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How Two Rights Made a Wrong: *Sullivan*, Anti-SLAPP, and the Underenforcement of Public-Figure Defamation Torts

Justin W. Aimonetti & M. Christian Talley

ABSTRACT. Two wrongs don't make a right, but can two rights make a wrong? With public-figure defamation actions, the answer is sometimes "yes." To protect the right to freedom of speech, the Supreme Court held in *New York Times v. Sullivan* that public officials who sue for defamation must prove that defendants acted with "actual malice." On its own, the *Sullivan* standard is almost impossible to satisfy. But in many states, the true standard for public-figure defamation suits has become even tougher. Seeking to protect the right to petition, many state legislatures have enacted statutes targeting so-called "strategic lawsuits against public participation" (SLAPP)—suits filed in retaliation for the exercise of First Amendment rights. These statutes permit defendants who claim they were sued for their First Amendment activities to make "anti-SLAPP" motions early in the litigation. To prevent dismissal of their claims, plaintiffs then must show—before discovery—a probability of success on the merits. Whatever these statutes' utility in ordinary litigation, they saddle public-figure defamation plaintiffs with an almost-comical catch-22: to survive an anti-SLAPP motion and obtain discovery, plaintiffs must demonstrate that defendants likely acted with actual malice. But because "actual malice" refers to the defendant's mental state, it often requires discovery to prove. By trapping plaintiffs in this dilemma, anti-SLAPP double-counts defendants' rights and creates an anti-plaintiff super-standard. This synergy of *Sullivan* and anti-SLAPP has led to an undesirable underenforcement of defamation law. Despite *Sullivan* and anti-SLAPP's intended goals, their union immunizes defamatory speech unrelated to the search for "political truth" or the "marketplace of ideas."

INTRODUCTION

In November 2006, Sacramento County Adult Protective Services (APS) requested that an eighty-six-year-old citizen, Mary Jane Mann, be appointed a

conservator.[1] APS personnel noticed that Mann had become "confused and forgetful," struggled to recall conversations from the day before, and "had a history of getting lost while driving."[2] During Mann's evident cognitive decline, APS grew concerned that one of Mann's adult daughters, Carol Kelly, was unduly influencing Mann.[3] Indeed, APS "had evidence . . . that Kelly was attempting to take advantage of Mann financially."[4]

In light of those facts, a California trial court appointed Carolyn Young to act as Mann's temporary conservator.[5] As a conservator, Young was "subject to comprehensive regulatory and ethical standards."[6] She apparently had discharged those duties faithfully in the past. At the time of her appointment to Mann's conservatorship, Young had been a professional conservator for more than twenty years and had over one hundred additional clients.[7] Mann was ultimately among them for only a short time. In February 2007, one month after Young's appointment, Young, Mann, Kelly, and Mann's other daughter reached an agreement in a nonjudicial mediation about how to protect Mann's assets.[8] Accordingly, the conservatorship was dissolved.[9]

A year later, Young received a visit at her office from the local news station, Channel 13.[10] Its producer, Dave Clegern, asked Young for an interview about her role as a conservator, which she granted.[11] Clegern then confronted Young with a spate of accusations: that Young set up Mann's conservatorship "without justification," never notified Mann about its creation, and mismanaged Mann's funds.[12] Young denied the allegations and showed Clegern the APS report that indicated concern about Mann's cognitive impairment.[13]

Nevertheless, Channel 13 aired a sensational exposé a week later on Mann's conservatorship entitled "A Life Hijacked."[14] Produced by Clegern and hosted by investigative journalist Kurtis Ming, "the report consisted of interviews with

1. Young v. CBS Broad., Inc., 151 Cal. Rptr. 3d 237, 240 (Ct. App. 2012).
2. *Id.* at 247.
3. *Id.* at 240, 247.
4. *Id.*
5. Id.
6. *Id.* at 244.
7. *Id.* at 240, 245.
8. *Id.* at 240.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 240-41.

Mann and Kelly," but only "furtive shots of Young."[15] During her portion of the segment, Mann alleged that Young had threatened her, trespassed her home, committed battery upon Mann when Young "push[ed her] way in," and had stolen $60,000 from Mann's accounts.[16] Channel 13 had no evidence for those claims other than statements from Kelly and Mann, and it omitted its contrary interview with Young.[17] Instead, "to substantiate Mann's accusations," the program relied on "calculating filming techniques" and "sound effects."[18] For instance, Channel 13 filmed Young "from behind as if spying on her and without her knowledge," and it ominously depicted her driving by in slow motion.[19]

Young, understandably, sued for defamation.[20] During an earlier period in the development of American libel law, she likely could have prevailed in every jurisdiction in the United States.[21] And it appeared, at least at first, that she would prevail in modern-day California as well. For private-figure defamation, California requires only that a plaintiff show the defendant negligently published false, unprivileged statements that harmed the plaintiff's reputation.[22]

In response, however, Channel 13 and its parent company, CBS, invoked a unique procedural protection available to defendants in putative free-speech cases.[23] As with dozens of other states, California has enacted a statute meant to

15. *Id.* at 241.

16. *Id.* at 246, 248.

17. *Id.* at 247-48 (explaining that Clegern was unable to obtain cooperation, and thus corroboration, from other witnesses, either due to the confidential nature of the information involved or mere refusal to discuss the case); *id.* at 241 (noting the omission of Young's interview from the report).

18. *Id.* at 241.

19. *Id.*

20. *Id.* at 241.

21. As discussed further in Part I, for most of American history, libel was not thought to implicate any serious First Amendment concerns. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (upholding a libel conviction and noting that "libelous utterances" were outside "the area of constitutionally protected speech").

22. Brown v. Kelly Broad. Co., 771 P.2d 406, 424-25 (Cal. 1989); Taus v. Loftus, 151 P.3d 1185, 1209 (Cal. 2007).

23. *Young*, 151 Cal. Rptr. 3d at 242.

deter so-called strategic lawsuits against public participation, or SLAPP.[24] California's anti-SLAPP law, like some of its counterparts nationwide,[25] has two features salient to libel claims: First, if the defendant alleges that she was sued for engaging in First Amendment activities, the court must halt the suit before any discovery occurs.[26] Second, if the plaintiff cannot immediately show "a probability of success on the merits," then the court must dismiss her claims.[27] Luckily for Young, the trial court determined that these protections were inapplicable to some of her claims, since many of Channel 13's statements "were not privileged" under the statute.[28]

On interlocutory review, however, the California Court of Appeal delivered Young the one-two punch this Essay terms the public-figure defamation "superstandard." With its first jab, the court reasoned that Young was not a private individual, but a public official.[29] Young, to be sure, was not an employee of the government, did not seek to become one, and did not exercise any authority over the government's policy decisions.[30] But because her role as a conservator was "analogous to . . . [a] social worker,"[31] and thus analogous to a government employee, the court imposed the standard for public-official libel actions laid down in *New York Times v. Sullivan*: actual malice.[32] To prevail, Young would have to show that Channel 13's personnel either knew that statements in the exposé were false or had acted with "reckless disregard" to their falsity.[33]

With its second blow, the court ruled that California's anti-SLAPP law applied to the contested statements.[34] Unlike the ordinary requirement that a California plaintiff simply plead "a statement of the facts constituting the cause of action,"[35] the plaintiff's response to an anti-SLAPP motion must demonstrate a

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24. *Id.* (identifying CAL. CIV. PROC. Code § 425.16 (West 2020) as the anti-SLAPP law); *see also* Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020), https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law [https://perma.cc/GQG4-XRUQ] (noting that "twenty-nine states have now enacted some version of an anti-SLAPP statute").

25. Horwitz, *supra* note 24.

26. CAL. CIV. PROC. CODE §§ 425.16(b)(1), (g) (West 2020).

27. *Young*, 151 Cal. Rptr. 3d at 242.

28. *Id.*

29. *Id.* at 243-45.

30. *Id.*

31. *Id.* at 244.

32. 376 U.S. 254 (1964) (establishing the actual malice standard); *Young*, 151 Cal. Rptr. 3d at 245-49 (applying the standard to *Young*).

33. *Young*, 151 Cal. Rptr. 3d at 245.

34. *Id.* at 242-43.

35. CAL. CIV. PROC. CODE § 425.10(a)(1) (West 2020).

"probability of success."[36] In combination with *Sullivan*, then, the defendants' motion required Young to demonstrate that she would likely present clear and convincing evidence at trial that Channel 13 had acted with actual malice.[37] Lacking a direct admission by the defendants, however, and denied the opportunity for discovery by Channel 13's anti-SLAPP motion, Young's suit reached a dead end. Deprived of discovery, she could not surmount the *Sullivan*/anti-SLAPP super-standard.

Young is one among many illustrations of a little-known but very real problem that has crept into defamation law.[38] Intending to protect defendants sued for exercising their First Amendment rights, California and other states have codified anti-SLAPP provisions over the past thirty years.[39] Many of these laws are written broadly, applying to virtually any lawsuit where the defendant asserts that her conduct has a First Amendment nexus.[40] Functioning properly, their burden-shifting mechanism defeats nonmeritorious claims filed to harass speakers with abusive litigation.[41] But when applied to defamation suits, they confound the Supreme Court's reticulated vision for the correct standard in public-figure libel actions. Actual malice no doubt was intended to be a stringent standard, but it was also intended to be an issue of fact that plaintiffs could bolster through discovery and prove at trial.[42] And it certainly was not crafted on the

36. *Young*, 151 Cal. Rptr. at 242.

37. *Id.* at 246.

38. A striking example of the super-standard recently surfaced in the case *Smartmatic USA Corp. v. Fox Corp.* Voting-technology company Smartmatic sued Fox News for defamation for Fox's "disinformation campaign" that claimed Smartmatic helped steal the 2020 election from President Donald Trump. Complaint at 10-11, Smartmatic USA Corp. v. Fox Corp., No. 151136/2021 (N.Y. Sup. Ct. Feb. 4, 2021). Fox News's motion to dismiss retorted that New York's anti-SLAPP law mandates immediate, pre-discovery dismissal unless Smartmatic could allege facts illustrating actual malice. Defendants' Memorandum of Law in Support of Fox Defendants' Motion to Dismiss Pursuant to the First Amendment and CPLR §§ 3211(a)(1), (a)(7), at 3, *Smartmatic*, No. 151136/2021 (Feb. 8, 2021). In addition to the case studies presented in this Essay, the super-standard has also surfaced in several federal lawsuits. *See, e.g.*, Arpaio v. Zucker, 414 F. Supp. 3d 84, 93 (D.D.C. 2019) ("[T]he Court acknowledges that the burden of putting forward articulable facts of actual malice is a difficult one to meet, especially when discovery is not yet available to the parties."); Abbas v. Foreign Policy Grp., LLC, 975 F. Supp. 2d 1, 13 (D.D.C. 2013); Adelson v. Harris, 973 F. Supp. 2d 467, 503 (S.D.N.Y. 2013).

39. *Anti-SLAPP Statutes and Commentary*, MEDIA L. RESOURCE CTR. (2019), https://www.medialaw.org/topics-page/anti-slapp [https://perma.cc/SW6G-XBM9] (compiling state anti-SLAPP statutes).

40. *Id.*

41. *See* Horwitz, *supra* note 24.

42. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 17 n.50 (1989).

assumption that an anti-SLAPP mechanism would apply concurrently.[43] As discussed below, had anti-SLAPP existed at mid-century, "actual malice" would have been an unnecessary innovation.[44] Given the near-comical burden that *Sullivan* and anti-SLAPP generate when acting in tandem, those standards should be disentangled.

This Essay makes that case in two Parts. Part I details the respective origins of the actual malice standard and state anti-SLAPP laws. It argues that despite *Sullivan*'s gleaming reputation,[45] the Court made a serious error when it diagnosed the issue it was confronting as one of libel law, rather than one involving strategic lawsuits against public participation. By missing that insight, the *Sullivan* Court crafted an extremely under-inclusive standard that created the need for state experimentation with anti-SLAPP. That experimentation, in turn, created the present and unwarranted *Sullivan*/anti-SLAPP super-standard. Moreover, that super-standard immunizes speech far afield from *Sullivan* and anti-SLAPP's original goals of protecting political debate. Part II proposes solutions to mitigate the super-standard's impact. Solutions might flow from Congress, the Supreme Court, state courts, or state legislatures. Though each involves trade-offs, each solution would help to rationalize public-figure libel law. And, by abolishing the super-standard, they might give our society a needed incentive to police its decaying discourse.

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43. George W. Pring and Penelope Canan would not introduce their SLAPP theory until the late 1980s—well after the Court had announced the actual malice standard in its 1964 *Sullivan* decision. *See id.*

44. See *infra* Part I.

45. *See, e.g.*, Marty Lederman, *Justice Thomas's Attack on* New York Times v. Sullivan*: Old Originalism in New Originalism Garb*, BALKINIZATION (Feb. 23, 2019, 6:51 PM), https://balkin.blogspot.com/2019/02/justice-thomas-and-nyt-v-sullivan-old.html [https://perma.cc/GSU2-4X3P] (labeling recent criticism of *Sullivan* "alarming"); *The Uninhibited Press, 50 Years Later*, N.Y. TIMES (Mar. 8, 2014), https://www.nytimes.com/2014/03/09/opinion/sunday/the-uninhibited-press-50-years-later.html (calling *Sullivan* "the clearest and most forceful defense of press freedom in American history").

I. THE INADVERTENT CREATION OF AN ANTI-PLAINTIFF SUPER-STANDARD

When the First Amendment was originally framed, and for 173 years thereafter, libel was thought to have "nothing to do" with freedom of speech.[46] Instead, libel was both a crime and a tort,[47] and certain libels—chiefly, false accusations of criminality or unfitness for a trade—were considered egregious.[48] For those libels, known as libels per se, the law presumed injury to the plaintiff's reputation.[49] There was also no rigid distinction between libels leveled at "private individuals" and those leveled at "public figures" or "public officials."[50] Each theory was actionable, and their respective elements were similar.[51]

That all changed, however, with the Supreme Court's *Sullivan* decision in 1964.[52] *Sullivan* grew out of an advertisement *The New York Times* ran in March 1960.[53] Entitled "Heed Their Rising Voices," it detailed various abuses civil-rights protestors had endured at the hands of police, and it went on to solicit donations for the protestors' fight against segregation.[54] It also contained various technical falsehoods.[55] Montgomery police had been deployed to Alabama State College but had not "ringed" it, as the ad claimed, and Dr. Martin Luther King Jr. had been arrested not "seven times, but only four."[56] Though the ad mentioned no one in particular, Montgomery's former commissioner, L.B. Sullivan, filed a libel suit against the *Times* on the theory that the ad was "of and concerning" him.[57] What resulted was a $500,000 libel judgment—the largest in Alabama's history[58]—delivered by a hopelessly biased Alabama judge and an

46. Dexter v. Spear, 7 F. Cas. 624, 624 (Story, Circuit Justice, C.C.R.I. 1825) (No. 3,867); *see* New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (noting that the Court was, "for the first time," holding First Amendment protections applicable to public-official libel actions).

47. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 517 (2d ed. 2020).

48. *See id.*; Proto v. Bridgeport Herald Corp., 72 A.2d 820, 825 (Conn. 1950).

49. DOBBS, HAYDEN & BUBLICK, *supra* note 47, § 516.

50. *See id.* § 517.

51. *See id.*

52. *Id.* § 519.

53. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

54. *Id.* at 292 app.

55. *Id.* at 258.

56. *Id.* at 259.

57. *Id.* at 261-62.

58. Walter Dellinger, *The Right to Be Wrong*, N.Y. TIMES (Sept. 1, 1991), https://archive.nytimes.com/www.nytimes.com/books/98/12/27/specials/lewis-law.html [https://perma.cc/4955-TCQB].

all-white jury.[59] After the Alabama Supreme Court affirmed, the United States Supreme Court granted certiorari.[60]

Though not traditionally thought of in such terms, *Sullivan* involved a sort of proto-SLAPP. Commissioner Sullivan advanced a weak libel claim with the transparent purpose of harassing the civil-rights movement and "punish[ing]" the *Times* for "criticizing the South."[61] The Court might have held that retaliation for First Amendment activities with *any* tort runs afoul of constitutional guarantees. But the Court failed to conceptualize the case in that manner. Instead, it viewed the issue as one specific to the tort of libel: that too low a fault requirement—for example, mere negligence—would "chill[]" expression by making it too easy for public officials to silence their critics.[62] In response, the Court declared that public officials who sue for libel must prove that defendants acted with "actual malice."[63] Concerned that Alabama courts would find on remand that the *Times* had transgressed even the new standard, the Court took the unusual step of declaring Sullivan's evidence legally insufficient to show actual malice.[64]

By constitutionalizing the law of libel, *Sullivan* was said to safeguard "the market place of ideas" and, even more grandly, to facilitate "arriv[al] at political truth."[65] But it also inaugurated an era of First Amendment expansionism into libel law that produced questionable results. The Court later held that "public figures," and then "limited-purpose public figures," and then even private citizens criticized on matters "of public concern" who claimed libel per se, had to prove actual malice.[66] As a result, some plaintiffs who had formerly labored in obscurity—for instance, Carolyn Young—were suddenly vaulted to "public figure" status upon filing a libel claim. Following a subsequent Supreme Court

59. John Bruce Lewis & Bruce L. Ottley, New York Times v. *Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 12-16, 12 n.65 (2014).

60. *See Sullivan*, 376 U.S. at 256.

61. Mary Wood, *'Common Law' Explores Why the Supreme Court's Most Famous Libel Case Is Still Generating Debates*, U. VA. SCH. L. (Feb. 4, 2020), https://www.law.virginia.edu/news/202002/common-law-explores-why-supreme-courts-most-famous-libel-case-still-generating [https://perma.cc/U6YH-K5NJ] (quoting Frederick Schauer).

62. *Sullivan*, 376 U.S. at 300-01 (Black, J., concurring); *see id.* at 279-80 (majority opinion).

63. *Id.* at 279-80.

64. *Id.* at 285-86.

65. Anthony Lewis, *Court Broadens Freedom of the Press*, N.Y. TIMES (Mar. 15, 1964), https://www.nytimes.com/1964/03/15/archives/court-broadens-freedom-of-the-press-supreme-court-decision-in-times.html [https://perma.cc/Q29F-PALJ].

66. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 (1979); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion).

holding that the failure to investigate does not constitute actual malice, *Sullivan* and its progeny encouraged an unfortunate journalistic moral hazard. Journalists' virtual impunity to libel judgments sheltered sloppy reporting of sensational but demonstrably false allegations.[67]

Yet as these doctrines made *winning* a libel suit "almost impossible" for public figures who sued in good faith after their reputations were damaged,[68] they did nothing to prevent plaintiffs from *filing* claims in bad faith.[69] Even if they could not win, deep-pocketed plaintiffs could still punish their defendant-critics with meritless libel litigation. Attorneys' fees, the hassle of discovery, and wasted time could themselves be sufficient to deter members of the public from engaging in First Amendment activities.[70] Plaintiffs, moreover, could execute such harassment through nondefamation claims — for instance, business or antitrust torts — where *Sullivan* does not apply.[71] It was precisely these abuses that George W. Pring and Penelope Canan gave the memorable moniker "SLAPP."[72]

Despite its latent connection to *Sullivan* and speech issues, SLAPP was originally framed as an assault on the right to petition.[73] Pring cataloged a series of baseless suits launched against good-faith petitioners who were harassed with abuse of process.[74] His work laid a foundation for states' efforts to combat these suits with anti-SLAPP statutes. Some, bearing the mark of Pring's original theory, are framed specifically as safeguards for the right to petition.[75] Others are worded broadly and do not even require a showing that the plaintiff filed the suit to harass the defendant.[76] The California law involved in the *Young* litigation, for instance, provides a defense for any claim simply "arising from" the exercise of First Amendment rights.[77]

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67. *See, e.g.*, Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 295-301 (1971).

68. *Dun & Bradstreet*, 472 U.S. at 771 (White, J., concurring).

69. Pring, *supra* note 42, at 9 (noting that fifty-three percent of all SLAPPs in his original data set were based on defamation claims).

70. *Id.* at 5-6.

71. *Id.* at 9.

72. *Id.* at 4; *see also* Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 23 (1989) ("Strategic Lawsuits Against Public Participation (SLAPPs) involve the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena, where the playing field appears more advantageous.").

73. Pring, *supra* note 42, at 9-12.

74. *Id.* at 7-9, 13-15.

75. *Anti-SLAPP Statutes and Commentary*, *supra* note 39.

76. *Id.*

77. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2020).

It is easy to see how either anti-SLAPP statutes or the *Sullivan* standard, when functioning independently, make some sense in their own right. *Sullivan* makes libel suits harder to win, but it gives plaintiffs a chance to do so with discovery. For many years, First Amendment scholars considered this the "proper balance" of speech and reputation.[78] Conversely, imagine a jurisdiction without *Sullivan* but with an anti-SLAPP law. Libel suits in theory would be easier to win, but the defendant could still prevail by showing that the plaintiff sued in retaliation for First Amendment activities. More libels would be actionable under that regime, but only the most egregious could ever proceed to trial. Combined, however, actual malice and anti-SLAPP create a super-standard unforeseen by the *Sullivan* Court—one that blocks access to evidence and uniquely disables public-figure defamation claims.

That super-standard might be justified if it protected the free exchange of ideas in some uniquely desirable way. But all too often, the super-standard creates a safe harbor for defendants' weaponized gossip. Two brief examples reinforce the points *Young* illustrated above. Take the recent case of Thomas Cronin. In the summer of 2017, Cronin ran for a leadership position at EASTCONN, an educational services center in Connecticut.[79] He was then its Director of Education, and he hoped to serve as its new Executive Director.[80] But in the middle of his candidacy, an apparent detractor named Paul Pelletier sent the Board a letter rife with baseless accusations "that disparaged Cronin."[81] The missive accused Cronin of mismanaging funds, engaging in cronyism, and displaying grave incompetence in his current position.[82] In response, Cronin filed a suit for libel per se.[83] He offered the trial court several affidavits suggesting that, "contrary to the defendant's vituperation," he had been a well-liked and highly effective employee.[84]

Whatever promise his claims might have had initially, they soon met their demise in the clutches of the super-standard. The trial court first concluded "that Cronin was a public official" for purposes of the libel suit, given EASTCONN's

78. *See* Sean Thomas Prosser, *The English Libel Crisis: A* Sullivan *Appellate Review Standard is Needed*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 337, 345 (1992); *see also* DOBBS, HAYDEN & BUBLICK, *supra* note 47 (discussing the history of defamation law).

79. Cronin v. Pelletier, No. CV186014395S, 2018 WL 3965004, at *1 (Conn. Super. Ct. July 26, 2018).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at *2.

84. *Id.* at *4.

loose affiliation with the state government.[85] He thus had to prove that Pelletier disparaged him either with knowledge that the remarks were false or while knowing there was a serious risk of their falsity.[86] Following a well-worn path, Pelletier then "filed 'a special motion to dismiss' pursuant to the procedure set forth in [Connecticut's] [a]nti-SLAPP statute."[87] Any discovery Cronin might have pursued to illustrate Pelletier's actual malice was "severely limited by the filing of [the] special motion to dismiss."[88] That procedural mechanism stripped from Cronin any realistic shot at making his case, and the trial court therefore dismissed his claims. Even as it did so, however, the court was sympathetic to Cronin. It acknowledged that Cronin might very well have been able to show that Pelletier's "bitterness" motivated the smear campaign.[89] And it pointed out the "harshness" of the legislative scheme establishing the special motion.[90] But bound by that "legislative judgment," the court could not allow Cronin's suit to proceed.[91]

Consider next the saga of California immigration attorney John Hu. Hu's "practice focuses on immigration matters, and he specializes on visa petitions under the EB-5 Immigrant Investor Program."[92] That program makes visas available to foreign investors who invest a certain amount of capital into commercial enterprises in the United States.[93] Hu's business suffered when commenters on an online message board levied accusations of grave misconduct: that Hu labored under a conflict of interest and that he was being sued by the SEC.[94] One commenter even included a link to the SEC's supposed "indictment" of Hu.[95] The problem? None of those claims were true. Instead, they had been concocted by Hu's business competitor, Zoe Makhsous.[96]

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85. *Id.* at *2.

86. *Id.* at *3 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

87. *Cronin*, 2018 WL 3965004, at *1.

88. *Id.* at *3.

89. *Id.* at *4.

90. *Id.* at *3.

91. *Id.*

92. Hu & Assocs., LLC v. New Life Senior Wellness Ctr., LLC, No. LACV16-03078 JAK (MRWx), 2017 WL 10591754, at *1 (C.D. Cal. July 7, 2017).

93. *Id.*

94. *Id.* at *1-2.

95. *Id.* at *2.

96. *Id.* at *11 (noting that Hu and Makhsous were "competing for the same pool of potential investors"); *id.* at *18 (explaining that Makhsous's allegations were demonstrably false).

Hu filed a libel suit against Makhsous.[97] Predictably, Makhsous sought refuge under the super-standard. She argued that Hu qualified as a public figure because her statements had been directed toward Hu's business practice.[98] The court agreed, determining that Hu was a public figure for the limited purpose of his immigration business.[99] His claim, therefore, hinged on proof of actual malice.[100] In a now familiar pattern, the court ruled in response to Makhsous's anti-SLAPP motion that Hu was entitled to only minimal discovery. Hu was granted the chance to show that he and Makhsous were competitors, which he did. But he was denied the opportunity to probe Makhsous's thought process as she defamed him.[101] Hu, therefore, was functionally barred from showing actual malice. And though Makhsous's statements were demonstrably false, Hu lost anyway.

II. REFORMING THE PRESENT SUPER-STANDARD

What does the speech of Channel 13, Paul Pelletier, and Zoe Makhsous have in common? One answer, discussed above, is defamatory falsity. But another is the lack of a plausible relationship to the original purpose of the *Sullivan* standard: to promote a vital political discourse and to shelter those who, working in good faith, might occasionally be mistaken about some peripheral fact. Instead, the combination of *Sullivan* and anti-SLAPP serves to immunize a motley assembly of nastygrams, whispering campaigns, and baseless sensationalism. It is an aberration in need of reform. Accordingly, this Essay now suggests four methods by which federal and state actors might unwind the super-standard.

One solution readily available to courts interpreting anti-SLAPP statutes is to modify their approach to those provisions regulating discovery. Avoiding discovery, to be sure, is often considered anti-SLAPP's raison d'être. But in what is perhaps a tacit admission of the super-standard problem, the same statutes sometimes permit courts to order discovery even after an anti-SLAPP motion.[102] Take California's law as an example. It provides that, although such a motion stays discovery, "the court, on noticed motion and good cause shown, may order

97. *Id.* at *1.

98. *Id.* at *16.

99. *Id.* at *17.

100. *Id.* at *18.

101. *Id.* at *19.

102. *See, e.g.*, Grishin v. Sulkess, No. CV 18-10179 DSF (AGRx), 2019 WL 4418543, at *7 (C.D. Cal. May 31, 2019); Am. Dental Ass'n v. Khorrami, No. CV 02-3853 DT(CTX), 2003 WL 24141019, at *6 (C.D. Cal. July 14, 2003) (granting a motion for limited discovery); Toll v. Wilson, 453 P.3d 1215, 1217 (Nev. 2019) (same).

that specified discovery be conducted notwithstanding this subdivision."[103] In contrast to the approach taken in *Young* and *Hu*, courts should recognize that avoiding the super-standard constitutes "good cause" for discovery. When confronting the super-standard, courts should grant public-figure libel plaintiffs limited discovery tailored to the issue of actual malice. Relaxing that interpretation would grant public-figure plaintiffs with potentially meritorious claims a fair shot at making their case.

Second, state legislatures could modify the language of their anti-SLAPP statutes to clarify that those protections apply only when the plaintiff's suit was filed to harass the defendant — *not* simply when the defendant's conduct has some arguable First Amendment nexus. To invoke anti-SLAPP protections under many states' existing regimes, all the defendant must show is that her conduct had some relationship to the First Amendment.[104] That trigger is unreasonably light. Every defamation claim involves some form of speech. So every defamation claim, from the strongest to the most trivial, will have *some* First Amendment nexus. A mere nexus requirement, then, makes anti-SLAPP statutes an unreliable indicator of when a libel claim is meritorious versus when it is abusive. Instead, a defendant should be required to show in her anti-SLAPP motion that the plaintiff filed her lawsuit with the objective purpose of harassment. That modified requirement would be more faithful to the original purpose of anti-SLAPP — weeding out retaliation — and would permit the litigation of good-faith claims against defendants' baseless accusations.

Third, as others have suggested,[105] Congress, by statute, or the Supreme Court, by federal rule, could create a federal anti-SLAPP provision. For instance, a new Federal Rule of Civil Procedure could (1) allow defendants to make a federal anti-SLAPP motion while (2) conditioning that motion on a showing that the plaintiff's purpose was to harass the defendant and (3) allowing limited discovery on the issue of actual malice if the defendant cannot demonstrate harassment. A federal solution is attractive not just for its inherent uniformity, but also because that uniformity would solve the intractable circuit split about whether anti-SLAPP is "substantive" or "procedural" for *Erie* purposes.[106] That split has

103. CAL. CIV. PROC. CODE § 425.16(g) (West 2020).

104. Park v. Bd. of Trs. of Cal. State Univ., 393 P.3d 905, 908 (Cal. 2017).

105. *See, e.g.*, Horwitz, *supra* note 24.

106. Appellate courts have expressly acknowledged the circuit split. *See, e.g.*, Intercon Sols., Inc. v. Basel Action Network, 791 F.3d 729, 731 (7th Cir. 2015) (noting that the application of anti-SLAPP laws "has produced disagreement among appellate judges"). *Compare* Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014), *and* Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010), *and* United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999), *with* Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019), *and* Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018), *and* Carbone v. Cable

led to a somewhat random patchwork in which states may apply anti-SLAPP in their own proceedings, but defendants may be stripped of those benefits upon removal to federal courts that view anti-SLAPP as merely procedural.[107] In cases removed to federal court, a federal procedural law that circumvented the super-standard could displace state anti-SLAPP laws that irrationally disable public-figure libel claims.[108]

Last and most controversial, the Supreme Court could overrule *Sullivan* and replace it with a First Amendment anti-SLAPP principle.[109] As mentioned, *Sullivan* was a missed opportunity. Though its underlying facts strongly resembled a SLAPP, the Court failed to understand the case as such. It thus set forth a constitutional rule focused on libel rather than abuse of process. If the Court overrules *Sullivan*—which one Justice has signaled it should consider[110]—the Court could instead hold that a defendant is entitled to dismissal of the plaintiff's claims if the defendant can show that the plaintiff filed her complaint with the objective purpose of harassing the defendant for engaging in First Amendment expression. The invariable objection, of course, is that such a rule is merely "made up." But so was *Sullivan*. To the extent the Court is interested in crafting constitutional rules, reading the First Amendment to provide an anti-SLAPP protection would mitigate *Sullivan*'s original underinclusiveness and create a nationally uniform defense for speakers in those states without anti-SLAPP laws.

CONCLUSION

Sullivan and anti-SLAPP have much in common. Both were born of a righteous enmity for the harassment of speakers and petitioners by rich and powerful interests. Yet the standards' convergence has facilitated a unique hostility toward the tort of defamation and, thus, hostility toward the value of reputation itself. In other contexts, scholars have rightly decried the Supreme Court's refusal to

News Network, 910 F.3d 1345, 1347 (11th Cir. 2018), *and* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015).

107. Benjamin Ernst, Note, *Fighting SLAPPS in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. Rev. 1181, 1183-84 (2015).

108. Hanna v. Plumer, 380 U.S. 460, 466 (1965) (explaining that federal courts in diversity actions must apply state substantive law and federal procedural law).

109. Relatedly, if the Court declines to *overrule* the *Sullivan* line of cases, it might consider restricting the universe of individuals who qualify as "public officials" or "public figures." But that approach would simply preserve the super-standard for whatever class of public officials and public figures remained.

110. *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675, 677-78 (2019) (Thomas, J., concurring in the denial of certiorari).

protect one's interest in her reputation.[111] But at the same time, they have applauded the virtual inability of public figures to levy a civil action in defense of it. That incoherent reality, now exacerbated by a super-standard the *Sullivan* Court failed to foresee, ought to change.

Justin W. Aimonetti, J.D., Virginia, 2020; M.A., Virginia, 2020; B.A., Columbia, 2017.

M. Christian Talley, J.D., Virginia, 2020; M.St., Oxford, 2017; B.A., Vanderbilt, 2016.

111. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 694 (1976); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 325-28 (1976).