama and Joseph Biden, Palin became a well-known figure in national Republican politics. After resigning her position as Alaska governor in 2009, Palin became a commentator on Fox News and gave paid speeches from 2009 through 2019. She also gained prominence as an unofficial leader of the Tea Party movement and was a keynote speaker at the first National Tea Party Convention in Nashville, Tennessee, in 2010. Palin became a staunch supporter of Donald Trump who was successful in his 2016 presidential campaign.

While engaging in diverse political activities, Palin appeared in several reality television series and wrote a number of books, including Going Rogue: An American Life (2009) (which commented on the McCain presidential campaign); America By Heart: Reflections on Family, Faith and Flag (2010); Good Tiding and Great Joy: Protecting the Heart of Christmas (2013); and Sweet Freedom: A Devotional (2015). Finally, Palin was involved in SarahPAC, a political action committee created after she ran for vice president, as a “forum to have [her] voice heard, “to help candidates, to help issues.” It was run by a professional staff and involved in fundraising activities.

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90. Brief of Defendants-Appellees, supra note 80, at 21.
93. See id. at Sapp-291, 337–38 (examination and cross examination of Sarah Palin December 9th and 10th of 2022).
94. Id. at SApp-337.
Clearly, Palin has long been at the intersection of politics and the media. Now, law has been added to the mix by the defamation action. She has been aggressive in her statements and apparently unconcerned with potential political or legal fallout. For example, she accused President Barack Obama of “palling around with terrorists.”96 She was also notorious for stating in 2009 that Obamacare would lead to “death panels.”97

All these facts support the expectation that Palin has multiple platforms to challenge any improper statements made by the news media. The Brief of Amici Curiae Reporters Committee for Freedom of the Press and 52 Media Organizations disputed Palin’s contention that defamation law needs revision.98 The amici brief declared:

Appellant emphasizes in her brief that this case was “high-profile.” But the legal questions her appeal raises could not be more ordinary. The First Amendment’s protections apply equally no matter the level of media attention or what “polarizing” issues a case may involve. Journalists and news media organizations depend on those protections to do their work of delivering important information to the American people so they can make the decisions necessary to govern themselves. Appellant articulates no reason why those protections should be different here, where Appellant is a high-profile public figure with a national platform to deliver her own messages and information to the public—because there is none.99

On Monday, November 6, 2023, Palin’s twice dismissed action was finally argued before the Second Circuit. While Palin’s counsel led with an assault on the actual malice standard, the three-judge panel, made up of Circuit Judges John M. Walker, Jr., Reena Raggi, and Richard J. Sullivan, exhibited little appetite for the challenge.100

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97. See Frank, supra note 34. For further coverage of the “death panels” statement, see CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 79 (2021) [hereinafter SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION].


99. Id.

during oral argument are not definitive evidence of the judges’ views, but they do reflect some areas of concern. Judge Walker told counsel for Palin, Shane Vogt, “I think you’re wasting time for oral argument by spending a lot of time on this question . . . .”101 But Palin’s counsel’s other arguments seemed to gain more traction—did Judge Rakoff ignore probative evidence or provide improper responses to jurors? Judge Raggi was concerned with the legal impact of editor Bennet’s statement that he believed he read the Times’s editorials that stated no connection had been established between the 2011 shooting and a map of Palin’s political action committee distributed with crosshairs over Giffords’s district. Only time will tell where the panel ultimately comes down on the issues.

B. The Two E. Jean Carroll v. Donald J. Trump Lawsuits

A second example of the application of the actual malice standard in defamation cases are the two lawsuits filed by E. Jean Carroll, a “journalist, author, former writer for Saturday Night Live, and advice columnist for Elle magazine,” against Donald J. Trump. Unlike Sarah Palin, Jean Carroll did not challenge the constitutionality of the Sullivan decision. Instead, she presented evidence that resulted in the jury finding that Trump made his statements with actual malice and awarded her $2.98 million in damages for defamation.

Carroll’s first suit against Trump (Carroll I) arose from statements then-President Trump made in June 2019 in response to an article published on June 21, 2019 in New York Magazine on the internet, which contained an excerpt from Carroll’s soon to be released book detailing Trump’s alleged sexual assault of her in late 1995 or early 1996 in the Bergdorf Goodman department store in New York City.104

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103. Complaint and Jury Demand at ¶ 17 Carroll v. Donald J. Trump, No. 1:20-cv-07311 (LAK) (S.D.N.Y. Sept. 8, 2020), E. Jean Carroll’s advice column was published in Elle Magazine from 1993 until 2020, where she was known for her aggressive but humorous writing style. From 1994 to 1996, she was the host and producer of the Ask E. Jean television series that was featured on NBC’s America’s Talking. In the mid-1980’s she wrote for Saturday Night Live. She also wrote for magazines including The Atlantic and Vanity Fair and was a contributing editor for Outside, Esquire, and New York magazines. See Charisse Jones, Beauty Queen, Journalist, Pioneer. The Many Faces of Trump Accuser E. Jean Carroll, USA Today (July 3, 2019, 8:30 AM), https://www.usatoday.com/story/money/2019/07/03/e-jean-carroll-new-york-circuit-donald-trump-assault-accusation/1584135001.
1. Trump’s Responses to the June 2019 Statements by Carroll

Trump made three 2019 statements in response to Carroll’s account, which she alleged to be defamatory. One statement was made by Trump soon after Carroll’s excerpt was released.\(^\text{105}\) He declared:

> Regarding the ‘story’ by E. Jean Carroll, claiming she once encountered me at Bergdorf Goodman 23 years ago. I’ve never met this person in my life. She is trying to sell a new book. That should indicate her motivation. It should be sold in the fiction section. . . False accusations diminish the severity of real assault. All should condemn false accusations and any actual assault in the strongest possible terms.\(^\text{106}\)

The second statement by Trump was reported in the media and published in a White House press release entitled, “Remarks by President Trump Before Marine One Departure” on June 22, 2019. It stated, in part: “It’s a false accusation and it’s a disgrace that a magazine like New York—which is one of the reasons it’s failing. People don’t read it anymore, so they’re trying to get readership by using me. It’s not good.”\(^\text{107}\)

Then, on June 24, 2019, Trump said in an interview with The Hill newspaper, “Number one, she’s not my type. Number two, it never happened.”\(^\text{108}\)

Carroll brought her first case against Trump in November 2019 (Carroll I) for defaming her in the above statements. Her defamation claim was premised on the fact that Trump accused her “of fabricating her [sexual assault] allegations [against him] to increase book sales” and for other improper purposes thereby causing her professional and reputational harm” and causing her “emotional pain and suffering.”\(^\text{109}\)

In response to Trump’s motion for summary judgment filed on June 29, 2023, District Court Judge Lewis A. Kaplan\(^\text{110}\) denied the motion.


\(^{107}\) First Amended Complaint and Demand for Jury Trial, supra note 106, at 18, ¶ 92.

\(^{108}\) Id. at 20, ¶ 98.

\(^{109}\) Id. at 3–4, ¶ 11, 15.

\(^{110}\) District Judge Kaplan is a senior United States District Judge on the United States District Court for the Southern District of New York. He was appointed by President Bill Clinton and has been on the bench since February 1, 2011. See Kaplan, Lewis A., Fed. Jud. Ctr., https://www.fjc.gov/history/judges/kaplan-lewis [https://perma.cc/4DD8-BDNU].
and the alternative request for leave to raise an absolute presidential immunity defense.\textsuperscript{111}

2. \textit{The Second Carroll Action}

In her “second case”\textsuperscript{112} (Carroll II), Carroll sued Trump for alleged sexual assault and defamation based on a statement he posted on his social media account in October 2022 “that was substantially similar” to his statements of June 2019.\textsuperscript{113} The second case was tried before a jury in April and May 2023 and also presided over by Judge Kaplan.\textsuperscript{114} On May 9, 2023, the jury found that Trump’s statement was defamatory, that Carroll proved, “by clear convincing evidence that Mr. Trump’s statement was false,” that “Mr. Trump made the statement \textit{with actual malice},” and that Carroll provided by a “preponderance of the evidence” that she was “injured as a result of Mr. Trump’s publication of the October 12, 2022 statement.”\textsuperscript{115} The jury awarded Carroll $5 million in damages against Trump, including $2.02 million for sexual assault and $2.98 million for defamation.\textsuperscript{116}

Trump’s negative statements about Carroll did not end with the jury’s verdict. During a CNN appearance the next day on May 10, 2023, Trump declared that Carroll was a “wack job,” that the trial was “rigged,”

\textsuperscript{111} Memorandum Opinion Denying Defendant’s Motion for Summary Judgment, supra note 104, at 46. On July 11, 2023 the U.S. Department of Justice issued a letter stating:

After balancing and weighing the evidence . . . from Mr. Trump’s deposition, the jury verdict in Carroll II, and the new allegations in the Amended Complaint, the Department has determined that there is no longer a sufficient basis to conclude that the former President was motivated by “more than an insignificant” desire to serve the United States Government.


\textsuperscript{112} Memorandum Opinion Denying Defendant’s Motion for Summary Judgment, supra note 104, at 2. When Ms. Carroll filed her 2019 action, she was prevented from suing for sexual battery by the New York statute of limitations. The \textit{Adult Survivor Act} of 2022 renewed her ability to bring assault claims, leading to those claims in the second action. Id. at 3 n.3.

\textsuperscript{113} Id. at 2.

\textsuperscript{114} Verdict Form at 1–4, Carroll v. Donald J. Trump, No. 1:22-cv-10016-LAK (S.D.N.Y. May 9, 2023), ECF No. 174.

\textsuperscript{115} Verdict Form, supra note 114, at 2–3; Carroll v. Trump, No. 22-cv-10016 (LAK), 2023 WL 4612082, at *16 (S.D.N.Y. July 19, 2023) (emphasis added).

denied raping her, and declared, “I don’t know who the hell she is.” Trump appealed the Carroll II jury verdict on May 11, 2023. However, the next day, his attorneys proffered $5.55 million to the district court in the event the appeal failed. Carroll then sought leave to amend her original defamation action (Carroll I) to include the new remarks Trump had made after the verdict on the CNN town hall broadcast and Truth Social. Judge Kaplan granted the motion on June 13, 2023.

3. The Motions in the Carroll Litigation Continue

After the Carroll II unanimous jury verdict in Carroll’s favor, Trump filed a Rule 59 motion challenging the jury verdict as “a miscarriage of justice” and sought a new trial on damages or remittitur. Following a detailed fifty-nine page opinion, Judge Kaplan denied the motion on July 19, 2023. As part of the July 19th opinion, Judge Kaplan carefully probed the defamation claim premised on Trump’s 2022 statement. According to Judge Kaplan, the “crux” of that statement was “that Ms. Carroll lied about his sexually assaulting her and that her entire accusation was a ‘[h]oax’ concocted to increase sales of her then-forthcoming book.” To establish that Trump defamed her, Judge Kaplan stated that Carroll had to prove Trump’s statement “was false (i.e., not substantially true),” that he knew the statement was false or acted recklessly of whether it was true or false and that the statement disparaged Carroll in her profession or exposed her to hate or contempt in the community.


120. Granting Plaintiff’s Motion to Amend at 1, Carroll v. Trump, No. 20-cv-7311 (LAK) (S.D.N.Y. June 13, 2023), ECF No. 169.

121. Motion for New Trial at 1, Carroll v. Trump, No. 22-cv-10016 (LAK) (S.D.N.Y. June 21, 2023), ECF No. 204.


123. Id. at *10.

124. Id. The jury had found that Mr. Trump made the statement “with actual malice.” Transcript of Trial Proceedings at 1432, Carroll v. Trump, No. 22-cv-10016 (LAK) (S.D.N.Y. June 15, 2023), ECF No. 201.
In evaluating the defamation claim and the impact of an alleged “rape” claim, Judge Kaplan found that the claim was never based on the specific New York Penal Law definition of “rape” but was based on Carroll’s alleged fabrication of the incident. Indeed, the opinion reasoned that Trump never specifically denied “raping” Ms. Carroll but “instead accused her of lying about the incident as a whole, of ‘completely m[a]king up a story’ that was a ‘Hoax and a lie.’ There is thus no factual or legal support for Mr. Trump’s made-up version of Ms. Carroll’s defamation claim.” Judge Kaplan also found that the damages awarded by the jury did not deviate significantly from awards in other New York defamation awards. Citing Plaintiff’s Opposition Memorandum, the Court distinguished other New York awards:

The cases Mr. Trump cites “do not compare in the slightest to being defamed by one of the loudest voices in the world, in a statement read by millions and millions of people, which described you as a liar, labeled your account of a forcible sexual assault a ‘hoax,’ and accused you of making up a horrific accusation to sell a ‘really crummy book.’”

Thus, Judge Kaplan found that Trump failed to establish a new trial or remittitur was warranted, relating to the defamation claim. Finally, he held that the jury’s punitive damage award of $280,000 was neither excessive nor violative of due process. Thus, Judge Kaplan concluded that the jury neither reached “a seriously erroneous result” nor rendered a verdict that was “a miscarriage of justice.”

On August 7, 2023, the district court granted Carroll’s motion to dismiss Trump’s counterclaim and to strike certain purported affirmative defenses in Carroll I. Trump alleged in his counterclaim that Carroll’s statements during the CNN May 10, 2023 interview “repeated falsehoods and defamatory statements” that resulted in damage to Trump’s reputation. The only support for Trump’s claim of falsity was the fact that the jury in Carroll II did not find he “penetrated her vagina with his

125. See Carroll, 2023 WL 4612082, at *25; Complaint and Demand for a Jury Trial at 18, ¶ 92, Carroll v. Trump, No. 22-cv-10016 (S.D.N.Y. Nov. 11, 2022), ECF No. 1.
128. Id.
129. Id.
131. Defendant’s Answer to Plaintiff’s Amended Complaint at 26, ¶12, No. 20-cv-7311 (LAK-JLC) (S.D.N.Y. June 27, 2023), ECF No. 171.
However, the court concluded that “Mr. Trump has not plausibly alleged that Ms. Carroll’s statements during the CNN interview was not at least substantially true.”

The court then identified an even more consequential finding—on the sexual abuse question—that the jury’s “implicit determination that Trump digitally raped her—is conclusive with respect to this case.” Thus, Carroll’s statements were “substantially true.” Consequently, the court found that Trump failed to state a defamation claim “because (1) he fails to plausibly allege that Ms. Carroll’s statements were not true, and (2) in the alternative, Ms. Carroll’s allegedly defamatory statements were substantially true as a matter of law.” As a result, the jury verdict in Carroll II stands, at least for now, and the claims in Carroll I can move forward.

4. Motions Regarding the Preclusive Effect of Carroll II Verdict On 2019 Statements

In a well-publicized September 6, 2023 opinion, the district court ruled on the parties’ “competing motions” regarding the collateral estoppel impact of the jury verdict in Carroll II on the defamation claims asserted in Carroll I. The court's detailed memorandum opinion again illustrated the proper application of the actual malice standard and whether the trial in Carroll I should address only damages issues or as Trump contended, that there was no preclusive effect on liability and any damages in Carroll I were limited by the damages the jury awarded in Carroll II.

The district court analyzed in detail three statements made by Trump about Carroll in 2019. The court ultimately found “the verdict

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132. See Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion to Dismiss and Motion to Strike at 5–6, Carroll v. Trump, No. 20-cv-7311 (LAK-JLC) (S.D.N.Y. July 25, 2023), ECF No. 181; see Carroll, 2023 WL 4612082, at *13.
134. Id. at *7.
135. Id.
in *Carroll II* established . . . that Mr. Trump’s statements were made with actual malice.”139 In support, Judge Kaplan concluded that the jury in *Carroll II* “found by clear and convincing evidence that Mr. Trump made the 2022 statement with actual malice.”140 That is, that Trump “knew that it was false, had serious doubts as to its truth, or had a high degree of awareness that the statement probably was false.”141 The jury concluded that Mr. Trump knew his statement that Ms. Carroll made untrue allegations about being sexually assaulted for her own personal gain were false or that he acted with reckless disregard of their falsity. Trump’s 2019 statements raised the identical issue.142 The Judge agreed with Ms. Carroll’s argument that “[n]o reasonable person could believe that [Mr.] Trump acted with actual malice in October 2022, but lacked it in June 2019.”143 In addition, even if the jury verdict in *Carroll II* that Trump’s 2022 statement was made with actual malice did not result in issue preclusion, it was still sufficient for summary judgment purposes.144 Thus, the jury’s determination that Trump’s 2022 statement was false “is controlling in [the 2019] case.”145

While the jury in *Carroll II* was told not to consider Mr. Trump’s 2019 statements, that did not impact the fact “that the jury considered and decided issues common to both cases . . . .”146 Thus, the Judge reached the ultimate conclusion as to the defamation claim that “[t]he jury’s verdict in *Carroll II*, as well as (and alternatively) the undisputed facts, established that Mr. Trump’s 2019 statements were made with actual malice.”147 The judge granted Carroll’s motion for partial summary judgment based on Trump’s June 24, 2019 statement but denied Trump’s motion to restrict Carroll’s damages based upon the impact of the *Carroll II* verdict in the *Carroll I* case.148 Judge Kaplan’s detailed analysis applied the existing *Sullivan* requirements and there seem few grounds for a challenge to that standard at the appellate or Supreme Court levels.

After a long pause relating to appellate proceedings involving the Westfall Act immunity,149 the *Carroll I* case has now moved forward.

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139. Id. at *8.
140. Id.
141. Id. (citing Transcript of Trial Proceedings at 1431–32, No.22-cv-10016 (S.D.N.Y. June 15, 2023), ECF No. 201).
142. Id.
143. Id. (emphasis added).
145. Id.
146. Id.
147. Id.
148. Id. at *11.
Judge Kaplan’s January 9th, 2024 Memorandum and Order on Plaintiff’s Motion in Limine resolved a number of key issues before the jury trial on damages. For example, it prevented Trump and his attorneys from offering any evidence, argument, or comments [before the jury] . . . [s]uggesting or implying that . . . Trump did not sexually abuse Carroll; that he did not make his June 21 and 22, 2019 statements concerning . . . Carroll with actual malice in the constitutional sense of that term; that . . . Carroll fabricated her account . . . or offering testimony or advancing any argument inconsistent with the Court’s collateral estoppel decision determining that . . . Trump, with actual malice, lied about sexually assaulting . . . Carroll . . . .150

The second trial, dealing with Carroll’s damages, began January 16th, 2024. As Judge Kaplan’s January 9th Memorandum and Order stated: “The only issue at trial will be Ms. Carroll’s damages from Mr. Trump’s defamatory statements.”151 Carroll testified that Trump “shattered my reputation” and that a course of online threats resulted.152

Trump testified for approximately three minutes on January 25th. He stated that he had not encouraged anyone to harm Carroll. Trump’s attorneys had argued that Carroll was not actually defamed by Trump’s many statements, but she actually secured social status and beneficial reputation from them.153

On January 26th, 2024, a jury of seven men and two women rendered a very sizeable verdict against Trump after no more than three hours of deliberation. The unanimous verdict was for $83.3 million in damages, made up of $11 million in compensatory damages for reputation repair,

150. Memorandum and Order on Plaintiff’s In Limine Motion at 26–27, Carroll v. Trump, No. 20-cv-7311 (LAK) (S.D.N.Y. Jan. 9, 2024), ECF, No. 252 (emphasis added). The Memorandum and Order reasoned:

The Court, however, already has granted partial summary judgment to Ms. Carroll on the issue of constitutional actual malice, meaning that Mr. Trump is precluded from arguing he believed his statements to have been true when uttered . . . Indeed, the jury in Car- roll II already found that Mr. Trump knew of the falsity of his statements (accusing Ms. Carroll of lying), or at least that he made them with reckless disregard for their truth or falsity or that he in fact entertained serious doubt as to the truth of his own statements.

Id. at 17 (citing Verdict Form at 2, Carroll v. Donald J. Trump, No. 1:22-cv-10016-LAK (S.D.N.Y. May 9, 2023), ECF No. 174).

151. Id. at 9.


$7.3 million in compensatory damages outside of reputation repair and $65 million in punitive damages.154

Carroll’s attorney, Roberta Kaplan, maintained in her closing argument that the only thing that would stop Trump’s attacks on Carroll would be to make it too costly for him to carry on. After the verdict, Ms. Kaplan said the verdict illustrates that “the law applies to everyone in our country, even the rich, even the former presidents.”155 Trump’s attorney, Alina Habba, indicated that the verdict would be appealed. Trump signaled a similar intent, declaring that the result was “absolutely ridiculous!”156

154. Corinne Ramey & James Fanelli, Jury Orders Trump to Pay E. Jean Carroll $83 Million for Defamation, Wall St. J. (Jan. 26, 2024, 6:56 PM), https://www.wsj.com/us-news/law/jury-set-to-decide—whether-trump-must-pay-e-jean-carroll-again-for-defamation-07785bd5. See also Verdict Form at 1–2, No. 1:20-cv-07311-LAK (S.D.N.Y. Jan. 26, 2024), ECF No. 280. At the conclusion of the second jury trial, Judge Lewis Kaplan cautioned the jurors “[m]y advice to you is that you never disclose that you were on this jury.” Brent B. Griffiths & Laura Italiano, Judge in Trump Defamation Trial Advises Jurors to ‘Never Disclose That You Were on This Jury’, Bus. Insider (Jan. 26, 2024, 4:36 PM), https://www.businessinsider.com/judge-lewis-kaplan-trump-defamation-trial-jury-advice-2024-1. This was not the first time the court addressed the issue. See Maria Cramer & Benjamin Weiser, In Trump’s Defamation Trial, The Nine Most Important People Are Exigens, N.Y. Times (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/nyregion/trumps-defamation-trial-carroll-jury.html. Indeed, Judge Kaplan’s prior Memorandum Opinion Re Anonymous Jury, Carroll v. Trump, Case No. 1:22-cv-10016-LAK, 2023 WL 2612260, at *5 (S.D.N.Y. Mar. 23, 2023), declared, in part, [o]n the basis of the unprecedented circumstances in which this trial will take place, including the extensive pretrial publicity and a very strong risk that jurors will fear harassment, unwanted invasions of their privacy, and retaliation . . . the court finds that there is strong reason to believe the jury needs the protection . . . below.


On March 9, 2024, Trump posted a $91.6 million bond (110% of the judgment), provided by an insurance company, which will prevent Carroll from collecting the judgments while Trump appeals. See Benjamin Weiser & Ben Protess, Trump Posts $91.6 Million Bond for Defamation Judgment in Carroll Case, N.Y. Times (Mar. 8, 2024), https://www.nytimes.com/2024/03/08/nyregion/trumps-defamation-trial-carroll-bond-defamation.html.


156. Victoria Bekiempis, Donald Trump Ordered to Pay E. Jean Carroll $83.3 Million in Defamation Trial, Guardian (Jan. 26, 2024, 5:09 PM), https://theguardian.com/us-news/2024/jan/26/e-jean-carroll-damages-trump-defamation-verdict#.---text=A%20New%20York%20City%20jury.fund%20a%20reputational%20repair%20campaign. On March 18, 2024 Trump filed a new action in the Southern District of Florida alleging that American Broadcasting Companies, Inc. and George Stephanopoulos defamed him by stating that Trump “had been found liable by multiple juries for the rape of Ms. E. Jean Carroll.” The complaint declared that the false statements were made by Stephanopoulos “with actual malice or with a reckless disregard for the truth.” Trump v. Am. Broadcasting Cos., Inc., No. 1:24-cv-21050-(CMA) (S.D. Fla. Mar. 18, 2024) Doc. 1. In support, the complaint alleged that the Carroll II verdict form for battery stated that Trump did not rape
C. Dominion Voting Systems v. Fox News Network

The most numerous and complex of the recent defamation cases are those arising out of claims of fraud involving the 2020 presidential election. More than twenty lawsuits have been filed by individuals and corporations against attorneys, media representatives, and corporations based on their election-related statements. This Section examines the background to those defamation suits, discusses the various lawsuits that have been filed, and then focuses on one of the lawsuits: U.S. Dominion, Inc. v. Fox News Network. In that case, Dominion alleged defamation per se based on claims of fraud and conspiracy involving its voting machines that Fox on-air hosts and their guests made or supported and sought $1.6 billion in damages. Although Dominion was a public figure and Fox News was a media corporation, the Sullivan decision was not an issue in the case. Dominion did not challenge its need to prove actual malice and, after lengthy discovery, uncovered sufficient evidence that Fox News hosts and their guests knew that their allegations of voter fraud were false. Dominion settled its claim against Fox News for $787.5 million in April 2023, on the day the jury trial was scheduled to begin.

1. The Background to the 2020 Election Defamation Cases

Although the lawsuit brought by Dominion was based on defamatory comments made on various Fox News programs between November 2020 and late January 2021, the suit had its origins in the months leading up to the November 2020 election. From the beginning of the 2020 presidential campaign, President Trump repeatedly claimed at rallies, “the only way we’re going to lose this election is if the election

Ms. Carroll and that “[n]either the Carroll I jury, nor the Carroll II jury found [Trump] ‘liable for rape.’” See id. at 1-2, 4-8. The complaint also noted that the verdicts in Carroll II and Carroll I were currently on appeal to the United States Court of Appeals for the Second Circuit. Id. at 7-8. Finally, as noted previously, Judge Kaplan addressed the type of assault Carroll experienced in Carroll v. Trump, No. 20-cv-7311, 2023 WL 5017230, at *7 (S.D.N.Y. Aug. 7, 2023), finding as to the sexual abuse question, that the jury’s “implicit determination that Mr. Trump digitally raped her” was conclusive as to that case. Id. The Carroll related defamation cases now continue at the district court and before the Second Circuit.


158. Mullin, supra note 157.

is rigged” and there is “massive fraud.”  Trump’s comments were broadcast on Fox News programs in the months before the election and become an article of faith among many of his supporters.

The 2020 presidential election itself, held in the middle of the COVID-19 pandemic, was and remains, one of the most controversial in U.S. history. Because a record number of persons chose to vote by mail, it took longer than usual to count the ballots in some states. Thus, as election night November 3, 2020, drew to a close, the major news networks were unable to call the winner of the presidency because of the large number of ballots remaining to be counted. However, just before midnight on election night, Fox News predicted, before any other news organization, that Biden was the winner in Arizona. That call angered not only President Trump, who declared early the next morning that he had won the election, but also many Trump supporters and Fox viewers, who began a “Stop the Steal” campaign that grew in the following months.

Anger over the potential outcome of the election built in the days after November 3rd as the delay in counting the ballots continued, as President Trump’s early lead gradually faded away, and as some states that he had carried in the 2016 election—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin—switched to Biden. On Saturday, November 7th, the counting of the ballots finally reached the point that the networks, including Fox, were confident of the outcome in enough states to project that Joseph Biden was the winner of the 2020 election.

References:

160. Morgan Chalfant, Trump: The Only Way We’re Going to Lose this Election is if the Election is Rigged, The Hill (Aug. 17, 2020, 7:22 PM), https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the/.


164. Id.


166. Elena Mejia & Geoffrey Skelley, How the 2020 Election Changed the Electoral Map, FiveThirtyEight (Dec. 8, 2020, 6:00 AM), https://projects.fivethirtyeight.com/2020-swing-states/

majority of people in the United States either were excited by, accepted, or came to accept, Biden’s election. However, the following day, Sidney Powell, a member of President Trump’s legal team that was focusing on contesting the election results, was interviewed by Maria Bartiromo on the Fox News program *Sunday Morning Futures* and stated that there was “a massive and coordinated effort to steal this election” and that “fraud” had occurred in the Dominion software which involved flipping votes in the computer system or adding votes that did not exist.\(^{168}\)

In the following weeks, President Trump tweeted a series of articles supporting his claims of voter fraud that were made on Newsmax and One American News Network (OANN), Fox News’s main competitors. He encouraged Fox viewers to switch to other networks and attacked Fox, stating that the network’s “daytime ratings have completely collapsed. Weekend daytime even WORSE” and declared “#foxnews is dead.”\(^{169}\) One result of the attacks on Fox was that the value of the company’s stock dropped by 6% and average viewership dropped approximately 20% between Election Day 2020 and mid-January 2021.\(^{170}\) The fear over the consequences of losing viewers and revenue is reflected in a text that Fox News host Tucker Carlson sent on November 8th: “With Trump behind it, an alternative like [N]ewsmax could be devastating to us.”\(^{171}\)

In order to regain viewers who supported President Trump and increase revenue, Fox News turned to Sidney Powell, Rudy Giuliani, and Mike Lindell, all of whom were supporting Trump’s claims of election fraud, and made them frequent guests on its programs. With the assistance of supportive questioning from Fox News hosts, these guests made a series of claims of fraud against Dominion and Smartmatic, another voting machine company whose machines also were

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used in the election. In December 2020 Smartmatic, another voting machine company, sent a letter to Fox, Newsmax, and OANN, demanding a retraction of their comments about Dominion and Smartmatic and threatening legal action. Fox and Newsmax initially broadcast videos stating that there was no evidence that Dominion or Smartmatic used software to interfere with the election. However, their attacks on Dominion and Smartmatic then continued.

Notwithstanding the statements from numerous sources that there been no systematic voter fraud in the 2020 election and that Dominion and Smartmatic voting machines did not flip votes or delete Trump votes, President Trump, his close advisors, and many of his supporters continued to dispute the outcome of the 2020 election and to promote conspiracy theories. They alleged that, in a number of states, there had been fraud in counting the ballots and rigged voting machines that affected the outcome and that Dominion was responsible for it. Although recounts were conducted by hand in some states, including Arizona and Georgia, they did not change the outcome. Sixty-two lawsuits were also filed in various states challenging the election results. However, all but one were unsuccessful and the Supreme Court refused to hear any of the challenges. As a result, early in the morning of January 7, 2021, after hours of delay at the Capitol because of riots on

175. Complaint, supra note 172, at 36–37, ¶ 70.
178. Id. at 216.
180. For a discussion of some of those cases, see Final Report to Investigate the Jan. 6th Attack, supra note 161, at 210–13.
January 6th meant to delay or prevent the certification of the electoral votes.\textsuperscript{182} Joseph Biden received 306 votes from the Electoral College to Donald Trump’s 232 votes.\textsuperscript{183}

Despite Joseph Biden’s election and inauguration as President of the United States, allegations of voter fraud continued. In January 2021, a Google search of the phrase “Dominion voting fraud” produced over 8.4 million results; 1.9 million results for “dominion manipulate vote”; and over 18.9 million results for “who manufactures dominion voting machines.”\textsuperscript{184} Allegations were made against some individuals who had counted state ballots and against Dominion, whose machines were used in approximately twenty-eight states, and Smartmatic, whose machines were used in Los Angeles County in California. The allegations of fraud resulted in more than twenty defamation lawsuits:\textsuperscript{185}

- **Eric Coomer v. Donald J. Trump for President, Inc., Sidney Powell, and Rudolph Giuliani, et al.**\textsuperscript{186}
- **Eric Coomer v. Salem Media of Colorado, Inc. and Randy Corporon**\textsuperscript{187}
- **Eric Coomer v. Make Your Life Epic LLC, d/b/a Thrivetime Show and Clayton Thomas Clark**\textsuperscript{188}
- **Eric Coomer v. Michael J. Lindell. Frankspeech LLC, and My Pillow, Inc.**\textsuperscript{189}
- **Eric Coomer v. Patrick Byrne**\textsuperscript{190}
- **U.S. Dominion, Inc. v. Sidney Powell**\textsuperscript{191}

\textsuperscript{182} For an account of the January 6th riots, see generally Final Report to Investigate the Jan. 6th Attack, supra note 161, at 210–11.


\textsuperscript{185} Much of the information about these suits is taken from 16 Defamation Lawsuits Filed by Voting Machine Manufacturers and a Former Employee (with 4 Counterclaims), A-Mark Found., https://thec2020election.org/defamation-lawsuits-filed-by-voting-machine-manufacturers/ [https://perma.cc/V9V4-NDY9] [hereinafter 16 Defamation Lawsuits Filed by Voting Machine Mfg.].


\textsuperscript{190} Complaint, Coomer v. Byrne, No. 1:22-cv-01575 (D. Colo. June 24, 2022).

• U.S. Dominion Inc. v. Rudolph W. Giuliani292
• U.S. Dominion, Inc. v. My Pillow, Inc.193
• U.S. Dominion, Inc. v. Fox News Network LLC194
• U.S. Dominion, Inc. v. Newsmax Media, Inc.195
• U.S. Dominion, Inc. v. Herring Networks Inc.196
• U.S. Dominion, Inc. v. Patrick Byrne197
• Ruby Freeman and Wandrea Moss v. Rudolph Giuliani198
• Ruby Freeman and Wandrea Moss v. James Hoft, Joseph Hoft, and TGP Communication LLC, d/b/a/ The Gateway Pundit199
• Majed Khalil v. Fox News Corp.200
• Smartmatic USA Corp. v. Mike Lindell and My Pillow, Inc.201
• Smartmatic USA Corp. v. Fox News Corporation, Fox News Network LLC, Lou Dobbs, Maria Bartiromo, Jeanine Pirro, Rudolph Giuliani, and Sidney Powell202
• Smartmatic USA Corp. v. Newsmax Media, Inc.203
• Smartmatic USA Corp. v. Herring Networks, Inc. d/b/a One America News Network204

2. U.S. Dominion, Inc. v. Fox News Network, LLC

On March 26, 2021, U.S. Dominion, Inc., the parent company of Dominion Voting Systems, filed a 139-page complaint (443 pages with exhibits) in the Superior Court of Delaware against Fox News Network. In addition, the complaint named five Fox News and Fox Business personalities who hosted programs on Fox and who it said were agents for Fox as “Relevant Non-Parties”: Maria Bartiromo, Tucker Carlson, Lou Dobbs, Sean Hannity, and Jeanine Pirro. The lawsuit also named as defendants three non-Fox employees who appeared frequently as guests on Fox programs after the 2020 election: Sidney Powell, an attorney and author; Rudolph Giuliani, a former U.S. Attorney, Mayor of New York City, and an attorney for Donald Trump and the Trump Campaign; and Mike Lindell, the founder and CEO of My Pillow, Inc.

a. The Dominion Complaint

Dominion’s complaint alleged that Fox representatives repeatedly made, or did not challenge guests on its programs, who made false conspiracy claims that the company was part of a plot to steal the 2020 election by altering vote counts and manipulating its voting machines to benefit Joseph Biden. Dominion also stated that it suffered “enormous and irreparable economic harm” as a result of the allegations that included lost profits, which it projected to be not less than $600 million; lost enterprise value, which it listed as not less than $1 billion; security expenses of not less than $600,000; and expenses incurred in combating the disinformation campaign of not less than $700,000. Dominion also sought punitive damages to be determined at trial, pre- and post-judgment interest, and all its expenses, including attorneys' fees.

Thirty pages of Dominion’s complaint detailed twenty specific instances, between November 8, 2020, and January 26, 2021, in which Fox published false and defamatory per se statements of fact about Dominion, either by its own agents making the statements, or by intentionally providing a forum for its guests on its programs, knowing they would make defamatory statements. The complaint also alleged that Fox

206. Id. at 7–12.
207. Id. at 12–13.
208. See id. at 95–125.
209. Id. at 4, 136–37.
210. Id. at 95.
program hosts also affirmed, endorsed, repeated, or agreed with their guests’ statements, and republished defamatory statements either on the air, Fox websites, Fox social media accounts, or other Fox digital platforms and subscription services. The subject matter of the allegedly defamatory statements can be divided in four groups: election fraud; algorithm flips; Dominion ties with Venezuela; and kickbacks for using Dominion voting machines. Because the twenty allegedly defamatory statements set out in the complaint are too lengthy to include in this Article, the two examples below illustrate the allegations made against Dominion.

The first example occurred on the November 13, 2020 live broadcast of *Lou Dobbs Tonight*, where the following conversation took place between Lou Dobbs, the host, and his guest, Sidney Powell:

**Sidney Powell:** Well, I can hardly wait to put forth all the evidence we have collected on Dominion, starting with the fact it was created to produce altered voting results in Venezuela for Hugo Chavez and then shopped internationally to manipulate votes for purchase in other countries, including this one. We also need to look at and we’re beginning to collect evidence on the financial interests of some of the governors and Secretaries of State who actually bought into the Dominion Systems surprisingly enough—Hunter Biden type graft to line their own pockets by getting a voting machine in that would either make sure their election was successful or they got money for their family from it.

* * *

People need to come forward now and get on the right side of this issue and report the fraud they know existed in Dominion Voting Systems, because that’s what it was created to do. It was its sole original purpose. It has been used all over the world to defy the will of people who wanted freedom.

**Lou Dobbs:** Well, good, because this is an extraordinary and such a dangerous moment in our history. Sidney, we’re glad that you are on the charge to straighten out all of this. It is a foul mess and it is far more sinister than any of us could have imagined, even over the course of the past four years.

The second example occurred on the November 15th, 2020 live broadcast of *Fox and Friends Sunday*, where one of the hosts, Maria Bartiromo, made the following statement:

**Maria Bartiromo:** [S]o much news on the software that was used on the voting machines on election night. There is much to understand about Smartmatic, which owns Dominion Voting Systems. They have businesses in Venezuela, Caracas. We’re going to talk about it with

211. Dominion Complaint, supra note 205, at 95.
212. Id. at 98–99.
Rudy Giuliani and why he does believe that he will be able to overturn this election with evidence. He will join me along with Sidney Powell to give us an update on their investigation. This is very important to understand what is going on with this software. Sidney Powell is also talking about potential kickbacks that government officials who were asked to use Dominion actually also enjoyed benefits to their families.213

Dominion’s role in the 2020 presidential election made it a “public figure,” as were the on-air program hosts at Fox News and the guests on their programs. Fox News was a media defendant. Thus, Dominion was required to prove that the allegedly defamatory statements made against it were made with actual malice as required by the New York Times v. Sullivan. None of the parties questioned the standard’s application to the case. Fox News had no reason to challenge the application of Sullivan since, without the requirement of a showing of actual malice, Dominion would be able to recover simply by showing negligence, a standard that it would have no trouble meeting. Fox also hoped that Dominion would not be able to meet the stringent requirement of actual malice. Dominion did not challenge Sullivan and alleged in its complaint that Fox News personalities “recklessly disregarded the truth” in making and endorsing statements about Dominion on their programs.214

b. Fox News’s Motion to Dismiss

On May 18, 2021, Fox Corporation, the most profitable part of the Fox media empire, filed a motion in the Superior Court of Delaware to dismiss Dominion’s complaint for failure to state a claim.215 In its sixty-one page brief, Fox raised three constitutional arguments that its reporting and commentary were not actionable defamation. First, Fox contended that truthfully reporting on newsworthy allegations, such as claims of election fraud made by the President and his legal team, were matters of public concern and not actionable. Second, Fox claimed that the media is protected by the “fair reportage” privilege, which under New York law (the law governing the case), provides that a civil action cannot be maintained “for the publication of a fair and true report of any judicial proceeding, legislative proceeding, or other

213. Id. at 103.
214. Id. at 2.
216. Id. at 15–19.
official proceeding.”\textsuperscript{217} Third, Fox asserted that opinion and hyperbolic rhetoric about newsworthy allegations are constitutionally protected.\textsuperscript{218} In addition to its constitutional arguments, Fox claimed that none of the twenty examples of individual statements in Dominion’s Complaint were actionable defamation.\textsuperscript{219}

Dominion argued that no privilege applied to Fox in this case.\textsuperscript{220} First, Dominion noted that New York law does not recognize the “neutral reportage defense.”\textsuperscript{221} Second, Dominion argued that, even if the “neutral reportage defense” applied, a jury could find that Fox went beyond neutral reportage by broadcasting clearly irresponsible sources, by espousing and concurring with the defamatory statements made by others, and by communicating defamatory statements in its own voice.\textsuperscript{222} Third, Dominion contended that the “fair report” privilege did not protect Fox’s defamatory statements because that privilege is limited to actual, accurate reports about a specific governmental proceeding.\textsuperscript{223} Fourth, Dominion stated that the alleged defamatory statements were actionable statements of mixed opinion or opinion based on false facts.\textsuperscript{224} Finally, Dominion asserted that it had alleged facts from which the court could infer actual malice.\textsuperscript{225}

On December 16, 2021, Delaware Superior Court Judge Eric M. Davis ruled that none of the defenses Fox raised supported dismissal of Dominion’s Complaint and that it was “reasonably conceivable that Dominion has a claim for defamation.”\textsuperscript{226} According to Judge Davis, the “neutral reportage privilege” requires a showing of accurate and dispassionate reportage of a newsworthy event.\textsuperscript{227} In this case, Judge Davis pointed to “SETTING THE RECORD STRAIGHT” emails sent by Dominion to Fox in November 2020.\textsuperscript{228} The emails contained analysis from election experts which tended to disprove the election fraud claim. However, Fox personnel continued to report claims of Dominion’s connection with election fraud without also reporting Dominion’s emails

\textsuperscript{217} Id. at 19–20.
\textsuperscript{218} Id. at 15.
\textsuperscript{219} Id. at 30–52.
\textsuperscript{221} U.S. Dominion, Inc., 2021 WL 5984265, at *16.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id. at *28.
\textsuperscript{227} U.S. Dominion, Inc., 2021 WL 5984265, at *22.
\textsuperscript{228} Id. at *24.
and expressed their own view that evidence connected Dominion to an illegal election fraud conspiracy.\textsuperscript{229}

Judge Davis noted that it was reasonably conceivable that Fox was not dispassionate: “Given that Fox apparently refused to report contrary evidence, including evidence from the Department of Justice, the Complaint’s allegations support the reasonable inference that Fox intended to keep Dominion’s side of the story out of the narrative.”\textsuperscript{230} Judge Davis also ruled that the “fair report privilege” did not apply to Fox in this case because its “reporting (i) was not fair or true and (ii) did not concern an official proceeding.”\textsuperscript{231} Finally, Judge Davis held that the “opinion defense” did not support dismissal of the complaint.

Here, the complaint supports the reasonable inference that Fox was reporting on a fact, i.e., that Dominion aided or caused election fraud. Fox’s news personnel repeatedly framed the issue as one of truth-seeking and purported to ground interview questions in judicial proceedings and evidence. Reviewing the Complaint, the Court does not read Fox’s statements as mere statements of opinion.\textsuperscript{232}

Judge Davis concluded that whether Dominion ultimately would be able to prove Fox’s actual malice by clear and convincing evidence was irrelevant to the motion to dismiss. For purposes of Fox’s motion to dismiss, it was “reasonably conceivable” that Dominion had a claim for defamation per se and denied the motion.\textsuperscript{233} The effect of this was to allow Dominion’s claim to proceed to discovery where it would attempt to uncover email and other communications among Fox News executives and on-line personalities. Finally, Judge Davis identified two issues that he said needed further briefing: first, whether New York’s anti-SLAPP law applied to the case and, second, whether Dominion was a “public” or “private” figure for purposes of the case.\textsuperscript{234} Both Fox News and Fox Corporation included counterclaims in their motions, alleging that Dominion violated New York’s anti-SLAPP law because Dominion filed its lawsuits without a substantial basis in law and fact with the purpose of infringing on Fox’s free speech and free press rights. On January 27, 2023, Judge Davis issued two decisions on those issues. Since Dominion did not contest application of the actual malice standard to its defamation claims, Judge Davis ruled that Dominion was a “public figure for the limited purposes of the defamation claims” in its lawsuits.

\textsuperscript{229} Id. at *23–24.  
\textsuperscript{230} Id. at *24.  
\textsuperscript{231} Id. at *25.  
\textsuperscript{232} Id. at *27.  
\textsuperscript{234} Id. at *29.
against Fox.235 In a separate memorandum opinion on applicability of New York’s anti-SLAPP law, he said he would apply a standard requiring Dominion to present evidence of “clear and convincing evidence” of actual malice. However, he did not apply the heightened summary judgment standard required by New York’s anti-SLAPP statute.236

c. Discovery

In the months following Judge Davis’s opinion denying Fox’s motion to dismiss, the company’s executives and anchors prepared for their depositions and turned over to Dominion’s attorneys, as required, their private emails, text messages, and related documents for the period after the 2020 presidential election. For eight months, Dominion’s attorneys analyzed the documents and took depositions from dozens of people at all levels of the Fox organization. Depositions were taken from Fox executives and on-air hosts including Maria Bartiromo, Tucker Carlson, Lou Dobbs, Steve Doocy, Sean Hannity, Ed Henry, Lachlan Murdoch, Rupert Murdoch, Dana Perino, Jeanine Pirro, Suzanne Scott, Shepard Smith, and Chris Stirewalt. As the trial approached, Dominion released portions of the depositions and documents it had obtained during discovery in February 2023.237

In their depositions, many Fox executives and on-air hosts stated that they never believed the claims being made against Dominion by guests such as Sidney Powell and Rudy Giuliani.238 In his August 2022 deposition, for example, Sean Hannity said he did not believe Sidney Powell’s claims of Dominion’s fraud “for one second.”239 The most damaging deposition to Fox was the one taken of Rupert Murdoch, the chair of Fox Corporation.240 He repeatedly rejected the conspiracy theories...
made by Fox News hosts after the election. On one occasion when he was watching Rudy Giuliani and Sidney Powell on television, he told Suzanne Scott, the CEO of Fox News: “Terrible stuff damaging everybody, I fear.” In a January 2023 deposition, Murdoch was asked: “Do you believe that Dominion was engaged in a massive and coordinated effort to steal the 2020 presidential election?” Murdoch’s response was “No.” In another question, Murdoch was asked: “Have you ever believed that Dominion engaged in a massive and coordinated effort to steal the 2020 presidential election?” Again, Murdoch’s answered “No.” Finally, one of Dominion’s attorneys asked Murdoch: “You’ve never believed that Dominion was involved in an effort to delegitimize and destroy votes for Donald Trump, correct?” Murdoch replied that “I’m open to persuasion; but, no, I’ve never seen it.”

The emails and text messages also show that, while Fox hosts and guests were making claims that Dominion voting machines rigged the presidential election, in private, the Fox hosts were criticizing their guests for their claims. On their programs, Fox hosts asked questions that helped them promote their conspiracy theories and made statements themselves that agreed with their guests. Yet, in a series of text messages turned over during discovery, Tucker Carlson, Lou Dobbs, Sean Hannity, and Laura Ingraham attacked Sidney Powell and Rudy Giuliani for making accusations of conspiracy without evidence. For example, on November 16, 2020, the Lou Dobbs Tonight staff received an email from Ed Rollins, a Republican strategist who had run a pro-Trump PAC. Rollins stated that he believed Biden had won the election because “I have seen or heard no evidence of fraud... The conspiracy theories put forth by Rudy and Sidney are all bulls---.” Two days later, Carlson texted Ingraham that “Sidney Powell is lying...” Ingraham

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responded: “Sidney is a complete nut. No one will work with her. Ditto with Rudy.”245 However, they and other Fox news hosts continued to invite Giuliani and Powell and others onto their evening programs and continued to support their claims that electronic voting machines had contributed to a stolen election. Finally, the emails and text messages also show that Fox’s top executives and on-air hosts were less worried about the factual accuracy of what they were saying than about ratings, particularly after viewers who supported Trump’s claims of election fraud began to switch to Newsmax and OANN which supported his claims.246

In the month leading up to the scheduled beginning of its defamation trial, Fox faced more trouble. Abby Grossman, a news producer who worked with on-air hosts Maria Bartiromo and Tucker Carlson, filed lawsuits in New York and Delaware accusing Fox of coercing her into giving misleading testimony concerning the network’s coverage of election fraud claims against Dominion.247 In her complaint, she alleged that Fox News lawyers coached her in “a coercive and intimidating manner” before her deposition in the Dominion case. She settled her claim against Fox in late June 2023, for $12 million.248

d. Settlement and Aftermath

With less than a month before the trial of Dominion’s claim was scheduled to begin, a number of decisions by Judge Davis went against Fox and added to its problems. On March 22nd, Fox filed a motion in Delaware state court seeking partial summary judgment on the grounds that Fox Corporation executives, including Rupert Murdoch and his son Lachlan, had no direct involvement with what was aired on Fox programs and thus were not liable to Dominion for defamation. A week later, Judge Davis not only denied Fox News and Fox Corporation’s motions for summary judgment, he also held the evidence developed in the case “is CRYSTAL clear that none of the Statements relating to Dominion about the 2020 election are true.”249 This would have a major

impact if the case went to trial since it left the jury to decide only two questions: did Fox spread the false claims about Dominion with actual malice (i.e., knowing that the statements were false or were made with reckless disregard as to whether they were true) and, if so, what damages did Dominion suffer because of the publication of the defamatory statements? On April 5th Judge Davis also held that Dominion could compel both Rupert Murdoch and Lachlan Murdoch to testify at the trial. That ruling had the potential to further embarrass Fox if the Murdochs, the top executives at Fox, along with other executives and on-air hosts had to answer questions about why they made and allowed conspiracy theories to be made about the 2020 election when they knew the allegations were not true.

In the days before the trial was scheduled to begin, Fox faced further trouble. First, Judge Davis said Fox had a “credibility problem” for its late disclosure that Rupert Murdoch was the Chairman of Fox Corporation. Less than a week later, Judge Davis ruled that Fox News could not claim that the false information about Dominion was protected under the “newsworthiness defense.” Four days before the trial was due to begin, another problem for Fox arose when a recording of Rudy Giuliani was made public. The recording was made by a former Fox employee of Giuliani saying, just before an appearance on a Fox program, that he did not have any evidence to back up his claims of election rigging by Dominion.

Jury selection for the trial began on Thursday, April 13th, and, at the end of the day, Judge Davis announced that it would resume on Monday, April 17th. With the trial scheduled to begin on Tuesday, April 18th, newspaper articles ran articles over the weekend on how the trial “could reshape libel law” and how the trial would be a “dramatic moment in

American history. After swearing in the jury on Tuesday morning, Judge Davis immediately adjourned for lunch and then further delayed the opening statements. Late in the afternoon, the parties announced that they had reached a settlement in the case. Under the terms of the settlement, Fox News did not have to apologize or admit that it had made and helped spread defamatory statements about Dominion. Instead, it released a statement saying simply, “We acknowledge the Court’s rulings finding certain claims about Dominion to be false.” The statement then went on to claim that the settlement “reflects Fox’s continued commitment to the highest journalistic standards.”

Although the settlement was the lead story for most news organizations, Fox News devoted only six minutes of broadcast time to the settlement on the night it happened. However, the fact that Fox agreed to pay Dominion $787.5 million in damages was an implicit admission of guilt. The only larger award of damages in a defamation case came in November 2022 when a jury awarded the families of the victims of the Sandy Hook elementary school shooting $1.4 billion in damages in their suit against Alex Jones. However, the settlement not only saved Fox


259. Id.


from a long and expensive trial, it had two other benefits for the company: first, it saved it from the embarrassment that the release during trial of documents showing that Fox on-air hosts either did not believe what they and their guests were saying or were deeply skeptical of their claims and, secondly, it saved Fox from the strong possibility of an even larger damage award if the jury found that the company had acted with actual malice.262

The settlement of its lawsuit with Dominion did not end Fox’s problems resulting from the allegations made following the 2020 presidential election. A week after the settlement, Tucker Carlson, whose program Tucker Carlson Tonight was the most widely watched cable news program in the country, left Fox News.263 Fox cancelled Carlson’s program without providing a reason. However, text messages obtained during discovery in the Dominion case showed that Carlson said he hated Donald Trump and criticized some of his own guests.264 In August 2023, Fox Corporation’s chief legal officer, Viet Dinh, also left his position with Fox. Some inside Fox felt he gave the company flawed legal advice during the Dominion lawsuit.265

The most serious problem confronting Fox after the Dominion settlement is the lawsuit brought against it in New York by Smartmatic, which is seeking $2.7 billion in damages.266 That suit also arises out of

alex-jones-infowars-bankruptcy [https://perma.cc/CV9R-H86N]. In November 2023, the Sandy Hook families made an offer in Jones’s bankruptcy case to settle for $85 million over ten years. It is not clear whether Jones will accept the families’ offer. Timothy Bella, Sandy Hook Families Offer Alex Jones a Deal to Settle $1.5 Billion Debt, Wash. Post (Nov. 28, 2023, 10:47 AM), https://www.washingtonpost.com/nation/2023/11/28/alex-jones-bankruptcy-sandy-hook-settlement/ [https://perma.cc/V4VW-4PHB].


allegations of fraud in counting the 2020 residential ballots. The decision that Judge Davis made in the *Dominion* suit rejecting Fox’s First Amendment defenses likely will have an impact on Smartmatic’s defamation suit against Fox. Finally, in April 2023, Fox shareholders have filed a shareholders derivative suit against Rupert Murdoch and his son and other Fox board members for not exercising adequate in Delaware alleging fiduciary breach of duty for not exercising adequate oversight of the company.267

Dominion’s settlement with Fox is not the end of its litigation over allegedly defamatory statements made about it after the 2020 election. It currently has suits in the discovery stage against Sidney Powell,268 Rudolph W. Giuliani,269 My Pillow, Inc, 270 Newsmax Media, Inc, 271 Herring Networks Inc, 272 and Patrick Byrne.273

As important as the *Dominion* case and settlement are, they have little direct impact on the future of the *New York Times v. Sullivan* decision since neither party challenged its constitutionality. That was understandable for Fox, since, as a media defendant, it wanted to make it as difficult as possible for Dominion to recover and the actual malice standard sets a very high standard for recovery in defamation cases. However, as the *Dominion* case progressed, particularly through the discovery stage, it became clear to the company that the treasure trove of emails and text messages between Fox on-air hosts, along with their depositions and those of executives, would allow it to prove that Fox was making and supporting statements it knew or strongly suspected were false. Although Judge Davis left it to the jury to decide whether

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there was actual malice, the fact that Fox settled for such a large amount indicates that it seriously worried that the jury would legitimately find actual malice and would award even greater damages.

While the Dominion case shows that Sullivan does not make it impossible to hold media organizations responsible for their false statements, the case may be unique. It also is possible that the Dominion case will make it more difficult to prove actual malice if media organizations adopt policies prohibiting employees from emailing and texting each other with their personal views and criticisms of the guests and issues they are covering. Without the internal emails, text messages, and depositions of Fox on-air hosts and executives, Dominion’s case would have been much more difficult, and it is doubtful whether it could have shown actual malice.274

II. NEW YORK TIMES v. SULLIVAN: POLITICAL, LEGISLATIVE, AND JUDICIAL CHALLENGES

Although the decision in New York Times v. Sullivan was unanimous, the decision has not been without its critics over the past sixty years. In our article commemorating the 50th anniversary of Sullivan, we discussed some of the judicial and academic critics and their claims that Sullivan needlessly ignored common law standards, that it failed to stem the tide of large verdicts in libel cases, and that the actual malice standard operates as a catalyst for the expenditure of even greater defense costs.275 However, the past ten years have seen more calls to reverse, or at least revise, New York Times v. Sullivan than at any other time in the decision’s sixty-year history. A new element was added in 2015 when Donald Trump, then a candidate for president, began calling for the decision to be reversed. Additional criticism followed in February 2023 from Florida Governor Ron DeSantis and the Florida state legislature which introduced (but did not enact) bills whose major elements explicitly

274. For a recent analysis of the background of the Dominion litigation and the reaction of Fox media representatives, see generally BRIAN STELTER, NETWORK OF LIES: THE EPIC SAGA OF FOX NEWS, DONALD TRUMP, AND THE BATTLE FOR AMERICAN DEMOCRACY (2023). Stelter’s analysis is enlightening:

Of all the efforts at Big Lie accountability … Dominion’s lawsuit against Fox was the most expensive. Fox’s executive team had dismissed Dominion’s chances … But Fox ultimately paid a staggering self-imposed fine for its unchecked attacks on Dominion—and the accountability did not end there. Because Fox was subject to the pretrial discovery process, it was forced to share years of emails, texts, chats, and memos with Dominion.

Through court filings, Dominion ensured that thousands of documents were exposed to the public.

Id. at 4. These documents not only exposed Fox to potential liability in the Smartmatic litigation but also reflect the value of broad discovery in cases with on-going statements of untruths.

275. Lewis & Ottley, supra note 7, at 27–36.
conflicted with Sullivan. One Supreme Court Justice, Clarence Thomas, has called, in five opinions since 2019, for Sullivan to be reversed as conflicting with the First and Fourteenth Amendments. Another Justice, Neil Gorsuch, has urged the Court to “reconsider” the decision, without specifying what that would entail. Finally, criticism of Sullivan has continued to come from the academy and from politically oriented think-tanks with their focus now on the failure of Sullivan to meet the originalism test, the changed nature of the media since 1964, and the perceived threat that Sullivan poses to the political system.

So far, the Supreme Court has refused to take up the challenges to Sullivan. However, the arguments and actions of some politicians, state legislatures, judges, and scholars may leave the Court with little choice but to consider the precedent of the case. This Part examines the political, legislative, scholarly, and judicial challenges that have been made to Sullivan since 2014. It also reviews the arguments made by those who defend the decision and feel it should be preserved.

A. Political and Legislative Challenges

1. Donald Trump: Open Up Libel Laws!

U.S. presidents have complained about their treatment by the press since the beginning of the republic. However, the first president to propose changing defamation law to make it easier for public officials and public figures to recover damages for stories about them published by news organizations was Donald Trump. At a political rally in Fort Worth, Texas, in late February 2016, Trump, then a candidate for president, stated:

I think the media is among the most dishonest groups of people I’ve ever met. They’re terrible. If I become President, oh, do they have problems. They’re going to have such problems. * * * One of the things I’m going to do if I win . . . I’m going to open up our libel laws so that when they write purposely negative and horrible and false articles, we can sue them and win lots of money . . . So when The New York Times writes a hit piece which is a total disgrace or when the Washington Post . . . writes a hit piece, we can sue them and win money instead of having no chance of winning because they are totally protected. You see, with me they’re not protected . . .

When Trump met with the Washington Post editorial board the following month, the members asked him what he wanted to do with libel laws. Trump replied that if a newspaper gets a story wrong, it should

276. See infra notes 351–81.
278. Donald J. Trump, Speech During Campaign Rally in Fort Worth, Texas (Feb. 26, 2016).
publish a retraction. “They should at least try to get it right. And if they don’t do a retraction, they should, you know, have a form of a trial.” 279

Unfortunately, Trump did not elaborate on what he meant by “a form of a trial” or what would be the standard for recovery. However, he went on to state that he did not want to “impede free press” and that all he wanted was fairness because libel laws were “really impotent.” 280

After his election in 2016, President Trump repeated his desire to change defamation law in a Twitter post in March 2017, in which he stated that “[t]he failing [New York Times] has disgraced the media world. Gotten me wrong for two solid years.” 281 He concluded his post by asking: “Change libel laws?” 282 Since Trump was talking about the effect of defamation on himself (a public official), a “change” in the law would require reversing or reinterpreting Sullivan and the actual malice standard. That same month, Reince Priebus, Trump’s Chief of Staff, said the White House actively was considering a change to libel laws affecting news reporting. However, he admitted that “[h]ow that gets executed and whether that goes anywhere is a different story.” 283 Although the Trump administration never stated specifically what was “being looked at” and did not propose specific steps to “open up” libel laws, at the beginning of a Cabinet meeting in January 2018 Trump took implicit aim at the Sullivan decision when he said his administration would:

take a strong look at our country’s libel laws so that when somebody says something that is false and defamatory about someone, that person will have a meaningful recourse in our courts... Our current libel laws are a sham and a disgrace and do not represent American values and American fairness. 284

Trump made those comments shortly after his attorneys sent a cease-and-desist letter and threat to sue for defamation to Henry Holt & Co., the publisher of Michael Wolff’s book, Fire and Fury: Inside the Trump


280. Id.


282. Id.


White House, in an unsuccessful attempt to block publication of the book, which was critical of the Trump administration. In response, the publisher increased the number of copies of the first edition and moved up its release date. Wolff's book became a best-seller, and Trump never filed a lawsuit against him.

In response to critical excerpts from another book, Bob Woodward’s Fear: Trump in the White House, published a week before the book’s release in September 2018, Trump called on “Washington politicians” to change the nation’s libel laws. Despite Trump’s repeated criticism of defamation laws, there was little he or the Republican majority in Congress could do to change those laws since defamation is an issue for state courts and legislatures and has a constitutional component as a result of the Sullivan decision. Although Trump could have used his three appointments to the Supreme Court to nominate Justices who supported reversing Sullivan and making defamation entirely an issue of state law, he chose not to do so. Only Justice Neil Gorsuch among Trump’s Supreme Court appointees has indicated a desire to reexamine Sullivan. More importantly, in Counterman v. Colorado, a June 2023 decision of the Supreme Court, seven of the nine Justices explicitly referred to Sullivan and the actual malice standard to vacate a criminal conviction in a case dealing with the appropriate level of recklessness in “true-threats” cases.

Part of Trump’s stated desire during his administration to change defamation law and make it easier for public officials and public figures to recover may have stemmed from the fact that none of the defamation suits he filed in the thirty years before he became president had been successful on their merits in a court. In a 2016 article published in Communications Lawyer, Professor Susan Seager discussed the seven speech-related lawsuits filed by Trump and his companies between 1984 and 2015. None of the seven unsuccessful suits were brought against newspapers or cable news networks that became the focus of Trump’s...

291. Id. at 83–105 (opinion of Sotomayor, J.).
criticism and litigation after 2016. Instead, he and his companies sued an architecture critic, a book author, a former Trump University student, a Miss Pennsylvania winner, the cable television show host Bill Maher, a culinary and bartender labor union, and a Spanish-language television network’s programing chief.\footnote{Id. at 1, 5–9.}

As discussed previously, Southern politicians used defamation lawsuits, and the threat of such suits, during the struggle for civil rights in the early 1960s to try to prevent the Northern media from writing articles critical of their segregationist policies. In the same way, Trump has used social media attacks, cease-and-desist letters, the threat of litigation, and defamation actions since 2016 as tools to discredit publishers, the media, journalists, and those he feels have been critical of him. For example, in February 2019 Trump called for “retribution” (without specifying what form it would take) against NBC for satirizing him on Saturday Night Live.\footnote{CNN, Trump Threatens ‘SNL’ with ‘Retribution’ Over Parody, YouTube (Feb. 18, 2019), https://www.youtube.com/watch?v=V7Op4sg5Ffg.} The same week, he called the New York Times “a true ENEMY OF THE PEOPLE,” a term he has used to describe a number of news media outlets.\footnote{Michael M. Grynbaum & Eileen Sullivan, Trump Attacks The Times, in a Week of Unease for the American Press, N.Y. Times (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/politics/new-york-times-trump.html [hereinafter Grynbaum & Sullivan, Trump Attacks The Times]; see Erik Wemple, Trump Called the Media ‘the Enemy of the People.’ He Means It., Wash. Post (Mar. 20, 2023, 9:15 AM), https://www.washingtonpost.com/opinions/2020/03/20/trump-called-media-enemy-people-he-means-it/.} In a Twitter post he wrote, “The Press has never been more dishonest than it is today. Stories are written that have no basis in fact. The writers don’t even call for verification. They are totally out of control . . . The New York Times reporting is false.”\footnote{Grynbaum & Sullivan, Trump Attacks The Times, supra note 295.}


As president, Donald Trump increasingly made media-bashing a staple not only of his messaging but also of his policy. It would be hard to argue that he did not intend to permanently fracture American
confidence in the press—at least that sector of the bifurcated partisan media that often-found fault with him.  

Since 2020, Trump has filed at least seven defamation lawsuits and has been sued twice for defamation. However, in only one of the suits did Trump urge that New York Times v. Sullivan should be reexamined. In all the other suits, he focused on the alleged defamatory statements made by the defendants and asserted that the publication of the statements met the actual malice standard. All the suits filed by Trump later were dropped or dismissed or are pending.

- In February of 2020, Trump filed a suit against the New York Times arising out of a 2019 article he alleged falsely accused his campaign of colluding with Russia to undermine the 2016 presidential election. In March 2021, a New York state court dismissed the suit, saying that the complaint failed to allege facts meeting the requirements of the actual malice test.  

- In March 2020, Trump sued the Washington Post claiming that a series of articles the newspaper published during the 2020 campaign were false and forced his campaign committee to spend money refuting them. A federal district court judge in D.C. dismissed that suit in February 2023, again saying that Trump had failed to plead sufficient factual allegations to support an inference of actual malice.

- In March 2020, Trump’s campaign filed a defamation lawsuit in Georgia against CNN. The suit alleged a statement that the campaign “assessed the potential risks and benefits of again seeking Russia’s help in 2020 and has decided to leave that option on the table” was defamatory. In November 2020, a federal district court judge dismissed the suit saying that the complaint failed to plead knowledge of the falsity or reckless disregard of the truth.

- In April 2020 Trump’s reelection campaign committee filed a defamation suit against a television station in Wisconsin for broadcasting a political advertisement prepared by the PAC Priorities USA. Trump claimed that the ad made it appear that he had said that the coronavirus was a hoax and that the broadcast of the

299. Id. at 422.
advertisement met the actual malice test. However, in November 2020, Trump’s reelection campaign dropped the suit, with each side agreeing to pay their own costs and attorney fees.303

- In October 2022, Trump filed a $475 million defamation suit against CNN in federal court in Florida, alleging that the network defamed him with fake news for the purpose of damaging his chances of reelection in 2024.304 In his December 2022 response in opposition to CNN’s motion to dismiss, Trump alleged that his complaint adequately established actual malice. But he urged the court not to “reflexively apply” Sullivan since “[t]he sustained defamation of falsely linking President Trump to Nazis provides a perfect vehicle for Supreme Court reexamination of Sullivan.”305

The federal district court judge did not accept that argument and in late July 2023, dismissed the suit, stating that all the statements that Trump relied upon in his complaint were opinion and could not be the basis for defamation.306

- In May 2023, Trump’s media company, Trump Media & Technology Group (TMTG) filed a suit against the Washington Post claiming that an article about it finances was defamatory. The suit alleged that the Post acted with actual malice because it published “fabricated facts about securities fraud and published and republished Statements that were a product of their imagination.” The company is seeking $2.78 billion in compensatory and $1 billion in punitive damages.307

Trump’s near silence since 2018 on his earlier pledge to “open up libel law,” which could be done only by reversing or revising Sullivan and the actual malice standard, indicates that his earlier statement may

have been prompted by some or all of three factors: first, his anger at his loss of the several defamation suits he had filed dating back to 1984; second, his anger at the press for its critical reporting of him and his administration; and finally, his desire to discredit the media among his supporters. Since 2020, he also may have come to realize that abolishing the actual malice standard of *Sullivan*, returning to a negligence standard, would make it much easier for those who have filed defamation lawsuits against him, his supporters, and news organizations, such as Fox News and Newsmax, that support his claim that the 2020 election was rigged and stolen to win their cases.

2. **Governor Ron DeSantis and “Media Defamation”**

Just as Donald Trump began his 2016 campaign for president by attacking the media and libel laws, Florida Governor Ron DeSantis began his campaign for the 2024 Republican presidential nomination by criticizing the media in general and the *New York Times v. Sullivan* decision in particular. In early February 2023, DeSantis sponsored a round-table discussion in the Florida capital with people he said were victims of “media defamation” and experts who had fought to hold “big media companies accountable for their actionable lies.” DeSantis stated that he wanted to make it easier for people to sue the media which he claimed were society’s “leading purveyors of disinformation.” He accused the press of using *Sullivan*’s actual malice test as a shield to intentionally “smear” politicians and said that “[t]here needs to be an ability of people to defend themselves not through government regulation or restriction, but through being able to seek private right of action . . . .”

DeSantis’s attack on the *Sullivan* decision was significant because it occurred only nine months after the Supreme Court’s June 2022 decision in *Dobbs v. Jackson Women’s Health Organization*. In his concurring opinion in that case, Justice Clarence Thomas signaled a willingness

310. *Id.*
311. *Id.*
by the Court to reconsider other long-time precedents. However, just three days after deciding *Dobbs*, the Court declined to reconsider *Sullivan* when it denied a petition for a writ of certiorari in a defamation case, *Coral Ridge Ministries Media v. Southern Poverty Law Center*. Justice Clarence Thomas was the only Justice to dissent from the denial of cert. With the Supreme Court unwilling to accept a case challenging *Sullivan*, DeSantis decided to try to enact state legislation that would create a direct challenge to the decision, trigger a reexamination of it, and perhaps force the Supreme Court to overturn that decision.

3. Florida Legislature: A New Approach to Defamation

Two weeks after DeSantis’s round-table discussion, Representative Alex Andrade, a Republican member of the Florida State Legislature, introduced a bill in the Florida House that would make substantial changes in the state’s defamation law and specifically provided that a public figure did not have to show actual malice to recover in a defamation case if the allegation did not relate to their public status. Although a similar bill was introduced in the Florida Senate (S.B. 1220) at the same time the House bill was introduced, the House bill (H.B. 991) received the most attention and is the focus of this analysis.

Although the House and Senate bills were pulled by their sponsors in late April 2023, they would have made major changes in seven areas of defamation law. First, H.B. 991 provided that the “journalist’s privilege” did not apply to defamation claims when the defendant was a “professional journalist or media entity.” The journalist’s privilege provides that a journalist is not required to turn over information they have obtained as part of their active newsgathering to courts or law enforcement without a sufficient reason. The effect of this provision is that, in a defamation action, a journalist could be forced to testify about information they had obtained when gathering the news, including the identity of their sources. Second, the House bill expanded the venue options for

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313. Id. at 333, 2301–02 (Thomas, J., concurring).
317. Defamation, False Light, and Unauthorized Publication of Name or Likeness, Fla. HB 991, § 1 (2023).
a plaintiff in a defamation suit by providing that, when a suit was based on material published on radio or television, venue for a lawsuit was proper in any county in Florida where the material was accessed. If the claim was based of material published on the internet, venue was proper in any county in the state. This proposed change was intended to reflect the wide reach of broadcasts and the internet.

Third, the bill provided that Florida’s offer of judgment statute would not apply to defamation claims. This meant that the fee-shifting provisions of Florida law did not apply to defamation cases and that a prevailing plaintiff was entitled to an award of their reasonable costs and attorney fees. Fourth, the proposed bill placed limits on the judicial determination of who is a public figure by stating that a person could not be considered a public figure for purposes of defamation if their notoriety arose solely from: (1) defending themselves against an accusation; (2) granting an interview on a specific topic; (3) public employment other than an elected office or an appointment by an elected official; or (4) a video, image or statement uploaded on the internet which reached a broad audience.

Since these persons were not considered public figures, they did not have to prove actual malice in a defamation case and could recover by showing negligence.

The fifth proposed change in defamation law was the lengthiest in the bill. The provision set out three situations in which the fact finder must infer that a statement was made with actual malice for purposes of defamation. This provision moved actual malice from a subjective inquiry to an objective one, which could be inferred when:

- The defamatory allegation is fabricated by the defendant, is the product of his or her imagination, or is based wholly on an unverified anonymous report;
- An allegation is so inherently implausible that only a reckless person would have put it into circulation; or
- There are obvious reasons to doubt the veracity of the defamatory allegation or the accuracy of an informant’s reports.
- The defendant willfully failed to validate, corroborate, or otherwise verify the defamatory allegation.

The bill went on to state that “[t]here are obvious reasons to doubt the veracity of a report when: (1) There is sufficient contrary evidence that was known to or should have been known to the defendant after a reasonable investigation; or (2) The report is inherently improbable or implausible on its face . . . .”

319. Defamation, False Light, and Unauthorized Publication of Name or Likeness, Fla. HB 991, § 4 (2023).
320. Id. § 5.
321. Id. § 6(1).
322. Id.
The bill also stated that an allegation that the plaintiff had discriminated against another person or group because of their race, sex, sexual orientation, or gender identity constituted defamation per se.\textsuperscript{323} Thus, if the accusation was false, it automatically was defamation. The bill also would have restricted the ability of a person to prove the truth of the claim.

- A defendant cannot prove the truth of an allegation of discrimination with respect to sexual orientation or gender identity by citing a plaintiff’s constitutionally protected religious expression or beliefs.
- A defendant cannot prove the truth of an allegation of discrimination with respect to sexual orientation or gender identity by citing a plaintiff’s scientific beliefs.
- A prevailing plaintiff for allegations under this subsection is, in addition to all other damages, entitled to statutory damages of at least $35,000.\textsuperscript{324}

The sixth proposed change in the bill made a journalist’s use of anonymous sources much more difficult by providing that a statement by an anonymous source was presumed to be false in defamation proceedings.\textsuperscript{325} If the defendant refused to reveal the anonymous source, “the plaintiff need only prove that the defendant acted negligently in making the defamatory statement.”\textsuperscript{326} Thus, the actual malice standard did not apply in such cases.

The seventh proposed change made by the bill confronted Sullivan directly by stating that a public figure did not have to show actual malice to prevail in a defamation suit if the alleged defamatory statement did not relate to the reason for their public status.\textsuperscript{327} Finally, the bill eliminated the prevailing party attorney fee awards in suits filed in violation of Florida’s anti-SLAPP law, which were a means of protecting publishers from expensive and frivolous lawsuits. The bill also would have eliminated the ability of the winning party to recover attorney’s fees awards in connection with a claim that a lawsuit was filed in violation of the anti-SLAPP laws. Instead, the bill provided that the court must award the non-moving party (i.e., the plaintiff) the reasonable attorney fees and costs they incurred if they prevailed on a motion such as one to dismiss or for summary judgment filed by the defendant under the anti-SLAPP laws. However, where the moving party (i.e., the defendant)

\textsuperscript{323} Id. § 6(2).
\textsuperscript{324} Id.
\textsuperscript{325} Defamation, False Light, and Unauthorized Publication of Name or Likeness, Fla. HB 991, § 7(1) (2023).
\textsuperscript{326} Id. § 7(2).
\textsuperscript{327} Id. § 8.
prevailed on such a motion, they would not be entitled to an award of their reasonable attorney fees and costs.\textsuperscript{328}

The Florida House and Senate bills were referred to their appropriate committees for consideration. On April 20, 2023, however, the Florida House and Senate pulled both bills. The reason given by legislators was that the House and Senate were too far apart in their negotiations for any immediate compromise and, with the annual legislative session coming to an end, it was necessary to focus on the budget and other bills.\textsuperscript{329} A more likely explanation is that the bills were withdrawn because they drew opposition from all sides of the political spectrum: the liberal media, free speech advocates, the Florida Press Association, Christian broadcasters, and business groups who feared that the legislation, if enacted, would result in costly litigation against all media outlets.\textsuperscript{330} One owner of a media outlet in Florida sent an email to state legislators telling them to “KILL” H.B. 991.\textsuperscript{331} All the media owners in Florida were familiar with the defamation lawsuits filed by Donald Trump against the New York Times, the Washington Post, and CNN, as well as the numerous defamation suits filed by Dominion Voting Machines and Smartmatic against Fox News, Newsmax, and election result deniers resulting from the 2020 presidential election. Although Dominion Voting Machines settled its defamation lawsuit against Fox News for $787.5 million before the Florida bills were withdrawn, numerous other suits against Fox News and Smartmatic still were (and still are) pending. According to one commentator, the Florida bills represented an “existential threat” to the media of all political persuasions.\textsuperscript{332} One sign that withdrawing the bills has not ended the legislative debate over the future of Sullivan, at least in Florida, is that Representative Andrade has stated that he intends to file a revised version of his House bill when the Florida legislature reconvenes in 2024.\textsuperscript{333}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{328} Id. § 11.
\item \textsuperscript{330} Ken Bensinger, Right-Wing Media Splits From DeSantis on Press Protections, N.Y. Times (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/us/politics/desantis-defamation-libel-laws-florida.html#:~:text=Ron%20DeSantis%20has%20long%20courted,have%20helped%20propel%20his%20rise.
\item \textsuperscript{331} Id.
\item \textsuperscript{332} Margie Menzel, Florida’s Defamation Bill Failed Due to Opposition From Media of All Political Persuasions, WFSU Pub. Media (May 9, 2023, 8:35PM), https://news.wfsu.org/state-news/2023-05-09/floridas-defamation-bill-failed-due-to-opposition-from-media-of-all-political-persuasions [https://perma.cc/F72M-SSSK].
\item \textsuperscript{333} Ken Bensinger, In Blow to DeSantis, Florida Bills to Limit Press Protections Are Shelved, N.Y. Times (May 3, 2023), https://www.nytimes.com/2023/05/03/us/politics/desantis-florida-defamation-bills.html.
\end{itemize}
\end{footnotesize}
B. Judicial Challenges

1. Early Critics of Sullivan

The Supreme Court’s decision in *New York Times v. Sullivan* was unanimous. Yet, in the following decades, Justice Byron White and Chief Justice Warren Burger expressed some degree of dissatisfaction with the actual malice test. It was not until 2007 that the first Justice, Antonin Scalia, expressed support for reversing *Sullivan*. However, he did not do so in the context of a judicial opinion, nor did he indicate whether he favored returning to the common law rules or adopting some modified version of the common law.334 In addition, while she was a Professor at Harvard Law School in the early 1990s, Elena Kagan expressed concern in a law review article about what she called the “questionable extensions” of the actual malice test to public figures and to cases which had little connection with the factual situation in *Sullivan*.335 She suggested focusing on the underpinning of the decision, limiting the actual malice standard to speech on matters of public importance or cases involving powerful individuals.336

It would be a mistake to give too much emphasis to Justice Kagan’s comments about *Sullivan* since they were made in a law journal article, more than thirty years ago, and before she became a Supreme Court Justice. A guide to her current views of *Sullivan* and the actual malice standard can be found in three cases since 2019 in which, as a Supreme Court Justice, she voted with the majority to deny a writ of certiorari where the future of *Sullivan* could have been an issue.337 In a fourth case, *Counterman v. Colorado*,338 decided in June 2023, the Court considered the mental state required to establish criminal liability for “true threats” of violence, a category of speech that the First Amendment does not protect. The case arose from the criminal conviction of Counterman, who had sent hundreds of Facebook messages (many of them threatening) to a woman who was a singer and musician. Counterman was convicted under a Colorado statute making it unlawful to “[r]epeatedly . . . make[] any form of communication with another person”

336. Id. at 212–15.
in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” Counterman argued that the messages were not “true threats” and could not be the basis of a criminal prosecution. Ultimately, the trial judge rejected that argument using an objective standard and found that the statements “rose to the level of a true threat.” The judge sent the case to the jury which found Counterman guilty. On appeal Counterman argued that the First Amendment required the prosecution to show not only that his statements were objectively threatening but that he was aware of their threatening character. The Colorado Court of Appeals upheld his conviction on appeal and the state Supreme Court denied review.

In vacating the conviction and remanding the case, Justice Kagan, writing for the Court, held that the First Amendment requires a mental state of recklessness for true-threats prosecutions, and that the government “must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” Although the facts in Counterman did not involve defamation, Justice Kagan turned to Sullivan and to the actual malice standard to show how that decision protects speech by requiring that, in a defamation case, a public figure must act with “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” Justice Kagan extended a similar subjective recklessness standard to true threat cases. She did so even though “the protected speech near the borderline of true threats . . . is, if anything, further from the First Amendment’s central concerns than the chilled speech in Sullivan-type cases (i.e., truthful reputation-damaging statements about public officials and figures).” Chief Justice John Roberts and Associate Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson joined Justice Kagan's opinion of the Court. In her concurring opinion in Counterman, Justice Sonia Sotomayor viewed the case as one of stalking involving threatening speech and thus did not require resort to the true-threats exception to the First Amendment. However, because Justice Kagan “relie[d] heavily” on Sullivan and the actual malice standard,

339. Id. at 70.
340. Id. at 66.
341. Id. at 71.
342. Id.
343. Id.
344. Counterman, 600 U.S. at 71.
345. Id. at 69.
346. Id. at 66.
347. Id. at 81.
348. Id. at 84–85 (Sotomayer, J., concurring).
Justice Sotomayor discussed the decision favorably and endorsed its use in true-threats cases. While Justice Neil Gorsuch concurred in parts of Justice Sotomayor’s concurring opinion, he did not concur in the part of her opinion discussing and approving *Sullivan*.

2. Justice Clarence Thomas and Originalism

The Supreme Court Justice who has been the most vocal in his opposition to the *Sullivan* decision is Justice Clarence Thomas. Beginning with his concurring opinion in the Court’s denial of a writ of certiorari in *McKee v. Cosby* in 2019, he has echoed Justice Antonin Scalia’s view that *Sullivan* is not consistent with the First and Fourteenth Amendments when they were drafted and ratified. Justice Thomas agreed with the majority in denying a writ of certiorari to Kathrine McKee, who had accused Bill Cosby of sexual assault forty years earlier. McKee argued that Cosby’s attorney responded for him by writing and leaking a defamatory letter. According to McKee, the letter deliberately distorted her personal background to “damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame” her. She alleged that excerpts of the letter were sent via the internet and published by news outlets around the world. Applying *Sullivan*, the U.S. Court of Appeals for the First Circuit concluded that, by disclosing her accusation of sexual assault to a newspaper reporter, McKee had “thrust’ herself to the ‘forefront’ of the public controversy over ‘sexual assault allegations implicating Cosby’” and thus was a “limited purpose public figure.” However, she could not prove, as required by *Sullivan*, that the lawyer had knowingly or recklessly said something false. McKee asked the Supreme Court to review the appeals court’s determination that she was a public figure.

In his fourteen-page concurring opinion, Justice Thomas began by stating that he agreed with the Court’s decision not to take up the “factbound question” of whether McKee was a limited-purpose public figure. However, he then said that he was writing a concurring opinion “to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it [i.e., whether she was a limited

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349. Id. at 101 (Sotomayor, J., concurring).
350. *Counterman*, 600 U.S. at 66 (Syllabus at 3).
352. Id. at 675.
353. Id.
354. Id.
355. Id.
purpose public figure] in the first place.” Justice Thomas called Sullivan and the Court’s decisions extending it to public figures, “policy-driven decisions masquerading as constitutional law” and said that, instead of “reflexively apply[ing] this policy-driven approach to the Constitution. . . . we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.” Justice Thomas then examined the background and decision in Sullivan and subsequent decisions, finding that: “None of these decisions made a sustained effort to ground their holdings in the Constitution’s original meaning.” After applying his originalist approach to the historical basis of common law libel and seditious libel at the time of the adoption of the First and Fourteenth Amendments, he concluded that it was the intent of the framers, and their understanding of the meaning of the First and Fourteenth Amendments, that should control.

[T]here appears to be little historical evidence suggesting that the New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment. . . . We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.

Two years after McKee, the Supreme Court again was asked to reconsider whether the actual malice requirement of Sullivan applied to a “public figure.” In Berisha v. Lawson, Shkëlzen Berisha sued Guy Lawson who had written a book entitled, War Dogs: The True Story of How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History. Berisha alleged that portions of the book defamed him by incorrectly identifying him as an arms dealer and a “key figure” in the “Albanian mafia” and that Lawson “recklessly relied on flimsy sources to contend that he was.” Because the U.S. District Court for the Southern District of Florida found that the Berisha was a public figure, it granted the Lawson summary judgment because of the

356. Id. at 676.
357. McKee, 139 S. Ct. at 676.
358. Id. at 678.
359. Id. at 682.
360. Id. at 682.
lack of evidence that Lawson had acted with actual malice.\textsuperscript{364} The Eleventh Circuit affirmed, and Berisha asked the Supreme Court to reconsider the actual malice requirement as it applied to public figures.\textsuperscript{365} However, the Supreme Court again denied the writ of certiorari.

In Berisha both Justice Thomas and Justice Neil Gorsuch dissented from the denial of the writ. In his three-page dissent, Justice Thomas again took an originalist approach and said that the actual malice requirement “bears no relation to the text, history, or structure of the Constitution”\textsuperscript{366} and that, in fact, the opposite rule historically applies: “[T]he common law deemed libels against public figures to be . . . more serious and injurious than ordinary libels.”\textsuperscript{367} For Justice Thomas, the “lack of historical support for this Court’s actual-malice requirement is reason enough to take a second look at the Court’s doctrine.”\textsuperscript{368} He also felt that reconsideration of \textit{Sullivan} was even more required by what he called the “real-world effects” of conspiracy theories and other disinformation, such as the Pizzagate conspiracy theory that resulted in a shooting at the pizza shop that was said to be the home for a Satanic child abuse ring involving top Democrats and Hillary Clinton.\textsuperscript{369} “The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires.”\textsuperscript{370}

In late June 2022, the Supreme Court denied a writ of certiorari to revisit \textit{Sullivan} for a third time in three years. As was becoming the norm in such cases, Justice Thomas dissented. In \textit{Coral Ridge Ministries Media v. Southern Poverty Law Center,}\textsuperscript{371} the plaintiff was a Christian non-profit ministry dedicated to spreading “a biblically informed view of the world, using all available media.”\textsuperscript{372} In 2017 Coral Ridge applied to receive donations through AmazonSmile, a program that permits Amazon customers to contribute to approved nonprofits. However, Coral Ridge learned that it was ineligible for the program due to the Southern Poverty Law Center (SPLC) designating Coral Ridge an “[a]nti-LGBT hate group” because of its views concerning human sexuality

\textsuperscript{364} Id.
\textsuperscript{365} Id.
\textsuperscript{366} Id. at 2425 (quoting Tah v. Global Witness Publishing, Inc., 991 F.3d 231, 251 (C.A. D.C. 2021) (Silberman, J., dissenting)).
\textsuperscript{367} Id. (quoting McKee v. Cosby, 139 S. Ct. 675, 679 (2019) (opinion of Thomas, J.)).
\textsuperscript{368} Id. at 2425.
\textsuperscript{369} Berisha, 141 S. Ct. at 2425.
\textsuperscript{370} Id.
\textsuperscript{371} Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022).
\textsuperscript{372} Id. at 2454 (Thomas, J., dissenting).
and marriage. Coral Ridge sued the SPLC for defamation in federal district court in Alabama, arguing that it “opposes homosexual conduct based on its religious belief” and was not a hate group. The district court dismissed Coral Ridge’s complaint for failure to state a claim because the SPLC’s “hate group” designation has a highly debatable and ambiguous meaning” and Coral Ridge did not “plausibly allege[] that SPLC acted with actual malice . . . .” The Eleventh Circuit Court of Appeals affirmed but rested its decision entirely on the actual malice standard, saying that Coral Ridge had not “sufficiently alleged that SPLC doubted or had good reason to doubt the truth of the ‘hate group’ designation.”

The Supreme Court, by an 8-1 vote, declined to grant the writ of certiorari to review the defamation decision. Only Justice Thomas dissented, stating that he would grant the writ “to revisit the ‘actual malice’ standard.” According to Justice Thomas, the Coral Ridge case was “one of many showing how New York Times and its progeny have allowed media organizations and interest groups ‘to cast false aspersions on public figures with near impunity.’”

In June 2023, the Supreme Court decided *Counterman v. Colorado.* The fact that Chief Justices Roberts, Alito, Kavanaugh, and Jackson joined Justice Kagan’s opinion, including her support for *Sullivan*, indicates that they either accept *Sullivan* and the actual malice standard or they have not encountered a case that makes them rethink their attitude toward the decision. Although Justice Amy Coney Barrett filed a dissenting opinion in *Counterman*, she did not question the *Sullivan* decision. Thus, her views on *Sullivan* remain unclear, although she voted to deny the writs of certiorari in *Berisha* and *Coral Ridge Ministries Media*. The fact that Justice Gorsuch did not join in the portion of Justice Sotomayor’s concurring opinion in *Counterman* supporting *Sullivan*, indicates that he still has the reservations he expressed towards the decision in *Berisha*.

Finally, Justice Thomas wrote a brief two-page dissent in *Counterman*, rejecting what he called “the majority’s surprising and misplaced reliance on New York Times Co. v. Sullivan.” He concluded his dissent by stating: “It is thus unfortunate that the majority chooses not

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373. Id.
374. Id.
375. Id.
376. Id.
378. Id.
380. Id. at 105 (Opinion of Thomas, J., dissenting).
only to prominently and uncritically invoke New York Times, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court’s jurisprudence.\textsuperscript{381}

In his five dissents and concurring opinions advocating that the Supreme Court “reconsider,” and possibly reverse, New York Times v. Sullivan, Justice Thomas argued that the actual malice test has no basis in the Constitution.\textsuperscript{382} He labeled Sullivan and its progeny as “policy-driven decisions masquerading as constitutional law”\textsuperscript{383} and based that view on originalism, one of a number of methods of constitutional interpretation.\textsuperscript{384} Under the theory of originalism, all articles and amendments to the Constitution must be interpreted according to their “original meaning,” which is fixed at the time they were adopted.\textsuperscript{385}

For Justice Thomas, like Justice Scalia before him, the critical question in evaluating New York Times v. Sullivan is whether the “original meaning” of the First and Fourteenth Amendments was understood to include an actual malice requirement for defamation actions brought by public officials. Since persons in 1789 and 1868 did not understand those amendments to include an idea of an actual malice standard, they could not be interpreted in 1964 to include such a meaning. If people want an actual malice standard for defamation cases, they must change their state law or amend the Constitution.

The “originalist” approach to constitutional interpretation stands in marked contrast to the “living constitution” theory used by the Supreme Court and Justice William Brennan when it decided Sullivan and other cases in the 1960s. Living constitutionalists believe that the meaning

\textsuperscript{381}  Id. at 106 (Thomas, J., dissenting).

\textsuperscript{382}  In the Cosby case, Justice Thomas wrote: “The constitutional libel rules adopted by this court in New York Times and its progeny broke sharply from the common law of libel, and there are good reasons to question whether the First and Fourteenth Amendments displaced this body of common law.” McKee v. Cosby, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring).

\textsuperscript{383}  Id. at 676.

\textsuperscript{384}  For a discussion of the different approaches to constitutional interpretation, see generally CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION (2023) [hereinafter SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION]; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2013); ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011).

of constitutional articles and amendments changes with the evolution of social attitudes. They see part of the job of the Court as keeping the Constitution relevant without formally amending it.\footnote{386}

If, as Justice Thomas argues, the Supreme Court must follow the “original meaning” of the Constitution in defamation cases, what is that “original meaning”? In his concurring opinion in \textit{McKee v. Cosby}, Justice Thomas set out his view of the history of defamation law in the United States.\footnote{387} Under the common law in place at the time the First and Fourteenth Amendments were ratified, a public figure did not need “to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove ‘‘a false written publication that subjected him to hatred, contempt, or ridicule.’’”\footnote{388} Justice Thomas drew on Blackstone’s \textit{Commentaries} as support for his view of the common law of libel and his view that the common law considered “libels against public figures to be more serious and injurious than ordinary libels.”\footnote{389} Far from being protected, Blackstone considered libels against a public official a criminal offense “most dangerous to the people and deserving of punishment.”\footnote{390} Although the common law permitted a privilege to comment on public questions and matters of public interest, that privilege applied only “when the facts stated were true.”\footnote{391} To Justice Thomas, these common law rules provided the backdrop for the First and Fourteenth Amendments, which did not repeal the common law of libel, and were the basis of numerous Supreme Court decisions extending from the early 1800s until 1964.\footnote{392} Thus, according to Justice Thomas, “there appears to be little historical evidence suggesting that the \textit{New York Times} actual-malice rule flows from the original understanding of the First of Fourteenth Amendments.”\footnote{393}

Justice Thomas’s views of the historical meaning of the First and Fourteenth Amendments and their application to defamation law have a number of supporters, among them Glenn Harlan Reynolds.\footnote{394} Carson

\begin{itemize}
\item \footnote{386} For support and criticism of the living constitution theory, see generally \textsc{Sunstein, How to Interpret the Constitution, supra} note 384; Lawrence B. Solum, \textit{Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate}, 113 NW. U. L. REV. 1243 (2019); see generally \textsc{David A. Strauss, The Living Constitution} (2010).
\item \footnote{387} \textit{McKee v. Cosby}, 139 S. Ct. 675 (2019) (Thomas, J., concurring).
\item \footnote{388} \textit{Id.} at 678 (citation omitted).
\item \footnote{389} \textit{Id.} at 679.
\item \footnote{390} \textit{Id.}
\item \footnote{391} \textit{Id.}
\item \footnote{392} \textit{Id.} at 682.
\item \footnote{393} \textit{McKee}, 139 S. Ct. at 682 (Thomas, J., concurring).
\item \footnote{394} See generally Glenn Harlan Reynolds, \textit{Rethinking Libel for the Twenty-First Century}, 87 TENN. L. REV. 465 (2020).
\end{itemize}
Holloway,395 Ed Whelan,396 Michael L. Smith,397 and John M. Kang.398 These critics agree that the Sullivan decision does not comport with the original and traditional view that libel claims raised no constitutional issues because libel was not protected by the First Amendment.399 However, they go further and make three other broad arguments: first, Sullivan is another example of the improper judicial activism of the Warren Court; second, the decision undermines self-government by permitting the press to spread defamatory falsehoods without having to pay damages, thus harming individual rights and particularly the right to reputation; and finally, the actual malice standard gives the press power that is inconsistent with legal equality.

At the same time, Justice Thomas and the other supporters of originalism are not without their critics. The most prolific and historically detailed of these critics is Matthew Schafer, who, in a series of articles, has shown that the historical record of common law libel contains evidence supporting the actual malice test adopted by the Supreme Court in Sullivan.400 Schafer points out that many of the drafters of the Constitution disagreed with Blackstone, who has been cited frequently by Justice Thomas in his concurring and dissenting opinions involving Sullivan, and his view that freedom of the press consisted only of freedom from prior restraint.401 This led Schafer to ask: “Blackstone hated the Colonists and the cause of independence. He hated republican sentiment. He rejected the idea that sovereignty resided, first, in the People. Why the Supreme Court treats him as the final arbiter of questions of history more than 200 years later defies understanding.”402

396. See generally Whelan, supra note 21.
402. Id.
Schafer also presents historical evidence for the actual malice rule adopted by Sullivan and shows that the drafters of the Constitution and the post-Civil War Congresses intended, by the First or Fourteenth Amendments, to place limits on state libel law. Finally, in a recent article, Schafer analyzes twelve nineteenth-century U.S. treatises, and concludes that early American commentators did not adopt Blackstone’s views as their own. Instead, they created a new understanding of press freedom built on negotiated conflicts between libel’s speech-suppressing tendency and the need for democratic debate powered by the press. The result was an American idea of freedom of the press that replaced the English authorities.


While Justice Neil Gorsuch made brief reference to the common law and Blackstone in his dissent in Berisha v. Lawson, the main focus was not on the doctrine of originalism but on how “our Nation’s media landscape has shifted” since Sullivan was decided in 1964. To Justice Gorsuch, the actual malice test might have made sense then because of the limited number of broadcasting licenses for television and radio and domination of the press by a few large companies employing “legions of investigative reporters, editors, and fact checkers.” However, as a result of “revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption anywhere in the world.” This revolution in technology also has meant that a large number of newspapers and periodicals have gone out of business and that television news networks have lost viewers. In their place are twenty-four-hour cable news channels and the internet. According to Justice Gorsuch: “What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.”

Justice Gorsuch raised other concerns. While in 1964, the Supreme Court may have thought that the actual malice standard could be limited to a small number of government officials, today private citizens

406. Id. at 2427.
407. Id.
408. Id.
409. Id. at 2428.
can become public figures on social media overnight and courts have extended the situations in which a person can become a limited public figure.\textsuperscript{410} To Justice Gorsuch, it is unclear how well these modern developments serve \textit{Sullivan}'s original purposes. He admitted in his dissent that he did not have “any sure answers” as to whether \textit{Sullivan} still promoted the goals of 1964 and said he was not even sure of all the questions that should be asked.\textsuperscript{411} But, unlike Justice Thomas, Justice Gorsuch did not call explicitly for the reversal of \textit{Sullivan}. Instead, he asked that the Court reconsider the decision, saying that “the Court would profit from returning its attention, whether in this case or another, to a field so vital to the ‘safe deposit’ of our liberties.”\textsuperscript{412}

4. \textit{Shrinking Local Newspapers and the Continuing Impact of the “Actual Malice” Standard}

In deciding whether \textit{Sullivan} still promotes the goals of 1964, it also is necessary to examine the shrinking number of local newspapers and its impact on the actual malice standard. The \textit{Sullivan} case arose at a time when libel suits were being used in an attempt to silence Northern newspaper coverage of the growing civil rights movement in 1960’s in the South. Many authors have acknowledged this litigation strategy.\textsuperscript{413} In her book, \textit{Actual Malice}, Professor Samantha Barbas declared:

\begin{quote}
The fate of the \textit{New York Times}, the nation’s press, and the civil rights movement hung in the balance. * * * \textit{Sullivan}’s lawsuit was one of a string of lawsuits brought by Southern segregationist officials against Northern media outlets in a massive regional vendetta intended to intimidate them and prevent them from reporting on the civil rights movement.\textsuperscript{414}
\end{quote}

Another analyst of the media, the Southern civil rights movement in the 1960s, and related litigation has declared:

\begin{quote}
Libel law was fast becoming a political cudgel to intimidate the press and stop the reporting of racial upheaval of the day. * * * Without the U.S. Supreme Court’s landmark decision in \textit{New York Times} . . . in 1964, media coverage of the civil rights struggle . . . would have been sharply curtailed if not squelched altogether.\textsuperscript{415}
\end{quote}

As noted above, some commentators and judges have questioned the need or validity of the actual malice standard in a changed print

\textsuperscript{410} Id. at 2429.
\textsuperscript{411} \textit{Berisha}, 141 S. Ct. at 2430.
\textsuperscript{412} Id.
\textsuperscript{413} \textit{Barbas}, supra note 1, at 1.
\textsuperscript{414} Id. at 1–2.
\textsuperscript{415} \textit{Emondson}, supra note 2, at 1–2.
media environment. However, one cannot ignore the present plight and even extinction of many local newspapers or the negative impact on society of a local “news deserts.”

While addressing the actual malice standard in 2021, Justice Gorsuch acknowledged what many media experts and reports have stated: the new media environment “also facilitates the spread of disinformation.”

So, many may question the impact of depriving the print media of defamation protection if negative results actually flow from the elimination of local newspapers. Indeed, many articles and reports authored by universities and research institutions reflect the devastating effects of having communities lose their local newspapers. The 2022 Report on the State of Local News by Penny Abernathy of Northwestern University describes the hazards to communities when local news media decline or disappear altogether. The Report declares:

This is a nation increasingly divided journalistically, between those who live and work in communities where there is an abundance of local news and those who don’t. The loss of local journalism has been accompanied by the malignant spread of misinformation and disinformation, political polarization, eroding trust in the media, and a yawning digital and economic divide among citizens.

Other studies and articles have reached similar conclusions. For example, Penelope Muse Abernathy, in a 2018 report, confirmed that:

The stakes are high, not just for the communities that have lost newspapers or are living with the threat of losing a local newspaper—but also for the entire country. Our sense of community and our trust in democracy at all levels suffer when journalism is lost or diminished. In an age of fake news and divisive politics, the fate of communities across the country—and of grassroots democracy itself—is linked to the vitality of local journalism.

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418. Id.
420. Id.
Similarly, a March 2020 article in *Harvard Business Review* recognized that local U.S. journalism was vanishing. The author, Victor Pickard, detailed the impact of declining local newspapers:

> Democracies need independent, fact-based journalism to provide a voice for a diverse range of people, to watchdog the powerful, and keep members of a society informed. * * * The demise of local newspapers—which are still by far the main source of original reporting in their communities—is also linked to a rise in local corruption and an increase in polarization, as news consumers rely more on partisan-inflected national outlets for their information.422

Finally, in his book, *Cheap Speech—How Disinformation Poisons Our Politics—And How To Cure It*, UCLA law Professor Richard L. Hasen observed:

> Many traditional journalistic outlets, especially local ones, have collapsed or in danger of being scaled back to irrelevance; barriers to entry for producing slick, objective-looking false information have fallen dramatically; the flood of false information is hitting American voters at the same time that confidence in legitimate media is falling; and people are most likely to fall for false information when it lines up with their preexisting ideological preferences.423

While there is no one solution, acknowledging the rapid decline in local media is a first step.424 Few, if any, articles or studies dispute the demise of local newspapers. Cities like Youngstown, Ohio have lost local papers that existed for 150 years. The closing of the Youngstown Vindicator left “a community of hundreds of thousands without a daily newspaper.”425 As Margaret Sullivan, a former member of the Pulitzer

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424. See Katerina Eva Matsa & Kirsten Worden, *Local Newspapers Fact Sheet*, Pew Rsch. Ctr. (May 26, 2022), https://www.pewresearch.org/journalism/fact-sheet/local-newspapers/ [https://perma.cc/65N5-BLR3] (“The transition to digital news consumption has hit the newspaper industry hard in recent years. Some national publications have managed to weather the storm . . . but many local newspapers have been forced to shutter their doors permanently . . .”).

Prize Board and media critic confirmed in her 2020 book Ghosting The News\textsuperscript{426} stated:

The decline of local news is every bit as troubling as the spread of disinformation on the internet. . . . Another crisis is happening more quietly. Some of the most trusted sources of news—local sources, particularly local newspapers—are slipping away, never to return. The cost to democracy is great.\textsuperscript{427}

In response to Justice Gorsuch’s dissent in Berisha v. Lawson,\textsuperscript{428} which questioned whether Sullivan and the actual malice standard still are necessary due to changes in the media environment, two authors responded “yes” because the “premises of that question . . . are incorrect, on both the facts and law.”\textsuperscript{429} The authors, Richard Tofel and Jeremy Kutner responded:

There is . . . one segment of the body politic that will suffer greatly if Sullivan were to be overruled. And it is the same target that was under assault back when the case was decided: responsible journalists. Back then, it was the New York Times that was chief among the coordinated attacks to deter critical reporting. Such political attacks against critical reporting were, and remain, the motivating animus behind calls to “loosen the libel laws” whether such calls come from former presidents or members of the judiciary.\textsuperscript{430}

Based on recent reporting, the defamation actions that can imperil local (or any) newspaper are not decreasing.\textsuperscript{431} Some philanthropic groups are aware of the continuing loss of local news media and stepped in to give needed aid.\textsuperscript{432} However, this aid is to keep the news outlets in

\textsuperscript{426} MARGARET SULLIVAN, GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY (2020).

\textsuperscript{427} Id. at 15.

\textsuperscript{428} Berisha v. Lawson, 141 S. Ct. 2424 (2021).


\textsuperscript{430} Id.

\textsuperscript{431} Curriden, supra note 32, at 36–38.

\textsuperscript{432} Katie Robertson, Philanthropies Pledge $500 Million to Address Crisis in Local News, N.Y. Times (Sept. 7, 2023), https://www.nytimes.com/2023/09/07/business/media/macarthur-foundation-grants-to-local-news.html#:~:text=On%20Thursday%2C%20more%20than%2020,26,2023), https://www.nytimes.com/2023/11/26/opinion/local-newspapers-democracy-journalism.html. Mr. Schmemann noted “[l]ooking back at those [small daily or weekly] papers isn’t just the nostalgia of an old newspaperman. They were the building blocks of community, democracy, politics. Their loss is a major reason behind the acute polarization and political confusion we are suffering today.” Mr. Schmemann did recognize that there were some areas of hope where nonprofits are working to “restore local coverage.” A new book, ELLEN CLEGG & DAN KENNEDY, WHAT WORKS IN COMMUNITY NEWS: MEDIA STARTUPS, NEWS DESERTS, AND THE FUTURE OF THE FOURTH ESTATE (2024), offers more information on the perils of
business, after “some 2500 newspapers have shut down since 2005—and more continue to close,” not to make papers immune from the growing number and expense of libel suits.

III. CAN DEFAMATION PROCEEDINGS BE IMPROVED WITHOUT DOING AWAY WITH THE ACTUAL MALICE STANDARD?

As discussed in Part I, some have suggested doing away with the actual malice standard, but we feel that’s like throwing the baby out with the bath water. That said, some steps can be taken to improve the present state of defamation litigation without changing the Sullivan test.

The cases discussed in this Article have demonstrated many disputes involving false, baseless statements eventually reach the correct result or settle, but they clearly could be resolved more quickly with less related expenses. One way to effectively combat false information in a defamation action and decrease the staggering expense and attorneys’ fees is to require rapid disclosure of supporting information and to determine if the statements are colorable through motion practice. A significant number of states and the District of Columbia have enacted what are known as anti-SLAPP laws. While the provisions of the laws differ significantly, the central purpose of the various statutes remains the same. As the Institute for Free Speech recognizes:

Anti-SLAPP statutes are intended to provide a legal defense for those who have been targeted by litigation solely because they have said or written something that a plaintiff does not like . . . Importantly, however, anti-SLAPP statutes generally have a procedural aspect that many conventional defenses lack—an opportunity for the defendant to file a motion that forces judicial consideration of certain issues at an early stage of the litigation (known as an anti-SLAPP motion).

\textbf{A. The New York Anti-SLAPP Law}

In November 2020, New York expanded its anti-SLAPP law, which was originally adopted in 1992.\footnote{N.Y. Civ. Rts. § 70-a (McKinney 2023). The Reporters Committee For Freedom of the Press provides a detailed summary of the New York Law. \textit{New York, Rep’s Comm. For Freedom of the Press}, https://www.rcfp.org/anti-slapp-guide/new-york/ [https://perma.cc/WFS7-59XD].} The law covers defendants in legal actions “involving public petition and participation.”\footnote{Id. § 76-a(1)(a)(1)–(2).} The prior law limited this term to only cases brought by plaintiffs seeking public permits, zoning changes, or other entitlements from a government entity. The 2020 amendments expanded this coverage to cases involving “any communication in a place open to the public or a public forum in connection with an issue of public interest” or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest \ldots ”\footnote{Id. §76-a(1)(d).}

The revised law also requires that courts “broadly” construe the term “public interest” to “mean any subject other than a purely private matter.”\footnote{N.Y.C.P.L.R. § 3211(g)(1) (McKinney 2024).} The revised law is framed to make it easier for a defendant to obtain dismissal of a SLAPP suit. A defendant is only required to file a motion to dismiss, illustrating that the legal action involves “public petition and participation,” and then the burden shifts to the plaintiff to show that the lawsuit “has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.”\footnote{Id. § 3211(g)(2).} If the plaintiff does meet this burden, the court must dismiss the case.

Based on the amended law, courts ruling on anti-SLAPP motions will consider the pleadings (that is the plaintiff’s complaint and defendant’s answer) plus “supporting and opposing affidavits stating the facts upon which the action or defense is based.”\footnote{Id. § 3211(g)(1) (McKinney 2024).} The revised law permits
the defendant to submit evidence early in the case—before expensive discovery takes place.

The 2020 amendment also mandates the court to stay “all discovery, pending hearings, and motions” from the time an anti-SLAPP motion is filed until the court rules on that motion.446 But the law does allow courts to permit some discovery, “limited to the issues raised in the motion to dismiss,” if the plaintiffs demonstrate specific reasons why they cannot otherwise provide facts “essential” to their opposition to the anti-SLAPP motion.447 The revised anti-SLAPP law requires that plaintiffs may not recover damages in libel cases involving “public petition and participation” unless they show “by clear and convincing evidence” that the defendant made the statement knowing it was false or “with reckless disregard” as to whether it was false.448

Despite the benefits of the revised New York law, its enforcement has not been without challenges. While Judge Jed S. Rakoff held that the revised New York law applied retroactively to litigation pending when the amendments were passed, others have differed on this issue.449 Still other courts have reached divergent conclusions on whether the amended anti-SLAPP law even applies in federal court.450 And, some federal district courts also have refused to apply § 70a, the revised law’s attorneys’ fee provisions.451

In response to the differing state laws relating to SLAPP suits, the Uniform Law Commission (ULC) created the Uniform Public Expression Protection Act (UPEPA).452 Recently, a number of organizations joined in an open letter expressing support for anti-SLAPP laws “modeled after” UPEPA.453 The model act provides a number of features that would improve existing state anti-SLAPP laws. The letter focused on “six features in the UPEPA . . . necessary for an effective anti-SLAPP law”454. The “features” include:

1. Protection of all expression on matters of public concern;

446. Id. § 3211(g)(3).
447. Id.
448. N.Y. CIV. RTS. § 76-a(2).
454. Id.
2. Minimization of litigation costs by allowing defendants to file an anti-SLAPP motion in court;

3. Requiring plaintiffs to show they have a legitimate case early in the litigation;

4. The right to an immediate appeal on anti-SLAPP motion ruling;

5. Award of costs and attorneys’ fees; and,

6. Broad judicial interpretation of anti-SLAPP laws to protect free speech.  

The letter concluded with the statement: “We appreciate the work of the Uniform Law Commission to craft the UPEPA and support its passage in states across the country with weak or no anti-SLAPP laws.”  

While anti-SLAPP statutes can provide useful protection for defendants, they are far from uniform and not all states have adopted them in any form. Moreover, there has been no adoption of a federal anti-SLAPP law and no evidence that it will happen in the near future.  

As noted previously, the focus on protecting journalists, does not tell the whole defamation liability story in an era when major public-figure defamation cases are on the rise. Concocted stories and bold lies also have spawned a flood of litigation. Alex Jones’s lies about the mass shooting of twenty-six people at Sandy Hook Elementary School have been a catalyst to huge awards against him in a number of cases. In August 2022 a Texas jury ordered Alex Jones, host of Infowars, to pay parents of killed six-year-olds in the Sandy Hook, Connecticut shooting $4.1 million in compensatory damages and $45.2 million in punitive damages for spreading a lie that the shooting was actually a hoax.

Jones had falsely claimed that the shootings were created by government-financial “gun grabbers” who used actors to serve as grieving parents. In

455. Id. The Organizing signers included the American Civil Liberties Union (ACLU) Institute, Institute for Free Speech, Institute for Justice, Public Participation Project and Reporters’ Committee for Freedom of the Press, as well as twenty other organizations that joined in.

456. Id.


October of the same year, a Connecticut jury awarded $96.5 million to eight Sandy Hook victims’ families and an FBI agent.640

Another example of how a spreader of baseless lies can be held accountable is the Freeman v. Giuliani641 case. In the Freeman action, Rudy Giuliani was alleged to have claimed that two Georgia election workers improperly handled ballots during tabulation of votes in the 2020 election in Atlanta.642 Giuliani had claimed “that plaintiffs were pulling suitcases filled with mystery ballots from under tables while tabulating the votes on election night . . . .”643 The decision by U.S. District Judge Beryl Howell demonstrates several factors crucial to defamation law. First, regardless of who the parties are—public figures, limited purpose public figures or private figures, prompt disclosure of relevant information is crucial to a just and economical resolution.

Second, having judges prepared to intervene to ensure compliance with applicable rules and law is necessary for all parties. In Freeman, the Judge found Giuliani had failed to comply with court ordered discovery


464. Id. In a 2021 case with similar delay tactics, Freeman v. Hoft, the plaintiffs Ruby Freeman and Wandrea “Shaye” Moss claimed they were “targets of . . . a campaign of lies” by an ultra-conservative St. Louis website, known as The Gateway Pundit, concerning “ballot fraud to alter the outcome of the 2020 presidential election in Georgia.” The Gateway Pundit ultimately published many stories about election workers counting illegal ballots to steal the presidential election. But despite trying to delay the action, St. Louis Circuit Judge Michael Stelzer, dismissed a counterclaim as well as defendant’s motion to dismiss the entire case. See Amended Complaint at 1–2, Freeman v. Hoft, No. 21-CV-1424-HEA, (E.D. Mo. Jan. 14, 2022). See also Jason Hancock, Gateway Pundit Accused of Purposely Delaying Defamation Case Involving False Fraud Claims, Mo. Indep. (Oct. 12, 2023, 10:03 AM), https://missourindependent.com/briefs/gateway-pundit-accused-of-purposely-delaying-defamation-case-involving-false-fraud-claims/ [https://perma.cc/3DY7-9APY]; Jason Hancock, As Fox News Case Heads to Trial, Far Right St. Louis Site Faces its Own Defamation Suit, Mo. Indep. (Apr. 17, 2023, 5:55 AM), https://missourindependent.com/2023/04/17/
plaintiffs to bully them and to plaintiffs subjected to falsehoods and disinformation.\(^{465}\)

No one has all the answers in this era of falsehoods and disinformation that come from a variety of sources including social media, television news and websites, but we do have some meaningful conclusions. One thing that has been demonstrated by the Alex Jones, Fox News, and Rudy Giuliani cases is that those who spread and cultivate falsehoods can be held accountable under the actual malice standard. Therefore, while the application of actual malice standard can be modestly adjusted, for example, to expedite discovery and disclosure of probative information\(^{466}\)—but throwing out the long standing and broadly applied actual malice test is not required.\(^{467}\) Many defamation scholars have reached similar conclusions. In his 2021 article, Matthew L. Schafer concluded:

Nor is there reason to believe that removing the protections of the actual-malice rule will confront the serious problems that do face the news industry or our broader mass-communication eco system. If anything, overturning \textit{Sullivan} would likely worsen matters, to chill reputable news organizations while doing little to deter bad actors operating anonymously on the internet.\(^{468}\)

Professor Jane E. Kirtley also voiced concerns with “doing away with \textit{New York Times v. Sullivan}” in a 2020 article. She declared: “There is no question that the defense of libel suits can be very costly, and that news organizations, facing significant challenges of their own, may well be deterred from investigative reporting if they fear that crippling legal expenses or even bankruptcy, may follow.”\(^{469}\)

And, as Professor Richard L. Hasen noted in his 2022 book titled \textit{Cheap Speech}, he does not believe that changing the defamation standards is a viable solution. He explained in greater detail:

\footnotesize
\begin{itemize}
\item 465. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION, supra note 97, at 104–05 (2021).
\item 467. This issue has received significant coverage. See Zachary R. Cormier, \textit{The News Media Engagement Principle: Why Social Media Has Not Actually Overrun the Limited Purpose Public Figure Category}, 78 U. MIAMI L. REV. 64, 78–90 (2023).
\item 468. Schafer, \textit{In Defense}, supra note 21, at 159.
\end{itemize}
Easing the actual malice standard will do little to counter disinformation, given that much of it does not defame anyone in particular and lawsuits are cumbersome things. * * * The openness of these conservative justices to rethinking First Amendment law in light of cheap speech is encouraging, but lowering the bar for libel suits is a dangerous way of attacking the disinformation problem.\(^{470}\)

The law surrounding the actual malice standard is sometimes complex and nuanced. But, because the standard has withstood the test of time while preserving free speech, its wholesale replacement is uncalled for. Indeed, the print media and those subjected to politically-oriented bullying and rampant falsehoods are likely in need of even greater protections. Clearly, anti-SLAPP laws and the aggressive enforcement of defamation pleading and discovery standards by the court system is required. Spreaders of falsehoods should not be able to postpone discovery responses for years—all the while they bleed their opponents of thousands of dollars in attorneys’ fees or force them into bankruptcy.

**Conclusion**

Defamation law has changed over time. But, its negative motivations and substantial downsides have only increased. Indeed, more defamation actions are filed now than in the recent past. Moreover, the new use of the social media and other informal means to spread untruths and to bludgeon opponents only increases the hazards to all parties and to the print media, in particular. And, some defendants are motivated to continue making defamatory statements to stimulate supporters regardless of the law or ultimate cost. Yet, the support for the actual malice standard remains. As discussed in this Article, the standard can be better supported with active judicial oversight and more aggressive pleadings, motion practice and anti-SLAPP statutes to help avoid the substantial attorneys’ fees and other related costs that can be incurred in defending even totally meritless claims. The Alex Jones Sandy Hook Families Litigation\(^ {471}\) and the Freeman and Moss v. Giuliani\(^ {472}\) cases illustrate that baseless lies can take years to resolve and even longer to compensate the victims of untruths that have been spread for the economic or political benefit of adverse parties.\(^ {473}\)

\(^{470}\) Hasen, supra note 423, at 117

\(^{471}\) See supra note 460 and accompanying text.


So, while there have been a number of critics of the actual malice standard on the bench, in political parties and academies, there is no substantial evidence that changing the standard would lead to better, more just, or less expensive results. And, even though some members of the media may even be responsible for false and defamatory statements, there is no evidence that overturning New York Times v. Sullivan will lead to different outcomes. Indeed, the plaintiffs in the Sandy Hook and Dominion Voting cases were ultimately able to secure substantial awards despite the actual malice standard that some have termed an insurmountable barrier to recovery. This conclusion does not mean that defamation law cannot be made more efficient by use of detailed pleading rules as well as expedited discovery and motion practice requirements. These measures, in applicable cases, together with anti-SLAPP statutes, can hasten resolution of subject defamation cases and contain litigation costs.

The Sullivan standard sometimes may protect negligent conduct, but not baseless statements meant to cause harm to others or for political gain. One can hope that the impact of substantial awards against those who spread false statements for their own benefit, ultimately may discourage others from doing so in the future.

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defame even as their assets are depleted or made unreachable to plaintiffs. Rudy Giuliani who reasserted his defamatory allegations against two Georgia poll workers outside the courthouse as the jury decided his case, filed for bankruptcy just days after he was ordered to pay $148 million for those lies.

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