**MLRC Media Law Conference**

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**Libel Developments Boutique**

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1. **Developments with regard to *New York Times v. Sullivan***
* Cases:
	+ *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from the denial of certiorari)
		- “This Court’s pronouncement that the First Amendment requires public figures to establish actual malice bears “no relation to the text, history, or structure of the Constitution.” *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (CADC 2021) (Silberman, J., dissenting) (emphasis deleted). In fact, the opposite rule historically prevailed: “[T]he common law deemed libels against public figures to be ... more serious and injurious than ordinary libels.” *McKee*, 586 U. S., at ––––, 139 S.Ct. at 679 (opinion of THOMAS, J.).”
		- “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. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be “the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton,” . . . Or consider how online posts falsely labeling someone as “a thief, a fraudster, and a pedophile” can spark the need to set up a home-security system. . . . Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. . . . Or read about Kathrine McKee—surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. *See McKee*, 586 U. S., at –––– – ––––, 139 S.Ct. at 675–676 (opinion of THOMAS, J.).”
	+ *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Gorsuch, J., dissenting from the denial of certiorari)
		- “Since 1964, however, our Nation’s media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks demanded significant investment and expertise. . . . The effect of these technological changes on our Nation’s media may be hard to overstate. Large numbers of newspapers and periodicals have failed. . . . Network news has lost most of its viewers. . . . . With their fall has come the rise of 24-hour cable news and online media platforms that “monetize anything that garners clicks.” Logan 800. No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. Id., at 804. A study of one social network reportedly found that “falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper ... and doing so more quickly than accurate statements.” Id., at 804, n. 302; . . . . All of which means that “the distribution of disinformation”—which “costs almost nothing to generate”—has become a “profitable” business while “the economic model that supported reporters, fact-checking, and editorial oversight” has “deeply erod[ed].” Logan 800.”
		- “The bottom line? It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy. *See id.*, at 778–779. Under the actual malice regime as it has evolved, “ignorance is bliss.” *Id.*, at 778. Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. See ibid. 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. Id., at 804. As Sullivan’s actual malice standard has come to apply in our new world, it's hard not to ask whether it now even “cut[s] against the very values underlying the decision.” Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?”
	+ *McKee v. Cosby*, 139 S. Ct. 675, 203 L. Ed. 2d 247 (2019) (Thomas, J., concurring in the denial of certiorari)
		- “*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own “‘federal rule[s]’ ” by balancing the “competing values at stake in defamation suits.” *Gertz*, *supra*, at 334, 348, 94 S.Ct. 2997 (quoting *New York Times*, *supra*, at 279, 84 S.Ct. 710). We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, 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.”
		- “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 sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”
		- “These common-law protections for the “core private righ[t]” of a person's “ ‘uninterrupted enjoyment of ... his reputation’ ” formed the backdrop against which the First and Fourteenth Amendments were ratified. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 567 (2007) (quoting 1 Blackstone \*129). Before our decision in New York Times, we consistently recognized that the First Amendment did not displace the common law of libel.”
		- “There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law. . . . But after canvassing historical practice under similar state constitutions, treatises, scholarly commentary, the ratification debates, and our precedent, [Justice White] concluded that “[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.” *Gertz*, 418 U.S., at 381, 94 S.Ct. 2997; *see id.*, at 380–388, 94 S.Ct. 2997. Justice White later expressed “doubts about the soundness of the Court's approach” in New York Times “and about some of the assumptions underlying it.” *Dun & Bradstreet*, 472 U.S., at 767, 105 S.Ct. 2939 (concluding that the Court “struck an improvident balance in the *New York Times* case”).
	+ *Nunes v. Lizza*, No. 20-2710, 2021 WL 4177754, at \*5 (8th Cir. Sept. 15, 2021)
		- “On appeal, Nunes suggests that the actual malice standard of New York Times v. Sullivan should be reconsidered, see *McKee v. Cosby*, ––– U.S. ––––, 139 S. Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari); *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251-56 (D.C. Cir. 2021) (Silberman, J., dissenting in part), but of course we are bound to apply it.”
	+ *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021) (Silberman, J., dissenting)
		- “I am prompted to urge the overruling of New York Times v. Sullivan. Justice Thomas has already persuasively demonstrated that New York Times was a policy-driven decision masquerading as constitutional law. *See McKee v. Cosby*, ––– U.S. ––––, 139 S. Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari). The holding has no relation to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380–88, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting). As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth. New York Times should be overruled on these grounds alone.”
		- “One can understand, if not approve, the Supreme Court's policy-driven decision. There can be no doubt that the New York Times case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule. As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity.8 It would be one thing if this were a two-sided phenomenon. *Cf. New York Times*, 376 U.S. at 305, 84 S.Ct. 710 (Goldberg, J., concurring) (reasoning that the press will publish the responses of public officials to reports or accusations). *But see* Suzanne Garment, *The Culture of Mistrust in American Politics* 74–75, 81–82 (1992) (noting that the press more often manufactures scandals involving political conservatives). The increased power of the press is so dangerous today because we are very close to one-party control of these institutions. Our court was once concerned about the institutional consolidation of the press leading to a “bland and homogenous” marketplace of ideas. *See Hale v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring). It turns out that ideological consolidation of the press (helped along by economic consolidation) is the far greater threat.”
		- “Although the bias against the Republican Party—not just controversial individuals—is rather shocking today, this is not new; it is a long-term, secular trend going back at least to the ’70s. (I do not mean to defend or criticize the behavior of any particular politician). Two of the three most influential papers (at least historically), The New York Times and The Washington Post, are virtually Democratic Party broadsheets. And the news section of The Wall Street Journal leans in the same direction. The orientation of these three papers is followed by The Associated Press and most large papers across the country (such as the Los Angeles Times, Miami Herald, and Boston Globe). Nearly all television—network and cable—is a Democratic Party trumpet. Even the government-supported National Public Radio follows along.”
	+ *Moore v. Cecil*, No. 4:19-CV-1855, 2021 WL 1208870, at \*1 (N.D. Ala. Mar. 31, 2021)
		- The Supreme Court announced that public figures must prove “actual malice” in New York Times v. Sullivan, 376 U.S. 254 (1964). Moore challenges the constitutionality of the New York Times actual malice requirement, citing Justice Thomas's recent statement that “[t]here are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.” *McKee v. Cosby*, 139 S. Ct. 675, 680-82 (2019) (Thomas, J. concurring in cert denial). Of course, district courts must follow Supreme Court precedent, so this court must apply the New York Times actual malice standard. But Moore has reserved this argument should he wish to argue it to higher courts.”
	+ Colborn v. Netflix Inc., No. 19-CV-0484-BHL, 2021 WL 2138767, at \*8 (E.D. Wis. May 26, 2021)
		- “Indeed, some recent decisions have suggested the Court’s imposition of the “actual malice” standard in New York Times v. Sullivan may itself have gone too far. *See, e.g.*, *McKee v. Cosby*, 586 U.S. ––––, 139 S. Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari); *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251-56 (D.C. Cir. 2021) (Silberman, J., dissenting in part).”
	+ *Fairfax v. CBS Broad. Inc.*, No. 119CV01176AJTMSN, 2020 WL 10147131, at \*14 (E.D. Va. Feb. 11, 2020), *aff’d sub nom.*, *Fairfax v. CBS Corp.*, 2 F.4th 286 (4th Cir. 2021)
		- “These legal complexities [relating to actual malice] are underscored by on-going judicial assessments pertaining to defamations claims by public figures. *See, e.g., McKee v. Cosby*, ––– U.S. ––––, 139 S.Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in the denial of certiorari) (questioning, as a matter of constitutional law, the “actual malice” standard to state defamation law).”
	+ *Palin v. New York Times Co.*, 482 F. Supp. 3d 208, 214 (S.D.N.Y.), *modified*, 510 F. Supp. 3d 21 (S.D.N.Y. 2020)
		- “There is no dispute that plaintiff is a public figure and must therefore, under seemingly well-settled law, prove that the statements were published with actual malice. See *Palin*, 940 F.3d at 809-10; *see generally New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). What plaintiff is really asking, then, is for this Court either to “overrule” *New York Times v. Sullivan* or else to distinguish that case on the facts and refuse to apply the actual malice rule here. Pl. Mem. at 8, 13. To the extent those are, in fact, different requests, the Court declines them both.”
	+ *Anderson v. Colorado Mountain News Media Co.*, No. 18-CV-02934-CMA-GPG, 2019 WL 3321843, at \*9 (D. Colo. May 20, 2019), report and recommendation adopted, No. 18-CV-02934-CMA-STV, 2019 WL 6888275 (D. Colo. Dec. 18, 2019)
		- “Citing to Justice Thomas’ concurrence in *McKee v. Cosby*, 139 S.Ct. 675, 681-82 (2019) (concurring in the denial of a writ of certiorari yet encouraging a potential re-visitation of the actual-malice rule in terms of the displacing effect on state law defamation claims), Plaintiffs invite this Court to reconsider the topic on the basis that *New York Times Co. v. Sullivan* sets an impossible standard, thus displacing the possibility of proving up a mere negligence claim. This Court declines the invitation to overturn a half-century of Supreme Court jurisprudence.”
* Current Petitions:
	+ Petition for Writ of Certioari, *Pace v. Baker-White*, No. 21-394 (U.S.)
		- “Petitioner here respectfully submits that the Court should grant this Petition and revisit the policy-driven decision of *New York Times v. Sullivan*, 376 U.S. 245 (1964). Given the proliferation of “fake” and “polluted” news that spreads like wild fire over the internet causing harm to our democracy, there is a dire need to reconsider and revise the “actual malice” standard. Absent action by this Court, the defeated plaintiff, like Petitioner Pace, will continue to have his reputation and professional life destroyed by falsehoods. The dramatic change in the “public square,” in light of the advent of the internet and technological advances, demands this Court strike a different balance recognizing at least some ability to protect a public figure’s reputational harm and deter the spread of false speech.”
	+ Petition for Writ of Certioari, *Tah v. Global Witness*., 2021 WL 3209835 (U.S.)
		- “When the actual malice standard is combined with the Twombly and Iqbal standard, as interpreted by the D.C. Circuit and the other federal circuits that are aligned with it, there is effectively little or no law of defamation left. As Justice Thomas observed: “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.” *Berisha*, 141 S.Ct. at 2425 (Thomas, J.).”
	+ Petition for Writ of Certiorari, *Wilson v. Phoenix Newspapers, Inc.*, 2021 WL 3885353 (U.S.)
		- “Justice Thomas, in his concurring opinion in the case of McGee v. Cosby, Jr., 137 S.Ct. 675 (2019) said “the Sullivan case, infra, \*16 federalized the law of libel and was a mistake and needs to be re-visited.” Several other learned judges have agreed that the time has come to re-visit the Sullivan case, infra and modify its constitutional malice requirements in libel cases. Justice Gorsuch in Berisha v. Lawson, U.S. Supreme Court case No. 20-1063 (Jul. 2, 2021), Senior Cir. Judge Silberman, in *Tau v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021).”
* Additional Reading
	+ Matthew Schafer, *In Defense: New York Times v. Sullivan*, 81 La. L. Rev. --- (forthcoming)
	+ Samantha Barbas, *The Press and Libel Before New York Times v. Sullivan*, 44 Colum. J.L. & Arts 511 (2021)
	+ Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 Tenn. L. Rev. 465 (2020)
	+ David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020)
1. **High-Profile Defamation Cases**

**Congressman Devin Nunes Lawsuits**

Republican Congressman Devin Nunes has represented California’s 22nd District in San Joaquin Valley since 2003. He has become a controversial national figure during his tenure on the House Intelligence Committee during the Trump presidency. In the last two years Nunes and his attorney Steven Biss have filed six lawsuits alleging defamation or related claims against media and non-media defendants. Here is an update on each case as of September 9, 2020:

1. *Nunes v. Twitter* (Henrico Cty., Va. Cir. Ct.). On March 18, 2019, Rep. Nunes sued a Republican consultant and two pseudonymous Twitter accounts—most famously, Devin Nunes’ Cow—for defamation based on allegedly false and defamatory tweets about him and also sued Twitter for negligence and to unmask the identity of the accounts’ owners. Examples of challenged tweets include Devin Nunes’ Cow calling Nunes a “treasonous cowpoke” and the consultant referencing a Fresno Bee article about a lawsuit involving a winery Nunes partly owned. (In Nunes’ next lawsuit, he sued over the article directly). The Henrico County Circuit Court denied the identified defendants’ motions to dismiss for lack of personal jurisdiction. On June 24, 2020, however, the court granted Twitter’s motion to dismiss with prejudice on the ground of immunity under 47 U.S.C. § 230 because Twitter was not the publisher of the challenged tweets. Twitter reiterated at a hearing on the motion that it would not cooperate in providing information about the two pseudonymous accounts. Nunes nevertheless filed an amended complaint seeking to sue Twitter on an “aiding and abetting” theory. The court subsequently dismissed Twitter from the suit and, in September 2021, dismissed the claims against the Republican consultant as well.

2. *Nunes v. McClatchy Co.* (Albemarle Cty., Va. Cir. Ct.). On April 8, 2019, Nunes sued McClatchy over a Fresno Bee article reporting on a lawsuit involving a California winery partly owned by Nunes. The article reported that the lawsuit alleged that in 2015 some investors in the company held a yacht fundraising event where there was prostitution and the use of cocaine. The article said it was unclear whether Nunes was involved in the fundraising event or knew about the lawsuit. On September 9, 2019, McClatchy moved to dismiss for lack of personal jurisdiction. On February 12, 2020, the court ordered limited discovery on the personal jurisdiction issue. McClatchy filed for bankruptcy on February 13, 2020, and Nunes subsequently dropped the case.

3. *Nunes v. Fusion GPS* (E.D. Va.). On September 4, 2019, Nunes sued Fusion GPS and one of its principals, alleging Civil RICO violations in connection with Congressional ethics complaint filed against Nunes. The defendants called the lawsuit an untimely defamation suit mislabeled as a RICO suit. On February 21, 2020, the court granted defendants’ motion to dismiss without prejudice, on the ground that the conclusory allegations of the complaint were insufficient either to allege personal jurisdiction or to state a claim on which relief could be granted. The court cautioned Nunes that any amended complaint would have to comply with Rule 11. Nunes filed an amended complaint on April 6, and the defendants moved to dismiss again on April 27. Defendants argued that the amended complaint failed to cure the initial infirmities and Nunes should be sanctioned under Rule 11. The motion to dismiss has been fully briefed. In April 2021, the court granted defendants’ motion to dismiss.

4. *Nunes v. Lizza* (N.D. Iowa). On September 30, 2019, Nunes sued reporter Ryan Lizza and Hearst Magazines, the publisher of Esquire, over a report about Nunes’ relatives’ family farm in Iowa. Nunes challenged eleven statements in the article. The court granted a stay of discovery. Defendants moved to dismiss Nunes’ amended complaint, moved to strike certain allegations, and sought relief under California’s anti-SLAPP act, Cal. Civ. Proc. Code § 425.16. On August 5, 2020, the court entered an order granting the defendants’ motion to dismiss with prejudice. The court held that none of the challenged statements was actionable, for a combination of reasons including that Nunes has failed plausibly to allege actual malice and that the statements were not “of and concerning” Nunes, were not susceptible of a defamatory meaning, were protected opinion, and were not plausibly alleged to be false. The court denied the anti-SLAPP motion on procedural grounds and denied as moot defendants’ motion to strike certain allegations in the complaint about defendant Lizza, but the court agreed that the allegations were immaterial, impertinent, and scandalous. Nunes appealed to the Eighth Circuit. In September 2021, the Court held that Nunes failed to plausibly allege that Lizza recklessly disregarded the truth when it first published his article about Nunes, but the Court added that Lizza may have crossed the line when he sent a tweet linking to his 2018 Esquire article after he was sued for defamation over it.

5. *Nunes v. CNN* (E.D. Va., then S.D.N.Y.).On December 3, 2019, Nunes sued CNN for defamation over its report that a witness was prepared to testify that Nunes had met with a former Ukrainian prosecutor to discuss “digging up dirt” on Joe Biden. CNN moved to dismiss. It argued that California law applies under Virginia *lex loci* choice of law rules and Nunes’ failure to comply with California’s pre-suit correction statute, Cal. Civ. Code § 48a, coupled with his failure plausibly to allege special damages, require dismissal of the case. CNN also moved under 28 U.S.C. § 1404 to transfer the case to the Southern District of New York because of the Eastern District of Virginia’s absence of relevant contacts with the dispute. The court granted the transfer motion on May 22, 2020, leaving the motion to dismiss for the transferee court to decide. The Southern District ordered further briefing on choice of law, which was completed on August 14, 2020. In February 2021, the Southern District granted CNN’s motion to dismiss.

6. *Nunes v. Washington Post* (E.D. Va., then S.D.N.Y.). On March 2, 2020, Nunes sued the Washington Post and a Post reporter over a report that President Trump learned from Nunes about a Trump administration congressional briefing on Russian interference with the 2020 election and Trump became angry because he mistakenly believed the briefing had been given exclusively to Democrats. The Post moved to dismiss on the following grounds: (1) nothing in the article could reasonably be read to convey the implication Nunes claimed, that Nunes had conveyed inaccurate information to Trump about the briefing; (2) the complaint failed to plausibly allege actual malice; and (3) dismissal was required for Nunes’ failure to comply with the California correction statute and his failure plausibly to allege special damages. The Post also moved under 28 U.S.C. § 1404 to transfer the case to the District of the District of Columbia because of the Eastern District of Virginia’s absence of relevant contacts with the dispute. The court granted the transfer motion on May 22, 2020, leaving the motion to dismiss for the transferee court to decide. The D.D.C. ordered further supplemental briefing on any binding authority in the D.C. Circuit, which was completed on June 10, 2020. In August 2021, the court denied the motion to dismiss, ruling that Nunes had sufficiently pleaded that the Post published its article “with at least reckless disregard of the truth that it had previously reported.”

**Covington Catholic Students Washington Mall Lawsuits**

A now-famous confrontation by the steps of the Lincoln Memorial on the National Mall occurred on Friday, January 18, 2019. It involved participants in two different scheduled events—the March for Life and the Indigenous Peoples March—as well as a small group of members of the Black Hebrew Israelites group who were provocatively addressing onlookers and passers-by using an electronic megaphone. Videos of parts of the confrontation began going viral on Saturday, January 19, focusing on the behavior of a group that was later identified as students from Covington Catholic High School in Covington, Kentucky. At the center of the viral video debate was a face-to-face standoff between Native American activist Nathan Phillips and a student later identified as Nicholas Sandmann. On social media public officials, other public figures, and countless others criticized the students’ behavior, and on Saturday afternoon the Covington Diocese issued a statement critical of the students’ behavior.

A number of news organizations began covering the controversy that Saturday and Sunday. By Sunday, additional videos began to emerge on social media, causing many to defend the students’ actions and criticize the initial criticisms as an unfair rush to judgment based on an incomplete picture. News organizations updated their coverage in light of the new information and developments. In a public statement on Sunday, Sandmann identified himself and defended his actions. Within weeks, Sandmann, through his parents, began suing news organization for defamation. Other Covington Catholic students who say they appeared in the videos also filed suit against news organization and others. Here is an update on the cases as of September 2020:

1. Nicholas Sandmann lawsuits(E.D. Ky). Starting in February 2019, Sandmann, through his parents, sued the Washington Post, CNN, and NBC in separate lawsuits for each news organization’s initial coverage of the controversy. Each complaint challenged statements in multiple articles and, in the case of CNN and NBC, video reports. The district court ruled on the Washington Post’s motion to dismiss first. The court initially dismissed the case in its entirety. Its ruling distilled the complaint’s allegations against the Post to 33 sets of statements and ruled that none of the statements was actionable. The grounds for the ruling included that certain statements were about the group of students generally, not Sandmann, and thus failed under the group-libel doctrine, and other statements were either not defamatory or were protected opinion. On plaintiff’s motion to reconsider and to file an amended complaint, the court reconfirmed its order as to 30 of the 33 statements, but ruled that three of the statements—involving reporting the activist’s account that Sandmann had “blocked” him during the confrontation, made sufficient allegations to survive a motion to dismiss. The court then issued orders in the other two cases similarly granting the CNN and NBC motions to dismiss except for reporting the activist’s account of being “blocked.”

 After Sandmann’s counsel told the court at a January 2020 scheduling conference that they intended to sue additional media defendants over their initial coverage of the incident, the court stayed the discovery schedule until the new defendants could be served and their motions to dismiss resolved. Sandmann then sued a number of additional news organization, focusing his complaints on the “blocking” statements. In separate complaints, Sandmann sued five more media defendants: CBS, ABC, the New York Times, Gannett Co., and Rolling Stone. Sandmann announced a settlement of his CNN lawsuit in January 2020 and his Washington Post lawsuit in July 2020.

2. Charles Blessing, *et al.* lawsuits (E.D. Ky.).

 a. On September 16, 2019, through their parents, a group of Covington Catholic students who say they were pictured in some of the viral videos, sued comedian Kathy Griffin for harassment and invasion of privacy over tweets she sent during the initial weekend seeking to identify the students in the video. The court dismissed the case for lack of personal jurisdiction on April 9, 2020. In January 2021, the Sixth Circuit affirmed the dismissal.

 b. On February 18, 2020, the Blessing group also sued a Twitter user, Dr. Sujana Chandrasekhar, for a tweet she recirculated that showed photos of students from the viral videos and criticizing the pictured students. The court dismissed the case for lack of personal jurisdiction on June 25, 2020. In January 2021, the Sixth Circuit affirmed the dismissal.

 c. On February 18, 2020, the Blessing group also sued the Washington Post, CNN, and NBC for defamation and for invasion of privacy. These defamation claims were all based on the allegations in the Sandmann lawsuits and specifically relied on the district court’s Sandmann ruling to identify allegedly false and defamatory statements. The Post, CNN, and NBC all moved to dismiss on the same grounds as in the Sandmann case. The defendants added that (1) the only set of statements that survived dismissal in Sandmann—the “blocking” statements—were “of and concerning” Sandmann only and not the members of the group of students, and (2) none of the allegations stated a claim for invasion of privacy. In December 2020, the suits against the Washington Post, CNN, and NBC were dismissed with prejudice in December 2020. The Blessing group appealed to the Sixth Circuit where the rulings were upheld.

3. John Does lawsuit (Kenton Cty., Ky. Cir. Ct. and E.D. Ky.). On August 1, 2019, a group of anonymous plaintiffs who say they are Covington Catholic students pictured in some of the viral videos, filed a defamation lawsuit against a number of well-known Twitter users over tweets that were critical of the group or of Nicholas Sandmann (who was not a plaintiff in this case). The defendants included Senator Elizabeth Warren, Congresswoman Deb Haaland, and media figures including Shaun King, Maggie Haberman, Kathy Griffin, and Ana Navarro. Sen. Warren removed the case to federal court pursuant to 28 U.S.C. § 1442(1), on the ground that she is an officer of the United States sued for speech relating to an act under color of her office. On November 5, 2019, the court dismissed with prejudice the claims against Sen. Warren and Rep. Haaland. The court held that the doctrine of sovereign immunity provided a complete defense to both defendants because the challenged tweets were made within the scope of their employment as elected representatives. The court declined to exercise supplemental jurisdiction over the claims of the other defendants. Plaintiffs appealed the dismissal to the Sixth Circuit, which affirmed in an opinion issued September 3, 2020. John Does’ petition for certiorari was subsequently denied.

**Trump Presidential Campaign Lawsuits**

In February and March 2020, President Trump’s reelection campaign organization, Donald J. Trump for President, Inc., filed three defamation lawsuits against three major news organization the President has repeatedly targeted with accusations over their reporting on him and his administration: CNN, the New York Times, and the Washington Post. The campaign sued over individual statements in opinion pieces that commented on the conduct or statements of President Trump, and/or the conduct of people assisting his campaign, as part of national debate related to (1) the spring 2019 release of the Mueller Report or (2) a June 2019 interview Trump gave to ABC News in which he said he would listen to opposition research from foreign nations in the 2020 campaign. Although the opinion pieces all made statements about Trump personally, the complaints did not name him personally as a plaintiff. In addition, in April 2020 the Trump campaign also sued a small north central Wisconsin television station for running a PAC’s advertisement that criticized his handling of the COVID-19 pandemic. Here is an update on each case as of September 9, 2020:

1. *Donald J. Trump for President, Inc. v. New York Times* (NY Sup. Ct.). On February 26, 2020 the Trump campaign sued the New York Times for comments in an op-ed piece by former Times executive editor Max Frankel to the effect that if Mueller found no collusion between Trump’s associates and Russia it was because the Mueller Report took a formalistic and legalistic approach to conclusion. The piece concluded that, based on extensive public reporting, there was an overarching deal that, while not illegal, was unseemly. The Times has moved to dismiss, arguing that the challenged statements are protected opinion, are not susceptible to the meaning alleged by the campaign, and are not “of and concerning” the campaign organization, and the complaint fails plausibly to allege actual malice. Briefing of the motion is complete.

On March 9, 2021, New York Supreme Court Judge James d’Auguste dismissed the suit with prejudice, on the grounds that Frankel’s column was protected opinion and that Trump’s counsel had failed to prove actual malice. D’Auguste ruled that the campaign did not have the legal standing to file the suit, but he denied a request by the NYT to impose monetary sanctions on the campaign for the suit.

2. *Donald J. Trump for President, Inc. v. Washington Post* (D.D.C.). On March 2, 2020, the Trump campaign sued the Washington Post for comments made in two June 2019 opinion pieces by two Washington Post opinion columns. Both columns were written after the Mueller Report was publicly released and President Trump told ABC news in an interview that he would listen to oppositions research from foreign nations in the 2020 campaign. The complaint alleged that the first column defamed the campaign when, citing and linking to the Mueller Report and an analysis of the report, it noted that Trump and/or the campaign tried to conspire with 2016 Russian election interference activities. The complaint alleged that the second column defamed the campaign when, commenting on Trump’s ABC interview, asked, who knows what sort of aid Russia and North Korea would give the 2020 Trump campaign now that he has invited them to offer assistance. The Post has moved to dismiss the complaint, arguing that the challenged statements are protected opinion and the complaint fails plausibly to allege actual malice. The motion also argues that the first column, about the Mueller Report, is protected by fair report privilege and the second column, about the ABC interview, is not defamatory of the campaign itself. The court held a hearing on the motion to dismiss in December 2020 but has not yet ruled on the motion.

1. *Donald J. Trump for President, Inc. v. CNN* (N.D. GA.). On March 6, 2020, the Trump campaign sued CNN over an opinion column that, in the wake of President Trump’s ABC interview indicating a willingness to accept opposition research from a foreign government, opined that the Trump campaign in 2020 had left the option of the table of again seeking Russia’s assistance. CNN moved to dismiss the complaint, arguing that the challenged statement is protected opinion and the complaint fails plausibly to allege actual malice. The complaint was dismissed on the basis that it did not sufficiently allege actual malice.
2. *Donald J. Trump for President, Inc. v. Northland Television* (W.D. Wis.). On April 27, 2020, the Trump campaign sued a small independent television station in Wisconsin for defamation over a political advertisement placed by Priorities USA Action political action committee. The advertisement criticized Trump’s handling of the COVID-19 pandemic while quoting Trump stating “[t]he coronavirus, this is their new hoax.” The complaint alleged that this and other quotations were juxtaposed in a misleading way. The television station moved to dismiss the complaint, and Priorities USA was permitted to intervene in the case as a defendant. It filed its own motion to dismiss. Both defendants argued that the challenged statement in the advertisement is “of and concerning” President Trump but not the campaign organization, is protected opinion, and is substantially true, and the campaign has failed plausibly to allege actual malice. The PAC also argued that the campaign lacks Article III standing. The case was remanded to state court due to lack of subject matter jurisdiction and ultimately dismissed in November 2020.

**Sarah Palin v. The New York Times (S.D.N.Y. & Second Circuit)**

* In 2017, *The New York Times* published an editorial suggesting a connection between the 2011 shooting of Congresswoman Gabby Giffords and a map distributed by the PAC of former Governor and Vice-Presidential candidate Sarah Palin depicting various congressional districts, including Giffords’, in crosshairs. The Times promptly issued an apology and correction, noting that there had been no link established between the map and political incitement. Palin sued The Times for defamation.
* The Times brought a motion to dismiss. The District Court held an evidentiary hearing, and concluded that Palin had not adequately alleged actual malice. Palin appealed.
* The Second Circuit reversed and remanded, holding that the District Court should have either accepted the allegations of Palin’s complaint as true or treated the motion to dismiss as a motion for summary judgment if it were going to consider evidence. The Second Circuit held that Palin had adequately alleged actual malice because of the author’s prior experience on the same topic and his alleged hostility to Palin. The Second Circuit also affirmed the District Court’s rejection of The Times’ “of and concerning” and opinion arguments.
* Following remand, the District Court granted the defendants’ motion to dismiss Palin’s claim to a disgorgement of profits. In August 2020, the district court denied the New York Times’ motion summary judgment, finding sufficient evidence of actual malice. The trial has been continuously postponed due to COVID in 2021.

**Jason Miller v. Gizmodo Media Group LLC (S.D. Fla.)**

* Former Trump staffer and CNN commentator Jason Miller sued Gizmodo over a story on Splinter.com headlined, “Court Docs Allege Ex-Trump Staffer Drugged Woman He Got Pregnant With ‘Abortion Pill.’” Gizmodo invoked the fair and true report privilege arguing that the story recounted the contents of a filing in a family court matter that was functionally under seal.
* The District Court dismissed Miller’s non-defamation claims, and later granted Gizmodo’s motion for summary judgment on the defamation claim, holding that New York’s fair and true report privilege applies even to sealed filings, and that the article essentially summarized and restated what was in the court filing.
* Miller filed a notice of appeal to the Eleventh Circuit.
* On April 16, 2021 the Eleventh Circuit affirmed the District Court’s grant of summary judgment in favor of Gizmodo.

**3. #MeToo Liar Libel Cases**

# Introduction.

Three years ago, the #metoo hashtag swept across Hollywood, bringing a wave of accusations and lawsuits that quickly spread nationwide across industries.

As statutes of limitations prevented many claims of sexual misconduct from going forward, individuals on both sides embraced defamation lawsuits as an alternative legal battleground, with media outlets and lawyers brought into the mix. Victims bring defamation claims against harassers and against the media for portraying them as liars, extortionists, and con artists, while accused individuals sue victims and the media in attempts to preserve their reputations. The cases raise a whole host of issues, including how to calibrate, in this context, rights to free speech, reporting claims of sexual misconduct, the fair report privilege, and confidentiality.

# Relevant Case Law.

## *Zervos v. Trump*, 59 Misc. 3d (N.Y. 2018): Plaintiff claimed Donald Trump sexually assaulted her twice. Trump denied the statements on multiple occasions, claiming Plaintiff and other accusers were liars and only in pursuit of fame. Plaintiff filed suit claiming Trump made the “liar” statements knowing they were false. Trump moved to dismiss the Complaint, claiming that his statements were political speech protected by the First Amendment, but the Court denied the motion, finding that Trump’s statements could be defamatory. On appeal, the Supreme Court, Appellate Division of New York held that the Supremacy Clause did not prevent a state court from exercising jurisdiction over the President in a defamation action stemming from pre-Presidential conduct. Moreover, the court held that the President’s denials of wrongdoing and calling Plaintiff a liar motivated by financial gain during his Presidential campaign were reasonably susceptible of defamatory meaning and those statements were not rendered nonactionable in defamation by being made during his political campaign. The case advanced to the New York Court of Appeals, which granted Zervos’ motion to dismiss the appeal on the grounds of mootness. The case is now proceeding in the trial court.

## *Clifford v. Trump*, No. 1:18-cv-03842 (S.D.N.Y. 2018): Plaintiff claimed that in 2011 she had agreed to contribute to an article set to be published by a magazine outlet concerning her intimate relationship with Trump in 2006. Thereafter, Plaintiff claimed she was threatened by a man and the article was never published. In 2018, a sketch of the man who Plaintiff claimed threatened her was released to the public. The next day, Trump tweeted in response to a side-by-side photo of the sketch and Plaintiff and her ex-husband, calling it a “total con job.” Plaintiff filed suit claiming Trump defamed her by calling her a liar and accusing her of committing a crime. Trump transferred the case to the Central District of California where two other suits related to the parties are pending. The President filed an anti-SLAPP motion against Plaintiff, which was granted. The District Court held that the President’s social media post included verifiably true or false statements but that the post was rhetorical hyperbole and thus protected from defamation liability under the First Amendment. Interestingly, the anti-SLAPP motion was brought under Texas law (Clifford being a resident of Texas). On appeal the Ninth Circuit upheld the dismissal, finding that the Texas anti-SLAPP statute did apply in federal court, contrary to the jurisprudence of the Fifth Circuit. The U.S. Supreme Court denied certiorari in February 2021.

## *Carroll v Trump 1:20-cv-07311 (SDNY 2019)* E. Jean Carroll, a former *Elle* magazine columnist, claims that she was forcibly raped by Trump in the 1990s and detailed the assault in her book published in 2019. Trump denies ever meeting Carroll and said that Carroll was not his “type” and that he did not find her attractive. Carroll brought a defamation suit against Trump in New York state court in November 2019. In February 2020, Carroll announced that *Elle* terminated her contract after 26 years, which she attributes to Trump’s public disparagement of her reputation. In September 2020 (under the Trump administration), the DOJ assumed responsibility for Trump’s defense and moved the case to federal court. The DOJ argued that Trump’s remarks were made in his official capacity as the President and thus the government should take over the case. The Southern District denied the substitution, and the DOJ appealed to the Second Circuit, where the issue is pending. Concurrently, in September 2021, the Southern District ordered the case to proceed against Trump, without substituting the DOJ as the defendant in the case.

## *Corfman v. Moore*, No. cv-2018-900017.00 (Ala. Cty. Ct. 2018): Plaintiff made statements in an article that Moore sexually abused her. In the article, Moore responded by stating the allegations were false and a “desperate political attack.” After Plaintiff filed suit, Moore moved to dismiss, but the Court denied the motion. In his Answer, Moore claimed his statements were privileged subject to the self-defense privilege against accusations. In August 2021, the court dismissed Moore’s campaign for Senate from the suit and also ruled that Corfman was a limited-purpose public figure. The trial is set to begin this fall.

## *Guiffre v. Dershowitz*, 410 F.Supp.3d 564 (S.D.N.Y. 2019): Plaintiff brought an action against Defendant, claiming that Defendant defamed her by making public statements that Plaintiff was a liar, committed perjury, and was conspiring with the law firm Plaintiff obtained to extort Defendant. Defendant filed a motion to dismiss and motion to disqualify counsel. The court denied Defendant’s motion to dismiss, holding that Plaintiff pled sufficient facts to defeat the qualified self-defense privilege and Defendant took affirmative steps to republish statements from 2015. The court granted Defendant’s motion to disqualify counsel. Dershowitz filed counterclaims in November 2019 and April 2020 Documents regarding Jefferey Epstein and Ghislane Maxwell have been unsealed. Some aspects of the amended complaint have been voluntarily dismissed but the proceedings are ongoing.

## *Depp v. Heard*, Case No. CL 2019-02911 (Vir. Cir. Ct. 2019): Depp filed a defamation action against his ex-wife, Amber Heard, demanding over $50,000,000. The action arises from an op-ed published in The Washington Post in which Heard wrote from the perspective of a “public figure representing domestic abuse,” although she did not name Depp specifically. Depp denies all claims of domestic abuse and insists Heard was the actual abuser. On April 11, 2019, Heard filed a motion to transfer the case to LA (where the op-ed was written) and dismiss the case under the California anti-SLAPP statute, which was denied. Heard thereafter filed a demurrer claiming that Depp failed to allege actionable statements, her op-ed was merely opinion and did not implicate Depp directly, and she was protected by Virginia’s anti-SLAPP statute. The demurrer was also denied. In August 2021, a Virginia district judge rejected Heard’s third motion to dismiss the defamation lawsuit filed against her by Depp. A trial is scheduled for April 11, 2022. Meanwhile, Depp lost his case against the Sun newspaper in the UK that he filed on similar grounds. In November 2020, a judge in the UK ruled that The Sun was justified in their coverage of Depp as a domestic abuser. Depp was not permitted to appeal the ruling and was ordered to pay the Sun’s legal fees.

# Relevant Reading.

## Julia Jacobs, Rose McGowan Sues Harvey Weinstein and Lawyers He Enlisted to Discredit Her, New York Times (October 23, 2019), https://www.nytimes.com/2019/10/23/arts/rose-mcgowan-harvey-weinstein-lawsuit.html

## Julia Jacobs, #MeToo Cases’ New Legal Battleground: Defamation Lawsuits, New York Times (January 12, 2020), https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html

## Adam Klasfeld, Epstein Accuser Wants More Defamation Claims Against Alan Dershowitz, Courthouse News (December 2, 2019), https://www.courthousenews.com/epstein-accuser-wants-more-defamation-claims-against-alan-dershowitz/

## Kenzie Bryant, Johnny Depp’s Libel Arguments Are Basically Over, and Now the World Waits for an Opinion, Vanity Fair (July 28, 2020) https://www.vanityfair.com/style/2020/07/johnny-depp-libel-lawsuit-wrap-up

## **Pleading Actual Malice under *Iqbal***

1. ***Twombly* and *Iqbal***

1. **Rule 8(a)(2):** Federal Rule of Civil Procedure 8(a)(2) sets the pleading requirements for actual malice: “A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief.”

1. ***Twombly*:** In 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which interpreted Rule 8(a)(2)’s requirement that a pleading include “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Twombly* emphasized a “plausibility” requirement, that a plaintiff plead “enough facts to state a claim to relief that is plausible on its face.” This requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
2. ***Iqbal*:** In 2009, the Supreme Court decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which explained the application of the “plausibility” standard. First, the court is to identify and disregard allegations that are “no more than conclusions.” Second, the court is to evaluate the “well-pleaded factual allegations….assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”
3. **Applying *Iqbal* to Actual Malice**

1. **Actual Malice Generally.** For a public official or public figure plaintiff to prevail in a defamation action, the plaintiff must plead and prove “actual malice,” i.e., that the allegedly defamatory statement “was published with knowledge that it was false or reckless disregard of whether it was false.” *New York Times v. Sullivan*, 376 U.S. 270, 273 (1964).

* It is a subjective standard, based on the reporter’s state on mind, not the actions of an objectively reasonable person. *See* *St. Amant v. Thompson*, 390 U.S. 727 (1968).
1. **Pre-*Iqbal*.** Prior to *Iqbal*, courts generally considered actual malice to be an evidentiary matter for summary judgment or trial that would entitle a plaintiff to discovery.
2. **Post-*Iqbal****.* Several Circuits have used the “plausibility” requirements to affirm dismissal of public official or public figure defamation claims on motions to dismiss on actual malice grounds.
* **First Circuit.** The first to consider the issue, in *Schatz v. Republican State Leadership Committee*, 669 F. 3d 50 (1st Cir. 2012), the First Circuit concluded that the plausibility test applied to a consideration of actual malice. The Court held that the plaintiff’s mere recitation of the reckless disregard standard constituted only “actual-malice buzzwords,” not a plausible claim for relief. The Court also rejected the argument that this burden was actually higher than required by *Iqbal*: “Sure, malice is not a matter than requires particularly in pleading – like other states of mind, it ‘may be alleged generally.’….But, to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred.” The First Circuit again considered the issue in *Lemelson v. Bloomberg L.P.*, 903 F.3d 19 (1st Cir. 2018). Here, the court explained that the plaintiff's “well-pleaded facts must ‘nudge[] his actual malice claim across the line from conceivable to plausible.'" *Id*. (quoting *Schatz*, 669 F. 3d at 58). The court dismissed the plaintiff’s defamation claim and reasoned that the plaintiff’s allegations of actual malice failed to meet this threshold because “fail[ure] to fact-check its story or test the accuracy of its information” is not sufficient to establish reckless disregard. *Id*. at 25.
* **Second Circuit.** In *Biro v. Conde Nast*, 807 F. 3d 541 (2d Cir. 2015), the Second Circuit likewise affirmed dismissal due to inadequate allegations of actual malice and rejected the plaintiff’s argument of an entitlement to discovery. In doing so, the Court deemed insufficient the plaintiff’s pleading of a “failure to investigate” and “rel[iance] on anonymous and biased sources,” as there were no allegations questioning the reliability of the sources.
* **Third Circuit**. The Third Circuit considered the issue and followed suit in *McCafferty v. Newsweek Media Grp.*, Ltd., 955 F.3d 352 (3d Cir. 2020). In *McCafferty*, the Court dismissed Plaintiff’s defamation claim against Newsweek and found that Plaintiff did not sufficiently plead facts that suggested actual malice and could not use discovery “to probe Newsweek’s state of mind” to make such showing. *Id*. at 360 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009)). Specifically, the court found Plaintiff’s allegations that Defendant “‘grossly departed from professional journalistic standards,’” possessed a motive “to improve its ‘declining and anemic sales and online hits,’” and used a photo of Plaintiff at the top of the article, were insufficient to plead actual malice. *Id*. at 359-60.
* **Fourth Circuit.** In *Mayfield v. National Ass’n for Stock Car Auto Racing, Inc.*, 674 F. 3d 369 (2012), the Fourth Circuit also affirmed dismissal based on the plaintiff’s near-complete reliance on a blanket recitation of the standard. The Court also rejected as insufficient the allegations of bias against the plaintiff, as there were no corresponding allegations that the defendants knew or should have known the statements were false.
* **Seventh Circuit**. In *Pippen v. NBCUniversal Media, LLC*, 734 F. 3d 610 (2013), the Seventh Circuit also affirmed dismissal on actual malice grounds. Plaintiff had pled both failure to investigate and failure to retract, which the Court found insufficient to establish or plead actual malice.
* **Eleventh Circuit.** In *Michel v. NYP Holdings, Inc.* 816 F. 3d 686 (2016), the Eleventh Circuit joined those affirming lower court dismissals on actual malice grounds. The Court noted that the pre-*Iqbal* cases permitting discovery were “completely out of line with the current state of the law.” As had the courts of other circuits, the Court then rejected the plaintiff’s recitation of the standard and allegations of failure to investigate as insufficient. The Eleventh Circuit reaffirmed these principles a few years later in *Turner v. Wells*, 879 F.3d 1254 (11th Cir. 2018). Here, the court explained that the “plausibility pleading standard applies to the actual malice standard in defamation proceedings,” and that Plaintiff’s allegations of were conclusory and failed to meet this standard. *Id*. at 1273-74.
1. **Palin v. New York Times Evidentiary Hearing:**
	1. In *Palin v. New York Times Company,* 264 F. Supp. 3d 527 (S.D.N.Y. 2017), a libel action based on an editorial about gun violence published by *The* *Times*, the District Court initially granted the *Times*’*s* motion to dismiss on actual malice grounds, but only after holding an “unusual” evidentiary hearing that the court described as necessary to allow for a proper plausibility determination.
	2. The district court’s use of an evidentiary hearing to aid in its plausibility analysis was highly controversial, engendering debate about whether it was appropriate for a court to consider when deciding plausibility at the motion to dismiss stage. It also led to significant debate within the media bar regarding whether the use of such hearings to assess motions to dismiss defamation actions provided benefits to the press or not.
	3. Alas, in a decision of Aug. 6, 2019, the Second Circuit reversed the lower court’s dismissal of the complaint, sharply criticizing Judge Rakoff for considering evidence from the hearing when evaluating the *Times’s* motion to dismiss and finding that the complaint pled sufficient facts to plausibly state a claim for defamation. *Palin* v. *New York Times Co.*, 940 F.3d 804 (2d Cir. 2019). As a result, it appears use of evidentiary hearings to determine plausibility will not catch on.
	4. More troubling, however, was the Second Circuit’s permissive and vague analysis of the plausibility standard at the motion to dismiss stage. The court found editorial page editor James Bennet’s failure to reacquaint himself with contradictory articles published six years earlier by The Atlantic, when Bennet was an editor there, plausibly alleged reckless disregard. The court also referenced Bennet’s political party affiliations and his public opposition to gun violence as relevant factors in finding the allegations plausible.
	5. At the end of August 2020, Judge Rakoff denied the New York Times’ motion for summary judgment, finding sufficient evidence of actual malice. The case has not yet proceeded to trial.

1. **Defamatory Meaning & Opinion: “Racist,” “White Supremacist”**

a. Introduction

1. Decisions have remained consistent in holding that references to people’s “racist” actions or “white supremacist” views are statements of constitutionally protected opinion, and/or are not defamatory as a matter of law. However, plaintiffs continue to litigate whether calling their words and actions “racist” is a statement of fact. Dismissal of such actions is not always swift or even assured – and Justice Thomas has essentially invited appeals over “false accusations of racism or anti-Semitism” in his *Berisha v. Lawson* dissent (see Point 1 above).

b. Relevant Decisions

# 1. *Loomer v. New York Magazine* *et al.*, No. 50-2019-CA-015123-XXXX-MB, 2021 WL 1748010 (Cir. Ct. Fla. Apr. 29, 2021). Laura Loomer, who later won the Republican nomination for Congress in Florida in 2020, was “unverified” by Twitter in 2017. (Twitter later shut down Loomer’s account following her criticism of Ilhan Omar and her Muslim faith.) Loomer sued *New York* Magazine, *GQ*, Media Matters, *Rolling Stone*, *Washington Examiner*, and others for including her in reports such as 2017’s “Twitter Is Mass Un-Verifying Alt-Right and White Supremacist Accounts” (https://nymag.com/intelligencer/2017/11/twitter-un-verifying-alt-right-accounts-like-richard-spencer.html).

a. The *Loomer* court held that describing Loomer as a “white supremacist” or “Alt-Right” were “statements of pure opinion protected by the First Amendment,” based as they were “upon facts set forth in the applicable articles or that are publicly available.” Collecting state and federal cases, the court stated that “Ample case law exists holding that rhetorical classifications concerning social and political beliefs are protected opinions, particularly when those comments are made in the course of discussing public figures, political candidates, and activists.” Loomer failed to provide “controlling or persuasive authority to support her argument” that any reference to her as a “White Supremacist” was a statement of fact.

b. The court also found that, “In addition to failing to state a cause of action under a traditional motion to dismiss standard,” Loomer’s “claims were brought without merit in violation of [Florida’s] Anti-SLAPP statute.”

1. *Cummings v. City of New York et al.*, No. 19-cv-7723 (CM)(OTW), 2020 WL 882335 (S.D.N.Y. Feb. 24, 2020). Plaintiff Patricia Cummings, a New York City public school teacher, was fired after an incident in which she allegedly had her 7th grade students reenact conditions on a slave ship as part of a history lesson and asked them how it felt to be a slave. She sued the New York *Daily News* and other media defendants who reported on the incident and the resulting investigation, and she also brought claims against various governmental agencies and individuals. In addition to contesting the accuracy of the overall reporting on the incident, she took issue with several of the media reports’ characterization of her actions as racist.
	1. The court noted that “Courts in New York have consistently held that terms like “racist” constitute nonactionable opinion,” citing *Silverman v. Daily News, L.P.*, 11 N.Y.S.3d 674 (2d Dep't 2015), *Russell v. Davis*, 948 N.Y.S.2d 394, 395–396 (2d Dep't 2012), *Goetz v. Kuntsler*, 625 N.Y.S.2d 447, 452 (Sup. Ct. N.Y. Cty. 1995), and *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. Rich. Cty. 1995).
	2. Accordingly, the court concluded that “the terms ‘racist’ and ‘racism’ that appear in the Daily News Defendants’ articles are pure statements of opinion based on disclosed facts. For example, in the Daily News Defendants’ February 2, 2018 article, the opening line states, “Kids and parents say this Bronx teacher needs a lesson – in racism.” In this context, references to Plaintiff as racist do not have the precise meaning capable of sustaining a defamation action. The line merely expresses the views of Plaintiff's students and their parents, quotation from whose interviews feature prominently in the Articles. Similarly, in the Daily News Defendants’ July 9, 2018 article, the Daily News Defendants note that City Department of Education officials had not yet concluded investigations of “educators accused of racist acts.” This, too, indicates that Plaintiff's accusers viewed her actions as racist – an opinion about her conduct, rather than a factual assertion. In addition, as in Silverman, the Daily News Defendants disclosed the facts on which the opinions are based—i.e., that they were allegations from parents, students, and staff about the Plaintiff's Middle Passage lesson. . . because the facts reported by the Daily News Defendants underlying the opinions were based on substantially true disclosed facts, the opinions are not actionable under a defamation theory.”
	3. The court also found that statements by defendant Lenard Larry McKelvey a/k/a Charlamagne Tha God referring to plaintiff as a “bigot,” “white devil” and “cracker-ass-cracker” were not actionable because they were not provably false and constituted nonactionable rhetorical hyperbole.

3. *McCafferty v. Newsweek Media Grp. Ltd.*, 955 F.3d 352 (3d Cir. 2020)(see 4(B)(3), above). The parents of a 12-year old child sued over *Newsweek* reporting on the child’s “expound[ing] to alt-right interviewers about [his] love of President Donald Trump and the platforms and candidates he endorses.” The report included comments from Columbia University professor Todd Gitlin, who said that such interviews “‘camouflage’ the political positions of the hard right ‘as feel-good sweetness and light, when, in fact, they are defending raw racism and sexual abuse’” (<https://www.newsweek.com/2018>
/01/05/trumps-child-soldiers-745677.html). The child’s parents sued *Newsweek* under Pennsylvania defamation and false light law. The district court granted *Newsweek*’s motion to dismiss.

a. The Third Circuit affirmed dismissal. “As Pennsylvania courts recognize,” the Third Circuitobserved, “pure opinions cannot be defamatory. Under the First Amendment, opinions based on disclosed facts are ‘absolutely privileged,’ no matter ‘how derogatory’ they are…. That holds true even when an opinion is extremely derogatory, like calling another person’s statements ‘anti-Semitic.’” The court added that the privilege “makes sense. When an article discloses the underlying facts, readers can easily judge the facts for themselves.”

b. “In any event, derogatory characterizations without more are not
defamatory,” the Circuit further held. “Take accusations of racism. In Pennsylvania, ‘a simple accusation of racism’ is not enough…. Rather, the accusation must imply more, by for instance suggesting that the accused has personally broken the law to ‘act[ ] in a racist manner.’”

c. The Circuit also noted that a statement of someone speaking for the “hard right” is “‘incapable of defamatory meaning’ because it just describes their ‘political ... philosoph[y].’”

c. Pending Cases

1. *McInnes v. Southern Poverty Law Center, Inc.*, No. 2:19-cv-00098-MHT-JTA (M.D.Al.). The Proud Boys founder sued SPLC for alleged references to him as an “extremist,” “white supremacist,” and “Alt-Right figure” in connection with its designation of Proud Boys as a “hate group.” SPLC moved to dismiss in April 2019, contending statements at issue were opinion, substantially true, not of and concerning McInnes, and/or not defamatory as a matter of law. In September 2021, court ruled McInnes had failed to plead parties’ “citizenship” to satisfy diversity jurisdiction; ordered McInnes to amend his complaint; and denied SPLC’s motion with leave to renew. Plaintiff filed his amended complaint Sept. 13, 2021.

2. *Cooper v. Franklin Templeton*, No. 1:21-cv-04692-RA (S.D.N.Y.). Suit by person who called police on a Black birdwatcher in Central Park in 2020. Plaintiff claims defamation by her (now former) employer, which tweeted that while it was investigating the incident, it does not “condone racism of any kind.” Defendants filed 12(b)(6) in August 2021, contending that statements at issue were protected opinion. While judge’s rules require complaint response, they permit plaintiff to amend in lieu of responding to 12(b)(6) motion. Plaintiff filed her amended complaint Sept. 22, 2021.

3. *Landino v. Massachusetts Teachers Ass’n*, No. 20-cv-11392 -DJC (D. Mass.). Suit over teachers association posting about Project Veritas and plaintiff, its former chief operating officer. Court denied motion to dismiss over statement that Landino had been involved in “right-wing undercover operations and organizations.” 2021 WL 2186815 (May 28, 2021). “Although the mere use of the term right-wing may be ‘too vague to be cognizable as the subject of a defamation action,’” the court ruled, “when viewing the statement in its totality, the use of the term ‘undercover’ . . . cross[es] the threshold of potentially holding him ‘up to contempt, hatred, scorn, or ridicule’ as to constitute [a] defamatory statement[ ].” The court subsequently denied defendant’s request for “phased” discovery; status conference on prospective summary judgment motions set for March 2022.

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