21-0066-cv

United States Court of Appeals

for the

Second Circuit

PETER BRIMELOW,

Plaintiff-Appellant,

– v. –

NEW YORK TIMES COMPANY,

Defendant-Appellee.

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

BRIEF FOR DEFENDANT-APPELLEE

DAVID E. MCCRAW
DANA R. GREEN
THE NEW YORK TIMES COMPANY
620 Eighth Avenue
New York, New York 10018
(212) 556-4031

Attorneys for Defendant-Appellee
New York Times Company

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee The New York Times Company hereby discloses that it is a publicly traded company, has no parent company, and no publicly held corporation owns ten percent or more of its stock.

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Defendant-Appellee The New York Times Company ("The Times") respectfully submits this brief in response to the brief of Plaintiff-Appellant Peter Brimelow.

PRELIMINARY STATEMENT

Brimelow is not coy about the purpose of this lawsuit: he asks the court to legitimize his ideology and silence his critics. Both before the District Court and on appeal, Brimelow spends much of his pleadings railing against social "taboos" that cause him to be ostracized for his views on race and immigration. Not content with the protections afforded to him by the First Amendment, which give him the right to author or publish theories that some races are innately less intelligent, less capable, and more prone to commit crime, Brimelow demands that the courts also shield him from criticism and social rebuke for those publications. Essentially, Brimelow argues that the world should embrace his ideas. But that is not the role of the courts and it is certainly not the purpose of the First Amendment. Brimelow has the freedom to share his ideas. Others have the freedom to reject them.

The Times reported critically on Brimelow and the website he founded and edits, VDARE, five times in 2019 and 2020. In doing so, The Times described Brimelow as an "open white nationalist" because he unabashedly advances views that reasonably can be described as such. The Times further characterized Brimelow or VDARE at various times as "racist," "white supremacist," and "white

nationalist." The Times also reported accusations that a specific blog post published by VDARE used an anti-Semitic word. The District Court correctly dismissed all of the claims because Brimelow could not plausibly show actual malice in light of his or VDARE's own extensive publications that reasonably could be viewed as racist, white supremacist, or white nationalist. Brimelow's own brief only adds to that record. The court additionally held that all but one of the statements were non-actionable "opinion" as a matter of law, that statements about VDARE and others were not "of and concerning" Brimelow, and that one of the articles was subject to the wire service defense. The District Court correctly rejected Brimelow's attempt to chill constitutionally protected speech. This Court should do the same and affirm.

COUNTERSTATEMENT OF THE ISSUES

1. Did the District Court properly dismiss all of Brimelow's claims on the basis that, even if the statements at issue were otherwise actionable, he could not, as required by the First Amendment and New York law, plausibly show actual malice?

2. Did the District Court properly dismiss the Second Amended Complaint on the basis that terms like "racist," "white supremacist," "white nationalist," and "anti-Semitic," are non-actionable opinion as a matter of law?

3. Did the District Court err in determining that the phrase "open white nationalist" is capable of only one meaning and that it represented a potentially actionable factual allegation that Brimelow had described himself as a "white nationalist"?

4. Did the District Court correctly hold that hyperlinking to the SPLC website did not republish the contents of that website and that The Times only is potentially liable for the words that it published?

5. Did the District Court properly find that statements regarding the website VDARE.com or others were not "of and concerning" Brimelow as a matter of law?

6. Has Brimelow waived objections to the District Court's application of the wire service defense to dismiss claim premised on the May Article, which republished verbatim a wire article from Reuters?

SUMMARY OF THE ARGUMENT

The First Amendment and New York law provide robust protections for critical reporting on public figures regarding matters of public concern. Here, The Times published five articles reporting on events involving appellant, Peter Brimelow, a prominent anti-immigration activist, or the website that he founded and edits, VDARE. Two of the articles reported on national political figures and their ties to white nationalism and other controversial beliefs. Two of the articles reported on complaints by federal immigration judges who objected to a VDARE article that was included in the government's daily press clippings. And one of the articles was a republication of a Reuters wire story about Facebook taking steps to address inauthentic social media activity. In the articles, The Times described Brimelow, VDARE, or articles published on VDARE as white nationalist, white supremacist, or anti-Semitic.

Even if those descriptions were construed as actionable statements of fact—and they are not, as a matter of law—Plaintiff has not and cannot show that The Times published the characterizations with actual malice: that is, knowing that they were false or despite a high degree of awareness of their probable falsity. Brimelow's career as a writer and editor would not have put The Times on that kind of notice. Brimelow has, for years, advocated for the preservation of the United States as a majority-white country and espoused the belief that Black and

Hispanic people are less intelligent and more prone to crime. VDARE routinely publishes essays by writers that Brimelow himself calls white nationalists, espousing similar theories about non-white and non-Christian people, often in extremist terms.

In addition, courts in this jurisdiction and elsewhere repeatedly have held, as part of our profound national commitment to freedom of speech, that those kinds of characterizations are incapable of objective proof and are not actionable as defamation. And the context and presentation of the characterizations reinforced to readers that these were inherently subjective evaluations of ideology.

Many of the articles and statements also did not refer to Brimelow. As a matter of law, those articles were not "of and concerning" Brimelow and cannot have defamed him, personally. Finally, one of the articles was a verbatim republication of a Reuters wire service article, subject to dismissal under the wire service defense, a finding that Brimelow does not challenge on appeal and therefore has waived. The Court should affirm the District Court's dismissal of all claims with prejudice.

STATEMENT OF FACTS

A. Peter Brimelow

Plaintiff Peter Brimelow is a prominent and outspoken opponent of non-white immigration to the United States. J.A. 161.[1] He is the author of the book *Alien Nation: Common Sense About America's Immigration Disaster* (1995) ("*Alien Nation*"), and the founder and editor of the website VDARE.com ("VDARE"). J.A. 8, 9-10, 32. Together, *Alien Nation* and his publications on VDARE comprise the substance of Brimelow's "original writings" referenced in his Second Amended Complaint.[2] J.A. 162; *see also* J.A. 22, 33, 37, 40, 45.

1. *Alien Nation*

In *Alien Nation*, Brimelow argues that American immigration law since 1965 has had a "disastrous" and "catastroph[ic]" effect on American identity, which he defines in racial terms. J.A. 61 (citing *Alien Nation* at 150). The thesis of his book is perhaps best captured by this passage:

> The American nation of 1965, nearly 90 percent white, was explicitly promised that the new immigration policy would not shift the country's racial balance. But it did. . . . It is simply common sense that Americans have a legitimate interest in their country's racial balance. It is common sense that they have a right to insist that their government stop shifting it. Indeed it seems to me that they have a right to insist that it be shifted back.

[1] "J.A." refers to the Joint Appendix, ECF No. 32. "Brimelow Br." refers to the Brief of Plaintiff-Appellant, ECF No. 33.

[2] As set out below, the District Court properly took judicial notice of these writings.

Id.

Brimelow describes modern American immigration policy as "Adolf Hitler's posthumous revenge on America," and contends that "the American nation has always had a specific ethnic core," and "[it] has been white." *Id.* He asserts that "the role of ethnicity and race has proved to be elemental—absolute—fundamental," and laments that the United States "faces . . . the breaking of . . . 'the racial hegemony of white Americans.'" *Id*. He worries that "public policy now discriminates against" his son, Alexander—"a white male with blue eyes and blond hair." J.A. 61-62.

Reviews of *Alien Nation*, republished on VDARE, connect Brimelow's anti-immigration views to ethnic nationalism. One review faults Brimelow for viewing American identity through the prism of race—as is characteristic of ethnic nationalists—rather than through the prism of culture, politics, and economics—as civic nationalists do. "In the end, [Brimelow] explains the content of American national identity in old-fashioned, blood- and-soil racial terms: it is the culture of white (i.e., European-origin) Americans. . . . Brimelow for some reason insists on describing in racial and ethnic terms a national identity that can only be properly characterized in cultural terms." J.A. 62 (quoting Francis Fukuyama, *Alien Nation Review: Culture Vulture*, VDARE (May 1, 1995) (originally published in the *National Review*), https://tinyurl.com/y8lxxmqj). Another review, also posted on

VDARE, concludes "Mr. Brimelow seeks to replace this American tradition [of accepting immigrants] with an ethnic nationalism . . . ." *Id.* (quoting Reed Ueda, *Alien Nation Review: Natterings of a Neo-Nativist*, VDARE (Apr. 18, 1995) (originally published in *The Wall Street Journal*), https://tinyurl.com/y8fsswxh). And a third reviewer is perhaps most emphatic, concluding Brimelow "sets forth what looks very much like a defense of old-fashioned white racial nationalism." *Id.* (quoting Michael Lind, *Alien Nation Review: American By Invitation*, VDARE (Apr. 24, 1995) (originally published in *The New Yorker*), https://tinyurl.com/y9pvlfj8).

2. VDARE

Brimelow also is the founder and editor of VDARE. J.A. 9-10. The site is operated by a duly incorporated nonprofit foundation. *See id.* at 45 (asserting VDARE's 501(c)(3) status). *See also* VDARE, https://vdare.com/donate (providing VDARE Foundation's federal tax information). VDARE provides a platform for those "critical of America's post-1965 immigration policies,"[3] J.A. 9-10, and is particularly concerned with what it terms the "National Question"—that is, "how long the US can continue as a coherent nation-state in the face of current

[3] Prior to 1965, the United States imposed an immigration quota system that prioritized immigration from Britain and Germany, severely limited immigration from outside Western Europe, and prohibited *all* immigration from Asia, in order to "preserve the ideal of U.S. homogeneity." *See* U.S. Dept. of State, Office of the Historian, *The Immigration Act of 1924 (The Johnson-Reed Act)*, https://tinyurl.com/qe2tnuw.

immigration policy." J.A. 63 (quoting VDARE, https://vdare.com/about). VDARE's founding principles include that "***Demography is destiny***: Human differences are not social constructs. It is only with an honest consideration of race and ethnicity, the foundations of human grouping, that human differences can be explained," and "***The racial and cultural identity of America is legitimate and defensible***: Diversity per se is not strength, but a vulnerability." *Id.* (quoting VDARE, https://vdare.com/about) (emphases in original).

On the website, posts are tagged by "topic." VDARE, https://vdare.com/publication-tags.[4] Indicative of the tone and content of the site, the most commonly tagged topics on VDare.com include: "Diversity is Strength" (typically leading to content claiming to show the opposite), "Anti-White Hate Crimes," "Achievement Gap," "Minority Occupation Government," "Immigrant Mass Murder," "GOP Share of the White Vote," "White Guy Loses His Job," "Camp of the Saints," "Disgruntled Minority Massacre," "Christophobia," "Immigrants and Disease," "Refugee Racket," and "Black Murders of White Cops." *Id.*

VDARE routinely publishes articles by individuals whom Brimelow himself identifies as "white nationalists," a term he has defined to mean "people aiming to

[4] As set out further below, the court may properly take judicial notice of a publication for the fact of its existence, rather than the truth of its contents. *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008). *See infra* at 24-26.

defend the interests of American whites." J.A. 63 (citing Peter Brimelow, *What's 'White Nationalist' about Official English anyway?*, VDARE (June 23, 2009), https://tinyurl.com/ybwy3owp; Peter Brimelow, *Brimelow Remembers Tanton: "A Citizen Who Took Up Arms For His Country,"* VDARE (Dec. 26, 2019), https://tinyurl.com/ydda8668 (hereinafter *Brimelow Remembers Tanton*) (defining white nationalists as "people aiming to defend the interests of American whites—as they are absolutely entitled to do")).

For example, VDARE has published more than 80 posts by Jared Taylor, whom Brimelow describes as a white nationalist. J.A. 63 (citing Peter Brimelow, *Is VDARE. COM "White Nationalist"?*, VDARE (July 24, 2006), https://tinyurl.com/y8484l7c) ("We also publish on VDare.com a few writers, for example Jared Taylor, whom I would regard as 'white nationalist.'"). Taylor asserts, among other things, that there are racial differences in intelligence and that some races have a greater propensity to commit crime. *See, e.g.*, Jared Taylor, *"They Don't Let Low-IQ People Immigrate"—Why China Has Soared Past The U.S.*, VDARE (Dec. 22, 2020), https://bit.ly/3pGqHcX (arguing that China is surpassing the U.S. because "China doesn't have a lot of blacks and Hispanics. . . . It isn't trying to turn unteachable Somalis and Hondurans into anesthesiologists"); Jared Taylor, *The 2016 Edition of the Color of Crime*, VDARE (Mar. 18, 2016), https://bit.ly/2Nw8cuB (claiming that "if New York City were all white, the

murder rate would fall by 91 percent and non-fatal shootings would drop by 97 percent. You could lay off most of the police force").

VDARE also published more than 420 articles by Sam Francis before his death in 2005. In his obituary, Brimelow wrote that Francis was "a type of white nationalist, defending the interests of the community upon which the historic United States was, as a matter of fact, built." J.A. 63-64 (quoting Peter Brimelow, *In Memoriam Sam Francis (April 29, 1947 – February 15, 2005)*, VDARE (Feb. 16, 2005), https://tinyurl.com/ycng54em). Brimelow defended Francis's ideology as "legitimate" and Francis as "an important part of the VDARE.COM coalition." *Id.* Many of Francis's articles published by VDARE advanced white nationalist and white supremacist theories. *See, e.g.*, Sam Francis, *Race And The American Prospect: An Introduction*, VDARE (Sept. 5, 2006), https://bit.ly/3qLCPKZ (arguing that "[r]aces with a lower level of cognitive capacity could have produced neither the modern West, with its scientific and technological achievements, nor the ancient West, with its vast political organization and sophisticated artistic and philosophical legacies" and "[n]on-whites may indeed create a different civilization of their own, but it will not be the same as the one we as whites created and live in, and most of us would not want to live in it").[5]

[5] Notably, VDARE also has published multiple articles or blog posts expressing anti-Semitic theories and beliefs. The site has published no fewer than 19 articles by an academic named Kevin McDonald, many expressing virulently anti-Semitic views. *See, e.g.*, Kevin McDonald,

In this litigation, Brimelow has denied that he is a white nationalist and instead characterizes himself as a "civic nationalist." J.A. 164. Previously, however, in an interview republished on VDARE, Brimelow conceded that "my heart is with civic nationalism, but my head is with racial nationalism." J.A. 163. *See also* J.A. 22, 64 (citing James Fulford, *SLATE's Osita Nwanevu Interviews Peter Brimelow At CPAC*, VDARE (Feb. 24, 2018), https://tinyurl.com/yc339hwk). Brimelow has also repeatedly defended white nationalism as an ideology. He has explained that "I do think that whites have common interests they can legitimately defend" and "I do think white nationalism in the sense of representing white interests is a legitimate position," J.A. 64 (citing Peter Brimelow, *INSIDER'S Nicole Einbinder interviews VDARE.com's Peter Brimelow: "'White Supremacist' Is The Equivalent of Me Calling You a Communist"*, VDARE (Apr. 4, 2019), https://tinyurl.com/y6v9a9dz (hereinafter *Einbinder Interview*)); *see also id.* (citing *Brimelow Remembers Tanton* (eulogizing the prominent white nationalist, John Tanton, as "a gentleman" and "an

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Are These Antifa/BLM Riots a Jewish Coup?, VDARE (Sept. 12, 2020), https://bit.ly/3bpuLt3 (theorizing that the Black Lives Matter movement might be "a Color Revolution-style attempted Jewish coup"); Kevin McDonald, *The Trump Impeachment: A Clash Between America's Competing Elites*?, VDARE (Jan. 26, 2020), https://bit.ly/3pLeun7 (claiming that the first Trump impeachment "is a Jewish coup" and expressing surprise that "Jews now feel confident enough that they can safely participate in such displays"); Kevin McDonald, *Why So Much Jewish Fear And Loathing Of Donald Trump?*, VDARE (Oct. 29, 2015), https://bit.ly/3ukktTs (arguing that Jews have "always" sought to "lessen[ ] the demographic, political, and cultural power of White America" and that Jews oppose Trump because he "may imperil the project of dispossessing White America").

environmentalist")). Brimelow maintains, "white nationalism as a movement to defend the interests of American whites is as natural as Hispanic nationalism and Zionism - and inevitable as whites move into a minority." J.A. 64 (citing Peter Brimelow, *John Tanton vs. SPLC: Let's See Some Treason Lobby Letters*, VDARE (Sept. 21, 2008), https://tinyurl.com/y9eys29y).

Brimelow has promoted theories at the heart of white nationalism and white supremacy, including that certain races are predisposed to commit crime and that IQ is linked to race. *See, e.g.*, J.A. 65 (citing James Fulford, *Yes, Virginia (DARE), There IS Hispanic 'Ethnic Specialization' In Child Rape. The Totalitarian Left Just Doesn't Want You To Know*, VDARE (Mar. 18, 2019), https://tinyurl.com/yd4leszu (Brimelow video at 51:46) ("[C]rime in this country is ethnically variegated. There's ethnic specialization in crime. And Hispanics do specialize in rape, particularly of children. They're very prone to it, compared to other groups.")); *id.* (citing Peter Brimelow, *"This Isn't A Free Country": The Heritage Foundation And The Fate Of Jason Richwine*, VDARE (May 11, 2013), https://tinyurl.com/y7mrcyah (asserting "[t]he facts about the differing average IQ levels of the various post-1965 immigrant streams have been settled science for many years" and research "can't be debunked" that Jews, East Asians and White Americans have higher IQs than Hispanic and Black Americans)). He has asserted that non-European immigrants cannot "assimilat[e]" into American culture and

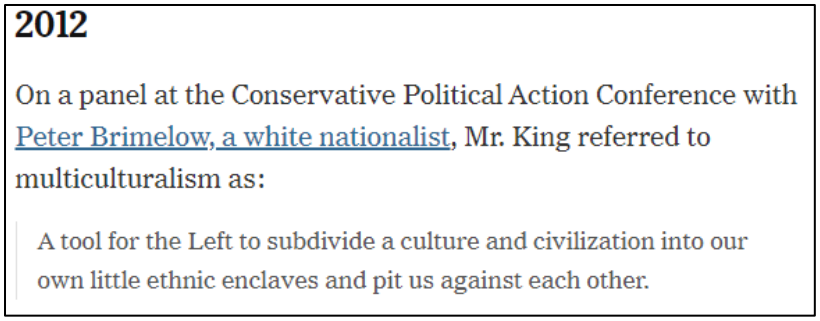
advocated not just restricting non-white immigration but that "[t]he ultimate answer must be: expulsion" of ethnic and religious minority immigrants. J.A. 65 (quoting Peter Brimelow, *San Bernardino: The Answer Is An Immigration Moratorium—And Muslim Expulsion*, VDARE (Dec. 4, 2015), https://tinyurl.com/yb5vae3m).

B. The Articles

Brimelow alleged defamation claims arising from five separate articles, but the gist of his claims was that he was falsely portrayed as a racist, white nationalist, or white supremacist and an anti-Semite.

1. The January Article

On January 15, 2019, The Times published an article (the "January Article") about controversial Iowa Congressman Steve King and his history of offensive comments. J.A. 20, 88-91. The January Article included a bullet-point timeline of examples. J.A. 88-91. One bullet point stated that, in 2012, "On a panel at the Conservative Political Action Conference with Peter Brimelow, an open white nationalist, Mr. King referred to multiculturalism as: 'A tool for the Left to subdivide a culture and civilization into our own little ethnic enclaves and pit us against each other.'" J.A. 21, 89. The piece was later revised to say:



2012

On a panel at the Conservative Political Action Conference with Peter Brimelow, a white nationalist, Mr. King referred to multiculturalism as:

> A tool for the Left to subdivide a culture and civilization into our own little ethnic enclaves and pit us against each other.

J.A. 23, 66-67. The underlined words hyperlink to the website of the Southern Poverty Law Center ("SPLC"). J.A. 23-24. The SPLC website categorizes Brimelow's ideology as "white nationalist" and includes examples of Brimelow's public statements. J.A. 24. *See* SPLC, *Peter Brimelow*, htttps://www.splcenter.org/fighting-hate/extremist-files/individual/peter-brimelow. Brimelow asserts that the article harmed his reputation by accusing him "of being a figure of division and racism" and by linking to the SPLC website. J.A. 21-25 (SAC ¶¶ 51, 57, 68–75).

2. The August Article

In August 2019, a controversy erupted among immigration judges when the Department of Justice Executive Office for Immigration Review ("EOIR") included in its daily briefing a VDARE blog post. J.A. 30-31, 93-95. The union representing immigration judges submitted a complaint to the EOIR, protesting that the post "directly attacks sitting Immigration Judges with racial and ethnically tinged slurs." J.A. 30. In an article (the "August Article"), The Times reported on the controversy, including the union's complaint, EOIR's response, VDARE's

denial, and the history of the disputed term used in the VDARE post, "kritarch." J.A. 30-31. The August Article does not reference Brimelow. *See* J.A. 93-95. He nonetheless claims the August Article personally defamed him with quotes from officials and other third parties stating that VDARE is "an anti-immigration hate website," a "white nationalist website" and "racist." J.A. 30-32.

3. The September Article

A month later, The Times published a story (the "September Article") about the departure of senior EOIR officials. *See* J.A. 35-36, 97-98. The September Article details conflict between immigration judges and the Trump administration. J.A. 97-98. It closes by briefly noting that: "Last month, tensions increased when a daily briefing that is distributed to federal immigration judges contained a link to a blog post that included an anti-Semitic reference and came from a website that regularly publishes white nationalists." J.A. 36. The underlined text hyperlinks to the August Article. The September Article does not reference Brimelow and does not name VDARE. Brimelow alleges it personally defamed him to say that a blog post on VDARE used an anti-Semitic reference. *Id.*

4. The November Article

On November 18, 2019, The Times published an article (the "November Article") about Stephen Miller, a close adviser to President Trump who was instrumental in driving changes to immigration policy. J.A. 39, 100-03. The

November Article reported on leaked emails showing Miller "maintained deeper intellectual ties to the world of white nationalism than previously known." J.A. 100. It includes examples of Miller's terminology, theories, and source citations, and quotes experts opining on their significance and links to white nationalism. *See generally* J.A. 100-03. Among the examples given is that Miller cited "Peter Brimelow, the founder of the anti-immigration website VDARE, [who] believes that diversity has weakened the United States, and that the increase in Spanish speakers is a 'ferocious attack on the living standards of the American working class.'" J.A. 100. The underlined text hyperlinks to reporting and a video in which Brimelow made those statements. *See* Sofia Resnick, *VIDEO: Peter Brimelow attacks multiculturalism at CPAC*, Colo. Indep. (Feb. 9, 2012), https://tinyurl.com/ybtv3aft.

The November Article reports that SPLC "has labeled VDARE a 'hate website' for its ties to white nationalists and publication of race-based science . . . ." J.A. 100. The underlined text hyperlinks to SPLC's web page on VDARE. *See* SPLC, *VDARE*, https://www.splcenter.org/fighting-hate/extremist-files/group/vdare. The article explains that VDARE "approvingly cite[s] Calvin Coolidge's support for a 1924 law that excluded immigrants from southern and Eastern Europe, and praise[s] 'The Camp of the Saints,' a 1973 French novel that popularizes the idea that Western civilization will fall at the hands of immigrants."

J.A. 100. The article quotes experts explaining why those statements are indicative of white nationalist beliefs. *See generally* J.A. 100-03. The article also includes contrary opinions, refuting the connection. *See generally id.*

5. The May Article

On May 5, 2020, The Times published a wire article from Reuters (the "May Article"). *See* J.A. 43, 105-07. The May Article reports that Facebook said it had identified and removed several networks of fake social media accounts, including ones linked to Iran, QAnon, "and a separate U. S.-based campaign with ties to white supremacist websites VDARE and the Unz Review." J.A. 43-44, 105. The article reports that Facebook said the networks recently had been pushing coronavirus-related disinformation. J.A. 44, 105. The May Article does not mention Brimelow. Nevertheless, Brimelow asserts that the article, because of its reference to VDARE, defames him personally and accuses him of "manipulating on-line readers by utilizing a 'bot-farm' of fake accounts." J.A. 44. *See* also Brimelow Br. at 51.

C. The District Court Proceedings

Brimelow filed his initial complaint on January 9, 2020. J.A. 168. He amended his pleading on April 23, 2020, and again on May 26, 2020. *Id.* Brimelow's operative pleading, the Second Amended Complaint, seeks five

million dollars in actual damages, punitive damages, and costs. J.A. 161. On June 18, 2020, The Times moved to dismiss. J.A. 48-50.

On December 17, 2020, the District Court (Failla, J.) granted The Times's motion and dismissed the Second Amended Complaint with prejudice. J.A. 161-88. As Brimelow is concededly a public figure, he bore the burden of plausibly alleging actual malice, and the court found that he failed to do so for any of the articles. J.A. 178, 179, 184, 185, 187. It held that in light of Brimelow's extensive publications on immigration and race—of which the court could properly take judicial notice, *id.* at 161-2 n.1—Brimelow could not show The Times "knew, or recklessly ignored information suggesting, that he did not hold 'white nationalist' views." J.A. 179; *see also* J.A. 184, 185, 187. The court concluded "there is ample basis in the material . . . for The Times to reasonably have deemed Plaintiff's views as falling within a broad colloquial understanding of the term 'white nationalist.'" J.A. 179.

The District Court also dismissed many of the claims on alternative grounds. First, the court concluded that many of the statements at issue are matters of opinion—subjective terms incapable of objective proof—and are therefore non-actionable as a matter of law. J.A. 174-75, 181, 185, 187. The court explained that terms like "white nationalist" have a "'debatable, loose and varying' meaning in contemporary discourse," and there is "no single, precise understanding of the term

'white nationalist' that is falsifiable." J.A. 175. The court also found that some of these quotations, in context, were plainly expressing the speaker's subjective opinions of VDARE or Brimelow. *See, e.g.*, J.A. 185. Second, the court dismissed a number of statements because they are not "of and concerning" Brimelow; they are about VDARE. J.A. 181-84, 186-87. The court rejected Brimelow's attempt to treat the website as his alter ego. Finally, the court dismissed Brimelow's claim stemming from the May Article for the additional reason that it is barred by the wire service defense. J.A. 187 ("The Times republished, verbatim, an article from Reuters, an indisputably reputable wire service.").

ARGUMENT

I.
BRIMELOW'S PUBLIC POLICY ARGUMENTS LACK ANY FOUNDATION IN LAW AND WOULD CLEARLY VIOLATE THE FIRST AMENDMENT

Brimelow spends almost half his brief arguing for reversal on public policy grounds that lack any foundation in law and that, if applied, would clearly violate the First Amendment. *See* Brimelow Br. at 18-32. His chief complaint is that his ideology and ideas about race are "taboo" and are viewed with contempt by society. That ideology includes the theory, set out in his brief, that there are "measurable differences in intelligence among the races" and "not only are those differences real and measurable, but that they are innate." *Id.* at 25-26.

Specifically, Brimelow claims that Black Americans are innately less intelligent than white Americans. *See, e.g.*, *id.* at 18, 24-26. According to Brimelow, these "[r]acial differences in intelligence (to say nothing of crime) are only awkwardly acknowledged" by society, which he views as a problem. *Id.* at 21.

The District Court's decision, Brimelow argues, should be reversed because it is a "tacit endorsement of those enforcing the taboos" against his ideas. *Id.* at 15. Permitting him to sue for defamation, he argues, would facilitate wider discussion of his ideology. *Id.* at 23, 27. In addition, because the Articles, in his view, "enforce dishonest taboos" against his ideas, are an "intellectual witch hunt," and "police the boundaries of respectable discourse," they should be considered outside the bounds of First Amendment protections. *Id.* at 31-32.

Brimelow's novel arguments lack any basis in law and turn First Amendment protections on their head. Brimelow is not prevented from airing his controversial theories on race and immigration, as amply demonstrated by the website that he founded and edits, the many speeches he has given, and the articles he has authored. The First Amendment guarantees him this access to the marketplace of ideas. But it does not promise anyone will buy what he is peddling. Brimelow's attempts to use First Amendment arguments to chill criticism are utterly specious and should be rejected.

II.
THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF COULD NOT PLAUSIBLY SHOW ACTUAL MALICE

The District Court held that all but one of the statements at issue are opinion and therefore not actionable (*see* Section III *infra*). Even if the statements were construed as statements of fact, though, Brimelow's claim would still fail. As the District Court found, Plaintiff has not adequately shown that any of the publications were made with actual malice.

The District Court readily concluded that Brimelow is a public figure, a finding that Brimelow does not dispute. J.A. 177-78; *see also* J.A. 8-9, 28-29, 32. He therefore must plausibly plead and prove actual malice, *i.e.*, that The Times published with knowledge that the statements at issue were false, or despite a "high degree of awareness" of their "probable falsity." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Brimelow must establish actual malice by "clear and convincing evidence." *Contemporary Mission v. New York Times Co.*, 842 F.2d 612, 621 (2d Cir. 1988). This "heavy burden of proof," *id.*, serves our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," even though such debate "may well include vehement, caustic, and sometimes unpleasantly sharp"—and even "erroneous"—commentary about public figures. *New York Times Co. v. Sullivan*,

376 U.S. 254, 270–71 (1964). When a plaintiff fails plausibly to plead actual malice, the claim must be dismissed. *See, e.g.*, *Biro v. Condé Nast*, 807 F.3d 541 546 (2d Cir. 2015); *Cabello-Rondon v. Dow Jones & Co.*, 720 F. App'x 87, 89 (2d Cir. 2018) (summary order).

To meet that high standard, the District Court held that Brimelow would need to show that The Times knew that he was not a white nationalist or recklessly ignored information suggesting he was not and published the characterization anyway. J.A. 179. The court took judicial notice of Brimelow's extensive publications and public statements on race and immigration and concluded he could not make that showing because there is "ample basis in the material . . . for The Times to reasonably have deemed Plaintiff's views as falling within a broad colloquial understanding of the term 'white nationalist.'" *Id.* The court reached the same conclusion for other statements at issue: "There is no evidence that The Times knew the characterizations . . . were false and, given the surrounding circumstances—namely, the views Plaintiff himself had previously expressed publicly and the views expressed by other individuals on VDARE, it cannot be said that The Times acted recklessly either." J.A. 184. *See also id.* ("Plaintiff has not adequately pleaded actual malice . . . for the same reasons previously discussed"); J.A. 187 ("Plaintiff does not adequately plead . . . actual malice). The District Court's conclusion is amply supported by the record below, by records of

which the court may take judicial notice, and is only reinforced by Brimelow's own appeal brief.

Brimelow argues that the District Court erred in two ways: first, by "improperly taking judicial notice of voluminous materials to which Brimelow had objected," and, second, by "weighing this improper material against Brimelow's allegations, as though the court itself were the trier of fact." Brimelow Br. at 45. Both arguments fail.

A. The Court Properly Took Judicial Notice of Brimelow and VDARE's Publications

Brimelow's pleading and appeal brief champions and repeatedly cites to his "long and distinguished career as a writer and journalist," his book, *Alien Nation*, his editing and publishing via VDARE, and the contents of that website. *See, e.g.*, J.A. 8-10, 21-23, 32-34, 36-37, 40-41, 45 (SAC ¶¶ 6-11; 57, 61, 117, 124, 142, 156, 178); Brimelow Br. at 8. And one of Brimelow's core allegations, repeated in each cause of action, is that The Times acted maliciously by failing to "seek[] corroboration" from "Plaintiff's website 'VDARE.com'" or to "link[] to Plaintiff's website, 'VDARE.com' or to any original writings by Plaintiff." J.A. 21-22, 33, 36-37, 40-41, 45 (SAC ¶¶ 57, 124, 142, 156, 178). Nevertheless, Brimelow now asserts that the District Court must ignore those very writings on a motion to dismiss. Brimelow Br. at 46-47. The court, he claims, should be able to consider *only* the specific section of the VDARE website (and, apparently, his book) that he

cited. *Id.* at 47; *see also id.* at 50 ("[T]he only proper allegations concerning actual malice were those of Brimelow's pleadings.").

Brimelow is seeking, via purportedly narrow drafting, to evade the consequences of his own publications, publications that bear directly on actual malice. The law does not permit him to do so. "Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision." *Cortec Indus., Inc. v. Sum Holding L.P*, 949 F.2d 42, 44 (2d Cir. 1991). *See also Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) ("[P]laintiff [may not] evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that prove[s] that his claim had no merit.").

The record available to the court on a motion to dismiss is not so narrow as Brimelow claims. It is well-settled that the court may properly consider materials incorporated by reference in the complaint and of facts "not subject to reasonable dispute because it is generally known" or facts that "can be accurately and readily determined by sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). But the Court also may "take judicial notice of the fact" of a publication, "without regard to the truth of their contents." *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008). This includes taking notice of the

existence of articles, news reports, and other public statements "to show that information . . . was publicly available." *See, e.g., Garber v. Legg Mason, Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009); *see also Biro v. Condé Nast*, 963 F. Supp. 2d 255, 271 n.9 (S.D.N.Y. 2013) ("the Court can take judicial notice of the existence of articles written by and about [Plaintiff], though not for the truth of the matter asserted in the documents themselves."). A court's determination of whether to take judicial notice of facts is reviewed for abuse of discretion. *Staehr*, 547 F.3d at 424.

That is precisely what the District Court did. Brimelow does not dispute that he is the author of any of the writings attributed to him and he does not deny that the relevant articles and blog posts were published on VDARE.com. The District Court did not abuse its discretion in considering the existence and content of these materials and Brimelow's attempt to exclude them from judicial review is without merit.

B. The District Court Properly Rejected Brimelow's Allegations of Actual Malice as Inadequate as a Matter of Law

Brimelow next argues that the District Court erred in failing to "engage" with his allegations of actual malice, instead making a "curt assertion that 'there [was] ample'" support for The Times's characterizations of Brimelow and VDARE. Brimelow Br. at 45-46. But the court is not required to engage with every argument presented by a party. The reasons for the District Court's decision are

clear. *See Zuma Press, Inc. v. Getty Images (US), Inc.*, -- F. App'x ---, 2021 U.S. App. LEXIS 6139, at *11 (2d Cir. Mar. 3, 2021) (summary order) ("[W]e need not remand for further explanation where the reasons for a district court's decision are clear."). The court's analysis was "curt" because the record is simply overwhelming that Brimelow's public views on race and immigration can reasonably be viewed as racist, white nationalist, or white supremacist and that the website he edits, VDARE, also publishes racist, white nationalist, white supremacist, and anti-Semitic material.[6] Brimelow cannot manufacture actual malice where the public record provides obvious reasons to *believe* the statements at issue.

Brimelow argues that the Court "does not get to weigh the evidence on a Rule 12(b) motion and decide, like the jury, that Appellee's libel was reasonable." Brimelow Br. at 47. But that is not what the District Court did. Brimelow seems to misunderstand the nature of the actual malice inquiry. It is Brimelow's burden to show that The Times knew he is *not* an open white nationalist, white nationalist, white supremacist, etc., or recklessly disregarded evidence that he is not. He is tasked with proving a negative. The District Court concluded he could not make

[6] Indeed, Plaintiff and VDARE have been widely so characterized in this way that they should be deemed "libel-proof" as to these accusations. *See* J.A. 82-83 & n.9.

that showing because, among other things, the public record would not put The Times on notice that its journalists were incorrect.

Even if the court disregarded Brimelow's writings, his claim would still fail under the actual malice standard. His pleaded allegations of actual malice lack legal merit. Those allegations included The Times's failure to seek comment, its reliance on "questionable sources" like the SPLC, "bias," "inadequate investigation," its ignoring of Brimelow's denials, ill-will, "deviation from accepted news gathering standards," and a "pre-conceived storyline." Brimelow Br. at 46.

Brimelow makes much, for example, of The Times's purported failure to abide by various in-house standards. Brimelow Br. at 9, 16, 53; J.A. 10-13, 18, 21-22, 33-34, 36-37, 40-41, 45 (SAC ¶¶ 14-23, 27, 37, 57-58, 124-25, 142-43, 156-57, 178-79). But deviating from journalistic standards does not constitute actual malice. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 665. *See also Biro*, 963 F. Supp. 2d at 286 (failure to follow standards "even where it violates the paper's practices as set forth in its employee handbook" does not establish actual malice). He argues that The Times should have sought comment from him—and should have credited his claims to be a "civic nationalist." Brimelow Br. at 16, 46; J.A. 21-22, 33-34, 36-37, 40-41, 45 (SAC ¶¶ 57, 124, 142, 156, 178). But "failure to investigate is not evidence of actual malice," *Biro*, 963 F. Supp. 2d at 285. And The Times is not

required to adopt his preferred terminology. As this Court has said, "Surely liability under the 'clear and convincing proof' standard of *New York Times v. Sullivan* cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Edwards v. Nat'l Audubon Soc'y Inc.*, 556 F.2d 113, 121 (2d Cir. 1977). *See also Harte-Hanks*, 491 U.S. at 692, n.37. Brimelow also argues that The Times wrongly relied on the SPLC, "a highly questionable source." Brimelow Br. at 13-14, 45-46; J.A. 18, 22, 33, 37, 40 (SAC ¶¶ 38, 57(d), 124(d), 142(d), 156(d)). But he does not refute any of the *facts* on the SPLC site—much of it quotations from his own publications. *See Peter Brimelow*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/individual/peter-brimelow.

Additionally, for many of his allegations, Brimelow simply recites the legal standard, rather than alleging facts. That is insufficient to meet the *Iqbal/Twombly* pleading standard. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). For example, Brimelow argues that The Times had "preconceived hostility toward Plaintiff as an ideological opponent," and "malice in the usual sense of ill will." Brimelow Br. at 46. *See also* J.A. 35, 38-39, 42, 46-47 (SAC ¶¶

131, 149, 163, 185). Brimelow pleads no facts in support of this allegation. Contradictorily, in fact, Brimelow pleads that The Times is a fellow publisher of "the science of race-based differences." *See* J.A. 15-16, 25 (SAC ¶¶ 36, 76-81). In any event, ill will, alone, does not establish actual malice. "Despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication." *Biro*, 807 F.3d at 546 (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001)). "Ideological" opposition also does not constitute actual malice. *See, e.g.*, *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991) ("[M]any publications set out to portray a particular viewpoint or even to advance a partisan cause. Defamation judgments do not exist to police their objectivity.").

The remainder of Brimelow's actual malice argument is directed to debating the meaning of one passage from his book, *Alien Nation*, published some 25 years ago. Brimelow Br. at 48-50. Brimelow's argument ignores the many more explicitly racist, white nationalist, white supremacist and anti-Semitic writings that Brimelow or VDARE have published since then, which the District Court relied on. *See supra* at 19; J.A. 163, 179. Ultimately, Brimelow's refutation only serves to demonstrate how Brimelow's dispute with The Times is academic, not reputational. Brimelow did not—and cannot—meet the requisite showings for

actual malice and on that basis, alone, the District Court decision should be affirmed.

III.
THE DISTRICT COURT CORRECTLY HELD THAT THE CHALLENGED STATEMENTS ARE NON-ACTIONABLE "OPINION" AS A MATTER OF LAW

The District Court correctly held that characterizations of Brimelow or VDARE or their publications as "white nationalist," "white supremacist," "anti-Semitic," or similar language were non-actionable opinion as a matter of law. In doing so, the District Court correctly summarized the applicable law. The court recognized that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). In addition to those federal constitutional protections, "[t]he New York Court of Appeals has embraced and even more free-speech protective standard under the New York State Constitution for determining what constitutes non-actionable opinion." J.A. 171 (citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) ("Unlike the Federal Constitution, the New York Constitution provides for absolute protection of opinions")). *See also Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286 (1986)

("[F]alse or not, libelous or not," expressions of opinion "are constitutionally protected and may not be the subject of private damage actions").

In evaluating whether a statement is protected opinion, the District Court properly looked to three factors: "(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." J.A. 172; *see also Gross v New York Times Co.*, 82 N.Y.2d 146, 153 (N.Y. 1993).[7]

The District Court applied these factors to the various statements at issue, giving greater weight to some factors than others, depending on the nature of the words at issue and the context of the article. For some, such as characterizations of Brimelow or VDARE as "white nationalist" or "white supremacist," the court found that the statements lacked a precise meaning and were incapable of adjudication:

> [T]he description of Plaintiff as a "white nationalist" is properly interpreted as opinion because the term has a "debatable, loose and varying" meaning in contemporary discourse. *Buckley*, 539 F.2d at 894. To some, it may be essentially synonymous with "anti-

[7] The third factor sometimes is treated as two separate contextual inquiries—the context within which the statement appears and the broader social context surrounding the communication—but the analysis substantively remains the same. *See, e.g.*, *Celle*, 209 F. 3d at 178–79.

> immigration," a descriptor that Plaintiff cannot plausibly deny; to others, it may be synonymous with "white supremacist," which suggests a belief in a racial hierarchy that is not specific to the United States. There is no single, precise understanding of the term "white nationalist" that is falsifiable such that The Times's characterization of Plaintiff as such constitutes a statement of fact.

J.A. 175; *see also* J.A. 181, 185, 187. The court also found that the context of articles conveyed or reinforced to readers that the words at issue were opinion. *See, e.g.*, J.A. 173-75, 180, 185. And the court concluded that the revised January Article and other statements were additionally protected as opinion based on disclosed facts, a result of hyperlinks to supporting materials. J.A. 174-75. The only statement that the court deemed potentially actionable was the initial characterization of Brimelow in the January Article as an "open" white nationalist. J.A. 174. As set out below, that conclusion was in error but the claim ultimately was properly dismissed on other grounds. J.A. 179.

Brimelow argues that the District Court erred in several ways. Among other things, Brimelow argues that the language at issue has a precise meaning that is capable of objective proof and that the court improperly applied New York law by giving insufficient weight to the context within which the statements were made. Brimelow Br. at 33-34, 35-37. These arguments are without merit and should be rejected.

A. The Court Correctly Found Labels Like "White Nationalist" and "White Supremacist" Are Subjective and Not Susceptible to Objective Proof

As much as Brimelow wishes the statements at issue had a precise meaning and were subject to objective proof, the District Court's reasoning is consistent with the overwhelming weight of precedent. Courts in New York and elsewhere have repeatedly found terms like "racist," "white nationalist," "white supremacist," and "anti-Semitic" to be non-actionable opinion. *See, e.g.*, *Ratajack v. Brewster Fire Dep't Inc.*, 178 F. Supp. 3d 118, 165–66 (S.D.N.Y. 2016) (nonactionable opinion to call plaintiff a "racist"); *Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494, 507 (S.D.N.Y. 2012) (statements referring to plaintiff as anti-Semitic were non-actionable opinion and noting that "the reasonable reader would understand any implication that [the plaintiff] himself is anti-Semitic and/or anti-American to be the opinion of a person 'voicing no more than a highly partisan point of view'"); *Carto v. Buckley*, 649 F. Supp. 502, 508–09 (S.D.N.Y. 1986) (accusations of "racial and religious bigotry" non-actionable opinion); *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (term "racist" was non-actionable opinion); *Morgan v. NYP Holdings, Inc.*, 2017 N.Y. Misc. LEXIS 5035, at *20-21 (Sup. Ct. Kings Cty. Dec. 15, 2017) (dismissing a defamation claim over an article that described plaintiff as acting "like a Nazi" and holding that "any implication that plaintiff is anti-Semitic constitutes a non-actionable opinion"); *Borzellieri v. Daily News, LP*,

39 Misc. 3d 1215(A), at *1 (N.Y. Sup. Ct. Queens Cty. Apr. 22, 2013) (non-actionable opinion to dub plaintiff a "white supremacist principal," who had "ties to a white supremacist group," had authored "racist writings," and had contributed to "the white supremacist publication American Renaissance"), *aff'd sub nom. Silverman*, 129 A.D.3d at 1055, *appeal dismissed*, 26 N.Y.3d 962 (2015); *Russell v. Davies*, 97 A.D.3d 649, 650–51 (2d Dep't 2012) (non-actionable opinion to call plaintiff's essay "racist and anti-Semitic"); *Straka v. Lesbian Gay Bisexual & Transgender Cmty. Ctr., Inc.*, 2020 N.Y. Misc. LEXIS 3083, at *24-25, 30-31 (Sup. Ct. N.Y. Cty. July 1, 2020) (non-actionable opinion to say that plaintiffs espoused "white supremacist" views and were "far-right provocateurs who share responsibility for incitement to violence against trans people, black people, women, immigrants, Jews, and Muslims, and who publicly associate themselves with prominent, violent members of the 'Alt Right' white nationalist movement."); *Jorjani v. N.J. Inst. of Tech.*, 2019 U.S. Dist. LEXIS 39026, at *19–20 (D.N.J. Mar. 11, 2019) (calling plaintiff a "white supremacist" and "full of racism" not actionable); *Reilly v. WNEP*, 2021 Pa. Super. Unpub. LEXIS 734, at *22 (Pa. Super. Ct. Mar. 17, 2021) (non-actionable opinion to claim that plaintiff was a "white nationalist," "racist," "white supremacist," and 'Neo-Nazi"; "Whether any evidence 'proves' that Reilly is a white nationalist is matter of socio-political opinion incapable of defamatory meaning."); *Edwards v. Detroit News, Inc.*, 910

N.W.2d 394, 402 (Mich. Ct. App. 2017) (calling plaintiff a "leader" of "white supremacist groups like the Ku Klux Klan," non-actionable opinion).

Against this weight of precedent, Brimelow argues, first, that the words at issue have a precise and provable meaning because they are defined in the Merriam-Webster Dictionary. Brimelow Br. at 36. That is obviously absurd. The word "absurd" also appears in Merriam-Webster, but that does not make it an actionable factual statement. The Times itself has reported on the varying, debatable, and evolving meanings of some of the terms at issue. *See, e.g.*, Michael Powell, *'White Supremacy' Once Meant David Duke and the Klan. Now it Refers to Much More*, N.Y. Times (Oct. 17, 2020), https://tinyurl.com/4vxk7sr6; Amanda Taub, *'White Nationalism,' Explained*, N.Y. Times (Nov. 21, 2016), https://tinyurl.com/cd66f6rf.

Brimelow next argues that the terms at issue are capable of objective proof because juries are asked to assess the *mens rea* of defendants accused of hate crimes. But criminal defendants are not charged or convicted with *being* white-supremacist or white nationalist. Hate crime laws—which, notably, must be narrowly drawn to avoid constitutionally-prohibited criminalization of hate speech and beliefs[8]—ask jurors to determine that a victim was targeted because of their status in a protected class. *See, e.g.*, N.Y. Pen. Law § 485.05. No jury is asked to

[8] *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

parse out the taxonomy of the attacker's ideology or beliefs. In any event, terms that define established crimes in criminal law are routinely found to be opinion in context in defamation law. *See, e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (accusation that developer was engaged in "blackmail" held to be an opinion); *Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494, 510 (S.D.N.Y. 2012) (plaintiff accused of being "responsible for war crimes or contributed to human rights violations"); *Springer v. Almontaser*, 75 A.D.3d 539, 540–41 (2d Dep't 2010) (the terms "stalked" and "harassed" found to have no precise, readily understood meaning in context).

Ultimately, Brimelow's claim that the words have a clearly defined meaning is belied by his own briefing and prior publications. In his appeal brief, he defines "white nationalist" to mean "one of a group of militants who espouse white supremacy and advocate enforced racial segregation." Brimelow Br. at 36. But previously he has defined it to mean "people aiming to defend the interests of American whites." Peter Brimelow, *What's 'White Nationalist' about Official English anyway?*, VDARE (June 23, 2009), https://tinyurl.com/ybwy3owp; *See also* J.A. 163 (quoting *Brimelow Remembers Tanton* and defining white nationalists as "people aiming to defend the interests of American whites—as they are absolutely entitled to do"). He also has dismissed the term as just the "smear *du jour*" of "Woke Trump-Deranged Leftism," used indiscriminately by those on the

political left to describe those on the right. J.A. 65 (quoting *Brimelow Remembers Tanton*). "[W]hite supremacy" and "white nationalism," Brimelow argues, "are simply terms of abuse the Left uses to suppress rational criticism of immigration policy, and to intimidate the GOP from appealing to its own base." J.A. 65-66 (quoting *Einbinder Interview*). Dubbing someone on the right a "white nationalist," Brimelow says, "[i]s the equivalent of me calling Beto O'Rourke (or you) a Communist." J.A. 66. And he has claimed that the use of the term "white supremacist" to describe him was just an example of "overwrought language." J.A. 75 (citing Peter Brimelow & Jared Taylor, *A Public/Private Initiative to Curtail Debate"--The Op-Ed The NYT Wouldn't Run*, VDARE (Sept. 9, 2017), https://tinyurl.com/yda4yspf). Brimelow's own varying interpretations support the District Court's conclusions.

B. The Court Gave Appropriate Weight To The Context Of The Statements At Issue

Brimelow fares no better with his complaint that the District Court gave insufficient weight to the context within which the statements at issue were made, which he argues is the most important factor. Brimelow Br. at 35, 37-42. Brimelow misunderstands the law.[9] Courts repeatedly have made clear that no single factor in

[9] Brimelow also repeatedly cites to *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), as controlling case law. While New York courts incorporated the standards developed in that case, it is not controlling. The applicable legal standard in New York is that set out in *Steinhilber*, 68 N.Y.2d 283, and its progeny.

the opinion analysis consistently is determinative in every case. *See, e.g.*, *Steinhilber*, 68 N.Y.2d at 291 (This is not "a rigid set of criteria which can be universally applied. The infinite variety of meanings conveyed by words . . . rules out . . . a formulistic approach."); *Celle*, 209 F.3d at 179 (emphasizing that New York law eschews a rigid application of the relevant factors).

This simply makes logical sense. In some cases, a statement will be provably false and have a precise meaning but the overall context will overcome those two factors and render the words non-actionable opinion. For example, even an accusation that the plaintiff committed "extortion"—a crime defined by statute—can be rendered non-actionable by its contextual use. *McDougal v. Fox News Network, LLC*, 2020 U.S. Dist. LEXIS 175768, at *4 (S.D.N.Y. Sept. 25, 2020). *See also, e.g.*, *McKesson v. Pirro*, 2019 N.Y. Misc. LEXIS 1295 (Sup. Ct. N.Y. Cty. Mar. 21, 2019) (allegation that a police officer was seriously injured "at the direction of" plaintiff was rendered non-actionable by the context). In other cases, the words at issue will be so inherently imprecise or value-laden that the context is of limited relevance to the analysis. *See, e.g.*, *Held v. Pokorny*, 583 F. Supp. 1038, 1040 (S.D.N.Y. 1984) (dubbing actions "immoral" was non-actionable opinion because "[t]hose concepts are infinitely debatable" and "the Court could not instruct the jury on how to evaluate the truth of a charge of immorality without entering into an age old debate better left to philosophers"). Context cannot make

actionable words that by their very nature are so subjective that they are incapable of evidentiary proof.

Unable to counter that law and logic, Brimelow asserts that the words at issue cannot be deemed "opinion" because they appeared in the news section of The Times, a "serious paper." Brimelow Br. at 39-41. Brimelow offered the same reductionist argument below and the District Court properly rejected it:

> In his opposition, Plaintiff argues that the inclusion of the January Article in the "News" section rather than in the "Opinion" section of The Times is dispositive of whether the statements contained in the article should be considered fact or opinion. The Court does not agree that the analysis is this simple."

J.A. 173. On appeal, Brimelow doubles down, arguing that publications in "prestigious and trusted newspaper[s]" should be "construed as factual assertions"—apparently believing that a publication like The Times is not entitled to the constitutional protections afforded to others for non-actionable opinion. Brimelow Br. at 40.

Brimelow fundamentally does not understand the difference between "opinion" as a term used in everyday conversation versus "opinion" as a term of art in First Amendment jurisprudence. Almost all news articles—no matter how scrupulously factual in nature—necessarily must employ descriptors and characterizations that would be deemed non-actionable "opinion" as a matter of law. It would be impossible to explain the world without them. For example, a

recent report on the dangers presented by new COVID strains began by describing the mood in the country as "buoyant" as a result of hospitalization and deaths having fallen "steeply" and the rollout "accelerating" towards "an eventual return to normalcy."[10] But almost all of these terms would be classified as "opinion" as a matter of law because whether the country is buoyant or cautious, whether deaths have fallen steeply or less than hoped for—let alone what "normalcy" is—are subjective and incapable of objective proof.

Contrary to Brimelow's arguments, the District Court did not "clearly avoid" the context within which statements were made. Brimelow Br. at 40. The court analyzed each of the articles and, for most of them, concluded that although they were "news" reporting, the subject matter and presentation of the purportedly defamatory statements communicated that the articles were at times conveying opinions. The August and September Articles, for example, report on a dispute over the meaning of a specific word—kritarch—and what significance should attach to it. As the District Court specifically noted, throughout the August Article, competing views are attributed to different speakers, including the union, DOJ, the Anti-Defamation league, and VDARE. *See* J.A. 180; J.A. 93-95. Even Brimelow's pleadings signal that this is really an ideological dispute—not a factual one—by

[10] Apoorva Mandavilli and Benjamin Mueller, *Virus Variants Threaten to Draw Out the Pandemic, Scientists Say*, N.Y. Times (Apr. 3, 2021), https://tinyurl.com/6xb9bbv4.

claiming that it was "absurd" to suggest "kritarch" is offensive because it is a "perfectly normal" word. J.A. 31-32 (SAC ¶ 111). Whether a word is "normal" or "anti-Semitic" is not capable of objective proof to a constitutional standard.

Similarly, the whole thrust of the November Article is a discussion of Presidential Adviser Stephen Miller's ideology and influences, their meaning and significance—inherently subjective themes—with different speakers presenting their views. *See* J.A. 100-103. The article include, for example: direct quotations from a University of California academic opining on the difference between the "guys" Miller cited and "neoconservatives and Republican orthodoxy," a citation to the SPLC having "labeled VDARE a 'hate' website" for its ties to white nationalists and publication of race-based science, a former Breitbart editor opining that it is "easy" to connect white supremacist websites to Miller's policy proposals, and a University of Georgia political scientist asserting that VDARE and others "are white nationalist organizations who provide a pseudo-intellectual veneer to classic racism." *Id.* The District Court took note of this context and content, finding that "the overall tone of the article is one of commentary, rather than neutral reportage" and that readers would have understood the descriptions to be "those of the sources cited, [which] are plainly opinion rather than statements of fact." J.A. 185. The District Court properly considered the context of the statements in dismissing as opinion the various claims.

C. The District Court Erred in Concluding the Phrase "Open White Nationalist" Was Potentially Actionable

The District Court did err, however, in one respect in its opinion analysis.[11] Although ultimately dismissing the claim on other grounds, the Court held that describing Brimelow as an "open white nationalist" meant that Brimelow self-identifies as a white nationalist. J.A. 174. Because he denies that he is a white nationalist, the court considered the statement to be capable of objective proof and potentially actionable. In contrast, simply referring to Brimelow as a "white nationalist" was "properly interpreted as opinion." J.A. 174-75.

The Court of Appeals has repeatedly cautioned against "'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible facts' that might form the basis of a sustainable libel action." *Gross*, 82 N.Y.2d at 156 (quoting *Immuno, AG.*, 77 N.Y.2d at 256); *see also, e.g., Jacobus v. Trump*, 55 Misc. 3d 470, 478 (N.Y. Sup. Ct. N.Y. Cty. 2017) ("[T]he reviewing court should not pick apart the challenged communication to isolate and identify factual assertions."). The court should not engage in "strained or artificial construction" to find defamation. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999) (citations and quotations omitted). Instead, in even closes cases, the courts are to

[11] A party may argue to affirm a judgment in its favor based on any grounds supported by the record, even if that may involve challenging part of the reasoning of the lower court, without filing a cross-appeal. *Jennings v. Stephens*, 574 U.S. 271 (2015). *See also, e.g., United States v Kirsch*, 903 F.3d 213, 228 n.18 (2d Cir 2018) (government not required to cross-appeal when challenging the lower court's reasoning but not judgment).

come down on the side of protecting free expression. *McKesson*, 2019 N.Y. Misc. LEXIS 1295, at *35 ("Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech." (quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 384-85 (N.Y. 1977)).[12]

The district court's interpretation of the phrase "open" to mean "that [Brimelow] publicly self-identifies as such," J.A. 174, stretches the word beyond its common and natural meaning. "Open" is consistently defined in this context to mean that a person makes little effort to conceal something. *See, e.g.*, Merriam-Webster Dictionary (defining open to mean "completely free from concealment: exposed to general view or knowledge"); Dictionary.com ("exposed to the air or to view; not covered"); Cambridge Dictionary ("not secret," and giving as an example "There has been open hostility between them"). Counsel has been unable to find any dictionary that defines "open" or "openly" to mean "self-described" or "self-identified." An "open" white nationalist is thus most naturally understood as a person who makes little effort to conceal their ideology, whether they would

[12] "[T]he determination of whether a statement is opinion or rhetorical hyperbole as opposed to a factual representation is a question of law for the court." *Wexler v. Dorsey & Whitney LLP*, 815 F. App'x 618, 621 (2d Cir. 2020) (summary order) (quotation and citation omitted):

characterize themselves that way or not. The modifier "open" serves to emphasize how readily those beliefs can be perceived.

For example, it is not uncommon for a politician or public figure to be dubbed an "open racist" or "open misogynist." The charge was routinely made against former President Trump.[13] The implication of those statements was not that the former President referred to himself that way: he did not. The implication was that his motives or beliefs were transparent to others and could readily be perceived. Similarly, accusing a politician of engaging in "open corruption," for example, suggests that they make little effort to conceal the corruption, not that they would describe it as corruption. Brimelow himself adopts this interpretation on appeal. He asserts that "the only fair interpretation of Appellee's initial

[13] *See, e.g.*, Cherie Jacobus, *Goodbye to Trump's GOP: We've left the Republican Party and all other women should too*, N.Y. Daily News (May 4, 2020) (asserting the president "is an open racist and misogynist"); Lucas Aulbach, U*S senator blasts racial comment against Kentucky AG candidate Daniel Cameron*, Courier Journal (Aug. 2019), https://tinyurl.com/36psdn72 (quoting an accusation the president is an "open racist."); Kalli Holloway, *Trump's DOJ Is Determined to Kill Until the Very End*, Daily Beast (Feb. 3, 2021), https://tinyurl.com/463ujv4j (asserting "This president is an open racist"); Amanda Arnold, *The Infuriating History of White Women Voting Against Women's Rights*, Vice (Nov. 17, 2016) ("pundits saw the women's vote as especially important this election for an obvious reason: Trump is an open misogynist"). *See also* Gabe Ortiz, *America's most racist congressman: How did white supremacist' become such a bad thing?*, The Oklahoman (Jan. 10, 2019), https://tinyurl.com/wkjzdtjp (referring to Rep. Steve King as an "open white supremacist" although King denies being one); Noah Berlatsky, *Is Bernie Sanders anti-Semitic? Why new right-wing smears are the real anti-Semitism*, NBC News (Dec. 17, 2019), https://tinyurl.com/wtkm5tm7 (asserting that Pastor Robert Jeffress, one of President Trump's faith advisors, is "an open anti-Semite," although Jeffress does not identify as such); Sean Sullivan and David Weigel, *Facing blowback, Bernie Sanders retracts endorsement of controversial candidate*, Wash. Post (Dec. 13, 2019), https://tinyurl.com/9aea9yj (reporting accusations that a congressional candidate was an "open misogynist," although the candidate rejected that characterization).

statement [that Brimelow is an "open white nationalist"] is that The New York Times meant to convey that Brimelow was a white supremacist driven by race hate (whether open or secret does not matter for this analysis)." Brimelow Br. at 33.

IV.
THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE HYPERLINK IN THE JANUARY ARTICLE WAS NOT ACTIONABLE

The January Article was revised to include a hyperlink to the SPLC website entry on Peter Brimelow. J.A. 23-24 (SAC ¶ 68); J.A. 88-91; J.A. 175-76. The District Court found that the hyperlink provided an underlying factual basis to support the characterization of Brimelow as a white nationalist. J.A. 172-73. It is well-settled that an opinion based on disclosed facts is protected. *See, e.g.*, *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 461 (S.D.N.Y. 2012) ("A statement of 'pure opinion' is one which is either 'accompanied by a recitation of the facts upon which it is based' or 'does not imply that it is based upon undisclosed facts.'" (quoting *Steinhilber*, 68 N.Y.2d 283)). Brimelow engages in a lengthy and opaque argument about the significance of that hyperlink (what he dubs the "stealth edit"). *See* Brimelow Br. at 42-44. Brimelow appears to be arguing that that because the SPLC is "dishonest," it cannot provide the kind of context that would qualify the statement at issue as opinion based on disclosed facts. *Id.* at 43 ("The factual recitation contained in the hyperlink was, at best "incomplete" - and was

knowingly dishonest, to boot. . . . That incomplete and knowingly dishonest recitation removes the hyperlink from the protection accorded a recitation of facts that might otherwise provide context.").

But this argument is misplaced. Whatever Brimelow thinks of the SPLC, its website entry about him largely consists of quotations from his own work and an account of his career as a writer—the factual accuracy of which he does not dispute. It was those materials that showed readers some of the reasons why Brimelow could be considered a white nationalist. But none of this is relevant to the District Court's decision. It did not hold that the term "white nationalist" was protected only because The Times showed the underlying factual basis it was relying on. It held that the statement was protected because it was an inherently subjective term not capable of objective proof and because Brimelow failed to establish actual malice (to the extent that the statement is construed to be factual). J.A. 175, 177-79.

Brimelow errs as well in trying to hold The Times liable for hyperlinking to the SPLC website. Brimelow Br. at 42-44. But a publisher is only liable for the words it actually publishes.[14] *Id.* Courts consistently have held that a hyperlink is not independently actionable and should be treated like "the twenty-first century

[14] The SPLC website arguably goes beyond what The Times reported. Brimelow particularly objects to its suggests that he is anti-Catholic, "extremist,' or properly included in its "hate" files.J.A. 24 (SAC ¶¶ 69-72).

equivalent of the footnote." *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017). Extending the analogy: citing to a book that contains defamatory material does not subject the citer to liability for everything in the book, but quoting defamatory passages from the book could give rise to liability for republishing those quoted passages. The same principles apply to hyperlinks. *See also In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) ("[A] mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material." (collecting cases)).[15] The hyperlink's underlying content cannot be a basis for liability.[16]

V.
THE DISTRICT COURT DID NOT DISMISS BASED ON THE "NEUTRAL REPORT PRIVILEGE"

Brimelow also attacks the District Court's opinion for improperly "reaching for (without explicitly acknowledging it) . . . the 'neutral report privilege.'" Brimelow Br. at 52. Plaintiff is tilting at straw men. *See id.* at 51-53. Neither The Times nor the District Court mentioned any such privilege. Brimelow is apparently

[15] Courts also have found that merely hyperlinking to an allegedly defamatory website is shielded from liability by Section 230 of the Communications Decency Act. *See, e.g., Vazquez v. Buhl*, 150 Conn. App. 117 (Conn. App. Ct. 2013).

[16] If this Court were to conclude that the District Court found that The Times "republished" the full contents of the SPLC website or that the hyperlink itself was actionable, the Court should reverse those findings, for the reasons set forth here.

bothered by the fact that the disputed articles provided varying opinions on the relevant controversies. The district court properly took into account that fact in considering the context of the statements at issue. *See* J.A. 180, 185. That is legal analysis, not the invocation of a privilege.

VI.
THE DISTRICT COURT CORRECTLY HELD THAT STATEMENTS AT ISSUE WERE NOT "OF AND CONCERNING" BRIMELOW

The District Court correctly found that Brimelow could not bring claims based on statements about VDARE, rather than Brimelow. It is the plaintiffs' burden, which "is not a light one," to "plead and prove that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such." *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 86 (N.Y. 2016). *See also Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006). The "of and concerning" requirement is not merely a matter of common law; it is constitutionally mandated. *See Sullivan*, 376 U.S. at 288–92 (finding that the First Amendment bars recovery to a plaintiff who was not the subject of the allegedly defamatory statements). As with the opinion analysis, courts view statements from the perspective of a "reasonable reader." *See, e.g., Fulani v. N.Y. Times Co.*, 260 A.D.2d 215, 216 (1st Dep't 1999).

As the District Court correctly observed, "[a]s a general rule, defamatory words directed at a corporation or organization do not give rise to a claim by the individuals associated with it." J.A. 182 (citing *Gilman v. Spitzer*, 538 F. App'x 45, 47 (2d Cir. 2013) (concluding that allegations of extensive illegal activity by company were not "of and concerning" an employee); *Cardone v. Empire Blue Cross & Blue Shield*, 884 F. Supp. 838, 847-48 (S.D.N.Y. 1995) (statements defamatory of company are not "of and concerning" its CEO); *Three Amigos*, 28 N.Y.3d at 87 (allegations that a business was a mafia enterprise were not "of and concerning" individuals associated with the club); *Fulani*, 260 A.D.2d at 216 (statement defaming political group not "of and concerning" a prominent member)).[17]

Consistent with that precedent, the court concluded that the purportedly defamatory statements in the August and September Articles were not "of and concerning Brimelow." The articles do not mention Brimelow by name. J.A. at 93-95, 97-98. The September Article does not even name VDARE. J.A. 97-98. They report allegations that a VDARE blog post—one not authored by Brimelow—used an anti-Semitic word. The District Court quite reasonably held that nothing in the

[17] VDARE's independent legal and reputational status is further demonstrated by the fact that VDARE has filed its own claims against The Times, alleging defamation based on the same Articles at issue here. *See VDARE Found., Inc. v. The New York Times Company*, Index No. 156665/2020 (N.Y. Sup. Ct. N.Y. Cty).

articles accused *Brimelow* of anti-Semitism. J.A. 183-84. Similarly, the May Article did not mention Brimelow by name and did not accuse VDARE of any wrongdoing—an even more attenuated claim. *See* J.A. 186-87. The article reports that Facebook removed "a U.S. network of fake accounts linked to QAnon . . . and a separate U.S.-based campaign with ties to white supremacist websites VDARE and Unz Review." J.A. 105. As the District Court correctly found, the nature of the "tie" is unspecified: the article does not assert that VDARE controlled the campaign or that any employee was involved. "A reader could just as plausibly infer that . . . even just avid readers of the site[ ] were behind the activity in question." J.A. 186. Critical statements about "a network" that in turn has unspecified "ties" to VDARE, that in turn is edited by Brimelow are not "of and concerning" Brimelow. And all but one of the statements at issue in the November Article refer to VDARE or content on the site, rather than Brimelow, specifically. *See* J.A. 39-40 (SAC ¶ 153). The only statement about Brimelow in the November Article is the truthful statement that he founded "the anti-immigration website VDARE" and a direct quote from a video-taped speech that he gave. J.A. 39 (SAC ¶ 153(a)).

On appeal, Brimelow argues that whether a statement is 'of and concerning' the plaintiff is a question of fact for the jury. Brimelow Br. at 54. Brimelow is wrong. "Whether a plaintiff has satisfied this requirement is typically resolved by

the court at the pleading stage." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017) (citing *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001) (affirming dismissal at the pleading stage of statements not "of and concerning" plaintiff)).

The three cases Brimelow cites do not support his contention. In *Harwood Pharmacal Co. v. National Broadcasting Co.*, a sixty-year-old case, the court applied a now outdated legal standard: it asked whether a jury could conclude that the statements were "of and concerning" the plaintiff, rather than a "reasonable reader." 9 N.Y.2d 460, 462-63 (N.Y. 1961). But the court still made this determination as a matter of law on a motion to dismiss. *Id.* Similarly, in *Brady v. Ottawa Newspapers, Inc.*, (a case relied on below) it was for the court to decide as a threshold matter whether, in the context of group libel, the words referred to a small enough number of people that they reasonably could refer to plaintiff. 84 A.D.2d 226, 231 (2d Dep't 1981). *Geisler v. Petrocelli*, on the other hand, presented an unusual question not relevant here: whether a fictional character in a novel so closely resembled the plaintiff that it defamed her. 616 F.2d 636 (2d Cir. 1980). The court considered that evaluation to be so factually complex that it was "best resolved by the trier of fact." *Id.* at 639. But, again, it was a question for the court to consider in the first instance.

Next, Brimelow argues that it was error for the District Court to evaluate the "of and concerning" requirement from the perspective of "those who knew or knew of plaintiff." J.A. 183. But this is a standard *Plaintiff himself* asserted in opposition to The Times's motion to dismiss. *See id.* ("As Plaintiff points out, when determining whether a person not named has nevertheless been defamed by implication, the relevant audience is not 'all the world' but rather 'those who knew or knew of plaintiff.'" (citing Pl. Opp. at 12)).

Brimelow then argues this standard—which he sought—is "extremely unfair." Brimelow Br. at 56. But Brimelow is trying to have it both ways: he wants the relevant audience to be people who know VDARE well enough that they know he is the Editor (even if he is not named in an article)—but not *so* well that they understand that VDARE publishes diverse and contradictory opinions that cannot logically all be ascribed to him, personally. That proffered self-serving standard is neither logical nor practical and has no basis in law.

Brimelow also argues that District Court improperly presumed that the relevant audience would know he does not share the views of all the writers on VDARE. Brimelow Br. at 56. But, again, Brimelow is attempting to evade the consequences of his own arguments. Brimelow pleaded as fact that VDARE publishes a diversity of opinions. *See, e.g.*, J.A. 9-10 (SAC ¶ 11). Accepting those facts as true, the District Court reached the obvious logical conclusion:

> Plaintiff cannot possibly hold all the views reflected on the site. . . . [A] blog post authored by someone other than Plaintiff does not necessarily reflect Plaintiff's views on the subject matter discussed. In the same way, no one would reasonably assume that everything published in The Times reflects the personal views of its executive editor, Dean Baquet.[18]

J.A. 183. The court properly and logically rejected Brimelow's claims premised on statements about VDARE and others and the decision should be affirmed.

VII.
PLAINITFF MUST SHOW ACTUAL MALICE AS A MATTER OF STATE LAW

Brimelow closes his brief by discussing Justice Thomas's concurrence in *McKee v. Cosby*, 139 S.Ct. 675, 676 (2019). Brimelow Br. at 58-59. Brimelow apparently advocates that the federal constitutional actual malice standard should be abandoned, and state and common law fault standards apply instead. There are obvious barriers to Brimelow's argument. *See, e.g., Palin v. New York Times Co.*, 482 F. Supp. 3d 208, 214-15 (2d Cir. 2020) (rejecting identical arguments: "plaintiff . . . fundamentally misunderstands the doctrine of *stare decisis*."). But setting those barriers aside for argument's sake, Justice Thomas's concurrence does not get Brimelow where he thinks it will. New York's recently amended Anti-

[18] The District Court also sharply criticized Brimelow's attempts to "have it both ways: He claims that everything to do with VDARE is attributable to him, and at the same time objects to The Times drawing inferences about his views based on the content he chooses to publish as editor of VDARE. . . . The Writings by other authors published on VDARE either do or do not reflect back on Plaintiff; they cannot do both simultaneously." J.A. 183 n.5.

SLAPP Law "requires plaintiff, as a matter of state law, to prove by clear and convincing evidence what [he] had already been tasked with establishing under the federal Constitution: that defendants made the allegedly defamatory statements . . . with actual malice." *Palin v. New York Times Co.*, 2020 U.S. Dist. LEXIS 243594, at *13 (S.D.N.Y. Dec. 29, 2020). *See* N.Y. Civil Rights Law § 76-a. The law applies retroactively, including to proceedings such as this one that are continued following the law's enactment. *See, e.g.*, *Palin*, 2020 U.S. Dist. LEXIS 243594, at *13 (concluding the statute applies retroactively); *Coleman v. Grand*, -- F. Supp. 3d ---, 2021 U.S. Dist. LEXIS 37131 (E.D.N.Y. Feb. 22, 2021) (same); *Sackler v. Am. Broad. Cos.*, 2021 NY Slip Op 21055, at *3 (Sup. Ct. N.Y. Cty. Mar. 9, 2021) (same).

In short, separate and apart from the requirements of the federal Constitution, Brimelow must plead and prove actual malice as a matter of applicable state law. The District Court correctly held Brimelow could not meet that standard. Brimelow's arguments are without merit, and dismissal with prejudice should be affirmed.

VIII.
BRIMELOW HAS WAIVED HIS RIGHT TO CHALLENGE DISMISSAL PURSUANT TO THE WIRE SERVICE DEFENSE

Brimelow makes a number of challenges to the District Court's dismissal of claims premised on the May Article. *See, e.g.*, Brimelow Br. at 50-57. But he does not challenge the court's dispositive finding that the article is subject to the wire service defense. "The wire service defense is available where . . . a news organization reproduces an apparently accurate article by a reputable publisher, without substantial change and without actual knowledge of its falsity." *Winn v. Associated Press*, 903 F. Supp. 575, 579 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 350 (table) (2d Cir. 1996). The District Court found that: 1) the May Article "republished without modification from the Reuters wire service" (*compare* J.A. 105-107, *with* J.A. 109-12), that Reuters is "an indisputably reputable wire service," and 3) that there was "no reason" why The Times should have doubted the accuracy of the article. J.A. 186-87. The court made clear that this was a separate and independent basis for disposing of Brimelow's claims arising from the May Article. *See* J.A. 187 (dismissing claim "both because [the statement in the May Article] is . . . [one] of opinion and because The Times is merely a republisher of the Reuters article"). Brimelow does not challenge that ruling. "[A]rguments not made in an appellant's opening brief are waived." *JP Morgan Chase Bank v Altos*

Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir 2005). For this reason, too, Brimelow's claim as to the May Article warrants dismissal.

CONCLUSION

For all the reasons set forth above, the order and judgment of the District Court should be affirmed.

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Respectfully submitted,

/s/ David E. McCraw

David E. McCraw
Dana R. Green
The New York Times Company
Legal Department
620 Eighth Avenue
New York, NY 10018
Phone: (212) 556-4031
Fax: (212) 556-1009
Email: mccraw@nytimes.com

Attorneys for Defendant-Appellee

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/s/ David E. McCraw

David E. McCraw
Dana R. Green
The New York Times Company
Legal Department
620 Eighth Avenue
New York, NY 10018
Phone: (212) 556-4031
Fax: (212) 556-1009
Email: mccraw@nytimes.com

Attorneys for Defendant-Appellee