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

BRIEF FOR PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

Whether the lower court correctly dismissed Brimelow's pleadings on the "open white nationalist" smear despite conceding that it was an untrue factual allegation for which no absence of actual malice was found?

Whether the lower court correctly weighed the factors distinguishing fact from opinion under New York law as to the balance of Brimelow's complained of statements?

Whether republication of materials from a source that is disreputable, and which materials are incomplete and inaccurate, is actionable?

Whether the second and third and fifth news articles hinted at undisclosed facts?

Whether the free speech protections of the First Amendment of the U.S. Constitution and Section Eight of the New York State Bill of Rights should be extended to shield repressive and dishonest behavior that aims to confine debate and enforce intellectual orthodoxies, as here?

Whether a media defendant which republishes defamatory allegations in its news section can be held liable?

Whether the lower court correctly found that the second, third and fifth news articles were not of and concerning Brimelow?

Whether Brimelow adequately pled actual malice in the publication of the complained of statements?

Whether over objection by Brimelow, the lower court correctly took notice of numerous voluminous writings outside the pleadings which Brimelow could not address under the constraints of a motion to dismiss?

Whether the actual malice standard is both Constitutionally infirm and promotes reckless and malicious behavior by the media, especially where it is invoked to shield repressive behavior that confines debate and enforces intellectual orthodoxies, as here?

INTRODUCTION

Brimelow in this brief inveighs against powerful taboos, for the sake of free speech. And as the brief shows, he is right to do so. Before moving to the argument, however, it bears noting that thoughtful writers have observed that taboos can serve an important purpose in society. To this point, Brimelow himself has paid eloquent tribute:

> Taboos, however, are not just a matter of cowardice and mendacity. They also reflect a sincere human reluctance to give offense (which is why they tend to become rampant in diverse societies). Peter Brimelow, Alien Nation: Common Sense About America's Immigration Disaster (Random House: New York, 1995)) p. xvii.

Brimelow goes on:

> Although it may sometimes appear otherwise, I am not abnormally anxious to give offense. I'm sorry that some readers may find parts of this book distressing, particularly when they are civilians, guiltless of the practice of journalism and politics.
> The job, however, must be done. Race and ethnicity are destiny in American politics. The racial and ethnic balance of America is being radically altered through public policy. This can only have the most profound effects. Is it what Americans want?
> And the taboo that prevents this simple reality from being debated also prevents discussion of the most obvious irrationalities in current immigration policy – such as its perverse de facto discrimination against skilled immigrants; and those countries that, by accident, were not first through the door after 1965. *Id.*

Much the same could be said for this brief. We recognize, in many contexts, the

useful and even necessary role played by taboos. One cannot run a law firm, raise a family, organize a church, or even probably host a dinner party under the principles articulated by John Stuart Mill. But when taboos interdict large swathes of important public debate, such that whole topics are debarred from discussion, then matters have gone too far. They have gone too far now where race is concerned. Cowardice and mendacity would appear to have achieved prominent roles in the drama. It is certainly time then, for a change of cast.

In any event, inevitably dogmas do not serve the needs of all. Indeed, the taboos bode particularly ill for Brimelow, for he has distinguished himself on the matter of immigration, a subject which, perforce, must address itself to changing racial demographics. This is an uncomfortable truth which, quite helpfully, The New York Times itself has previously acknowledged[1]: "The strong racial element in current immigration has made it more than ever before a delicate subject. It is to Mr. Brimelow's credit that he attacks it head on, unapologetically." R. 9. Analyzing the "delicate subject" of the changing racial demographics of the country and subjecting that issue to "uninhibited, robust, and wide open debate" has now led to Brimelow being smeared with accusations of race hatred in perhaps

[1] Acknowledged, that is, before it began the series of attacks which are the subject of this lawsuit and appeal.

the most prestigious paper in America.

Ironically, Brimelow must now turn to the very institution which is the source of the taboos he has offended, and seek protection there. In order to extend such protection to Brimelow, we will be asking the courts to encourage debate on an issue which threatens serious criticism of the courts themselves. That is no easy feat. Yet, as argued below, it is the most principled path for this Court.

STATEMENT OF SUBJECT MATTER JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332 because the action alleged defamation by The New York Times (a citizen of New York or Delaware- R. 7-8) against Brimelow (a citizen of Connecticut - R.7) and the amount in controversy exceeded $75,000.00. R.8

The District Court issued a memorandum opinion/order dated December 17, 2020, but actually entered December 16, 2020, which dismissed all of Brimelow's claims under FRCP 12 (b). R.188. Judgment was entered on January 6, 2021. R.189. Brimelow filed a timely notice of appeal on January 12, 2021. R. 190.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

This appeal is from a final order or judgment.

STATEMENT OF THE CASE

A) *Nature of the Case and Relevant Procedural History*: This appeal is from an order in the Southern District Court of New York (Judge Katherine Polk Failla) dismissing all five causes of action sounding in defamation.

Brimelow initially filed his case on January 9, 2020. He filed an amended complaint on April 23, 2020, then filed a second amended complaint on May 26, 2020, which was occasioned by further attacks from The New York Times that had been published on May 5, 2020 (in other words, after the litigation was underway, The New York Times continued its campaign against Brimelow).

The New York Times moved to dismiss Brimelow's Second Amended Complaint on June 18, 2020. Brimelow resisted with opposition on July 28, 2020; The New York Times replied on August 11, 2020, and Judge Katherine Polk Failla granted dismissal as to all counts by an opinion and order entered December 16, 2020. Oral argument was not granted, although Brimelow had requested it. Judgement was entered on January 6, 2021. R.189.

B) *Identification of the Judge Who Rendered the Decision Being Appealed*: Judge Katherine Polk Failla.

C) *Disposition Below*: The case was dismissed entirely pursuant to FRCP 12(b).

D) The opinion and order was not reported.

FACTS

From January 15, 2019 through May 5, 2020, The New York Times Company carried on a remarkable campaign of vilification against Brimelow. From the first date to the last, The New York Times launched a series of attacks aimed at him, all carried in the news section of the paper. R. 20-21, 30-31, 35-36, 39-40, 43-44.

Brimelow has had a long and distinguished career as a writer and journalist. R.8. He was a business writer and editor at the "Financial Post," "Maclean's," "Barron's," "Fortune," "Forbes" (where he attained the position of senior editor), and "National Review"; and his book Alien Nation: Common Sense About America's Immigration Disaster was a bestseller. R.8. Indeed, The New York Times itself had been effusive in it praise of Brimelow's work. R.8-9.

Beginning in January of 2019, however, The New York Times reversed course and the very aspects of Brimelow's journalism which had been praised by it now became an excuse to attack his character. Appellee now charged him with being "an open white nationalist," (R. 20-21); with "attack[ing] sitting immigration judges with racial and ethnically tinged slurs," (R.30-31); with

running a "hate website," (R. 40); with "us[ing]... [the word kritarchy] in a pejorative manner [to cast] Jewish history in a negative light as an anti-Semitic trope of Jews seeking power and control," (R.31); with posting "an anti-Semitic reference" on a blog (R.36); with running a "white supremacist website," (R. 40); and with running a "network of fake accounts," (R.43-44), among other things.

After the first of these attacks on January 15, 2019, Brimelow responded by sending a letter of protest *via* his attorney on January 17, 2019. R.22-23. In that letter Brimelow protested that he was neither an "open white nationalist," nor even a "white nationalist." R.22-23. In response, The New York Times refused to follow its own publicly stated policy of making corrections promptly and prominently, i.e. "Because its voice is loud and far-reaching, The Times recognizes an ethical responsibility to correct all its factual errors, large and small (even misspellings of names), promptly and in a prominent reserved space in the paper..." R.13.

Instead, The New York Times effected a "stealth-edit," whereby it removed the adjective "open" from its on-line statement that Brimelow was a "white nationalist," but failed to acknowledge that it had made even this measly correction. R.23-24. The original print version remains uncorrected and was carried, among other places, into the Congressional record. R.21 Even worse,

Appellee continued to label Brimelow a "white nationalist" over his objection, and added an extremely damaging hyperlink to the SPLC website which can fairly be said to defame Brimelow anew. R.23-24. All of this occurred in a news story. R.24-25.

Appellee has a known ethical code of neutrality with respect to news reportage, one that is pled by Brimelow with exacting detail at R. 10–13. Under that code, fairness and impartiality should reign, and "negative overtones, in coverage of a figure in the news" are supposed to be avoided, especially where "divisive issues" such as religion or politics are concerned. R.11. Furthermore, men who are "criticized or otherwise cast in a bad light" are supposed to "have an opportunity to speak in their own defense." R. 11.

A commitment to fair reportage is not the only code for which Appellee is known. Appellee's own manual specifically and strictly reserves "news" for "the factual reporting and analysis by the news staff," while "editorial" is reserved for "the opinion sections and their staffs." R. 12-13. This policy has long been known as the "separation of church and state" at the New York Times. R.13. Thus, in all circumstances, the taint of opinion is said to be kept out of The New York Times' news reporting. R. 12-13

Brimelow sent subsequent letters of protest on February 15, 2019,

September 27, 2019, and October 16, 2019, which all stressed that Appellee's false and defamatory story had not been rectified by the "stealth edit" and that the hyperlink had in some measure aggravated the original smear. R. 26. Appellee, however, refused to budge; indeed, it would not even publish a "Letter to the Editor" in which Brimelow defended himself. R.26, 28.

These protests were also sent amidst steadily worsening attacks. Scrapping its commitment to "fairness and impartiality" and the avoidance of even "negative overtones," The New York Times printed further attacks on Brimelow in news articles carried on August 23, 2019 (the Second Cause of Action – R.30-35), September 13, 2019 (the Third Cause of Action – R.35-39), November 18, 2019 (the Fourth Cause of Action – R. 39-42), and May 5, 2020 (the Fifth Cause of Action – R.42-47).

Some of these were truly absurd. The August 23, 2019 article essentially accused Brimelow of anti-Semitism because his website had used the word "kritarchy" *viz*. the Greek word for rule by judges. R.30-31. In addition to the familiar accusations of hate and extremism, that news article featured a *faux*-debate over whether the Greek term had somehow been co-opted and used as a kind of anti-Semitic code word. R.30-31. The conclusion was provided by the Anti-Defamation League, which assured The New York Times' readers that, based

on undisclosed facts, they could be sure that Brimelow's website was in fact using the word as an anti-Semitic dog-whistle. R.30-31.

Turning to the September 13, 2019 news article, it dispensed with any sham debate at all and simply declared, as an established fact, that the VDARE website "included an anti-Semitic reference." R.36.

The November 18, 2019 news article approvingly quoted the SPLC characterization of Brimelow's website VDARE as a"'hate website' for its ties to white nationalists and publication of race-based science..." and essentially accused Brimelow of being a white supremacist. R.39-40. The May 5, 2020 news article accused Brimelow of running a white supremacist website and of promoting "anti-Semitic and anti-Asian hate speech," as well as proffering the bizarre allegation that he was running a network of fake accounts, in violation of Facebook's rules. R.43-44.

In no case was Brimelow ever consulted for his point of view before the attacks were printed. R. 33, 36-37, 40, 45. Indeed, Appellee continued to refuse to print any letters from Brimelow in which he defended himself. R.26, 28. The May 5, 2020 article was actually published after Brimelow had commenced this litigation to defend his name. R.42-43. Appellee had known, therefore, that Brimelow took strong exception to the allegation that he is "racist" or "white

supremacist" or otherwise animated by race hatred, even to the point of litigating. R.42-43.

One of the main themes of Brimelow's pleadings is that The New York Times knows full well that the subject of race and racial differences is not accorded "uninhibited, robust and wide open debate," but is instead restricted by rather severe taboos. R. 14-18. More than that, Appellee understands full well that speech can carry a silencing power and can be abused to undermine or even halt debate, especially when it is deployed for *ad hominem* attacks on the character of those who stray to the edge, or beyond the edge, of conventional debate. R.14.

Another theme of Brimelow's pleadings was that it was knowingly false for Appellee to invoke the authority of the SPLC as justification for it attacks on Brimelow as a white nationalist (either open or secret) driven by race hate. The pleadings set forth, in considerable detail, allegations that show that the SPLC is known to be a dubious and highly partisan organization which is in fact little more than a scam, one which profits by unfairly exaggerating the threat of hate and extremism, and which stoops to intentional falsehoods to vilify men whom it perceives as partisan opponents. R.18-20, 25-28.

Notably, prior to Appellee's attacks on Brimelow, the SPLC had attacked The New York Times' own editor, Mr. Nicholas Wade, for writings in the New

York Times that dealt with the scientific evidence for genetic racial differences. R.25. If such qualifies as race hate, then Appellee had some soul searching of its own to do before damning Brimelow. Yet with gross hypocrisy, the hyperlink Appellee added as part of its stealth-edit indicates that the main justification for the SPLC's malign characterization of Brimelow as a racist is that he, too, had published writers who dealt with the scientific evidence for genetic racial differences. R.24.

Indeed, in a subsequent article on November 18, 2019 – which formed the basis for Brimelow's Fourth Cause of Action – Appellee would explicitly acknowledge that the SPLC categorizes both Brimelow and his website VDARE as sources of alleged "hate" for the publication of science dealing with racial differences. R. 24, 40. Obviously, it was knowingly false for Appellee to invoke the SPLC condemnation of Brimelow as an alleged hate-filled white nationalist based upon his publication of articles on the science of racial differences, when the Appellee knew full well that it had itself published numerous articles on the science of racial differences. R.25.

SUMMARY OF ARGUMENT

First: in this case, liability for defamation would actually encourage First Amendment interests and foster the exchange of ideas, for here it would penalize libels that were deployed as part of an intellectual witch hunt, whose purpose was to suppress debate and enforce taboos. Moreover, the taboos in this case happen to align with governmental policies favored by the courts and thus have the same effect as seditious libel: they discourage criticism of government and government policy. In fact, the taboos are far more subtle and potent than a clumsy weapon like seditious libel. Withdrawing any protection from a man who seeks to redeem his good name would appear to be a tacit endorsement of those enforcing the taboos.

Second: there was no plausible reason proffered by the lower court for dismissing the "open white nationalist" libel where the lower court a) correctly found that such a libel was actionable; but b) found saving grace in the subsequent on-line stealth-edit. The on-line stealth-edit has absolutely no impact on the print record.

Moreover, even the subsequent libel of "white nationalism" was actionable under the modified *Ollman* factors. The offending statement is precise, verifiable

and was carried in the news section of what is arguably America's most prestigious paper, one with a known ethical code of strict and fair factual reporting, without the taint of opinion in its news reportage. Similar analysis applies to each of the additional causes of action occasioned by four additional and similar libels against the Appellant, which were all carried in the news section of the paper.

Third: the very purpose of the fact-opinion analysis is perverted if it is used to shield a party who has attempted to stifle debate by enforcing taboos because the purpose of the analysis is, in the first place, to encourage free debate.

Fourth: the allegations of actual malice were not only plausible, but fairly overwhelming. Appellant demonstrated that Appellee was actuated by a pre-conceived animus to harm him and failed to seek corroboration from obvious sources, relied on questionable sources with a reputation for persistent inaccuracies, was biased and utilized inadequate investigation, continually published against him in the face of verifiable denials, adhered in the face of contrary evidence to a pre-conceived storyline, refused to abide by its own pro-claimed ethical code in its reporting on him, and combined malice in the usual sense of ill will with an egregious deviation from accepted news gathering standards.

Fifth: in considering the actual malice issue, the lower court erred by ignoring Appellant's allegations completely, then compounded this basic error by improperly taking judicial notice of voluminous materials to which Appellant had objected and then weighing this improper material against Appellant's allegations, as though the court itself were the trier of fact.

Sixth: the neutral reportage privilege was not available as a defense for Appellee because it cannot avail a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure.

Seventh: where it was undisputed that Appellant is widely known in his capacity as both the creator and editor of a website, is one of a small group of people who run the day to day operations of the site, is the editor of site and is identified as such on the very SPLC website referenced in a number of Appellee's articles (among other facts), then "those who knew or knew of plaintiff can make out that the plaintiff is the person referred to" in the news articles under consideration. The "of and concerning" element as to these articles has therefore been plausibly pled.

ARGUMENT

POINT I: THE ORDER BELOW STRIKES AT THE CENTRAL MEANING OF THE FIRST AMENDMENT

The courts have long been acquainted with the evidence for what The New York Times has referred to as the "treacherous issue" of "the genetic differences between human races." R.16. Consider the following materials, which were urged upon the Supreme Court by the parties in the celebrated case of *Brown v. Board of Ed.*, 347 U.S. 483 (1954):

> Since the days of the Army intelligence-testing program a very large amount of material dealing with the question of Negro intelligence has been collected. The summaries of the results of Garth..., Pinter..., Witty and Lehman... and others make it quite clear that Negroes rank below Whites in almost all studies made with intelligence tests. Otto Klineberg, Negro Intelligence and Selective Migration (Columbia University Press: New York, NY) 1935, reprinted Greenwood Press Publ: Westport, CT), 1974, p. 9.

> ...Terman.., one of the early authorities in the field, expressed the opinion that the Binet scale was a true test of native intelligence, relatively free of the disturbing influences of nurture and background. If this were so, the difficult problem of racial differences in intelligence might be solved as soon as a sufficiently large body of data could be accumulated.
> "The date are now available. The number of studies in this field has multiplied rapidly, especially under the impetus of the testing undertaken during the World War, and the relevant biography is extensive. The largest proportion of these investigations has been made in America, and the results have shown that racial and

> national groups differ markedly from one another.
> "Negroes in general appear to do poorly. Pinter.. estimates that in the various studies of Negro children by means of Binet, the I.Q. ranges from 83 to 99, with an average around 90. With group tests Negroes rank still lower, with a range in I.Q. from 58 to 92, and average only 76. Negro recruits during the war were definitely inferior; their average mental age was calculated to be 10.4 years, as compared with 13.1 years for the White draft. Otto Klineberg, Race Differences (Harper & Brothers: New York, 1935), pp. 152-153.

As stated, these materials were set before the Supreme Court in the arguments for *Brown v. Board of Education.*

But they were *not,* as one might suppose, urged by the benighted parties opposing integration. Instead, they were urged by then Attorney Thurgood Marshall, joined by fellow NAACP attorneys Robert L. Carter, Spottswood W. Robinson, III, (each of whom also later became federal judges), as well as Attorney Charles S. Scott. The above materials were referenced by Attorney Marshall in his brief to the Supreme Court for *Brown*, which can be found on Westlaw at 1952 WL 47265. Specifically, the above materials were set before the court in the appendix to the brief, dated September 22, 1952, which Attorney Marshall and his fellows maintained was a statement "drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry

who have worked in the area of American race relations."[2]

Today, few would dare to openly acknowledge this evidence. The Court need not take our word for it. Brimelow's pleadings show that the New York Times itself grants that the subject of race is fraught with heavy taboos. A few specific examples should suffice:

> The New York Times on September 17, 2002: "...*a storm has threatened anyone who prominently asserts that politically sensitive aspects of human nature might be molded by the genes*. So biologists, despite their increasing knowledge from the decoding of the human genome and other advances, are still distinctly reluctant to challenge the notion that human behavior is largely shaped by environment and culture. *The role of genes in shaping differences between individuals or sexes or races has become a matter of touchiness, even taboo*." R. 14 (emphasis supplied).
>
> The New York Times on July 20, 2001: "Scientists planning the next phase of the human genome project are being forced *to confront a treacherous issue: the genetic differences between human races*." R. 16 (emphasis supplied).
>
> The New York Times on January 11, 2019: "In a recent documentary, the geneticist [*viz.* Nobel Prize Winner Dr. James

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[2] Professor Klineberg in particular was cited in Marshall's brief for the proposition that "The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences."

Regarding precisely that hypothesis, Professor Klineberg had written (in 1935), "While we have no complete proof that an improvement in their background can bring them up to the White level, we also have no right to conclude the opposite..." Klineberg, Negro Intelligence and Selective Migration, *supra.* at p. 59.

> Watson] *doubled down on comments he made a decade ago, then apologized for, regarding race, genetics and intelligence...* Dr. Watson, *one of the most influential scientists of the 20th century*, had apologized after making similar comments to a British newspaper in 2007. *At the time, he was forced to retire from his job as chancellor at Cold Spring Harbor on Long Island...*" R. 15 (emphasis supplied).

Thus, in the procedural posture of this appeal, the taboo nature of the subject must be taken as a seated fact. Race, as the above quotes from Appellee make clear, is today confined within one of de Tocqueville's "formidable fences." 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 context found at R.142-143.* Racial differences in intelligence (to say nothing of crime) are only awkwardly acknowledged, often with all the frank aplomb of a Victorian presbyter stammering over the facts of life. There is none of the "uninhibited robust and wide open debate" which the courts maintain is essential for enlightened self-government.

Whence came these formidable taboos? Ironically, the source appears to be the courts themselves, particularly the *Brown* decision.

In *Brown* the Supreme Court took the position that the problems associated

with racial differences could be met and overcome by changing the outer structures of society. According to the *Brown* court, innate or genetic differences played no part in the racial differences which are plain to see. Instead, the Supreme Court held that it was the external structure of society which was to blame for such differences. Segregation itself was responsible for generating "a feeling of inferiority as to the status in the community," an alleged handicap the Supreme Court said was "unlikely to ever be undone." *Brown v. Board of Ed.* at 494. Furthermore, the *Brown* court endorsed – without reservation – a finding from one of the lower courts that the "'sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'" *Id.*

Precisely that position has become a dogma today, one fenced in by formidable taboos. This Court is therefore confronted with a situation where the well known injunction of "uninhibited robust and wide open debate" has been thwarted, but ironically, the taboos seem to achieve a happy result for the federal judiciary: government policies favored by the courts are spared scrutiny.

For that reason, one cannot help but see that the taboos are agreeable to the

federal judiciary. *Brown* contributed immensely to their power and prestige. As Judge Bork observed, nothing heralded the advent of judicial power so much as *Brown*, for in that case, the Supreme Court discovered, "it could make a highly controversial decision stick, even over powerful opposition." Robert Bork, Coercing Virtue: The Worldwide Rule of Judge (AEI Press: Washington, D.C., 2003), p. 56.

High priests do not readily receive accusations that their idol stands on clay feet. The courts benefit, immensely, from the informal system of censorship de Tocqueville detected (see R.142-143), one which now surrounds the fraught issue of innate racial differences. And it could even be that the taboo has now become so potent that judges, like most everyone else, are afraid to transgress it. We are aware, for example, of no case from the Supreme Court openly acknowledging the link between race and I.Q.

The contrast with how the Supreme Court has approached pornography is striking. Our high court can screw up the courage to admit to reviewing "pubic hair" as "background to the most vivid and precise descriptions of the response, condition, size, shape, and color of the sexual organs before, during and after orgasms," (*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 446 (Clark, J., Dissenting); but the

Supreme Court is too bashful to admit what Thurgood Marshall had put before them in *Brown* on the black-white I.Q. gap.

In any event, the fences that stand now ensure that the premises of *Brown* are never seriously or openly challenged, thereby reenforcing the power and prestige that accrued from that decision. We ought to be wary of this scenario. One need not be a cynic to conclude that governmental institutions are often too jealous of their powers. Indeed, in America, this is almost a high school civics lesson, for The Federalist teaches as much.

A few points are in order.

First, contrary to the intellectual witch hunt lately practiced, with no little hypocrisy, by The New York Times, it is abundantly clear that one can hold any side of the race-I.Q. debate in good faith. That assertion should be fairly self-evident, but if it were not, Thurgood Marshall's brief and The New York Times' own reporting would put the issue to rest. In 1952, when Attorney Marshall submitted his brief in *Brown*, his own "summary of the best available scientific evidence" indicated a significant gap in average I.Q. scores among the races. That "best available scientific evidence" contained, among others, Professor Klineberg's studies from 1935 (quoted above), which 1935 materials referenced in turn "a very large amount" of I.Q. testing that had been undertaken during the First

World War.

True, the burden of Attorney Marshall's evidence was that I.Q. and other traits might prove relatively elastic and that the gap would close when the scourge of segregation was ended. But segregation did end and the social fabric of America was reworked, under the principles set forth in *Brown*. Nevertheless, we jump ahead to 2001 and 2002 and The New York Times' own science editor is referring to such things as the role of genes in shaping differences between the races and the need to "make it safer for biologists to discuss what they know about the genetics of human nature" (R. 14); said editor also reports that "scientists say they have found that the size of certain regions of the brain is under tight genetic control and that the larger these regions are the higher is intelligence." R.16. Furthermore, we come to 2019 and a Nobel prize winning geneticist is still referring to the scientific evidence for intelligence differences among the races. R.15.

From the First World War to 2019 is a period of over 100 years. If in all that time, respected scientists, even Thurgood Marshall's own scientists, are finding measurable differences in intelligence among the races, we can be assured that there is at least a good faith basis for arguing that it is so. In fact, we have a good faith basis for saying not only are those differences real and measurable, but

that they are innate.

What does this mean for *Brown* and for the social consequences worked by that decision? We do not know. The issue is not openly discussed. There is no "power of reason as applied through public discussion" here. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis J, concurring). The taboos are so rigidly enforced that the Nobel prize winning scientist, for example, was fired, *pour encourager les autres*. R.15.

But it seems clear that those differences may carry immense consequences for a nation undergoing rapid demographic transformation effected by immigration. It is notable, for example, the while the Supreme Court has never openly acknowledged the link between I.Q. and race, at least certain justices have considered the important consequences I.Q. holds for individuals. For example, in *Atkins v. Virginia,* 536 U.S. 304 (2002), Justice Stevens, joined by fellow Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer noted that men with 70 I.Q.s had "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. Needless to say, if these consequences for individuals are clear, then it is only fair to say that they are magnified when they aggregate in greater numbers

among certain elements of the population.

And yet the taboos are so severe that virtually no one discusses the issue openly, let alone under conditions approximating uninhibited, robust and wide open debate. There is the example of Dr. Watson, and numerous others who have found their names inscribed on the *ostracon*.

Into this terrible maelstrom wanders Brimelow, who wants to discuss immigration policy, a matter which Appellee admits requires confronting the delicate issue of race. R. 9. For broaching the issue of the scientific evidence of racial differences, Brimelow is defamed. The New York Times reports that he is an evil man, one actuated by race hatred, rather than any good faith interpretation of the data. Indeed, sharing a stage with Brimelow is, in itself, a racist and divisive action, or so The New York Times reports. R. 20.

The question put by this appeal is whether the courts are willing to shield those who maintain the fences; who abuse speech to conduct an intellectual witch hunt; who deploy words not to further debate, but to confine it; not to render it "robust and wide open," but stifled and closed. In candor, it is very much an open question chiefly because the courts themselves appear to have a vested interest in keeping that debate suppressed.

And there is an easy way out for the Court. Often the courts take refuge in

the notion that, by dismissing a suit wherein a plaintiff hopes to vindicate his name, they are protecting robust debate. The name suffers, but at least debate is free. This assumes that liability for defamation always and everywhere inhibits debate. It is a superficial analysis, which, for all that, has often been repeated.[3]

This is facile. Several distinguished jurists have aptly noted that there are circumstances where the assumed tension abates. For example, then Judge Scalia, joined by Judge Wald and Judge Edwards, lamented "the distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations" and suggested that "by putting some brake upon that tendency," defamation liability "not only does not impair but fosters the type of discussion the first amendment is most concerned to protect." *Ollman v. Evans*, 750 F.2d 970, 1039 (D.C. Cir, 1984) (Scalia, J., dissenting). And Justice Stewart, somewhat more obliquely, appears to have entertained the same hope in his concurrence in *Rosenblatt v. Baer*, where he referenced "the preventive effect of liability for defamation" and warned against the easy lie which can " infect and degrade a whole society." 383 U.S. 75, 93–94 (1966) (Stewart, J., concurring).

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[3] Noted First Amendment scholar Harry Kalven, for example, wrote of "...the tension that will always attend the *New York Times [v. Sullivan]* rule –the tension between protection of robust criticism on public matters and protection of individual reputation." Harry Kalven, Jr., edited by Jamie Kalven, A Worthy Tradition: Freedom of Speech in America (Harper & Row: New York, 1989) p. 71.

Judge Scalia's observation from *Ollman v. Evans* captures exactly what Brimelow is attempting to argue here.

In *Terminiello v. Chicago*, the court warned of the "standardization of ideas" that could be effected "either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Turning to our own day, it is evident that if dominant political groups did not wish to suppress discussion of innate racial differences, then it is hard to see how the taboos surrounding that issue could have become so pervasive and so readily enforced. R.15. (As the quotations from The New York Times' own science editor show, certainly it cannot be that the brilliant arguments for the conventional wisdom have vanquished all rivals.) When those same taboos happen to benefit the vested interests of the federal courts, sparing them from criticism – and they do – then we have the specter of the courts tacitly cooperating with dominant political groups to ensure that certain issues are resolved in a standardized way.

The means of censorship are varied and subtle, but certainly withdrawing the ability of a man to defend his name is one such method, different only in kind from where a government, for example, withdraws physical protection from a mob attempting to shout down a hostile speaker, or even attempts to prosecute the speaker for challenging the mob. *Terminiello v. Chicago*, *supra.*

We are told that there is a central meaning of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The freedom to criticize government and government policy is supposedly at this center. *Rosenblatt v. Baer, supra* at 85. That must include the freedom to criticize policies held dear by the courts themselves. In the talismanic phrase of Justice Brennan, speech in America is to be "uninhibited robust and wide open." There cannot be an exception for the subject of racial differences, whether in I.Q. or in any other "treacherous issue." Whatever the speculative dangers to free speech that are posed by libel actions between private parties, they pale in comparison to the actual coerced silence that is effected by the ready smears of our most powerful news organs. As de Tocqueville saw long ago, it was not so much state power that threatened freedom of speech in a mass democracy, but those who can organize a crowd to condemn loudly, or even appear to condemn loudly. de Tocqueville *supra*.; see also R.142-143. Newspapers excel at such "manufactured consent." We urge this court to be mindful of that reality before reflexively reaching for dismissal on "opinion" grounds.

POINT II: THE DISTRICT COURT ERRED BY REFLEXIVELY APPLYING THE TEST DISTINGUISHING FACT FROM OPINION WHERE IT WAS CONCEDED THAT THE NEW YORK TIMES WAS ACTING TO SUPPRESS DEBATE ON A TABOO ISSUE

The purpose of the fact versus opinion analysis, under either the New York Constitution or the First Amendment, is to further the exchange of ideas. Thus, the New York Court of Appeals has urged that the "hypertechnical parsing" of fact from opinion should never distract from the true "objective of the entire exercise," which is to assure that the "cherished constitutional guarantee of free speech is preserved." *Immuno AG v Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991). And of course, other courts have recognized that furthering debate is the underlying rationale for the fact-opinion distinction, including the court from which New York derived its test. *Ollman v. Evans*, 750 F.2d 970, 991 (D.C. Cir, 1984)(Starr, J), 1001 (Bork, J, concurring) FN6, and 1021 (Robinson, CJ, Dissenting).

But speech itself can have a silencing effect. *See de Tocqueville supra. and R. 142-143.* This is especially true where it is deployed, with malice, to police the boundaries of respectable discourse and enforce dishonest taboos. In that case, the speech itself contributes nothing to the guarantee of free speech. Quite the opposite, it is a means of undercutting the freedom of speech

The pleading herein plausibly alleges that is precisely what The New York

Times had stooped to in its repeated attacks on Brimelow. R. 14-15.

If the Court acknowledges that there are such circumstances, then the question devolves into the mundane one of whether such circumstances are plausibly pled here. We maintain that the pleadings here abundantly support the allegations that The New York Times was conducting an intellectual witch hunt with the conscious purpose of suppressing debate on a sensitive issue. The record is more than adequate to that purpose, especially in the familiar procedural posture of a Rule 12(b) motion, where Brimelow's allegations must be deemed true and where any favorable inferences need to be drawn in his favor. R. 14-15.

POINT III: THE DISTRICT COURT NEGLECTED TO CORRECTLY WEIGH THE MODIFIED *OLLMAN* FACTORS BY WHICH NEW YORK LAW DISTINGUISHES OPINION FROM FACT AS TO THE INITIAL "OPEN WHITE NATIONALIST" SMEAR IN THE JANUARY 15, 2019 NEWS ARTICLE.

Here The New York Times initially labeled Brimelow an "open white nationalist," but, upon protest from Brimelow, revised the libel (in the on-line edition only) to simple "white nationalist" R.22-24.

The District Court correctly found that the initial allegation of "open white nationalism" was actionable. R. 174. However, by obscure logic, the lower court found saving grace in the stealth edit. R.174-175. This is non-sensical.

To begin with, the stealth edit and hyperlink did not change the character of the initial publication. If The New York Times published an actionable statement on January 15, 2019 – which the District Court concedes it did do – then the stealth edit does not change that fact; it does not even change the print edition. At best, the stealth edit would save the revised statement from being actionable in the on-line edition.

But of course, it did not do this either. The District Court held that the new context provided by the stealth edit and hyperlink somehow saved the revised statement because now on-line readers would know that The New York Times was only using a word with variable meaning: to some, the word might mean nothing more than that Brimelow was "anti-immigrant," while to others, it might mean that Brimelow was "white supremacist" and a purveyor of "racial hierarchy." R. 175.

Such a dubious explanation overlooks the fact that the initial publication was borne under a banner reading "A Timeline of Steve King's Racist Remarks and Divisive Actions." R. 21. Under such preface, the only fair interpretation of Appellee's initial statement about Brimelow 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). Indeed, the paper was clearly informing its readers that Brimelow was so toxic that merely by sharing a stage

with him, Congressman King had blundered into a "racist and divisive action." R. 20. When The New York Times effected the stealth edit and added the hyperlink, it was merely confirming, in the teeth of Brimelow's written denial of January 17, 2019 (R.22-24), the odious meaning it had already conveyed. But there was no initial ambiguity about whether The New York Times had first accused Brimelow of race hate. When the paper added the stealth edit, it was simply doubling down on and confirming its previous calumny.

Before proceeding on, it bears stressing that there is absolutely nothing in the lower court's opinion as to why the allegations of actual malice were not sufficient with regard to the initial publication of "open white nationalism" leveled on January 15, 2019. R. 179. Thus, with regard to the initial defamatory statement the lower court a) correctly finds that such a libel is actionable; b) then reverses course with the non-sequitur detailed above; which c) cannot be covered with the additional defense of no actual malice. Clearly, the libel stemming from initial publication should not have been dismissed.

POINT IV: THE SUBSEQUENT STEALTH EDIT WHICH REVISED THE ONLINE JANUARY 15, 2019 ARTICLE TO "WHITE NATIONALIST" REMAINED ACTIONABLE UNDER THE MODIFIED *OLLMAN* FACTORS

Turning to the lower court's handling of the revised statement, the lower court's analysis is little better. Under New York law, the fact/opinion analysis is weighed under the modified *Ollman* factors which are doubtless familiar to this Court. *Gross v New York Times Co.*, 82 N.Y.2d 146, 153 (1993); *Mann v. Abel*,10 N.Y.3d 271, 276 (2008); *Davis v Boeheim*, 24 N.Y.3d 262, 269 (2014). In this analysis, it is the third factor which carries the most weight. *Brian v Richardson*, 87 N.Y.2d 46, 51 (1995).

This is not to say that the other two elements are entirely negligible. However, upon reflection, the import of the first two factors is powerfully informed by the third, *viz.* the overall context of the statement. For example, *vis-a vis* the first factor, Justice Holmes aptly noted that "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content *according to the circumstances* and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (emphasis supplied). As to the second, verifiability, Judge Starr saw the relative nature of this inquiry from the start. *Ollman, supra* at. 982 (Starr, J). Doubtless he would agree with the

observation that verifiability "...is not a property that either does or does not obtain. Rather, it is a property that may be present in varying degrees." Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VIRGINIA LAW REVIEW 263, 279 (1978).

None of which should be taken as a concession that the first two factors weighed against Brimelow. On the contrary, the specific language at issue has a precise meaning which is readily understood. The Merriam-Webster Dictionary, for example, defines "white nationalist" as "one of a group of militant whites who espouse white supremacy and advocate enforced racial segregation."[4] Given both the banner announcing Congressman King's racist and divisive actions and the hyperlink to the SPLC website, there is no doubt that such was the meaning imparted to the words "white nationalist" by *The New York Times* in the revised statement. R. 23-25.

And the charge is clearly capable of adequate proof. As the Seventh Circuit once noted, where civil rights actions are concerned the charge of racism is a "mundane fact litigated every day in federal court." *Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000). Then, too, in prosecutions involving hate crimes, where the burden of proof is much higher than anything Brimelow would need to

[4] Found at https://www.merriam-webster.com/dictionary/white%20nationalist.

meet, the courts have consistently acknowledged that juries are capable of weighing proof as to the motives of the accused, even where the facts supply only inferences. *People v. Marino*, 35 A.D.3d 292, 293 (1st Dept, 2006); *People v. Sprately*, 152 A.D.3d 195, 200 (3rd Dept, 2017).

It cannot be that juries can determine whether race hate lies behind a given action when confronted with a civil rights case, or even when asked to consider proof beyond a reasonable doubt in the context of an alleged hate crime, but that the same issue somehow becomes hopelessly confused when a quick escape from a libel action is needed. Such an unprincipled conclusion recalls the criticism of the fact-opinion test Judge Bork referred to in *Ollman v. Evans*, where he noted that "the opinion/fact 'distinction, without more, primarily furnishes vague familiar terms into which one can pour whatever meaning is desired.'" *Ollman,* at 1001 n6 (Bork, J, concurring) (*quoting* Titus, *Statement of Fact Versus Statement of Opinion -- A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962)).

Turning to the third factor, the lower court both misconstrued the case law and Brimelow's argument. R. 173. According to the lower court:

> ...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. Instead, it must consider the 'full context of the communication' in which the allegedly defamatory statement appears. R. 173.

It then vaguely references the "tone" of the (revised) news article, finding that it clearly signaled "opinion" rather than "fact" to its readers. However, the lower court accomplishes this by neglecting the context entirely and finding the "tone" to be supplied *in toto* by the words themselves. Apparently, the lower court believes that the words "white nationalist" have the strange power of providing their own tone; and in each and every usage, they carry a meaning that is "debatable, loose and varying."

This is facile. As Judge Bork noted in his *Ollman* concurrence, the shadings of a particular word can be crucially important. *Ollman* at 1000, (Bork, J., concurring) n5. Judge Bork pointed to the fact that the words "Leninist" and "Communist-fronter" were actionable in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, while the similar allegation of "fascist" was immune in *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976). It is, of course, the context that provides the shading. The *Gertz* allegations were made in a series of investigative articles, while the *Buckley* statement was carried in a book by an openly partisan author which the court did not hesitate to characterize as a "polemic tract." *Id.* at 894.

And, protests aside, the lower court clearly avoided giving due weight to the fact that the statement was carried in the news section. First, while not necessarily dispositive in itself, placement in the news section should have weighed heavily in favor of interpreting the challenged statement as "fact" rather than "opinion." Time and again the New York Court of Appeals has stressed that the context of a news article signals fact, not opinion, *e.g.* "since the articles appeared in the news section rather than the editorial or 'op ed' sections, the common expectations that apply to those more opinionated journalistic endeavors were inapplicable here." *Gross v New York Times* at 156; "Letters to the editor, unlike ordinary reporting, are not published on the authority of the newspaper or journal." *Immuno AG v Moor-Jankowski*, at 252 (1991); *see also Brian v Richardson* at 51–52; *see also Mann v Abel, supra.*

Rather than distinguish these precedents, the lower court grasped at two other cases of lesser value, *Russell v. Davies*, 97 A.D.3d 649 (2nd Dept, 2012) and *Ratajack v. Brewster Fire Dep't Inc.*, 178 F. Supp. 3d 118, 165-66 (S.D.N.Y. 2016). As a federal district court applying New York law, the Court of Appeals provides the weightiest precedent. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). To the extent that a lower appellate state court decision (*Russell*) or even a district court decision (*Ratajack*) conflict with the Court of Appeals, they

give way. And in any event, the cases are distinguishable on the facts.

Russell dealt with comments made against a candidate for Congress during a political campaign that appeared in a tabloid newspaper (the Daily News). As for *Ratajack,* the challenged statements occurred in a resignation letter delivered to a local fire department, not the news section of what is arguably America's most prestigious paper. *Ratajack v. Brewster Fire Dep't Inc.*, at 165-66. The *Ratajack* comments were also made in full disclosure of the underlying facts. *Id.* No such disclosure was made here by The New York Times.

Second, Brimelow did not rest his argument only on the fact that the offending statements were made in news columns. He stressed that they were made in the news columns of The New York Times, which has become the most prestigious and trusted newspaper in the nation. R. 10. As opposed to more tabloid style newspapers, The New York Times carries a considerable reputation for both *gravitas* and factual reporting. R. 10–13. Nor was this simply artful pleadings: the Eleventh Circuit, for example, singled out The New York Times (along with *The Washington Post*) as a pre-eminent exemplar of the kind of paper where one would expect to find factual investigative reporting. *Michel v NYP Holdings, Inc*, 816 F.3d 686, 699 (11th Cir 2016).

More than that, Brimelow had pled in exacting detail that The New York

Times is a serious paper with a well known code that requires strict separation between fact and opinion in its newspaper (i.e. the "separation of church and state" at The New York Times). R. 10-13. The lower court failed to address any of this.

In *Flamm v Am. Ass'n. of Univ. Women*, 201 F.3d 144, 152 (2nd Cir. 2000) this Court explained that the nature of the source of offending statements should substantially affect the credibility and import of the statements. In that case, a non-profit academic organization's directory of attorney referrals described the plaintiff as an "ambulance chaser" who was interested only in "slam dunk" cases. The attorney sued for defamation and, much like Appellee herein, the nonprofit invoked the "loose, figurative" language defense. But this court rightly rejected the argument, holding that "[e]xaggerated rhetoric may be commonplace in labor disputes, but a reasonable reader would not expect similar hyperbole in a straightforward directory of attorneys and other professionals." *Id.* In other words, the source of the statements provided a context that precluded dismissal on grounds of hyperbole and opinion.

Given the well known reputation enjoyed by *The New York Times* as a serious and credible newspaper (e.g. *Michel v NYP Holdings, Inc*, supra), buttressed here by the pleadings which detail both its well known code and longstanding practice of reserving its news for factual statements (R. 10-13), the

attacks on Brimelow carried in the news section should have been construed as factual assertions.

POINT V: THE HYPERLINK THAT ACCOMPANIED THE STEALTH EDIT DID NOT PROVIDE GENUINE CONTEXT, NOR CAN THE MATERIAL THAT IT REPUBLISHED BE DISMISSED AS OPINION

The lower court correctly discerned that the hyperlink was a new publication (R. 176-177), a holding The New York Times has not appealed. However, the lower court, with scant analysis, held that such republished statements both a) "provided the previously missing underlying basis" for the initial smear of Brimelow as an "open white nationalist" and b) were "statements of opinion" which were themselves immune from defamation liability. R.177.

This is error in several ways. First, as shown above, the SPLC hyperlink simply doubled down on the initial charge of race hate, often repeating verbatim the charge of "white nationalism." R.24. Respectfully, one cannot explain or give context to the charge of "white nationalism" by adding a hyperlink claiming Brimelow is appropriately described as a white nationalist because he is a white nationalist, any more than one can flush out an allegation of hate by explaining that a man hates because he hates.

Second, The New York Times never mounted this ridiculous argument – and it is easy to see why. Instead, Appellee argued (unsuccessfully, as it turned out) that it was not actually republishing the materials from the SPLC website. But Appellee did not argue anywhere that the hyperlink provided the appropriate context for its defamatory revised statement, or that by means of the hyperlink Appellee was fully disclosing the factual basis for its malign characterization. *Cf.* R. 79.

Nor could it. The factual recitation contained in the hyperlink was, at best "incomplete" – and was knowingly dishonest, to boot. See R.24–26, especially Appellee's knowledge of its own publication on the science of racial differences, and the SPLC's condemnation of Appellee's own science editor, Mr. Nicholas Wade.

That incomplete and knowingly dishonest recitation removes the hyperlink from the protection accorded a recitation of facts that might otherwise provide context. *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 19 (1990); see also *Ollman supra* at 1027 (Robinson, CJ, dissenting). Indeed, partial and incomplete disclosures, such as those perfected by the SPLC, are likely to prove even more damaging. "The author's recountal of some of the background facts normally creates the inference that there are no other facts pertinent to the opinion

expressed..." *Ollman supra* at 1027 (Robinson, CJ, dissenting). The libeler has, in effect, "baited his hook with truth" *(Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966)) and is likely to be all the more successful with his ruse because of it.

Nor was the hyperlink appearing in The New York Times' news column dismissible as another instance of opinion. Indeed, the very fact that The New York Times, with its estimable reputation, its known ethics code, and its known practice of strictly delimiting fact from opinion in its paper (see R. 10–13), would link to the SPLC website in a news article would be taken by its readers as a signal that the contents of that website were truthful and worthy enough to be credited in a factual report of the news. *Ollman supra* at 984, 986, 990 (D..C. Cir., 1984) (Starr, J.); *Gross v New York Times supra* at 156; *Immuno AG v Moor-Jankowski, supra* at 252.

POINT VI: THE LOWER COURT INCORRECTLY IGNORED BRIMELOW'S PLEADING ON ACTUAL MALICE AND THEN COMMITTED FURTHER ERROR BY A) NOTING VOLUMINOUS MATERIALS OUTSIDE THE RECORD AND B) WEIGHING THE EVIDENTIARY IMPORT OF THOSE MATERIALS AGAINST BRIMELOW

This was, of course, a Rule 12(b) Motion, where it is axiomatic that the courts must "construe[e] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Palin v. New York Times Co.*, 940 F.3d 804, 810 (2nd Cir. 2019).

The lower court, however, ignored Brimelow's allegations completely, then compounded this basic error by a) improperly taking judicial notice of voluminous materials to which Brimelow had objected (see R. 124 -125); and b) weighing this improper material against Brimelow's allegations, as though the court itself were the trier of fact. This is error.

Brimelow allegations of actual malice as to each of the news articles were specific, exacting, and persuasive. The cumulative weight of these allegations should more than suffice: there was failure to seek corroboration from obvious sources (R. 21-23, 26, 33, 36-37, 40, and 45; *see Harte–Hanks Communication v Connaughton*, 491 U.S. 657, 692 (1989)); reliance on questionable sources and publication of materials that rely on sources with a reputation for persistent

inaccuracies (R. 18-20, 24-28, 33, 37, and 40; *see Harte–Hanks Communication* supra and *Gertz v Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982); bias combined with inadequate investigation (R. 21-23, 28, 34, 37, 41, and 45; *see Church of Scientology In't v. Behar*, 238 F.3d 168, 174 (2nd Cir. 2001); publication in the face of verifiable denials (R. 22-26, 28, 33, 41-43; *see Curran v. Phila Newspapoers, Inc.*, 376 Pa. Super. 508, 513 (Superior PA, 1988)); adherence in the face of contrary evidence to a pre-conceived storyline (R. 22-26, 28, 42-43; *see Gertz v Robert Welch, Inc.,* supra at 539 and *Palin v. New York Times Co.,* 940 F.3d 804, 813 (2nd Cir. 2019); and malice in the usual sense of ill will and an *egregious* deviation from accepted news gathering standards (R. 10-13, 22-28, 33-34, 36-37, 41-43; see *Harte–Hanks Communication v Connaughton*, supra at 667–668, and Note 5). These are all indications of "actual malice" in the sense intentional falsehood or reckless disregard of the truth.

The lower court failed to address any of these allegations. Cf. R.179. Instead, it dismissed Brimelow's allegations with the curt assertion that "there is ample basis in the material of which the Court has taken judicial notice for The Times to reasonably have deemed Plaintiff's views as falling within a broad colloquial understanding of the term 'white nationalist.'" *Id.*

But, quite aside from the fact that The New York Times was not giving the

term white nationalist a "broad colloquial" spin, 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, after all. *Palin* supra at 812. There might be an alternate set of facts from which favorable inferences can be drawn in favor of Appellee, but at this stage, "The test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation." *Id.* at 815.

And in fact, the lower court should not even have the other materials urged by Appellee before it. As argued below, the fact that Brimelow refers to one section of his website, VDARE, which explicitly addresses the question of whether he (and it) are white nationalists, does not open the door to dumping the entire archive of the website on the court on a motion to dismiss. For one thing, Brimelow specifically denied using the other materials in the framing of his pleadings (R. 124-125), meaning they fail the test set in *Chambers v Time Warner, Inc.*, 282 F.3d 147, 153 (2nd Cir. 2002). For another, the "sheer breadth and volume" of the materials urged by The New York Times was grossly inappropriate for a Rule 12(b) motion. *Republic of Colombia v. Diageo North America Inc.*, 531 F.Supp.2d 365, 452 (E.D.N.Y. 2007).

Finally, there must be "no material disputed issues of fact regarding the relevance of the document [or materials]..." *Faulkner v. Beer*, 463 F.3d 130, 134

(2d Cir. 2006); yet here Brimelow contended that the materials were being taken out of context and noted, for example, that while Appellee was now using isolated fragments from his book Alien Nation to scare the lower court, the same work had been the subject of effusive praise by The New York Times when it was published, a point also made clear by the pleadings. R. 9 and R. 125.

An example should illustrate this point. At R. 61, Appellees erroneously state that Brimelow defines American identity in racial terms and Appellee even quotes a fragment from Alien Nation which reads "the American nation has always had a specific ethnic core. And that core has been white." Comparison with the full context of the passage is revealing. What Brimelow actually wrote was:

> Thus Virginia [*viz.* Virginia Postel, editor of *Reason* magazine, with whom Brimelow was debating], like many modern American intellectuals, is just unable to handle a plain historical fact: that the American nation has always had a specific ethnic core. And that core has been white.
> A nation, of course, is an interlacing of ethnicity and culture.[5] Individuals of any ethnicity or race might be able to acculturate to a national community. And the American national community has certainly been unusually assimilative. But nevertheless, the massive ethnic and racial transformation that public policy is now inflicting on America is totally new – and in terms of how Americans have traditionally viewed themselves, quite revolutionary. Pointing out this reality may be embarrassing to

[5] Which is to say, Brimelow does *not* define American identity in simplistic racial terms.

> starry-eyed immigration enthusiasts who know no history. But it cannot reasonably be shouted down as "racist." Or "un-American." Brimelow, *supra* at p. 10.

It would be an understatement to say that the import and relevance of this statement is not without dispute. The truth is that it does not support Appellee's malign characterization of Brimelow, at all. Indeed, if anything, it raises questions about the character of The New York Times.

For example, what manner of white nationalist, where that term is used to convey race hate and is interchangeable with racist, allows that people "of any ethnicity or race might be able to acculturate to" America because our nation has been "unusually assimilative"?

If race truly is the be-all and end-all for Brimelow, why does he advance the decidedly more nuanced position that a nation "is an interlacing of ethnicity and culture"?

And what is wrong with noting a "plain historical fact," such as that the ethnic core of America has always been white? Did Appellee not realize that Brimelow was only noting a "plain historical fact" before mounting its argument? This would seem hard to deny, for the words preceding the quote proffered to the lower court are "a plain historical fact."

The above exercise could be repeated over and over as to the numerous scare quotes dishonestly hauled before the lower court by The New York Times. But such an exercise would prove tedious even on a motion for summary judgment (to say nothing of a Rule 12(b) motion), and only goes to show the wisdom of *Republic of Colombia v. Diageo North America Inc.*, *supra*. Suffice it to say that the relevance and import of the materials Appellees had thrust before the lower court are not without dispute, and as such, were improper candidates for judicial notice on a Rule 12(b) motion.

In short, the only proper allegations concerning actual malice were those of Brimelow's pleadings. They are more than equal to the task.

POINT VII: THE NEW YORK TIMES' SUBSEQUENT ATTACKS ON BRIMELOW AS ANTISEMITIC AND WHITE NATIONALIST IN THE AUGUST 23, 2019 AND SEPTEMBER 13, 2019 ARTICLES ARE ALSO ACTIONABLE, AS ARE THE NOVEMBER 18, 2019 AND MAY 5, 2020 ARTICLES WHICH CHARGED HIM WITH HATE, WHITE SUPREMACISM, AND WHITE NATIONALISM

The lower court simply repeated its faulty analysis with regard to the offending statements in the August 23, 2019, September 13, 2019, November 18, 2019, and May 5, 2020 articles. We need break (almost) no new ground here, for part of the lower court's analysis will largely stand or fall with the above

arguments.

If being labeled a "white nationalist" where the meaning conveyed is that of race hate is actionable, then so too should the subsequent charges of the August 23, 2019 and September 13, 2019 articles. R.30-31 and 36.

Likewise with the other articles. The November 18, 2019 article reiterated the charge of white nationalism as race hate (R. 39-40), while the May 5, 2020 article not only reiterated the substantially similar charge of white supremacy, but added the puzzling allegation that Brimelow through his website, was running a "bot-farm," that is, using a network of fake web accounts (so called "coordinated inauthentic behavior"), apparently to push white supremacy and promote anti-Semitic and anti-Asian hate speech. R. 43-44.

For the reasons set forth above, these charges are all actionable: they satisfy the modified *Ollman* Factors used under current New York law.

But there is additional error in the lower court's holding. The above articles all hinted at undisclosed facts. R.30-31 and 36; 39-40, and 43-44. This should be an additional ground that negates any opinion defense for these statements. *Gross v New York Times Co*, *supra* at 155; *Milkovich v. Lorain Journal Co* supra at 19; *see also Ollman supra* at. 1023–1024 (Robinson, CJ, dissenting).

However, without citing any authority whatsoever, the lower court held that

the characterizations of VDARE and Brimelow were all "attributed as the opinion of the individuals discussed in the story, and not stated as The Time's independent view." R. 180; see also R.185-186. This was, again, not an argument mustered by Appellees.

What the lower court was apparently reaching for (without explicitly acknowledging it), was the "neutral reportage privilege" from this Court's decision in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.1977). In that case, this Court held that under certain circumstances, the press enjoys "absolute immunity from libel judgments for accurately reporting 'newsworthy' statements, regardless of the press's belief about the truth of the statements." *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225 (3rd Cir. 1978).

But the neutral reportage privilege only extends so far. Judge Friendly later noted that "the privilege was limited in scope and required careful examination of the facts in each case. *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68 (2nd Cir. 1980). And it is never available for "a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure." *Id.* In those circumstances, the publisher must "assume responsibility for the underlying accusations." *Id.*

That, of, course, is what we have here, as illustrated by the earlier stealth-edit hyperlink to the SPLC in January of 2019, along with Appellee's obstinate and malicious refusal to adhere to its own ethical code and recognize the correction or otherwise to provide Brimelow's perspective. In these circumstances, the Second Circuit's neutral reportage privilege vanishes and we are back to the older law of "tale bearers and tale makers." Prosser, Handbook of the Law of Torts § 113, at 768-69 (4th ed. 1971); Restatement (Second) of Torts § 578 (1977).

The lower court's handling of the "of and concerning" element with regard to the August 23 2019, September 13, 2019, November 18, 2019, and May 5, 2020 articles is addressed below.

That leaves only the actual malice element of the August 23, 2019, September 13, 2019, November 18, 2019, and May 5, 2020 articles. Again, what has been argued above should by and large suffice to show the lower court's errors in this regard, *viz.* that the lower court ignored Brimelow's actual pleadings, in favor of an alternative set of facts derived from materials that were improperly placed before the court in the first place. Such credibility determinations are "not permissible at any stage before trial," and are certainly *verboten* under Rule 12 (b). *Palin v. New York Times Co., supra* at 812.

POINT VIII: THE AUGUST 23, 2019, SEPTEMBER 13, 2019 AND MAY 5, 2020 ARTICLES WERE OF AND CONCERNING BRIMELOW

The question of whether a statement is "of and concerning" the plaintiff is generally a question of fact for the jury. *Harwood Pharmacal Co. v National Broadcasting Co.*, 9 N.Y.2d 460, 462 (1961); *Brady v Ottaway Newspapers*, 84 A.D.2d 226, 231 (2nd Dept. 1981); *Geisler v Petrocelli*, 616 F.2d 636, 640 (2nd Cir. 1980). If there is any dispute about the facts, the question is unsuitable for resolution on a Rule 12(b) motion, where the court must accept the allegations of the complaint as true and accord the plaintiff the benefit of drawing all reasonable inferences in his favor. *Lynch v. City of New York*, 952 F.3d 67, 75 (2nd Cir. 2020); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2nd Cir. 2016).

The court can, of course, dismiss if the allegations of the pleadings clearly do not meet *Iqbal/Twombly* standards as to this element, just as it could for any other manifestly deficient elements of a defamation claim. But the ability to dismiss under Rule 12(b) certainly does not empower the lower court to disregard Brimelow's allegations completely and draw heavy inferences in favor of The New York Times.

Here Brimelow had pled no less than eleven separate factual allegations showing that it was reasonable to conclude that Appellee's attacks on VDARE

implicated him. R. 32-33, 36, and 44. In their moving papers below, The New York Times addressed exactly two of these eleven separate allegations, leaving the other nine unchallenged. R. 77-78.

With at least nine separate allegation unchallenged (and, to be fair, construing the two allegations that were challenged in his favor), Brimelow should certainly have met threshold of the "of and concerning element" as to the August 23, 2019, September 13, 2019 and May 5, 2020 articles. As this Court recently noted, "the bar to satisfy this element is low." *Palin v. New York Times Co.*, *supra* at 816.

Where it was undisputed that Brimelow is widely known in his capacity as both the creator and editor of VDARE, is one of a small group of people who run the day to day operations of VDARE, is the editor of VDARE and is identified as such on the very SPLC website referenced in a number of Appellee's articles (among other facts), then "those who knew or knew of plaintiff can make out that the plaintiff is the person referred to" in the three articles disputed articles under consideration. *New York PJI 3:25, citing Chicherchia v Cleary*, 207 A.D.2d 855 (2nd Dept 1994); *Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 A.D.3d 82 (1st Dept 2015), *aff'd,* 28 N.Y.3d 82 (2016).

Rather than address Brimelow's allegation, the lower court once again

simply ignored them. R. 182-183. More than that, the lower court committed the elementary mistake of drawing a very heavy inference in favor of The New York Times, to wit:

> 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." (PI. Opp. 12 (citing Comment to New York Pattern Jury Instruction § 3:25)). *The relevant audience in this case — that is, those who are aware of VDARE and Plaintiffs role at the site — can also be presumed to know that the site publishes "writers of all political persuasions*" (SAC ¶11), and that a blog post authored by someone other than Plaintiff does not necessarily reflect Plaintiffs views on the subject matter discussed. R. 183 (emphasis supplied)

Of course, this is extremely unfair. It is axiomatic that the lower court cannot presume anything in favor of The New York Times where Appellee was the proponent of a motion to dismiss.

Even more, this presumption was particularly galling in light of the record before the lower court, which included the stealth edit and hyperlink to the SPLC website. R. 22-26. If there are certain of the "relevant audience" who understand that Brimelow does not agree with everything on the VDARE site and who know that the site publishes writers of all political persuasions (or might be prone to doubt that he was the "mastermind" behind the alleged hate campaign reported in the May 5, 2020 news article –see R. 186-187), there are doubtless millions more

who, thanks only to the malice of the New York Times and its January 2019 hyperlink, know Brimelow exclusively as the bugbear presented by the SPLC. It is precisely such an audience which would have been reading the August 23, 2019, September 13, 2019 and May 5, 2020 articles, and precisely such an audience which would not be aware of any of the nuance so artlessly superimposed by the lower court.

POINT IX: THE ACTUAL MALICE STANDARD ACTUALLY UNDERMINES FIRST AMENDMENT PRINCIPLES AND SHOULD BE RETIRED

We raise this issue now, not because we expect this Court to overrule Supreme Court precedent, but so that it may comment on the issues thoughtfully raised by Justice Thomas in his concurrence in *McKee v Cosby*, 139 S.Ct. 675, 676 (2019).

Justice Thomas argued that the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) should be reconsidered: "We should not continue to reflexively apply this policy-driven approach to the Constitution... If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we." *McKee v Cosby*, *supra* (Thomas, J, concurring)

Justice Thomas concluded that the Constitution did not require proof of actual malice because "Historical practice... suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel." *Id.* at 681. Among the reasons mentioned are the fact that public figures continued to bring libel actions without ever demonstrating actual malice into the

late 19th Century, that states continued to criminalize libel, including for public figures, and that Congress, even when approving state constitutions under Reconstruction, did so with express reference to libel laws which made no mention of any actual malice standard. *Id.*

These are cogent and persuasive arguments. To them we would add the following: there are many instances in which the actual malice standard actually undermines the free speech values (i.e. "uninhibited robust and wide open debate") it is meant to shield. It does this when it erects a potent shield for those, like Appellee, who have lately turned from encouraging robust debate to enforcing intellectual orthodoxies. This is not worthy of First Amendment protection.

CONCLUSION

Brimelow respectfully request 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 of New York for further proceedings.

Dated: Goshen, New York
March 16, 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 12,741 words.

Dated: Goshen, New York
March 16, 2021

Yours, etc.

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