24-2785-cv

United States Court of Appeals

for the

Second Circuit

MONICA MILLER, SUZANNE ABDALLA,

Plaintiffs-Appellants,

– v. –

LETITIA JAMES, Individually and in her official capacity as ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellee.

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

A panel rehearing and rehearing *en banc* are necessary because the panel's decision on standing conflicts with the decision of this Court in *Oneida Indian Nation v. United States DOI*, 789 F. App'x 271 (2d Cir. 2019), with the U.S. Supreme Court's decision in *Meese v. Keene*, 481 U.S. 465 (1987), and with the decision of the U.S. Court of Appeals for the Sixth Circuit in *Parsons v. United States DOJ*, 801 F.3d 701, 712 (6th Cir. 2015), among others. The full Court's consideration is necessary to secure and maintain uniformity of the Court's decisions. Fed. R. App. P. 40(b)(2).

Additionally, the panel's defamation decision in which it held that Defendant's public declarations that Red Rose Rescue, a pro-life organization, is a "terrorist group" and that those who belong to this group are "terrorists" were simply expressions of opinion based on disclosed facts is wrong, particularly since the "disclosed facts" merely repeat the defamation by describing the acts of the "terrorists" as "terrorizing."

This case comes to the Court on the granting of Defendant's motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Consequently, there are no fact disputes as all allegations of fact and reasonable inferences drawn from those facts must be construed in Plaintiffs' favor. (Summ. Order at 4, 6).

In sum, when the chief law enforcement officer for the State of New York falsely and publicly declares that you are a "terrorist" and that you belong to a

"terrorist group," these false declarations are defamatory *per se*, and they cause reputational harm as a matter of fact and law for standing purposes.

SUMMARY OF FACTS

Plaintiffs Miller and Abdalla[1] are active members of Red Rose Rescue. Plaintiffs engage in peaceful, nonviolent, First Amendment activity such as sidewalk counseling, holding pro-life signs, and distributing pro-life literature pursuant to their association with Red Rose Rescue. Plaintiffs also provide financial support to the organization. (Compl. ¶¶ 9-21, R.1, A-7, 8, 9).

Plaintiff Miller is publicly known as a national leader of Red Rose Rescue, and Plaintiff Abdalla speaks to the media on behalf of Red Rose Rescue. Thus, *both Plaintiffs are publicly known as people who directly associate with Red Rose Rescue*. (*Id*. ¶¶ 12-14, 20, 30, A-7, 8, 9, 11).

On June 8, 2023, Defendant held a public press conference announcing a new *civil* lawsuit filed by the State of New York and the Attorney General against *Red Rose Rescue*, Christopher Moscinski, Matthew Connolly, William Goodman, Laura Gies, John Hinshaw, and *John and Jane Does*, alleging civil violations of FACE and the New York State version of this statute. (*Id*. ¶ 28, A-11).

During the press conference, Defendant declared that those who associate with Red Rose Rescue are "terrorists," and she declared that Red Rose Rescue is a

[1] It should not go unnoticed that Plaintiff Abdalla has a Middle Eastern name, so accusations of "terrorism" are particularly troublesome to her.

"terrorist group." (*Id*. ¶ 31, A-11). At the close of her press conference, Defendant doubled down and declared that Red Rose Rescue is in fact a "terrorist group." (*See id*. ¶ 33 [citing website where video of press conference remains published], A-12).

The civil lawsuit contains no allegations of terrorism because Red Rose Rescue participants never engage in acts of terrorism or other acts of violence. That is, they are not "terrorists" nor is Red Rose Rescue a "terrorist group." Consequently, Defendant's defamatory and injurious statements, which are provably false, were not a fair and true report of any judicial proceeding, legislative proceeding, or other official proceeding. (*Id*. ¶ 29, A-11).

Defendant's false and defamatory remarks were of and concerning Plaintiffs as Plaintiffs are publicly associated with Red Rose Rescue. (*Id*. ¶¶ 9, 12, 13, 16, 19, 20, 31, A-7, 8, 9, 11). The statements were made and published in such a way that allows for easy identification of the individuals within the group. A reader/viewer/listener could reasonably understand that the defamatory statements about Red Rose Rescue include Plaintiffs. (*Id*. ¶ 32, A-11). For example, a simple Internet search for "Red Rose Rescue" reveals a picture of Plaintiff Miller on the organization's homepage. *See* https://www.redroserescue.com/ (last visited Oct. 27, 2023). And while Plaintiff Miller was not a named *defendant* in the lawsuit, *she was expressly named in the allegations* of the complaint, and *she was personally served with a copy of the complaint by the Attorney General's office as the agent for Red Rose Rescue*. (Compl.

¶ 30, R.1, A-11). In the civil lawsuit—the basis for the press conference—Defendant states in multiple paragraphs of her complaint that Plaintiff Miller is a "*member*" of "*Red Rose Rescue*." (*See* Muise Decl., Ex. A [Civil Compl. ¶¶ 69, 76, 89] at Ex. 1, R.10-1, A-34, 36, 38). The civil lawsuit also names "John and Jane Does" as defendants "who are active in" Red Rose Rescue. (*Id*. [Civil Compl.] at 1, A-24). Plaintiff Abdalla is "active" in Red Rose Rescue. (Compl. ¶¶ 16-20, R.1, A-8, 9).

Defendant's defamatory statements that those associated with Red Rose Rescue are "terrorists" and that Red Rose Rescue itself is a "terrorist group" are published and remain published on the Attorney General's website and have been republished by multiple media sources, including, *inter alia*, the *Washington Examiner* and the *Washington Times*. (*Id*. ¶ 33, A-12). As noted, these defamatory statements are part of official public records maintained by the Attorney General's office. (*See id.*).

Defendant held a public press conference to ensure that her defamatory statements were widely reported and repeated as she intended these statements to cause harm to pro-lifers, including Plaintiffs. Defendant's defamatory attack on pro-lifers had no legitimate governmental purpose; it was an abusive use of government authority and power. (*Id*. ¶¶ 34-35, A-12).

As the chief law enforcement officer of New York, Defendant is in a position to know that Red Rose Rescue is not a "terrorist group" and that the pro-lifers who associate with Red Rose Rescue are not "terrorists." If Defendant had any facts to

substantiate these false accusations of criminal activity, she would have brought a criminal complaint for engaging in terrorist activity and not a civil action seeking a mere 30-foot buffer zone. Defendant has not brought such a criminal complaint as no facts exist to do so, and Defendant knows it. (*Id.* ¶¶ 36, A-12, 13).

Terrorism is a crime punishable under New York law, *see* N.Y. Penal Law §§ 490.00, *et seq*., and federal law, *see* 18 U.S.C. § 2331. Terrorism is widely considered to be *one of the most heinous criminal acts.* (*See* Compl. ¶ 37 ["[T]errorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated. . . .] [quoting N.Y. Penal Law § 490.00], R.1, A-13).

Defendant's public dissemination of false information has had a chilling effect on Plaintiffs' rights to free speech and expressive association, and the defamatory statements have had a chilling effect on the rights to free speech and expressive association of other pro-lifers associated with Red Rose Rescue. Defendant's defamatory statements have caused, and will continue to cause, irreparable harm to Plaintiffs. Defendant's defamatory statements have also caused Plaintiffs to suffer humiliation and a loss of reputation. (Compl. ¶¶ 40, 42, R.1, A-14).

Defendant's false statements were designed to chill the exercise of constitutional rights by pro-lifers such as Plaintiffs and to chill those who would associate with Red Rose Rescue from exercising their constitutional rights. (*Id.* ¶¶ 43-

44, A-14, 15). Defendant's labeling of pro-lifers as "terrorists" creates a basis for government investigation, surveillance, punishment, condemnation, and other disfavored treatment, and it has tarnished Plaintiffs' public reputation and subjects Plaintiffs to public retribution. (*Id*. ¶¶ 46, 50, A-15, 16).

Defendant's actions have the purpose and effect of deterring pro-lifers from associating with Red Rose Rescue and deterring donors and volunteers from supporting the activities of Red Rose Rescue. Defendant's actions also legitimize the illegitimate attacks against pro-lifers in the public eye. Consequently, the challenged actions harm Plaintiffs' constitutionally protected activities and interests. (*Id*. ¶¶ 48-53, A-15, 16, 17).

Defendant's actions were motivated by malice against pro-lifers, including Plaintiffs, and their religious objection to abortion, and they were made with hatred, ill will, and spite. Defendant will continue to disseminate false information about Plaintiffs unless enjoined from doing so by this Court. (*Id*. ¶ 41, A-14).

I. The Panel's Standing Decision Is Erroneous and Conflicts with this Court's, the Supreme Court's and Other Circuit's Precedent.

Defendant has placed the power of the government, with its authority, presumed neutrality, and assumed access to all the facts (including whether facts exist to claim that Plaintiffs are terrorists), behind a designation *intended* to reduce the effectiveness of the Red Rose Rescue and its pro-life efforts protected by the First and Fourteenth Amendments. Case law makes plain that a chilling effect on expressive activity

coupled with reputational harm are sufficient injuries to confer standing to advance such claims. In fact, reputational harm alone is an injury in fact for standing purposes.

Contrary to the panel's decision (Summ. Order at 5), this case is not *Laird v. Tatum*, 408 U.S. 1 (1972), in which the only alleged injury was a subjective chilling effect. *Compare Laird*, 408 U.S. at 10-11 (holding that subjective chill, "without more," was not sufficient for standing), *with Parsons v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir. 2015) (distinguishing *Laird* and finding an injury caused by the government's "hybrid-gang" designation). The "terrorist" and "terrorist group" labels alone are sufficient to confer standing in this case. This Court's opinion in *Oneida Indian Nation v. United States DOI*, 789 F. App'x 271 (2d Cir. 2019), confirms this point:

> Appellant argues that DOI's name change "vindicated the Wisconsin tribe's erroneous claim to the Oneida Nation legacy" and thereby "diminished the [New York Oneidas'] status and reputation as the original Oneida Nation, or its direct successor." Appellant Br. 38-39. To support its reputational injury argument, Appellant cites cases in which a plaintiff successfully asserted reputational injury based on a derogative or negatively perceived label applied to the plaintiff by the government. Appellant Br. 41-42 (citing, *inter alia, Meese v. Keene*, 481 U.S. 465, 473-77 (1987) (state senator seeking to exhibit films had standing to challenge the Department of Justice's characterization of films as "political propaganda"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-40 (1951) (certain nonprofit organizations designated as "Communist," injuring their right to be free from defamatory statements); *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 711-12 (6th Cir. 2015) (group labeled "hybrid gang" in a government report entitled "National Gang Threat Assessment")).
>
> Those cases are distinguishable. *In each of them, the government*

> *attached a derogatory label to the plaintiff*, whereas here the government has said nothing about the New York Oneidas, let alone anything derogatory. *See Meese*, 481 U.S. at 469-70 (the Department of Justice applied label "political propaganda" to films pursuant to statutory definition); *McGrath*, 341 U.S. at 125 (government entities purported to act pursuant to Presidential authorization to designate organizations as Communist "after appropriate investigation and determination"); *Parsons*, 801 F.3d at 707 (government agency described group as "hybrid gang" in threat assessment report).
>
> In any event, that DOI published the new name *does not imply that the federal government regards Appellant as lesser*. As Appellant admits, DOI's policy is to approve automatically any name chosen by a tribe. By contrast, *Meese, McGrath*, and *Parsons* *involved negative labels applied by the Government based on* certain statutory criteria or *the Government's own analysis*.

Oneida Indian Nation, 789 F. App'x at 277 (emphasis added). Here, Defendant placed a "derogatory label" on Plaintiffs, who are members of Red Rose Rescue and who engage in constitutionally protected activity through this organization. At a minimum, Plaintiffs are members of Red Rose Rescue similar to how the plaintiffs in *Parsons* were members of the "Juggalos," the self-identified fan base of a musical group called "The Insane Clown Posse." *See Parsons*, 801 F.3d at 706 ("Plaintiffs self-identify as Juggalos"). This reputational harm to Plaintiffs is an injury in fact for standing purposes, regardless of whether other harms exist. *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (stating that "[t]he Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing").

On the issue of reputational harm, the panel made the following erroneous conclusion: "with respect to their assertion of reputational harm, Plaintiffs have

alleged no facts to 'nudge[] their claims across the line from conceivable to plausible.' *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)." (Summ. Order at 5). What facts are missing? When the government, through its top law enforcement officer, labels someone a "terrorist" and belonging to a "terrorist group"—facts that are clearly established in this case—these false and derogatory labels are at least as injurious (and certainly more so) than labeling an organization a "hybrid gang" or "communist" or labeling a film a politician intends to show as "political propaganda." *See Oneida Indian Nation*, 789 F. App'x at 277 (citing *Meese*, *Parsons*, and *McGrath*).

In *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court found that Keene had standing to advance his First Amendment claim based on the reputational harm caused by the government's "political propaganda" label placed on films that he intended to show. Because of the indirect nature of the alleged harm, Keene supported his claim with additional evidence *to show how this label on the films* he wanted to show would harm *his* reputation. *See id*. Such evidence is unnecessary when the reputational injury is direct (and self-evident), as in this case. This Court, and many others, have long held that reputational harm is an injury in fact for standing purposes. *See, e.g., Gully*, 341 F.3d at 161-62; *McGrath*, 341 U.S. at 139 (holding that charitable organizations designated as "Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage [to] the

reputation of those organizations in their respective communities"); *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) ("As a matter of law, reputational harm is a cognizable injury in fact.") (citing *Meese*); *Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes."); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) ("Case law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action.").

Finally, in *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015), the Sixth Circuit affirmed that reputational harm of the sort at issue here is sufficient to confer standing and made this following relevant observation regarding redressability:

> In *Meese*, the defendant, the Attorney General, espoused an analogous argument—that enjoinment of the DOJ's label of certain films as "political propaganda" would not stem negative reaction to the plaintiff's exhibition of the films. . . . The Supreme Court disagreed, articulating that the harm to plaintiff occurred because "the Department of Justice has placed the legitimate force of its criminal enforcement powers behind the label of 'political propaganda.'" . . . The Juggalos in this case also suffer alleged harm due to the force of a DOJ informational label. . . . As in *Meese*, "[a] judgment declaring the [action in question] unconstitutional would eliminate the need to choose between [First Amendment-protected activity] and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation."
>
> The Agencies also assert that an order declaring the 2011 NGIC Report unconstitutional would not alleviate the alleged harm entirely because the information on Juggalo activity is available through the aforementioned alternate channels. But it need not be likely that the

> harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement. *See Meese*, 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains"); [*Friends of the Earth, Inc. v.*] *Laidlaw* [*Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)] (finding civil penalties sufficient to satisfy redressability noting that they have at least "*some* deterrent effect") (emphasis added). "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of a suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Laidlaw*, 528 U.S. at 185-86. An order declaring the 2011 NGIC Report unconstitutional and setting it aside would abate the reflection of Juggalo criminal activity as gang or gang-like by the Agencies. . . . The declaration the Juggalos seek would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of the DOJ's criminal gang or gang-like designation.

Parsons, 801 F.3d at 716-17 (internal citations omitted).

In sum, the panel's decision conflicts with well-established precedent and should be reversed.

II. The Panel's Decision that the New York Attorney General's Statements Were Opinion and Not Defamatory *Per Se* Is Patently Erroneous.

"'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *McGrath*, 341 U.S. at 139 (quoting Restatement, Torts, § 559). Accusing someone of a heinous crime, such as "terrorism," is defamation *per se*. *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809 (JMF), 2021 U.S. Dist. LEXIS 102800, at *27 (S.D.N.Y. June 1, 2021) ("Accusing someone of a serious crime is defamatory *per se*. . . ."); *see also*

Van Der Linden v. Khan, 535 S.W.3d 179, 198 (Tex. App. 2017) ("Khan alleges that falsely accusing someone of having admitted that he provided financial support to terrorists constitutes defamation *per se*. We agree."); *Grogan v. KOKH, Ltd. Liab. Co.*, 256 P.3d 1021, 1030 (Okla. Civ. App. 2011) ("It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person.").

The panel concluded that Defendant's statements were statements of opinion and not statements of fact. The panel is mistaken.

To determine whether a statement is opinion or fact, the Court considers: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." *Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008) (internal quotations and citations omitted). New York penal law, which Defendant is sworn to enforce, proscribes "act[s] of terrorism." (Compl. ¶ 37, R.1, A-13). As Defendant noted in her brief, a "terrorist" is someone who engages in (*i.e.*, a "practitioner of") "terrorism." Def.'s Br. at 27 (citing Merriam-Webster). There was nothing equivocal about Defendant's statements. And the terms have a precise meaning (a meaning that is

certainly injurious to one's reputation), particularly when they come from the top law enforcement officer of New York—a state that is no stranger to heinous acts of terrorism. Defendant's statements are also capable of being proven false as neither Red Rose Rescue nor any member of Red Rose Rescue has ever been convicted, let alone charged, with committing an act of terrorism. *See, e.g.*, *Grogan*, 256 P.3d at 1030 ("It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person."). Defendant, the chief law enforcement officer for the state, certainly knows this fact to be true. Finally, the context of the defamatory statements—a press conference called by the Attorney General of New York—makes it exceedingly likely that the reasonable listener would consider these statements to be statements of fact as Defendant placed the power of the New York government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of Red Rose Rescue and its associates in the eyes of the public.

The crux of the panel's defamation decision is as follows:

> A statement of opinion is one "accompanied by a recitation of the facts upon which it is based" or that "does not imply that it is based upon undisclosed facts." *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014). Here, James fully explained the factual basis for her opinion. And in "the full context of the communication in which the statement appears," it is clear that James was using the term "terrorist" as rhetorical hyperbole to characterize the conduct she had described. *Gross*, 82 N.Y.2d at 153. Before she used the word "terrorist," and while discussing the events giving rise to the lawsuit described in the related press conference, James repeatedly described the defendants in that lawsuit as "terrorizing"

> patients in the colloquial sense. And she made clear that Red Rose Rescue and its associates were not designated terrorists in the formal legal sense, and that she called them terrorists "because of their activities"—that is, the activities she had just described. James Press Conference at 21:41–21:47. In this context, James used the term "terrorist" to express an opinion, not a fact, and her characterization is not subject to proof or disproof.

(Summ. Order at 8-9). The panel is mistaken as there was no "colloquial sense" about her statements. The very terms Defendant used to describe "their activities" (the "disclosed facts") are criminal and convey the very same defamatory meaning as "terrorist" or "terrorism." A "terrorist" is someone who "terrorizes people," similar to how a "murderer" is someone who "murders" people. Defendant left undisclosed whether the activities that "terroriz[ed]" patients were acts of violence or threatened acts of violence (*i.e.*, criminal acts of terrorism). *See also* Def.'s Br. at 6 (quoting statements).

In light of the fact that Defendant is the top law enforcement officer of the state (and not a private citizen), the context is such that the listener would understand that Defendant was conveying facts. *See* Def.'s Br. at 6 (quoting video and stating, "The Attorney General stated that it is her 'responsibility to keep individuals safe from terrorists. And that's what they are.'").

Further, the fact that Defendant indicated that Red Rose Rescue had not been "designated" a terrorist group adds no "disclosed facts" or context rendering Defendant's statements hyperbole. A person or organization need not be "designated"

a terrorist or terrorist group before being accused of or charged with terrorism.

Quite simply, if New York law is that an otherwise defamatory statement becomes non-defamatory opinion by relying on a "disclosed fact" that is nothing more than the verb form of the defamatory noun descriptor, defamation becomes a nullity.

CONCLUSION

Plaintiffs respectfully request a rehearing and *en banc* review.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,865 words, excluding those sections identified in Fed. R. App. P. 32(f). *See* Fed. R. Civ. P. 40.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

ATTACHMENT

24-2785
Miller et al v. James

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of The United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of April, two thousand twenty-five.

PRESENT:

ROBERT D. SACK,
BETH ROBINSON,
Circuit Judges,
JOHN G. KOELTL,*
District Judge.

MONICA MILLER, SUZANNE ABDALLA,

Plaintiffs-Appellants,

v. No. 24-2785

LETITIA JAMES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellee.†

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* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

† The Clerk's office is respectfully directed to amend the caption as reflected above.

FOR PLAINTIFFS-APPELLANTS: ROBERT J. MUISE (David Yerushalmi, Kate Oliveri, *on the brief*) American Freedom Law Center, Ann Arbor, MI.

FOR DEFENDANT-APPELLEE: BEEZLY J. KIERNAN, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Victor Paladino, Senior Assistant Solicitor General, *on the brief*) *for* Letitia James, Attorney General of the State of New York, Albany, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 27, 2024, is **AFFIRMED**.

Plaintiffs-Appellants Monica Miller and Suzanne Abdalla allege that they engage in "peaceful, non-violent, and non-obstructive activities in defense of . . . human life" as part of a group called Red Rose Rescue. App'x at 7–9, ¶¶ 9, 16. In June 2023, Defendant-Appellee Letitia James, Attorney General of the State of New York, held a press conference to announce a civil lawsuit against Red Rose Rescue and several of its members – not including Plaintiffs. At this press conference, James described Red Rose Rescue activists as having "terrorized patients" during

incidents in which they unlawfully entered or blocked access to three separate health care facilities. *See* Office of the New York State Attorney General, *Attorney General James Sues Militant Anti-Abortion Group for Invading Clinics and Blocking Access to Reproductive Health Care*, at 3:19–6:10 (June 8, 2023) ("James Press Conference"), https://ag.ny.gov/attorney-general-james-sues-militant-anti-abortion-group-invading-clinics-and-blocking-access, [https://perma.cc/RV5Q-S9ZY].[1] She then stated, "[I]t is my duty and my honor and my responsibility to keep individuals safe from terrorists. And that's what they are." *Id.* at 8:09–8:18. Later in the press conference, however, James responded to a question by saying, "They haven't been designated as such. I refer to them as terrorists because of their activities." *Id.* at 21:41–21:47.[2] In response to another question, she said "This will apply to this terrorist group." *Id.* at 23:58–24:05.

Based on these statements, in July 2023, Plaintiffs sued James under 42 U.S.C. § 1983, alleging that in her official capacity she violated their First

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[1] We may properly consider the press conference video because the complaint incorporated it by reference. *See* App'x at 12 ¶ 33; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("[A] court may consider documents attached to the complaint as an exhibit or incorporated in it by reference . . . ." (internal quotation marks omitted)).

[2] Because the reporter's question is inaudible, it is unclear whether James referred to Red Rose Rescue or to its members in her response to the question.

Amendment rights to freedom of speech and association and their Fourteenth Amendment right to equal protection. They also sued her in her individual capacity for defamation under New York law.

The district court dismissed the constitutional claims under Federal Rule of Civil Procedure 12(b)(1) for lack of standing, and the defamation claim under Rule 12(b)(6) for failure to state a claim. *Miller v. James*, 751 F. Supp. 3d 21, 30–42 (N.D.N.Y. 2024). Plaintiffs appealed.

We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

I. Constitutional Standing

The district court dismissed Plaintiffs' First Amendment and Fourteenth Amendment claims for failure to establish Article III standing. *Id.* at *3–7. We review a district court's determination that a plaintiff lacked standing without deference to the district court, accepting as true all material factual allegations in the complaint. *See Cerame v. Slack*, 123 F.4th 72, 80 (2d Cir. 2024). To establish standing, Plaintiffs must plausibly allege that (1) they have suffered an injury in fact, which is both "concrete and particularized" and "actual or imminent, not

conjectural or hypothetical," (2) the injury was "fairly traceable to the challenged action of the defendant," and (3) it is likely that the injury is "redress[able] by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).[3]

Plaintiffs allege that James's statements "have a chilling effect on Plaintiffs' rights to freedom of speech and expressive association" and caused irreparable harm to their "public reputation." App'x at 14, ¶ 40. But "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). And with respect to their assertion of reputational harm, Plaintiffs have alleged no facts to "nudge[] their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

James described incidents in which Red Rose Rescue activists had unlawfully entered or blocked entry into health care facilities, and she referred to them as "terrorists." James Press Conference at 8:13. She later acknowledged that they were not "designated" terrorists but explained that she called them that because of their activities. *Id.* at 21:41. It is not at all apparent how these statements about the conduct of *other* Red Rose Rescue activists, and James's characterization

[3] In quotations from caselaw and the parties' briefing, this summary order omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

of the organization in light of that conduct, have injured *Plaintiffs'* reputations simply by virtue of their association with Red Rose Rescue, and they have alleged no facts to support their conclusory assertion of reputational harm. "While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." *Baur v. Veneman*, 352 F.3d 625, 636–37 (2d Cir. 2003).

For the same reason, Plaintiffs lack standing to pursue their Fourteenth Amendment claim. *See Cerame*, 123 F.4th at 80 n.11 ("Although standing is required for each claim, because the injury is the same for the First Amendment and Fourteenth Amendment claims in this case . . . we perform only one analysis.").

II. Defamation Claims

We review without deference the district court's ruling that Plaintiffs failed to state a claim of defamation, accepting the factual allegations in the complaint as true and drawing reasonable inferences in the Plaintiffs' favor. *See Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014).

Only false statements of fact are actionable as defamation. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 151 (1993). The district court ruled that James's statements are best understood as conveying non-actionable opinions, not facts that are capable of being true or false. *Miller*, 751 F. Supp. 3d at 37–40. To determine whether something is opinion or fact, the court must consider: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal [to] readers or listeners that what is being read or heard is likely to be opinion, not fact." *Gross*, 82 N.Y.2d at 153.

Although New York law defines an "act of terrorism," *see* N.Y. Penal Law § 490.05, the term "terrorist" can have a colloquial meaning other than identifying someone who has committed an act of terrorism under New York's criminal code. By analogy, a New York court concluded that a "defendant's statement that she was stalked and harassed was not an actionable statement of objective fact because it did not have a precise, readily understood meaning," despite the fact that there

is a legal definition of stalking and harassment. *Springer v. Almontaser*, 75 A.D.3d 539, 541 (N.Y. App. Div. 2d Dept. 2010).

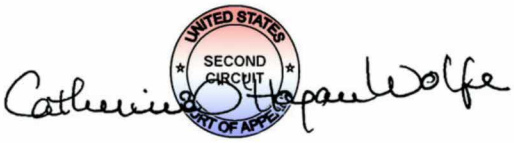
A statement of opinion is one "accompanied by a recitation of the facts upon which it is based" or that "does not imply that it is based upon undisclosed facts." *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014). Here, James fully explained the factual basis for her opinion. And in "the full context of the communication in which the statement appears," it is clear that James was using the term "terrorist" as rhetorical hyperbole to characterize the conduct she had described. *Gross*, 82 N.Y.2d at 153. Before she used the word "terrorist," and while discussing the events giving rise to the lawsuit described in the related press conference, James repeatedly described the defendants in that lawsuit as "terrorizing" patients in the colloquial sense. And she made clear that Red Rose Rescue and its associates were not designated terrorists in the formal legal sense, and that she called them terrorists "because of their activities"—that is, the activities she had just described. James Press Conference at 21:41–21:47. In this context, James used the term "terrorist" to express an opinion, not a fact, and her characterization is not subject

to proof or disproof. We must therefore affirm the district court's dismissal of Plaintiffs' defamation claims.[4]

* * *

For the reasons explained above, the district court's judgment is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[4] Because we conclude that Plaintiffs fail to state a claim for defamation on this basis, we need not consider the district court's alternate rationale that Plaintiffs also failed to plead special damages or per se actionability. *See Miller*, 751 F. Supp. 3d at 40–42. Likewise, we need not consider whether James's statements were "of and concerning" Plaintiffs. *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, 132 A.D.3d 82, 86 (N.Y. App. Div. 1st Dept. 2015); *cf. id.* at 88 ("[A] statement made about an organization is not understood to refer to any of its individual members unless that person is distinguished from other members of the group.").