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

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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

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[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.

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