ORAL ARGUMENT NOT YET SCHEDULED

Court of Appeals No. 14-7070

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VINCENT FORRAS, ET AL.
Plaintiffs-Appellants,

v.

IMAM FEISAL ABDUL RAUF, ET AL.
Defendants-Appellees.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
IN CIVIL CASE NO. 1:12-cv-00282

REPLY BRIEF OF PLAINTIFFS-APPELLANTS FOR REVERSAL OF THE DISTRICT COURT'S ORDER AND REQUEST FOR ORAL ARGUMENT

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GLOSSARY

"Anti-SLAPP Act" refers to the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.*

"FRCP" refers to the Federal Rules of Civil Procedure

"SLAPP" refers to a "Strategic Lawsuit Against Public Participation"

SUMMARY OF ARGUMENT

The U.S. District Court for the District of Columbia ("District Court") erroneously granted Appellees' "Special Motion to Dismiss" which was filed pursuant to the District of Columbia's Anti-SLAPP Act, D.C. Code §§ 16-5501 – 5505 ("Anti-SLAPP Act"). This motion was improperly granted because Appellees filed their Special Motion to Dismiss over a year after the 45-day statutory deadline for filing a special motion to dismiss had passed.

It is undisputed that Appellees' Special Motion to Dismiss in the District Court was not filed within the 45-day deadline provided by the D.C. Anti-SLAPP Act. The Appellees incorrectly argue that the statutory deadline for filing the special motion to dismiss was extended when the District Court entered a stay of the proceedings. However, as the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") ruled in *Sherrod v. Breitbart*, 720 F.3d 932 (D.C. Cir. 2013), a federal court does not have the authority to extend the 45-day deadline set by statute during which a defendant may file a "special motion to dismiss."

Sherrod makes clear that a federal court may alter a deadline that was established by court order or by the Federal Rules of Civil Procedure ("FRCP"), but lacks power to alter a deadline established by statute. Even though the District

Court had stayed this case, the District Court's decision was void because the Special Motion to Dismiss was not filed within the statutory deadline.

The Appellees' brief in opposition does not offer any reason to alter this conclusion. Appellees argue that the District Court should have abstained from taking jurisdiction over the case. But they still could have filed their Special Motion to Dismiss within the deadline while the decision thereon would have been stayed.

Further, as set forth in the Appellant's initial brief, the authority to award attorney's fees arises under the same D.C. Anti-SLAPP Act and that authority is dependent upon the granting of the Special Motion to Dismiss. As a result, the expiration of the deadline also affects the decision to award attorneys' fees.

Even if the Special Motion to Dismiss was filed timely, which it was not, the District Court erred in considering the Anti-SLAPP Act in federal court as it conflicts with FRCP. The Anti-SLAPP Act is plainly a procedural rule, and therefore the District Court was bound to apply and follow the FRCP instead.

Further, even if the Anti-SLAPP Act is held to be applicable in this case, Appellants had shown a likelihood of success on the merits, as already briefed but summarized below. Discovery must thus proceed; rather than cutting off Appellants' right to due process to adjudicate his claims.

Finally, the Anti-SLAPP Act is unconstitutional as a violation of the Seventh

Amendment and, contrary to the Appellees' strained arguments, this Court has no reason not to hear this argument on appeal.

For these reasons, the District Court erred in granting Appellees' Special Motion to Dismiss and this Court should respectfully reverse and remand this case with further instructions that the Special Motion to Dismiss be stricken from the record and that the D.C. Anti-Slapp Act is in violation of the Federal Rules of Civil Procedure and also unconstitutional.

ARGUMENT

I. THE ANTI-SLAPP SPECIAL MOTION TO DISMISS WAS FILED OUTSIDE OF 45-DAY PERIOD AND THUS IS TIME BARRED

It is undisputed that Appellees did not file their Special Motion to Dismiss within 45-days of the filing of this case in the District Court, which is the time limit set by D.C. Code § 16–5501.This makes this case a very simple one and this Court must respectfully reverse and remand the District Court's decision.

D.C. Code § 16–5502 sets forth the procedure for filing a special motion to dismiss and firmly sets the statutory deadline of 45-days:

> § 16–5502. Special motion to dismiss.
>
> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45-days after service of the claim.

D.C. Code § 16–5502 *(emphasis added)*. There is no provision allowing for a court to extend the 45-day deadline. As a result, the Special Motion to Dismiss should not have been granted and the District Court erred in considering it.

In *Sherrod*, this Court already decided this question. In *Sherrod*, the District Court had granted a 30 day extension of time. This Court held:

> We reject O'Connor's argument that this extension of time enlarged the period for filing under the D.C. statute.
>
> Motions under Federal Rule of Civil Procedure 6(b) cannot extend statutory time limits. "Every court to have considered this question has held that Rule 6(b) may be used only to extend time limits imposed by the court itself or by other Federal Rules, but not by statute." *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 368 (D.C. Cir. 2011) (per curiam) (collecting cases), *cert. denied*, 132 S. Ct. 761 (2011); *see also* 4B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1165 (3d ed. 2002).
>
> The reason is apparent. Rule 6(b) gives district courts wide discretion to modify the time limits set forth in the rules. Statutory time limits are different. Whether a statute of limitations may be tolled requires the court to engage in statutory interpretation. This is not a matter of the court's discretion. The intent of the legislature is controlling. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994). As in *Argentine Republic*, "the district court could not, as a matter of law, have granted the motion because Rule 6(b) may not be used to extend periods of time dictated by statute." 637 F.3d at 368.
>
> ***It follows that the district court's granting of the "Consent***

> ***Motion" to extend time pursuant to Rule 6(b) could not have extended the D.C. statute's 45-day limit. The district court therefore properly denied as untimely defendants' motion to dismiss under the District of Columbia's Anti-SLAPP Act.***

Sherrod, 720 F.3d at 937-38 (emphasis added).

Initially, it should not be overlooked that the Appellees enjoyed an initial 45-day period in the Superior Court and then another, second 45-day period when Appellants re-filed their case in the District Court. Appellees had already fully analyzed the law and its application to the circumstances in order to file within the District of Columbia. Appellees also admit that the Superior Court lawsuit was "in all substantial respects identical to this later-filed action" brought in the District Court. *See* Def's Mot. For Stay at p. 4. (JA17). Therefore, the re-filing of the case to federal court actually doubled the length of time available for Appellees to file a special motion to dismiss. Appellees suffered no surprise. Yet they did not meet the 45-day deadline.

Appellants offer their prediction about what the Superior Court for the District of Columbia ("Superior Court") might have decided. However, regardless of the circumstances, it is not for this Court to rewrite the statute, especially where the legislature has created a drastic measure cabined by limitations. Those limitations should not be lightly ignored. "[A]s the Supreme Court has emphasized time and again, courts have no authority to rewrite the plain text of a statute." *Kay*

v. FCC, 525 F.3d 1277, 1279 (D.C. Cir. 2008).

Furthermore, much of Appellees' arguments are irrelevant. They explain that they asked the District Court to stay this case on the basis that they wanted to the District Court to abstain from taking the case at all. Appellees heavily depend on *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Colorado River* simply states circumstances in which a federal court should abstain from entertaining a diversity case at all. That was not the case here. The D.C. District Court granted the stay but did not have the power to change the statutory deadline. The case was dismissed in the Superior Court and it was only then that the D.C. District Court considered this lawsuit. Abstention was not necessary and *Colorado River* is not relevant to this case.

Thus, the Defendant's Special Motion to Dismiss under D.C. Code § 16-5502 and motion for attorney fees under D.C. Code § 16-5504 were not timely filed and this Court must reverse and remand the decision of the District Court.

II. THE ANTI-SLAPP ACT DOES NOT APPLY

A. The D.C. Anti-SLAPP Act Is Inapplicable In Federal Court Under Diversity Jurisdiction

The Government of the District of Columbia has filed an *amicus curiae* brief wherein it defends the validity of the Anti-SLAPP act in federal courts sitting in diversity. Appellees raise similar arguments.

The *Amicus Curiae* is the author of the D.C. Anti-SLAPP Act. As a result, Appellants will directly address the *Amicus Curiae's* brief subject to the Court's consideration. However, *Amicus Curiae* and the Appellees are incorrect.

First, the Honorable Robert L. Wilkins of the U.S. District Court for the District of Columbia held that the Anti-SLAPP Act directly conflicts with FRCP and is inapplicable in federal diversity jurisdiction. *3M Co. v. Boulter*, 842 F.Supp.2d 85 (D.D.C. 2012).

Indeed, the District of Columbia intervened in *3M Co. v. Boulter*, for the purpose of making the same arguments there that it makes here as *Amicus Curiae*. Yet the District of Columbia abandoned in that appeal the same arguments it makes here. Judge Wilkins then refused to vacate his prior decision. *See, 3M Company v. Boulter,* Memorandum and Opinion, Case No. 11-cv-1527, March 22, 2013.

Second, *Amicus Curiaie* insists that the FRCP does not pre-empt substantive state law by its terms or pedigree under the Rules Enabling Act. It is beyond dispute that a federal court sitting in diversity jurisdiction must apply substantive state law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Burke v. Air Serv. Int'l, Inc.*, 685 F.3d 1102, 1107 (D.C. Cir. 2012).

Yet in *3M Co. v. Boulter*, Judge Wilkins ruled that the D.C. Anti-SLAPP Act is a procedural rule. Judge Wilkins concluded that ultimately the

> "Act is a summary dismissal *procedure* that the Defendants and the District seek to clothe in the costume of the substantive right of immunity--but this is largely a masquerade."

842 F.Supp.2d at 110-111 *(emphasis added)*. That is, the Anti-SLAPP Act governs the procedures by which cases progress in the courts of the District of Columbia. The Anti-SLAPP Act does not create or modify a substantive cause of action or right to relief.

The Anti-SLAPP Act does not change the underlying substantive causes of action in any way. On its face, the Anti-SLAPP Act allows a case to continue to trial by jury if a trial judge – rather than the eventual jury – predicts that the plaintiff will be likely to prove the case on the underlying causes of action at trial. The trial of the substantive causes of action will be precisely the same on the merits as before the Anti-SLAPP Act was enacted.

The Anti-SLAPP Act dictates how a case proceeds through the courts. The Anti-SLAPP Act does not modify specifically-identified causes of action, but applies to any and all causes of action. Moreover, the procedural differences under the Anti-SLAPP Act apply identically regardless of which substantive causes of action are being litigated. A process that applies in the same uniform way regardless of the substantive claim is procedural.

The Anti-SLAPP Act creates procedural obstacles under certain circumstances. But the greatest change is that a judge makes an early prediction of

success on the merits rather than allowing a jury to decide on the basis of admissible evidence.

In this case in the court below, Judge Rothstein concluded from the reasoning of "the Courts of Appeals cases and the recent D.C. District Court cases [was] persuasive, . . . the Anti– SLAPP Act empowers defendants with the substantive right to fend off SLAPP lawsuits." (JA305-06).

However, a "substantive right" to "fend off lawsuits" is a contradiction in terms. A mechanism "to fend off" lawsuits of a certain type is necessarily procedural. Judge Rothstein's analysis, on which the Appellees rely, admits that the Anti-SLAPP Act is a means "to fend off" a lawsuit. That speaks to a procedural rule.

As Judge Wilkins extensively analyzed and concluded:

> "There is no question that the special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid dismissal. … Upon careful examination of the Act's special motion to dismiss procedure, this Court holds that it squarely attempts to answer the same question that Rules 12 and 56 cover and, therefore, cannot be applied in a federal court sitting in diversity."

842 F.Supp.2d at 102. And "Indeed, the District [of Columbia] expressly acknowledges that the Act places a "heightened burden of proof" on a plaintiff."

Id. Judge Wilkins entered into an *Erie* analysis, guided by the U.S. Supreme Court's most recent 2010 decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010).

While arguing the opposite, the Appellees mention on page 22 of their brief that "Likewise, in enacting Anti-SLAPP statutes, legislatures recognize that existing summary judgment and dismissal procedures, like those of Federal Rules of Civil Procedure 12 and 56, may be inadequate to protect free expression rights:" The acknowledgement that Anti-SLAPP Acts are needed because FRCP Rule 12 and Rule 56 are "inadequate" is a clear sign that the DC Anti-SLAPP Act is in conflict with and incompatible with FRCP Rules 12 and 56. The purpose of Anti-SLAPP Act, Appellees suggest, is to depart from the "inadequacy" of FRCP Rule 12 and Rule 56. The motivation is to rewrite the FRCP outside of the Rules Enabling Act, 28 U.S.C. § 2072. Judge Wilkins analyzed and ruled:

> "Although the District contends that the state law and the federal rules can exist "side by side" [Dkt. No. 32 at 25-26], the Court does not see how this is so, particularly in a case such as this one where the parties have introduced hundreds of pages of material outside the pleadings and Defendants ask this Court to evaluate whether 3M's claims are likely to succeed on the merits based partly on matters in those materials. If a plaintiff is obligated to demonstrate a likelihood of success on the merits under Section 16-5502 (most likely with little to no discovery), this places a higher procedural burden on plaintiff than is required to survive a motion for summary judgment under Rule 56. As such, Section 16-5502(b) restricts "the procedural right to maintain [an action]" established by the federal rules and

> squarely conflicts with Rule 12(d) and Rule 56 as construed above. Shady Grove, 130 S.Ct. at 1439 n.4."

842 F.Supp.2d at 103. Ultimately Judge Wilkins held:

> "[p]ursuant to the unanimous opinions in *Burlington Northern* and *Walker*, as well as the majority opinion in part II-A of *Shady Grove* and other Supreme Court cases, the first obligation of the Court is to construe the applicable federal rule according to its plain meaning and the relevant explanations provided in the Advisory Committee Notes. This Court holds that the text and structure of Rules 12 and 56 were intended to create a system of federal civil procedure requiring notice pleading by plaintiffs, whereby a federal court may dismiss a case when the plaintiff fails to plead sufficiently detailed and plausible facts to state a valid claim, ***but a federal court may not dismiss a case without a trial based upon its view of the merits of the case*** after considering matters outside of the pleadings, except in those instances where summary judgment under Rule 56 is appropriate."

842 F.Supp.2d at 106 *(emphasis added).* The Anti-SLAPP Act is therefore in direct conflict with the FRCP. The federal rule governs in federal court. Challenges to the Federal Rules of Civil Procedure as violations of the Rules Enabling Act can succeed "only if the Advisory Committee, the [Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Rules Enabling Act nor constitutional restrictions." *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 552 (1991)(quoting *Hanna v. Plumer* , 380 U.S. 460, 471). The Supreme Court has

rejected *every* Rules Enabling Act challenge to a federal rule that has come before it. *Shady Grove*, 130 S. Ct. at 1442 (plurality)(emphasis added). As Judge Wilkins also ruled:

> "The Court must "first determine whether [the federal rule] answers the question in dispute." Id. (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987)). "This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988) (citing *Burlington Northern and Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980).
>
> "If the federal rule answers or covers the question in dispute, the federal rule governs unless it is invalid. *Shady Grove*, 130 S.Ct. at 1437; *Stewart*, 487 U.S. at 27. The Court does not "wade into Erie's murky waters unless the federal rule is inapplicable or invalid." *Shady Grove*, 130 S.Ct. at 1437 (citing *Hanna v. Plumer*, 380 U.S. 460, 469-71 (1965))."

842 F.Supp.2d at 93-94.

Whether the Anti-SLAPP act is procedural or substantive is thus not dispositive as to its applicability. As Judge Wilkins went on to further find:

> "This Court need not conclusively decide whether the D.C. Anti-SLAPP Act creates any substantive rights. Because this Court finds that Rules 12 and 56 answer the question in dispute, the Court need not "wade into Erie's murky waters" to consider that issue. See Shady Grove, 130 S.Ct. at 1437. Nonetheless, even assuming a substantive right is created, the Anti-SLAPP Act cannot apply in this Court because the D.C. Council has clearly mandated the *procedure* for enforcing any such

substantive right that preempts Federal Rules 12 and 56."

842 F.Supp.2d at 108.

Thus, the Anti-SLAPP Act, under any analysis, is inapplicable in federal court.

B. Appellees Are Not Protected By The Litigation Privilege

Appellees argue that their statements are protected by the litigation privilege. However, Appellees are mistaken.

Initially, statements in a pleading enjoy only qualified – not absolute – "litigation privilege." Applying New York law, *Kelly v. Albarino*, 485 F.3d 664 (2nd Cir. 2007) explained that the litigation privilege is broad, but a statement must be "pertinent" to a matter before the Court to come within the privilege.

Specifically, in Appellee Rauf's "Memorandum of Law in Support of Motion to Dismiss" (Memo) and Affirmation In Support of Motion to Dismiss ("Bailey Affirmation") filed in *Forras v. Rauf*, Appellees falsely branded Appellants as enemies of Islam, stating in pertinent part:

> "Plaintiff's attorney, an infamous publicity hound, has found in Plaintiff the perfect victim, a man who could have comfortably concluded his life as a national hero, as self-described 'first responder' to the greatest national tragedy since Pearl Harbor. Instead, thanks to this wholly frivolous lawsuit, he trades in his well deserved laurels for fifteen minutes of fame as a nationally recognized bigot." Defs.' Mem. In Supp. Of Mot. To Dismiss at 4.

> "His cause and his case have all the rationality of one who would seek to tear down New York City's Chinatown as vengeance for Pearl Harbor on the theory that all Asians are alike." *Id.* at 5.
>
> "Plaintiff's view is simple. According to him, Islam equates with terrorism…." *Id.*
>
> "Yet because of Plaintiff's revulsion for one particular religion has so poisoned his mind, he claims the right to use the power of the court…." *Id.*
>
> "He has elected to transform himself from America's poster child hero to America's Spokesman of Bigotry…" *Id.*
>
> "That the plaintiff in this suit finds Islam unacceptable to him personally is simply irrelevant to the protection which Islam is entitled under the First Amendment…" *Id.* at 8.
>
> "… we find that Plaintiff has nothing to offer but his bigoted assumption that all Muslims approve terrorism…" *Id.* at 25.
>
> "bigotry like that of Plaintiff in this suit to flourish in the rich mud of ignorance and religious intolerance." Bailey Affirmation at 3.
>
> "We are all united under a single banner pledged to eradicate the very kind of religious intolerance we see in Plaintiff, represented in those years by the Third Reich and those aligned with it." *Id.*

(JA 8, 71). To increase the circulation of these dangerous statements, Defendants intentionally provided these defamatory statements to the New York Post, which at all material times was a print and internet newspaper with national and international publication and viewership, including wide distribution in Washington, D.C. Compl. ¶¶ 4, 6. (JA 8).

Appellants, who are both Jewish, were branded publicly by Rauf, a Muslim

cleric, to the Muslim world as an enemy of Islam in the New York Post, through publications read by radical Muslims, many of whom reside in D.C. Compl. ¶14. (JA 10). In effect, Defendants published to the Islamic world a Fatwah against the Plaintiffs not unlike that against the renowned writer Salman Rushdie, thus intimidating the Plaintiffs.

Further, statements made to members of the media or otherwise made *outside* of the court do not afford the same litigation privilege. Appellees are located in New York and Appellants brought this case in the District of Columbia. Under the law of both jurisdictions there is no absolute privilege for the defamatory statements made by Appellees. *Jacobs v Herlands*, 17 NYS 2d 711, 712 (N.Y. 1940) (under New York law, lawyer's summoning of reporters and providing a statement is not protected by the absolute privilege); *Cloonan v. Holder*, 602 F. Supp. 2d 25, 29 (D.D.C. 2009) ("the privilege does not apply…where the defamatory statements did not have a sufficient relation to the subject matter of the litigation."); *see also Rothman v Jackson*, 49 Cal App 4th 1134, 1138 (2d D 1996)(holding that the litigation privilege did not apply to "litigating in the press" or making statements to members of the media); *Myers v. Hodges*, 44 So. 357 (Fla. 1907)(holding that the privilege attaches only to statements connected or relevant to the case or subject to inquiry). As Appellants have made clear, *it is not the filing in court – but the later circulation of libel*

outside of court – that is the libel that the Appellants sued upon.

Appellees perpetuated the dissemination of the defamatory remarks by aggressively disseminating outside of court court papers containing the defamatory statements to the New York Post to publish an article with the false statements.

Here, the Appellees' defamation of the Appellants does not meet the test of being pertinent to the litigation. The D.C. Court cited to D.C. precedent and mistakenly concluded that the litigation privilege is absolute.

C. Appellees Are Not Protected by The First Amendment

The Appellants do have a likelihood of success on the merits. Even if it were determined that Appellants are public figures, the actual malice requirement is also satisfied – and extensively so. Actual malice requires that a statement challenged as defamatory was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Beeton v. District of Columbia*, 779 A.2d 918,923 (D.C. 2001).

Here, Appellees were clearly aware of the falsity of their statements, acted with complete and reckless disregard as to whether the statements were true and instead, continued to publish their false statements to the Islamic world, both nationally and internationally.

Moreover, the Appellees were clearly pursuing an aggressive agenda to silence any dissent or disagreement with their plans to claim key historical sites in

the name of Islam. The defamatory statements were made intentionally and knowingly in furtherance of an agenda, not negligently or accidentally. Appellees' sought to silence any one who disagrees with them by labeling them as bigots.

D. Appellants' Case is Likely to Succeed on the Merits

i. Likely to Succeed on Merits of Claim for False Light

A claim for false light requires (1) publicity; (2) about a false statement, representation or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be offensive to a reasonable person. *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999), citing Restatement (Second) of Torts §652E. "It is enough that he is given unreasonable and highly objectionable publicity that contributes to him characteristics, conduct or belief that are false, and so is placed before the public in a false position". Restatement (Second) of Torts §652E. Appellees fail to appreciate the varying facts involved in Appellants' false light claim, particularly given the reckless and life-threatening result of Appellees' conduct and it is evident that Appellants are likely to succeed on the merits of the claim.

A false light claim requires a false statement, representation or imputation that places a plaintiff in a false light that would be highly offensive to a reasonable person. *Kitt*, 742 A.2d at 850. In other words, "…it applies only when the

defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." Restatement (Second) of Torts §652E, cmt. c.

Appellees maliciously attributed false beliefs to Appellants, placing them in a position that would be highly offensive to a reasonable person. Specifically, Appellees claimed that Appellants maintain that all of Islam indiscriminately is equated with terrorists, that Islam is unacceptable to Appellants, and that all Muslims approve of terrorism. Adding insult to injury, Appellees also referred to Appellants as Nazis (despite both Appellants being of Jewish decent). Significantly, no such belief was ever stated, implied or conveyed by Appellants. Appellees knew, given the wide publication of the statements, that readers and the public would not be able to appreciate Appellants' actual beliefs.

In addition, Appellees effectively placed Appellants in a position of danger intending to incite violent, atrocious, and disturbing threats towards Appellants. Appellees' false, misleading, and outrageous statements admittedly held Appellants up for extreme danger in their community, particularly in D.C., where Appellant Klayman is the General Counsel of Freedom Watch and is widely recognized as a lawyer and where Appellant Forras is actively involved through his organization.

ii. Likelihood of Succeeding on the Merits of Claim for Defamation

"To prevail in a defamation suit, Plaintiff need show that the statements complained of are i) defamatory; ii) capable of being proven true or false; iii) of and concerning' the Plaintiff; iv) false; and v) made with the requisite degree of intent or fault." *Coles v. Washington Free Weekly, Inc.*, 881 F.Supp. 26, 30 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996).

Appellees' statements constituted ***libel per se***. To make a claim for libel per se, plaintiffs must allege that defendant's statements have ascribed to plaintiffs conduct and characteristics that would tend to injury him "in [their] trade, profession, or community standing" or "adversely affect [their] fitness for the proper conduct of [their] lawful business. *Howard Univ. v. Best*, 484 A.2d 958, 988 (D.C. 1984), *Wallace*, 715 A.2d at 877. Appellants are not required to prove special harm if defendants words are defamation per se. *Farnum v. Colbert*, 293 A.2d 279, 281 (D.C. 1972).

The falsity of Appellees' statements are apparent and are clearly capable of being proven as true or false. It is true that statements of opinion that do "not contain a provable false factual connotation" are fully protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) An opinion is not actionable if it cannot be objectively verified as false or cannot "reasonably be interpreted as stating actual facts" about the plaintiff. *Milkovich*, 497 U.S. at 18-

20.

A statement of opinion may become actionable if it has an explicit or implicit factual foundation and is, therefore, objectively verifiable. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (2000); *see also Moldea*, 22 F.3d at 313 (statements of opinion actionable "if they imply a provable false fact, or rely upon stated facts that are provably false"). Here, Appellees statements can objectively be verified as false, both in its explicit as well as implicit reliance in a factual foundation. Moreover, mixed statements of opinion and fact are actionable. *Harper, James and Bray, 2 The Law of Torts 2d, § 5.8 at 66-68; Restatement of Torts 2d § 566 (1977).* This is also true in New York, where the statements were made. *Steinhilber v. Alphonse*, 501 N.E.2d 550, 551 (N.Y. 1986).

Appellees also argue that their comparison of Appellants to the Third Reich and Appellants are Nazis is merely a statement of opinion. However, it is clear that Appellees manner of analysis is a tactical effort to mislead the court from the truth: that taken into context, Appellees reference to Appellants as Nazis is clearly factual and verifiable as true or false. Specifically, Appellees ignore the fact that this statement was part of a larger statement intended to support their false claim that Appellants were bigots and advocated religious intolerance. Whether Appellants, in fact, were bigots and advocated religious intolerance is a factual assertion, not an opinion. Such a factual assertion about someone is capable of

being verified and is understood by the public as asserting an objective fact.

Providing further guidance is *Milkovich v. Lorain Journal Co.,* where the U.S. Supreme Court held that a reasonable fact finder could conclude the statements in a reporter's column implied assertions that a high school wrestling coach perjured himself in a judicial proceeding, and this was sufficiently factual to be susceptible of being proved as true or false. *Milkovich v. LorainJournal Co*., 497 U.S. 1, 20 (1990) . The Court reasoned that it never intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.' *Rodriguez v. Panayioutu*, 314 F.3d 979, 985 (9th Cir. 2001), citing *Milkovich*, 497 U.S. at 19. The Court further indicated that a false assertion of fact could be libelous even though couched in terms of opinion. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 19-20. As such, statements including provable false factual assertions which are implied in the context of an opinion are not protected from defamation liability under the First Amendment. *Id* at 19.

Further, when a plaintiff requests a jury trial, as was the case here, it is not for the District Court to decide whether a statement is defamatory or not. "It is only when the court can say that the publication is not reasonably capable of *any*

defamatory meaning and cannot be reasonably understood in *any* defamatory sense that it can rule as a matter of law, that it was not libelous." *Levy v. American Mut. Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964) (Emphasis added); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001). "**[I]f the language is capable of two meanings, one actionable and the other not, it is for the jury to determine which of the two meanings would be attributed to it by persons of ordinary understanding under the circumstances.**" *Levy*, 196 A.2d at 476 (Emphasis added).

E. Appellees Confuse the "Melange"

Appellees rely upon a statement in the Opinion Below by Judge Rothstein that: "Defendants present a mélange of reasons why this case should be dismissed," and that the "mélange" was diverse enough that the judge felt it necessary to "resist the temptation to deal with" them all. (JA304).

However, Judge Rothstein was not finding that a "mélange" of reasons exist to support dismissal. While an appellate court may consider alternative grounds for a lower court's decision under a "harmless error" theory, Judge Rothstein's statement was not an endorsement of alternative reasons for dismissing the case.

III. THE ANTI-SLAPP ACT'S UNCONSTITUTIONALITY SHOULD BE CONSIDERED ON APPEAL

As set forth in Appellants' initial brief, the Anti-SLAPP Act is

unconstitutional as it conflicts with FRCP and is also violation of the Seventh Amendment to the United States Constitution.

The District of Columbia, as *Amicus Curiae*, argues that Appellants may not raise the issue of the constitutionality of the Anti-SLAPP Act on appeal. However, the District of Columbia is mistaken.

First, Appellants originally contested the constitutionality of the Anti-SLAPP Act in their Opposition to Appellees' Motion to Dismiss. Courts of Appeals should not prevent parties from improving arguments that were presented in a more rudimentary form below. That Appellant's argument has evolved since that time to encompass additional reasons why this Act is unconstitutional should be of no consequence.

As the U.S. Court of Appeals for the Eighth Circuit has held, "one of the primary purposes of appellate review' would be undermined, after all, if a court 'refuse[d] to consider each nuance or shift in approach urged by a party simply because it was not simply urged below." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991).

The U.S. Court of Appeals for the Ninth Circuit also agrees that parties may present new arguments on appeal. In *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004), the court considered the new argument "because [appellant's] argument is not a new claim; rather, it constitutes an alternative

argument to support what has been his consistent claim from the beginning." *Id.*

Here this Court is faced with the same situation. Appellants first raised the claim that the Anti-SLAPP Act was unconstitutional and have only slightly altered their legal argument during this appeal. Thus, this Court should respectfully consider Appellants' argument.

Further, even if the constitutionality of the Anti-SLAPP Act was not raised in the District Court , which it was, issues of illegality and constitutionality may be raised for the first time on appeal. As one example, the U.S. Court of Appeals for the First Circuit has considered a waived argument despite the absence of an issue of constitutional magnitude. *Chestnut v. City of Lowell*, 305 F.3d 18, 21 (1st Cir. 2002).

Even more, a Court of Appeals has it within its discretion to consider a legal argument that was not presented below. Appellate courts occasionally exercise their discretion to address such an issue. *Chestnut v. City of Lowell*, 305 F.3d 18, 21 (1st Cir. 2002)("...it is settled in this circuit that "an appellate court has discretion, in an exceptional case, to reach virgin issues," that is, to relieve a party of a prior forfeiture.) *citing United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990). Many circuits are in agreement with this standard, *See, e.g., Batiansila v. Advanced Cardiovascular Sys*., 952 F.2d 893, 896 (5th Cir. 1992) (stating that it should consider waived argument if a 'miscarriage of justice' would otherwise

result and it raises a pure issue of law).

IV. CONCLUSION

For the foregoing reasons, respectfully, the decision of the District Court must be reversed with instructions to strike Appellees' Special Motion to Dismiss, that the D.C. Anti-Slapp Act is procedural and in violation of the Federal Rules of Civil Procedure and also unconstitutional, and order that the case proceed to the discovery phase. Moreover, and importantly, Appellees' Special Motion to Dismiss was filed late well after the 45-day deadline for filing of the motion and the District Court did not have the power to extend the statutory deadline imposed by the Anti-SLAPP Act. Finally, even if the Anti-SLAPP Act is applicable, Appellants established a likelihood of success on the merits for each of the claims and to cut off Appellants' rights to prove his case would work a denial of due process.

This Court should respectfully so rule to prevent a manifest injustice and to avoid having Appellants being severely penalized in any event by having to pay attorneys fees and costs that were inflated by the Imam and his lawyer. Appellants were defamed and harmed by being publicly branded as enemies of Islam and Nazis and their lives put at risk, and it would be outrageous, as Appellees are attempting to do, to have them also pay attorneys fees and costs for the harm done to them.

Oral argument is respectfully requested.

Dated: March 4, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,061words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2015, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I further certify that on the same day, I served the foregoing document on the following counsel by electronic service via the CM/ECF system:

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