21-66

In the

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Appellee has apparently settled on the tactic of attacking the character of the undersigned instead of directly confronting the issues. Hence Appellee makes several dismissive references to Brimelow's "racist, white supremacist, or white nationalist" and then observes that "Brimelow's own brief only adds to that record." Appellee brief, p. 2, *see also Id.*, p. 24. This is extremely ill advised. Attorneys are often tasked with the duty to say and take controversial stands. Indeed, Rule 1.2 (b) of New York's Rule of Professional Conduct is meant, in part, to facilitate the representation of controversial causes. We are simply not going to be intimidated into intellectual cowardice or professional irresponsibility by counsel's baseless aspersions.

Furthermore, if attorneys must take controversial positions, it is all the more important that judges consider those positions, fairly, rationally, and free from every personal bias. That Appellee expects this Court will not is evident on almost every page of its brief.

If the inference Appellee wishes us all to draw is that no decent man should notice, let alone say aloud, unflattering things about minorities, we can only say that such a position amounts to the suicide of the intellect. It betokens a mode of discourse, rife with stupidity, cowardice, and dishonesty, that is unworthy of free

men. If what we have written is factually untrue, then let Appellee demonstrate its falsity. In any earnest contest that falsity would be damning enough. But if Appellee cannot demonstrate falsity, let us leave aside all *faux* indignation.

Apparently, Appellee was irked by Brimelow's proffer, particularly the Klineberg studies resurrected from Thurgood Marshall's *Brown* brief. Appellee ignores the fact that such studies were originally urged by the *Brown* appellants, not Brimelow. By avoiding their provenance, counsel casually dismisses them as just more evidence of Brimelow's alleged racism. *e.g.* Appellee Brief, p. 2. Counsel also avoids entirely the import of *Atkins v. Virginia*, 536 U.S. 304 (2002), where some of the most progressive modern justices stressed the importance of I.Q. for social functioning.

Under any fair and rational analysis, dodging both Marshall's use of Klineberg's I.Q. studies and *Atkins v. Virginia* should be construed as significant concessions, if not outright surrenders. Instead, Appellee uses the occasion to cast aspersions on Brimelow (and by extension, the undersigned) as racist for having dared to raise them. Of course, this is what happens in a society held hostage by irrational taboos. Those within Tocqueville's fence see no need defend their positions in earnest. Herd-like, they simply alert others to the fact that someone has now wandered outside the fence. Under such conditions, a defense of point

and sputter will do.

It should not, not for attorneys, and certainly not for this Court. Is Appellee suggesting that I.Q. cannot be measured, except when such measurements prove useful to the progressive wing of the Supreme Court? Or again, that such measurements are not accurate, except when they can be used to halt an execution? Or perhaps that, although capable of being measured and accurate, such measurements cannot be correlated to race, like numerous other traits? Or that I.Q. can be correlated with race, but only when Thurgood Marshall is assuring the *Brown* court that any measured differences will disappear with an improved environment? These arguments do not seem particularly persuasive, yet they are implied in Appellee's point and sputter response to Brimelow's opening brief.

More importantly, they reflect the anemic state of discourse in America where the subject is race. That might be less a concern for the courts, and the issue less pressing here, if such anemia did not indicate the *de facto* censorship of government policy heralded by the courts themselves, beginning with *Brown.* But it does. The record indicates that plenty of men feel the burden of dissenting from the underlying premise of *Brown*, *as The New York Times* itself has reported on several occassions R.14-15. By contrast, there is nothing in the record to indicate that anyone is persecuted for adhering to the premise of *Brown.*

The courts like to think that they have erected safeguards for the freedom of speech. Where race is concerned, they should instead ask how the have permitted the suicide of the intellect, for that is what we have where obvious patterns are ignored, or, where such patterns are reluctantly conceded, only one explanation is permitted. The frank candor of Professor Klineberg's studies no doubt come as a surprise to many. Why? Because they contrast so vividly with the admitted reticence of today's scholars. R. 14-15. Yet pattern recognition is one of the main functions of intelligence. And once such patterns are noticed, free men do not suffer that only one explanation must suffice. What we have then is stupidity, or lying and cowardice on a grand scale.

It is no coincidence that the subject obtained taboo status in the seven decades since *Brown*, on the allegedly progressive watch of our courts. Whatever one's point of view in the debate over racial differences (wholly nature, wholly nurture, or some combination of nature and nurture), no one committed to fostering robust debate could bless the *status quo* where "nurture alone" reigns supreme and where dissent from that premise exposes a man to calumnies in the news section of *The New York Times*. Thanks to ideological watchdogs like *The New York Times*, we have become Professor Meiklejohn's "simple-minded people who are unwilling or unable to question their own convictions, who would defend

their principles by suppressing that hostile criticism which is necessary for their clarification." Alexander Meiklejohn, Free Speech and its Relation to Self-Government (Lawbook Exchange, Ltd., Clark, New Jersey: 2014), p. 4. If our courts do not actually welcome that *status quo*, then we need to think anew about how we have arrived here and what practical steps can be taken to remedy the situation. Reflexively applying formulae will not do.

POINT I: BRIMELOW'S ARGUMENT IS WELL GROUNDED IN THE PURPOSE AND SUBSTANCE OF THE FIRST AMENDMENT.

Appellee's first point is that Brimelow's argument as to the silencing effect of abusive speech "lacks any foundation in law and would clearly violate the First Amendment." Appellee Brief, p. 20-21. Remarkably, Opposing Counsel fails to address any of the authority Brimelow had proffered. Nor is this gap filled with any of Appellee's own authority: there is not a single case, treatise, law review article, or any other secondary source cited against Brimelow on this point. Appellee offers only the empty assurances of counsel.

This is jejune. If there were no foundation in the First Amendment for what Brimelow has argued then Judge Scalia — surely no tyro where the First

Amendment is concerned — would not have observed that "by putting some brake upon" the tendency to "descend from discussion of public issues to destruction of private reputations" defamation liability would actually foster "the type of discussion the first amendment [sic] is most concerned to protect." *Oilman v. Evans*, 750 F.2d 970, 1039 (D.C. Cir, 1984) (Scalia, J., dissenting).

If holding parties liable for defamation did not help cleanse public discourse of easy lies, then Judge Stewart would not have concurred in *Rosenblatt v. Baer*, 383 U.S. 75, 93-94 (1966) (Stewart, J., concurring).

If there were no substance weighing in favor of Brimelow, his argument would not align so perfectly with what de Tocqueville warned was the most potent threat to free speech in America — the "tyranny of the majority," where those who condemn do so loudly, while those who agree with the dissident "but without his courage, retreat into silence as if ashamed of having told the truth.[1]"

Incidentally, the Supreme Court has been citing de Tocqueville with some regularity since even before the second volume of Democracy in America was published. *See Bank of Augusta v. Earle*, 38 U.S. 519 (1839). De Tocqueville's

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[1] Alexis de Tocqueville, Democracy in America, Part II, Chapter 7 "The Omnipotence of the Majority in the United States and Its Effects," Lawrence translation (Anchor Books, Doubleday & Co., 1969), pp. 254— 256 —*full quote found at R.142-143.*

brilliance, his almost preternatural grasp of a modern mass democracy's strengths and weaknesses, are readily apparent to anyone who has ever read him.

Opposing Counsel does not address Judge Scalia's dissent from *Oilman v. Evans*, he does not address Justice Stewart's concurrence from *Rosenblatt v. Baer*, and he avoids de Tocqueville like the plague. Counsel's headlong flight from argument is all the more notable because, before taking wing, he pauses to contemptuously sneer at Brimelow's argument as "turn[ing] First Amendment protections on their head" and "utterly specious." (Appellee Brief, p. 21.)

But its does not turn the First Amendment on its head to point out that calumnies have the effect of abridging the type of discussion the First Amendment was most concerned to protect, which is precisely Judge Scalia's point in his *Oilman* dissent. And where it is apparent that debate has been or even may be stifled, the courts have in the past intervened, even among private parties, to ensure that debate is fostered rather than forestalled. The most notable example of this would be *Curtis v. Publishing v. Butts*, 388 U.S. 130, 154-155 (1967), where the Supreme Court decided to extend the *Sullivan* rule on actual malice to all public figures. The Supreme Court did this not because there was a question of prior restraint, or governmental censorship, or seditious libel; it did so solely in the hopes of protecting robust debate, even among purely private parties, as Brimelow

and Appellee are private parties.

Aside from the above, at least one notable First Amendment scholar has made arguments quite similar to what Brimelow urges here. Professor Alexander Meikeljohn thought long and hard about freedom of speech in general and the First Amendment in particular. His name and work will not be unfamiliar to any who have studied the First Amendment at any length[2].

In *The First Amendment is an Absolute,* SUPREME COURT REVIEW (1961), 245-266, Meiklejohn makes it abundantly clear that, like Judge Scalia, like de Tocqueville, he finds defamation to be a deadly enemy of the First Amendment. In arguing for certain restrictions on speech as necessary preconditions to the freedom of speech, Meiklejohn parallels the argument Brimelow has put forward here:

> ...if the interests of a self-governing society are to be served, vituperation which fixes attention on the defects of an opponent's character or intelligence and thereby distracts attention from the question of policy under discussion may be forbidden as a deadly enemy of peaceable assembly. Anyone who persists in it should be

[2] For example, Meikeljohn has been favorably cited several times by the Supreme Court, both in majority opinions and dissents. *e.g. Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee,* 412 U.S. 94, 122 (1973); *Branzburg v. Hayes,* 408 U.S. 665, 713 (1972) (Douglas, J, dissent). It is strange that Appellee has apparently never heard of him, for Meikeljohn was referenced by Appellant at R. 127 in the briefing before the trial court.

> expelled from the meeting, and, if need be, the police should give help in getting it done. *Id.* at 260.

Smearing a man as a racist and white nationalist for publishing scientific evidence which *The New York Times* now wishes were not in circulation would certainly seem to qualify as "vituperation fixing itself on an alleged defect in character" *(viz.* Brimelow's evil intent) meant to distract from "the question of policy under discussion" *(viz.* race differences and how to address them).

There is a high price that is paid when such vituperation goes unpunished. The chilling effect of such attacks is now pervasive in America, even reaching into the hard sciences, an unhappy state of affairs made clear by the pleadings. R.14. Hence, *The New York Times* reports that biologists, even with the benefits of decoding the human genome, "are still distinctly reluctant to challenge the notion that human behavior is largely shaped by environment and culture" R.14. (There's that dogma from *Brown* again). Indeed, even a man as fiercely independent and stalwart as James Watson has been, at times, cowed by the smears. R.15. None could mistake this state of affairs for "uninhibited, robust and wide open debate."

So when counsel offers only the sneer that Brimleow's argument is "utterly specious" and "lacking any foundation in law," he is dead wrong, which is why he fails to address any of the authority proffered by Brimelow and instead stoops to

name calling and insults.

POINT II: THE DISTRICT COURT DID ERR BY WEIGHING EVIDENCE OUTSIDE THE PLEADINGS AGAINST BRIMELOW, WHOSE ALLEGATIONS FOR SULLIVAN MALICE WERE MORE THAN SUFFICIENT.

Appellee's second argument is that it was proper for the District Court to take judicial notice of voluminous writings outside the pleadings and weigh them against Brimelow's complaint. In making this argument, Appellee once again avoids authority raised in Brimelow's opening brief. Citing to *Palin v. New York Times Co.*, 940 F.3d 804, 815 (2n^{d} Cir, 2019) Brimelow had argued that the District Court erred by gathering facts from outside Brimelow's pleadings because "The test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation." Appellee fails to cite or discuss *Palin* whatsoever (nb: it does cite a later decision from the *Palin* litigation that addresses a different issue).

Brimelow had allowed that there could be limited exceptions to the prohibition of reaching beyond the pleadings — such as where the documents were undoubtedly used to frame the complaint *(Chambers v Time Warner, Inc.*, 282 F.3d 147, 153 (2n^{d} Cir, 2002)) and where there were no material disputes regarding

the relevance of the documents *(Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006)) — but that such exceptions did not obtain here.

Appellee avoids any discussion of *Chambers v Time Warner* or *Faulkner v. Beer;* neither case is mentioned in its brief.

Instead, Appellee builds its argument around *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2n^{d} Cir, 1991). But *Cortec* only demonstrates why the exceptions are distinguishable from this case. *Cortec* involved rescission of a stock purchase agreement that allegedly involved securities fraud. The missing documents that the *Cortec* defendant placed before the court consisted of "copies of its warrant, the Bowles' offering memorandum, and the Stock Purchase Agreement." Id at 46. These are akin to contracts or other formal instruments.

But contracts or other instruments are different in kind from hundreds of different journalistic writings. For one thing, their relevance does not offer material dispute *(Faulkner v. Beer*, supra.), whereas journalistic writing practically invites dispute, especially as to relevance and weight. Those problems increase exponentially when the "outside documents" are multiplied to hundreds of different journalistic writings, authored at various times. If relevant, they clearly create issues to be resolved by the fact finder. Second, the proper interpretation of contracts or instruments are often pure issues of law for a court, not fact intensive

questions for a jury.

Appellee's analogy is strained and illogical. The District Court erred in taking notice of hundreds of writings outside the pleadings.

In a confusing passage, Appellee next argues that the District Court did not weigh evidence outside the pleadings at all, but simply took notice of the public record and correctly determined that it "would not put The Times on notice that its journalists were incorrect." Appellee Brief, pp. 27-28. This is error. The only proper record before the District Court consisted of Brimelow's second amended compliant, which amply pleads *Sullivan* malice *(viz.* Actual or Constitutional Malice). If the District Court was reviewing some other "public record," that could only mean it was, in fact, considering the voluminous materials improperly thrust before it by Appellee. The District Court then, did exactly what it was forbidden from doing, which is weigh extraneous evidence against the nonmoving party on a Rule 12(b) motion. *Palin v. New York Times Co.*, *supra.* at 812.

Finally, Appellee argues that even within the four corners of Brimelow's pleading, his allegations do not amount to Constitutional Malice. This is a captious objection, sustained for the most part by Appellee's distortion of the facts and the case law. Appellee's tack is to take each of Brimelow's allegations in

isolation and observe that, for example, failure to follow journalistic standards does not constitute *Sullivan* malice; and failure to investigate is not *Sullivan* malice; and malice in the sense of ill-will does not equal *Sullivan* malice, etc.

That is all true as far as it goes, but it ignores the fact that where several of these factors are combined together, their cumulative effect signifies *Sullivan* malice. Thus, *Harte-Hanks* makes clear that ill will combined with an extreme departure from journalistic standards is sufficient to satisfy the *Sullivan* malice standard. *Harte—Hanks Communication v Connaughton*, 491 US 657, 667-668, and N5 (1989). Here Brimelow has a plead these factors in combination. R.1013, 21-28, 33-34, 36-37, 40-41.

Similarly, *Biro v Conde Nast*, 963 FSupp 2d 255, 285 (SDNY, 2013), *aff'd on other grounds*, 807 F3d 541 (2"[d] Cir, 2015) does not stand for the proposition that "failure to investigate is not evidence of actual malice." The full context of the sentence is: "the failure to investigate is not evidence of actual malice, unless there are 'obvious reasons to doubt the veracity' of the allegedly defamatory statements." *Id.* at 285, *citing Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 190 (2nd Cir., 2000), *citing in turn St. Amant v. Thompson*, 390 U.S.727, 732 (1968). Here Brimelow's pleading is replete with obvious reasons to doubt the veracity of the defamatory statements, including everything from *The New York*

Times' own high praise of Brimelow for "attacking, unapologetically" the "delicate subject" of the racial aspects of immigration (R. 9), to *The New York Times's* own publication of scientific evidence for racial differences (R. 15-18), to the clearly dishonest character of the Southern Poverty Law Center (R. 18-20, 26-28), to Brimelow's repeated written denials (R. 22-23, 26, 42-43).

Appellee next argues that despite Brimelowe's disavowal, it "was not required to adopt his preferred terminology" and then quotes *Edwards v. National Audubon Society, Inc.*, for the proposition that "in the world of polemical charge and countercharge" mere denials do not alert a conscientious reporter to error. 556 F.2d 113, 121 (2n^{d} Cir, 1977), *cent. denied*, 434 U.S. 1002 (1977). But in the first place, the news section of *The New York Times* promises its readers that it will not be the world of polemical charge and counter-charge. R.10-13. In this regard, it is notable that a New York trial court recently refused to follow the District Court's decision precisely because of the promises Appellee makes to its readers.

> ...Veritas contends that NYT's own ethical policies—which NYT publishes on its website—prohibit news reporters from injecting their subjective opinions into news stories published by NYT, and thus a reasonable reader would expect a news reporter's statements to be assertions of fact and not opinion. However, Defendants rely on a recent federal case where the court rejected the argument that inclusion of an article "in the 'News' section rather than in the

> `Opinion' section of NYT is dispositive of whether the statements contained in the article should be considered fact or opinion (Brimelow v New York Times Co., No. 20 CIV. 222 (KPF), 2020 WL 7405261, at 5 [S.D.N.Y. Dec. 16, 2020])...
> However, if a writer interjects an opinion in a news article (and will seek to claim legal protections as opinion) it stands to reason that the writer should have an obligation to alert the reader, including a court that may need to determine whether it is fact or opinion, that it is opinion. *Project Veritas v. The New York Times Co,* Westchester Supreme Index No. 63921/2020, Decision and Order dated March 18, 2021, p. 5.

The Westchester Supreme Court was right. *The New York Times* promises its readers that its news section will be news, not polemic. R.10-13.

In any event, *Edwards v. National Audubon Society, Inc.* is distinguishable because it that case *The New York Times* had provided an "exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps." *Id.* at 120. What was newsworthy was that a respected organization had leveled the charges in the first place. Moreover, the reporter had relayed the Society's charges fairly and accurately, did not in any way espouse the Society's accusations himself, and was sure to include the "maligned scientists' outraged reactions in the same article that contained the Society's attack." *Id.*

Here by contrast, it was the reporters from *The New York Times* itself who took up the cudgel against Brimelow; they espoused the accusations themselves (doubling down on their smears *via* the stealth-edit and hyperlink after Brimelow

had protested and explained his position), and repeatedly refused to include Brimelow's point of view. R. 22-24, 26. When such is the case *Edwards v. National Audubon Society, Inc.* provides no shield. *Id.* at 120.

Appellee's next argument is that "Brimelow does not refute any of the facts on the SPLC site — much of it quotations from his own publications" Appellee Brief, p. 29. But he did not need to. Brimelow shows that the SPLC's modus operandi is, like some bugbear out of Orwell, to attack men for being thought criminals — and that *The New York Times* was fully aware of the SPLC's methods. R. 19-20, 26-28. Presumably *The New York Times,* as the beneficiary the of landmark First Amendment case declaring the need for "uninhibited, robust, and wide open debate," is opposed to this in principle. It should therefore not be in the business of paying heed to any organization that sniffs around for impure thoughts, still less waiting for a man to protest his innocence before defaming him for said thought crimes in its news section.

More than that, Brimelow shows that even if he made certain statements and published certain articles, such as those dealing with the dreaded subject of racial differences, so too did *The New York Times.* If such is what it takes to constitute hate or white supremacy, then *The New York Times* is likewise guilty — and knew that it was a black pot attacking the proverbial kettle. R. 15-18, 25-26.

Appellees also complain that Brimelow's allegation are conclusory and formulaic, particularly those regarding pre-conceived hostility and common law malice. Not so: Brimelow's allegations are precise and exacting. *e.g.* R. 10-13, 18-20, 21-23, 26-28, 33-34, 36-37, 40-41, 42-43, 45. With regard to old-fashioned malice, nothing else explains Appellee's staunch refusal to grant Brimelow an opportunity to "speak in his own defense" by publishing a letter to the editor, its repeated refusal to acknowledge the "stealth edit" in contravention of its own standards, and the libels that continued to be printed even after Brimelow instituted suit over the first four articles. R. 22, 26, 42-43.

POINT III: APPELLEE'S OPINION DEFENSE FAILS.

In arguing for the shield of opinion, Appellee once again refuses to engage with Brimelow's opening brief. We had argued at length, that under the particular facts of this case, *The New York Times's* opinion defense perverted the very purpose of the test because the "objective of the entire exercise" is to assure that the "cherished constitutional guarantee of free speech is preserved." *Immuno AG v Moor-Jankowski,* 77 NY2d 235, 256 (1991); *see also, Oilman v. Evans,* 750 F.2d 970, 991 (DC Cir, 1984)(Starr, J), 1001 (Bork, J, concurring) FN6, and 1021 (Robinson, CJ, Dissenting). Here it is conceded that *The New York Times* was

acting to suppress speech and confine debate, which should place it beyond the protection of a test meant to ensure robust debate.

Appellee never responds to this argument. Indeed, *Immuno AG v Moor-Jankowski* is never mentioned on this point in Appellee's brief and *Oilman v. Evans* is dismissed in an insubstantial footnote. We respectfully submit that the point should be conceded.

Likewise, Appellee fails to respond to our argument as to the stealth edit and hyperlink, *viz,* that by such practices, *The New York Times* merely doubled own on its initial calumny of race hate and failed to provide saving context for the original libel.

On the related point of exactly what shading the Appellee gave to words such as "white nationalist" in its repeated attacks on Brimelow, Appellee again distorts the issue instead of confronting the argument. It is doubtless true that words like "white nationalist" can have loose and varying meanings, some of which are even benign. It is likewise true that in the manner in which *The New York Times* deployed those words, it ruled out any loose, varying, and benign meanings. To take a familiar example from the case law, the word "blackmail" can also have varying meanings, but if the surrounding context confirms that the author means "threatening to accuse any person of an indictable crime with a view

to extorting money or goods", then we can rule out the alternate meaning of taking a tough albeit legal bargaining position.

Appellee offers a lengthy string citation over pages 34-36 of its brief, to the effect that many courts have found terms like racist, white supremacist and anti-Semitic to be non-actionable. We retort with *Towne v. Eisner* — yet another case that Appelle avoided — and say that words are not crystals, transparent and unchanged in every circumstance. *Id.*, 245 U.S. 418, 425, 62 L. Ed. 372, 38 S. Ct. 158 (1918). Here those words were deployed in *The New York Times* in its news section, facts which distinguish the present litigation from each and every case cited in its string. If these words were factual enough for the news section of *The New York Times*, they are factual enough to be submitted to a jury.

Moving on, Appellee, once again, avoids Brimelow's argument as to the relative nature of the concept of verifiability.

Likewise, Appellee avoids Brimelow's argument as to the context provided by this specific newspaper with its well known journalistic code. R. 10-13; *see also, Project Veritas v. The New York Times Co,* supra. Instead, Appellee caricatures Brimelow's argument, and then adds the fillip that apparently Brimelow believes that Appellee is not entitled to the constitutional protection afforded to others for non-actionable opinion. Not quite: Brimelow maintains that

if Appellee would avail itself of those protections, it must at least relegate its attacks to the op-ed pages, rather than giving them added bite by strategic placement in the news section.

Finally, Appellee offers a condescending argument as to the undersigned's inability to comprehend "opinion" as that word is commonly understood and "opinion" as a mysterious term of art in First Amendment jurisprudence. What follows is a digression, quite beside the point, on the permitted use of adjectives and adverbs such as "buoyant," "steeply," accelerating," etc. in a news story, none of which appear in context to relate to anyone's charcter. Appellee's argument is without substance: opinion as a term of art in defamation necessarily refers to reputations and the potential harms thereto. The question of the proper use of adjectives or adverbs outside of the context of a comment on someone's reputation simply would never arise in a defamation case.

POINT IV: THE HYPERLINK WAS ACTIONABLE.

Appellee again dodges Brimelow's argument and does not contest that the hyperlink contained a factual recitation that was, at best "incomplete." Appellee neither distinguishes, nor even discusses, the holding of *Milkovich v. Lorain Journal Co*, 497 US 1, 19 (1990), or *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir, 1966), where the libeler has, in effect, "baited his hook

with truth," but still exposes himself to liability.

Instead, Appellee argues that it has not republished the SPLC material at all, citing to *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013), *affd*, 876 F.3d 413 (2n[d] Cir. 2017) and *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3" Cir. 2012). But *Adelson v. Harris* was a fair comment case applying Nevada law. *Id.* at 481. We are not applying Nevada law here. And the hyperlink only provided a fair report of a judicial proceeding. *Id.* at 471. A judicial proceeding is worlds away from the smear merchants at the SPLC. R.18-20, 26-28. In any event, fair comment is not available to Appellee under applicable law from the Second Circuit because it cannot meet the criteria under *Edwards v. National Audubon Society, Inc.*, as detailed above.

Turning to *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3' Cir. 2012), it, too, fails to shelter Appellee. That case held that mere reference to an article, "as long as it does not restate the defamatory material, does not republish the material." Here *The New York Times* chose to restate the substance of the SPLC's defamatory material (R.24), which places its actions beyond the holding of *In re Phila. Newspapers, LLC.*

POINT V: THE DISTRICT COURT DID NOT ACTUALLY DISMISS ON THE BASIS OF THE WIRE SERVICE DEFENSE, WHICH WAS NEVER PROPERLY RAISED, AND IN ANY EVENT FAILS IN LIGHT OF THE SUFFICIENCY OF THE ACTUAL MALICE ALLEGATIONS FOR THE MAY 5, 2020 ARTICLE.

The only reference Appellee ever made to the wire service defense in the moving papers below is found in a footnote at R. 79. But attempting to raise arguments in a footnote is improper. *Panzella v. Cnty. of Nassau,* 2015 U.S. Dist. LEXIS 133475, N2.

Furthermore, the analysis provided by the District Court for the dismissal of this cause of action does not refer to any cases actually invoking the wire service defense. R. 187. Instead, the District Court invoked *Karaduman v. Newsday,* 51 N.Y.2d 531, 550 (1980) (where the holding applied to a book publisher, not any wire service) and *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 383 (1977) (holding again applies to a book publisher). R. 187.

In any event, even if this argument was properly raised below, it fails for reasons already argued in this brief, *viz.* that The New York Times had reason to question the accuracy of the May 5, 2020 article. R. 42-45; see *Karaduman v. Newsday*, supra, and *Rinaldi v. Holt, Rinehart & Winston, Inc.*, supra.

POINT VI: THE SECOND, THIRD AND FIFTH ARTICLES WERE OF AND CONCERNING BRIMELOW.

Yet again, Appellee fails to meet Brimelow's argument as to whether the August 23, 2019, September 13, 2019 and May 5, 2020 articles were of and concerning Brimelow. Appellee nowhere discusses *Lynch v. City of New York*, 952 F.3d 67, 75 (2n[d] Cir. 2020) or *Nicosia v. Amazon.com, Inc.*, 834 F3d 220, 230 (2n[d] Cir. 2016), cited for the proposition that where there is any dispute about the facts, the question is unsuitable for resolution on a Rule 12(b) motion. Appellee does not take issue with the fact that they have attempted to dispute two of the eleven separate allegations showing that Brimelow should be identified with VDARE, thereby leaving the other nine unchallenged. R. 77-78. For the rest, we will stand on our opening brief.

POINT VII: THE REACH OF NEW YORK'S RECENTLY AMENDED ANTI-SLAPP LAW IS UNKNOWN, BUT IT ARGUABLY GRANTS BRIMELOW A NEW SUBSTANTIVE DEFENSE WHICH ALLOWS THIS COURT TO CONSIDER SULLIVAN ANEW.

Appellee correctly notes that Brimelow advocates a retirement of the *Sullivan* malice standard in favor of one applied by the common law and the states. New Yorks' anti-SLAPP law now incorporates the *Sullivan* malice standard

by statute. NY Civil Rights Law § 76-a. However, there are some twists, and it may not deliver *The New York Times* from trouble.

In the first place, as argued above, Brimelow's pleading suffices for *Sullivan* malice. Thus, under any applicable law, his pleading should stand.

Second, NY Civil Rights Law § 76-a was amended on November 10, 2020, well after this action was filed on January 9, 2020. R. 2. While several cases have noted that it should be applied retroactively, none are precedent as to this Court applying New York law. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 465 (1967). Under New York law, the "presumption against retroactive legislation is deeply rooted." *Morales v. Gross*, 657 N.Y.S.2d 711, 712 (2nd Dept. 1997); *see also, Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998). Civil Rights Law 76-a nowhere states that the amendments shall be given retroactive effect. Instead, they "shall take effect immediately." 2020 Sess. Law News of N.Y. Ch. 250 (A. 5991-A) (McKinney's Nov. 20, 2020). This is, at best, "equivocal" because "the date the legislation is to take effect is a separate question from whether the statute should apply to claims or rights then in existence." *Majewski, supra.* at 583. In short, the new statute should not be given retroactive effect.

Moreover, CPLR § 3211(g) was amended in tandem with the Civil Rights

Law §76-a. It now provides that motions to dismiss implicating Civil Rights Law § 76-a "shall be granted *unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."* This appears to grant a new substantive defense against dismissal. Here, Brimelow would meet the criteria for that defense because Justice Thomas' concurrence in *McKee v Cosby*, 139 S.Ct. 675, 676 (2019) provides cogent, powerful arguments for the reversal of the *Sullivan* malice standard.

And those arguments are only gaining strength with Judge Silberman's dissent in *Tah v. Global Witness Publ., Inc.*, 991 F.3d 231 (DC Cir, 2021). Echoing Justice Thomas, Judge Silberman points out that *Sullivan* was a "policy-driven decision" that lacked grounding in the Constitution. *Id.* Like Brimelow herein, Judge Silberman finds that under *Sullivan*, the power of the press is "now abused" and that it allows "the press to cast false aspersions on public figures with near impunity." *Id.* He goes on:

> It is well-accepted that viewpoint discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 387, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). But ideological homogeneity in the media—or in the channels of information distribution—risks repressing certain ideas from the public consciousness just as surely as if access were

restricted by the government.

This, too, dovetails with what Brimelow has argued. Indeed, the observation gains added strength where there is an almost instinctive cooperation between the presses and the courts due to shared ideological ground.

For the above reasons, even under New York's amended law, Brimelow would demonstrate "a substantial argument for an extension, modification or reversal of existing law."

CONCLUSION

Brimelow respectfully requests that the Order of Dismissal be reversed as to all five counts, his pleadings (the Second Amended Complaint) be reinstated, and the matter remanded back to the Southern District Court for further proceedings.

Dated: Goshen, New York
April 27, 2021

Yours, etc.

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CERTIFICATION

I hereby certify that this brief complies with FRAP 32(a)(7)(C) in that it contains 5,820 words.

Dated: Goshen, New York
April 27, 2021

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