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New York Times v. Sullivan Is Safe From Sarah Palin

By Anne M. Champion and Lee R. Crain

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Anyone hoping the U.S. Supreme Court will use the Sarah Palin defamation case against the New York Times as an opportunity to revisit New York Times v. Sullivan will be disappointed, say Gibson, Dunn & Crutcher LLP attorneys Anne M. Champion and Lee R. Crain. The "actual malice" rule from Sullivan is also reflected in New York state's anti-SLAPP law, which is insulated from Supreme Court review.

Sarah Palin just lost her defamation case against the New York Times but has hinted at her likely appellate strategy. She told reporters she was going to consider appealing any loss to the U.S. Supreme Court to ask it to reconsider another famous case against the Times—the bedrock *New York Times v. Sullivan*. Unfortunately for her, that strategy is likely destined for failure.

Decided in 1964, *New York Times v. Sullivan* adopted what's commonly known today as the "actual malice" standard for defamation cases. The court held specifically that the First Amendment required that standard.

"Actual malice" makes it harder for public figure defamation plaintiffs like Palin to win. Such a public figure has to prove that a defendant like the Times said something false about her either knowing the statement was false or by recklessly disregarding the truth; and that the defendant intended it to be defamatory or recklessly disregarded its defamatory nature. The actual malice standard gives speakers room to criticize elected leaders and other public figures even if that criticism is harsh and may ultimately be wrong.

Sullivan has attracted some criticism in recent years. Justice Clarence Thomas and Justice Neil Gorsuch of the Supreme Court have now suggested it should be revisited, along with many commentators. Some have criticized *Sullivan* as allowing the media and politicians themselves to be too loose with their words and even to lie, because they can hide behind the high "actual malice" bar to avoid defamation liability.

Anyone hoping that the Supreme Court will use the Palin case as an opportunity to revisit *Sullivan* will likely be disappointed. That's because *Sullivan* is not the only source of law applicable to Palin's case.

Yes, it's true that Palin needed to prove actual malice to win. In other words, she needed to show that the Times made false statements about her knowing those statements were false, or that the Times was reckless with the truth.

But that standard doesn't only come from *Sullivan*—it comes from New York law. And that New York law should be insulated from Supreme Court review as many state laws are.

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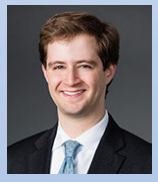

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NEW YORK ANTI-SLAPP LAW ALSO HAS ACTUAL MALICE STANDARD

Although the actual malice standard in Palin's case is built on *Sullivan*, it also extends to Palin's claim because of New York's anti-SLAPP (strategic lawsuits against public participation) statute, recently amended in November 2020.

Anti-SLAPP laws are designed to discourage lawsuits intended to punish or chill speech and petitioning activity by making it easier for courts to dispose of such suits early on by imposing heightened burdens, fee-shifting, and other substantive and procedural protections. Fundamentally, anti-SLAPP laws are supposed to give defendants the ability to speak their minds without fear of having to go through the crippling expense of a lawsuit.

Critically, New York's anti-SLAPP statute expressly adopts its own actual malice standard for claims such as defamation. It says that in cases like Palin's, the plaintiff has to prove "that any [defamatory] communication…was made with knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. R. L. § 76-A(2).

Sounds familiar, right? That's because it is the exact same standard that the Supreme Court adopted in *Sullivan*—the actual malice standard.

So what does that mean for Palin? That means if *New York Times v. Sullivan* had never existed or had been overturned years ago, she would still have to prove actual malice. She would still have to show that the Times defamed her knowing that what it was saying was false or that it was reckless with the truth.

In short, while the Supreme Court ruled in *Sullivan* that the First Amendment required the actual malice standard to apply—the case said nothing about whether states could adopt their own actual malice standards, too. As a result, even though Judge Jed S. Rakoff has stated Palin failed to satisfy the actual malice standard, that ruling does not rest merely on *Sullivan*. It is also independently based on state law.

Ultimately then, if Palin tries to revive her case by seeking to pull *Sullivan* down, she's likely to fail. Whether the Supreme Court overrules *Sullivan* in the future or not, a plaintiff bringing a defamation claim covered by New York's anti-SLAPP statute has the burden to prove actual malice.

So whether you love *Sullivan* or hate it, whether you want it to thrive or fall, Palin and her defamation case against the New York Times is an unlikely vehicle for the Supreme Court to reassess *Sullivan*.

Sullivan has its pros and its cons, and while some may look on the Palin case as a time to reflect whether *Sullivan* imposed a good rule, *Sullivan* and its actual malice standard is likely to live another day.

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