24-2785-cv

United States Court of Appeals

for the

Second Circuit

MONICA MILLER, SUZANNE ABDALLA,

Plaintiffs-Appellants,

– v. –

LETITIA JAMES, Individually and in her official capacity as ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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ARGUMENT IN REPLY

Defendant asserts four "points" in her response brief: first, that Plaintiffs lack standing to advance their constitutional claims; second, that Plaintiffs' constitutional claims are barred by the Eleventh Amendment; third that Plaintiffs' constitutional claims lack merit; and fourth, that the district court properly dismissed Plaintiffs' defamation claim. (*See* Def's Br.). But for the Eleventh Amendment argument and the newly raised privilege claim (discussed *infra*), neither of which the district court addressed, each of these "points" was fully addressed in Plaintiffs' opening brief. Accordingly, we will endeavor to avoid needless repetition in this reply brief, but some repetition will be necessary nonetheless insofar as certain arguments bear emphasis in light of Defendant's presentation.

We begin this reply brief by highlighting a fundamental error. Both the district court and Defendant improperly seek to impose a heightened pleading requirement for Plaintiffs. This error compels reversal.

I. Defendant and the District Court Improperly Impose a Heightened Pleading Standard.

Plaintiffs appeal the district court's order granting Defendant's motion to dismiss the Complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Defendant's motion merely challenged the legal sufficiency of the Complaint. Both the district court and Defendant in her response brief seek to impose a heightened pleading standard for Plaintiffs. This is an invitation for error as a "heightened"

pleading standard under the Federal Rules "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (internal quotations omitted).

Rule 8(a) simply requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion, a complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. As stated by the Supreme Court, "[W]e do not require heightened fact pleading of specifics," *id*. at 570, which is precisely what the lower court and Defendant demand here. Moreover, "when a complaint adequately states a claim, it may not be dismissed based on a district court's [or a defendant's] assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Twombly*, 550 U.S. at 563 n.8.

When reviewing the plausibility of the claims set forth in Plaintiffs' Complaint, the district court was required to accept the factual allegations as true and construe the pleading in the light most favorable to Plaintiffs, drawing all reasonable inferences in their favor. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010). The same liberal standard applies in this Court. *Bldg. Indus. Elec. Contractors Ass'n ex rel. United Elec. Contractors Ass'n v. City of N.Y.*, 678 F.3d 184, 187 (2d Cir. 2012). And as discussed in further detail below, this liberal standard also applies

to Defendant's challenge to standing under Rule 12(b)(1). (*See infra* § II). In short, Plaintiffs' Complaint states plausible claims for relief, and Plaintiffs have standing to advance these claims. It was error to grant Defendant's motion to dismiss.

The indisputable facts for purposes of reviewing the lower court's decision can be summarized as follows. Defendant Letitia James, the Attorney General of New York, publicly and falsely declared, with malice, that private citizens who associate with Red Rose Rescue are "terrorists" and belong to a "terrorist group." This false and defamatory declaration was of and concerning Plaintiffs, as Plaintiffs are publicly known members of this group. In fact, Plaintiff Miller is considered the leader of this group, and the Attorney General knows this. Plaintiff Miller is discussed by name in the civil lawsuit that was the subject of the press conference at issue, and the Attorney General formally served Plaintiff Miller with the complaint as the principal agent for Red Rose Rescue. (Compl. ¶¶ 20, 30, R.1, A-9, 11). To argue that the defamatory statements were not "of or concerning" Plaintiffs is a frivolous argument contrary to the facts.[1]

Additionally, the video of the defamatory statements is posted on the Attorney

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[1] For example, Defendant repeatedly makes the tendentious argument that the Attorney General's defamatory statements "did not even mention plaintiffs." (Def.'s Br. at 15). The argument lacks merit. *See, e.g., Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015) (individual plaintiffs were self-described members of the "Juggalos" and not named personally in the offending National Gang Intelligence Center report but yet had standing to advance their constitutional claims). Certainly, for purposes of this appeal, the Court must reject this argument.

General's official website, and it remains to this day a government record available to the public. (Comp. ¶ 33 [citing website where video of press conference was published and remains published to this date], A-12). In other words, the harm is ongoing, and prospective relief will remedy this harm.

Without question, terrorism is a heinous crime that is proscribed by state (and federal) law.[2] As the chief law enforcement officer for New York, Defendant is well aware of this fact (and the recent terrorist attack in New Orleans is yet another sober reminder of this indisputable point). (Compl. ¶¶ 37, R.1, A-13).

It is a *provable* fact that Plaintiffs and others who associate with Red Rose Rescue are *not* terrorists; they have *never engaged* in a criminal act of terrorism nor have they *ever been charged* with engaging in any such act. Defendant knew this when she made her reckless and intentionally false declaration. She chose her words carefully and intentionally, and they were made with actual malice, hatred, ill will, and spite, *and for the unlawful purpose of suppressing the activities of pro-lifers who associate with Red Rose Rescue*. (Compl. ¶¶ 2, 24, 41, R.1, A-5, 6, 10, 14). No doubt, had Defendant possessed *any* evidence demonstrating that Red Rose Rescue was a terrorist organization or that those associated with this organization had engaged in *any* act of terrorism (and she would be the one with this evidence in light of her position as the Attorney General), she would have charged them for this criminal

[2] *See, e.g.*, N.Y. Penal Law §§ 490.00, *et seq*.; 18 U.S.C. § 2331 (defining, *inter alia*, "domestic terrorism").

conduct as her bitter and abusive feelings toward pro-lifers are plainly evident. The fact that she hasn't charged anyone associated with Red Rose Rescue with this criminal conduct unequivocally demonstrates the falsity of her factual assertions. (Compl. ¶¶ 29, 36, 68, R.1, A-11, 12, 13, 19).

In sum, when the chief law enforcement officer for the State of New York falsely and very publicly (at a press conference where she invited people and organizations who share her animosity toward pro-lifers) declares that you are a "terrorist" and that you belong to a "terrorist group," these false declarations are defamatory *per se*, and they cause reputational harm as a matter of fact and law. (Compl. ¶¶ 40, 42, 46, 47, 50, 52, R.1, A-14, 15, 16).

Defendant's reckless and intentional disregard for the truth is unlawful. She is the Attorney General and has thus placed the power of the government, with its authority, presumed neutrality, and assumed access to all the facts (including the existence of any evidence of terrorism), behind a designation *intended* to reduce the effectiveness of the Red Rose Rescue and its pro-life efforts protected by the First Amendment. (Compl. ¶ 52, R.1, A-16).

The *objective* harm to Plaintiffs' reputation coupled with the injury to Plaintiffs' efforts protected by the First Amendment—injuries that are fairly traceable to Defendant's actions and likely to be redressed by the relief requested—are sufficient for Plaintiffs to establish standing to advance their constitutional claims.

The district court erred by dismissing this case. Defendant's arguments in defense of this dismissal decision are without merit. This Court should reverse.

II. Plaintiffs Have Suffered a Personal Injury Fairly Traceable to Defendant's Unlawful Conduct and Likely to Be Redressed by the Requested Relief.

To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiffs satisfy this standard. And once again, the proper application of the standard of review is important here.

A. Standard of Review.

Defendant's Rule 12(b)(1) motion was a facial challenge to standing as it was based on the allegations of the Complaint. When the Rule 12(b)(1) motion is a facial challenge, "the ***plaintiff has no evidentiary burden***. . . . The task of the district court is to determine whether the [complaint] alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (internal citations, quotations, and punctuation omitted) (emphasis added); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). Moreover, "when evaluating standing, courts 'must assume that the party asserting federal jurisdiction is correct on

the legal merits of his claim, that a decision on the merits would be favorable and that the requested relief would be granted.'" *Barry's Cut Rate Stores, Inc. v. Visa, Inc.*, No. 05-MD-1720 (MKB) (JO), 2019 U.S. Dist. LEXIS 205335, at *134 (E.D.N.Y. Nov. 20, 2019) (quoting *Cutler v. United States HHS*, 797 F.3d 1173, 1179 (D.C. Cir. 2015)).

B. Injury.

An example illustrating Defendant's (and the lower court's) error here is found in Defendant's response brief with regard to the issue of whether Plaintiffs have sufficiently alleged a "reputational" injury. Plaintiffs appropriately rely on the principle of law established in *Meese v. Keene*, 481 U.S. 465 (1987), among other cases (*see infra*), that harm to reputation is a cognizable injury sufficient to assert a claim arising under the First Amendment. Defendant does not (because she cannot) dispute this point of law. (*See* Def.'s Br. at 14 ["To be sure, reputational harm may be sufficiently concrete to support standing."]).

In *Meese*, the alleged reputational harm was caused by the government's "political propaganda" label placed on films that Keene intended to show. This reputational harm is significantly more remote than declaring Plaintiffs—who are indisputably members of Red Rose Rescue and Plaintiff Miller is the leader of the group—to be "terrorists" belonging to a "terrorist group." Because Keene "submitted detailed affidavits, including one describing the results of an opinion poll and another

containing the views of an experienced political analyst" (*see* Def.'s Br. at 14) to show how this *indirect* governmental action of labelling the films at issue in that case would cause harm to *his* reputation does not impose a similar evidentiary burden on Plaintiffs in this case, particularly where the reputational harm is clearly evident and direct (*i.e.*, accusing Plaintiffs of being "terrorists" and belonging to a "terrorist group"). It is wrong to argue otherwise as the case law does not impose such an evidentiary burden on Plaintiffs, particularly at the pleading stage. Case law overwhelmingly supports Plaintiffs' reputational injury, and thus standing, in this case. *See, e.g., NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) ("As a matter of law, reputational harm is a cognizable injury in fact.") (citing *Meese*); *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (stating that "[t]he Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing"); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (finding standing to challenge a sanction that "affect[s] [the plaintiff's] reputation"); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) ("Case law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (holding that charitable organizations designated as "Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage

[to] the reputation of those organizations in their respective communities"); *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) (stating that "being put on a blacklist . . . is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list . . . does not impose legal obligations"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such a label could sour the perception of him by "people who can affect his future and his livelihood"); *Parsons v. United States DOJ*, 801 F.3d 701, 712 (6th Cir. 2015) ("Stigmatization also constitutes an injury in fact for standing purposes.").

Defendant's reliance on *Oneida Indian Nation v. United States DOI*, 789 F. App'x 271 (2d Cir. 2019) (*see* Def.'s Br. at 15), is misplaced as this case supports standing in this case. A lengthy quote from this decision is necessary to fully illustrate this point:

> Appellant argues that DOI's name change "vindicated the Wisconsin tribe's erroneous claim to the Oneida Nation legacy" and thereby "diminished the [New York Oneidas'] status and reputation as the original Oneida Nation, or its direct successor." Appellant Br. 38-39. To support its reputational injury argument, Appellant cites cases in which a plaintiff successfully asserted reputational injury based on a derogative or negatively perceived label applied to the plaintiff by the government. Appellant Br. 41-42 (citing, *inter alia, Meese v. Keene*, 481 U.S. 465, 473-77 (1987) (state senator seeking to exhibit films had standing to challenge the Department of Justice's characterization of films as "political propaganda"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-40 (1951) (certain nonprofit organizations

> designated as "Communist," injuring their right to be free from defamatory statements); *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 711-12 (6th Cir. 2015) (group labeled "hybrid gang" in a government report entitled "National Gang Threat Assessment")).
>
> Those cases are distinguishable. ***In each of them, the government attached a derogatory label to the plaintiff***, whereas here the government has said nothing about the New York Oneidas, let alone anything derogatory. *See Meese*, 481 U.S. at 469-70 (the Department of Justice applied label "political propaganda" to films pursuant to statutory definition); *McGrath*, 341 U.S. at 125 (government entities purported to act pursuant to Presidential authorization to designate organizations as Communist "after appropriate investigation and determination"); *Parsons*, 801 F.3d at 707 (government agency described group as "hybrid gang" in threat assessment report).
>
> In any event, that DOI published the new name ***does not imply that the federal government regards Appellant as lesser***. As Appellant admits, DOI's policy is to approve automatically any name chosen by a tribe. By contrast, *Meese, McGrath*, and *Parsons* ***involved negative labels applied by the Government based on*** certain statutory criteria or ***the Government's own analysis***.

Oneida Indian Nation, 789 F. App'x at 277 (emphasis added). Here, the Attorney General placed a "negative label" on Plaintiffs, who are unquestionably members of Red Rose Rescue (with Plaintiff Miller being the publicly recognized leader of the group, as Defendant knows) and who engage in constitutionally protected activity through this organization. Indeed, at a minimum, Plaintiffs are members of Red Rose Rescue similar to how the plaintiffs in *Parsons* were members of the "Juggalos," the self-identified fan base of a musical group called "The Insane Clown Posse." *See Parsons*, 801 F.3d at 706 ("Plaintiffs self-identify as Juggalos"). This reputational harm to Plaintiffs is an injury in fact for standing purposes, regardless of other harms.

See generally John v. Whole Foods Mkt. Grp., Inc., 858 F.3d 732, 736 (2d Cir. 2017) (noting that this Circuit has "repeatedly described [the injury in fact] requirement as a low threshold," "which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy") (internal quotations and citations omitted).

Additionally, the adverse effects of these defamatory statements have caused and will continue to cause harm to the legally protected right of Plaintiffs to carry on their pro-life work with Red Rose Rescue free from defamatory statements from the top law enforcement officer of New York. *See Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 140-41 ("The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right."). As set forth in the Complaint,

> Defendants James' challenged actions have the purpose and effect of deterring pro-lifers from associating with Red Rose Rescue and those involved with Red Rose Rescue, including Plaintiffs, and deterring donors and volunteers from supporting the activities of Red Rose Rescue. Defendant James' actions also legitimize the illegitimate attacks against pro-lifers in the public eye. Consequently, the challenged actions harm Plaintiffs' constitutionally protected activities and interests.

(Compl. ¶ 51, R.1, A-16). And while there is more in the Complaint, nothing further is needed for standing. Plaintiffs have suffered an injury in fact.

C. Fairly Traceable.

The fairly traceable element of standing, which is a low threshold, is also not difficult to establish here. *Carter*, 822 F.3d at 55 (noting that the "fairly traceable" element "does not create an onerous standard," and that "it is a standard lower than that of proximate causation"). Plainly, the alleged injuries at issue are directly traceable to Defendant's actions. Defendant does not appear to seriously dispute this point. Rather, her focus is on the injury and redressability elements, couching the latter in terms of failing to demonstrate a risk of future harm. We discuss that point next.

D. Future Injury and Redressability.

Contrary to Defendant's argument, there is an ongoing injury and substantial risk of future injury such that the injury is redressable and the requested ***prospective*** relief is appropriate. The Sixth Circuit's ruling in *Parsons*, which relied on *Meese*, demonstrates the error of Defendant's argument:

> The Juggalos in this case *also suffer alleged harm due to the force of a DOJ informational label*. While the 2011 NGIC Report is not the designation itself, it reflects the designation and includes an analytical component of the criminal activity performed by Juggalo subsets, classifying the activity as gang-like. As in *Meese*, "[*a*] *judgment declaring the* [action in *question*] *unconstitutional would eliminate the need to choose between* [*First Amendment-protected activity*] *and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation*."
>
> * * *
>
> *The declaration the Juggalos seek* ***would likely combat at least some***

> *future risk that they would be subjected to reputational harm and chill due to the force of the DOJ's criminal gang or gang-like designation*.

Parsons, 801 F.3d at 716-17 (internal citations omitted) (emphasis added); *see also Rooks v. Krzewski*, No. 306034, 2014 Mich. App. LEXIS 604, at *91 (Mich. Ct. App. Apr. 3, 2014) ("Numerous other courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory statements after there has been a determination that the speech was, in fact, false.") (citing cases).

Additionally, the Court could issue an order expunging all official government records, specifically including an order removing the video of the offending press conference from the government's official website, that label Plaintiffs as "terrorists" and Red Rose Rescue as a "terrorist group." *See Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (stating that "a court may order expungement of records in an action brought . . . directly under the Constitution, without violating the intricate statutory provisions that purport to be the 'exclusive' means by which [government records] may . . . be alienated or destroyed").

As stated in Plaintiffs' opening brief:

> In sum, "[a] judgment declaring the [action in question] unconstitutional would eliminate the need to choose between [First Amendment-protected activity] and incurring *the risk that public perception* of this criminal enforcement scheme will harm [Plaintiffs'] reputation." *See Parsons*, 801 F.3d at 717 (emphasis added). The declaration Plaintiffs "seek would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of [Defendant James'] designation." *Id*.

(Pls.' Br. at 32). In the final analysis, Plaintiffs have alleged a "substantial risk of future injury," and this injury is redressable by the requested relief. Plaintiffs have standing to advance their constitutional claims.

III. The Eleventh Amendment Does Not Bar Plaintiffs' § 1983 Claims.

Defendant argues that she is immune from suit under 42 U.S.C. § 1983 by virtue of the Eleventh Amendment. (Def.'s Br. at 18-20). The district court did not address this issue. Nonetheless, Defendant is mistaken. To begin, Plaintiffs' § 1983 claims involve state action as Defendant was acting in her capacity as the Attorney General at the time she made the false and injurious statements. That is, Defendant's labeling of Plaintiffs as "terrorists" and belonging to a "terrorist group" is "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed" it. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

And while a suit against a government official in her official capacity is essentially a suit against the government, *Ky. v. Graham*, 473 U.S. 159, 166 (1985), it is well established that prospective declaratory and injunctive relief are available in actions against state officials sued in their official capacities based on an allegedly

unconstitutional official act, *Ex Parte Young*, 209 U.S. 123, 151-56 (1908). In other words, the Eleventh Amendment is not a bar to this action for declaratory and injunctive relief. *See id.* Furthermore, as the chief law enforcement officer for the State of New York and the person *directly* responsible for the alleged harm, Defendant is the proper party in this case. *See id*. at 157 ("In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act.").

In sum, Defendant does not enjoy Eleventh Amendment immunity against Plaintiffs' claims for declaratory and injunctive relief advanced against her in her official capacity under 42 U.S.C. § 1983. As the Complaint expressly states, Plaintiffs' claims arising under § 1983 are brought against Defendant in her official capacity only. (Compl. ¶ 27, R.1, A-10). And *all* of the claims arising under § 1983 seek only declaratory and injunctive relief. (*Id*. ¶¶ 57, 60, 63, R.1, A-17, 18).

As set forth above, the requested prospective relief is plainly available in this case. Accordingly, Defendant's Eleventh Amendment immunity argument lacks merit.

IV. When the Attorney General of New York Declares that Someone Is a "Terrorist" or Belongs to a "Terrorist Group," those Statements Constitute Defamation *Per Se*.

"'A communication is defamatory if it tends so to harm the reputation of

another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 139 (quoting Restatement, Torts, § 559); *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809 (JMF), 2021 U.S. Dist. LEXIS 102800, at *27 (S.D.N.Y. June 1, 2021) ("Accusing someone of a serious crime is defamatory *per se*. . . ."). As alleged in the Complaint, the "terrorist" and "terrorist group" designations have harmed Plaintiffs' reputations and have deterred third persons from associating or dealing with them. (Compl. ¶¶ 40, 42, 46, 47, 48, 49, 50, 51, 53, 57, R.1, A-14-17); *see Van Der Linden v. Khan*, 535 S.W.3d 179, 198 (Tex. App. 2017) ("Khan alleges that falsely accusing someone of having admitted that he provided financial support to terrorists constitutes defamation *per se*. We agree."); *Grogan v. KOKH, Ltd. Liab. Co.*, 256 P.3d 1021, 1030 (Okla. Civ. App. 2011) ("It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person.").[3]

While the district court appropriately rejected Defendant's argument that her statements were not "of and concerning" Plaintiffs, it is important to point out again the way in which Defendant is playing fast and loose with the facts. In her brief, Defendant asserts that "the only individuals specifically connected to the Attorney

[3] Defendant notes in her brief that the court in *Grogan* rejected the plaintiff's defamation claim (Def.'s Br. at 31), but it did so because the alleged defamatory statement was shown to be true and not based on a finding that accusing someone of terrorism was nonactionable opinion. *See Grogan*, 256 P.3d at 1027-28.

General's statements were those named as defendants in her lawsuit (who are not plaintiffs here)." (Def.'s Br. at 26). According to Defendant, the public would not be aware of Plaintiffs direct involvement with this "terrorist" pro-life group specifically known as Red Rose Rescue. This argument is frivolous. At a minimum, while Plaintiff Miller was not a named *defendant* in the civil lawsuit (the point of the press conference was to announce the filing of this lawsuit with great public fanfare), she was certainly *named* (expressly) throughout the lawsuit as a *member* of Red Rose Rescue. (*See* Muise Decl., Ex. A [Civil Complaint], R.10-1, A-24-43). And to make matters worse for Defendant, the Attorney General personally served this civil complaint on Plaintiff Miller *as the agent for Red Rose Rescue*. (Compl. ¶ 30, R.1, A-11).

Additionally, the argument that Defendant's statements were simply opinion and not statements of fact is absurd, and so is the argument that the terms "terrorist" or "terrorist group" do not have a precise meaning. *See generally Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008) (stating that the court has set out various factors to be considered for distinguishing between fact and opinion, including "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers

or listeners that what is being read or heard is likely to be opinion, not fact") (internal quotations and citations omitted).

As Defendant notes (and as alleged in the Complaint), New York penal law, which Defendant is sworn to enforce, proscribes "act[s] of terrorism." (*See* Def.'s Br. at 27). Indeed, New York law describes terrorism as "*a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated.*" (Compl. ¶ 37, R.1, A-13). As Defendant further notes, a "terrorist" is someone who engages in (*i.e.*, a "practitioner of") "terrorism." (Def.'s Br. at 27 [citing Merriam-Webster]). There was nothing equivocal about Defendant's defamatory statements. And the terms have a precise meaning (a meaning that is certainly injurious to one's reputation), particularly when they come from the top law enforcement officer of New York—a state that is no stranger to heinous acts of terrorism.

Defendant's statements are also capable of being proven false as neither Red Rose Rescue nor any member of Red Rose Rescue, including Plaintiffs, has been convicted, let alone charged, with committing an act of terrorism. *See, e.g.*, *Grogan*, 256 P.3d at 1030 ("*It is undisputed that Grogan is not a terrorist*, and that portrayal of him as a terrorist would be highly offensive to a reasonable person.") (emphasis added). And the New York Attorney General, as the chief law enforcement officer for the state, certainly knows this fact to be true. Indeed, if Defendant had any evidence

of such illicit conduct, there is no question that she would have charged Red Rose Rescue and its members with violating New York penal law proscribing "terrorism." She hasn't done so because her injurious statements are false.

Finally, the context of the defamatory statements—a press conference called by the Attorney General of New York—makes it exceedingly more likely than not that the reasonable listener would consider these statements to be statements of fact. Drawing from the *Meese* case, the context of these injurious statements is such that Defendant "place[d] the power of the [New York] Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of [Red Rose Rescue and its associates] in the eyes of the public." *Meese*, 481 U.S. at 493 (Blackmun, J., joined by Brennan, J., and Marshall, J., dissenting). Indeed, no "New York court[has] squarely held that [when the Attorney General publicly] describe[s] an individual as a terrorist or engaging in terrorism [that this] is a nonactionable opinion." (*Compare* Def.'s Br. at 28). And it would be wrong to do so here.

Finally, Defendant asserts for the first time that her defamatory statements were privileged. Defendant failed to raise this privilege argument below; therefore, she forfeits the argument on appeal. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (internal quotation

marks omitted)). Nonetheless, the argument is without merit.

"The general rule . . . provides that a principal executive of State or local government and those entrusted by law with considerable administrative or executive policymaking responsibilities are entitled to absolute immunity from defamation claims emanating from official reports and communications." *Mahoney v. Temp. Com. of Investigation*, 165 A.D.2d 233, 238 (N.Y. App. Div. 1991) (internal citations omitted). However, "the privilege is not to be extended liberally, and instead must be carefully confined to that type of situation in which the protection provided by the privilege will serve a necessary societal function." *Clark v. McGee*, 404 N.E.2d 1283, 1286 (N.Y. 1980).

As stated by the Court of Appeals of New York:

> While absolute privilege is thus a creature of strong public policies, there do exist powerful countervailing considerations which preclude broad application or expansion of this privilege. ***Public office does not carry with it a license to defame at will, for even the highest officers exist to serve the public, not to denigrate its members***. Although the needs of effective government mandate that certain important officials be absolutely privileged with respect to statements made in the course of and concerning their public responsibilities, it is yet true that "a balance must be struck between this objective and the right of an individual to defend himself against attacks upon his character."

Id. (internal citation omitted) (emphasis added). "[E]ven a public official who is otherwise entitled to immunity 'may still be sued if the subject of the communication is unrelated to any matters within his competence or if the form of the communication – *e.g.*, a public statement – is totally unwarranted.'" *Id.* (quoting *Lombardo v. Stoke,*

222 N.E.2d 721, 724 (N.Y. 1966)). "Both the subject of the statement and the circumstances in which it is made are of importance in determining whether a particular statement was privileged." *Clark,* 404 N.E.2d at 1286.

In *Clark v. McGee*, the court considered defamatory statements made to a local radio station by a town supervisor about an employee's job performance. The court determined that the subject matter of the defamatory statements was related to the defendant's duties but that the forum of the speech, a local radio station, did not afford him absolute privilege because the statements were not made during the performance of an essential part of his public duties. *Id*. at 1287.

Similarly, in *Santavicca v. Yonkers*, the Superintendent issued letters of reprimand and stated in a press conference, without specifically naming any individuals, that she would officially reprimand each member of the coaching staff who had not followed certain procedures, claiming that this failure contributed to a student's death. *Santavicca v. Yonkers*, 132 A.D.2d 656, 656-57 (N.Y. App. Div. 1987). The court concluded that, while the letter of reprimand was well within the duties of the superintendent and thus covered by absolute privilege, the statement at the press conference was not privileged because it was not an essential part of her job.[4]

[4] The court did ultimately conclude that the statement was covered by qualified privilege "because of the interest in providing the public with information as to what steps were being taken to prevent a reoccurrence of the tragic incident involving a

In comparison, in *Sheridan v. Crisona*, a borough president submitted an official report to the mayor analyzing the city's acquisition of a condemned property in which he said the city's appraiser could only have reached the conclusions in his appraisal report through "misinformation, ignorance, distortion and incompetence." *Sheridan v. Crisona*, 198 N.E.2d 359, 360 (N.Y. 1964). Since the condemned property was prominently covered by the newspapers, the report was eventually released to news outlets. *Id*. The court concluded that the borough president had an absolute privilege from the libel suit because he was acting within the scope of his duties when he compiled the report as the law gave him broad powers with regard to condemned properties in the city. *Id.* at 361.

Likewise, in *Lombardo v. Stoke*, a college president and board of education responded to widespread allegations of anti-Catholic discrimination by preparing a statement, approved by the chairman of the board, that denied the allegations and stated that the allegations originated with "a few members of the College's own staff [who were] unable to convince colleagues of their qualifications for advancement . . . [and] deliberately charged religious discrimination to explain their lack of academic

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student's death." *Id*. at 657. Overcoming qualified privilege requires a showing of malice. *Id*. The superintendent's statements were an explanation of the internal procedures being taken by the public schools unlike here where Defendant was not describing her office's procedures or even a claim advanced in the civil case; she was engaging in a malicious attack of a pro-life group and its members, accusing them of being criminals ("terrorists") and belonging to a criminal organization ("terrorist group").

success and to obtain promotion." *Lombardo*, 222 N.E.2d at 722. The court concluded that absolute privilege applied because of the widespread newspaper coverage of the allegations necessitated a public statement and that it was within the defendant's discretion to address the truthfulness and origin of the accusations. Thus, the defendant was "acting within the scope of [its] official powers [and] must be accorded the protection of absolute privilege." *Id*. at 402.

Defendant relies principally on *Gautsche v. State*, 67 A.D.2d 167 (N.Y. App. Div. 1979), where the court analyzed statements made by an Assistant Attorney General in a press release. In *Gautsche*, the court stated as follows:

> Public policy dictates that the Attorney-General *disclose to the public the facts concerning any fraudulent or illegal activities uncovered in the process of any investigation*, as well as the facts concerning any prosecution therefor. Here, Assistant Attorney-General Wallenstein in the investigation, prosecution and disclosure of the activities of the claimants was exercising the powers delegated to him by the Attorney-General, and all statements made by him having relation to such investigation and prosecution are absolutely privileged.

Id. at 170. Contrary to Defendant's argument, this decision doesn't license the Attorney General to publicly make false and injurious statements with malice for the purpose of injuring an organization and those who associate with the organization because the Attorney General opposes their political and religious viewpoints on the issue of abortion. *Clark,* 404 N.E.2d at 1286 ("Public office does not carry with it a license to defame at will, for even the highest officers exist to serve the public, not to denigrate its members."). Moreover, the court emphasized that such publications are

privileged only "so long as the publication has some relation to the *executive proceeding* in which he is acting." *Gautsche*, 67 A.D.2d at 169; *see also Park Knoll Assocs. v. Schmidt*, 451 N.E.2d 182, 184 (N.Y. 1983) (noting that the privilege "is limited to the speaker's official participation in the processes of government").

Here, Defendant does not have absolute privilege for declaring members of Red Rose Rescue "terrorists" and belonging to a "terrorist group" during a press conference to announce a civil lawsuit that contains no allegations of terrorism. These defamatory statements were not made as part of her official duties (they were not made during any judicial proceeding nor do they appear in the civil complaint at issue), and the statements were not related to allegations against her office that required a response.

Clark is similar to this case. Regardless of the fact that labelling members of Red Rose Rescue as "terrorists" belonging to a "terrorist group" has no "relation to the executive proceeding in which [Defendant was] acting" or discussing (there is no terrorism charge in the civil complaint), the forum of the press conference is not an "essential part" of the Attorney General's official duties. The Attorney General files many cases without a press conference, and she and her office prosecute many cases without speaking to the press. Further, given that the civil complaint involved violations of civil law and not criminal law, the subject matter of her defamatory statements is further removed from the scope of her duties at issue in this conference.

This misalignment of the subject matter also makes this case clearer than *Santavicca* where the defendant was just outlining the internal procedures being taken to correct an issue. Here, Defendant went well beyond simply announcing that she was filing a civil lawsuit; she used this press opportunity to publicly *and maliciously* declare that members of Red Rose Rescue, which includes Plaintiffs, were "terrorists" and that Red Rose Rescue was a "terrorist group"—false assertions which have no relation to the civil claims advanced in the lawsuit at issue.

This is also what distinguishes Defendant's defamatory statements from the statements at issue in *Sheridan* and *Lombardo*. In those cases, the defamatory statement was made in the process of compiling an official report or responding to criticism in the press. Here, the defamatory statements served no official or legitimate purpose—and certainly not one that promotes any public interest. Rather, the purpose of these defamatory statements was to attack and denigrate the pro-lifers associated with Red Rose Rescue, which includes Plaintiffs, and to diminish their reputation in the public eye.

In the final analysis, if the Court concludes that Defendant did not waive this privilege, then it should conclude that it does not apply under the circumstances of this case.

CONCLUSION

The Court should reverse the district court and permit this case to proceed to the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,532 words, excluding those sections identified in Fed. R. App. P. 32(f).

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