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Wynn v. The Associated Press, et al.: A Recent Petition for a Writ of Certiorari Highlights Challenges to New York Times v. Sullivan and Anti-SLAPP Laws

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The 1964 Supreme Court case *New York Times v. Sullivan*, which requires public officials to prove "actual malice" to succeed on a defamation claim, was a watershed moment in defamation law. *Curtis Publishing Co. v. Butts* was decided just a few years later and extended the same protection to "public figures" in addition to public officials. Since then, anti-SLAPP laws have proliferated at the state level, providing even further protections to defendants. These laws generally provide an expedited procedure to dismiss claims implicating First Amendment rights if the plaintiff cannot bring forward evidence supporting a claim early in the case. While states continue to pass anti-SLAPP laws, this legal regime has also come under increasing scrutiny.[1] A petition for a writ of *certiorari* recently filed by casino magnate Steve Wynn against the Associated Press ("AP") launches a frontal assault on *Sullivan* and also illustrates a number of issues in play.

Wynn's case stems from an AP article published in 2018. That article reported on a complaint to local police, also filed in 2018, alleging that the complainant had a child with Wynn "after he raped her" in the 1970s. According to Wynn, the report also included fanciful elements that the author of the AP article herself characterized as "crazy," such as that the complainant gave birth to a "purple doll" in a "water bag." Wynn alleged that AP defamed him by accusing him of rape without investigating the allegations or reaching out to Wynn for comment before publication.

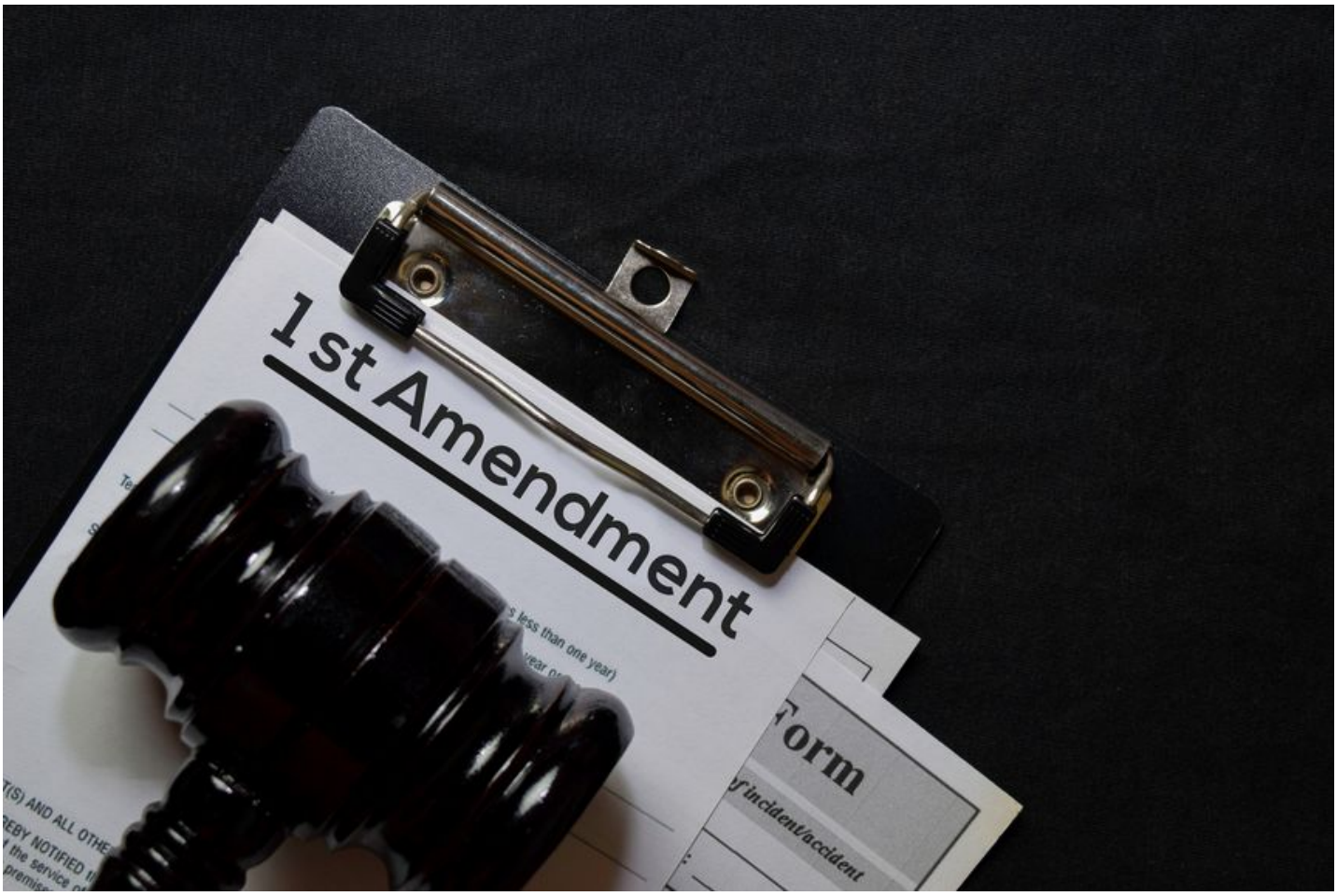
When Wynn first filed suit, AP filed a special motion to dismiss under Nevada's anti-SLAPP statute. That statute requires a two-step analysis: first, the defendant must show by a preponderance of the evidence that the statement at issue was "a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the defendant meets that burden, the plaintiff must then show "with prima facie evidence, a probability of prevailing on the claim." *Id.* The trial court held that Wynn failed to show actual malice and therefore granted AP's motion. On appeal, the Nevada Supreme Court affirmed the dismissal, holding for the first time that a plaintiff must present sufficient evidence in response to a motion to dismiss for a jury to infer that the publication was made with actual malice *by clear and convincing evidence*.

Wynn's *certiorari* petition presents two questions. First, Wynn asks the Court to directly overturn *Sullivan*, or at least *Curtis Publishing*. Barring that, Wynn asks the Court to incorporate the Seventh Amendment right to a jury trial against the States and hold that applying a clear and convincing actual malice standard at the motion to dismiss stage violates that right. With respect to the first question, Wynn attempts to appeal across the jurisprudential spectrum. He cites not only to dissents by Justices Thomas and Gorsuch, both of whom have stated a desire to revisit *Sullivan*, but also to a 1993 article on *Sullivan* by Justice Kagan in which she noted that the "dark side" of the actual malice standard is that "it allow[s] grievous reputational injury to occur without monetary compensation or any other effective remedy." In general, Wynn argues that *Sullivan*'s original rationale—providing "breathing space" for the press to report on public issues—has been undermined by the development of an online media environment in which publishers compete to publish first and ask questions later, and in which readers are siloed by algorithms, effectively preventing public figures from correcting the record.

While the current Court likely does not have the votes to overturn *Sullivan* or *Curtis Publishing*, state courts have found that anti-SLAPP statutes can violate the right to a trial by jury. Thirty-three states and the District of Columbia have passed some form of anti-SLAPP law. The supreme courts of Washington and Minnesota struck those states' anti-SLAPP laws as unconstitutional under their state constitutions, focusing on the laws' application of the clear and convincing standard. The Minnesota supreme court, for example, held that applying the clear and convincing standard "transfer[s] the jury's fact-finding role to the district court" and improperly "require[s] the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence)." *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 636 (Minn. 2017). In 2021, Washington enacted a new anti-SLAPP statute that requires a plaintiff to establish only a *prima facie* case as to each essential element of the cause of action, rather than meet the clear and convincing standard.

While *Sullivan* and *Curtis Publishing* appear ensconced for now, challenges to anti-SLAPP laws have succeeded, and the landscape of such laws continues to evolve.

[1] *See, e.g.*, David Enrich, *Can the Media's Right to Pursue the Powerful Survive Trump's Second Term*, New York Times (March 3, 2025), https://www.nytimes.com/2025/03/03/magazine/nyt-sullivan-defamation-press-freedom-ruling.html?searchResultPosition=3, scrutinizing the scrutiny.



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