

No. 22-1124

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Dana Cheng, Epoch Group, Inc.,
PLAINTIFFS – APPELLANTS,

v.

Dan Neumann, Maine People’s Alliance, d/b/a Beacon,
DEFENDANTS – APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MAINE

**BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL
LIBERTIES UNION OF MAINE, IN SUPPORT OF DEFENDANTS-
APPELLEES SEEKING AFFIRMANCE**

Carol J. Garvan
Zachary L. Heiden
Anahita Sotoohi
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-6224
zheiden@aclumaine.org

Brian Hauss
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

Counsel for *Amici Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICI CURIAE*¹

The American Civil Liberties Union (“ACLU”) and the American Civil Liberties Union of Maine (“ACLU of Maine”) submit this *amici curiae* brief in support of affirmance of the District Court’s grant of Defendants’ Motion to Dismiss.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. The ACLU frequently litigates and files *amicus curiae* briefs in cases involving important First Amendment principles, including defamation cases. *See, e.g., Green Grp. Holdings, LLC v. Schaeffer*, No. 2:16-cv-145-CG-N, 2016 WL 6023841 (S.D. Ala. Oct. 13, 2016); Order, *Energy Transfer Equity, LP v. Greenpeace Int’l*, No. 1:17-cv-173-BRW-CRH (D.N.D. Feb. 14, 2019).

The ACLU of Maine is the Maine state affiliate of the ACLU. Founded in 1968 to advance the civil rights and civil liberties of all Mainers, the ACLU of Maine strives to protect the rights guaranteed and secured by the United States Constitution for the people of Maine. The ACLU of Maine has frequently appeared

¹ *Amici* confirm that no party or counsel for any party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

before this Court in First Amendment cases, both as direct counsel and as *amicus curiae*. See, e.g., *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020); *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Sagardía De Jesús*, 634 F.3d 3 (1st Cir. 2011); *Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011).

The interpretation and application of anti-SLAPP law and pleading standards in a manner that protects the rights of journalists and the general public is of immense concern to the ACLU and the ACLU of Maine, their civil rights clients seeking justice, and their members and donors.

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Dana Cheng is a public figure who often uses her platform to assert that the Chinese Communist Party poses a significant threat to American democracy, and that it is essential to preserve traditional American values in the face of that threat.² Cheng is employed by Plaintiff-Appellant Epoch Group, Inc. (collectively, “Appellants”) as both a journalist for *The Epoch Times* and its vice president. App. at A-10–11, A-13; Complaint ¶¶ 9, 18.

² Ep. 5: Dr. Dana Cheng, Shootin’ Straight with Ken Buck (Apr. 8, 2021), <https://www.shootinstraightpodcast.com/episode-5-dr-dana-cheng/> (containing an interview of Cheng with Rep. Ken Buck; Cheng’s discussion of China’s communist influence on media appears at 26:08, analogizing “hit piece” critiques of *The Epoch Times* by *The New York Times*, *The Atlantic*, and *NBC* to “communist-style suppression”).

Cheng is frequently interviewed on radio programs and podcasts, and her interviews receive media coverage.³ Cheng also occasionally writes articles herself.⁴ She is a public spokesperson for *The Epoch Times* and releases statements to the media on *The Epoch Times*'s behalf.⁵ Cheng's interviews, articles, and

³ Jason Salzman, *Buck Says Critical Reporting on The Epoch Times Is 'Similar' to China's Cultural Revolution*, Colo. Times Recorder (Apr. 9, 2021), <https://coloradotimesrecorder.com/2021/04/buck-says-critical-reporting-on-the-epoch-times-is-similar-to-chinas-cultural-revolution/35663/> (summarizing an above-mentioned interview of Cheng on a podcast); James O'Rourke, *Boebert & Buck Continue Promoting Misinformation from Epoch Times*, Colo. Times Recorder (July 21, 2021), <https://coloradotimesrecorder.com/2021/07/boebert-buck-continue-promoting-misinformation-from-epoch-times/38244/> (discussing the same interview); Joel Hilliker, *An Anxious Warning About Communism*, Trumpet (Apr. 21, 2021), <https://www.thetrumpet.com/23906-an-anxious-warning-about-communism>; Bill Hoffman, *Top Talkers Rally for US Domination in China Trade War*, Newsmax (Oct. 1, 2019), <https://www.newsmax.com/newsfront/trade-war-tariffs-communism/2019/10/01/id/935174/>.

⁴ Dana Cheng, *Former Congressman Bob McEwen: "They Will Rue the Day They Pulled this Stunt,"* Highland Cnty. Press (Dec. 13, 2020), <https://highlandcountypress.com/Content/In-The-News/In-The-News/Article/Former-Congressman-Bob-McEwen-They-will-rue-the-day-they-pulled-this-stunt-/2/20/63230>.

⁵ Paul Farhi, *Two Sites that Amplify Hoaxes Given Special Treatment at Trump's Briefings Despite Restrictions*, Wash. Post (Aug. 14, 2020), https://www.washingtonpost.com/lifestyle/media/two-sites-that-amplify-hoaxes-given-special-treatment-at-trumps-briefings-despite-restrictions/2020/08/14/8579032e-de6e-11ea-809e-b8be57ba616e_story.html (identifying Cheng as a spokesperson for Epoch Times); Eli Clifton, *This NBC Executive Became a Conspiracy King and Pro-Trump Media Boss*, Daily Beast (May 26, 2020), <https://www.thedailybeast.com/nbc-executive-chris-kitze-became-a-boss-at-epoch-times-pro-trump-outlet> (same).

media statements focus on the Chinese Communist Party's influence on American politics, the similarities she perceives between Chinese government-supported media and American media outlets, and *The Epoch Times*'s positive reputation as a news source.

The Epoch Times, an online news source that covers a wide variety of topics, has repeatedly come under fire for promoting false information related to COVID-19, the validity of the 2020 presidential election, and QAnon conspiracy theories.⁶

In June 2021, Cheng served as a panelist in a community forum hosted by the Maine Republican Party. Defendant-Appellee Dan Neumann, covering the event as a journalist, wrote that Cheng had previously given a radio interview to Kim Monson in which Cheng stated as follows: she was present at the Capitol when it was breached; she was not at the front of the crowd and did not enter the

⁶ See Jason Wilson, *Falun-Gong Aligned Media Push Fake News About Democrats and Chinese Communists*, Guardian (Apr. 30, 2021), <https://www.theguardian.com/us-news/2021/apr/30/falun-gong-media-epoch-times-democrats-chinese-communists>; Brandy Zadrozny & Ben Collins, *Trump, QAnon, and an Impending Judgment Day: Behind the Facebook-Fueled Rise of The Epoch Times*, NBC News (Aug. 20, 2019), <https://www.nbcnews.com/tech/tech-news/trump-qanon-impending-judgment-day-behind-facebook-fueled-rise-epoch-n1044121>; Kevin Roose, *How The Epoch Times Created a Giant Influence Machine*, N.Y. Times (Mar. 9, 2021), <https://www.nytimes.com/2020/10/24/technology/epoch-times-influence-falun-gong.html>; Joshua Benton, *What is The Epoch Times? A Vehicle for Pro-Trump Conspiracy Theories, and the Culmination of all that Facebook Has Encouraged*, Nieman Lab (Oct. 26, 2020), <https://www.niemanlab.org/2020/10/what-is-the-epoch-times-a-vehicle-for-pro-trump-conspiracy-theories-and-the-culmination-of-all-that-facebook-has-encouraged/>.

building; and the attack had been perpetrated by anti-fascist forces. Neumann’s article also stated that *The Epoch Times* had consistently questioned the results of the 2020 presidential election; promoted anti-vaccine mis-information; and promoted QAnon. The article contained a photo of Cheng. Cheng and *The Epoch Times* filed suit against Defendant-Appellees Neumann and the Maine People’s Alliance (collectively, “Appellees”). Appellees filed, and the District Court granted, a motion to dismiss under New York’s anti-SLAPP statute.

Plaintiffs in SLAPP lawsuits advance meritless legal claims (usually sounding in defamation or other reputational torts) to impose excessive litigation costs and deter their critics from speaking out on issues of public interest.⁷ To prevent such lawsuits from stifling free expression, many states (including New York) have enacted anti-SLAPP statutes. New York’s anti-SLAPP law imposes a burden on plaintiffs who seek to impose liability for speech on matters of public concern to “establish by clear and convincing evidence a substantial basis in fact and law for its claim.” *Sackler v. Am. Broad. Companies, Inc.*, 144 N.Y.S.3d 529, 534 (N.Y. Sup. Ct. 2021) (quoting *Duane Reade, Inc. v. Clark*, No. 107438/03,

⁷ See Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc’y Rev. 385 (1988).

2004 WL 690191, at *4 (N.Y. Sup. Ct. Mar. 31, 2004)); N.Y. Civ. Rights § 76-a; N.Y.C.P.L.R. § 3211(g).⁸

Neumann’s statements, as published in *Beacon* by Maine People’s Alliance, are at the very core of the First Amendment’s protections. “[I]t is a prized American privilege to speak one’s mind,” and “this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion.’” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Because the First Amendment reflects our national commitment to rigorous and open debate, it requires specific safeguards against the misuse of the legal system to chill or punish protected expression. That danger is particularly serious in defamation actions like this one.

As the District Court held, Plaintiffs have failed to satisfy the applicable burden necessary to sustain their defamation claims. First, Cheng and Epoch Group fail even to plausibly allege that Neumann, *Beacon*, or Maine People’s Alliance acted with actual malice, as required under N.Y.C.P.L.R. § 3211(g) and Fed. R. Civ. P. 12. Second, Appellants fail to plausibly allege malice, which is required by the First Amendment for defamation actions brought by public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finally, many of the purportedly defamatory statements are expressions of protected opinion, which cannot support

⁸ Unless otherwise noted throughout, all emphasis is added and all internal citations are omitted.

a claim of defamation. *Noonan v. Staples*, 556 F.3d 20, 28 (1st Cir. 2009); *Gertz*, 418 U.S. at 339–40 (holding that statements of opinion are not capable of defamatory meaning).

These defects are equally fatal to Appellants’ remaining claims—false light, invasion of privacy, and infliction of emotional distress—which likewise seek to sanction Appellees for protected expression. Despite their various labels, Appellants’ claims are all “formulae for the repression of expression.” *Sullivan*, 376 U.S. at 269. There is no “talismanic immunity from constitutional limitations”; rather, each claim “must be measured by standards that satisfy the First Amendment.” *Id.*; see also *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (“while such a bad motive [to inflict emotional distress] may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures”).

This Court should reject Appellants’ attempt to use the judiciary to intimidate speakers into silence on matters of public concern. The District Court’s dismissal of Appellants’ claims should be affirmed.

ARGUMENT

The District Court’s dismissal should be affirmed for three separate reasons. *First*, both Rule 12 of the Federal Rules of Civil Procedure and the pleading

requirements of New York’s anti-SLAPP law⁹ require Appellants to establish, by clear and convincing evidence, that the targets of their defamation claims acted with actual malice, and they have not done so. *See* N.Y. Civ. Rights § 76-a(2); *Sackler*, 144 N.Y.S.3d at 534. *Second*, the First Amendment requires public figures to, at a minimum, plausibly allege malice as a required element of defamation, and Appellants have not done that either. *See* U.S. Const. amend. I; *Gertz*, 418 U.S. at 342. And *third*, even if Appellants had plausibly alleged and established actual malice, their claims fail in part because many of the challenged statements are protected opinion. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990).

I. New York’s anti-SLAPP statute mandates dismissal.

New York’s anti-SLAPP statute imposes a heightened burden on plaintiffs bringing claims that target statements on matters of public concern. When a claim is based on “any communication in a place open to the public or a public forum in connection with an issue of public interest; or . . . any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,” N.Y. Civ. Rights § 76-a(1)–(2), then the plaintiff may only recover if they can “establish[] by clear and convincing evidence” that “any communication which gives rise to the action was made with knowledge of

⁹ *Amici* agree with the District Court’s choice of law analysis, which concluded that New York law ought to apply in this case. *See Add.* 9–13.

its falsity or with reckless disregard of whether it was false.” N.Y. Civ. Rights § 76-a(2).

Further, New York’s motion-to-dismiss statute, N.Y.C.P.L.R. § 3211, specifically governs anti-SLAPP motions to dismiss and provides that once a defendant shows that their targeted activity involved public petition and participation, the defendant’s anti-SLAPP motion “shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.” N.Y.C.P.L.R. § 3211(g). Once a special motion to dismiss is brought, the “burden is upon the plaintiff to establish that its claim has the requisite substantial basis,” based on the pleadings and affidavits. *See Sackler*, 144 N.Y.S.3d at 534 (applying N.Y.C.P.L.R. § 3211(g)).

Though the District Court was correct that New York’s anti-SLAPP law applies here (because the January 6th attack, the national pandemic response, and the 2020 election are all topics of public concern), and that Appellants failed to satisfy its evidentiary requirements, it is not necessary for this Court reach that question because Appellants have not met the pleading standard under Rule 12. *See Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 35 (1st Cir. 2011) (holding that “bald allegation[s]” and “naked assertion[s]. . . devoid of further factual enhancement”

cannot support a successful opposition to an ordinary motion to dismiss (second alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))).

First, Neumann’s statements in the *Beacon* article plainly qualify as public petition or participation within the meaning of the New York anti-SLAPP law, because they are statements made in a public forum on a matter of public interest. “Public interest” under the New York statute is “construed broadly,” N.Y. Civ. Rights § 76-a(1)(d), and encompasses everything except “purely private matter[s].” *Coleman v. Grand*, 523 F.Supp.3d 244, 259 (E.D.N.Y. 2021) (finding statements made about a private sexual relationship were of public concern given that their timing coincided with the rise of the #MeToo movement). Here, the allegedly defamatory statements addressed matters of significant and widespread public debate—including the January 6 attack on the nation’s Capitol, the 2020 election, the COVID-19 pandemic, and the QAnon conspiracy theory. These topics are far from “purely private matters.”

Accordingly, under the New York anti-SLAPP statute, Appellants were required to demonstrate actual malice by clear and convincing evidence to recover damages. N.Y. Civ. Rights §76-a(2). As the New York trial court noted in *Sackler*, applying New York’s anti-SLAPP law, plaintiffs are entitled to the “benefit of every possible inference,” but “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or

clearly contradicted by documentary evidence are not entitled to such consideration.” 144 N.Y.S.3d at 533–34. And, as the Supreme Court of Georgia recently explained in interpreting a similar requirement in Georgia law, this “summary-judgment-like procedure” still requires the court to measure the proffered facts against the stringent “substantive evidentiary and legal standards” that apply. *See A.C.L.U. v. Zeh*, 312 Ga. 647, 653–54; 864 S.E.2d 422, 429–30 (Ga. 2021).

Second, the evidence Appellants proffered here failed to meet the evidentiary and legal standards set by Rule 12 or the New York anti-SLAPP law. As the District Court noted, Appellants relied on “flat assertions” that Neumann’s article contained “calculated falsehoods,” without actually identifying any falsifiable and false items to back up their claim. *See Add. 17*. Appellants also claim that the Defendants had a “reckless attraction” to defaming Plaintiffs, but without any actual defamation Appellees cannot be put on trial for their assertions. Appellants claims were properly dismissed for failing to sufficiently allege actual malice under New York law. *Coleman*, 523 F.Supp.3d at 259.

II. The First Amendment mandates dismissal.

The First Amendment also imposes stringent requirements on those who seek to use tort law to punish or inhibit the free exchange of ideas. In order to afford the “breathing space essential” to the “fruitful exercise” of First Amendment

rights, the Supreme Court has held that plaintiffs who “are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that [a] defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.” *Gertz*, 418 U.S. at 342 (quotation marks omitted) (referring to the “actual malice” standard set forth in *Sullivan*, 376 U.S. 254).

Public figures are individuals who are “notori[ous for] . . . their achievements or the vigor and success with which they seek the public’s attention.” *Gertz*, 418 U.S. at 342. “In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” *Id.* at 351. In other cases, “an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.*

Notably, the distinction between public and private persons in the context of a defamation claim exists because “private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985).

Public figures “assume special prominence in the resolution of public questions,” *Gertz*, 418 U.S. at 351, and “[o]ur citizenry has a legitimate and

substantial interest in [their] conduct.” *Milkovich*, 497 U.S. 1, 15 (1990) (first alteration in original). Requiring such parties to demonstrate “actual malice” in order to pursue defamation claims provides “breathing room” for journalists to make “unintentional, good faith mistakes” while reporting on information that self-governing people need to carry out their civic duty.¹⁰ And, as then-Judge Kavanaugh observed, requiring defamation plaintiffs to satisfy the actual-malice standard early in the case is “essential” because subjecting defendants to long and costly litigation will thwart the First Amendment’s purpose “even if the defendant ultimately prevails.” *Kahl v. Bureau of Nat’l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017).

It is not sufficient for a plaintiff’s complaint to conclusorily state that the defendant showed “reckless disregard” for the truth—rather, the plaintiff must allege specific facts to support a plausible inference of malice under *Iqbal* pleading standards. For instance, in *Schatz v. Republican State Leadership Committee*, 669 F.3d 50, 58 (1st Cir. 2012), this Court held that the plaintiff, who alleged that the RSLC published libelous campaign ads about him, “ha[d] not nudged his actual-malice claim across the line from conceivable to plausible,” because none of his factual allegations plausibly suggested that “the RSLC either knew that its

¹⁰ See *New York Times v. Sullivan: The Case for Preserving an Essential Precedent* 114, Media Law Resource Ctr., <https://medialaw.org/issue/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent/>.

statements were false or had serious doubts about their truth and dove recklessly ahead anyway” (internal citation and quotation marks omitted).

To properly allege actual malice, Plaintiffs were required to produce credible allegations that the challenged statements were made “with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not.” *Sullivan*, 376 U.S. at 280. The *Sullivan* Court held that the allegations and evidence before it—including allegations that the “advertisement was not ‘substantially correct,’” allegations and evidence of “the Times’ failure to retract upon respondent’s demand, although it later retracted upon [another person’s] demand,” and evidence showing “that the Times published the advertisement without checking its accuracy against the news stories in the Times’ own files”—could not establish actual malice. *Id.* at 286–87. The Court also refused to view the Times’ eventual retraction of the advertisement as evidence of malice, instead holding that the Times had given a reasonable explanation for the retraction. *Id.* at 287. And the Court held that the “evidence that the Times published the advertisement without checking its accuracy” against its news stories at most established negligence, not actual malice. *Id.* at 287–88.

“Reckless disregard” requires a showing that “the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The mere fact that a publication is erroneous

does not demonstrate such disregard. *Id.* A failure to investigate—even if a prudent person would have investigated further—does not constitute malice. *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Nor does an alleged failure to investigate, standing by itself, give rise to a plausible inference of actual malice sufficient to withstand a motion to dismiss. *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016). “Rather, the plaintiff must plead facts giving rise to a reasonable inference that the defendants acted to intentionally avoid learning the truth.” *Id.*

The crux of Appellants’ malice allegations is that Appellees could have conducted some further research and taken other sources into account prior to publication but did not. App. at A-4, A-18; Complaint ¶¶ 18, 33. This is not “reckless disregard”—it is, at most, a failure to investigate. The District Court was correct to conclude, after a thorough review of the complaint and of the additional accompanying factual material, that Appellants failed to “substantiate” their “conclusory allegations” of actual malice. Add. 17.

III. Even if Appellants had plausibly alleged actual malice, many of the challenged statements are protected opinion.

Defendants claims separately fail in large part because they target protected opinion.¹¹ Add. 19–21.

¹¹ *Amici* take no position on the other defenses raised in Appellees’ motion to dismiss.

“Under the First Amendment there is no such thing as a false idea.” *Gertz*, 418 U.S. at 339. While statements of fact capable of defamatory meaning may be actionable, statements of opinion are not. *Id.* In order for a statement to be facially actionable in a defamation suit, it must be “sufficiently factual to be susceptible of being proved true or false.” *Milkovich*, 497 U.S. at 21. The Supreme Court has recognized that “intemperate, abusive, or insulting language” can “be an effective means to make [a] point.” *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974). “[T]o use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like ‘unfair’ or ‘fascist’—is not to falsi[f]y facts.” *Id.* at 284. Rather, it is a way to “demonstrate . . . strong disagreement with the views” being described, and it is protected. *Id.*

Applying these well-established First Amendment principles, New York courts look to the following factors to determine whether a given statement is an opinion:

(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; (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.

Ganke v. Mensch, 480 F. Supp. 3d 542, 552 (S.D.N.Y. 2020). Even a statement that might appear to be fact may be deemed opinion under New York law if the statements are made under “circumstances in which an audience may anticipate . . . epithets.” *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 414 (N.Y. App. Div. 2011) (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 294; 501 N.E.2d 550, 556 (N.Y. 1986)). And statements are considered “pure opinion” (and therefore non-actionable) if they are “accompanied by a recitation of the facts upon which [they are] based.” *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153–54; 623 N.E.2d 1163, 1168 (1993).

Here, Appellees’ use of the terms “far-right media personality,” “conspiracy theorist,” and “right wing” are plainly non-actionable opinions. The terms “far-right” and “right-wing” are not susceptible to being proved true or false, and are undefined, ambiguous descriptors that cannot support a defamation claim. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1252–53 (11th Cir. 2021), *cert. denied*, *Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, 142 S. Ct. 2453 (2022) (recognizing that the term “hate group” was not provably false because it has a “highly debatable and ambiguous meaning”); *Buckley v. Littell*, 539 F.2d 882, 893–94 (2d Cir. 1976) (finding that the term “radical right” was a statement of opinion); *Landino v. Mass. Teachers Ass’n*, No. 20-cv-11392-DJC, 2021 WL 2186815 (D. Mass. May 28, 2021) (finding that the

term “right-wing” was a statement of opinion). Imprecise terms lacking a commonly-accepted definition cannot be considered factual statements for purposes of establishing actual malice.

Likewise, the term “conspiracy theorist” is not subject to easy definition and it is often used imprecisely by people of varying political viewpoints—it does not have a single, agreed-upon definition.¹² It is therefore an “undefined slogan” that must be considered an opinion. Furthermore, each of these phrases must be considered “pure opinion” because within the article, Neumann provided access to the facts upon which these opinions were based (an interview of Cheng and an article in *The New York Times*). These statements are not actionable. *Ganke*, 480 F.Supp.3d at 551-52.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court.

¹² See, e.g., Victor Garcia, *Sean Hannity on Pelosi’s Impeachment Managers: “Most Hyper-Partisan, Conspiracy Theorist Trump Haters,”* Fox News (Jan. 15, 2020), <https://www.foxnews.com/media/sean-hannity-rips-pelosis-impeachment-managers-most-hyper-partisan-conspiracy-theorist-trump-haters> (labeling prominent Democrat Nancy Pelosi a conspiracy theorist); Kevin Roose, *What is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. Times (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html> (identifying certain subsections of Republican voters as conspiracy theorists).

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Respectfully Submitted,

/s/ Zachary L. Heiden

Zachary L. Heiden (1st Cir. No. 99242)

/s/ Carol J. Garvan

Carol J. Garvan (1st Cir. No. 1145471)

/s/ Anahita Sotoohi

Anahita Sotoohi (1st Cir. No. 1204291)

ACLU of Maine Foundation

P.O. Box 7860

Portland, Maine 04112

(207) 619-6224

heiden@aclumaine.org

/s/ Brian Hauss

Brian Hauss (1st Cir. No. 1183865)

ACLU Foundation

125 Broad Street, 18th Floor

New York, NY 10004

bhauss@aclu.org

Counsel for Amici Curiae

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FED. R. APP. P. 32(G)**

In compliance with Fed. R. App. P. 29(a)(4)(G), counsel for *amici curiae* certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 4072 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman in 14-point type.

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/s/ Zachary L. Heiden
Zachary L. Heiden
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-6224
heiden@aclumaine.org

*Counsel for Amici Curiae ACLU and
ACLU of Maine*

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022 I electronically filed this *Amici Curiae* Brief with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to all counsel of record.

Dated: July 29, 2022

/s/ Zachary L. Heiden
Zachary L. Heiden
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-6224
heiden@aclumaine.org

*Counsel for Amici Curiae ACLU and
ACLU of Maine*