SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE NEW YORK TIMES COMPANY,

Plaintiff,

-against-

PETER BRIMELOW,

Defendant.

Index No.

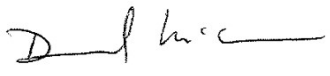
SUMMONS

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the attorneys for the Plaintiff within twenty (20) days after the service of this summons, exclusive of the date of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial is to be held in New York County, New York. The basis of the venue is the location of Plaintiff's principal place of business at 620 Eighth Avenue, New York, New York 10018, and that this county is the location where a substantial part of the events giving rise to the claim occurred.

Dated: New York, NY
April 12, 2021



David E. McCraw
Dana R. Green
The New York Times Company
Legal Department

620 Eighth Avenue
New York, NY 10018
Phone: (212) 556-4031
Facsimile: (212) 556-4634
Email: mccraw@nytimes.com

Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
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THE NEW YORK TIMES COMPANY,

Plaintiff,

-against-

PETER BRIMELOW,

Defendant.

Index No.

COMPLAINT

Plaintiff, The New York Times Company ("The Times"), by and through its attorneys, brings this complaint against Defendant Peter Brimelow ("Brimelow") and alleges as follows:

NATURE OF ACTION

1. This is an action brought pursuant to New York Civil Rights Law § 70-a to recover costs, fees, and expenses incurred by The Times in the defense of defamation claims brought by Peter Brimelow. *See Brimelow v. N.Y. Times Co.*, No. 20-cv-00222, 2020 U.S. Dist. LEXIS 237463 (S.D.N.Y. Dec. 17, 2020), *aff'd*, No. 21-66-cv, 2021 U.S. App. LEXIS 31672 (2d Cir. Oct. 21, 2021), *cert. denied*, No. 21-1030 (U.S. Jan. 19, 2022).

PARTIES

2. The Times is a New York corporation with its principal place of business at 620 Eighth Avenue, New York, New York 10018.

3. Upon information and belief, Defendant Peter Brimelow is a natural person over the age of eighteen and a resident of the state of Connecticut.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 301 and 302. Defendant tortiously commenced and continued in New York a strategic litigation against public participation ("SLAPP") against The Times that is the basis of this claim.

5. Venue is proper in New York County pursuant to CPLR § 503(a) and (c) because The Times's principal place of business is in New York County and because defendant tortiously commenced and continued in New York County the SLAPP that is the basis of this claim.

FACTS

6. On January 9, 2020, Mr. Brimelow filed an action for defamation against The Times in the United States District Court for the Southern District of New York, seeking five million dollars in actual damages, punitive damages, and costs. *Brimelow v. N.Y. Times Co.*, No. 20-cv-00222 (S.D.N.Y.), Dkt. No. 1.

7. As amended, Mr. Brimelow's complaint alleged that five articles published by The Times between January 2019 and May 2020 defamed him by portraying him or the content published on VDARE as being "animated by race hatred" and of being "white nationalist," "white supremacist," and "anti-Semitic." *See id.* Dkt. No. 22 (Second Amended Complaint) Exhibit A.

8. On June 18, 2020, The Times moved to dismiss. *Id.* Dkt. Nos. 23, 24.

9. On November 20, 2020—after The Times's motion to dismiss was fully briefed and prior to the court's decision on the motion—New York significantly expanded its anti-SLAPP law to enhance the protections afforded to defendants in defamation cases. *See Governor Cuomo Signs Legislation to Stop Frivolous Lawsuits Meant to Intimidate, Bully or Suppress Free*

Speech (Nov. 10, 2020), https://on.ny.gov/3nz3Ejf. The amended New York anti-SLAPP law has the following effects:

a. In an action involving public petition and participation, a court is required to dismiss the suit unless the plaintiff can establish by clear and convincing evidence a "substantial basis" in fact and law for its claim. CPLR § 3211(g)(1).

b. To recover damages, defamation plaintiffs must establish by clear and convincing evidence that the statements at issue were made with actual malice. N.Y. Civ. Rights Law § 76-a(2).

c. In an action involving public petition and participation, a prevailing defendant may bring an action to "recover damages, including costs and attorney's fees, from any person who commenced or continued such action." *Id.* § 70-a(1).

d. "[C]osts and attorney's fees shall be recovered upon a demonstration" that the action "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." *Id.* § 70-a(1)(a).

10. The amended anti-SLAPP further defines actions involving public petition and participation to include claims based on: "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." *Id.*

§ 76-a(1)(a). "Public interest" is "construed broadly" to mean "any subject other than a purely private matter." *Id.* § 76-a(1)(d).

11. On December 17, 2020, the district court granted The Times's motion, holding that Mr. Brimelow failed to state a claim upon which relief could be granted for all five articles. *Brimelow v. N.Y. Times Co*., No. 20-cv-00222, 2020 U.S. Dist. LEXIS 237463, at 12 (S.D.N.Y. Dec. 17, 2020) Exhibit B.

12. The district court made clear that Mr. Brimelow's claims lacked any sound basis in fact or law. The district court concluded, among other things, that all but one of the statements about Mr. Brimelow and VDARE were non-actionable opinion as a matter of law, many of the statements were not "of and concerning" Mr. Brimelow, and "[t]here is no evidence" of actual malice set out in the complaint. *See* Ex. B. In other words, Mr. Brimelow failed adequately to plead multiple necessary elements of his defamation claims.

13. On January 12, 2021, Mr. Brimelow noticed his appeal to the Second Circuit.

14. On January 21, 2021, The Times wrote to counsel for Mr. Brimelow, bringing to his attention the changes to the New York Anti-SLAPP laws and advising him that, if Mr. Brimelow were to persist with his meritless appeal, The Times would seek an award of fees through a separate action against him, pursuant to N.Y. Civ. Rights Law § 70-a. Exhibit C.

15. Mr. Brimelow nonetheless continued to pursue his meritless appeal, putting The Times to the cost of briefing and oral argument.

16. On October 21, 2021, the Second Circuit affirmed, by summary order, the district court's dismissal of Mr. Brimelow's complaint. *Brimelow v. N.Y. Times Co.*, No. 21-66-cv, 2021 U.S. App. LEXIS 31672 (2d Cir. Oct. 21, 2021) Exhibit D. The court held that Mr. Brimelow did

"not plausibly allege that the Times acted with actual malice." *Id.* at 3. On that basis alone, dismissal of all claims was appropriate. *Id.* at 11 n.1.

17. The Second Circuit's decision makes clear that Mr. Brimelow's complaint and subsequent appeal lacked any basis in fact and law: "the Complaint *provides no basis* for plausibly inferring that the Times had any doubts about the truth of its statements regarding Brimelow or the VDARE website." *Id.* at 10 (emphasis added).

18. On January 19, 2022, Mr. Brimelow petitioned for writ of certiorari from the Supreme Court. Exhibit E.

19. On January 20, 2022, The Times wrote to Mr. Brimelow, again stating that The Times would seek its fees under the New York Anti-SLAPP for the costs of responding to his continued, meritless litigation, including the petition for writ of certiorari.

20. On February 24, 2022, Mr. Brimelow published an article on VDare.com, setting out the motivations for continuing to pursue his lawsuit against The Times, despite "almost universal skepticism" about its prospects. Peter Brimelow, *Will SCOTUS Uphold The NEW YORK TIMES' License to Lie?* (Feb. 24, 2022), https://vdare.com/articles/will-scotus-uphold-the-new-york-times-license-to-lie, Exhibit F. Among the justifications Mr. Brimelow offered was personal animus: "the *New York Times* case has just infuriated me. The paper's arrogance, dishonesty and malevolence are simply beyond words. Who does it think it is?" *Id.*

21. On February 28, 2022, the Supreme Court denied Mr. Brimelow's petition for certiorari.

COUNT I

(Recovery of Damages)

22. Plaintiff repeats, realleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth therein.

23. Mr. Brimelow's lawsuit against The Times was an action involving public petition and participation under N.Y. Civil Rights Law § 76-a(1)(a). It was based on five articles published by The Times—communications in "a public forum in connection with an issue of public interest" and "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." *Id.*

24. A defendant in an action involving public petition and participation may bring an action to recover damages, including costs and attorney's fees, from plaintiff. *Id.* § 70-a.

25. In-house counsel are entitled to fees equal to what outside counsel would receive for the same work. *See, e.g.*, *N.Y. Times Co. v. City of N.Y. Off. of the Mayor*, 194 A.D.3d 157, 166–67 (1st Dep't 2021) (awarding fees to The Times for work of its in house attorneys).

26. Costs and attorney's fees "shall be recovered" where an action involving public petition and participation was commenced or continued without a substantial basis in fact and law. *Id.* § 70-a(1)(a).

27. Other compensatory damages may be recovered where the action involving public petition and participation was commenced or continued for the purpose of "harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech." *Id.* § 70-a(1)(b).

28. The district court's opinion, the Second Circuit's opinion, the Supreme Court's denial of certiorari, and Mr. Brimelow's pleadings, briefing, and other public statements make

clear that he both commenced and continued his action without a substantial basis in fact and law.

29. Mr. Brimelow's pleadings, briefing, and other public statements demonstrate that he commenced and continued this action for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting The Times's free exercise of speech.

30. Under such circumstances, New York's anti-SLAPP law requires that The Times be awarded its costs, attorney's fees, and such other compensatory damages as the court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment against Brimelow as follows:

A. declaring that Plaintiff is entitled to its costs and attorney's fees;

B. awarding Plaintiff costs and attorney's fees, in an amount to be determined by the court; and

C. granting Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, NY
April 12, 2021

David E. McCraw
Dana R. Green
The New York Times Company
Legal Department
620 Eighth Avenue
New York, NY 10018
Phone: (212) 556-4031
Facsimile: (212) 556-4634
Email: mccraw@nytimes.com

Attorneys for Plaintiff

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PETER BRIMELOW,

Case 7:20-cv-00222

Plaintiff,

-against-

SECOND AMENDED COMPLAINT

NEW YORK TIMES COMPANY,

Defendant.

----------X

Plaintiff, by and through his attorney Frederick C. Kelly, Esq., alleges the following:

1. At all times hereinafter mentioned, the Plaintiff Peter Brimelow is a natural person residing in Connecticut.

2. Upon information and belief, at all times hereinafter mentioned, the Defendant, New York Times Company, was and still is a foreign limited company, organized and existing under the laws of the State of Delaware, but transacting business in the State of New York and having a principal place of business at 620 Eighth Avenue, New York, NY 10018.

JURISDICTION & VENUE

3. This Court has diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff is a citizen of Connecticut; Defendant is a citizen of New York or Delaware for

purposes of this inquiry. The amount in controversy exceeds $75,000, exclusive of interest and costs. Venue is proper under 28 U.S.C. § 1391(b)

4. This Court has personal jurisdiction over the Defendant. Facts supporting jurisdiction include, most prominently, Defendant's transacting of business in the State of New York and having a principal place of business at 620 Eighth Avenue, New York, NY 10018, as well as extensive publication and circulation of *The New York Times* within New York State. Venue is proper under 28 U.S.C. § 1391(b) in light of the above.

5. Therefore, this Court's exercise of personal jurisdiction over the Defendant comports with Constitutional due process standards. As described in the prior paragraph, the Defendant has purposefully established sufficient minimum contacts with New York such that it should reasonably anticipate being haled into court in New York. Moreover, the assertion of personal jurisdiction is reasonable and consistent with traditional notions of fair play and substantial justice.

THE PARTIES & BACKGROUND

6. Plaintiff has had a long and distinguished career as a writer and journalist. He was a business writer and editor at the "Financial Post," "Maclean's," "Barron's," "Fortune," "Forbes" (where he attained the position of senior editor), and "National Review"; and his book Alien Nation: Common Sense About America's Immigration Disaster was a bestseller.

7. Indeed, Defendant had implicitly acknowledged the important contribution Brimelow had made to public debate in America with said Alien Nation when Defendant chose to

review Alien Nation not once, but twice within the same week, a practice which Defendant usually reserves only for works it considers especially noteworthy.

8. Specifically, Defendant reviewed Alien Nation twice between April 16, 1995 and April 19, 1995: Nicholas Lemann, *Too Many Foreigners*, THE NEW YORK TIMES BOOK REVIEW, April 16, 1995, at 3, section 7; and Richard Bernstein, *The Immigration Wave: A Plea to Hold Back*, NEW YORK TIMES, April 19, 1995, at 17, section C.

9. Neither review detected any kind of race hatred or what the Defendant has lately claimed as "White Nationalism."

10. However, the second review published by Defendant was especially complimentary. Mr. Brimelow's writing was declared "powerful and elegant." Far from denigrating Alien Nation as "White Nationalist" and "Racist and Divisive," Defendant's review was lavish in its praise of Brimelow's work, stating *inter alia*:

    a. "Mr. Brimelow's personality also comes through, and it is entirely engaging."

    b. "...Mr. Brimelow has made a highly cogent presentation of what is going to be the benchmark case against immigration as it is currently taking place. Those who think that the system needs no fixing cannot responsibly hold to that position any longer unless they take Mr. Brimelow's urgent appeal for change into account."

    c. "The strong racial element in current immigration has made it more than ever before a delicate subject. It is to Mr. Brimelow's credit that he attacks it head on, unapologetically."

11. Since Christmas Eve, 1999, Plaintiff has run the website "VDARE.com," a forum site

that publishes writers of all political persuasions, so long as they are critical of America's post-1965 immigration policies. Over a score of years, Plaintiff, through "VDARE.com" has overseen the publication of data, analysis, and editorial commentary from a wide variety of writers of various races, religions, nationalities and political affiliations.

12. The Defendant New York Times Company, has, for over a hundred years, published a newspaper, *The New York Times.*

13. Under Defendant, *The New York Times* has become what is widely regarded as the most prestigious and trusted newspaper in the United States.

14. Under Defendant, *The New York Times* has committed itself to fairness and impartiality, for which admirable traits it has historically been known and which have contributed strongly to the prestige and trust with which *The New York Times* has been regarded.

15. Indeed, the Defendant publishes a manual of both style and journalistic ethics known as The New York Times Manual on Style and Usage (hereafter, the "Manual").

16. Upon information and belief, the Manual has set the Defendant's rules for *The New York Times* for more than a century.

17. The Manual confirms and reaffirms Defendant's commitment to the fairness and impartiality which have earned *The New York Times* the trust and prestige of a large part of the American public.

18. For example, as part of its commitment to fairness and impartiality, the Manual holds that:

> "The news report takes no sides and plays no favors in what it covers or what it omits...
> "The Times forgoes innuendo: An accusation that would not be acceptable in

> made outright cannot be implied through sly juxtaposition, the equivalent of a coked eyebrow.
> "Writers and editors should guard against word choices that undermine neutrality. If one politician is *firm* or *resolute,* an opponent should not be *rigid* or *dogmatic*." If one country in a conflict has a *leadership* while the other has a *regime*, impartiality suffers. Negative overtones, in coverage of a figure in the news, are easily detected and repaired...
> "Divisive issues like religion, politics, abortion and race relations call for extra sensitivity to neutrality in language...
> "Special care must be taken when partisan information comes from news sources who are identified incompletely or not at all. They should not be permitted the appearance or reality of hiding behind The Times when attacking others. See Anonymity.
> "And when, despite all efforts, The Times slips from neutrality, it is prompt and thorough in rectifying errors or lapses of fairness..." (emphasis in the original)

Earlier versions of the Manual, such as the "Revised Edition" published in 1976

had held that:

> "Fairness and impartiality... should be the hallmark of all news articles and news analyses that appear in the Times. *It is of paramount importance that people or organizations accused, criticized or otherwise cast in a bad light have an opportunity to speak in their own defense... Thus it is imperative that the reporter make every effort to reach the accused* ... If it is not possible to do so, the article should say that the effort was made and explain why it did not succeed." (emphasis supplied)

The current edition of the Manual continues to abide by this rule, stating:

> "[Editors'] notes acknowledge (and rectify, when possible) lapses of fairness, balance or perspective – faults more subtle or less concrete than factual errors, though as grave and sometimes graver. *Examples might include The Times failure to seek a comment from someone denounced or accused in its columns, or the omission of one party's argument in a controversy*, resulting from haste in fitting an article into too small a space..." (emphasis supplied)

19. Another aspect of Defendant's longstanding commitment to fairness and impartiality has

been its attempt to avoid the use of anonymous sources wherever possible; indeed the Manual casts anonymity as "a last resort, for situations in which The Times could not otherwise publish information it considers newsworthy and reliable."

20. The Manual holds that the best source for readers is one who can be identified by name, but also describes when anonymous sources can be used.

21. The Manual holds that "If concealment proves necessary, writers should tell readers as much as possible – without violating the promise of confidentiality – to help them assess the source's credibility. In particular, how does the source know the information? And does he or she have a stake in the issue?"

22. Upon information and belief, this is because Defendant has historically expected it reporters and editors to, in effect, vouch for the sources' claims before publication of any news or news analysis.

23. The Manual also holds that anonymous sources are not permitted to make derogatory statements about someone, stating "Anonymity should not be used as a cloak for personal attacks. The vivid language of direct quotation confers an unfair advantage on an unnamed speaker, and turns of phrase are valueless to a reader who cannot assess the source."

24. Another hallmark of Defendant's commitment to fairness and impartiality has been its well known and longstanding prohibition, in contrast to other newspapers, of any admixture of news, on the one hand, and opinion or editorializing, on the other. In reference to a newspaper, the Manual specifically reserves "news" for "the factual reporting and analysis by the news staff," while "editorial" is reserved for "the opinion

sections and their staffs."

25. Indeed, Defendant has rigidly committed itself to keeping news and opinion separate, so much so that the separation was long known internally at *The New York Times* as the "separation of church and state."

26. In what is yet another attempt to induce the trust of readers, the Defendant has set a policy of promptly correcting all factual errors called to its attention in a prominent space specially reserved for such corrections in the paper:

> "Because its voice is loud and far-reaching, The Times recognizes an ethical responsibility to correct all its factual errors, large and small (even misspellings of names), promptly and in a prominent reserved space in the paper... Whether an error occurs in a print article, a digital graphic, a video, a tweet or a news alert, readers should expect us to correct it. There is no five-second rule. It does not matter if it was online for seconds or minutes or hours."

27. Indeed, the Defendant publicly informs its readers and acknowledges its ethical obligation to make prompt corrections by explicitly proclaiming the above policy.

28. Upon information and belief, Defendant understands that its commitment to fairness and impartiality, its commitment to reaching out to men or organizations which are being criticized or otherwise cast in a bad light, its commitment to avoiding negative overtones and guarding against word choices the undermine neutrality, its commitment to "the separation of church and state," and its policy of making prompt and public corrections, induce a sense of trust in readers and contribute to the prestige of *The New York Times*; and in fact are designed, in part, to earn that trust and garner that prestige.

29. Upon information and belief, Defendant is also committed to uninhibited, robust and wide open debate on all topics, and proudly acknowledges that it was the beneficiary of

one of the landmark cases of modern First Amendment jurisprudence, to wit, *New York Times Co. v. Sullivan*, 376 US 254 (1964).

30. Upon information and belief, Defendant also understands that the privilege and license of a free press are meant to serve the larger issue of free speech and free inquiry, as in the *New York Times Co. v. Sullivan* decision.

31. Upon information and belief, Defendant understands that, ironically, speech can have a silencing effect that chills debate, especially where speech is used to enforce taboos or engage in *ad hominem* attacks by questioning the motives or character of people who pursue taboo subjects, or stray from perceived orthodoxy.

32. Defendant understand that the subjects of race and racial differences are subject to some of the most heavily fraught taboos in contemporary American society.

33. And Defendant has explicitly acknowledged such. For example, on or about September 17, 2002, Defendant published an article entitled "In Nature vs. Nurture, a Voice for Nature" which stated in relevant part:

> "Who should define human nature? When the biologist Edward O. Wilson set out to do so in his 1975 book 'Sociobiology,' he was assailed by left-wing colleagues who portrayed his description of genetically shaped human behaviors as a threat to the political principles of equal rights and a just society. *"Since then, a storm has threatened anyone who prominently asserts that politically sensitive aspects of human nature might be molded by the genes. So biologists, despite their increasing knowledge from the decoding of the human genome and other advances, are still distinctly reluctant to challenge the notion that human behavior is largely shaped by environment and culture. The role of genes in shaping differences between individuals or sexes or races has become a matter of touchiness, even taboo.*
> *"A determined effort to break this silence and make it safer for biologists to discuss what they know about the genetics of human nature has now been begun by Dr. Steven Pinker, a psychologist of language at the Massachusetts Institute of Technology*. (emphasis added)

34. Indeed, with well known examples, encompassing everyone from (arguably) vulgar types, such as former NBA Clippers owner Donald Sterling, to eminent and distinguished gentlemen, such as Nobel Prize Winner James Watson, Defendant is certainly aware of a number of salient examples of how orthodoxy on racial views is enforced. For example, on January 11, 2019, Defendant had reported on renewed controversy surrounding Dr. Watson's remarks on the link between I.Q. differences and race by stating:

> "Dr. Watson, one of the most influential scientists of the 20th century, had apologized after making similar comments to a British newspaper in 2007. At the time, he was forced to retire from his job as chancellor at Cold Spring Harbor on Long Island..."

Defendant's own summary of said January 11, 2019 news story, which was set below the headline, stated: "In a recent documentary, the geneticist doubled down on comments he made a decade ago, then apologized for, regarding race, genetics and intelligence." Indeed. Dr. Watson's forced recantation recalls nothing so much as Gallileo's "Eppur si muove." The all but naked coercion of Dr. Watson was not lost on Defendant.

35. Defendant is thus acutely aware of the silencing power of speech and the way in which otherwise robust debate can be confined by *ad hominem* attacks on the character of those who stray to the edge, or beyond the edge, of conventional debate.

36. But consistent with its commitment to free speech, Defendant itself has in the past bravely pushed the boundaries of the taboo on race differences. For example:

a. On or about July 20, 2001, Defendant published in *The New York Times* an article

entitled "Genome Mappers Navigate the Tricky Terrain of Race," which stated in relevant part:

> "Scientists planning the next phase of the human genome project are being forced to confront a treacherous issue: the genetic differences between human races."

b. On or about November 5, 2001, Defendant published in *The New York Times* an article entitled "Study Finds Genetic Link Between Intelligence and Size of Some Regions of the Brain" which stated in relevant part:

> "Lunging into the roiled waters of human intelligence and its heritability, brain scientists say they have found that the size of certain regions of the brain is under tight genetic control and that the larger these regions are the higher is intelligence."

c. On or about July 30, 2002, Defendant published in *The New York Times* an article entitled "Race Is Seen as Real Guide to Track Roots of Disease", which stated in relevant part:

> "Challenging the widely held view that race is a 'biologically meaningless' concept, a leading population geneticist says that race is helpful for understanding ethnic differences in disease and response to drugs. The geneticist, Dr. Neil Risch of Stanford University, says that genetic differences have arisen among people living on different continents and that race, referring to geographically based ancestry, is a valid way of categorizing these differences."

d. On or about Oct 8, 2002, Defendant published in *The New York Times* an article entitled "A New Look at Old Data May Discredit a Theory on Race," which stated in relevant part:

> "Two physical anthropologists have reanalyzed data gathered by

> Franz Boas, a founder of American anthropology, and report that he erred in saying environment influenced human head shape. Boas's data, the two scientists say, show almost no such effect. The reanalysis bears on whether craniometrics, the measurement of skull shape, can validly identify ethnic origin…"

e. On or about December 24, 2002, Defendant published in *The New York Times* an article entitled "The Palette of Humankind", which stated in relevant part:

> "Humankind falls into five continental groups - broadly equivalent to the common conception of races - when a computer is asked to sort DNA data from people from around the world into clusters."

f. On or about December 20, 2002, Defendant published in *The New York Times* an article entitled "Gene Study Identifies 5 Main Human Populations", which stated in relevant part:

> "Scientists studying the DNA of 52 human groups from around the world have concluded that people belong to five principal groups corresponding to the major geographical regions of the world: Africa, Europe, Asia, Melanesia and the Americas. The study, based on scans of the whole human genome, is the most thorough to look for patterns corresponding to major geographical regions. These regions broadly correspond with popular notions of race, the researchers said in interviews."

g. On or about March 20, 2003, Defendant published in *The New York Times* an article entitled "2 Scholarly Articles Diverge on Role of Race in Medicine, " which stated in relevant part:

> "A view widespread among many social scientists, endorsed in official statements by the American Sociological Association and the American Anthropological Association, is that race is not a valid biological concept. But biologists, particularly the population geneticists who study genetic variation, have found that there is a

> structure in the human population. The structure is a family tree showing separate branches for Africans, Caucasians (Europe, the Middle East and the Indian subcontinent), East Asians, Pacific Islanders and American Indians....Biologists, too, have often been reluctant to use the term 'race.' But this taboo was broken last year by Dr. Neil Risch, a leading population geneticist at Stanford University. Vexed by an editorial in The New England Journal that declared that race was 'biologically meaningless,' Dr. Risch argued in the electronic journal Genome Biology that self-identified race was useful in understanding ethnic differences in disease and in the response to drugs."

37. In apparent opposition to the Defendant, and in stark contrast to Defendant's purported commitment to

a. fairness and impartiality,

b. refraining from unfairly casting people in a bad light,

c. avoiding negative overtones and maintaining neutrality,

d. avoiding anonymous sources,

e. "the separation of church and state;" and

f. the policy of making corrections promptly, publicly and prominently,

is the Southern Poverty Law Center (the "SPLC"), which holds to none of the above ideals.

38. The SPLC is a dubious organization known by the Defendant to be highly questionable as a source of information.

39. The SPLC was exposed in the *Montgomery Advertiser*, decades ago in 1994, as a fund-raising scam which deliberately falsifies and inflates the threat of subjectively defined "hate" in order to bilk gullible donors and thereby bring in enough money to fund high

salaries for its executive officers.

40. Upon information and belief, the Defendant took notice of the *Montgomery Advertiser* expose when published, and certainly no later than May 12, 1996 – well before January 15, 2019 when the first of the publications at issue herein was made.

41. The SPLC is not committed to fairness and impartiality, but is openly partisan; and is known to be openly partisan by Defendant.

42. More than that, the SPLC is – in opposition to uninhibited, robust, and wide open debate – committed to persecuting people for holding unorthodox opinions.

43. Thus, in 2008, Mark Potok, an SPLC operative associated with a project that spies on men for holding unorthodox opinions, stated the following regarding the SPLC's work:

> "Our criteria for a hate group, first of all, have nothing to do with criminality, or violence, or any kind of guess we're making about 'this group could be dangerous.' It's strictly ideological."
>
> and
>
> "We see this political struggle, right? …I mean, we're not trying to change anybody's mind. We're trying to wreck the groups, and we are very clear in our head, this is[sic]… we are trying to destroy them. Not to send them to prison unfairly or not take their free speech rights away… but as a political matter, to destroy them."

44. Upon information and belief, the Defendant took notice of the above statements by Potok no later than 2008, and certainly well before January 15, 2019 when the first of the publications at issue herein was made.

45. Going well beyond mere anonymous sources (which practice the Defendant supposedly condemns – see Paragraphs 19–23 above), the SPLC makes broad use of a network or

unscrupulous characters who spy on fellow citizens, not, as Potok admitted above, for being dangerous or criminal, but merely for holding unorthodox opinions.

46. Upon information and belief, the Defendant readily understands this, and has understood this well before January 15, 2019 when the first of the publications at issue herein was made.

47. Regrettably, Defendant has conceived of a plan to target Plaintiff and intentionally defame him, in the process violating its long held standards of conduct, even as it leverages the prestige and trust gathered to it over many years to increase the sting of defamation against Plaintiff.

FIRST CAUSE OF ACTION

48. Thus, on or about January 15, 2019, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, online and in electronic format, an article entitled "A Timeline of Steve King's Racist Remarks and Divisive Actions" concerning the Plaintiff, hereafter "the Online Article."

49. The very next day, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, in print or paper format, the same or substantially same version of the Online Article, at Section A, Page 14 of the New York edition, but with a different headline, to wit "On the Record: Incendiary Remarks and Divisive Actions", hereafter, the "Print Article."

50. By means of both the Online Article and the Print Article, the Defendant published false and defamatory matter which accused Plaintiff Brimelow of being an "open white

nationalist."

51. By means of both the Online Article and the Print Article, the Defendant published false and defamatory matter which accused Plaintiff Brimelow of being a figure of division and racism.

52. The aforesaid the Online Article and the Print Article contained false and defamatory matter wherein it stated, under a banner reading"A Timeline of Steve King's Racist Remarks and Divisive Actions":

a. 2012. On a panel at the Conservative Political Action Conference with Peter Brimelow, an open white nationalist...

53. The statements referenced in Paragraph 52 above were and are false and untrue.

54. The statements referenced in Paragraph 52 above referred to the Plaintiff.

55. The statements referenced in Paragraph 52 above were published by the Defendant and widely read and discussed by the public at large. Indeed, the statements referenced in Paragraph 52 above were circulated widely and quickly.

56. For example, amongst other places, the smear about Plaintiff being "an open white nationalist" was carried into the Congressional Record by Representative Bobby Rush in the days after publication.

57. The statements referenced in Paragraph 52 were published by the Defendant

a. without seeking corroboration from the most obvious source, *viz*. Plaintiff Brimelow, who did and does deny being a white nationalist, let alone an "open white nationalist."

b. without seeking corroboration from another obvious source, to wit, Plaintiff's

website, "VDARE.com" which explicitly claims and claimed prior to January 15, 2019, that neither it, nor Plaintiff, is "white nationalist."

c. without linking to Plaintiff's website, "VDARE" or to any original writings by Plaintiff.

d. in apparent reliance on a highly questionable source with a reputation for persistent inaccuracies, namely the SPLC, which source Defendant has known to be highly questionable well before publication on January 15, 2019.

e. with preconceived hostility toward Plaintiff as an ideological opponent.

f. in the face of repeated and persistent denials, as will be seen.

58. Thus, the Online Article and the Print Article were published in egregious deviation from accepted newsgathering standards and in extreme departure from of Defendant's own commitment to fairness and impartiality, and specifically against its policy of affording one who was being attacked the opportunity to speak in his own defense.

59. Plaintiff called Defendant's attention to the defamatory material in a letter from his attorney dated January 17, 2019, which was received by Defendant on January 17, 2019.

60. In said January 17, 2019 letter, Plaintiff explained that:

> "Mr. Brimelow is not a 'white nationalist' and, specifically, does not refer to himself as such. To the contrary, he has repeatedly said that he is a 'civic nationalist.' For example, in a February 23, 2018 interview with Slate's Osita Nwanevu, Mr. Brimelow stated as follows: 'Personally, I would regard myself as a civic nationalist.'"

61. In the same January 17, 2019 letter, Plaintiff explained, with unimpeachable logic, that:

> "The fact that VDARE has published some critiques of America's immigration policies from those who aim to defend the interests of whites does not mean that Mr. Brimelow is an 'open white nationalist,' any more than the New York Times's decision to publish op-eds by avowed socialists makes it 'openly socialist.'"

Then, too, the letter made the point that:

> "The website that Mr. Brimelow edits, VDARE.com, is a forum site that publishes writers of all political persuasions, so long as they are critical of America's post-1965 immigration policies. Over the course of nearly 20 years, VDARE has published data, analysis and editorial commentary from a wide variety of writers of every race, religion, nationality and political affiliation."

62. Defendant responded by continuing to breach their own ethics and standards in what became an increasingly clear pattern of malice – both "common law" malice and "*New York Times v Sullivan*" malice.

63. Thus, in tacit acknowledgment of its error, Defendant partially corrected the Online Article by removing the adjective "open" from its description of Plaintiff.

64. However, as stated above, Defendant has a publicly avowed policy of making corrections promptly, explicitly and in a prominent reserved space, as per its stated policy.

65. But Defendant, because of its malice toward Plaintiff, refused to apply its own policy toward Plaintiff.

66. Instead, Defendant made an unacknowledged edit (or "stealth edit") in the Online Article and refused to make even this measly correction promptly, explicitly and in a prominent reserved space.

67. And Defendant continued to label Plaintiff a "white nationalist."

68. More than that, Defendant aggravated its original defamation and continued with its

pattern of ill will and malice toward Plaintiff by adding a hyperlink to the term "white nationalist" in its Online Article, which linked to a smear piece by the SPLC. That link can be found here:

htttps://www.splcenter.org/fighting-hate/extremist-files/individual/peter-brimelow

69. The link, found under the SPLC's "fighting-hate" and "extremist-files," accuses Plaintiff of hate and states, among other things, that Plaintiff is a "white nationalist" who allegedly "warns America of pollution by Catholics."

70. This is manifestly false and outrageous, given that Brimelow's first wife (who has passed on) was Catholic, as is his second wife; and several of his children were and are being raised Catholic, facts which could be easily discovered if Defendant cared to check with Plaintiff beforehand.

71. The link furthermore castigates Plaintiff for publishing articles on the science of racial differences in the words "VDARE.com posts... defenders of The Bell Curve — a highly controversial book arguing that whites are more intelligent than blacks — like Steve Sailer."

72. Furthermore, there is material on the SPLC website that makes clear that the SPLC categorizes Plaintiff under the "hate" category because of his publication of science dealing with racial differences, of which material the Defendant is aware.

73. Indeed, in a later article on November 18, 2019, Defendant would explicitly acknowledge that the SPLC categorizes both Brimelow and VDARE as sources of alleged "hate" for the publication of science dealing with racial differences.

74. Defendant was thus endorsing and vouching for the accuracy of the SPLC smear in a

news article.

75. Defendant was furthermore asserting as a fact that its readers could rely on the SPLC definition of "hate" as accurate, despite knowing that the SPLC is itself a partisan and unreliable source, which utilizes subjective definitions of "hate" with the aim of suppressing free speech and confining debate.

76. Furthermore, it was knowingly false – and grossly hypocritical – for the Defendant to join in the SPLC condemnation of Plaintiff as an alleged hate filled white nationalist based upon his publication of articles on the science of racial differences, when the Defendant both knew and knows full well that it had itself published numerous articles on the science of racial differences, as set forth at Paragraph 36 above.

77. Indeed, the author of most or all of the above articles at Paragraph 36 was well respected science author Nicholas Wade, who was an employee of Defendant for roughly thirty years.

78. But Mr. Wade, too, came in for condemnation by the SPLC for writing about the science of race differences.

79. The SPLC condemned Mr. Wade in an article published by the SPLC on May 28, 2014.

80. This is, of course, additional proof of the charge that the SPLC is an unreliable source, a money raising scam meant to bilk gullible people by exaggerating the threat of "hate."

81. Upon information and belief, Defendant was well aware of the SPLC's denunciation of Mr. Wade on May 28, 2014, well before Defendant agreed to begin endorsing the SPLC smears of Plaintiff on January 15, 2019.

82. Nevertheless, Defendant knows that it itself is not a purveyor of hate or white nationalism

because it has published articles on the science of racial differences.

83. Defendant therefore knew, in its "stealth edit" and hyperlink to the Online Article, that it was false to label Plaintiff a purveyor of hate or white nationalism because he had overseen the publication of articles on the science of racial differences, or to repeat and endorse the false claims of those who would so label Plaintiff.

84. Nevertheless, Defendant endorsed the smear of Plaintiff in its "stealth edit" and hyperlink to the Online Article in an act of bad faith and deliberate falsity.

85. Subsequent letters were sent by Plaintiff's attorney on February 15, 2019, September 27, 2019, and October 16, 2019, which all stressed that the Defendant's false and defamatory story had not been rectified by the "stealth edit" (and which "stealth edit" was itself another deviation from the Defendant's own standards) and had in some measure been aggravated by Defendant's endorsement of the SPLC's smear piece; and which requested that Defendant at least publish a "Letter to the Editor" in which Plaintiff defended himself.

86. These letters were received by Defendant on or about the above referenced dates by e-mail and, upon information and belief, seen and discussed internally by Defendant.

87. Meanwhile, even as the above letters were sent and discussed by Defendant, wherein Plaintiff increasingly protested his defamatory smear by Defendant's endorsement of the SPLC, it became increasingly clear throughout early 2019 that the SPLC was an even worse and disreputable organization than had been known.

88. One of the criticisms made clear by the *Montgomery Advertiser* in 1994 had been that the SPLC was too much the reflection – one might say the shadow – of one particularly

dubious man: Morris Dees.

89. Again, this fact was well known to Defendant, whose reporters have repeatedly covered the SPLC and checked many stories against the SPLC over the years.

90. On or about March 14, 2019, Morris Dees was suddenly fired from the SPLC under circumstances that suggest both sexual and racial improprieties on his part, which improprieties had consistently dogged Dees since even the *Montgomery Advertiser* articles decades ago.

91. Upon information and belief, such sexual and racial improprieties on the part of Morris Deed have been confirmed by the Defendant through its own contacts for many years.

92. In the days after March 14, 2019, many stories began to surface in the press about the hypocrisy and phoniness of the SPLC, including one in *The New Yorker* on March 21, 2019, by former SPLC employee Bob Moser.

93. In said article, Moser noted the SPLC's well documented practice of exaggerating hate and recalled "the hyperbolic fund-raising appeals, and the fact that, though the center claimed to be effective in fighting extremism, 'hate' always continued to be on the rise, more dangerous than ever, with each year's report on hate groups. 'The S.P.L.C.—making hate pay,' we'd say."

94. In said article, one particularly significant observation was that the SPLC's scam was an all but an open secret. As the New Yorker article recalled: "Walking to lunch past the center's Maya Lin–designed memorial to civil-rights martyrs, we'd cast a glance at the inscription from Martin Luther King, Jr., etched into the black marble—'Until justice rolls down like waters'—and intone, in our deepest voices, 'Until justice rolls down like

dollars.'"

95. Upon information and belief, Defendant not only read the *New Yorker* article by Bob Moser on March 21, 2019, but has, through its own reporters, long known of the truth of the allegations in Moser's article, and like facts about the SPLC.

96. Nevertheless, as the SPLC's troubles began to mount, with first Morris Dees being mysteriously fired, and then SPLC President Cohen suddenly and mysteriously resigning about a week later on March 23, 2019, the utter lack of credibility at the SPLC was apparent to all, even to its apparent ideological allies within Defendant.

97. But, due to a pre-conceived plan to defame Plaintiff, and animated by malice as aforesaid, Defendant resolutely refused to back down from its categorization of Plaintiff as a "white nationalist" on the word of the SPLC.

98. Similarly, in late 2019 Defendant continued, in what were additional unfair instances of malice and ill will directed against Plaintiff, to refuse to publish an expanded letter by Plaintiff defending himself against both the January 16-16, 2019 articles and further instances malice and ill will in August and September of 2019, directed against Plaintiff by Defendant in his role as Editor of VDARE.

99. Plaintiff, through his attorney, sent a proposed "Letter to the Editor" via certified mail and e-mail on September 27, 2019, which was received but never published by Defendant.

100. The above actions show that both the Online Article and the Print Article were published with "actual malice" under *New York Times v. Sullivan* and its progeny, in the sense of knowing falsehood or reckless disregard, and a deliberate attempt to purposefully avoid the truth. In the alternative, they were published in a grossly irresponsible manner

without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties; in further alternative, they were published with a lack of ordinary care and a failure to use that degree of care that a reasonable and prudent man would have used under the same circumstances.

101. In the statements referenced in Paragraph 52 above, the Defendant imputed to Plaintiff race hatred and traits inconsistent with his profession.

102. The statements referenced in Paragraph 52 above exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him.

103. The Defendant, by the publication of the statements referenced in Paragraph 52 above, meant and intended to expose the Plaintiff to public hatred, contempt, ridicule, and disgrace, to lower his reputation, and to deter decent people from associating or dealing with him.

104. By reason of the publication of the statements in Paragraph 52 above, Plaintiff has been injured in his good name, fame, credit, profession, and reputation as a man, and in his various public and private positions, callings, and lines of endeavor, and has been held up to public ridicule before his acquaintances and the public, and to suffer the loss of prestige and standing in his community and elsewhere.

105. By reason of the publication of the statements in Paragraph 52 above, Plaintiff has suffered special damages in the form of injury and loss of pecuniary opportunities in an amount of approximately $700,000.

106. The Defendant was actuated by ill will, malice, conscious disregard of the rights of

others, and was willful and wanton in its publication of the statements referenced in Paragraph 52 above, thereby entitling Plaintiff to punitive damages.

SECOND CAUSE OF ACTION

107. Plaintiff repeats the above allegations.

108. On or about August 23, 2019 the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, online and in electronic format, an article entitled "Justice Department Newsletter Included Extremist Blog Post."

109. A print version of the very same article was printed the following day.

110. The aforesaid the article contained false and defamatory matter wherein it stated:

a. A national union for the judges said the blog post "directly attacks sitting immigration judges with racial [sic] and ethnically tinged slurs."

b. That term [viz. "kritarch"] has historically been used in a non-pejorative way to describe "rule by judges," but more recently it has been co-opted by white nationalists and anti-Semitic extremists, according to the Anti-Defamation League.

c. The Southern Poverty Law Center classifies VDARE as an anti-immigration hate website.

d. On Thursday, Judge A. Ashley Tabaddor, the union's president and the judge of Iranian descent who was pictured in the VDare post, wrote to James McHenry, the director of the immigration review office, to protest the newsletter's inclusion of the post, saying it "directly attacks sitting immigration judges with racial and

ethnically tinged slurs."

e. "VDare's use of the term in a pejorative manner casts Jewish history in a negative light as an anti-Semitic trope of Jews seeking power and control," Judge Tabaddor wrote in the letter, referring to "kritarch."

f. On Friday, Judge Tabbador said she learned about the newsletter from colleagues who were outraged about the link to the white nationalist website. "If I had sent this, I would be facing serious disciplinary action," she said. "We get trained about zero tolerance of discriminatory and racist actions."

g. "It is shocking and outrageous that a vile, racist attack against distinguished jurists was linked and distributed from an official U.S. government publication," the union's president, Paul Shearon, said in a statement. "The Department of Justice is supposed to enforce our nation's laws against ethnic, racial and religious discrimination, not fan the flames of such hatred."

h. Aryeh Tuchman, associate director of the Anti-Defamation League's Center on Extremism, said that "kritarchy" had long been used to describe "rule by judges."... But he added that it appeared that extremists, "mainly confined to the racist, anti-immigrant site VDare, have co-opted the term to refer to liberal American judges as 'kritarchs'."... "Many of the extremists on VDare who use this term are in fact anti-Semites, and they may intentionally be using 'kritarch' as a way to express their anti-Semitism, but on its own, the term is not self-evidently anti-Semitic," he said.

111. The statements referenced in Paragraph 110 above were and are false and untrue, and

imply false assertions of fact. Indeed, the statements were absurd in that they implied that the term "kritarchy" – a perfectly normal political science term which means "rule by judges" – had suddenly been transformed into an anti-Semitic code word.

112. Plaintiff is widely known in his capacity as both the creator and editor of VDARE.

113. Plaintiff had come to be known synonymously with VDARE to the public at large, and certainly with Defendant.

114. Plaintiff is one of a small group of people who run the day to day operations of VDARE.

115. Plaintiff is the editor of VDARE and is identified as such on the website.

116. Furthermore, a close association between Plaintiff and VDARE is evidenced by the SPLC's website, which was referenced by Defendant in the very article in question. For example, the SPLC's webpage devoted to VDARE prominently features two photographs of Plaintiff, who is identified as an "associated extremist" by such SPLC website.

117. Plaintiff is prominently featured on VDARE's "Our Story" webpage, which informs readers that "It all started with a bold idea: in the face of unwavering hostility from the Main Stream Media, our editor, Peter Brimelow, launched VDARE.com on Christmas Eve of 1999 as an extension of his national bestselling book, Alien Nation: Common Sense About America's Immigration Disaster. After all, the issues of unrestricted mass immigration, both legal and illegal, weren't going away. They were getting bigger."

118. Plaintiff's picture is displayed as the first of the small group of four people comprising "the VDARE People" on VDARE's "Our Story" webpage. A link to VDARE's "Our Story" webpage can be found here: https://vdare.com/about

119. For all practical purposes, Plaintiff is the face of VDARE, and is known as such by both

friends and enemies of the VDARE site; and is easily discovered as such by following the SPLC attributions promoted and referenced by Defendant.

120. Indeed, numerous individuals have noted that the August 23, 2019 attack, like the later attacks of September 13, 2019 and May 5, 2020 below, were an attack on Plaintiff.

121. The statements referenced in Paragraph 110 identifies Plaintiff in such a way as to lead those who know him to understand that he was the person referred to.

122. Thus, the statements referenced in Paragraph 110 above referred to the Plaintiff.

123. The statements referenced in Paragraph 110 above were published by the Defendant and widely read and discussed by the public at large. Indeed, the statements referenced in Paragraph 110 above were circulated widely and quickly.

124. The statements referenced in Paragraph 110 above were published by the Defendant

a. without seeking corroboration from the most obvious source, *viz*. Plaintiff Brimelow.

b. without seeking corroboration from another obvious source, to wit, Plaintiff's website, "VDARE.com."

c. without linking to Plaintiff's website, "VDARE.com" or to the allegedly offensive post; or to any original writings by Plaintiff.

d. in apparent reliance on a highly questionable source with a reputation for persistent inaccuracies, namely the SPLC, which source Defendant has known to be highly questionable well before publication.

e. in apparent reliance on the bizarre reasoning provided by the ADL and Aryeh Tuchman.

f. suggesting undisclosed facts, known to Defendant or to those whom they were quoting, but unknown to the readers, which justified the charge of alleged "anti-Semitism."

g. with preconceived hostility toward Plaintiff as an ideological opponent.

h. in the face of repeated and persistent denials demonstrated above.

125. Thus, the above article was published in egregious deviation from accepted newsgathering standards and in extreme departure from of Defendant's own commitment to fairness and impartiality, and specifically against its policy of affording one who was being attacked the opportunity to speak in his own defense to avoid anonymous sources.

126. The above actions show that the publication was made with "actual malice" under the standard of "New York Times v. Sullivan" and it progeny, in the sense of knowing falsehood or reckless disregard, and a deliberate attempt to purposefully avoid the truth. In the alternative, the publication was made in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties; in further alternative, it was published with a lack of ordinary care and a failure to use that degree of care that a reasonable and prudent man would have used under the same circumstances.

127. The statements referenced in Paragraph 110 above exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him.

128. The Defendant, by the publication of the statements referenced in Paragraph 110 above, meant and intended to expose the Plaintiff to public hatred, contempt, ridicule, and

disgrace, to lower his reputation, and to deter decent people from associating or dealing with him.

129. By reason of the publication of the statements in Paragraph 110 above, Plaintiff has been injured in his good name, fame, credit, profession, and reputation as a man, and in his various public and private positions, callings, and lines of endeavor, and has been held up to public ridicule before his acquaintances and the public, and to suffer the loss of prestige and standing in his community and elsewhere.

130. By reason of the publication of the statements in Paragraph 110 above, Plaintiff has suffered special damages in the form of injury and loss of pecuniary opportunities in an amount of approximately $700,000.

131. The Defendant was actuated by ill will, malice, conscious disregard of the rights of others, and were willful and wanton in their publication of the statements referenced in Paragraph 110 above, thereby entitling Plaintiff to punitive damages.

THIRD CAUSE OF ACTION

132. Plaintiff repeats the above allegations.

133. On or about September 13, 2019, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, online and in electronic format, an article entitled "Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies."

134. On or about September 14, 2019, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times,* in print or paper format, the same or

substantially same version of the above article, at Section A, Page 17 of the New York edition, but with a different headline, to wit "Top Immigration Judge Departs After Shake-Up at Agency."

135. The aforesaid the articles contained false and defamatory matter wherein it stated:

a. Last month, tensions increased when a daily briefing that is distributed to federal immigration judges contained a link to a blog post that included an anti-Semitic reference and came from a website that regularly publishes white nationalists.

136. The blog post referenced above was a blog posted by VDARE.com.

137. Indeed, the above quoted words contained a hyperlink link to Defendant's prior August 23, 2019 article, referenced above.

138. The alleged "anti-Semitic reference" was the use of the word "kritarchy" – which is false and absurd.

139. The statements referenced in Paragraph 135 identifies Plaintiff in such a way as to lead those who know him to understand that he was the person referred to.

140. Thus, the statements referenced in Paragraph 135 above referred to the Plaintiff.

141. The statements referenced in Paragraph 135 above were published by the Defendant and widely read and discussed by the public at large. Indeed, the statements referenced in Paragraph 135 above were circulated widely and quickly.

142. The statements referenced in Paragraph 135 above were published by the Defendant

a. without seeking corroboration from the most obvious source, viz. Plaintiff Brimelow.

b. without seeking corroboration from another obvious source, to wit, Plaintiff's

website, "VDARE.com."

c. without linking to Plaintiff's website, "VDARE.com" or to the allegedly offensive post; or to any original writings by Plaintiff.

d. in apparent reliance on a highly questionable source with a reputation for persistent inaccuracies, namely the SPLC, which source Defendant has known to be highly questionable well before publication.

e. confirming that Defendant had indeed endorsed as true – in a news article – the bizarre reasoning provided by the ADL and Aryeh Tuchman in the prior article on August 23, 2019.

f. suggesting undisclosed facts, known to Defendant or to those whom they were quoting, but unknown to the readers, which justified the charge of alleged "anti-Semitism."

f. with preconceived hostility toward Plaintiff as an ideological opponent.

g. in the face of repeated and persistent denials demonstrated above.

143. Thus, the above article was published in egregious deviation from accepted newsgathering standards and in extreme departure from of Defendant's own commitment to fairness and impartiality and specifically against its policy of affording one who was being attacked the opportunity to speak in his own defense.

144. The above actions show that the publication was made with "actual malice" under the standard of "New York Times v. Sullivan" and it progeny, in the sense of knowing falsehood or reckless disregard, and a deliberate attempt to purposefully avoid the truth.

In the alternative, the publication was made in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties; in further alternative, it was published with a lack of ordinary care and a failure to use that degree of care that a reasonable and prudent man would have used under the same circumstances.

145. The statements referenced in Paragraph 135 above exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him.

146. The Defendant, by the publication of the statements referenced in Paragraph 135 above, meant and intended to expose the Plaintiff to public hatred, contempt, ridicule, and disgrace, to lower his reputation, and to deter decent people from associating or dealing with him.

147. By reason of the publication of the statements in Paragraph 135 above, Plaintiff has been injured in his good name, fame, credit, profession, and reputation as a man, and in his various public and private positions, callings, and lines of endeavor, and has been held up to public ridicule before his acquaintances and the public, and to suffer the loss of prestige and standing in his community and elsewhere.

148. By reason of the publication of the statements in Paragraph 135 above, Plaintiff has suffered special damages in the form of injury and loss of pecuniary opportunities in an amount of approximately $700,000.

149. The Defendant was actuated by ill will, malice, conscious disregard of the rights of others, and were willful and wanton in their publication of the statements referenced in

Paragraph 135 above, thereby entitling Plaintiff to punitive damages.

FOURTH CAUSE OF ACTION

150. Plaintiff repeats the above allegations.

151. On or about November 18, 2019, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, online and in electronic format, an article entitled "The White Nationalist Websites Cited by Stephen Miller."

152. The aforesaid article was critical of Stephen Miller merely for the ideas he was allegedly reading, evincing a strain of totalitarianism that has apparently infected Defendant.

153. The aforesaid the article contained false and defamatory matter, including outright misquotations, wherein it stated:

a. Peter Brimelow, the founder of the anti-immigration website VDARE, believes that... the increase in Spanish speakers is a "ferocious attack on the living standards of the American working class."

b. As a young Senate aide, Stephen Miller, President Trump's chief immigration adviser, referred to the two sources while promoting his anti-immigration views, suggesting deeper intellectual ties to the world of white nationalism than previously known.

c. "The heart of where these guys differ from neoconservatives and Republican orthodoxy is basically: 'What is the American nation and what is the nature of American nationhood?'" Lawrence Rosenthal, the chair and lead researcher at the Berkeley Center for Right-Wing Studies at the University of California, said in an

interview. "It's not based on 'We hold these truths to be self evident.' It's based on 'What were the color of the people who wrote those words?'"

d. The law center [i.e. the SPLC] has labeled VDARE a "hate website" for its ties to white nationalists and publication of race-based science...

e. ..."it's easy to draw a clear line from the white supremacist websites where he is getting his ideas to current immigration policy."

f. ..."both VDARE and American Renaissance are white nationalist organizations, who provide a pseudointellectual veneer to classic racism."

154. The statements referenced in Paragraph 153 above referred to the Plaintiff.

155. The statements referenced in Paragraph 153 above were published by the Defendant and widely read and discussed by the public at large. Indeed, the statements referenced in Paragraph 153 above were circulated widely and quickly.

156. The statements referenced in Paragraph 153 above were published by the Defendant

a. without seeking corroboration from the most obvious source, *viz*. Plaintiff Brimelow.

b. without seeking corroboration from another obvious source, to wit, Plaintiff's website, "VDARE.com."

c. without linking to Plaintiff's website, "VDARE.com" or to any original writings by Plaintiff.

d. in apparent reliance on a highly questionable source with a reputation for persistent inaccuracies, namely the SPLC, which source Defendant has known to be highly questionable well before publication.

e. against its policy of affording one being attacked the opportunity to speak in his own defense.

f. with preconceived hostility toward Plaintiff as an ideological opponent.

g. in the face of repeated and persistent denials, especially in the letters dated February 15, 2019, September 27, 2019, and October 16, 2019, referenced above.

h. with a steadfast refusal to publish any of Plaintiff's "Letters to the Editor" in which he defended himself.

157. Thus, the above article was published in egregious deviation from accepted newsgathering standards and in extreme departure from of Defendant's own commitment to fairness and impartiality and against its policy of affording one being attacked the opportunity to speak in his own defense and to avoid anonymous sources.

158. The above actions show that the publication was made with "actual malice" under the standard of "New York Times v. Sullivan" and its progeny, in the sense of knowing falsehood or reckless disregard, and a deliberate attempt to purposefully avoid the truth. In the alternative, the publication was made in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties; in further alternative, it was published with a lack of ordinary care and a failure to use that degree of care that a reasonable and prudent man would have used under the same circumstances.

159. The statements referenced in Paragraph 153 above exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him.

160. The Defendant, by the publication of the statements referenced in Paragraph 153 above, meant and intended to expose the Plaintiff to public hatred, contempt, ridicule, and disgrace, to lower his reputation, and to deter decent people from associating or dealing with him.

161. By reason of the publication of the statements in Paragraph 153 above, Plaintiff has been injured in his good name, fame, credit, profession, and reputation as a man, and in his various public and private positions, callings, and lines of endeavor, and has been held up to public ridicule before his acquaintances and the public, and to suffer the loss of prestige and standing in his community and elsewhere.

162. By reason of the publication of the statements in Paragraph 153 above, Plaintiff has suffered special damages in the form of injury and loss of pecuniary opportunities in an amount of approximately $700,000.

163. The Defendant was actuated by ill will, malice, conscious disregard of the rights of others, and were willful and wanton in their publication of the statements referenced in Paragraph 153 above, thereby entitling Plaintiff to punitive damages.

FIFTH CAUSE OF ACTION

164. Plaintiff repeats the above allegations.

165. This action was first instituted on January 9, 2020 and Defendant was aware of it from at least February 3, 2020, when its attorneys first made their appearances in this case.

166. Defendant has thus know, since at least February 3, 2020, that Plaintiff has strenuously objected to the allegation that he is “racist” or “white supremacist” or otherwise animated

by race hatred, even to the point of litigating.

167. Furthermore, on May, 2, 2020, Plaintiff had transmitted a letter to Defendant (*via* its attorney) that reminded Defendant that it had published highly complimentary reviews of Plaintiff's work, particularly Richard Bernstein, *The Immigration Wave: A Plea to Hold Back*, NEW YORK TIMES, April 19, 1995, at 17, section C, wherein Defendant had published the words "The strong racial element in current immigration has made it more than ever before a delicate subject. It is to Mr. Brimelow's credit that he attacks it head on, unapologetically."

168. Said Letter of May 2, 2020 had also stressed Defendant's failure to abide by its own ethical rules in its continuing attacks on Plaintiff, as related at Paragraphs 14-28 above.

169. Nevertheless, on May 5, 2020, just days after receiving Plaintiff''s fresh complaints in the course of this very lawsuit, Defendant continued to defame Plaintiff.

170. On or about May 5, 2020, the Defendant New York Times Company did falsely and maliciously publish in *The New York Times*, online and in electronic format, an article entitled "Facebook Says It Dismantles Disinformation Network Tied to Iran's State Media."

171. The aforesaid the articles contained false and defamatory matter wherein it stated:

a. In a monthly report of accounts suspended for so-called "coordinated inauthentic behaviour", Facebook said it had removed eight networks in recent weeks, including one with links to the Islamic Republic of Iran Broadcasting Corporation (IRIB).

b. The company also removed a U.S. network of fake accounts linked to QAnon, a

fringe group that claims Democrats are behind international crime rings, and a separate U.S.-based campaign with ties to white supremacist websites VDARE and the Unz Review.

c. Nathaniel Gleicher, Facebook's head of cybersecurity policy, said both U.S. networks recently began pushing coronavirus-related disinformation, taking advantage of a surge in online interest in the pandemic to promote anti-Semitic and anti-Asian hate speech tied to it. "We've seen people behind these campaigns opportunistically leverage coronavirus-related topics to build an audience and drive people to their pages or off-platform sites," he said.

d. The networks also pushed content focused on the upcoming U.S. presidential election, the report said

172. The statements referenced in Paragraph 171 identifies Plaintiff in such a way as to lead those who know him to understand that he was the person referred to.

173. Thus, the statements referenced in Paragraph 171 above referred to the Plaintiff.

174. The statements referenced in Paragraph 171 above were published by the Defendant and widely read and discussed by the public at large. Indeed, the statements referenced in Paragraph 171 above were circulated widely and quickly.

175. The statements are false and again accuse Plaintiff of race hatred and traits inconsistent with his profession as a journalist.

176. The statements are false and accuse Plaintiff of manipulating on-line readers by utilizing a “bot-farm” of fake accounts.

177. The statements are false and also accuse Plaintiff of violating VDARE's 501(c)(3) status.

178. The statements referenced in Paragraph 171 above were published by the Defendant

a. without seeking corroboration from the most obvious source, viz. Plaintiff Brimelow.

b. without seeking corroboration from another obvious source, to wit, Plaintiff's website, "VDARE.com."

c. without linking to Plaintiff's website, "VDARE.com" or to the allegedly offensive post; or to any original writings by Plaintiff.

d. suggesting undisclosed facts, known to Defendant or to those whom they were quoting, but unknown to the readers, which justified the charges of alleged "anti-Semitism," "race hatred," promoting fake and dubious science, and manipulating on-line readers by utilizing a "bot-farm" of fake accounts.

f. with preconceived hostility toward Plaintiff as an ideological opponent.

g. in the face of repeated and persistent denials demonstrated above.

179. Thus, the above article was published in egregious deviation from accepted newsgathering standards and in extreme departure from of Defendant's own commitment to fairness and impartiality and specifically against its policy of affording one who was being attacked the opportunity to speak in his own defense.

180. The above actions show that the publication was made with "actual malice" under the standard of "New York Times v. Sullivan" and it progeny, in the sense of knowing falsehood or reckless disregard, and a deliberate attempt to purposefully avoid the truth.

In the alternative, the publication was made in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties; in further alternative, it was published with a lack of ordinary care and a failure to use that degree of care that a reasonable and prudent man would have used under the same circumstances.

181. The statements referenced in Paragraph 171 above exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him.

182. The Defendant, by the publication of the statements referenced in Paragraph 171 above, meant and intended to expose the Plaintiff to public hatred, contempt, ridicule, and disgrace, to lower his reputation, and to deter decent people from associating or dealing with him.

183. By reason of the publication of the statements in Paragraph 171 above, Plaintiff has been injured in his good name, fame, credit, profession, and reputation as a man, and in his various public and private positions, callings, and lines of endeavor, and has been held up to public ridicule before his acquaintances and the public, and to suffer the loss of prestige and standing in his community and elsewhere.

184. By reason of the publication of the statements in Paragraph 171 above, Plaintiff has suffered special damages in the form of injury and loss of pecuniary opportunities in an amount of approximately $700,000.

185. The Defendant was actuated by ill will, malice, conscious disregard of the rights of others, and were willful and wanton in their publication of the statements referenced in

Paragraph 171 above, thereby entitling Plaintiff to punitive damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount no less than Five Million Dollars, together with punitive damages, and the costs and disbursements of this action.

Dated: Goshen, New York
May 26, 2020

Yours, etc.

/s/ Frederick C. Kelly
Frederick C. Kelly, Esq. (FK1986)
Attorney for Plaintiff
One Harriman Square
Goshen, NY 10924
Phone No.: (845) 294-7945
Fax: (845) 294-7889
fckelylaw@gmail.com

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETER BRIMELOW,

Plaintiff,

-v.-

THE NEW YORK TIMES COMPANY,

Defendant.

20 Civ. 222 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Peter Brimelow brings this action for libel against Defendant The New York Times Company, alleging that The New York Times ("The Times") defamed Brimelow in five articles published online and in print between January 2019 and May 2020. The operative complaint is Plaintiff's Second Amended Complaint, filed on May 26, 2020, in which he seeks $5 million in actual damages, punitive damages, and costs. Defendant has moved to dismiss the Second Amended Complaint for failure to state a claim. For the reasons set forth below, the Court grants Defendant's motion in full.

BACKGROUND[1]

A. Factual Background

1. The Plaintiff and the VDARE Website

Plaintiff Peter Brimelow is a prominent opponent of non-white immigration to the United States. He is the author of the book *Alien Nation:*

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[1] The facts in this Opinion are drawn primarily from Plaintiff's Second Amended Complaint (or "SAC" (Dkt. #22)), which is the operative pleading in this case, as well as the exhibits attached to the Declaration of David E. McCraw (Dkt. #25): Trip Gabriel, *A Timeline of Steve King's Racist Remarks and Divisive Actions*, N.Y. Times (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/us/politics/steve-king-offensive-

Common Sense About America's Immigration Disaster (1995) ("*Alien Nation*"), and the founder and editor of the website VDARE.com ("VDARE"). (SAC ¶¶ 6, 11, 112). Together, *Alien Nation* and commentary published on VDARE comprise much of Brimelow's "original writings." (*Id.* at ¶¶ 57, 124, 142, 156, 178). In *Alien Nation*, Plaintiff contends that "the American nation has always

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quotes.html (the "January Article"); Christine Hauser, *Justice Department Newsletter Included Extremist Blog Post*, N.Y. Times (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/us/justice-department-vdare-anti-semitic.html (the "August Article"); Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html (the "September Article"); Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen Miller*, N.Y. Times (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/us/politics/stephen-miller-white-nationalism.html (the "November Article"); Reuters, *Facebook Says It Dismantles Disinformation Network Tied To Iran's State Media*, N.Y. Times (May 5, 2020), originally available at https://www.nytimes.com/reuters/2020/05/05/technology/05reuters-iran-facebook.html (the "May Article"); Jack Stubbs & Katie Paul, *Facebook says it dismantles disinformation network tied to Iran's state media*, Reuters (May 5, 2020), https://www.reuters.com/article/us-iran-facebook/facebook-says-it-dismantles-disinformation-network-tied-to-irans-state-media-idUSKBN22H2DK (the "Reuters Article").

For ease of reference, the Court refers to Defendant's opening brief as "Def. Br." (Dkt. #24); Plaintiff's opposition brief as "Pl. Opp." (Dkt. #28); and Defendant's reply brief as "Def. Reply" (Dkt. #31).

The Court also takes judicial notice of Plaintiff's published writings, including his book *Alien Nation: Common Sense About America's Immigration Disaster* (1995), and his commentary on the website VDARE.com ("VDARE"), all of which are incorporated by reference in the Second Amended Complaint, as Plaintiff possesses those writings and indeed criticizes The Times for not citing to this material when referencing Plaintiff or VDARE in the articles in question (*see* SAC ¶¶ 57, 124, 142, 156, 178). The Court may properly take judicial notice of such statements because (i) the truth of the statements is not at issue; (ii) Plaintiff does not deny that he made the statements; (iii) there was undisputed notice to Plaintiff of their contents; and (iv) they are integral to Plaintiff's claims. *See Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("[T]he problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered[.] … Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated."); *see also In re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340, 354-55 (S.D.N.Y. 2011). The Southern Poverty Law Center ("SPLC") entry on "Peter Brimelow," linked to by one of the articles at issue and cited in the Second Amended Complaint (*see* SAC ¶ 68), and its entry on VDARE, linked to in another article, also are incorporated by reference.

had a specific ethnic core. And that core has been white." (Def. Br. 3 (quoting *Alien Nation* 10)). Elsewhere he has said, regarding his ideological viewpoint, that "my heart is with civic nationalism, but my head is with racial nationalism." (Def. Br. 6 (quoting an interview with Plaintiff published on VDARE)).

Plaintiff is VDARE's founder and editor (SAC ¶ 11), but it is not a purely personal platform; rather, it is a site operated by a duly incorporated nonprofit foundation, according to its own statements (*see, e.g.*, *id.* at ¶ 177 (asserting VDARE's tax-exempt status under 26 U.S.C. § 501(c)(3))). VDARE provides a platform for those "critical of America's post-1965 immigration policies" (*id.* at ¶ 11), and is particularly concerned with "how long the US can continue as a coherent nation-state in the face of current immigration policy" (Def. Br. 5 (quoting VDARE's "About" webpage)). VDARE's founding principles include that "[t]he racial and cultural identity of America is legitimate and defensible: Diversity per se is not strength, but a vulnerability." (*Id.* (quoting VDARE's "About" webpage)). VDARE routinely publishes articles by individuals whom Plaintiff identifies as "white nationalists," a term he has defined to mean "people aiming to defend the interests of American whites — as they are absolutely entitled to do." (*Id.* (quoting Plaintiff's writings on VDARE)).

2. The Alleged Defamation

Plaintiff claims that in five articles published between January 2019 and May 2020, The Times defamed Plaintiff by portraying him and content published on VDARE as "white nationalist," "white supremacist," and "anti-

Semitic." Plaintiff denies that he is a "white nationalist" and instead characterizes himself as a "civic nationalist." (SAC ¶ 60). Plaintiff contends that The Times incorrectly imputed to him "race hatred and traits inconsistent with his profession" (*id.* at ¶¶ 101, 175), and thereby "exposed the Plaintiff to public hatred, contempt, ridicule, and disgrace, lowered his reputation, and deterred decent people from associating or dealing with him" (*id.* at ¶¶ 102, 127, 145, 159, 181). This allegedly caused special damages to Plaintiff in the form of injury to reputation and loss of pecuniary opportunities, in the amount of approximately $700,000 per cause of action. (*Id.* at ¶¶ 105, 130, 148, 162, 184).

a. The January 15, 2019 Article

On January 15, 2019, The Times published an article about Iowa Congressman Steve King and his history of offensive comments. (January Article; *see also* SAC ¶ 48). As an example, the article stated that in 2012, "[o]n a panel at the Conservative Political Action Conference with Peter Brimelow, an open white nationalist, Mr. King referred to multiculturalism as: 'A tool for the Left to subdivide a culture and civilization into our own little ethnic enclaves and pit us against each other.'" (Def. Br. 8 (citing SAC ¶ 52); *see also* January Article). The article later was revised to refer to Plaintiff as a "white nationalist," rather than an "open white nationalist." (SAC ¶ 63; *see also* January Article). Where the article states Plaintiff's name, it hyperlinks to the Southern Poverty Law Center's ("SPLC") website entry on Plaintiff, which entry categorizes Plaintiff's ideology as "white nationalist" and includes

examples of Plaintiff's public statements. (SAC ¶ 68). Plaintiff asserts that he is not a white nationalist and that the January Article harmed his reputation (i) by accusing him "of being a figure of division and racism" and (ii) by linking to the SPLC website. (*Id.* at ¶¶ 51, 68-75).

b. The August 23, 2019 Article

In August 2019, a controversy erupted among immigration judges when the Department of Justice Executive Office for Immigration Review ("EOIR") included in its daily briefing a VDARE blog post that referred to two immigration judges as "kritarchs." (*See* August Article; *see also* SAC ¶¶ 108-10). The president of a union of immigration judges submitted a complaint to the EOIR, protesting that the post "directly attacks sitting immigration judges with racial and ethnically tinged slurs." (August Article). The Times reported on the incident, including the union's complaint, EOIR's handling of the matter, the history of the word "kritarchy," and VDARE's response to the controversy. (*Id.*). The article does not reference Plaintiff, but Plaintiff asserts that it was false and personally defamatory of him to quote officials and other third parties stating that VDARE is "an anti-immigration hate website" and a "white nationalist website," and, further, that "[m]any of the extremists on VDare who use [the term 'kritarch'] are in fact anti-Semites." (SAC ¶¶ 110, 122).

c. The September 13, 2019 Article

One month later, The Times published a related article about the departure of senior EOIR officials. (*See* September Article; *see also* SAC

¶¶ 133-34). The article details a conflict between immigration judges and the Trump administration, and notes that, "[l]ast month, tensions increased when a daily briefing that is distributed to federal immigration judges contained a link to a blog post that included an anti-Semitic reference and came from a website that regularly publishes white nationalists." (September Article). The underlined text hyperlinks to the August Article. The September Article does not reference Plaintiff and does not name VDARE, but Plaintiff alleges it personally defamed him to say that a blog post on VDARE used an anti-Semitic term. (SAC ¶¶ 135, 138-40).

d. The November 18, 2019 Article

On November 18, 2019, The Times published a piece about Stephen Miller, a close adviser to President Donald J. Trump who has been a driving force of the administration's immigration policy. (*See* November Article; *see also* SAC ¶ 151). The article states that leaked emails suggested that Miller "has maintained deeper intellectual ties to the world of white nationalism than previously known," and includes examples of Miller's terminology, theories, and cited sources of information. (November Article). It quotes experts opining on the links between Miller's ideas and white nationalism. (*Id.*). The article says that Miller cited VDARE, which was founded by "Peter Brimelow, … [who] believes that diversity has weakened the United States, and that the increase in Spanish speakers is a 'ferocious attack on the living standards of the American working class.'" (*Id.*). The underlined text hyperlinks to reporting and a video in which Brimelow made those statements.

The November Article reports that the SPLC "labeled VDARE a 'hate website' for its ties to white nationalists and publication of race-based science[.]" (November Article). The underlined text hyperlinks to the SPLC's webpage on VDARE. The article explains that VDARE "approvingly cite[s] Calvin Coolidge's support for a 1924 law that excluded immigrants from southern and Eastern Europe, and praise[s] 'The Camp of the Saints,' a 1973 French novel that popularizes the idea that Western civilization will fall at the hands of immigrants"; it also quotes experts explaining why those statements are indicative of white nationalist beliefs. (*Id.*). Plaintiff asserts that the statements about him and VDARE were false and defamatory of him. (SAC ¶¶ 153-63).

e. The May 5, 2020 Article

On May 5, 2020, The Times published a wire article from Reuters. (*See* May Article; *see also* Reuters Article). The May Article reports a Facebook announcement that the social medial platform had identified and removed several networks of accounts engaged in "coordinated inauthentic behavior," including a "U.S.-based campaign with ties to white supremacist websites VDARE and the Unz Review." (May Article; *see* also SAC ¶ 171). The article does not mention Plaintiff, but Plaintiff nonetheless asserts that the article, because of its reference to VDARE, accuses him personally of "race hatred." (SAC ¶ 175). He also claims that the article accuses him of "manipulating on-line readers by utilizing a 'bot-farm' of fake accounts" and engaging in actions that violated VDARE's "501(c)(3) status." (*Id.* at ¶¶ 176-77).

B. Procedural History

Plaintiff filed the original complaint on January 9, 2020 (Dkt. #1), and filed amended complaints on April 23, 2020 (Dkt. #16), and May 26, 2020 (Dkt. #22). After submitting a pre-motion letter to the Court announcing its intent to so move (Dkt. #17), Defendant filed its motion to dismiss on June 18, 2020 (Dkt. #23-25). Plaintiff filed his opposition submission on July 28, 2020 (Dkt. #28), and Defendant filed its reply submission on August 11, 2020 (Dkt. #30).

DISCUSSION

A. Applicable Law

1. Motions to Dismiss Under Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss pursuant to Federal Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept as true all well-pleaded factual allegations in the complaint. *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *see also Twombly*, 550 U.S. at 555 (noting that a court is "not bound to accept as true a legal conclusion couched as a factual allegation" (quoting *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986))). "Because a defamation suit 'may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit

itself,' courts should, where possible, resolve defamation actions at the pleading stage." *Adelson* v. *Harris*, 973 F. Supp. 2d 467, 481 (S.D.N.Y. 2013) (quoting *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

2. Defamation Under New York Law

Because subject matter jurisdiction in this case is based upon diversity of citizenship, the Court applies the choice of law rules of the forum state. *See Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). New York choice of law rules mandate application of the substantive law of the state with the most significant relationship to the alleged tort. *See Reeves* v. *Am. Broad. Cos.*, 719 F.2d 602, 605 (2d Cir. 1983) (citing *Nader* v. *Gen. Motors Corp.*, 25 N.Y.2d 560 (1970)). The parties' briefing indicates their mutual belief that New York law applies in this case (*see, e.g.*, Def. Br. 13; Pl. Opp. 2), and the Court agrees, given that The Times has its principal place of business in New York and published the allegedly defamatory statements from that location (*see* SAC ¶ 4).

Under New York law, defamation is defined as "a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Foster* v. *Churchill*, 87 N.Y.2d 744, 751 (1996) (citations and internal quotation marks omitted). "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." *Aronson* v. *Wiersma*, 65 N.Y.2d 592, 593 (1985). "Under New York law, to establish a claim for defamation, a

plaintiff must plead [i] a defamatory statement of fact; [ii] that is false; [iii] published to a third party; [iv] 'of and concerning' the plaintiff; [v] made with the applicable level of fault on the part of the speaker; [vi] either causing special harm or constituting slander per se; and [vii] not protected by privilege." *Cummings* v. *City of New York*, No. 19 Civ. 7723 (CM), 2020 WL 882335, at *15 (S.D.N.Y. Feb. 24, 2020) (internal quotation marks omitted).

B. Analysis[2]

1. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted as to the January Article

The Times argues that Plaintiff's cause of action arising out of the January Article should be dismissed because: (i) the article's characterizations of Plaintiff, first, as an "open white nationalist" (*see* SAC ¶ 50), and later revised to a "white nationalist" (*see* January Article; SAC ¶ 63), constitute non-actionable statements of opinion rather than false statements of fact (Def. Br. 13-17); (ii) the article's hyperlink to the SPLC's entry on Plaintiff did not republish allegedly defamatory material held on the SPLC site such that The Times can be held liable for that material (*id.* at 21); and (iii) Plaintiff has failed to show that The Times acted with actual malice towards Plaintiff (*id.* at 22-25). Plaintiff's efforts to refute each of arguments are discussed in the remainder of this section. (*See* Pl. Opp. 8-10, 14-21).

[2] In its Motion to Dismiss, Defendant does not challenge the adequacy of Plaintiff's allegation of damages. In any event, the Court finds that Plaintiff has sufficiently pleaded damages to survive dismissal on that ground.

a. Fact Versus Opinion

Central to the dispute in this case is the "distinction between expressions of opinion, which are not actionable, and assertions of fact, which may form the basis of a viable libel claim." *Gross* v. *New York Times Co.*, 82 N.Y.2d 146, 151 (1993). Because "falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action." *Rosner* v. *Amazon.com*, 18 N.Y.S.3d 155, 157 (2d Dep't 2015) (citations and internal quotation marks omitted).

The United States Supreme Court has recognized that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Thus, "loose, figurative, or hyperbolic language" is protected by the First Amendment, as it cannot reasonably be interpreted as stating actual, provable facts about an individual. *Id.* at 21. Protecting such speech ensures that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of this Nation." *Id.* at 20.

The New York Court of Appeals has embraced an even more free-speech-protective standard under the New York State Constitution for determining what constitutes non-actionable opinion. *See generally Immuno AG* v. *Moor-Jankowski*, 77 N.Y.2d 235 (1991), *cert. denied*, 500 U.S. 954 (1991); *see also Celle* v. *Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) ("Unlike

the Federal Constitution, the New York Constitution provides for absolute protection of opinions.").

The question whether a statement constitutes fact or opinion is a question of law for the court to decide. *See Chau* v. *Lewis*, 771 F.3d 118, 128 (2d Cir. 2014). To make this determination, courts consider three factors: (i) whether the statement in issue has a precise, readily understood meaning; (ii) whether the statement is capable of being proven true or false; and (iii) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is being read is likely to be opinion, not fact. *See Gross*, 82 N.Y.2d at 153. In applying these factors, courts have adopted a "holistic approach." *Davis* v. *Boeheim*, 24 N.Y.3d 262, 270 (2014). This involves looking "to the over-all context in which the assertions were made and determin[ing] on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff." *Id.* (internal quotation marks and alterations omitted) (quoting *Brian* v. *Richardson*, 87 N.Y.2d 46, 51 (1995)). "The burden rests with the plaintiff to establish that in the context of the entire communication a disputed statement is not protected opinion." *Celle*, 209 F.3d at 179.

In determining whether a particular communication is actionable, New York courts recognize a "distinction between a statement of opinion that implies a basis in facts that are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which

it is based or one that does not imply the existence of undisclosed underlying facts." *Gross*, 82 N.Y.2d at 153 (internal citations omitted) (citing *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied sub nom. Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977); *Buckley* v. *Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)). The former is actionable because a reasonable reader would infer that the writer knows certain facts, unknown to the audience, that support the opinion and are detrimental to the person toward whom the communication is directed; the latter is not actionable because a statement of opinion offered after a recitation of the facts on which it is based is likely to be understood by the audience as conjecture. *See id.* at 153-54.

In his opposition, Plaintiff argues that the inclusion of the January Article in the "News" section rather than in the "Opinion" section of The Times is dispositive of whether the statements contained in the article should be considered fact or opinion. (*See* Pl. Opp. 3, 4, 8). The Court does not agree that the analysis is this simple. Instead, it must consider the "full context of the communication" in which the allegedly defamatory statement appears. *Gross*, 82 N.Y.2d at 154.

By the Court's reading, the overall tone of the January Article indicates that it is meant as commentary rather than straight news. The article clearly conveys a particular perspective about Congressman King and his views; one need not look any further than the headline's reference to "racist remarks and divisive actions." (January Article). Thus, a reasonable reader would

understand that the January Article provides opinion as well as facts. *See, e.g.*, *Russell* v. *Davies*, 948 N.Y.S.2d 394, 394 (2d Dep't 2012) (finding that a reasonable reader of news reports describing plaintiff's essay as racist and anti-Semitic "would have concluded that he or she was reading and/or listening to opinions"); *Ratajack* v. *Brewster Fire Dep't Inc.*, 178 F. Supp. 3d 118, 165-66 (S.D.N.Y. 2016) (holding that claims that plaintiff was a "racist" were non-actionable opinion).

Narrowing its focus to the references to Plaintiff, the Court reaches different conclusions about the two different characterizations of Plaintiff. The Court concludes that the January Article's original description of Plaintiff as an "open white nationalist," considered in context, is stated as a falsifiable fact and "impl[ies] the existence of undisclosed underlying facts." *Gross*, 82 N.Y.2d at 153. Describing Plaintiff as an "*open* white nationalist" implies that he publicly self-identifies as such, rather than that The Times is making its own judgment about how to characterize his views. Whether Plaintiff self-identifies as a "white nationalist" is verifiable, and indeed in this lawsuit Plaintiff ardently denies that he does so. Additionally, the article does not provide any supporting information to contextualize the characterization. Accordingly, this alleged defamation cannot be dismissed as non-actionable opinion.

However, the "stealth edit," as Plaintiff describes it (*see* SAC ¶ 66), to modify the text to refer to Plaintiff as a "white nationalist" and to link to the SPLC's webpage on Plaintiff, changes the character of the statement. Again, the overall tone of the article suggests opinion-inflected commentary. In that

context, the description of Plaintiff as a "white nationalist" is properly interpreted as opinion because the term has a "debatable, loose and varying" meaning in contemporary discourse. *Buckley*, 539 F.2d at 894. To some, it may be essentially synonymous with "anti-immigration," a descriptor that Plaintiff cannot plausibly deny; to others, it may be synonymous with "white supremacist," which suggests a belief in a racial hierarchy that is not specific to the United States. There is no single, precise understanding of the term "white nationalist" that is falsifiable such that The Times's characterization of Plaintiff as such constitutes a statement of fact. Furthermore, the link to the SPLC's website, as objectionable as Plaintiff finds it, provides the previously-missing underlying basis for the characterization. Therefore, the Court finds that the final version of the January Article referring to Plaintiff as a "white nationalist" presents only non-actionable opinion.

In sum, the Court concludes that the original version of the January Article states as a matter of fact that Plaintiff is an "open white nationalist" and is therefore actionable, whereas the modified version of the January Article states as a matter of opinion that Plaintiff is a "white nationalist" and is therefore non-actionable.

b. Republication of SPLC Material

"Under New York defamation law, publication is a term of art." *Albert* v. *Loksen*, 239 F.3d 256, 269 (2d Cir. 2001) (internal quotation marks omitted) (quoting *Ostrowe* v. *Lee*, 256 N.Y. 36, 38 (1931) (Cardozo, C.J.)). Material is deemed published "as soon as read by any one else." *Id.* There is no dispute in

this case that the five articles at issue were "published" in the legal sense of the term. However, Plaintiff's claims implicate a corollary question, namely, whether The Times's manner of hyperlinking to the SPLC's articles on Plaintiff and VDARE constituted republication such that The Times is liable for drawing attention to allegedly defamatory content regarding Plaintiff published on the SPLC's website. (*See* SAC ¶¶ 68, 74-75, 83; *see also* Def. Br. 21; Pl. Opp. 14-16; Def. Reply 8-9).

Courts have concluded that merely hyperlinking to an existing publication does not duplicate the content of that publication and give rise to liability. *See Mirage Entm't, Inc.* v. *FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 39 (S.D.N.Y. 2018) (citing *Doctor's Data, Inc.* v. *Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012)). In contrast, courts have found that republication does occur when a defendant not only links to previously published material, but also repeats the allegedly defamatory statements. *See Enigma Software Grp. USA* v. *Bleeping Computer LLC*, 194 F. Supp. 3d 263, 277-78 (S.D.N.Y. 2016) (declining to dismiss claims where internet posts went "beyond merely hyperlinking" to the original post and instead "contain[ed] additional statements which [plaintiff] alleges are themselves defamatory"); *see also Clark* v. *Viacom Int'l Inc.*, 617 F. App'x 495, 505 (6th Cir. 2015) (unpublished decision) (explaining that "the test of whether a statement has been republished is if the speaker has affirmatively reiterated it in an attempt to reach a new audience that the statement's prior dissemination did not

encompass" (citing *Firth* v. *State*, 98 N.Y.2d 365, 371 (2002); RESTATEMENT (SECOND) OF TORTS § 577A, cmt. D)).

In the January Article, The Times hyperlinked to the SPLC's entry on Plaintiff in support of its characterization of Plaintiff as a "white nationalist." The Times argues that it "is not liable for the contents of the SPLC website, simply because it hyperlinked to the site" (Def. Br. 21); Plaintiff responds that "Defendant not only hyperlinked to the SPLC website, but repeated and endorsed the smears found on the SPLC website" (Pl. Opp. 15). The Court agrees with The Times that it would not be liable for content published on the SPLC's website had it merely linked to that site, *see Mirage Entm't, Inc.*, 326 F. Supp. 3d at 39, but disagrees that that is all The Times did. Rather, the January Article adopted and shared with a new audience the SPLC's characterization of Plaintiff as a "white nationalist." This constitutes potentially actionable republication. *See Enigma Software Grp. USA*, 194 F. Supp. 3d at 278; *see also Clark*, 617 F. App'x at 505. However, as discussed above, the statement that The Times republished is a statement of opinion that does not provide a basis for a defamation claim.

c. Showing of Actual Malice

"If the plaintiff is a public figure suing a media defendant, the First Amendment requires actual malice." *Celle,* 209 F.3d at 176 (citing *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 155 (1967)). "Those who have voluntarily sought and attained influence or prominence in matters of social concern are generally considered public figures." *Id.* (citing *Gertz* v. *Robert Welch, Inc.*, 418

U.S. 323, 324 (1974)). Plaintiff implicitly acknowledges that he is a public figure (SAC ¶¶ 6, 100, 112-13); thus he must plead and prove actual malice by "clear and convincing evidence." *Contemporary Mission* v. *The N.Y. Times Co.*, 842 F.2d 612, 621 (2d Cir. 1988).

"Actual malice" means that a publisher acted with knowledge that statements were false, or despite a "high degree of awareness" of their "probable falsity." *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989). Mere deviation from normal journalistic standards does not constitute actual malice. *See, e.g.*, *id.* at 665 ("[A] public figure plaintiff must prove more than an extreme departure from professional standards" to demonstrate actual malice); *see also Biro* v. *Condé Nast*, 963 F. Supp. 2d 255, 285 (S.D.N.Y. 2013). This "heavy burden of proof," *Contemporary Mission*, 842 F.2d at 621, serves a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and permit even "erroneous" commentary about public figures in certain circumstances, *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 270-72 (1964). When a plaintiff fails to plausibly allege that the publisher knowingly published false statements or acted with reckless disregard for the truth, courts may properly dismiss the case at the pleading stage. *See, e.g.*, *Biro* v. *Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (stating that to survive a motion to dismiss, "a public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable expectation that discovery will reveal evidence of actual malice" (internal quotation marks omitted)).

With respect to the January Article, Plaintiff must plausibly allege that The Times knew, or recklessly ignored information suggesting, that he did not hold "white nationalist" views, but published that characterization anyway. Plaintiff's criticism of The Times's apparent acceptance of the SPLC's characterization and disregard of Plaintiff's objections notwithstanding (*see* Pl. Opp. 16-17), there is ample basis in the material of which the Court has taken judicial notice for The Times to reasonably have deemed Plaintiff's views as falling within a broad colloquial understanding of the term "white nationalist." The Times's decision not to validate Plaintiff's preferred characterization and the differences he perceives between "white nationalism" and "civic nationalism" does not constitute recklessness. Rather, The Times was within its right to base its description of Plaintiff on its own evaluation of Plaintiff's published writings and other public commentary and on the analysis of an organization The Times perceived as having relevant expertise, namely the SPLC.[3]

Thus, Plaintiff's first cause of action concerning the January Article must be dismissed.

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[3] The reporters on the articles at issue in this case were also not precluded from adopting a critical posture towards Plaintiff and his views merely because at one point, twenty-five years ago, two other writers in The Times were more "complimentary" of Plaintiff's book, *Alien Nation*. (*See* SAC ¶¶ 7-10). The Court imagines that all sorts of views have been published in The Times in its 169-year existence, many of which would today be declaimed as relics of times gone by. Social mores change, and the views reflected in The Times are allowed to change with them. Such evolution does not constitute an "intellectual witch hunt" (Pl. Opp. 7), or "ill will" towards Plaintiff (*see* SAC ¶¶ 68, 98).

2. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted as to the August and September Articles

Next, Defendant argues that the causes of action arising out of the August and September Articles must be dismissed because: (i) the August and September Articles stated only non-actionable opinion regarding VDARE (*see* Def. Br. 17-19); (ii) the allegedly defamatory statements are not "of and concerning" Plaintiff (*see id.* at 19-20); and (iii) Plaintiff has not adequately pleaded actual malice (*see id.* at 22-25). The Court agrees with Defendant on each point.

a. Fact Versus Opinion

Plaintiff's claims with respect to the August and September Articles fail for the same reason as do his claims regarding the January Article: The articles state only opinions, not falsifiable facts. The August Article's characterizations of VDARE are all attributed as the opinion of the individuals discussed in the story, and are not stated as The Times's independent view. (*See* August Article (explaining that: (i) the EOIR briefing "linked to a post from VDare, a website that regularly publishes white nationalists, according to the 440-member union"; (ii) "[t]he Southern Poverty Law Center classifies VDare as an anti-immigration hate website"; (iii) "Judge Tabbador said she learned about the newsletter from colleagues who were outraged about the link to the white nationalist website"; and (iv) "Aryeh Tuchman, associate director of the Anti-Defamation League's Center on Extremism … added that it appeared that extremists, 'mainly confined to the racist, anti-immigrant site VDare,'" have co-opted the term "kritarch")). The September Article provides no such context for

the statement that VDARE "regularly publishes white nationalists," but Plaintiff does not appear to object to this part of the statement. (*See* SAC ¶¶ 135-38). In any event, the characterization of some individuals who post on VDARE as "white nationalists" is the same sort of non-actionable opinion commentary discussed previously.[4]

b. Statements "Of and Concerning" Plaintiff

To state a claim for defamation, a plaintiff must establish "that the [challenged] matter is published of and concerning the plaintiff." *Kirch* v. *Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006). That is, a plaintiff must show that "the allegedly defamatory comment refer[s] to the plaintiff." *Brady* v. *Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 788 (2d Dep't 1981). Whether a plaintiff has adequately alleged that the defamatory statements are "of and concerning" him is a question appropriately considered by a court on a Rule 12(b)(6) motion. *See, e.g.*, *Elias* v. *Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017) ("Whether a plaintiff has satisfied this requirement is typically resolved by the court at the pleading stage." (citation omitted)); *Gilman* v. *Spitzer*, 538 F. App'x 45 (2d Cir. 2013) (summary order) (affirming dismissal where plaintiff did not adequately plead the statement at issue was "of and concerning" him); *Three Amigos SJL Rest., Inc.* v. *CBS News Inc.*, 28 N.Y.3d 82, 87 (2016) (same).

"[W]here the person defamed is not named in a defamatory publication, it is necessary, if it is to be held actionable as to him, that the language used be

[4] Some individuals who publish their writings on VDARE may very well self-identify as "white nationalists" or related terms.

such that persons reading it will, in the light of the surrounding circumstances, be able to understand that it refers to the person complaining." *DeBlasio* v. *North Shore Univ. Hosp.*, 624 N.Y.S.2d 263, 264 (2d Dep't 1995). As a general rule, defamatory words directed at a corporation or organization do not give rise to a claim by the individuals associated with it. *See, e.g.*, *Gilman*, 538 F. App'x at 47 (concluding that allegations of extensive illegal activity by company were not "of and concerning" an employee); *Cardone* v. *Empire Blue Cross & Blue Shield*, 884 F. Supp. 838, 847-48 (S.D.N.Y. 1995) (statements defamatory of company are not "of and concerning" its CEO); *Three Amigos*, 28 N.Y.3d at 87 (allegations that a strip club was a mafia enterprise were not "of and concerning" individuals associated with the club); *Fulani* v. *N.Y. Times Co.*, 686 N.Y.S.2d 703 (1st Dep't 1999) (statement defaming political group not "of and concerning" a prominent member).

Neither the August Article nor the September Article names Plaintiff. (*See* August Article; September Article). Nevertheless, Plaintiff claims that the articles defame him personally by referring to a blog post on VDARE as "extremist," saying the post contained an anti-Semitic reference, and quoting sources calling VDARE "an anti-immigration hate website" and a "white nationalist website." (SAC ¶¶ 110-11, 122, 138-40). Plaintiff argues that he has "come to be known synonymously with VDARE to the public at large" and "is the face of VDARE," and therefore any reference to VDARE should be deemed a reference to him. (*See, e.g.*, *id.* at ¶¶ 112-22).

At the same time, however, Plaintiff states that VDARE "publishes writers of all political persuasions, so long as they are critical of America's post-1965 immigration policies." (SAC ¶ 11). That being the case, Plaintiff cannot possibly hold all the views reflected on the site. As Plaintiff points out, when determining whether a person not named has nevertheless been defamed by implication, the relevant audience is not "all the world" but rather "those who knew or knew of plaintiff." (Pl. Opp. 12 (citing Comment to New York Pattern Jury Instruction § 3:25)). The relevant audience in this case — that is, those who are aware of VDARE and Plaintiff's role at the site — can also be presumed to know that the site publishes "writers of all political persuasions" (SAC ¶ 11), and that a blog post authored by someone other than Plaintiff does not necessarily reflect Plaintiff's views on the subject matter discussed. *Cf. Cardone*, 884 F. Supp. at 847 (statements about a company's employees only concern the CEO "if those who know [the CEO] could conclude that ... he was directly responsible for all defalcations of his subordinates. It may be that ... he had ultimate responsibility, but that does not mean he was libeled when the acts of ... [his] employees were impugned.").[5] In the same way, no one would reasonably assume that everything published in The Times reflects the personal views of its executive editor, Dean Baquet. The references in the

[5] The Court notes that Plaintiff wants to have it both ways: He claims that everything to do with VDARE is attributable to him, and at the same time objects to The Times drawing inferences about his views based on the content he chooses to publish as editor of VDARE, including views that the articles in dispute characterize as "white nationalist," "white supremacist," "extremist," and "anti-Semitic." The writings by other authors published on VDARE either do or do not reflect back on Plaintiff; they cannot do both simultaneously.

August and September Articles to the controversial blog post are therefore not "of and concerning" Plaintiff as a matter of law.

The references to VDARE more generally — the August Article describes VDARE as a "white nationalist website" (August Article), and the September Article states that the site "regularly publishes white nationalists" (September Article) — may be closer to being "of and concerning" Plaintiff given his prominent role at the site. But the Court need not decide that issue, given that Plaintiff's claims must be dismissed on other grounds.

c. Showing of Actual Malice

For the same reasons discussed above regarding the January Article, Plaintiff's claim of "actual malice" is implausible. There is no evidence that The Times knew the characterizations of VDARE in the articles were false and, given the surrounding circumstances — namely, the views Plaintiff himself has previously expressed publicly and the views expressed by other individuals on VDARE, it cannot be said that The Times acted recklessly either.

Consequently, Plaintiff's second and third causes of action are dismissed.

3. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted as to the November Article

Defendant argues that the cause of action arising out of the November Article must be dismissed because: (i) the November Article stated only non-actionable opinion (*see* Def. Br. 15-17); and (ii) Plaintiff has not adequately pleaded actual malice (*see id.* at 22-25). The Court agrees with Defendant on each point for the same reasons previously discussed, and thus will be brief.

The November Article focuses on Stephen Miller, a close adviser to President Trump, and his "intellectual ties to the world of white nationalism," as described by The Times. (November Article). As with the January Article, the overall tone of the article is one of commentary rather than neutral reportage. The article names Plaintiff as the "founder of the anti-immigration website VDARE" and directly quotes remarks Plaintiff made at the Conservative Political Action Conference in February 2012, with a hyperlink to video of the event. (*Id.*; Def. Br. 10-11). These quotes are factually accurate and thus cannot be defamatory.

The November Article further quotes sources describing VDARE as a "hate website," a "white supremacist website," and a "white nationalist organization." (November Article). These descriptions are not The Times's, but rather those of the sources cited, and, in any event, are plainly opinion rather than statements of fact. To the extent Plaintiff objects to The Times placing him into the "world of white nationalism" and referring to his views as "white nationalist thinking" (*see* November Article), these characterizations, like those in the January Article, are properly considered opinion rather than fact. And again, Plaintiff does not make a plausible showing of actual malice by The Times. Accordingly, Plaintiff's fourth cause of action does not withstand scrutiny.

4. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted as to the May Article

Defendant argues that the cause of action arising out of the May Article must be dismissed because: (i) the May Article's reference to VDARE is not "of

and concerning" Plaintiff (*see* Def. Br. 19-21); and (ii) Plaintiff has not adequately pleaded actual malice (*see id.* at 22-25).[6]

The May Article, which the Times republished without modification from the Reuters wire service (*compare* May Article, *with* Reuters Article), discusses a monthly report issued by Facebook in which the company said it had suspended accounts with ties to VDARE that it considered to be engaged in "coordinated inauthentic behavior." (*See* May Article). The May Article also quotes Facebook's head of cybersecurity policy saying that the network of accounts "push[ed] coronavirus-related disinformation" and "promote[d] anti-Semitic and anti-Asian hate speech tied" to the pandemic. (*Id.*). It is plainly Facebook's view — not The Times's or Reuters's — that the Facebook accounts in question had links to VDARE, participated in "coordinated inauthentic behavior," and pushed disinformation and hate speech. Plaintiff does not suggest a basis for the reporters to doubt the validity of Facebook's findings, and the Court cannot think of one.

Furthermore, it strains credulity to say that Facebook's statements regarding the VDARE-connected network are "of and concerning" Plaintiff. There is no suggestion that the "campaign" of inauthentic behavior was masterminded by Plaintiff. A reader could just as plausibly infer that other individuals associated with VDARE, or even just avid readers of the site, were

[6] Defendant also argues in a footnote that The Times is protected by Section 230 of the Communications Decency Act because Reuters, not The Times, provided the content. (*See* Def. Br. 21 n.7). Plaintiff does not respond to this argument. The Court need not reach this argument because Plaintiff's claim fails as a matter of defamation law.

behind the activity in question. And Plaintiff provides no explanation for his claim that the May Article "accuse[s] Plaintiff of violating VDARE's 501(c)(3) status." (SAC ¶ 177). The Court does not credit this allegation as well-pleaded.

To the extent that Plaintiff believes that the Reuters reporters defamed him by declaring VDARE a "white supremacist site" (*see* SAC ¶¶ 171(b), 175), Plaintiff's defamation claim against Defendant nevertheless must be dismissed both because this is a statement of opinion and because The Times is merely a republisher of the Reuters article. "A company … which simply republishes a work is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of the reporter." *Karaduman* v. *Newsday, Inc.*, 51 N.Y.2d 531, 550 (1980) (internal quotation marks omitted) (quoting *Rinaldi* v. *Holt, Rinehart & Winston*, 42 N.Y.2d 369, 383 (1977)). The Times republished, verbatim, an article from Reuters, an indisputably reputable wire service. (*See* May Article). Reuters provided all content and Plaintiff gives no reason why The Times should have "question[ed] the accuracy of the article[] or the bona fides of the reporter." *Karaduman*, 51 N.Y.2d at 550.

In sum, Plaintiff does not adequately plead false statements of fact in the May Article, of and concerning him, made with actual malice by The Times. His fifth cause of action therefore fails as well.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint is hereby GRANTED.

The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: December 17, 2020
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

EXHIBIT C

The New York Times Company

David McCraw
Senior Vice President &
Deputy General Counsel

T 212 556 4031

mccraw@nytimes.com

620 8th Avenue
New York, NY 10018
nytimes.com

January 21, 2021

VIA EMAIL

Frederick C. Kelly, Esq.
One Harriman Square
Goshen, NY 10950
fckellylaw@gmail.com

Re: *Brimelow v. N.Y. Times*, 20-cv-222 (S.D.N.Y.), 21-66 (2d Cir.)

Dear Fred:

On November 10, 2020, Governor Cuomo signed legislation amending—and substantially strengthening—New York's "anti-SLAPP" statute. As amended, the law now applies to cases such as Mr. Brimelow's action in which news coverage is the basis of the claim.[1]

Most relevant to our case, the amendments make attorneys' fee awards for prevailing defendants mandatory rather than discretionary. *See* N.Y. Civ. Rights Law § 70-A. Under the amended fees provision:

> costs and attorney's fees shall be recovered upon a demonstration . . . that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.

N.Y. Civ. Rights Law § 70-A(1)(a) (emphasis added). The amendments are effective immediately and, as a federal district court recently held, apply to cases like this one that were initiated before the law was enacted

[1] Under the amended law, an "action involving public petition and participation" is "a claim based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." N.Y. Civ. Rights Law § 76-A(1)(a).

and remain in litigation. *See Palin v. N.Y. Times Co.*, 2020 U.S. Dist. LEXIS 243594, at *13 (S.D.N.Y. Dec. 29, 2020).[2]

The district court's decision in our case makes plain that Mr. Brimelow's complaint is "without a substantial basis in fact and law." Should he persist in his appeal and lose again, we will seek an award of fees through a separate action against him. *See* N.Y. Civ. Rights Law § 70-A(1) (a defendant "may maintain an action, claim, cross claim or counterclaim" to recover damages and fees); *see, e.g.*, *Dynamic Energy Sols., LLC v. Pinney*, 387 F. Supp. 3d 176, 183 n.1 (N.D.N.Y. 2019) (noting that statute permits a plaintiff to "file its anti-SLAPP claim . . . as an independent cause of action in federal court"); *see also New York Times Co. v. CIA*, 251 F. Supp. 3d 710, 715 (S.D.N.Y. 2017) (in FOIA case, in-house counsel awarded fees equal to what outside counsel would receive for same work); *Video-Cinema Films, Inc. v. CNN, Inc.*, 2004 U.S. Dist. LEXIS 1428, at *18 (S.D.N.Y. Feb. 3, 2004) (in copyright case,"attorneys' fees and costs should be awarded for litigation performed by in-house counsel if such fees would be awarded for the same work performed by outside counsel").

Because the statute also allows for punitive damages when the intent of the action is "harassing, intimidating, punishing or maliciously inhibiting free speech, petition, or association rights," please be advised that Mr. Brimelow is required to preserve all communications related to his motivation in bringing the suit or continuing the action on appeal, including any communications related to seeking and obtaining funding for the litigation. *See* N.Y. Civil Rights Law § 70-A(1)(c).

Sincerely,

David McCraw

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[2] The fees provision applies in federal court because it is substantive, not procedural. *See Palin*, 2020 U.S. Dist. LEXIS 243594, at *7 (noting that substantive state law applies in federal court); *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993) ("Attorney's fees mandated by state statute are available when a federal court sits in diversity.") (citing *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240, 259 n.31 (1975)).

EXHIBIT D

21-66-cv
Brimelow v. N.Y. Times Co.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of October, two thousand twenty-one.

PRESENT:

JOHN M. WALKER, JR.,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

Peter Brimelow,

Plaintiff-Appellant,

v. 21-66-cv

The New York Times Company,

Defendant-Appellee.*

FOR PLAINTIFF-APPELLANT: FREDERICK C. KELLY, Goshen, NY.

FOR DEFENDANT-APPELLEE: DANA R. GREEN (David E. McCraw, *on the brief*), The New York Times Company, New York, NY.

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* The Clerk of Court is respectfully directed to amend the caption as above.

Appeal from an order and judgment of the United States District Court for the Southern District of New York (Failla, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the December 16, 2020 order and January 6, 2021 judgment of the district court are **AFFIRMED**.

Plaintiff-Appellant Peter Brimelow appeals from a December 16, 2020 order and January 6, 2021 judgment of the United States District Court for the Southern District of New York (Failla, *J.*), granting Defendant-Appellee The New York Times Company's (the "Times") motion to dismiss the Second Amended Complaint (the "Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(6). In the Complaint, Brimelow brought state law claims alleging that the Times had defamed him in five published articles between January 2019 and May 2020 by characterizing him directly and indirectly (by referencing the content on the website that he operates, VDARE) as being "animated by race hatred," including accusations that he is an "open white nationalist" and "anti-Semitic." Joint App'x at 20–21, 30–31, 36, 39–40, 42–44 (Compl. ¶¶ 50, 110, 135, 153, 166, 171).

The district court dismissed these claims on the ground that the Complaint had failed to state a claim upon which relief could be granted because, among other reasons, it did not plausibly allege the necessary elements of a defamation claim under New York law with respect to any of the five articles. Brimelow timely appealed. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to affirm.

* * *

Brimelow argues on appeal that the district court erred in concluding that the Complaint failed to state a claim under New York law and therefore granting the Times's motion to dismiss his defamation claims. "We review *de novo* the grant of a motion to dismiss under Rule 12(b)(6) . . . , accepting as true the factual allegations in the complaint and drawing all inferences in the plaintiff's favor." *Biro v. Condé Nast*, 807 F.3d 541, 544 (2d Cir. 2015). To survive a motion to dismiss, "a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under New York law, a complaint asserting defamation claims must plausibly allege five elements: "(1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019). When a defamation claim is brought by a public figure, the First Amendment independently requires a showing that the defendant acted with actual malice. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

For the reasons discussed below, we conclude that the Complaint has failed to state a claim because it does not plausibly allege that the Times acted with actual malice and thus did not plausibly allege all the elements of a claim for defamation necessary to survive a motion to dismiss. *See Biro*, 807 F.3d at 546 ("[A] public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of actual malice." (second alteration in original) (internal quotation marks omitted)); *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) ("The bottom

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line, then, is that [plaintiff] has not nudged his actual-malice claim across the line from conceivable to plausible, so the [district court] rightly dismissed the complaint. . . . [Actual] malice is not a matter that requires particularity 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 . . . ." (internal quotation marks and citations omitted)); *accord Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) ("[E]very circuit that has considered the matter has applied the *Iqbal*/*Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings." (citations omitted)).

As a threshold matter, we recognize that the degree of fault the Complaint must plead with respect to the Times's alleged defamation depends upon whether Brimelow is a public or private figure. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333–35, 347 (1974); *accord Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001). The Complaint alleges that Brimelow "has had a long and distinguished career as a writer and journalist," having written, among other things, the "bestselling book, Alien Nation: Common Sense About America's Immigration Disaster," and he is "widely known in his capacity as both the creator and editor of [the website] VDARE." Joint App'x at 8, 32 (Compl. ¶¶ 6, 112, 117). Therefore, Brimelow is a public figure. *See Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) ("Those who have voluntarily sought and attained influence or prominence in matters of social concern are

generally considered public figures. Whether a plaintiff is a public figure is a question of law for the court." (citations omitted)). Brimelow does not argue otherwise.

Because Brimelow is a public figure, the First Amendment requires that the Complaint plausibly plead that the Times acted with "actual malice" in publishing defamatory material about Brimelow. *Id.* Actual malice requires that the Complaint plausibly allege that the Times published the defamatory statements that form the basis of Brimelow's claims "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Palin*, 940 F.3d at 809 (internal quotation marks omitted). "The reckless conduct needed to show actual malice is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing, but by whether there is sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication[.]" *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (internal quotation marks and citations omitted). Actual malice can be established "[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence." *Celle*, 209 F.3d at 183 (alterations in original) (internal quotation marks omitted). We have emphasized that the actual malice standard imposes on a plaintiff "a heavy burden of proof, a burden that is designed to assure to the freedoms of speech and press that breathing space essential to their fruitful exercise." *Contemp. Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 621 (2d Cir. 1988) (internal quotation marks and citation omitted).

Brimelow's principal argument regarding the actual malice element relies upon the Complaint's allegation that the Times published the alleged defamatory statements about him

being a "white nationalist" and an "open white nationalist" (and similar statements about VDARE being a "[w]hite [n]ationalist [w]ebsite[]"), Joint App'x at 20–21, 30–31, 36, 39–40, 43–44 (Compl. ¶¶ 50, 67, 110, 135, 151, 153, 171), despite the existence of contrary evidence—in particular, Brimelow's alleged "repeated and persistent denials" as to the truth of such statements, which, according to Brimelow, show that the Times acted with knowledge that the statements were false or with reckless disregard as to whether they were false, Joint App'x at 22–23, 26, 28–29, 34, 37–38, 41, 45–46 (Compl. ¶¶ 57(f), 59–61, 85, 100, 124(h), 126, 142(g), 144, 156(g), 158, 178(g), 180). To demonstrate Brimelow's purported "repeated and persistent denials," Joint App'x at 22 (Compl. ¶ 57(f)), the Complaint heavily relies upon a "February 23, 2018 interview with Slate's Osita Nwanevu, [in which Brimelow] stated [that] 'Personally, I would regard myself as a civic nationalist,'" Joint App'x at 22–23 (Compl. ¶¶ 60–61). That statement does not establish actual malice on the part of the Times. Brimelow does not show that the Times was or should have been aware of that statement and purposefully avoided it.

In any event, to the extent that Brimelow relies on this alleged denial during the 2018 interview or similar denials contained in his letters to the Times during the period when these five articles about him and the VDARE website were being published, it is well settled that denials without more do not support a plausible claim of actual malice. *See Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977) (asserting that the actual malice "standard . . . cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error"); *see also Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d

Cir. 2006) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." (second alteration in original) (internal quotation marks omitted)). Nor are we persuaded by Brimelow's attempts to find additional support in the Complaint's references to the Times's alleged departure from "accepted newsgathering standards" and its "own commitment to fairness and impartiality," Joint App'x at 22, 34, 37, 41, 45 (Compl. ¶¶ 58, 125, 143, 157, 179), in reporting on Brimelow. These allegations, even when considered collectively, sound in no more than journalistic negligence and thus fail to plausibly allege the requisite higher degree of fault—actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) ("Failure to investigate does not in itself establish bad faith." (citing *Sullivan*, 376 U.S. at 287–88)); *see also Contemp. Mission, Inc.*, 842 F.2d at 621 ("[A] finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing . . . . Rather, a public figure defamation plaintiff must show either that the publisher actually entertained serious doubts about the veracity of the publication, or that there are *obvious* reasons to doubt the veracity of the informant or the accuracy of his reports." (alterations in original) (internal quotation marks omitted)).

Finally, Brimelow contends that the Complaint sufficiently alleges actual malice by relying on *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), which he maintains clearly held that "ill will combined with an extreme departure from journalistic standards is sufficient to satisfy the [actual] malice standard." Reply Br. at 13; *see, e.g.*, Joint App'x at 22–24 (Compl. ¶¶ 58, 68). Brimelow misreads *Harte-Hanks*. To be sure, the Supreme Court in *Harte-Hanks* did acknowledge that "[a] newspaper's departure from accepted standards and the evidence

of motive" could be used as circumstantial evidence to support "[a] court's ultimate conclusion that the [newspaper] demonstrated a reckless disregard as to the truth or falsity of [alleged defamatory statements]." 491 U.S. at 667–68 (internal quotation marks omitted). However, the Court emphasized, in reviewing a judgment entered on a jury verdict in plaintiff's favor, that the "[newspaper defendant was] plainly correct in recognizing that a public figure plaintiff must prove *more than* an extreme departure from professional standards and that a newspaper's motive in publishing a story. . . cannot provide a sufficient basis for finding actual malice." *Id.* at 665 (emphasis added). Thus, the Court cautioned that "courts must be careful not to place too much reliance on such factors." *Id.* at 668. Indeed, actual malice was found in *Harte-Hanks* because the evidence of the newspaper's departure from accepted standards and ill will toward the plaintiff was supported by a host of other evidence that demonstrated that the defendant was "purposeful[ly] avoid[ing] . . . the truth," including, as particularly relevant here, evidence that the plaintiff (and several other witnesses) had "unambiguously denied" the alleged defamatory statements. *Id.* at 691–92.

Thus, the facts in *Harte-Hanks* stand in contrast to the allegations asserted in this case relating to the element of actual malice. Although referencing the alleged ill will toward Brimelow harbored by the Times, the Complaint provides no basis for plausibly inferring that the Times had any doubts about the truth of its statements regarding Brimelow or the VDARE website. *See Behar*, 238 F.3d at 174 ("Despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication."). In short, we find no combination of allegations from which one could plausibly

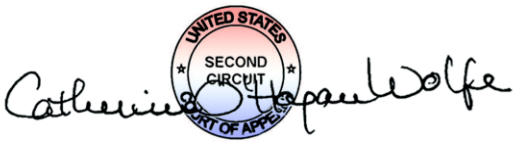
infer that the Times was purposely avoiding the truth in its reporting on either Brimelow or the VDARE website.

Accordingly, we conclude that the Complaint failed to plausibly allege that the Times published its statements about Brimelow or the VDARE website with reckless disregard as to whether they were true or false. Because the Complaint failed to sufficiently allege the actual malice element of a claim for defamation under New York law, the district court properly granted the Times's motion to dismiss for failure to state a defamation claim upon which relief could be granted.[1]

* * *

We have considered Brimelow's remaining arguments and find in them no basis for reversal. Accordingly, we **AFFIRM** the order and judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[1] Brimelow also challenges the district court's other grounds for dismissing his defamation claims, including its conclusions that: (1) all but one of the statements in the articles about Brimelow and the VDARE website were non-actionable opinions as a matter of law; (2) the statements about the VDARE website and others were not "of and concerning" Brimelow; and (3) one of the articles in the Times about the VDARE website was subject to the wire service defense because it was a verbatim republication of a Reuters article. However, because we affirm the district court's dismissal of the Complaint on the ground that the Complaint has failed to plausibly allege the requisite element of actual malice, we need not and do not reach these other issues.

EXHIBIT E

No.: _____

In the
Supreme Court of the United States

PETER BRIMELOW,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Frederick C. Kelly
Counsel of Record
LAW OFFICE OF FREDERICK C. KELLY
One Harriman Square
Goshen, NY 10924
(845) 294-7945
fckellylaw@protonmail.com

Counsel for Petitioner

Glen K. Allen
GLEN K. ALLEN ATTORNEY AT LAW
5423 Springlake Way
Baltimore, MD 21212
(410) 802 6453
GlenAllenLaw@Protonmail.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

Whether the Sullivan Malice rule should be abandoned, especially where it serves to spare government policy from criticism and shelters a powerful media entity which deliberately acted to narrow debate – in favor of governmental policy – on topics of vital public importance, such as race, intelligence, and crime?

Whether Brimelow appropriately pleaded Sullivan Malice where he showed a cumulative and repeating pattern that included wilful disregard of well established scientific evidence, failure to seek corroboration from obvious sources, reliance upon a highly questionable source with a reputation for persistent inaccuracies, ill will, and the continued violation of several of the New York Times's own journalistic standards?

PARTIES TO THE PROCEEDING

Petitioner is Peter Brimelow (“Brimelow”). Respondent is The New York Times Company ("the New York Times").

STATEMENT OF RELATED CASES

The following cases are the proceedings below and judgments entered:

a. *Peter Brimelow v. New York Times Co.*, Civil Action No.20-cv-00222-KPF, United States District Court, Southern District of New York. Judgement entered on January 6, 2021.

b. *Peter Brimelow v. New York Times Co.*, Case No. 21-66, United States Court of Appeals for the Second Circuit. Judgment entered October 21, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brimelow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("COA").

OPINIONS BELOW

The opinion of the COA ("COA Opinion") is published at 2021 U.S. App. LEXIS 31672 and 2021 WL 4901969.

The opinion of the United States District Court for the Southern District of New York ("District Court") is published at 2020 U.S. Dist. LEXIS 237463 and 2020 WL 7405261.

JURISDICTION

The judgment of the COA was entered on October 21, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . .".

STATEMENT OF THE CASE

From January 15, 2019 through May 5, 2020, the New York Times carried on a remarkable campaign of vilification against Brimelow. From the first date to the last, it launched a series of attacks aimed at him, all carried in the news section of Respondent's paper. The New York Times, which had formerly celebrated Brimelow's courage and insight for addressing politically important but controversial issues of race,

now charged him with being "an open white nationalist," with "attack[ing] sitting immigration judges with racial and ethnically tinged slurs," with running a "hate website," with "us[ing]... [the word kritarchy] in a pejorative manner [to cast] Jewish history in a negative light as an anti-Semitic trope of Jews seeking power and control," with running a "white supremacist website," and with running a "network of fake accounts," among other things. *Id.*

It soon transpired that the rationale for these attacks was that Brimelow had published scientific evidence for racial differences in intelligence and crime. Thus, after the first barrage, which accused Brimelow of being an "open white nationalist," the New York Times responded to Brimelow's first letter of protest by hyper-linking the term "white nationalist" to the Southern Poverty Law Center's website entry on Brimelow. That website entry explained that it relegated Brimelow to the "hate" category because of his publication of science dealing with racial differences, singling out the topic of intellectual differences among the races as a particularly egregious example of "pseudo-science." In a subsequent attack, published several months later on November 18, 2019, the New York Times would explicitly acknowledge that the Southern Poverty Law Center (SPLC) categorizes both Brimelow and his website, VDARE.com, as sources of alleged "hate" for the publication of science dealing with racial differences.

That there are measurable differences in intelligence among the races is not "pseudo-science," but well established scientific fact. It is so well established that approximately seventy years ago,

when briefing *Brown v. Board of Ed.*, 347 U.S. 483 (1954), Thurgood Marshall himself repeatedly acknowledged such evidence, offering several different volumes to this Court that detailed the fact that blacks (on average) consistently rank behind whites on measurable intelligence tests. Marshall's own arguments demonstrated that even as long ago as the early 1950s, such evidence was already old news. At that time the evidence had been steadily and consistently accumulating for decades; it would continue to grow in the future.

Moreover, the New York Times knew that such evidence was well founded, for the New York Times itself had published several reports in its science section on the genetic differences among the races. Tellingly, the New York Times had also published evidence for a strong genetic basis for intelligence. And the New York Times even knew that its own science editor, who had detailed the link between genes and intelligence, had been condemned by none other than the SPLC – the very same authorities that The New York Times had invoked in their jihad against Brimelow.

The New York Times also knew that false accusations of racism, especially where the subject concerns race and intelligence, were often fatal to the uninhibited, robust and wide open debate that thoughtful men understand is necessary to intellectual progress. Indeed, at the time of its campaign against Brimelow, it had in mind the recent example of Nobel Prize winner James Watson, who had been publicly assailed, fired, and at least temporarily cowed and silenced for daring to dissent

from the conventional wisdom.[1] Thus, the New York Times fully understood the silencing effect of speech. Indeed, it was targeting Brimelow precisely so as to police the boundaries of discourse and narrow the field of debate.

Respondent kept up the attacks in the face of repeated written protests by Brimelow. Respondent refused to permit Brimelow to publish a letter to the editor in which he defended himself, brushing off several requests. Perhaps most incredibly, Respondent continued its barrage not only after Brimelow had filed suit for libel, but after he reminded it, in submissions before the court, that the New York Times itself was "guilty" of the same kind of deviations from orthodoxy on the science of racial differences for which it was lately condemning him. Likewise, Respondent continued even after Brimelow reminded it of the enormous cost to intellectual freedom when even men like James Watson are battered into silenced by scurrilous attacks.

In attacking Brimelow the New York Times acted in wilful disregard of well established scientific evidence of which it knew; refused to permit Brimelow's point of view; repeatedly violated several of its own journalistic standards; and exhibited numerous other highly tell-tale signs of actual malice.

Jurisdiction was proper in the first instance because Brimelow was a citizen of Connecticut at the time of filing, while The New York Times was a citizen of New York and Delaware. The amount in controversy exceeds $75,000, exclusive of interest and

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[1] *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (Thomas, J., dissent)

costs. Thus, jurisdiction was proper under 28 U.S.C. § 1332.

REASONS FOR ALLOWANCE OF THE WRIT OVERVIEW

Brimelow's speech stands at the heart of the First Amendment. It concerns political matters of the highest order and references well established scientific evidence which is resisted and ignored by the government; it thus implies strong and well grounded criticism of governmental policy. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)

On the other hand, the New York Times's speech amounts to little more than name calling – the kind of communications which are "no essential part of any exposition of ideas," and "of such slight social value as a step to truth" that any benefits are clearly outweighed by the burdens of indulging such speech. *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). Invoking the *Sullivan* Malice rule to shield the NYT's speech has the paradoxical effect of silencing critics of governmental policies. This would appear to be a perverse outcome given that the ostensible purpose of the *Sullivan* Malice rule is to subject governmental policy to "uninhibited, robust, and wide open debate."

But appearances might be deceiving. Looking just below the surface, it is apparent that the *Sullivan* Malice rule, from the very beginning, permitted this Court to ally itself with a powerful media outlet to crush resistance to the Court itself. Given such provenance, that speech critical of this Court should become a casualty under the mandate of Sullivan is not surprising. But this means that the *Sullivan* Malice rule is not only unwarranted under any sound interpretation of the original understanding of the

First Amendment, but was flawed from the very beginning and was *never* the protection for government criticism it claimed to be. The *Sullivan* Malice rule should be abandoned.

POINT I: SPEECH IS NOT LIKE SCIENTIFIC DATA AND IS NOT MEASURED AND SIFTED AS SUCH; IT CONTAINS SILENCING POWER AND MUST BE EXAMINED FOR ABUSE.

In a recent dissent (*Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021)), Justice Gorsuch joined Justice Thomas's recent call (in *McKee v. Cosby*, 139 S. Ct. 675 (2019), Thomas, J. Concur) for reconsideration of the *Sullivan* Malice rule. *Id* at. 2430. Along the way, several insightful examinations of *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), were surveyed, including David A. Logan, "Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan," 81 OHIO ST. L. J. 759, 794 (2020); Richard A. Epstein, "Was New York Times v. Sullivan Wrong? 53 U. CHI. L. REV. 782 (1986); and (then Assistant Professor) Elena Kagan's "A Libel Story: Sullivan Then and Now," 18 L. & SOC. INQUIRY 197 (1993), among others. At the end, however, Justice Gorsuch indicates some doubts about the extent of his own inquiries, stating, "... I do not profess any sure answers. I am not even certain of all the questions we should be asking." *Berisha v. Lawson* at 2430.

A brief but extremely valuable article not cited by Justice Gorsuch would be William Smith, "The First Amendment and Progress" HUMANITAS, Summer 1987, 1. In that article, Professor Smith points to a hidden but questionable premise that underlies much of modern First Amendment jurisprudence. That premise reflects what Eric Voegelin has referred to as

the enthronement of "the Newtonian method of science as the only valid method of arriving at the truth." Voegelin, From Enlightenment to Revolution, Ed. John H. Hallowell (Duke University Press: Durham, 1975), p. 3. Following Voegelin, Professor Smith elaborates:

> The criteria by which words should be judged shifted from their moral and spiritual content to their utility as objects of science. In effect, words corresponded to scientific data. Some data, of course, were more valuable to progress than other data, but as in science the freedom to consider all data was the precondition to progress...
>
> Society was transformed into a giant laboratory in which all men were free to consider all things, and, with all these minds working, there was bound to be progress.
>
> Smith at p. 5.

However attractive to modern minds, these assumptions were foreign to the founding generation which ratified the First Amendment, as well as those such as Justice Story, who followed in the next generation[2].

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[2] Note Justice Story's curt dismissal of the notion that libel was something "peculiar" which rested on "harsh and extraordinary principles, not to be encouraged in an enlightened age" in *Dexter v. Spear*, 7 F. Cas. 624, F. Cas. No. 3867 (No. 3,867) (CC RI 1825)). Furthermore, in contrast to the Newtonian theory, Story readily acknowledges that the spiritual harm of defamation is often much worse than "any which can affect mere corporeal property." *Id.*

Despite being foreign to the First Amendment as originally understood, the premises of the "Newtonian method" have now thoroughly embedded themselves in First Amendment jurisprudence. Since the 70s this Court has instructed us that, like scientists in the lab, we must take words as data and at least temporarily suspend judgement on a host of exchanges that no sound man one could view with indifference, *e.g. Cohen v. California*, 403 U.S. 15 (1971), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239 (2002), or *Snyder v. Phelps*, 562 U.S. 443 (2011)

These developments reflect the intellectual revolution discerned by Professors Voegelin and Smith: "When this philosophy of science was applied to constitutional jurisprudence there could be almost no constitutional justification for the regulation of speech and expression." Smith, *supra.*

This is fundamentally misguided. Grasping this point is important because if we rest content with the *speech as data* paradigm we will miss the fact that speech itself can be self-limiting –silencing – while empirical data never is. In this regard, it seems remarkable the Alexis de Tocqueville's insights into the poor quality of American thought have never surfaced in this Court's First Amendment jurisprudence. Despite the formal guarantees of our First Amendment, de Tocqueville was unsparing in his assessment of the prospects for freedom of speech in America: "I know of no country in which, speaking generally, there is less independence of mind and true freedom of discussion than in America..." Alexis de Tocqueville, Democracy in America, Part II, Chapter 7 "The Omnipotence of the Majority in the United States and Its Effects," Lawrence translation (Anchor Books, Doubleday & Co., 1969), p. 254.

Yet for Tocqueville, the solution was not simply more speech ("the fitting remedy for evil counsels is good ones" *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) Brandeis, J., concur) because it was speech itself which too often silenced the truth:

> ...Before [a dissident writer] goes into print, he believes he has supporters; but he feels that he has them no more once he stands revealed to all, *for those who condemn him express their views loudly, while those who think as he does, but without his courage, retreat into silence as if ashamed of having told the truth....*
>
> Formally tyranny used the clumsy weapons of chains and hangmen; nowadays even despotism, though it seemed to have nothing more to learn, has been perfected by civilization.
>
> Princes made violence a physical thing, but our contemporary democratic republics have turned it into something as intellectual as the human will it is intended to constrain....
>
> De Tocqueville, *Id.* at pp. 254– 256 (emphasis supplied)

As de Tocqueville discerned, the tyranny of modern societies does not say, "Think like me or you die." *Id.* Instead it says:

> "You are free not think as I do; you keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but they will be useless to you, for if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will

> make excuses for refusing that. You will remain among men, but you will lose your rights to count as one. When you approach your fellows, they will shun you as an impure being, and even those who believe in your innocence will abandon you too, lest they in turn be shunned..."
>
> *Id.*

Thus, the danger to free speech in America has little to do with formal restrictions, such as censorship, let alone seditious libel. Instead, the danger rests with those who can and do organize public opinion to "condemn loudly." As the New York Times itself boasts and admits: "Because its voice is loud and far-reaching, The Times recognizes an ethical responsibility to correct all its factual errors..."

Neatly put, the riddle is that "debate on public issues" cannot be "uninhibited, robust, and wide-open" (*New York Times Co. v. Sullivan, supra.* at 270) if there is no libel law because of the distressing tendency for "political commentary to descend from discussion of public issues to destruction of private reputations." *Ollman v. Evans*, 750 F.2d 970, 1039 (D.C. Cir, 1984) (Scalia, J., dissenting). This descent is particularly destructive in a mass society for the reasons outlined by de Tocqueville.

Indeed, we suggest that the criticisms in Professor Logan's article can be understood in part as expounding on the ways modern technology amplifies the structural defects discerned by de Tocqueville. In the 18th and 19th Century, public opinion was still to a certain extent spontaneous; but with the rise of mass media, public opinion became subject to greater and greater organization – and hence manipulation.

Because of its reach, a dominant media player such as the New York Times can affect public opinion in much the same was as the hired clappers the Jacobins utilized to transform the crowds of Paris into mobs.

This is a serious problem that Justice Brennan simply waived off in *Sullivan*. He reasoned that free speech must inevitably include "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan, supra.* Thus, the opinion teems with the impression that opening the floodgates of criticism can only prove beneficial. *See* Robert D. Sack, Protection of Opinion under the First Amendment: Reflections on Alfred Hill, Defamation and Privacy under the First Amendment, 100 COLUM. L. REV. 294, 305 (2000), *citing to New York Times Co. v. Sullivan, supra.* at 256, 268, 269, and 272-273.

But the "level of discourse over public issues is not simply a function of the total amount of speech. It also depends on the quality of the speech." *Epstein* at 799-800. That unfounded attacks would not affect the quality of debate appears seriously misguided. The *Sullivan* Malice readily shelters such attacks, against which "good counsels" are inevitably drowned out.

POINT II: THE ACTUAL MALICE STANDARD IS BEING DEPLOYED HERE TO SUPPRESS SOLID SCIENTIFIC EVIDENCE THAT CALLS INTO QUESTION ESTABLISHED GOVERNMENT POLICY

This Court has long been acquainted with the evidence for what The New York Times has referred to as the "treacherous issue" of "the genetic differences between human races." Consider the following materials, which were urged upon this

Court by none other than Thurgood Marshall[3] in the celebrated case of *Brown v. Board of Ed.*, 347 U.S. 483 (1954):

> Since the days of the Army intelligence-testing program a very large amount of material dealing with the question of Negro intelligence has been collected. The summaries of the results of Garth..., Pinter..., Witty and Lehman... and others make it quite clear that Negroes rank below Whites in almost all studies made with intelligence tests.
>
> Otto Klineberg, Negro Intelligence and Selective Migration (Columbia University Press: New York, NY) 1935, reprinted Greenwood Press Publ: Westport, CT), 1974, p. 9.
>
> ...Terman.., one of the early authorities in the field, expressed the opinion that the Binet scale was a true test of native intelligence, relatively free of the disturbing influences of nurture and background. If this were so, the difficult problem of racial differences in intelligence might be solved as soon as a sufficiently large body of data could be accumulated.
>
> The data are now available. The number of studies in this field has multiplied rapidly, especially under the impetus of the testing undertaken during the World War, and the relevant biography is extensive. The largest proportion of these investigations has been

[3] Joined, of course, by fellow NAACP attorneys Robert L. Carter, Spottswood W. Robinson, III, (each of whom also later became federal judges), as well as Attorney Charles S. Scott.

> made in America, and the results have shown that racial and national groups differ markedly from one another.
>
> "Negroes in general appear to do poorly. Pinter.. estimates that in the various studies of Negro children by means of Binet, the I.Q. ranges from 83 to 99, with an average around 90. With group tests Negroes rank still lower, with a range in I.Q. from 58 to 92, and average only 76. Negro recruits during the war were definitely inferior; their average mental age was calculated to be 10.4 years, as compared with 13.1 years for the White draft.
>
> Otto Klineberg, Race Differences (Harper & Brothers: New York, 1935), pp. 152-153.

As stated, these materials were set before the Supreme Court in the arguments for *Brown v. Board of Education*. Specifically, Professor Klineberg's books were referenced for this Court in the appendix to the *Brown* brief, dated September 22, 1952, which Attorney Marshall and his fellows maintained was a statement "drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations." 1952 WL 47265 (1952), p. 8. Professor Klineberg in particular was cited in Marshall's brief for the proposition that "The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences." [4]

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[4] At footnotes 15, 16 and 17 of Marshall's appendix-statement. *Id.* at p. 13.

The implicit premise of Attorney Marshall's argument was that I.Q. – and other traits – might prove relatively elastic and that the gap would close after segregation was ended. This was the obvious premise upon which *Brown* was decided – what we might call the "Absolutist Nurture" side in the argument over whether racial differences were the result of Nature, or Nurture, or some combination of the two.

Of course, Nurture is only one side of the debate. Yet in any honest exchange the opposing side must also be consulted. As Walter Lippmann once put it:

> The ability to raise searching difficulties on both sides of a subject will," said Aristotle, "make us detect more easily the truth and error about several points that arise." ...The method of dialectics is to confront ideas with opposing ideas in order that the pro and the con of the dispute will lead to true ideas. But the dispute must not be treated as a trial of strength. It must be a means of elucidation.
>
> Lippmann, The Public Philosophy, (Little, Brown and Co: Boston, 1955), p. 125

If the premise of *Brown* (following Marshall) was that "the observable differences among various racial and national groups may be adequately explained in terms of environmental differences," 1952 WL 47265 (1952), p. 13, then that premise needed to be openly weighed by this Court against the opposing idea: that the observable differences among various racial and national groups is due to innate differences, which are more or less permanent, and which are not subject to

remedy by environmental tinkering[5]. Yet that opposing premise was never openly tested.

That is where Brimelow comes in, or tries to. But in pointing to the evidence for innate differences, Brimelow was assailed by the New York Times: indeed, merely for publishing writers who have invoked the scientific evidence for genetic differences was enough to malign Brimelow with invidious appellations like "Open White Nationalist," "White Nationalist," "White Supremacist," and the like.

That is a fraud: any educated man knows full well that there is solid evidence for innate racial differences in intelligence, as well as other traits. We need only consult the appellate records of *Brown*, along with recent reporting by New York Times itself, to see how well established such evidence is.

In 1952, when Attorney Marshall submitted his brief in *Brown*, his own "summary of the best available scientific evidence" indicated a significant gap in average I.Q. scores among the races. That "best available scientific evidence" contained, among others, Professor Klineberg's studies from 1935 (quoted above), which 1935 materials referenced in turn "a very large amount" of I.Q. testing that had been undertaken during the First World War. But jump ahead to 2001 and 2002 and The New York Times' own science editor is referring to such things as the role of genes in shaping differences between the races and the need to "make it safer for biologists to discuss what they know about the genetics of human

[5] And of course the two opposites immediately suggest a synthesis which also bears exploration: the observable differences are part Nature and part Nurture, the exact admixture of which is unknown.

nature"; said editor also reports that "scientists say they have found that the size of certain regions of the brain is under tight genetic control and that the larger these regions are the higher is intelligence." Furthermore, we come to 2019 and a Nobel prize winning geneticist is still referring to the scientific evidence for intelligence differences among the races – which was an occasion for round abuse by the media, an assault chronicled, if not encouraged, by the New York Times itself.

From the First World War to 2019 is a period of over 100 years. If in all that time, respected scientists, even Thurgood Marshall's own scientists, are finding measurable differences in intelligence among the races, we can be assured that there is at least a good faith basis for arguing that such differences do exist. In fact, we have a good faith basis for saying not only are those differences real and measurable, but that they are due to innate causes – ones that might not be subject to remediation by social tinkering. Even more, any honest and intelligent man would admit that the Nature thesis is bolstered by the failure of the promises made by Thurgood Marshall and adopted by this Court in *Brown* itself.

It is therefore an obvious fraud to accuse a man of bad faith or "white supremacy" because he adverts to well established science and follows a premise suggested by solid evidence. Even under the market place of ideas paradigm, the law cannot abide fraud:

> This marketplace, no less than any other, presupposes that there are certain private moves that are simply not permitted. A belief in markets for ordinary goods requires

> government protection (funded by taxes) against theft and fraud. A belief in the marketplace of ideas requires the same protection. Some protection against defamation is part of the total package. *Epstein* at 799.

It was – and is – important to openly debate the issues presented in *Brown*, all sides of them. It was important because the stakes were enormous. Everyone is in favor of improving conditions for blacks, in the Deep South, and elsewhere; but what if the problems besetting them were not due to segregation? Let us turn back to Walter Lippmann's observation about the method of dialectic: what if segregation was not the cause of black social problems, but the response to it? What then?

Are not these the hard questions, precisely the kind that judges, at their remove and deliberation, are supposed to be equipped to address?

Turning to a related issue, also before the *Brown* court but never explicitly acknowledged, what about the rate of black crime? We all know about this and so too does this Court. Following Marshall, the *Brown* court cited to Gunnar Myrdal <u>An American Dilemma: The Negro Problem and Modern Democracy</u> for the "modern authority" on how to improve the lot of blacks in America. *Brown v. Board of Ed.* at 495, n11. The improvements had best come quickly because perusing that study one is apt to find observations such as the following:

> [M]any Negroes, particularly in the South, are poor, uneducated, and deficient in health, morals, and manners; and thus not very agreeable as social companions. p. 582.

> Thus both the lack of a strong cultural tradition and the caste-fostered trait of cynical bitterness combine to make the Negro less inhibited in a way which may be dangerous to his fellows. They also make him more indolent, less punctual, less careful, and generally less efficient as a functioning member of society. p. 959.
>
> Myrdal, *supra.*, (page cites to Harper and Row, Publishers – Twentieth Anniversary Edition, 1962).

Once again, we have to go spelunking through the Court's sources to discover that such concerns were raised by the materials, because the *Brown* court gives no hint of the issues in the published decision. That silence, like the silence about I.Q. differences, suggests a deep unease by this Court with the materials before it

Thus, we realize that the Court finds these questions disquieting and we certainly do not mean to give offense. Then again, if Albert Snyder was forced to endure the most brutal attacks on the day of his son's funeral, with eight justices voting against any redress for him (*Snyder v. Phelps*), all in the name of the free exchange of ideas, it does not seem too much to ask some leeway from this Court to raise disturbing issues. After all, this Court is a deliberative body; it is not emotionally handicapped like a father who is pre-occupied with burying his child.

And precisely because this is supposed to be a deliberative body, capable of handling the tough questions, it is surprising to discover that the Court has not found an opportunity in seventy years to candidly and calmly discuss low black I.Q. and the

social effects consequent on such traits[6], or the obvious problems presented by high rates of black crime. Everyone is in favor of protecting Tom Robinson. Harper Lee, To Kill a Mockingbird. On the other hand, no one should want to encounter Reginald and Jonathan Carr. *Kansas v. Carr*, 577 U.S. 108, 113-114 (2016).

What if the Civil Rights revolution inaugurated by this Court forced us to do more of one than the other? What if, tragically, it caused an increase in both? Do not those who summon us to crusades have an obligation to frankly admit the costs of the battle? Or

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[6] This is not to say that this Court has neglected the importance of I.Q. On the contrary, where the subject prescinds from explicit racial differences, there appears to be broad consensus that I.Q. is real and holds important social consequences. *See Atkins v. Virginia*, 536 U.S. 304 (2002), where Justice Stevens, joined by fellow Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer noted that men with 70 I.Q.s had "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.

Let us consider the untenable contradictions implied by the appellate records in Brown and the ready citation to I.Q. studies in Atkins v. Virginia, when set against this Court's seventy year silence on the subject of racial differences in I.Q. Are we to believe that this Court has considered the matter and concluded that I.Q. cannot be measured – except when such measurements prove useful to the progressive wing of the Court? Or again, that such measurements are not accurate – except when they can be used to halt an execution? Or perhaps that, although capable of being measured and accurate, such measurements cannot be correlated to race, like numerous other traits? Or that I.Q. can be correlated with race, but only when Thurgood Marshall was assuring the *Brown* court that the measured differences would disappear with an improved environment?

do we expect "deception in government" even from this Court? *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J, concur).

These are important questions. They need to be thoroughly probed. That probing cannot occur when the premier paper in the nation is handed a megaphone by this Court to shout down dissenting views.

It is no answer to say that the quality of the debate is not any part of the responsibility of this Court. Debate does not simply happen, and the *Sullivan* shield itself clearly changes the nature of the debate. As Professor Epstein noted:

> ...the rules of defamation are important not only for the way in which they decide cases that arise. They are also important in the way in which they shape the primary decisions to enter into political discussion and debate. It does not seem far-fetched to assume that some honest people are vulnerable to serious losses if defamed... If the remedies for actual defamation are removed, or even watered down, one response is for these people to stay out of the public arena, thus opening the field for other persons with lesser reputations and perhaps lesser character. The magnitude of this effect is very hard to measure, but there is no reason to assume that it is trivial. Distinguished men and women invest substantial sums in their reputation. They have the most to lose if the price of participating in public debate is the loss of all or part of that reputational capital.
>
> *Epstein* at 799.

Are good men trying to stay out of this debate because their reputations could be ruined by speaking the (politically explosive) truth?

Absolutely. As Brimelow's pleading showed, even a man of the stature of James Watson has been intimidated into silence by those who "condemn loudly" – and The New York Times knows as much.

It was John Stuart Mill, no stranger to free speech, who warned, "[when] the most active and inquiring intellects find it advisable to keep the general principles and grounds of their convictions within their own breasts the price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind." Mill, On Liberty, 31 (Elizabeth Rapaport ed., Hackett Publ'g Co.1978). Certainly a Nobel Prize winning scientist such as James Watson would qualify as one of our "most active and inquiring intellects." It appears that too many of us have been intellectually pacified where the subject is race and genetics by those launching broadsides from behind *Sullivan*.

Only a false neutrality is maintained by withdrawing the ability of a man to defend his name. Indeed, withdrawing the ability of a man to defend his name is a method of subtle coercion, different only in kind from where a government withdraws physical protection from a mob attempting to shout down a hostile speaker, or even attempts to prosecute the speaker for challenging the mob. *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949).

POINT III: THERE WAS NO ORIGINAL PURITY: THE SULLIVAN RULE WAS LESS ABOUT FREE SPEECH THAN CRUSHING RESISTANCE – EVEN SYMBOLIC RESISTANCE – TO THE COURT ITSELF.

Many noted First Amendment scholars are unstinting in their praise of *Sullivan, e.g.* "New York Times Co. v. Sullivan... is a great tort case, a great defamation case, a great First Amendment freedom of speech and press case, and a great civil rights case." Sack, 100 COLUM. L. REV. 294, 303 (2000).

On the other hand, the *Sullivan* Malice rule also has its critics. Almost forty years ago Professor Epstein warned that without sufficient safeguards supplied by some defamation law, the public would "be required to discount the information that it acquires because it can be less sure of its pedigree. The influence of the press will diminish as there will be no obvious way to distinguish the good reports from the bad, in part because no one can ever be held legally accountable for their false statements." Epstein at 800. And that of course has come to pass. We come to Professor Logan in 2020 and he reports that confidence in the press, which once hovered close to 70%, has now dropped to about 40%, "its lowest ebb in the history of the Gallup Poll." Logan at 796-797, *Cf.* n. 256 and 262. The problem goes well beyond the immediate well being of the media: ""[A] press that lies to the public or negligently publishes falsehoods vitiates its role in facilitating democracy-enhancing speech and thereby harms the populace's ability to effectively govern itself." Logan at 805, n309 (quoting Benjamin Barron, "A Proposal to Rescue New York Times v. Sullivan by Promoting a

Responsible Press," 57 AM. U. L. REV. 73, 101 (2007)).

This was all perfectly foreseeable. "Heed Their Rising Voices" contained several false facts, none of which the New York Times had bothered to check before publication. *N.Y. Times Co. v. Sullivan* at 259-261. The Court condoned falsehood and negligence in *Sullivan*; it should come as no surprise that such practices have flourished. How we are supposed to practice self-government under these circumstances is hard to tell.

Brimelow urges that the critics have the best part of it. We suggest only one additional criticism that we have not found in the secondary literature: it is that the myth of an originally pure intention is just that, a myth. Yet even those critical of the defects of the *Sullivan* Malice rule often feel the need to pay respects to the alleged nobility of its original purpose. For his part, Justice Gorsuch writes, "In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs." *Berisha v Lawson* at 2428.

This position is simply not tenable because the Court could have harbored no such illusions in 1964. Under no circumstances could an obscure local politician in the Deep South, such as L.B. Sullivan, Commissioner of Public Affairs in Montgomery, Alabama, be cast as a "prominent governmental official" whose name was always in the news. Before this Court's decision, it is unlikely that most of the world had ever heard of Commissioner Sullivan, and

he has faded back into obscurity after whatever notoriety he had obtained in his lawsuit.

In fact, considering the feeble position of L.B. Sullivan and those similarly situated, one cannot help but notice the disconnect between the soaring rhetoric of Professor Wechlser's brief (1963 WL 105891) and the true status of a local pol in the Deep South in 1964. Wechlser's rhetoric is belied by this simple fact: for all the sonorous invocations of "seditious libel," in Alabama in 1964 there simply was not much sovereignty left to be wielded by a local elected official. In the preceding decade, it had almost all been taken by this Court. Anyone who doubts that fact need only reflect on how successful the L.B. Sullivans of the world were at maintaining the polices they favored after this Court took hold of them (in matters affecting race and numerous other hot button issues). That, of course, is the true context of the *Sullivan* decision[7].

The clear contrast between the ostensible justification of the rule and the relative impotence of L.B. Sullivan points to something else as the animating rationale of the decision. Judge Sack appears to give it away in an address he gave on the Fiftieth Anniversary of *Sullivan*: the decision was less about making sure that L.B. Sullivan could not punch up at the New York Times than about making sure that this Court could continue to safely punch down at L.B. Sullivan.[8] That makes perfect sense. *Sullivan*

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[7] In the words of Judge Sack: "Plainly, Sullivan cannot be considered apart from the struggle over civil rights or the identity of the Times." Robert D. Sack, New York Times Co. v. Sullivan - 50-Year Afterwords, 66 ALA. L. REV. 273, 278 (2014).
[8] This appears to be more or less an open secret. *See* Judge Sack, *Id.*, 291-292

could not really be about checking sovereign power because there was none to be found among local politicians in the Deep South by that time.

But if so, a reexamination of Justice Brennan's rhetoric is overdue: was there any true concern with "criticism" of the government? The answer appears to be "yes" in a way that does not flatter the Court, for it is clear that "Heed Their Rising Voices" was not the only bit of governmental criticism confronting Justice Brennan. The *Sullivan* jury, too, was doubtless sending a message that was, in context, a form of government criticism in its own right. Of course, that criticism was aimed at an authority much higher and exponentially more potent than a lowly municipal commissioner in Montgomery, Alabama. The Court would have none of it, although it certainly should have. When the premier deliberative body in the nation carefully stages a one sided debate on the most urgent issues of the day and deliberately avoids the hard questions, it has failed, miserably. Capping that failure with a lecture about the need for "uninhibited robust and wide open debate" – exactly the kind of debate the Court had shunned in *Brown* and its progeny– was insufferable hypocrisy.

Sullivan was an awful decision that spawned an awful rule. Its stated purpose was false and dishonest *ab initio*, and its subsequent application has proved worthy of its origins. It should be overruled.

POINT IV: UNDER THE SULLIVAN MALICE RULE BRIMELOW'S PLEADINGS WERE SUFFICIENT.

Although we understand that the Court dislikes fact-bound questions, we raise this point because after the commencement of the litigation, New York

state amended its laws to adopt the *Sullivan* Malice rule. The legislation has been viewed by some as retroactive. Thus, even if Brimelow were to succeed in convincing this Court to overrule *Sullivan*, he might well still suffer the adverse judgment of the COA.

The COA held that Brimelow did not make out a case for actual malice. But the cumulative weight of these allegations should more than suffice: there was failure to seek corroboration from obvious sources (*see Harte–Hanks Communication v Connaughton*, 491 U.S. 657, 692 (1989)); reliance on questionable sources and publication of materials that rely on sources with a reputation for persistent inaccuracies (*Harte–Hanks Communication, Id.* and *Gertz v Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982); bias combined with inadequate investigation (*Church of Scientology In't v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001); publication in the face of verifiable denials (*Curran v. Phila Newspapoers, Inc.*, 376 Pa. Super. 508, 513 (Superior PA, 1988)); adherence in the face of contrary evidence to a pre-conceived storyline (*Gertz v Robert Welch, Inc.,* at 539 and *Palin v. New York Times Co.,* 940 F.3d 804, 813 (2d Cir. 2019); and malice in the usual sense of ill will and an *egregious* deviation from accepted news gathering standards (*Harte–Hanks Communication v Connaughton*, at 667–668, and Note 5).

These are all indications of "actual malice" in the sense of intentional falsehood or reckless disregard of the truth. The COA decision casts this all aside as mere "denials which, without more do not support a plausible claim of actual malice" and some negligent journalism for the New York Times's failure to follow its own codes. App 7a-8a.

But this avoids the nature of the underlying charge, which is that Brimelow harbors evil motives (of white racism) for publishing scientific evidence linking race and intelligence. As stated, such evidence has been established for more than 100 hundred years. Exactly how ignorant can the editors of the New York Times pretend to be before the courts let us at least try to call them on it?

Likewise, "negligent journalism" which violates Respondent's own ethical codes might explain the initial mistakes of the first article. But negligence does explain why such mistakes continue to recur in five successive articles under a steady stream of written protests by Brimelow. Something other than negligence was at work.

CONCLUSION

For the reasons above, Brimelow respectfully requests that this Court grant certiorari, deliver us from *Sullivan* by declaring it overruled, and declare that Brimelow had made out actual malice in any event.

Glen K. Allen
GLEN K. ALLEN,
ATTORNEY AT LAW
5423 Springlake Way
Baltimore, MD 21212
(410) 802 6453
GlenAllenLaw@Protonmail.com

/s/ Frederick C. Kelly
Frederick C. Kelly
Counsel of Record
LAW OFFICE OF
FREDERICK C. KELLY
One Harriman Square
Goshen, NY 10924
(845) 294-7945
fckellylaw@protonmail.com

EXHIBIT F

Will SCOTUS Uphold The NEW YORK TIMES' License To Lie?

Peter Brimelow (https://vdare.com/writers/peter-brimelow)

02/24/2022

See also: **LEFT ON VERGE OF HUGE ANTI-FIRST AMENDMENT VICTORY—Unless SCOTUS Takes Up VDARE Vs. COLORADO SPRINGS** (/articles/left-on-verge-of-huge-anti-first-amendment-victory-unless-scotus-takes-up-vdare-vs-colorado-springs)

"The Supreme Court is going to revisit *SULLIVAN*," a noted First Amendment lawyer told me when we were thinking about whether to petition for certiorari over the Second Circuit's very disappointing October 21, 2021 decision (21-66-cv (2d Cir. Oct. 21, 2021 (https://casetext.com/case/brimelow-v-the-ny-times-co)) in *Brimelow vs. New York Times.* (/articles/the-sin-of-sullivan-why-donald-trump-tulsi-gabbard-and-i-are-suing-for-libel) "*But not for you* (/articles/the-fulford-file-edwards-vs-detroit-news-court-ends-libel-protection-for-whites)."

So much for Equality Before The Law (https://en.wikipedia.org/w/index.php?title=Equality_before_the_law&oldid=1059988813).

SULLIVAN is the 1964 decision in which the SCOTUS (Earl Warren (/posts/the-simplest-explanation-for-the-great-1964-1975-crime-rise-the-warren-court), proprietor), in order to get some Black Civil Rights activists (/posts/ny-times-vs-sullivan-and-the-law-of-libel-press-clings-to-its-right-to-lie) off the hook, broke with other Common Law (/letters/an-english-reader-gives-us-a-birthright-history-lesson) jurisdictions like Canada and the U.K. and proclaimed that publishing falsehoods (/articles/the-fulford-file-by-james-fulford-sherrod-obama-pigford-sullivan#sull) against politicians (later expanded to nearly all public figures (https://en.wikipedia.org/wiki/Curtis_Publishing_Co._v._Butts)) was not actionable unless knowing falsehood or reckless disregard (https://nieman.harvard.edu/stories/whys-this-so-good-no-99-renata-adler-and-reckless-disregard/)of the truth was shown. I discussed its disastrous consequences when I announced our suit against the *New York Times* two years ago: *The Sin Of SULLIVAN: Why Donald Trump, Tulsi Gabbard and I Are Suing For Libel* (/articles/the-sin-of-sullivan-why-donald-trump-tulsi-gabbard-and-i-are-suing-for-libel), April 3 2020. Essentially, *SULLIVAN* has given the Corporate Media a License To Lie (/articles/the-fulford-file-the-son-of-sullivan-and-the-invisible-victim) about public figures (/posts/trump-campaign-joins-vdare-com-in-suing-new-york-times-for-libel-press-clinging-bitterly-to-its-right-to-lie), contributing (among much else) to the current savage polarization of American public discourse. (/articles/not-journalism-googlism-kritarchy-the-lying-press-and-why-patriots-need-their-own-media)

Recently, it's become increasingly clear (/articles/brimelow-vs-new-york-times-project-veritas-victory-shows-we-can-prevail) that the Kritarchy (/articles/fifty-years-of-brown-the-age-of-kritarchy)and the legal profession in general is having quiet qualms about *SULLIVAN* —see here (/posts/peter-brimelow-silberman-critique-of-sullivan-decison-same-point-we-make-in-our-libel-suit-against-nyt) and here. (/posts/ny-times-vs-sullivan-and-the-law-of-libel-press-clings-to-its-right-to-lie) [*Clarence Thomas is right: Here's why Supreme Court should revisit libel law overreach* (https://www.usatoday.com/story/opinion/2019/02/27/supreme-court-libel-law-decision-constitutional-overreach-column/2985056002/), by Glenn Harlan Reynolds, *USA Today*, February 28, 2019] (Of course, we might reasonably ask why our democratically-elected legislators aren't ADDRESSING THIS ISSUE THEMSELVES AND DOING THEIR JOB. But this seems to be the way politics works).

Despite our Noted First Amendment Lawyer's warning, we stubbornly, and at fantastic expense (/legal-defense-fund), have filed a petition for our Writ of Certiorari to the SCOTUS [PDF (https://smallpdf.com/file#s=b861c0d3-2cb0-470a-a644-7b0901496664a)]. We have recently learned this case is scheduled to be discussed, along with our Colorado Springs (/articles/vdare-foundation-petition-to-the-u-s-supreme-court-in-colorado-springs-first-amendment-case) case, on Friday February 25.

It could be accepted, rejected, or held over. We may not know for some time.

So why did we go ahead in the face of almost universal skepticism?

- ***First reason: We're arguing about a fact, not an opinion***

In its 2019 article by Trip Gabriel *A Timeline of Steve King's Racist Remarks and Divisive Actions* (https://web.archive.org/web/20190115111855/https:/www.nytimes.com/2019/01/15/us/politics/steve-king-offensive-quotes.html), the *New York Times* accused me of being an "open white nationalist." But this is a factual question, not a matter of opinion. I may be, in the *New York Times'* opinion, a "white nationalist"—but I'm not "open." I've repeatedly (/posts/thinkprogress-journofa-casey-michel-trying-to-defund-immigration-patriots) disclaimed it i.e. here. (/articles/insider-s-nicole-einbinder-interviews-vdare-com-s-peter-brimelow-white-supremacist-is-the-equivalent-of-me-calling-you-a-communist)

That's my personal position. About VDARE.com, I said (/articles/is-vdare-com-white-nationalist) in 2006 in our FAQ response to *VDARE.COM "White Nationalist"? —*

> Like the immigration reform movement in general, [VDARE.com] is a coalition, agreed only on the need for immigration reduction. We have published writers of all races, and most political tendencies—including self-identified "progressives." (/articles/the-jobs-crunch-a-progressive-indictment-of-immigration-and-both-parties) Much of VDARE.COM is devoted to technical analyses of immigration's economic impact—for example Edwin S. Rubenstein's (/writers/edwin-s-rubenstein) demonstration that jobs in the post-2002 recovery have gone disproportionately to immigrants, (/articles/national-data-by-edwin-s-rubenstein-1) while black unemployment has actually risen. (See *The Employment Bus: Immigrants Drive, Blacks Sit in the Back* (/articles/national-data-by-edwin-s-rubenstein-96), June 22, 2006) We are certainly politically incorrect—but the merest glance would show that we are not "white nationalist."
>
> OK?
>
> Now I will boldly go (https://www.phrases.org.uk/meanings/385400.html) etc. We also publish on VDARE.COM a few writers, for example Jared Taylor (/articles/further-down-the-road-paved-with-good-intentions), whom I would regard as "white nationalist," in the sense that they aim to defend the interests of American whites. They are not white supremacists. They do not advocate violence. They are rational and civil. They brush their teeth. But they unashamedly work for their people (/articles/citizenism-vs-white-nationalism-a-second-reply-to-steve-sailer)—exactly as La Raza (/articles/hispandering-for-dummies) works for Latinos and the Anti-Defamation League (/articles/importing-anti-semitism-contd) works for Jews. [Note: *Jared Taylor subsequently abandoned the term "white nationalism" as too hopelessly smeared*].
>
> Get used to it. As immigration policy drives whites into a minority, this type of interest-group "white nationalism" will inexorably increase.

And the *New York Times* even tacitly admitted its error by stealth-editing Trip Gabriel's article on its website so that I was described merely as a "white nationalist," while adding a link to the Southern Poverty Law Center's article on me (https://www.splcenter.org/fighting-hate/extremist-files/individual/peter-brimelow), equally libelous (/articles/the-speech-that-launched-an-splc-hate-honor)but under *SULLIVAN* impossible to litigate.

Quite obviously, the *New York Times* knew it had gone too far.

But it arrogantly refused, contrary to its published ethical standards [*We Stand Corrected: How The Times Handles Errors,* (https://www.nytimes.com/2018/06/07/reader-center/corrections-how-the-times-handles-errors.html) *by Rogene Jacquette, NYT, June 7, 2018*], to acknowledge in print that it had made this change.

From my point of view, the high point of our litigation was when Katherine Polk Failla, the District Court judge, acknowledged that this factual point was "actionable." (/posts/brimelow-vs-new-york-times-headed-for-second-circuit)

But she also claimed that the *New York Times* had made me whole with its Stealth Edit. Obviously this is absurd, even apart from the fact that it contradicts *the New York Times'* published ethical standards (see above). Without a public admission in print, how would Rep. Bobby Rush (https://en.wikipedia.org/wiki/Bobby_Rush#Early_life,_education,_and_activism), who read the original libel into the Congressional Record [January 16, 2019 (https://www.govinfo.gov/content/pkg/CREC-2019-01-16/html/CREC-2019-01-16-pt1-PgE56-3.htm)], know to substitute a corrected version?

More reasons we went ahead:

- ***Second reason: You never know.***

Lawyers always tell clients to avoid trials because you never know how they might go. This is particularly true with SCOTUS. Justices Clarence Thomas (/posts/can-supreme-court-precedents-be-reversed-or-re-reversed-clarence-thomas-thinks-so-although-he-might-not-agree-with-our-choices), Neil Gorsuch (https://www.cnn.com/2021/07/02/politics/supreme-court-landmark-libel-case/index.html) and (yes!) Elena Kagan (https://reason.com/volokh/2021/07/02/justice-kagans-views-on-new-york-times-v-sullivan-as-of-1993/) have indicated concerns about *SULLIVAN*.

Maybe we'll get lucky. We won't know unless we try. Certainly our petition aims to dispel the myths surrounding the *Sullivan* decision, including the absurd but oft repeated notion that it was a worthy strike against "seditious libel." In reality, it was a strike against critics of SCOTUS itself, a point few others have made in their criticism of the *Sullivan* rule.

And the current Woke a.k.a. communist (/posts/peter-brimelow-s-speech-this-is-a-communist-coup-but-white-america-is-on-the-move-on-video-in-six-different-formats) triumph in public discourse is critically dependent on good people i.e. us doing nothing.

- ***Third reason: we are advised that the SULLIVAN dam IS about to break*** (https://www.washingtonpost.com/outlook/2021/07/13/major-supreme-court-first-amendment-decision-is-risk/) ***(see above).***

The process by which the Kritarchs and the legal profession in general changes its mind on anything is obscure (particularly to someone who thinks like I do that politicians should just debate issues and pass laws (/articles/ann-coulter-kavanaugh-threatens-the-left-s-right-to-cheat) about them). But it appears to involve contending law review articles and opinions by judges. Thus It took many years of unsuccessful litigation (/articles/brown-vs-board-govt-vs-people-the-curious-course-of-the-desegregation-wars) before the SCOTUS felt bold enough to issue its highly controversial (/posts/expert-consensus-on-brown-vs-board-or-else) *Brown vs. Board* decision (/articles/brown-vs-board-vs-the-u-s-constitution) banning school segregation. (/articles/brown-myths-live-in-law-schools)

But cases have to be brought to give judges a chance to opine and law professors something to analyze. One of our advisers likened the process to water building up behind a dam. VDARE.com is contributing to this buildup, just like (but in humbler way) as the admirably combative Sarah Palin, who on discovery in her libel case was able to find devastating *New York Times* internal emails that to a layman clearly demonstrate deliberate disregard of the truth[*Judge: Sarah Palin seeks new trial in defamation lawsuit* (https://apnews.com/article/sarah-palin-business-alaska-manhattan-jed-s-rakoff-2cb962428330a498206709b4ee0a3e72), AP, February 23, 2022]

If necessary, VDARE.com's attitude will be that (https://kinginstitute.stanford.edu/encyclopedia/ive-been-mountaintop) of a well-known mid-Twentieth century politician: (/posts/vdare-com-s-martin-luther-king-archive-48-items)

> *I may not get there with you. But I want you to know tonight, that we, as a people, will get to the Promised Land.*

- ***Fourth reason: Breaking another dam—getting racial differences in IQ into the courtroom.***

Because SCOTUS focuses on questions of law rather than questions of fact, our petition for cert did not address Judge Failla's obvious mistake in claim that the *New York Times* had repaired my reputation when it stealth-edited "open white nationalist" to become "white nationalist," adding a hyperlink to characteristic smear of me by the communist Southern Poverty Law Center (SPLC). As a non-lawyer, I find this puzzling and I regret it.

The SPLC, however, made its case (https://www.splcenter.org/fighting-hate/extremist-files/group/vdare) that I was a "white nationalist" by Point-And-Sputtering at VDARE.com's publishing articles of the scientific evidence (/articles/richard-lynn-s-the-global-bell-curve-the-explanation-that-fits-the-facts) for racial differences in IQ. (/articles/blacks-whites-and-asians-rushton-s-rule-of-three) Accordingly, our brief argues that such evidence does exist (/posts/charles-murray-on-the-20th-anniversary-of-the-bell-curve), is entirely legitimate—and has even published in the *New York Times* itself, for example by its long-time science writer Nicholas Wade.

The fact of race differences in IQ does not appear to have been cited in litigation for some 70 years. But ironically, NAACP attorne (/articles/ann-coulter-my-thurgood-marshall-plan-for-replacing-mlk-day)y Thurgood Marshall repeatedly noted (https://www.ohio-forum.com/2021/02/moak-authors-chapter-on-thurgood-marshall-the-legacy-and-limits-of-equality-under-the-law/) it while arguing (https://www.toqonline.com/archives/v5n1/TOQv5n1Wolters.pdf)*Brown vs. Board*—claiming, however, that it was the result of segregation and that the black-white gap would disappear if segregation were eliminated.

(This has not happened (/posts/the-test-score-gap-why-concentrate-on-programs-that-even-if-they-did-work-would-take-years), by the way).

Needless, allowing the fact of racial differences into litigation and into policy debate would be revolutionary. It would undercut the whole entire Racial Reckoning racket, which is based on the claim that any inequality in results must be caused by unequal treatment, sweep away two generations of Disparate Impact legislation, in which corporate lawyers were apparently too cowardly to make the argument, and cast a new and searing light on contemporary controversies from football coaches to publications in academic journals.

It would take very courageous judges. But that is why they have lifetime tenure.

- ***Fifth and final reason: WHO DOES THE* NEW YORK TIMES *THINK IT IS ANYWAY?***

My reaction to our Colorado Springs litigation has been increasing shock, as courts found various specious reasons to deny us slam-dunk First Amendment rights that I understood had been settled in the Civil Rights Era.

But the *New York Times* case has just infuriated me. The paper's arrogance, dishonesty and malevolence are simply beyond words. Who does it think it is? Why doesn't it have to follow the rules of checking with victims, not compounding calumnies during litigation, and acknowledging all errors publicly and honestly, that I was taught, during 40 years in the Mainstream Media, were essential parts of the defense to libel?

Who elected the *New York Times* to decide who can participate in public debate by pronouncing on their reputation over all their rational arguments to the contrary?

(For that matter, I am unimpressed with the competence and courage displayed by judges we have dealt with—including, alas, some Trump appointees).

Fortunately, our heroic donors agreed—I wonder if the *New York Times* realizes how remarkably unpopular it is. So we have been able to carry this through to this critical point.

By the time you read this, it may all be over. But we have given it all we have. And I'm glad.

Earlier Brimelow Vs. New York Times Coverage:

- *NEW YORK TIMES Calls ALIEN NATION "A Pretty Racist Tract Against Nonwhite Immigration"—They Reviewed It (Respectfully) TWICE When It Came Out (/posts/new-york-times-calls-alien-nation-a-pretty-racist-tract-against-nonwhite-immigration-they-reviewed-it-repectfully-twice-when-it-came-out)*
- *Oral Argument In BRIMELOW vs. NEW YORK TIMES Scheduled For 10 AM Eastern August 31: Watch It Live!* (/posts/oral-argument-in-brimelow-vs-new-york-times-scheduled-for-10-am-eastern-august-31-watch-it-live)
- *BRIMELOW vs. NEW YORK TIMES: Oral Arguments Set For August 31 (/articles/brimelow-vs-new-york-times-oral-arguments-set-for-august-31)*
- *BRIMELOW vs. NEW YORK TIMES: Project Veritas Victory Shows We Can Prevail! (/articles/brimelow-vs-new-york-times-project-veritas-victory-shows-we-can-prevail)*
- *Victory For Project Veritas May Equal Victory In BRIMELOW vs. NEW YORK TIMES (/posts/victory-for-project-veritas-may-equal-victory-in-brimelow-vs-new-york-times)*
- *Brimelow vs. NEW YORK TIMES Headed For Second Circuit! (/posts/brimelow-vs-new-york-times-headed-for-second-circuit)*
- *BRIMELOW vs. NEW YORK TIMES: We Respond To Motion To Dismiss—And Find Out The Use Of Ben Shapiro (/articles/brimelow-vs-new-york-times-we-respond-to-motion-to-dismiss-and-find-out-the-use-of-ben-shapiro)*

- *A Blackpilled Reader Wonders If Our NYT Lawsuit Isn't Just Coming At Them In "The Same Old Way"—We Say It's Something New! (/letters/a-blackpilled-reader-wonders-if-our-nyt-lawsuit-isn-t-just-coming-at-them-in-the-same-old-way-we-say-it-s-something-new)*
- *MSM Claims License To Lie, Wants You Dead—BRIMELOW vs. NEW YORK TIMES Moves Forward (/articles/msm-claims-license-to-lie-wants-you-dead-brimelow-vs-new-york-times-moves-forward)*
- *Peter Brimelow: Silberman Critique Of SULLIVAN Decision Same Point We Make In Our Libel Suit Against NYT (/posts/peter-brimelow-silberman-critique-of-sullivan-decison-same-point-we-make-in-our-libel-suit-against-nyt)*
- *NEW YORK TIMES: Sue Wrongthinkers For "Disinformation"—THEY Aren't Protected Like NYT (/posts/new-york-times-sue-wrongthinkers-for-disinformation-they-aren-t-protected-like-nyt)*
- *The Sin Of SULLIVAN: Why Donald Trump, Tulsi Gabbard and I Are Suing For Libel (/articles/the-sin-of-sullivan-why-donald-trump-tulsi-gabbard-and-i-are-suing-for-libel)*

Peter Brimelow [Email him (mailto:pbrimelow@vdare.com)] is the editor of VDARE.com. (/) His best-selling book, Alien Nation: Common Sense About America's Immigration Disaster (/articles/i-believe-i-will-be-at-least-exempted-from-the-curses-of-those-who-come-after-peter-brimelow-s-foreword-to-the-2013-kindle-edition-of-alien-nation)*, is now available in Kindle format.* (https://www.amazon.com/Alien-Nation-ebook/dp/B00BHNCGCE/?_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&tag=vd0b-20)

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