17-3801

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SARAH PALIN, an individual,

Plaintiff-Appellant,

—against—

THE NEW YORK TIMES COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 1:17-CV-04853-JSR, HON. JED S. RAKOFF

BRIEF OF *AMICI CURIAE* ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, BLOOMBERG L.P., BUZZFEED INC., CABLE NEWS NETWORK, INC., DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, GANNETT CO., INC., HEARST CORPORATION, HOME BOX OFFICE, INC., MEDIA LAW RESOURCE CENTER, INC., NEW YORK NEWS PUBLISHERS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND WP COMPANY LLC D/B/A THE WASHINGTON POST IN SUPPORT OF DEFENDANT-APPELLEE THE NEW YORK TIMES COMPANY'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*[2] are media companies and organizations of journalists and publishers. All of them are dedicated to and dependent upon the First Amendment protections previously articulated by the Supreme Court and this Court and applied in cases in this and other courts throughout the nation. Most of them participated in a previous *amici curiae* brief submitted in this case to this Court that supported Defendant-Appellant The New York Times Company ("*The Times*") with respect to the application of principles set forth in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp*. v. *Twombly*, 550 U.S. 544 (2007). This brief does not focus on arguments made in that brief about the scope and nature of those principles. Nor does it address issues relating to the hearing commenced by the district court to assist it in deciding if Plaintiff-Appellant Sarah Palin's complaint stated a plausible claim.

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[1] No party's counsel authored this brief. No party, party's counsel, or person other than *amici curiae*, their members, or their counsel provided money for the brief's preparation or submission.

[2] The *amici curiae* are Advance Publications, Inc., The Associated Press, Bloomberg L.P., Buzzfeed, Inc., Cable News Network, Inc., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Hearst Corporation, Home Box Office, Inc., Media Law Resource Center, Inc., New York News Publishers Association, Reporters Committee for Freedom of the Press, and WP Company LLC d/b/a The Washington Post.

The single issue this brief does address relates to this Court's treatment of the Supreme Court's epic opinion in *New York Times Co*. v. *Sullivan*, 376 U.S. 254 (1964) ("*Sullivan*") in the Panel's August 6, 2019 Opinion (the "Opinion"). In supporting the petition of *The Times*, the proposed *amici* are well aware of the infrequency with which petitions for panel rehearings are granted, let alone *en banc* review of panel decisions. They submit this brief because they believe that the decision of this Court is at such variance with *Sullivan* itself that, if followed, it could lead to significant limitations of speech about public figures that has long been protected by the First Amendment.

ARGUMENT

I. This Court's Opinion is Inconsistent with *New York Times* v. *Sullivan*.

The central holding of the Supreme Court's decision in *Sullivan* was that a public figure plaintiff must prove that an allegedly libelous statement was made with actual malice, a term defined by the Court and repeatedly restated by that Court and this as meaning a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id* at 280. That statement was repeated by this Court in this case, with citations to and quotations from *Sullivan* itself as well as to the case of *Church of Scientology Int'l* v. *Behar*, 238 F. 3d 168, 173–74 (2d Cir. 2001), one of the many Second Circuit cases that have quoted and sought to

apply it. *See* Opinion at 7, 19 n. 39. But that was the very standard that the *amici* submit this Court did not correctly apply in its assessment of *The Times*' appeal.

This Court's error stemmed from its interpretation and application of the words "reckless disregard" set forth in *Sullivan*, words that in the context of libel litigation have never been interpreted to mean what they appear to say. As Judge Sack has written in his text on libel, "the term 'reckless disregard' is, without further definition, as thoroughly misleading as 'actual malice.' Constitutional 'recklessness' is as little related to the common meaning of 'reckless' as constitutional 'malice' is related to the dictionary, common-sense, or common-law definitions of that word." Robert D. Sack, *Sack On Defamation* § 1.3.3 (5th ed. 2017).[3]

The "further definition" referred to by Judge Sack was not long in coming from the Supreme Court. The same year that *Sullivan* was released, the Supreme Court began to move far afield from any plain reading of "reckless disregard." In fact, the Court quickly began to articulate the meaning of those words in a manner more consistent with the spirit of the *Sullivan* ruling than any dictionary-rooted reading of those words. In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), "reckless

[3] This Court elsewhere observed that: "'Actual malice is now a term of art having nothing to do with actual malice.'" *Celle* v. *Filipino Reporter Enterprises Inc*., 209 F.3d 163, 194 (2d Cir. 2000) (quoting *Reliance Ins. Co*. v. *Barron's*, 442 F. Supp. 1341, 1349–50 (S.D.N.Y. 1977)).

disregard" was read to mean a "high degree of awareness of. . . probable falsity." In *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1978) the words were interpreted as conveying that "the defendant in fact entertained serious doubts as to the truth of his publication." In *Harte-Hanks Communications, Inc*. v. *Connaughton*, 491 U.S. 657, 666 (1989), the Court made a point of saying that the "reckless disregard" language may not be read as referring to "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." In short, the recklessness articulated in *Sullivan* is not at all the standard dictionary definition of the term referring to lack of proper caution, carelessness, or irresponsibility. *See* Merriam-Webster's Online Dictionary, available at https://www.merriam-webster.com/dictionary/reckless (accessed August 26, 2019) (defining "reckless" as "marked by lack of proper caution;" "careless of consequences;" "irresponsible").

But repeatedly in its Opinion in this case the Court read and applied the word "reckless" in just that manner. The Opinion based its conclusion that Palin's Proposed Amended Complaint stated a plausible claim by applying the very notion of recklessness that *Sullivan* appeared to articulate but that later cases have disowned. In one critical passage in the Court's Opinion, it held that "at a minimum," Palin's allegations "gave rise to a plausible inference that [*The Times*' editorial page editor James] Bennet was reckless when he published the editorial

without reacquainting himself with the contrary articles published in *The Atlantic* six years earlier." Opinion at 17. But that is precisely what constitutionally defined "recklessness" is not. It is not whether Bennet failed to "reacquaint" himself with earlier articles, which is the stuff of potential negligence; it is whether he had serious doubts about the truth of what he was publishing.[4]

The same is true of the Court's conclusion about the inclusion of a hyperlink in the article which stated in unambiguous terms that "no connection had been made" between the Palin map and the shooting, a conclusion directly at odds with the editorial position of *The Times* that led to this litigation. According to the Court's Opinion, "it was arguably reckless for Bennett to hyperlink an article that he did not read." *Id*. at 18. But in reaching that conclusion, once again the Court applied the wrong standard, since failing to read the hyperlink may arguably be "reckless" in some lay sense but had nothing to do with whether *The Times* said anything about Palin with a high degree of awareness that what it was saying was false.

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[4] Immediately after its erroneous reliance on Bennet not having "reacquainted" himself with earlier articles, the Court added that the "plausible inference of recklessness" that arose from that supposed failure was "strengthened" by "Palin's allegations that Bennet had reason to be personally biased against Palin and pro-gun positions in general." Opinion at 17. But this is likewise insufficient to show actual malice since it is well established that "'ill will toward the plaintiff, or bad motives, are not elements of the New York Times standard.'" *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264, 281 (1974) (quoting *Rosenbloom* v. *Metromedia, Inc*., 403 U.S. 29, 52 n. 18 (1971)).

The hyperlink example illustrates how far afield the Court's misconception of recklessness took it. It was undisputed that the editorial at issue linked readers to an article that offered a contradictory view to that in *The Times* editorial about any connection between the Palin map and the shooting. The link was set forth in one of the very sentences corrected by *The Times* the day after the editorial appeared, a sentence at the core of Palin's case. At the least, linking the article was inconsistent with seeking to knowingly publish false information in order to harm Palin, and the district court correctly concluded that it was implausible that *The Times* had acted with actual malice when it "included as a hyperlink an article undercutting its own conclusion." Opinion at 18. This Court's response was to characterize *The Times* as reckless since the editor had not personally read the hyperlink, an irrelevancy with respect to anything bearing on *The Times*' state of mind. In doing so, the Court offered no basis for concluding that it was plausible that an entity dedicated to defaming Palin would have printed, without comment, a hyperlink so favorable to her and so at odds with its own editorial.

Claims of recklessness are commonplace in public figure libel cases. Recklessness is generally far easier to prove—and certainly to assert—than actual knowledge of falsity. It is thus neither surprising nor unusual that so much of Palin's argument (and ultimately this Court's opinion) focused on *The Times*' allegedly reckless conduct. *See, e.g.*, Opinion at 14 (describing Appellant's claim that Bennet

"at least was reckless"); *id*. at 17 (concluding that "there was a plausible inference that Bennet was reckless").

Determinations as to whether recklessness has been sufficiently plausibly alleged are of particular import on motions to dismiss in public figure libel cases since in those cases actual malice must be proved by "clear and convincing" evidence, *Masson* v. *New Yorker Magazine, Inc*., 501 U.S. 496, 510 (1991)—a deliberately demanding standard adopted to assure far-reaching protection for journalists when they write about newsworthy and often powerful individuals. When the Constitution itself limits recovery that might have been available at common law, it is particularly important that the plausibility analyses compelled by *Twombly* and *Iqbal* correctly apply constitutional norms. The *amici* do not believe that this Court did so in its Opinion. It is for this reason that the *amici* respectfully submit that whatever path this case may take in the future, errors of the magnitude described in this submission about the very nature of constitutionally defined recklessness should not remain outstanding as the judgment of this Court.

CONCLUSION

The *amici* urge the Court to grant rehearing by the Panel or the Court *en banc*.

Dated: August 27, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 1,746 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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