

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DANA CHENG and EPOCH GROUP, )  
INC. )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
DAN NEUMANN and MAINE )  
PEOPLE’S ALLIANCE )  
 )  
Defendants. )  
 )  
 )

Docket No. 2:21-cv-00181-LEW

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN  
CIVIL LIBERTIES UNION OF MAINE IN SUPPORT OF DEFENDANTS’ MOTION TO  
DISMISS**

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### INTEREST OF AMICI CURIAE<sup>1</sup>

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 Defendants’ Motion to Dismiss, to assist the Court in resolving the issues presented in the Motion.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 2 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. CV 16-00145-CG-N, 2016 WL 6023841 (S.D. Ala. Oct. 13, 2016); Order, *Energy Transfer Equity, LP v. Greenpeace Int’l*, No. 1:17-cv-00173-BRW (D. N. Da. Feb. 14, 2019).

The ACLU of Maine is the Maine state affiliate of the ACLU. Founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers, the ACLU of Maine strives to ensure the rights guaranteed and secured by the United States Constitution for the people of Maine. The ACLU of Maine has frequently appeared before this court in First Amendment cases, both as direct counsel and as amicus curiae. *See, e.g., ACA Connects et al. v. Frey et al*, No. 1:20-cv-00055-LEW (D. Me. May 29, 2020); *Norris v. Cape Elizabeth Sch. Dist.*, 19-2167 (1st Cir. 2020); *Leuthy v. LePage*, Case No. 1:17-cv-00296-JAW (D. Me. Aug. 29, 2018).

The interpretation and application of anti-SLAPP law and pleading standards in a manner that protects the First Amendment rights of journalists and the general public is of immense

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<sup>1</sup> 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.

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 Dana Cheng is a public figure who often uses her platform to assert that the Chinese Communist Party poses a significant threat to modern American politics and that preservation of traditional American values in the face of that threat is essential. *See, e.g.*, The Stan Milam Show, *Dr. Dana Cheng from Epoch Times*, Apr. 15, 2021, <https://www.wclo.com/episode/4-15-21dr-dana-cheng-from-the-epoch-times/> (containing recording of an interview of Cheng; Cheng's discussion of the importance of tradition and a non-partisan media as distinguished from Chinese media begins at 9:30); *Epoch Times Dana Cheng on China's Threat*, YouTube, Dec. 17, 2020, <https://www.youtube.com/watch?v=TkJYk9A04P0> (containing recording of an interview of Cheng; Cheng's discussion of the rise of the CCP and the threat it creates begins at 0:45). Plaintiff Cheng is employed by Plaintiff Epoch Times as both a journalist and its vice president. Complaint ¶¶ 9, 18.

Cheng is frequently interviewed on radio programs and podcasts and her interviews receive media coverage. Jason Salzman, *Buck Says Critical Reporting on The Epoch Times Is 'Similar' to China's Cultural Revolution*, Colorado 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 interview of Cheng on a podcast); James O'Rourke, *Boebert & Buck Continue Promoting Misinformation from Epoch Times*, Colorado Times Reporter, Jul. 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*, The 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/>; Complaint, ¶ 19 (noting another radio interview Defendant Cheng participated in).

Cheng also occasionally writes articles herself. Dana Cheng, *Former Congressman Bob McEwen: "They will rue the day they pulled this stunt"* Highland County 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>. She serves as a public spokesperson for Epoch Times, releasing statements to the media on Epoch Times' behalf. Paul Farhi, *Two sites that amplify hoaxes given special treatment at Trump's briefings despite restrictions*, Washington 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](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); Eli Clifton, *This NBC executive became a conspiracy king and pro-Trump media boss*, The Daily Beast, May 6, 2020, <https://www.thedailybeast.com/nbc-executive-chris-kitze-became-a-boss-at-epoch-times-pro-trump-outlet>.

The contents of Cheng's interviews, articles, and media statements focus on the Chinese Communist Party's ("CCP") influence on American politics, the similarities she perceives between the CCP and modern American politics, and the Epoch Times's positive reputation as a news source.

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. See Jason Wilson, *Falun-gong aligned*

*media push fake news about Democrats and Chinese communists*, The Guardian, Apr. 30, 2021, <https://www.theguardian.com/us-news/2021/apr/30/falun-gong-media-epoch-times-democrats-chinese-communists>; Brandy Zadrozny and Ben Collins, *Trump, QAnon, and an impending judgment day*, 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*, New York Times, Oct. 24, 2020, <https://www.nytimes.com/2020/10/24/technology/epoch-times-influence-falun-gong.html>; Joshua Benton, *What is The Epoch Times?*, 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/>.

In June of 2021, the Maine Republican Party hosted a community forum for which Cheng was a panelist. Defendant Neumann, covering the event as a journalist, wrote an article noting (as relevant to the allegations of the Complaint) 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 but was not at the front of the crowd and did not enter the building; and that the attack had been perpetrated by anti-fascist forces. Neumann also stated the following about Plaintiff Epoch Times: they had consistently questioned the results of the 2020 presidential election; promoted anti-vaccine mis-information; and had promoted QAnon.<sup>2</sup> The article also contained a photo of Cheng.

Cheng and Epoch Times brought this lawsuit against Neumann and the Maine People's Alliance, in an apparent attempt to silence and intimidate those who would criticize their views.

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<sup>2</sup> The article also stated that Epoch Times is funded in part by Robert Mercer. That statement was later retracted and no longer appears in the article.

This is a textbook example of a strategic lawsuit against public participation (“SLAPP”). SLAPP lawsuits advance meritless legal claims (generally sounding in defamation or other reputational torts) to impose excessive discovery costs against the plaintiff’s critics or opponents and deter others from engaging in similar speech. *See* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 *Law & Soc’y Rev.* 385 (1998). To prevent such lawsuits from stifling free expression, many states (including Maine and New York) have enacted anti-SLAPP statutes requiring plaintiffs seeking to impose liability for speech on matters of public concern to substantiate their claims before proceeding to discovery. New York’s anti-SLAPP statute imposes this requirement on Plaintiffs here.

Neumann’s statements, as published in *The Beacon* by Maine People’s Alliance, reside 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.’” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)). 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 present in defamation actions, and several layers of protection have been put in place to safeguard against that danger. Those protections require dismissal of this case.

First, Cheng and Epoch Times, both public figures, fail to plausibly allege that either Defendant acted with actual malice, as required under longstanding Supreme Court precedent. *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). Second, many of the purportedly defamatory statements are expressions of protected opinion and therefore cannot support a claim of defamation. *Noonan*

*v. Staples*, 556 F.3d 20, 28 (1st Cir. 2009); *Gertz*, 418 U.S. at 339 (holding that statements of opinion are not capable of defamatory meaning). Plaintiffs’ defamation claim should therefore be dismissed.

These defects are equally fatal to Plaintiffs’ other claims—false light invasion of privacy and infliction of emotional distress—all of which seek to sanction Defendants for protected expression. Notwithstanding their various labels, Plaintiffs’ claims are all “formulae for the repression of expression.” *N.Y. Times*, 376 U.S. at 269. Not one has “talismanic immunity from constitutional limitations”; rather, each “must be measured by standards that satisfy the First Amendment.” *Id.*; see also *Hustler Magazine, 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”).

Measured against those standards, Plaintiffs’ claims fail. This Court should reject Plaintiffs’ attempt to use the judiciary as a forum for intimidating speakers into silence on matters of public concern. In light of its fatal flaws, the Complaint should be dismissed with prejudice.

## **ARGUMENT**

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

New York’s anti-SLAPP statute, provides in relevant part that 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,” then the plaintiff must establish that “any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false.” N.Y. CLS Civ. R. § 76-a(1)(a), (2).

Statements made by a reporter in a newspaper article are squarely within the statute’s meaning, assuming those statements bear on the public interest. *Sackler v. Am. Broadcasting Cos. Inc.*, NY Slip Op. 21055 (N.Y. 2021). “Public interest” under the New York statute is construed very broadly and encompasses everything except “purely private matters.” *Coleman v. Grand*, Case No. 18-cv-5663 (E.D.N.Y. Feb. 22, 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 matters encompassed in the allegedly defamatory statements are clearly made in connection with an issue of public interest, as they involved issues of political and public health importance—they are certainly not “purely private.” Accordingly, pursuant to the New York anti-SLAPP statute, Plaintiffs are also required to demonstrate actual malice. Because, as discussed below, Plaintiffs have not met that bar, their claims must be dismissed for failing to meet the pleading requirements imposed by the anti-SLAPP statute. *McDougall v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 185 (S.D.N.Y. 2020).

**II. Because Cheng is a public figure, the First Amendment requires Plaintiffs to allege specific facts giving rise to a plausible inference of actual malice.**

The Complaint should be dismissed because Plaintiffs fail to plausibly allege actual malice. 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 *N.Y. Times*, 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.* A public controversy can be established by showing that “persons actually were discussing some specific question” before the purported defamation occurred and that “a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.” *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 13 (1st Cir. 2011) (quotations omitted).

Here, all of the controversies underlying the statements at issue—the purported threat posed by the Chinese Communist Party, QAnon, vaccine conspiracy theories, the January 6 attack on the Capitol building, and the Epoch Times’ role as a media organization—were the subject of extensive public discussion prior to the subject article being published in June of 2021. Any resolution of the questions underlying these controversies (e.g., identifying the participants in the January 6 attack or resolving the extent of Epoch Times’ role) would surely impact those beyond the immediate participants, given the importance of the issues and the extent of their potential impact.

Cheng’s history of public speaking on these topics also demonstrates that she voluntarily injected herself into these controversies. *See Salzman supra*; *Hoffman supra*. Making statements bearing on a public controversy is explicitly a way in which a person can become a limited public figure. *Pendleton v. Haverhill*, 156 F.3d 57, 69-70 (1st Cir. 1998). Cheng can also be deemed a limited public figure because she has “chos[en] to assume a position or enter a profession that

draws one into public view and invites public discussion in relation to the issue.” *Franchini v. Bangor Pub. Co.*, Case No. 1:18-cv-00015-GZS (D. Me. Sept. 3, 2021). Cheng’s position as spokesperson indisputably draws her into the public view, as it requires her to make media statements on Epoch Time’s behalf, and her interviews invite public discussion.

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). These considerations make it clear that Cheng is not entitled to the protections given to private figures—she has voluntarily exposed herself to a higher level of publicity than normal (by participating in interviews and acting as a spokesperson for a prominent publication), and she has highly effective opportunities for rebutting any of the allegedly defamatory statements (giving an interview or statement to that effect, or publishing her own views in the Epoch Times). Cheng is, therefore, at a minimum, a “limited” public figure with respect to the public controversies that formed the basis for the allegedly defamatory statements.

Public figures, whether limited or all-purpose, “assume special prominence in the resolution of public questions,” *Gertz*, 418 U.S. at 351, and “our citizenry has a legitimate and substantial interest in [their] conduct.” *Milkovich v. Lorain Journal*, 497 U.S. 1, 15 (1990). They must therefore demonstrate “actual malice” before they may recover for defamation. *Gertz*, 418 U.S. at 342. At the pleading stage, this means that a plaintiff must plead a plausible factual predicate for actual malice. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986). 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, pursuant to the pleading standard set

forth in *Ashcroft v. Iqbal*, allege specific facts to show malice. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56-57 (1st Cir. 2012) (applying *Iqbal* pleading standards to the malice requirement).

To establish actual malice, Plaintiffs must show that the challenged statements were made “with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not.” *New York Times*, 376 U.S. at 280. The *New York Times* 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 credit 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 288.

“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).

Plaintiffs’ attempt to allege actual malice here is far less robust than the allegations and evidence before the Supreme Court in *New York Times*. The crux of Plaintiffs’ malice allegations is that Defendants could have conducted some further research and taken other sources into

account prior to publication but did not. Complaint ¶¶ 18, 33. This is not “reckless disregard”—it is, at most, a failure to investigate. Furthermore, Plaintiffs have failed to put forth facts showing that the supposedly defamatory statements are both capable of falsification and clearly erroneous; rather, they have put forth conclusory allegations disagreeing with Defendants’ characterizations. These conclusory allegations cannot satisfy the pleading standard. *See Schatz*, 669 F.3d at 57. Because Cheng is a public figure and Plaintiffs have utterly failed to allege any facts to show malice, Plaintiffs’ defamation claim must be dismissed.

**III. Even if Plaintiffs have plausibly alleged actual malice, many of the challenged statements are protected opinion.**

Additionally, many of the allegedly defamatory statements are protected opinion.<sup>3</sup> “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, 282 (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 falsify facts.” *Id.* at 284. Rather, it is a way to “demonstrate . . . strong disagreement with the views” being described, and it is protected. *Id.*

Under New York law, to determine whether a given statement is an opinion, courts look to the following factors:

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<sup>3</sup> *Amici* take no position on the other defenses raised in Defendants’ motion to dismiss.

(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.

*Ganke v. Mensch*, 480 F.Supp.3d 542, 551-52 (S.D.N.Y. 2020). Furthermore, even a statement which might appear to be a fact may be deemed opinion under New York law if the statements are made under “circumstances in which an audience may anticipate epithets.” *Id.*

Finally, New York allows for statements to be considered “pure opinion” (and therefore non-actionable) if they are “accompanied by a recitation of the facts upon which [they are] based.” *Id.* (citing *Steinhilber v. Alphonse*, 68 N.Y. 2d 283 (N.Y. App. 1986).

*A. The terms “far-right media personality,” “conspiracy theorist,” and “right wing” are opinions*

The terms “far-right” and “right-wing” are not susceptible to being proved true or false, and are undefined slogans that cannot support a defamation claim. *See 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*, Case No. 20-cv-11392-DJC, 2021 WL 2186815, (D. Mass. May 28, 2021) (finding that the term “right-wing” was a statement of opinion). Both phrases, as imprecise terms lacking a commonly accepted definition, cannot be considered a factual statement.

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. *See, e.g.*, Victor Garcia, *Sean Hannity on Pelosi’s impeachment managers*, 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?*, New York Times, Sept. 3, 2021, <https://www.nytimes.com/article/what-is-qanon.html> (identifying certain subsections of

Republican voters as conspiracy theorists). 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). They are therefore not actionable. *Ganke*, 480 F.Supp.3d at 551-52.

### CONCLUSION

For the foregoing reasons, this Court should dismiss this case with prejudice.

Respectfully Submitted, this 10th day of  
September, 2021,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2021 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 the following:

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