

# COURT RULES THAT BEING CALLED A WHITE NATIONALIST IS NOT A DEFAMATORY STATEMENT OF FACT

*Hodgson Russ Media & First Amendment Alert*  
January 12, 2021

A federal judge in New York has dismissed a lawsuit against the *New York Times*, issuing a ruling likely to be cited by the news media and others in the coming months and years.

In *Brimelow v. New York Times Company*, a federal court considered whether calling someone a white nationalist, as opposed to their preferred characterization as a civic nationalist, constituted defamation. Applying well-established New York precedent, the court held that such labels are non-actionable opinion. But news organizations should take heed as the court reiterated that linking to third-party sources could lead to liability for republishing defamatory material.

The plaintiff, Peter Brimelow, is a prominent opponent of non-white immigration to the United States, having written a book on the topic, lectured on the topic, and founding and editing a website called VDARE.com that is devoted to the topic. VDARE is operated by a separate 501(c)(3) entity and “provides a platform for those ‘critical of America’s post-1965 immigration policies.’” By Mr. Brimelow’s admission, the website regularly publishes articles by individuals he identified as white nationalists, it is not just an outlet for his writings.

In a series of articles published between January 2019 and May 2020 by the *New York Times* (“*Times*”), Mr. Brimelow claimed that he was defamed because they portrayed him, and content published on the website, as “white nationalist”, “white supremacist” and “anti-Semitic.” Mr. Brimelow denied these characterizations, and rather self-identified as a civic nationalist.

## Attorneys

Ryan Cummings  
Patrick Hines  
Charles H. Kaplan  
Ryan Lucinski  
Elizabeth McPhail  
Aaron Saykin  
Gary Schober  
Christian Soller

## Practices & Industries

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The court began its analysis by reciting the well-established principal that “[u]nder New York law, defamation is defined as a ‘false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’” The court focused on the difference between non-actionable opinion and assertions of fact, which can be the basis of a defamation claim. It is for the court to decide if a statement constitutes fact or opinion. To exercise its legal mandate, the court evaluates the subject statement in the full context in which it was made, and the broader social context and circumstances, to determine if a reader would understand that the statement is likely opinion, not fact.

In one article from January 2019, Mr. Brimelow was referred to as an “open white nationalist.” In a revised version of the article, the *Times* referred to him as a “white nationalist” and provided a link to the Southern Poverty Law Center’s (“SPLC’s”) website about him, which characterized his ideology as “white nationalist” and provided examples of his published statements to substantiate such a characterization. The court found that the original article sufficiently set forth a statement of fact when it referred to him as an open white nationalist because it implied that he self-identified as a white nationalist, when he claimed he does not. But the revised article referenced him more generally as a white nationalist and provided the context from SPLC’s website for the reference; as such, it was non-actionable opinion. Ultimately, the article, whether in its original form or its revised version, was not actionable because Mr. Brimelow failed to allege that the *Times* acted with actual malice when it published the articles.

In a second article, Mr. Brimelow was referred to as the founder of an anti-immigration website and directly quoted remarks he made at the Conservative Political Action Conference in February 2012, with a hyperlink to a video of the conference. The same article quoted other sources as describing the website as a “hate website”, a “white supremacist website” and a “white nationalist organization.” The court held that the direct quotes were accurate, the descriptions of the website were those of others, not the *Times*, and were plainly opinion, not actionable false statements of fact.

A third article was written by Reuters and republished, in its entirety and without additional commentary, by the *Times*. The court held that such republishing, without any indication that the “republisher had, or should have had, substantial reason to question the accuracy of the articles or the bona fides of the reporter” is not actionable against the republisher.

The remaining articles referenced the VDARE website, not Mr. Brimelow specifically. The court held that such statements were not “of and concerning” Mr. Brimelow so they were not actionable by him. In addition, Mr. Brimelow failed to allege actual malice to support his claims based on those articles.

As such, the *New York Times*’ motion to dismiss Mr. Brimelow’s complaint in its entirety was granted.

### The Takeaways

First, allegedly defamatory statements about a business will not automatically give the owner, an officer, director or employees of that business standing to pursue defamation claims. Second, broad labels such as “white nationalist” will likely be treated as non-actionable opinion. And third, by providing the facts upon which a characterization of a person is based, the characterization will be protected opinion as it gives the recipient of the statement the basis upon which to draw their own conclusions.

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But news organizations should be careful when linking to/republishing other's materials. The Brimelow court reiterated that merely hyperlinking to an existing publication does not duplicate the content of the publication and, therefore, does not give rise to liability for republishing defamatory material. However, hyperlinking to an article and repeating the allegedly defamatory statements is republishing and could lead to defamation liability for the news organization. Here, the *Times* hyperlink to the SPLC's website was accompanied by repeating that website's characterization of Mr. Brimelow as a white nationalist. The court held that such repetition could have led to defamation liability for the *Times* if "white nationalist" were not an opinion.

For any question you have regarding whether this recent decision impacts any of your organization's activities, please contact Ryan Cummings (716.848.1665) or Aaron Saykin (716.848.1345).

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