ORAL ARGUMENT NOT YET SCHEDULED
No. 13–7171

In the
United States Court of Appeals
For the District of Columbia Circuit

YASSER ABBAS,

Plaintiff-Appellant,

v.

FOREIGN POLICY GROUP, LLC and JONATHAN SCHANZER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF DEFENDANTS-APPELLEES

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OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Br. ..... Appellant's Brief

FDD ..... Foundation for the Defense of Democracies

FP ..... Foreign Policy Group, LLC

MTD ..... Motion to Dismiss

Op ..... Memorandum Opinion of September 27, 2013 (Sullivan, J.)

Opp. ..... Opposition

PA ..... Palestinian Authority

PSLRA ..... Private Securities Litigation Reform Act

SLAPP ..... Strategic Lawsuit Against Public Participation

USAID ..... United States Agency for International Development

STATEMENT OF THE ISSUES

1. Whether the district court was correct in dismissing the Complaint for libel on the grounds that the challenged statements, presented in the form of questions, are not reasonably capable of bearing the defamatory meaning that was alleged, and, alternatively, that the questions constitute protected opinions and fair comment.

2. Whether in a suit founded on diversity of citizenship, those legal rulings can form the basis for dismissal under the District of Columbia's Anti-SLAPP Act.

INTRODUCTION

The plaintiff in this case—Yasser Abbas, the son of the Palestinian leader Mahmoud Abbas—alleged that he was defamed by a commentary published in Foreign Policy Magazine that posed two questions: "Are the sons of the Palestinian president growing rich off their father's system?" and "Have they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?" Memorandum Opinion of Sept. 27, 2013 ("Op.") at 24 [JA-567].

Applying well-established principles of libel law, the district court dismissed the Complaint for two reasons: (1) the rhetorical *questions* raised

in the Commentary could not reasonably be understood as the defamatory *assertions of fact* alleged by Abbas; and (2) even if they were capable of being understood as defamatory assertions, they would constitute assertions of opinion protected by the First Amendment because "they do not contain a provably false connotation," *id.* at 24–32, 36 [JA-567–JA-575, JA-579]. Following a line of cases that reached the same conclusion in similar circumstances, the district court held that raising questions "is the paradigm of a properly functioning press," and that raising questions in a manner that "invite[s] the reader to form her own judgments" is "not libel." *Id.* at 28 [JA-571].

In his Brief ("Br."), Abbas essentially argues that a question is the same thing as an answer, and that no one has the right to raise the question whether there is a relationship between his political lineage and his wealth. He argues that such questions "should not be published" unless the author can prove what the answers are. Br. 19. The district court properly rejected this restrictive view of the First Amendment.

The district court also properly dismissed this case pursuant to the D.C. Anti-SLAPP Act. As multiple federal circuits have held, anti-SLAPP statutes like the D.C. law do not conflict with the Federal Rules of Civil

Procedure, especially in a case like this, where the Complaint fails to state a claim as a matter of law. And under the familiar *Erie* framework, the provisions of the D.C. law applicable here are plainly substantive and therefore apply in federal diversity actions.

BACKGROUND AND PROCEDURAL HISTORY

I. Factual Background

A. Appellant Yasser Abbas

Plaintiff Yasser Mahmoud Abbas ("Abbas") is the son of Palestinian president Mahmoud Abbas and a businessman who operates businesses throughout the Middle East and the Gulf region. Compl. ¶¶ 4, 9 [JA-009]. He filed this libel suit against Foreign Policy Magazine ("FP") and Dr. Jonathan Schanzer based on a commentary published on June 5, 2012 headlined "The Brothers Abbas" (the "Commentary"). Defs.' MTD Ex. A [JA-024–JA-026].

B. Foreign Policy Magazine

FP is an online and print publication that is a self-described forum for "international news and opinions." http://www.foreignpolicy.com/-about_us (Mar. 26, 2014). FP regularly publishes opinions from all sides of the political spectrum, including multiple perspectives on issues relating to

Israel and the Palestinian Authority. *See, e.g.*, Declaration of Shaina Jones ("Jones Decl.") Ex. 31 [JA-362–JA-366].

C. Dr. Jonathan Schanzer

Dr. Schanzer is Vice President for Research at Foundation for Defense of Democracies, a non-partisan institution focusing on national security and foreign policy. Declaration of Jonathan Schanzer ("Schanzer Decl.") ¶ 1 [JA-226]. Prior to joining FDD, Schanzer worked as a terrorism finance analyst at the U.S. Treasury Department and for several other think tanks. *Id.* ¶ 2 [JA-226]. Schanzer has published three books on the Middle East. *Id.* ¶ 4 [JA-227].

D. The Commentary and the Complaint

FP published the Commentary at issue on the "Arguments" page of its website, which is described as a webpage that is "[p]olemical, controversial, and powerful," providing "timely insight on stories making headlines around the world." http://www.foreignpolicy.com/about_us (Mar. 26, 2014). Published solely online, the Commentary contained hyperlinks to source materials throughout the text.

The Commentary's sub-headline posed the question: "Are the sons of the Palestinian president growing rich off their father's system?" Defs.'

MTD Ex. A [JA-024]. After stating that family members of President Abbas had grown wealthy in recent years, the Commentary then asked: "Have they enriched themselves at the expense of regular Palestinians and even U.S. taxpayers?" *Id*. These questions form the basis of Abbas's Complaint. The Complaint also identified a number of specific statements that were alleged to be false in some respect. As explained below, however, before the district court, Abbas abandoned any argument that those specific statements formed the basis for his claim. Rather, as Abbas explains in his Brief before this Court, "[t]he basis for the claim is the posing of the question . . . whether Plaintiff is 'profiting at the expense of the Palestinian people and U.S. taxpayers.'" Br. 42.

The author of the Commentary did not purport to answer the questions it posed. Rather, the Commentary simply set forth the facts that gave rise to those questions. It explained that the Abbas family's wealth had "become a source of quiet controversy in Palestinian society since at least 2009." Defs.' MTD Ex. A [JA-024]. And then it set forth the facts that were relevant to that controversy. The Commentary reported that Abbas holds "a degree in civil engineering from Washington State University" and "worked for a variety of Gulf contracting firms from the 1980s until the

mid-1990s." *Id.* [JA-024–JA-025]. It also reported that Abbas "return[ed] to Ramallah in 1997"—8 years before his father became the Palestinian president—"to launch businesses of his own." *Id.* [JA-025].

The Commentary proceeded to identify Abbas's business interests and political activities, as well as those of his brother, Tarek. The Commentary, for example, recounted that Abbas's businesses include Falcon Holding Group, a conglomerate that includes telecommunication, investment, electronic, tobacco and engineering companies. *Id.* It further explained that several of these businesses had received grants from USAID for various public projects. *Id.*

The Commentary then noted, "[t]he president's son is certainly entitled to do business in the Palestinian territories. But the question is whether his lineage is his most important credential—a concern bolstered by the fact that he has occasionally served in an official capacity for the Palestinian Authority." *Id.*

E. Abbas's Response to the Commentary

Within a week after the Commentary's publication, Abbas publicly threatened to sue FP and touted that he has filed other lawsuits against "similar defamation campaigns." Jones Decl. Ex. 33 [JA-368]. On July 23,

2012, Abbas's London-based counsel sent FP a letter, copying Schanzer, requesting that FP retract certain portions of the Commentary that Abbas alleged were false and defamatory, including 13 specific alleged factual errors. Jones Decl. Ex. 34 [JA-369–JA-376]. To note just one example of the nature of the letter's complaints, to make the point that some of Abbas's companies benefited from American aid, the Commentary stated that one of them "received" a $1.89 million contract from USAID. *Id*. [JA-371]. The letter asserted that that fact was false because, although the company had obtained a $1.89 million USAID contract, the agency had ultimately paid Abbas's company only about $ 1 million and withheld the rest. *Id*.

FP responded by laying out in detail why it did not find any of Abbas's complaints, such as the preceding example, to allege anything materially false or defamatory. At the same time, FP offered to clarify any facts, such as the preceding example, if Abbas would provide it with substantiation of his counsel's unsupported assertions. FP further offered Abbas the opportunity to publish a response. Jones Decl. Ex. 35 [JA-377–JA-384]. Abbas declined, Jones Decl. Ex. 36 [JA-386], and this lawsuit followed.

II. Proceedings Below

A. The Motions to Dismiss for Failure to State a Claim

Defendants filed a motion to dismiss the Complaint, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Defendants addressed each of the specific, *affirmative statements* quoted in the Complaint and argued that they were not "of and concerning" Abbas, not reasonably capable of a defamatory meaning, and/or not materially false. Defendants then argued, first, that the *questions* posed in the Commentary were merely questions—not affirmative statements—and were not, therefore reasonably capable of bearing a defamatory meaning; and, second, that even if the questions were taken as implied statements, they would be statements of opinion, rather than provably false statements of fact. Defendants also argued that the Complaint failed to set forth any adequate allegations of actual malice or even negligence and was, therefore, subject to dismissal under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

B. The Anti-SLAPP Act Motion

Defendants also filed a "special motion to dismiss" under the D.C. Anti-SLAPP Act. D.C. Code § 16-5502(a). The Anti-SLAPP Act provides that such a motion may be filed whenever a claim arises from "an act in

furtherance of the right of advocacy on issues of public interest," which it defines in several alternative ways. D.C. Code § 16-5502(a). If a defendant makes a showing that the claim arises from such an act, "then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." *Id.* § 16-5502(b). Defendants' Anti-SLAPP motion argued that Abbas was not likely to succeed on the merits "[f]or each of the reasons set forth in Defendants' Motion to Dismiss," and incorporated by reference the legal arguments made in support of their Rule 12(b)(6) motion. Defs.' Anti-SLAPP MTD at 26–28 [JA-221–JA-223].

C. The District Court's Opinion

1. The Applicability of the Anti-SLAPP Act

The district court (Sullivan, J.) granted the special motion to dismiss pursuant to the Anti-SLAPP Act. Op. at 36–37 [JA-579–JA-580]. The court first ruled that the D.C. law applies in federal court, noting that "other circuits have found that similar state statutes apply in federal court." *Id.* at 12 [JA-555].

The district court noted that Abbas did not dispute that the Commentary satisfied the statutory criteria for triggering the Act, and indeed found that the Commentary met the criteria of "several provisions of the Anti-

SLAPP Act." *Id.* at 15 [JA-558]. Because one of those provisions covered claims by a "public figure," *id.* § 16-5501(3), the Court ruled that Abbas "is a limited purpose public figure" because he had "voluntarily thrust himself into a role of prominence in both Palestinian politics and the controversy surrounding his wealth." *Id.* at 17 [JA-560].

2. The District Court's Legal Rulings on the Merits

After concluding that the Anti-SLAPP Act applied, the Court turned to whether Abbas demonstrated that his claim was "likely to succeed on the merits." *Id.* at 20 [JA-563]. To construe that standard, the Court looked to California's construction of its anti-SLAPP statute, which the Court noted was extensively relied upon in the legislative history of the D.C. law. *Id.* The Court thus interpreted that standard as being "'comparable to that used on a motion for judgment as a matter of law.'" *Id.* (quoting *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010)).

The Court then turned to the merits of the Anti-SLAPP motion, which had incorporated by reference the arguments made in support of the Rule 12(b)(6) motion. Because Abbas in his opposition to the Rule 12(b)(6) motion did not contest Defendants' arguments regarding the affirmative statements in the Commentary about his businesses, the district court not-

ed that Abbas had "considerably narrowed his libel claim and conceded that 'the article's reference to these businesses is not the basis for [his] libel claim.'" *Id.* at 23 [JA-566]. The Court therefore "treat[ed] any allegations of libel relating to these portions of the Commentary in Plaintiff's complaint as conceded." *Id.* at 6 n.3 [JA-549].

Turning to Abbas's attack upon the two allegedly "libelous questions," the Court first held that "the two questions posed in the Commentary cannot reasonably be read to imply the meaning that Abbas alleges," nor "can they be read to imply the assertion of objective facts." *Id.* at 27 [JA-570]. In so ruling, the Court explained that "the questions invite the reader to form her own judgments regarding the relationship between Mr. Abbas's family ties and his admittedly great wealth." *Id.* at 28 [JA-571]. "The reader could arrive at a number of different conclusions." *Id.* And "the invitation . . . for the reader to form her own opinion is not libel," the Court held, but "'the paradigm of a properly functioning press.'" *Id.* (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993)).

The Court also held, in the alternative, that "[e]ven if the two questions posed by the Commentary were capable of defamatory meaning, they are statements of opinion protected by the First Amendment because they

do not contain a provably false connotation." *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). The court applied the factors set forth in *Ollman v. Evans*, 750 F.2d 970 (1984) (en banc) for distinguishing fact and opinion. It held that the rhetorical nature of the questions, the Commentary's inclusion of hyperlinks to source material accessible to the reader, and its placement in the "Arguments" section of the FP website all supported the conclusion that the questions were, if anything, opinions "protected by the First Amendment." Op. at 28 [JA-571]. In addition, the court noted that the questions posed, by their very nature, are not readily susceptible to objective proof. *Id.* at 31 [JA-574]. The Court further held that any opinions reflected in the questions were also protected by the fair comment privilege under District of Columbia law. *Id.* at 32 n.7 [JA-575].

Because "the contested statements are either not capable of defamatory meaning or are protected statements of opinion" as a matter of law, the Court concluded that Abbas had not established that he was likely to succeed on the merits and thus granted Defendants' special motion to dismiss pursuant to the Anti-SLAPP Act. *Id.* at 1–2 & n.1, 36–37 [JA-544–JA-545, JA-579–JA-580].

Although the district court's legal rulings established that the Complaint had failed to state a claim upon which relief can be granted, the Court chose not to rule on the merits of the Rule 12(b)(6) motion, deciding instead to deny that motion as moot given that its ruling on the Anti-SLAPP motion "dispos[ed] of the entire action." *Id*. at 2 n.1, 37 [JA-545, JA-580].

On October 25, 2013, Defendants moved for their reasonable attorneys' fees and costs pursuant to D.C. Code § 16-5504(a), which provides that the court "may" award fees to a moving party that prevails on an Anti-SLAPP motion. Abbas opposed the motion, which is currently pending before the district court.

SUMMARY OF THE ARGUMENT

The district court correctly determined that the Commentary is not actionable as a matter of law because (a) the *questions* it posed were not reasonably capable of the defamatory *assertions of fact* alleged, and (b) even if they were, they were protected expressions of opinion and fair comment. Those legal conclusions, made without reference to anything other than the text of the Commentary, supported dismissal under Rule 12(b)(6).

Those same legal determinations also supported dismissal pursuant to the D.C. Anti-SLAPP Act, as the district court concluded. Abbas does not dispute that his defamation claim falls within the purview of the Act, because it is based on speech "in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). And because the Commentary could not support a claim for defamation as a matter of law, the district court correctly concluded that Abbas could not demonstrate "that the claim is likely to succeed on the merits," as required under the Anti-SLAPP Act. *Id.* § 16-5502(b).

The district court was correct in concluding that the Anti-Slapp Act applies in this federal diversity action. The statute is substantive in nature and does not conflict with Rules 12, 41, or 56 of the Federal Rules of Civil Procedure. As multiple circuits have held and twenty years of experience with anti-SLAPP litigation in the federal courts demonstrate, an Anti-SLAPP statute may be readily applied alongside those provisions. There is no general conflict between the Act and the Federal Rules, particularly given the district court's determination, following multiple other courts, that the likelihood-of-success standard should be construed as equivalent to the standard for judgment as a matter of law. And there is certainly no conflict

in a case like this one, where the Complaint fails to state a claim as a matter of law.

Finally, under *Erie*, declining to apply the Act in federal diversity cases would lead to forum-shopping and the inequitable administration of the laws, because potential plaintiffs in defamation and other similar actions could avoid any of the substantive requirements of the Act, including potential liability for attorneys' fees and costs, simply by filing in federal court wherever possible.

ARGUMENT

In any defamation case, the Court must determine at the outset, as a matter of law, whether the challenged publication is actionable— whether it is reasonably capable of a defamatory meaning, whether it states actual facts about the plaintiff, and whether the challenged expression is a factual one that can be proven false. *Farah v. Esquire Magazine*, 736 F.3d 528, 534–35 (D.C. Cir. 2013). And because defamation claims implicate First Amendment concerns, this Court has emphasized that courts should "err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327 (2010) ("First Amendment standards . . . must

give the benefit of any doubt to protecting rather than stifling speech." (internal quotation marks omitted)).

It is important that the determination of legal sufficiency be made at the outset of a defamation case, "because if a suit entails 'long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails." *Farah*, 736 F.3d at 534 (citing *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)). And the Court's gatekeeping function can be performed at the outset because "unlike most litigation . . . the central event—the communication about which suit has been brought—is literally before the judge at the pleading stage." Robert D. Sack, *Sack on Defamation* § 16.2.1, 16-3 (3d ed. 2009) (collecting cases).

Applying well-settled principles, the district court correctly held that the two questions Abbas challenges cannot support a claim for defamation. For the reasons stated by the district court, and for other reasons as well, the Complaint failed to state a claim upon which relief can be granted and, for that reason, was not likely to succeed on the merits. Op. at 36 [JA-579].

I. THE COMPLAINT FAILED TO STATE A CLAIM FOR DEFAMATION

A. The Challenged Questions Cannot Reasonably Be Read as Assertions of Defamatory Facts.

By his own admission, the "two statements at issue" in this case are not statements at all, but "*questions*," which are left unanswered in the Commentary. Br. 18 (emphasis added). Abbas bases his defamation claim on the questions (1) "Are the sons of the Palestinian president growing rich off their father's system?" and (2) whether Abbas (and his brother) are "profiting at the expense of the Palestinian people and U.S. taxpayers." Br. 42, 45. The author of the Commentary, of course, did not purport to answer those questions. Abbas argues that the answers were implicit in the very act of posing the questions. Br. 3, 41–42. That theory of defamation, however, requires "careful exegesis" of the challenged publication "to ensure that imagined slights do not become the basis for costly litigation." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000).

Questions have seldom been the subject of successful defamation actions. Like statements of opinion, they are rarely amenable to interpretation as assertions of *fact* that are "susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). In fact, a question, by

its nature, is not an *assertion* at all. The publisher is only responsible for the meaning that the reader "reasonably . . . understands that [the publication] was *intended* to express." Restatement (Second) of Torts § 563 (emphasis added). And as a general matter, most people understand that someone who poses a question is not *intending* to make a statement. As a result, although a "question can conceivably be defamatory," it is only actionable if it can "be reasonably read as an *assertion* of a false [and defamatory] *fact*; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993) (emphasis in original). Multiple federal courts of appeals have considered articles that raise questions very similar to the ones raised by the Commentary, and consistently found them to be nonactionable as a matter of law.

In *Chapin*, for example, the court considered an article in the *Philadelphia Inquirer* that "pointedly questioned the finances" of a charity program that enabled participants to send care packages to troops in Saudi Arabia. *Id.* at 1091. In one challenged portion of the article, the author posed a "hard to answer" question: "Who will benefit more from the project—GIs or veteran charity entrepreneur Roger Chapin of San Diego and Falls Church, Va., the organizer of the campaign?" *Id.* at 1093–94. That ques-

tion, asking whether the plaintiff benefited financially from his charity at the expense of donors and GIs, is much like the questions Abbas challenges here.

The question, the court wrote, "is pointed, and could certainly arouse a reader's suspicion," but it "cannot be reasonably read to imply the assertion of the false and defamatory fact—pocket-lining—of which plaintiffs complain." *Id*. at 1094. Instead, it "simply provokes public scrutiny of the plaintiffs' activities." *Id*.

In another challenged portion of the article, the author observed, "it is not clear where the rest of the money goes." *Id*. at 1095 (internal quotation marks omitted). With that sentence, the court held, the author was not making an assertion that "could be false"; rather, he was "invit[ing] the public to ask." *Id*. at 1096. The court reasoned:

> This invitation, rather than a libel, is the paradigm of a properly functioning press. Again, plaintiffs argue that the question implies the answer: Chapin is a dishonest man who pockets the difference. That answer was certainly within the wide range of possibilities, which is precisely why we need and must permit a free press to ask the question.

Id.

Courts across the country have employed similar reasoning in holding that questions could not support defamation actions. In *Partington v. Bugliosi*, a book about famous criminal proceedings asked: "Had Walker's defense lawyers not *read* the theft-trial transcripts?" 56 F.3d 1147, 1155 (9th Cir. 1995) (emphasis in original). And unlike in this case, the publication proffered an answer: "Our copy had ended up in a warehouse; perhaps theirs had too." *Id.* The plaintiff in *Partington* claimed that the question was defamatory because "it implie[d] that he did not read the transcripts and that he therefore did not adequately represent his client." *Id.* The court rejected the claim because "the rhetorical device used by Bugliosi"—the question—"negates the impression that his statement implied a false assertion of fact." *Id.* at 1157. "Bugliosi's use of a question mark," the court explained, "serves two purpose[s]: it makes clear his lack of definitive knowledge about the issue and invites the reader to consider the possibility of other justifications for the defendants' actions." *Id.*

Similarly, in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, the court considered whether a question in a handbill distributed by a union was actionable. 39 F.3d 191, 195 (8th Cir. 1994). Unlike the Commentary, the handbill affirmatively stated the un-

ion's opinion that "employees of Beverly Hills Foodland are being treated unfairly" and then asked recipients: "Is Beverly Hills Foodland being discriminatory in their hiring practices in the community?" *Id.* at 195 n.4. Quoting *Chapin*, the court noted that although "opinions [and] questions do not enjoy absolute protection as such, to be actionable such statements must be 'reasonably read as an *assertion* of a false *fact*.'" *Id*. at 195–96 (emphases in original). Because the challenged portion of the handbill "was not a false statement of fact, nor could it reasonably be read as such," it could not support a defamation action as a matter of law. *Id*. at 196.

In *Phantom Touring, Inc. v. Affiliated Publications*, the allegedly libelous question—posed by a columnist who wrote about a musical-comedy version of the "Phantom of the Opera"—was: "is Hill & Company trying to score off the success of Andrew Lloyd Webber's 'Phantom'?" 953 F.2d 724, 729 n.10 (1st Cir. 1992). Again, this resembles the inquiry posed by the Commentary, which asked whether Abbas was enriching himself due to his father's position. The court in *Phantom Touring* noted that the question "was posed rhetorically" and held that, at most, it "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact." *Id*. at 729–30.

Numerous other courts have reached the same conclusion with respect to defamation actions based on questions. *See, e.g., Adelson v. Harris*, __ F. Supp. 2d __, 2013 WL 5420973, at *2, *17-18 (S.D.N.Y. Sept. 30, 2013) (use of "rhetorical question" among other factors negated suggestion that author's description of donor's money as "'dirty'" and "'tainted'" implied "an expression of fact"); *Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2010 WL 3023805, at *3 (D. Colo. July 30, 2010) ("The question does not imply the existence of a fact that can be proven to be true or false, and thus, cannot be defamatory."), *aff'd*, 521 Fed. App'x 640 (10th Cir. 2013); *Sigur v. Emerson Process Mgmt.*, No. 05-1323-A, 2007 WL 1891124, at *5 (M.D. La. July 2, 2007) ("rhetorical questions" did "not imply any underlying fact"); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (statement in the form of a "rhetorical question" was not "an assertion of objective fact" and "not capable of being proven true or false"); *Eisenstein v. WTVF-TV*, 389 S.W. 3d 313, 321 (Tenn. Ct. App. 2012) (question was "'not equivalent to a direct charge'" but rather "invite[d] an answer of 'yes,' 'no,' or 'I don't know'") (citation omitted).

Here, as in *Chapin, Partington, Beverly Hills Foodland, Phantom Touring*, and similar cases, the portions of the Commentary upon which Abbas's

defamation claim relies are questions. Those questions (did Abbas "grow[] rich off [his] father's system," and did he "enrich[] himself at the expense of Palestinians . . . and . . . U.S. taxpayers?") are legally indistinguishable from the questions found nonactionable in *Phantom Touring* (did the plaintiff "score off the success" of Andrew Lloyd Webber's musical) and *Chapin* (did the plaintiff "benefit" personally from his charity).

Abbas neither cites these cases—which were relied upon by the district court—nor attempts to distinguish the legal principles upon which they rely. Instead, he bases his argument that the questions at issue imply defamatory meaning on two Georgia state court decisions that do not address questions at all. Br. 44–45. Unlike the cases collected above, the Georgia cases simply state the general rule that defamatory meaning can arise by implication. Abbas fails even to address the circumstances in which *questions* can reasonably be understood as assertions of false facts.[1]

[1] Abbas also suggests that *Chapin*, *Partington*, *Beverly Hills Foodland*, and *Phantom Touring* should be discounted because some involved decisions on motions for summary judgment. Br. 27. The procedural posture, however, does not change the fact that each case was decided on legal grounds, which are as applicable on a motion to dismiss as they are at summary judgment.

Instead, Abbas argues simply that "[p]osing such questions about a businessman, a politician, or even a judge is *too serious to ignore*." Br. 46 (emphasis added). To the contrary posing such questions is too important to sanction. As the court explained in *Chapin*, "invit[ing] the public to ask . . . rather than a libel, is the paradigm of a properly functioning press." 993 F.2d at 983.

Abbas even goes so far as to claim that posing a question is *more defamatory* than asserting an answer, because "posing such a serious allegation as a mere question encourages the reader into believing it even more." Br. 45. As a result, he maintains that unless the questioner can "prove[]" the worst possible answers to some degree of unspecified certainty, the questions "should not to be published." Br. 48.

As the district court held, "the questions posed in the Commentary cannot reasonably be read to imply" any of the answers that Abbas suggests. Op. at 27 [JA-570]. To the contrary, the Commentary outlines facts from which a reader could formulate a "wide range" of answers to the questions it poses. On the one hand, the Commentary presents facts from which a reader might conclude that Abbas earned his success: he holds "a degree in civil engineering from Washington State University," "worked

for a variety of Gulf contracting firms from the 1980s until the mid-1990s," and "return[ed] to Ramallah *in 1997*"—eight years before his father became the Palestinian president—"to launch a business *of his own*." Defs.' MTD Ex. A [JA-024–JA-025] (emphases added). The Commentary includes hyperlinks to source materials that provide additional support for the proposition that Abbas earned his success—hyperlinks that Abbas himself contends include material that "do not even remotely support the libel." Br. 53. For example, the Commentary links to a "Reuters report" that "state[s] that USAID confirmed that 'family ties were not a consideration' [in obtaining USAID contracts] and the contracts were won through 'full and open competitive bidding.'" Compl. ¶ 26 [JA-012].

On the other hand, the Commentary included facts that would support a belief that Abbas received some benefit, of varying degrees, from his relationship to the Palestinian President. A reader might conclude, for example, that Abbas's father introduced him to certain legitimate business opportunities, but that Abbas, a well-educated and experienced businessman, capitalized on those opportunities on his own merit. Or a reader might be inclined to assume that there was a greater degree of favoritism.

That there are several possible answers to the questions underscores the point. By posing questions rather than making assertions, and by making the sources available to the reader, the Commentary leaves it to the reader to formulate his own answer. *See Chapin*, 993 F.2d at 1094.

The Commentary certainly did not assert as a fact the defamatory answer that Abbas has urged upon the Court—that he is "wrongfully and possibly criminally getting rich off of his 'father's system,'" Opp. to Defs.' MTD at 6–7; Opp. to Defs.' Anti-SLAPP MTD at 15 [JA-435], or, as he puts it in his Brief on appeal, that he is a "thief" who "is guilty of having stolen from the Palestinians and U.S. taxpayers,"[2] Br. 9, 41. The Commentary did

[2] There would be nothing defamatory about saying that Abbas had grown rich off a system set up by his father or "at the expense of" Palestinians or Americans, unless there were an accusation of improper or criminal conduct by Abbas. Implicitly recognizing that fact, Abbas repeatedly characterizes the Commentary as accusing him of criminal conduct. *See, e.g.*, Br. 3 ("false accusation of stealing from U.S. taxpayers and the Palestinian people"), Br. 9 ("implication that Mr. Abbas is guilty of having stolen from the Palestinians and U.S. taxpayers"), Br. 41 (implication that Abbas is a "thief, wrongfully profiting at the expense of the Palestinian people and U.S. taxpayers"). The Commentary cannot reasonably be understood to make such a charge.

not even mention any possibility of "theft" or "stealing." That possibility was not even presented in the form of a question.[3]

The questions posed in the Commentary were more modest. In the district court's words, they "invite[d] the reader to form her own judgments regarding the relationship between Abbas's family ties and his admittedly great wealth." Op. at 28 [JA-571]. And "the invitation in the Commentary for the reader to form her own opinion," the Court concluded, "is not libel." *Id*.

In sum, the district court was correct in ruling that the questions posed did not imply the defamatory meanings alleged, and in recognizing that "[t]he First Amendment is served not only by articles . . . that purport to be definitive but by those articles that, more modestly, *raise questions* and prompt investigation or debate." *Ollman*, 750 F.2d at 983 (emphasis added).

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[3] Not only did charges such as "stealing," "theft," and "nepotism" not appear in the Commentary, they also cannot be found in the Complaint, either of Abbas's opposition briefs in the district court, or in the district court's opinion. That Abbas has had difficulty defining what defamatory assertions he contends these questions imply further underscores that they are nonactionable.

B. The Challenged Portions of the Commentary are at Most Implicit Opinions Based on Disclosed Facts.

The district court was also correct in concluding, in the alternative, that even if the two questions could be said to imply anything by way of an answer, what would be implied would be the author's subjective opinion, not any provably false assertion of fact. Op. at 28 [JA-571] (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). The district court correctly applied the multi-factor test this Court articulated in *Ollman* to distinguish nonactionable expressions of opinion from actionable assertions of fact. *See Moldea v. New York Times Co.*, 22 F.3d 310, 313–15 (D.C. Cir. 1994). Those factors include the language used, the context of the language, and the extent to which the language is verifiable (*i.e.*, capable of being proven true or false). *Ollman*, 750 F.2d at 979. Recently, this Court emphasized that "[c]ontext includes not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar works." *Farah*, 736 F.3d at 535 (internal quotation marks omitted). Each of the *Ollman* factors supports the district court's ruling.

First, as in *Ollman*, the challenged portions of the Commentary use "questions" and "interrogatory language." *Ollman*, 750 F.2d at 983. Such language "put[s] the reader on notice that what is being read is opinion." *Id*. In *Phantom Touring*, for example, the court observed that the allegedly libelous portion of the writing "was posed rhetorically" as a question, and therefore, at most, it "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact." 953 F.2d at 729–30.

Second, like the article in *Ollman*, which appeared on the Op-Ed page of the *Washington Post*, the Commentary appears on the "Arguments" page of FP's website, which describes itself as "[p]olemical, controversial, and powerful," providing "timely insight on stories making headlines around the world." Op. at 29 [JA-572]; *cf. Ollman*, 750 F.2d at 986 (noting that readers "expect that columnists will make strong statements, sometimes phrased in a polemical manner"). FP's placement of the Commentary on the electronic equivalent of the Op-Ed page signals to the "average reader" that he or she should "read the [challenged questions] to be opinion." *Ollman*, 750 F.2d at 990.

Third, the allegedly defamatory implications that Abbas seeks to draw from the language in the Commentary—of "wrongful," "improper," "corrupt" behavior, or "nepotism"—are themselves subjective terms whose meanings are vague and reflect subjective judgments. Whether someone acted "wrongfully" or "improperly" is inherently a matter of opinion, and cannot be objectively established. *See Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013) (explicit accusations that plaintiff engaged in "gross misconduct," "integrity violations," and "unethical behavior" were "not verifiable as true or false"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (statement that plaintiff was "wrong" or "intrinsically evil … not capable of verification"). Similarly, the question whether Abbas grew wealthy "at the expense of" Palestinians and U.S. citizens is so vague and subjective as to defy objective proof. If the Commentary can be read to convey such notions, they are opinions with which readers can either agree or disagree. And that, interestingly enough, is precisely what Abbas claims was true of the readers who posted comments about the Commentary. "Some agree," he notes, and "some disagree" with the author's views. Br. 46.[4]

[4] Abbas attempts to rely upon these posted comments to support his

Finally, the Commentary sets forth the facts that give rise to the author's questions—and that form the basis for any opinions that might have been implied. "When an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Partington*, 56 F.3d at 1156–57. This rule applies "no matter how unjustified and unreasonable the opinion may be." Restatement (Second) of Torts § 566 cmt. c; *see also Ollman*, 750 F.2d at 987 (setting out the facts "signalled to the reader" that "the [questions] represent[] a characterization arising from the [author's] view of the facts.").

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view of what the Commentary was understood to mean. But the comments are not part of the record and would not be relevant to the purely legal question presented by the motion to dismiss—"whether a communication is capable of bearing a particular meaning." Restatement (Second) of Torts § 614 & cmt. b. Only if the court answers that question in the affirmative is there a fact question as to whether the communication was "so understood by its recipient." *Id.* Evidence as to how readers in fact understood the Commentary might be admissible on the latter question; it is not relevant to the legal question presented by a motion to dismiss. *Id.*; *see also Farah*, 736 F.3d at 537 (holding that reactions of particular readers are irrelevant to the court's threshold legal inquiry).

In this case, the Commentary provides the facts that give rise to the question whether the Palestinian leader's family members had "grow[n] rich off their father's system" or "enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers." For example, the Commentary recounts that (a) one company owned by a holding company Abbas chaired, Falcon Electrical Mechanical Contracting Company, received a $1.89 million award from USAID to build a sewage system in the West Bank town of Hebron; (b) another company for which Abbas serves as managing director, First Option Project Construction Management Company, was awarded nearly $300,000 in USAID funds between 2005 and 2008 for public works projects; and (c) Tarek Abbas's "principal enterprise," Sky Advertising, "received a modest grant of approximately $1 million in USAID funds to bolster public opinion of the United States in the Palestinian territories." Defs.' MTD Ex. A [JA-025]. The Commentary also notes that Falcon's "website suggests that it does a great deal of public works projects, such as road construction and school construction, on behalf of the Palestinian Authority." *Id.* In other words, a significant amount of the revenue of Abbas's companies comes from "regular Palestinians"

and "U.S. taxpayers." As the district court properly observed, Abbas did not dispute these facts, or any others in the Commentary.[5]

The Commentary, moreover, provided readers with direct access to the source material it summarized. Abbas himself contends that these sources validate his perspective. But that only underscores the main point—that the reader was fully equipped to agree or disagree with any opinions that might have been implied. Under these circumstances, any conclusion drawn from those facts is protected. *See Partington*, 56 F.3d at 1156–57; *Farah*, 736 F.3d at 739–40; *see also Adelson*, __ F. Supp. 2d __, 2013 WL 5420973, at *12–15 (hyperlinks properly disclosed facts relied upon for

[5] Abbas seems to suggest that he did in fact dispute them. *See* Br. 42. This is simply not so. In the district court Abbas maintained emphatically that those facts were "not the basis for Plaintiff's libel claim," Opp. to Defs.' MTD at 10; Op. at 6 n.3 [JA-549]. Indeed, after FP and Schanzer in their motions to dismiss set forth why none of the facts the Complaint addressed were materially false and/or of and concerning Abbas, Abbas's response said they were "barking up the wrong tree" and trying to "divert attention from the *actual* allegations of libel" by addressing "*strawman* supporting allegations." Opp. to Defs.' MTD at 12 (emphases added). Before the district court, Abbas quibbled only with with the statement that Falcon received a $1.89 million from USAID, asserting that Falcon only received $872,578 of the $1.89 million that was awarded because the project "was terminated . . . when Hamas took over the Palestinian Legislative Council" in 2006. Compl. ¶ 27 [JA-012]. Even now, Abbas fails to specify any materially false statement of fact, much less explain in what respect it is false.

opinions in challenged publication); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999) (providing "a hyperlink for immediate access to such articles" supporting an internet posting "adequately disclosed the facts underlying the opinion expressed"); *Sandals Resorts Int'l Ltd. v. Google Inc.*, 925 N.Y.S.2d 407, 415 (App. Div. 2011) (hyperlinks constitute disclosure of facts supporting opinion).

For all of these reasons, if any answers were implied to the Commentary's questions, the answers would be protected opinions.

C. The Challenged Portions of the Commentary are Protected by the District of Columbia's Fair Comment Privilege.

District of Columbia law is even more protective of expressions of opinion than the First Amendment. Its "fair comment" privilege protects an expression of opinion even if the facts upon which that opinion is based are not disclosed "[s]o long as the facts are available to the public." *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. App. 1965). Here, as explained above, the facts upon which the Commentary's questions are based were disclosed, and were readily available to the public at the click of a mouse. Thus, the fair comment privilege provides an independent basis for affirmance.

D. The Complaint Fails Plausibly To Allege Actual Malice.

There is an additional reason, argued below but not reached by the district court, why the Complaint failed to state a claim. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Allegations that "are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Yet conclusions are all that Abbas alleged to satisfy his burden of pleading fault. The Complaint failed adequately to allege actual malice, which Abbas must prove as a public figure, or even to allege negligence, the minimum showing of fault required of a private figure.

As the district court held, Abbas is a limited purpose public figure. Op. at 17 [JA-560]. A person is a limited purpose public figure if there is a pre-existing public controversy in which he or she has played a non-trivial role and the alleged defamatory statements are germane to the person's participation in the controversy. *Waldbaum v. Fairchild Publn's, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980).

As to the first factor, Abbas concedes that there is a "public controversy concerning allegations of corruption within the Palestinian Authority." Br. 50. He argues, however, that that controversy did not extend to his own wealth, and that Schanzer manufactured that controversy by testifying before Congress and writing the Commentary. Br. 50.

Articles referenced in the Complaint, however, and other publicly available historical articles attached to Defendants' motions, show that the wealth of President Abbas and his family, including Abbas, was the subject of public scrutiny for many years before the Commentary was published. The press has long reported on Abbas's business success,[6] and that he has simultaneously played a prominent role in Palestinian political affairs, in-

[6] *See, e.g.*, Defs.' MTD Exs. C, D [JA-051–JA-052, JA-056–JA-057]; Jones Decl. Ex. 11 [JA-272] ("Yasser Abbas . . . is a leading Arab businessman in the region. He is chairman of the Falcon Group, which owns Falcon Telecom and Falcon Tobacco . . . "); Ex. 14 [JA-281] ("[Abbas] struck the carcinogenic equivalent of gold early this decade when he obtained a monopoly on the distribution of American cigarette brands such as Lucky Strike, Kent and Viceroy in the West Bank and Gaza."); Ex. 13 [JA-276] ("For Abbas, the cigar [he smokes] signifies profits, for he is the local distributor of the British-American Tobacco PLC (BTI), and selling these products is one of the most profitable businesses in the Palestinian Authority.").

cluding regularly serving as a political emissary for his father abroad.[7] Moreover, by the late 1990s both the press and Middle East analysts began raising questions about whether there was a connection to his political lineage.[8]

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[7] *See, e.g.*, Jones Decl. Ex. 15 [JA-283] ("Yasser Mahmoud Abbas who handed His Highness a written message from President of the Palestinian National Authority Mahmoud Abbas dealing with means of boosting bilateral ties, regional and international affairs"); Ex. 17 [JA-287] ("Yasser Abbas, acting as an emissary of his father, met with senior officials and two cabinet ministers [in Canada] to push for the speedy resumption and expansion of aid . . . ."); Ex. 18 [JA-290] ("In October 2008, Yasser Abbas, the Special Envoy of the Head of Palestinian National Authority Muhammad Abbas visited Kazakhstan.").

[8] Indeed, unlike the Commentary at issue here, many commentators assumed, rather than merely questioned, the existence and impropriety of such a connection. *See, e.g,* Jones Decl. Ex. 21 [JA-293] (*The New York Post* reported in 1998 that "[e]very industry in the PA-controlled areas is a monopoly controlled by a[ ] [Yasser] Arafat henchman . . . electronics are controlled by Yasser Abbas . . ."); Ex. 22 [JA-299] (An academic journal in 1999 discussed Mahmoud Abbas as a potential successor to Arafat and noted "[h]is vast new residences in Gaza and Ramallah have not helped quell the widespread suspicions of corruption concerning him and his children"); Ex. 23 [JA-334] (A 2002 law review article observed: "These monopolies also filter down to the children of Arafat confidantes. For instance, Paltech, an importer of consumer electronic entertainment (such as television and VCRs) is owned by Yasser Abbas. . . ."); Ex. 24 [JA-343] (*The Miami Herald* reported in 2003 that "With PA financial help, Yasser Abbas, the prime minister's son, joined the gravy train. He has gained control of the electronics industry, even though he's a Canadian citizen who lives in Ramallah only a few months a year."); Ex. 27 [JA-353] (Reuters reports in 2009: "U.S. support for President Abbas, including hundreds of millions of dol-

Second, Abbas has played a significant role in the controversy. Abbas has given interviews regarding his wealth, claiming that "he's a self-made millionaire," and "complain[ing] . . . that he had never received any privileges due to the fact that he's the son of the PA president." Defs.' MTD Ex. I [JA-045–JA-046].[9] At the same time, Abbas has long publicly touted his access to Palestinian Authority officials and acted as a kind of de facto spokesperson for his father and his government.[10]

As the district court concluded, "Abbas cannot reasonably claim that he has no role in the controversy apart from 'simply defending himself'"

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lars in aid for Palestinians, and the business dealings of his sons and closest advisers are sensitive issues in the Palestinian territories . . . .").

[9] *See also* Jones Decl. Ex. 13 [JA-277] ("But Abbas is quick to deny that his parentage helped him gain financial advantage. 'I never received any money from the PLO or the Palestinian Authority, not a penny,' he says."); Ex. 6 [JA-238] ("I can claim that all my projects that I take are competitive bidding. Nobody has any privilege to me, personally, to come and tell me, 'I will give you this', or 'I will give you that.'")

[10] *See, e.g.*, Jones Decl. Ex. 13 [JA-277] (Abbas "even advises on the appointment of some ministers. . . . Asked if his views on free markets are shared by the new Palestinian chairman, [Yasser Abbas] says: 'Yes. You can consider these statements to be his.'"); Ex. 6 [JA-267] (Abbas quoted as saying, "I know for the President's point of view that he gives the authority to the Prime Minister"); *id.* [JA-253] ("I will call my friend in the Energy Authority, the PEA, and I can get exactly the number (amount) of the damage . . . .").

against Schanzer. Op. at 18 [JA-561]; *cf. Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (holding that the plaintiff "became a public figure through his activities," partly through "voluntarily submit[ing] to numerous interviews").

Third, the Commentary is obviously germane to the public controversy surrounding the source of Abbas's wealth. Because Abbas is a public figure, he had the burden of pleading that defendants acted with actual malice—that is, with knowledge of falsity or "serious doubts" about its truth. *St. Amant v. Thompson*, 390 U.S. 727, 728, 731 (1968). The Complaint, however, failed to allege any facts that could plausibly establish actual malice on the part of either Defendant. Nor did Abbas proffer any such facts in response to the motions to dismiss.

Courts in post-*Iqbal* defamation cases have made clear that boilerplate assertions of actual malice are insufficient to withstand a motion to dismiss. *See, e.g.*, *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 615-16 (7th Cir. 2013) (affirming dismissal of complaint for failure to sufficiently allege actual malice); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012) (dismissing complaint that "used actual-malice buzzwords" as "merely legal conclusions, which must be backed by well-pled facts"); *May-*

field v. NASCAR, 674 F.3d 369, 377-78 (4th Cir. 2012) (dismissing libel claim which contained only "conclusory" allegations of actual malice).

Once the complaint is stripped of the conclusory allegations of actual malice, as required by *Iqbal*, there is nothing left. Abbas argues in his Brief that none of the "sources upon which Mr. Schanzer relied . . . even remotely support the libel." Br. 53. In the Complaint, however, Abbas actually pled the opposite, alleging that "Defendant Schanzer only used sources that supported his point of view." Compl. ¶ 12 [JA-010]. That inconsistency aside, this would not be a plausible allegation of actual malice even if it had been asserted in the Complaint. It is entirely conclusory, and in any event, courts have uniformly held that providing readers access to supposedly contrary sources is probative of the *absence* of actual malice. *Lohrenz v. Donnelly*, 350 F.3d 1272, 1286 (D.C. Cir. 2003); *Tavoulareas v. Piro*, 817 F.2d 762, 797 (D.C. Cir. 1987) (en banc).

Throughout this case, Abbas has advanced arguments about Dr. Schanzer's motives and other activities, but those arguments are not remotely probative of actual malice. He argues, for example, that Dr. Schanzer is on "a mission to criticize the Palestinian leadership," Br. 3, but that is not an allegation of knowledge of falsity or reckless disregard for the

truth. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510–11 (1991) (explaining that "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will" but requires the "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity"); *Lohrenz*, 350 F.3d at 1284 ("Evidence that the publishers . . . were on a mission to reinstate the ban against women being assigned to combat positions in the military does not suffice to show actual malice.").

The Complaint's theory of malice as to Schanzer focused on two instances in 2011 and 2012 in which Schanzer was invited by a congressional committee to join other Middle East experts to discuss the same subject-matter as the Commentary. Schanzer suggested that, given its oversight of foreign aid, Congress should investigate the questions being raised about the Abbas family. *See* Compl. ¶¶ 57-76 [JA-017–JA-019] ("[T]he FP article and Defendant Schanzer's 9/4/11 testimony establish actual malice on the part of Defendant Schanzer."). But Abbas has not specified anything in that testimony that is probative of knowledge of falsity or reckless disregard in this case, and indeed he now concedes that "[t]his action does not involve that testimony." Br. 2. His Brief points to a recent book by

Schanzer that was published a month *after* the district court's decision in this case, so was nowhere mentioned in his Complaint or in the proceedings in the district court. Br. 55. But even now Abbas does not specify anything in the book that supports an allegation of knowledge of falsity or reckless disregard for the truth.[11] Nor could such a book have any bearing on the author's attitude toward the truth of a Commentary written a year and a half earlier. *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996).

In sum, for the reasons stated by the district court, and for the additional reason that the Complaint did not plausibly allege fault,[12] the Complaint in this case did not state a claim upon which relief can be granted. It was therefore subject to dismissal under Rule 12(b)(6).[13] And for the rea-

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[11] The book does not even mention Yasser Abbas. Rather it is critical of his father.

[12] The Complaint does not even allege facts supporting an inference of negligence, the minimum level of fault required of a private figure.

[13] Even if this Court decides the Anti-SLAPP Act does not apply here, it could affirm the judgment below on the ground that the Complaint fails to state a claim under Rule 12(b)(6). *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995).

sons stated below, it was also subject to dismissal under the Anti-SLAPP Act.

II. THE DISTRICT COURT CORRECTLY APPLIED THE ANTI-SLAPP ACT TO DISMISS THIS CASE.

A Complaint that does not state a claim upon which relief can be granted is obviously not "likely to succeed on the merits." The district court was, therefore, correct in concluding that the "special motion to dismiss" under the D.C. Anti-SLAPP Act should be granted—unless, contrary to the district court's conclusion, the Anti-SLAPP Act does not apply at all in this diversity case.

The district court was plainly correct in applying the Anti-SLAPP Act. For almost two decades, numerous federal courts have applied anti-SLAPP statutes similar to the D.C. law. Those courts have held that anti-SLAPP statutes do not conflict with the Federal Rules, and they have readily applied those statutes without any conflict, as the district court did here. At bottom, Abbas's argument is predicated upon what is essentially a facial challenge to his own hypothetical and erroneous construction of the anti-SLAPP law. And in making these arguments, Abbas not only ignores the

manner in which the law has been construed and applied by the district court and other courts; he also misconstrues the Federal Rules themselves.

A. The District Court Correctly Construed the Anti-SLAPP Act to Apply in This Federal Diversity Case

1. The District of Columbia Anti-SLAPP Act

The Anti-SLAPP Act was enacted to "incorporate[] substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Report of the D.C. Committee on Public Safety and the Judiciary, Report on Bill 18-893, Anti-SLAPP Act of 2010, at 1, Nov. 18, 2010; Jones Decl. Ex. 37 [JA-388]. The Act "incorporates substantive rights," *id.*, provides what are indisputably substantive criteria to define the type of claim that is subject to its provisions, and places the burden on the defendant to make a prima facie showing that its threshold criteria are met.

Specifically, the Act, which the D.C. Council characterized as akin to a qualified immunity, applies to claims arising out of "an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). Such acts include: (1) statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial

body, or any other official proceeding authorized by law," *id.* § 16-5501(1)(A)(i); (2) statements made in "a place open to the public or a public forum in connection with an issue of public interest," *id.* § 16-5501(1)(A)(ii); and (3) "expression[s] or expressive conduct that involve[] petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1)(B). The district court held that the Commentary satisfied all three definitions, Op. at 15–20 [JA-558–JA-563], and Abbas does not dispute that determination.

Instead of addressing the statute as enacted, Abbas attacks FP and Schanzer for supposedly not being "normal, middle-class and blue-collar Americans." Br. 1. Apart from being irrelevant, this line of argument is misguided, for this case is exactly the type of lawsuit for which the Act was enacted.

First, even Abbas does not dispute that this case fits all of the possible statutory criteria for a "SLAPP" suit. Given that both the Commentary and Schanzer's congressional testimony addressed issues of foreign policy that have been at the forefront of domestic and international debate for decades, it is hard to imagine a case that would more clearly fit all of the statutory criteria.

Moreover, the D.C. Council understood that a "SLAPP suit" is one filed "to muzzle speech or efforts to petition the government on issues of public interest" and "achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Jones Decl. Ex. 37 at 1 [JA-388]. And although it is unnecessary to demonstrate such a motive in a particular case, there is ample evidence that this lawsuit is aimed at silencing a "provocative" critic from testifying before Congress, publishing opinion articles, and even writing books that "criticize the Palestinian leadership"—not just Abbas, but his father as well. Br. 3, 55. Indeed, Abbas is quite direct in asserting that, unless wrongful conduct can be "proven," questions such as the ones raised here "should not be published." Br. 19, 48. And as the district court noted, Abbas has a history of using his wealth to sue his and his father's critics for defamation, Op. at 3–4 [JA-546–JA-547], which is exactly the pattern of conduct the Act was intended to address.

To effectuate its purposes, the Act includes a fee provision in § 16-5504(a) as a potential remedy for a lawsuit that fits the substantive criteria for a "SLAPP" suit. It is well-settled that fee provisions are substantive for *Erie* purposes, and Abbas does not argue to the contrary. *See Cohen v. Bene-*

ficial Indus. Loan Corp., 337 U.S. 541, 555–56 (1949) (fee-shifting state law to a prevailing defendant in a shareholder derivative suit applied in federal court).

2. The Governing Analysis

To determine whether a federal rule or state law applies in a federal diversity action, a court must first ask whether the federal rule "answers the question in dispute," *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010), or whether instead the two "'can exist side by side, . . . each controlling its own intended sphere of coverage without conflict.'" *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1108 (D.C. Cir. 2012) (ellipses in original) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)); *see also Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987) ("The initial step is to determine whether [the federal rule] is 'sufficiently broad' to cause a 'direct collision' with the state law . . . thereby leaving no room for the operation of that law." (quoting *Walker*, 446 U.S. at 749–50)). In considering whether the federal rule and state law collide, the reviewing court should interpret the federal rule "with sensitivity to important state interests" and "to avoid conflict with important state regulatory policies." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 n.7, 437 n.22 (1996).

Where the federal rule and the state law do not conflict, the court proceeds to the second step of the analysis, applying the state law, under *Erie*, if the law is "'outcome-determinative' in the relevant sense"—*i.e.*, if declining to apply the state law would lead to forum shopping or inequitable administration of the laws. *Burke*, 685 F.3d at 1108–09 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). Where, however, the federal rule and the state law cannot be reconciled, "the Federal Rule or statute governs, 'unless it exceeds statutory authorization or Congress's rulemaking power.'" *Id.* at 1108 (quoting *Shady Grove*, 559 U.S. at 398).

a. The Anti-SLAPP Act Does Not Conflict With Any Federal Rule or Law.

The District of Columbia's own versions of Rules 12 and 56 exist "side by side" with its Anti-SLAPP Act without any apparent conflict, and the same holds true with respect to the Act and their nearly identical counterparts in the Federal Rules. Four federal Circuits have held that similar anti-SLAPP statutes apply in federal court, because those statutes do not conflict with any federal rule or law. *See Godin v. Schencks*, 629 F.3d 79, 89 n.16 (1st Cir. 2010); *Liberty Synergistics Inc. v. Microflo LTD*, 718 F.3d 138, 148 (2d Cir. 2013); *Hilton v. Hallmark Cards*, 599 F.3d 894, 901-02 (9th Cir. 2010);

Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 170 (5th Cir. 2009). Rather, the Act simply supplements the Federal Rules "to provide added protections beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Godin*, 629 F.3d at 88; *see also United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999). Indeed, for almost twenty years numerous federal jurisdictions have applied state anti-SLAPP statutes.[14]

Abbas primarily argues that the Act conflicts with the Federal Rules because, he asserts, a court "must grant" an Anti-SLAPP motion "even though the plaintiff has or can raise a genuine issue of material fact on its

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[14] *See also Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011) (if satisfied, New York statute would apply in federal court); *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (Oregon statute); *Tennenbaum v. Ariz. City Sanitary Dist.*, 799 F. Supp. 2d 1083 (D. Ariz. 2011) (Arizona statute); *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271 (N.D. Ga. 2003) (Georgia statute); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797 (N.D. Ill. 2011) (Illinois statute); *Containment Techs. Group Inc. v. Am. Soc. of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549 (S.D. Ind. Mar. 26, 2009) (Indiana statute); *Russell v. Krowne*, No. DKC 2008-2468, 2010 WL 2765268 (D. Md. July 12, 2010) (Maryland statute); *Balestra-Leigh v. Balestra*, No. 3:09-CV-551-ECR-RAM, 2010 WL 4280424 (D. Nev. Oct. 19, 2010), *aff'd on other grounds*, 471 F. App'x 636 (9th Cir. 2012) (Nevada statute); *Bible & Gospel Trust v. Twinam*, No. 1:07-CV-17, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (Vermont statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (Washington statute).

claim." Br. 22; *see also* Br. 24 ("requiring the plaintiff to prove that he is likely to prevail" is "obviously a significantly different showing from identifying material factual disputes . . ."). But the Act provides no such thing. As construed by the district court and numerous other courts, anti-SLAPP laws do not conflict with any federal rule or law.[15]

1. The Act does not conflict with Rules 12 or 56 or their standards. The district court construed the "likelihood of success" standard, as every other court has, to be "comparable to that used on a motion for judgment as a matter of law," *i.e.* "a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Op. at 20–21 [JA-563–JA-564] (quoting *Price v. Stossel*, 620 F.3d 992,

[15] At various points, Abbas relies upon the statement, taken from Justice Scalia's plurality opinion in *Shady Grove*, that "[i]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." Br. 4 (quoting *Shady Grove*, 559 U.S. at 410); *see also* Br. 32 (same). But that statement is irrelevant in determining whether a conflict exists; it pertains instead to whether a federal rule that *does* conflict with a state law would violate the Rules Enabling Act. And the statement does not help Abbas even in the Rules Enabling Act context, because it did not command a majority of the Court. *See Shady Grove*, 559 U.S. at 424–25 (Stevens, J., concurring); *id.* at 448 & n.7. As explained below, the substantive nature of the affected state law is central to the *Erie* analysis.

1000 (9th Cir. 2010)). That standard "mirrors" Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The district court properly looked to analogous California case law to construe the Act, noting that the D.C. Council itself had looked to the California anti-SLAPP statute as a model for the Act. The California statute, like the D.C. Act, requires a two-step inquiry; the second step of the California law requires the plaintiff to establish "a probability that the plaintiff will prevail on the claim." Cal. Code Civ. P. 425.16(b)(1); *Oviedo v. Windsor Twelve Properties*, 151 Cal. Rptr. 3d 117, 128 (Cal. App. 2d Dist. 2012) ("The probability of prevailing standard is satisfied when the party opposing an anti-SLAPP motion presents admissible evidence demonstrating . . . the existence of disputed material facts.").

Another D.C. district court decision recently construed the Act's "likelihood of success" provision the same way as the district court below, *see Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249, 956–57 (D.D.C. 2013) (Walton, J.), and so too has the District of Columbia Superior Court. *See Mann v. National Review, Inc.*, No. 2012-CA-008263-B (D.C. Sup. Ct., July 19, 2013); *Payne v. District of Columbia*, No. 2012-CA-6163-B (D.C. Sup. Ct. May 28, 2013); *The Washington Travel Clinic, PLLC v. Kandrac*, 2013-CA-

003233-B (D.C. Sup. Ct. Dec. 16, 2013).[16] In addition, the First Circuit implicitly did the same with respect to Maine's anti-SLAPP statute, noting that it "is a relatively young statute . . . and there is no reason to think the state courts would construe [it] so as to be incompatible with the Seventh Amendment" requirement that a jury resolve material fact disputes. *Godin*, 629 F.3d at 90 n.18. Abbas wholly ignores both the district court's construction of the Act and its application here.

Were this Court to construe the Act the same way—which it should—there obviously would be no conflict between the Act's "likelihood of success" standard and Rules 12 and 56. To the contrary, the Act's standard would simply provide certain additional substantive rights—in this case, attorneys' fees—to a SLAPP defendant, to be adjudicated under a standard that mirrors Rule 56.[17]

But even if the D.C. Court of Appeals were to construe the statute as imposing a higher pleading standard for a plaintiff to survive an anti-

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[16] These District of Columbia Superior Court cases are attached in the Addendum.

[17] The Anti-SLAPP Act also mirrors the standard provided under Federal Rule 12(d) for motions that include materials outside the pleadings, which are converted to Rule 56 motions.

SLAPP motion—which would be unnecessary in light of the fact that Abbas cannot even state a claim under traditional standards—that would make no difference. Federal courts routinely apply heightened pleading and evidentiary standards provided by state law for a specific category of cases. *See, e.g.*, *Burke*, 685 F.3d at 1108 (applying D.C. rule requiring expert testimony in certain cases in federal diversity action); *Milam v. State Farm Mut. Auto. Ins. Co.*, 972 F.2d 166, 170 (7th Cir. 1992) (explaining that "where a state in furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim," the rule "will be given effect in a diversity suit as an expression of state substantive policy").[18]

These cases simply reflect the well-settled understanding that neither Federal Rule 12 nor Rule 56 is so broad as to preclude a heightened pleading requirement in specific categories of cases. Indeed, the Private Securi-

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[18] *See also Weasel v. St. Alexius Med. Ctr.*, 230 F.3d 348, 351–53 (8th Cir. 2000) (applying North Dakota expert affidavit requirement, "designed to minimize frivolous claims," in federal diversity action); *Chamberlain v. Giampapa*, 210 F.3d 154, 162–63 (3d Cir. 2000) (applying New Jersey affidavit of merit statute in federal diversity action); *Ellingson v. Walgreen Co.*, 78 F. Supp. 2d 965, 969 (D. Minn. 1999) (applying Minnesota expert affidavit requirement in federal diversity action); *Williams v. United States*, 754 F. Supp. 2d 942, 954 (W.D. Tenn. 2010) (applying Tennessee's expert affidavit requirement in federal diversity action).

ties Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, is a federal version of such an additional pleading standard under the Federal Rules, meant to apply to a discrete category of cases to prevent abusive securities lawsuits. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320–21 (2007). "Designed to curb perceived abuses of the § 10(b) private claim," the PSLRA requires a § 10(b) plaintiff to "'state with particularity facts giving rise to a strong inference'" of scienter. *Id.* (quoting 15 U.S.C. § 78u-4(b)(2)). The existence of the PSLRA "support[s] [the] conclusion that Congress, in approving Rules 12 and 56, did not intend to preclude special rules designed to make it more difficult to bring certain types of actions where state law defines the cause of action." *Godin*, 629 F.3d at 91.

Consistent with this understanding, similar anti-SLAPP statutes in other states have defined various different standards, including those lower, higher, and equivalent to "likely to succeed," but none has been construed to require judicial determination of material fact disputes. *See, e.g.*, *id.* at 90; *Oviedo,* 151 Cal. Rptr. at 128; *Nexus v. Swift*, 785 N.W.2d 771, 782 (Minn. App. 2010) ("ultimate determinations of fact are not required by the clear-and-convincing standard set forth in" the Minnesota anti-SLAPP act);

Lee v. Pennington, 830 So. 2d 1037, 1043 (La. App. 2002) (A plaintiff is "only required to show a 'probability of success' of his claim before a jury (i.e., the merits)" under the Louisiana anti-SLAPP act).

Abbas quotes extensively from the dissent from the denial of rehearing in *Makaeff v. Trump University*, but that opinion rested on the erroneous view that the California anti-SLAPP statute requires "a showing considerably more stringent than identifying material factual disputes." *Makaeff*, 736 F.3d 1180, 1189 (9th Cir. 2013). As the prevailing opinion denying rehearing in *Makaeff* correctly pointed out, the California Supreme Court has expressly held to the contrary, construing its anti-SLAPP law to provide for an early "'summary-judgment-like'" motion. *Id*. at 1182-83 (quoting *Taus v. Loftus*, 40 Cal. 4th 683, 714 (2007)). The district court's analysis in *3M v. Boulter*, 842 F. Supp. 2d 85, 102 (D.D.C. 2012) (Wilkins, J.), likewise assumed that the Act requires an action to be dismissed even if a plaintiff demonstrates that there are genuine disputes of material fact. *Id.* Yet even in reaching that conclusion, the court acknowledged that anti-SLAPP laws that are construed to "operate[] essentially the same as Rules 12 and 56"—as the D.C. Act should be—could be applied in federal court. *Id.* at 109.

2. The Act does not conflict with the Federal Rules' discovery provisions. Abbas next argues that "Rule 12 provides the sole means of challenging the legal sufficiency of a claim before discovery commences." Br. 22. This plainly is not so. *See* Fed. R. Civ. P. 56(b) ("a party may file a motion for summary judgment at any time").

Abbas further asserts that "the anti-SLAPP Act also mandates a stay of all discovery pending the court's resolution of a motion to strike." Br. 26. Again, not so. The Act specifically provides that a plaintiff may obtain discovery provided that it "appears likely that targeted discovery will enable the plaintiff to defeat the motion" and the discovery would not be "unduly burdensome." D.C. Code § 16-5502(c)(2). This standard is consistent with the requirements of Rule 56(d) that a party may seek discovery if it shows "for specified reasons, it cannot present facts essential to justify its opposition" to a motion for summary judgment. Fed. R. Civ. P. 56(d); *see Godin*, 629 F.3d at 91 ("The limiting effect that [the Maine anti-SLAPP law] has on discovery is not materially different from the effect of Rule 12 proceedings and, in some instances, Rule 56 proceedings."). Moreover, federal courts may always restrict discovery that is unduly burdensome. Fed. R. Civ. P. 26(c)(1). Thus, multiple federal district courts in California have

granted or denied discovery to respond to anti-SLAPP motions after applying Rule 56(d), in a manner fully consistent with an analogous provision of the California statute authorizing discovery when needed. *See, e.g., Price v. Stossel*, 590 F. Supp. 2d 1262, 1271 (C.D. Cal. 2008); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1102 (C.D. Cal. 2004).

In any event, Abbas's arguments are purely speculative because he never sought any discovery, under either the Anti-SLAPP Act or the Federal Rules. Nor would any discovery have been relevant to the pure questions of law addressed in the district court's opinion. Abbas asserts that he has been denied the opportunity to "present[] himself for deposition" or "open[] up his books for inspection" to "clear his good name." Br. 54. But the Federal Rules give him no right to demand that *Defendants* take discovery of *him*. In fact, nothing prevented Abbas from presenting in his opposition to the Anti-SLAPP motion any testimony (through an affidavit) or any evidence about any of his companies that he contends would be relevant. He simply chose not to do so. Abbas's choice not to invoke the discovery provisions below precludes him from challenging the application of those provisions on appeal.

3. Dismissal with prejudice is consistent with the Federal Rules. Abbas next argues that the Act conflicts with "the Federal Rules" because it requires that a dismissal be with prejudice. Br. 28. Presumably Abbas is referring to Rule 41(b), but federal courts sitting in diversity routinely apply state laws that require dismissal with prejudice.[19] That is because Rule 41(b) simply sets "a default rule for determining the import of a dismissal" order which might otherwise be ambiguous. *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001). As Judge Friendly explained in *Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973), Rule 41 does not vest discretion to dismiss without prejudice where, as here, "[the court] must dismiss as a matter of law." *See also Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970) (en banc). As explained above, Abbas's claims fail as a matter of law, and any amendment would be futile. Abbas himself appears to recognize as much, having never sought leave to amend the Complaint. In these circumstances, there plainly is no conflict between the Act and the Federal Rules.

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[19] *See, e.g.*, *Weasel v.* St. *Alexius Med. Ctr.*, 230 F.3d 348, 351, 353 (8th Cir. 2000); *Chamberlain v. Giampapa,* 210 F.3d 154, 162-63 (3d Cir. 2000); *Ellingson v. Walgreen Co.*, 78 F. Supp. 2d 965, 969 (D. Minn. 1999); *Williams v. United States,* 754 F. Supp. 2d 942, 954 (W.D. Tenn. 2010).

4. No Seventh Amendment Issue is Presented. Finally, Abbas asserts in passing that the Act permits a judge to make findings of material fact, in violation of the Seventh Amendment. Br. 24–25. Abbas never raised any Seventh Amendment challenge in the district court, and so it "cannot be considered for the first time on appeal." *United States v. Stover*, 329 F.3d 859, 872 (D.C. Cir. 2003); *see also Byron v. Curtis of Family Hirotaka*, 519 Fed. App'x 473, 475 (9th Cir. 2013) ("We do not consider issues raised for the first time on appeal, including with respect to alleged violations of plaintiff's rights under the Seventh Amendment").[20]

In any event, in this case the district court did not resolve any disputed material facts, and for the reasons discussed previously its construction of the Act as providing a summary-judgment-like standard is plainly consistent with the Seventh Amendment. *See Tellabs*, 551 U.S. at 327 n.8 (courts may perform "gatekeeping judicial determination[s]" that "prevent submission of claims to a jury's judgment without violating the Seventh Amendment").

[20] Nor has Abbas complied with Fed. R. App. P. 44(b), requiring him to give notice to the Clerk who could in turn certify that question to the D.C. Attorney General.

Moreover, Abbas "can only succeed in a facial challenge" to the constitutionality of a statute by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.,* that the law is unconstitutional in all of its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). That plainly is not so as its application in this case illustrates. Abbas's invitation to this Court to "speculate about 'hypothetical or 'imaginary' cases" should be rejected. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quotation omitted). Finally, were there any doubt regarding the construction of the statute, this Court would be obligated to resolve that doubt to avoid any constitutional infirmity, and to construe the statute not to permit such judicial factfinding. *See Boos v. Barry*, 485 U.S. 312, 333 (1988).[21]

As the foregoing demonstrates, although Abbas seeks to portray this case as presenting a broad challenge to the Anti-SLAPP Act as a whole, this

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[21] Courts across the country have interpreted other states' anti-SLAPP acts to be consistent with a plaintiff's Seventh Amendment right (or the state constitutional analogue). *See Godin*, 629 F.3d at 90 n.18 (Maine anti-SLAPP act); *Nexus*, 785 N.W.2d at 782 (Minnesota anti-SLAPP act); *Lee*, 830 So. 2d at 1043 (Louisiana anti-SLAPP act). As the First Circuit noted in *Godin*, there is no reason to presume that the D.C. Court of Appeals would construe the Act in a way that conflicts with the Seventh Amendment. 629 F.3d at 90 n.18.

case presents a very narrow application of that Act. Indeed, the only substantive difference between the Act, as applied here, and what is provided under federal law, is the Act's provision permitting the prevailing party to seek attorneys' fees. And Abbas never contends that this fee provision conflicts with federal law or the Federal Rules. This Court thus need not even decide, once and for all, whether the Anti-SLAPP Act—in all its hypothetical applications under each of its provisions—can coexist with federal law. Rather, it need only determine that the Act and federal law do not conflict where, as here, the plaintiff (1) has failed to state a claim under Rule 12(b)(6), and (2) has not sought any discovery.[22]

b. Failure to Apply the Act Would Lead to Forum-Shopping and the Inequitable Administration of the Laws

Because the Act and the federal rules do not "directly collide," this Court next must conduct the familiar *Erie* analysis to determine whether a federal court sitting in diversity should apply state law. At a minimum,

[22] For example, in *Newsham* the Ninth Circuit first held that the California Anti-SLAPP statute should be applied in diversity cases, but only considered the two provisions of the statute that were actually relevant to the case before it. *Newsham*, 190 F.3d at 972. Two years later, in another case that required construction of the discovery provision, the Ninth Circuit addressed how *Erie* impacted that issue specifically. *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).

the fee-shifting provision of § 16-5504(a), which is the only portion of the Act that provides Appellees with something different from what they could have obtained in this case under the Federal Rules, is both indisputably substantive and "outcome-determinative."[23]

Declining to apply the statute in federal court would contravene *Erie*'s twin aims of avoiding "inequitable administration of the laws" and "forum shopping," *Hanna*, 380 U.S. at 467, as a plaintiff could avoid the requirements of the law, including any potential liability for fees and costs, simply by choosing a federal forum. *See Godin*, 629 F.3d at 92; *Newsham*, 190 F.3d at 973. Indeed, forum shopping has *already* occurred in the District as a result of the district court opinion in *3M* holding that the Act does not apply in federal diversity actions. *See Dean v. NBC*, Order at 2 (D.C.

[23] Because the Act's fee-shifting provision is substantive in nature, if this Court were to read the Federal Rules to displace that provision, such an application of the Federal Rules would be invalid under the Rules Enabling Act, and the fee-shifting provision therefore would apply in any event. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001). Abbas's reliance on Chief Judge Kozinski's concurring opinion, asserting that the California anti-SLAPP statute is procedural, does not help Abbas on this point. *See* Br. 33–35 (quoting *Makaeff v. Trump University LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring)). Chief Judge Kozinski did not consider a fee-shifting provision like the one at issue here, which is plainly substantive, and in any event, Chief Judge Kozinski's Court declined to credit his view.

Sup. Ct. June 25, 2012) (explaining that "[p]laintiffs [alleging defamation] wish to discontinue this case and pursue the same matter in Federal Court because [of the *3M* decision]").[24]

In fact, this case actually illustrates the degree to which declining to apply the Act in federal court would lead to the inequitable administration of the laws. By definition, a non-citizen plaintiff such as Abbas may always invoke federal diversity jurisdiction to sue any United States citizen in federal court. 28 U.S.C. § 1332(a)(2). Thus, under his view of the law citizens of other countries would have the unique ability to bring meritless suits for defamation against their critics who reside in the District of Columbia, without ever having to face the potential liability for attorneys' fees or assume the same evidentiary burdens that a citizen of the District has in the District's courts. Such an outcome is hardly fair, and "would directly contravene *Erie*'s aims." *Godin*, 629 F.3d at 92.

B. Abbas's Claims Were Correctly Dismissed Pursuant to the Anti-SLAPP Act.

As previously discussed, Abbas does not take issue with the district court's determination that Appellees made "a prima facie showing that the

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[24] The cited order is included in the Addendum.

claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). Furthermore, for all the reasons explained above, the Complaint failed to state a claim for defamation as a matter of law. Therefore, the district court correctly held that Abbas could not demonstrate that he was "likely to succeed on the merits." *Id.* § 16-5502(b).[25]

CONCLUSION

For the foregoing reasons, the district court's dismissal of Abbas's defamation action should be affirmed.

[25] Indeed, the judgment of dismissal may be affirmed based on Rule 12(b)(6) alone even if the Court were to hold the Anti-SLAPP Act inapplicable. *See* n.14, *supra*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kevin T. Baine, counsel for Appellee Foreign Policy Group, LLC, and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the foregoing Brief of Defendants-Appellees Foreign Policy Group, LLC and Jonathan Schanzer, is proportionately spaced, has a typeface of 14 points or more, and contains 13,979 words.

/s/ Kevin T. Baine
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Attorney for Appellee
Foreign Policy Group, LLC
Dated: April 30, 2014

CERTIFICATE OF SERVICE

I, Kevin T. Baine, counsel for Appellee Foreign Policy Group, LLC, certify that, on April 30, 2014, a copy of the foregoing Brief of Defendants-Appellees Foreign Policy Group, LLC and Jonathan Schanzer was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kevin T. Baine
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