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Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision

Justice Neil M. Gorsuch added his voice to that of Justice Clarence Thomas in questioning the longstanding standard for public officials set in New York Times v. Sullivan.

By Adam Liptak

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WASHINGTON — Two justices on Friday called for the Supreme Court to reconsider New York Times v. Sullivan, the landmark 1964 ruling interpreting the First Amendment to make it hard for public officials to prevail in libel suits.

One of them, Justice Clarence Thomas, repeated views he had expressed in a 2019 opinion. The other, Justice Neil M. Gorsuch, offered fresh support for the view that the Sullivan decision and rulings extending it warranted a reassessment.

They made their comments in dissents from the court's decision not to take up a libel case brought by the son of a former prime minister of Albania.

Both justices said the modern news media landscape played a role in their thinking about the actual malice doctrine announced in the Sullivan case. That doctrine required a public official suing for libel to prove that the offending statements were made with the knowledge they were false or with serious subjective doubt about their truth — a stricter standard than is applied to cases brought by ordinary people. The doctrine was expanded in later court rulings to cover public figures, not just public officials.

Justice Thomas denounced the explosion of conspiracy theories and other disinformation. He cited a news report on "the shooting at a pizza shop rumored to be 'the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton'" and a New York Times article on "how online posts falsely labeling someone as 'a thief, a fraudster and a pedophile' can spark the need to set up a home-security system."

"The proliferation of falsehoods is, and always has been, a serious matter," Justice Thomas wrote. "Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires."

Justice Gorsuch wrote that much had changed since 1964, suggesting that the actual malice doctrine might have made more sense when there were fewer and more reliable sources of news, dominated by outlets "employing legions of investigative reporters, editors and fact checkers."

"Large numbers of newspapers and periodicals have failed," he wrote. "Network news has lost most of its viewers. With their fall has come the rise of 24-hour cable news and online media platforms that 'monetize anything that garners clicks.'

"What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets," he wrote, "has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable."

The two justices made their comments in dissenting from the court's denial of review in Berisha v. Lawson, No. 20-1063, a libel case brought by Shkelzen Berisha, the son of Albania's former prime minister. He sued the author and publisher of "Arms and the Dudes: How Three Stoners From Miami Beach Became the Most Unlikely Gunrunners in History," a 2015 book that examined weapons procurement and was the basis of the movie "War Dogs."

Mr. Berisha said the book, written by Guy Lawson and published by Simon & Schuster, falsely linked him to an illicit arms deal.

The U.S. Court of Appeals for the 11th Circuit, in Atlanta, relying on decisions extending the Sullivan case from public officials to public figures, ruled that Mr. Berisha was a public figure.

"The purposes underlying the public figure doctrine apply unequivocally to Berisha: He was widely known to the public, he had been publicly linked to a number of high-profile scandals of public interest, he availed himself of privileged access to the Albanian media in an effort to present his own side of the story, and he was in close proximity to those in power," Judge Diarmuid F. O'Scannlain, visiting from the Ninth Circuit, wrote for a unanimous three-judge panel.

As a public figure, Judge O'Scannlain continued, Mr. Berisha had to show that what the book had said about him had been published with "actual malice" but had failed to do so.

On Friday, Justice Thomas said the Supreme Court had invented the actual malice rule out of whole cloth.

"This court's pronouncement that the First Amendment requires public figures to establish actual malice bears 'no relation to the text, history or structure of the Constitution,'" he wrote, quoting from a recent dissent from Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit.