

No. 26-10416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

THE ESTATE OF DONALD A. KING, THE DUSTIN INMAN SOCIETY, INC.,
Plaintiffs-Appellants,

v.

THE SOUTHERN POVERTY LAW CENTER,
Defendant-Appellee.

*Appeal from the United States District Court
for the Middle District of Alabama*
No. 2:22-cv-00207-CLM-JTA

REPLY BRIEF OF APPELLANTS

Todd V. McMurtry
THE MCMURTRY LAW FIRM, PLLC
405 Garrard St., Ste. 204
Covington, KY 41011
(859) 999-1074
todd@mcmurtry-law.com

Mathew D. Staver
Horatio G. Mihet
Daniel J. Schmid
Daniel J. Piedra
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org
hmihet@lc.org
dschmid@lc.org
dpiedra@lc.org

James R. McKoon, Jr.
McKoon & Gamble
P.O. Box 3220
Phenix City, AL 36868
(334) 297-2300
jrmckoon@aol.com

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SUMMARY OF REPLY

Thanks to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it is nearly impossible for public-figure plaintiffs to prevail in a defamation action. Because actual malice focuses on the defendant's state of mind, plaintiffs are left to rely on circumstantial evidence. When full discovery is permitted, at least the contest is a fairer fight. But if a defendant's self-serving declarations are all that it takes to end a defamation case, then public-figure plaintiffs, as a practical reality, are now *persona non grata*.

SPLC's brief demonstrates how the trick is done. Resist discovery that would show what SPLC's own analysts said to each other when they initially declined to designate DIS as an "anti-immigrant hate group." Shrink the actual-malice inquiry down to the say-so of the one employee, so that everyone responsible for building the file before him becomes irrelevant. Recast an investigative report that SPLC delivers to law-enforcement agencies as mere opinion the moment that report becomes a liability instead of an asset. And invoke the statute of limitations against a designation SPLC republishes every year to seek new, wider audiences. Four doors, each leading to the same room: summary judgment without a trial.

SPLC doesn't dispute that the Supreme Court allows plaintiffs to prove actual malice through circumstantial evidence. What SPLC argues instead is that none of the circumstantial evidence here counts. Motive evidence doesn't count, because this Court has said so—which on inspection, is in tension with *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), and with several sister circuits. A decade of institutional knowledge doesn't count, because the employee who signed off on the latest re-designation says he had no doubts, and SPLC would have this Court stop there. And the plain meaning of “anti-immigrant” doesn't count, because SPLC says it meant something else, known only to its staff.

Most telling is SPLC's unwillingness to grapple meaningfully with its own prior position on Plaintiffs. SPLC told a reporter in 2011 that Plaintiffs' advocacy “is not something we can quibble with,” and that kept them at a lesser label for six years. RB10; Doc. 114-10 at 3, 9. SPLC doesn't explain what changed about Plaintiffs' *own conduct* in 2017. Only that an advocacy organization that profits from identifying hate groups abruptly reverses a six-year position after one phone call from a biased reporter writing a hit piece. That should have given a jury something to

think about. But SPLC would have this Court decide, as a matter of law, that a jury may not.

None of SPLC's four arguments withstands the record. The discovery rulings rested on relevance, the very ground Plaintiffs briefed, so nothing was forfeited. The actual-malice inquiry has never been limited to the last person to sign off on the defamatory publication, and SPLC's own authority for that proposition has been rejected by the leading expert in defamation law, Rodney Smolla, as a misreading of *New York Times*. An investigative report SPLC gives to law enforcement as fact doesn't become opinion once it is challenged in court. And a designation SPLC republicizes annually, with press outreach and fundraising built around it, isn't shielded by a rule designed for a newspaper's single edition. The Court should reverse.

ARGUMENT

I. Plaintiffs were entitled to discovery of communications SPLC had about them since being tracked in 2011.

SPLC defends the discovery rulings below on three independent grounds. Each one fails. The courts below decided the motion to compel on relevance, the very ground Plaintiffs briefed here, so no forfeiture occurred. SPLC's single-actor theory misreads *New York Times* and cannot confine the actual-malice inquiry to Hanks alone. And a legal advocacy organization cannot invoke a First Amendment journalist's privilege reserved for the press. The district court should not have withheld discovery into SPLC's pre-2017 communications about Plaintiffs.

A. Plaintiffs did not forfeit any challenge to the district court's discovery determination.

Plaintiffs' opening brief explained (at 22–31) why the withheld discovery was the only window into what SPLC's analysts said about Plaintiffs during the six years they declined to designate DIS as a “hate group,” and the only means of testing whether SPLC applied a different standard to DIS than to comparable groups. SPLC contends that Plaintiffs forfeited any challenge to the district court's discovery ruling because the opening brief focused on relevance, not proportionality.

RB27–28 (citing *Skanska U.S.A. Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290, 1309 (11th Cir. 2023)). That argument misreads the record.

“Proportionality and relevance are ‘conjoined’ concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate.” *Runton by & through Adult Advoc. & Representation v. Brookdale Senior Living, Inc.*, 2018 WL 1083493, at *6 (S.D. Fla. Feb. 27, 2018) (citation omitted). The lower court judges never performed an independent burden-benefit analysis. Their references to “proportionality” were another way of saying the materials were not relevant, which Plaintiffs squarely presented to this Court.

Skanska is inapposite. There the magistrate’s discovery order rested on two express findings: that the Navy’s storm preparations were of “minimal relevance” because the Navy operates seagoing vessels, not barges, and, separately, that the Navy discovery was “not proportional to the needs of the case.” 75 F.4th at 1301–02. No comparable independent proportionality analysis exists here. The magistrate judge said so on the record: “I don’t think it’s necessary to get into undue burden, because I find that the relevant time frame for discovery is 2017 to present and that the defendant has already provided sufficient information.” Doc. 98-1 at

37:19–22. The magistrate judge’s ruling on the other-groups materials was even more explicit, excluding them “because it’s simply not relevant.” Doc. 98-1 at 57:18–20. The magistrate judge never weighed cost, volume, or hardship.

SPLC’s own presentation at the hearing confirms there was never an independent burden showing for Plaintiffs to rebut. As to recovering archived emails, counsel suggested that “if the Court needs us to talk to vendors and get an affidavit about the cost, we’re happy to do that.” Doc. 98-1 at 21:4–6. Counsel never supplied one, as Plaintiffs pointed out below. Doc. 98 at 14–15 (citing *Coker v. Duke & Co.*, 177 F.R.D. 682, 686 (M.D. Ala. 1998)). Bottom line: the magistrate judge never meaningfully analyzed proportionality.

The stated rationale in the district court’s order was also based on relevance. The pre-2017 emails were “unnecessary” because Plaintiffs “already [possessed] information that will show whether SPLC had a valid reason for changing its position.” Doc. 104 at 4–5. The other-groups materials were dismissed as a “fishing expedition”—the classic label for an irrelevant request. *Id.* at 6. Across six pages the order never identifies any disproportionate burden on SPLC. Relevance and proportionality

therefore cannot be separated on this record. The Court should reach the merits of Plaintiffs' discovery argument.

B. SPLC relies on a discredited legal theory in attempting to insulate scrutiny into its decade-long monitoring of Plaintiffs.

SPLC is correct that institutions do not have a state of mind. RB25. But it takes that settled rule too far by adopting a discredited theory of proof. In establishing the actual-malice standard, the Supreme Court explained that “the state of mind required for actual malice would have to be brought home to the persons in the [defendant’s] organization having responsibility for the publication of the [defamatory publication].” *N.Y. Times*, 376 U.S. at 287.

Quoting *Dongguk University v. Yale University*, 734 F.3d 113, 123 (2d Cir. 2013), SPLC contends that meeting the actual-malice burden requires the plaintiff to “identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice.” RB26. But as Professor Smolla notes: “This is *not the correct legal standard*, and this notion ought not be allowed to gain traction or approval in the caselaw.” Rodney Smolla, 1

Law of Defamation § 3:42.50 (2d ed.) (emphasis added). According to Professor Smolla:

The point of this passage in the Court’s opinion in *New York Times v. Sullivan* was to rebuff the claim that the Times was guilty of actual malice because there existed in the Times files information that would have shown some of the details in the famous Times advertisement defending Martin Luther King to be false. Those details, all trivial errors, might have been corrected had someone at the Times who handled the advertising copy known of the prior files. *This was, of course, before computers and digitized databases, a time when knowledge of those prior file stories would not have been widespread or easily accessible within the newspaper.* It was in this context that the Court emphasized the point that the *Times* could not be guilty of actual malice when nobody at the newspaper who dealt with the advertisement copy had any knowledge of the prior files.

Smolla, *supra*, § 3:42.50 (emphasis added). Contrary to SPLC’s position, “[t]his *clearly does not mean that actual malice had to be localized to one individual*—indeed the Court used the plural, ‘persons’ in describing that it had to be brought home to the persons responsible for the publication of the advertisement.” *Id.* (emphasis added).

Professor Smolla specifically criticizes *Dongguk’s* proposition—which SPLC leans on (RB 26)—as a “cavalier statement” that “create[ed] the incorrect impression that the actual-malice standard must be isolated and narrowed to the subjective state of mind of one individual.” Smolla,

supra, § 3:42.50. *Dongguk*’s interpretation of this passage in *New York Times*, he continues, “is simply not sound, in that the passage cited does not support the proposition that when there are multiple actors connected to a publication, it is incumbent on the court to ‘pick one’ and focus on that one person alone.” *Id.*

SPLC’s selective interpretation of *New York Times* therefore is at odds with the leading expert in defamation law. The Supreme Court’s use of the plural—“persons”—was deliberate. The Court was not inventing a rule that forces a plaintiff to hunt down a single decisionmaker and prove that individual’s subjective awareness of falsity. It was rejecting the notion that a newspaper could be charged with actual malice on the basis of information buried in its files that no one involved in the challenged publication ever saw. But where, as here, multiple actors within an organization research, draft, review, approve, and renew a defamatory designation, the inquiry necessarily encompasses the collective process and the knowledge that all the actors had. *See Smolla, supra*, § 3:42.50.

The district court’s application of SPLC’s single-actor theory confirms the error. The court treated Interim Research Director Keegan Hanks’s declaration—that he “never had any reason to doubt” the 2021

redesignation—as dispositive of the *entire* actual-malice inquiry. Doc. 134 at 31, 37–38. Yet the 2021 redesignation was not an independent act of judgment but simply the latest annual renewal of a designation first made in 2018 through a multi-actor process: Heidi Beirich directed a renewed look into Plaintiffs; analyst Shanmugasundaram prepared the activation report; Senior Research Analyst Piggott transferred it; Director of Research Amend received the proposal; and Beirich gave final approval. Doc. 114-6 (Levi Dep. 118:11–17); Doc. 114-7 (Beirich Dep. 104:14–105:11). Beirich herself had publicly acknowledged in 2011 that DIS was not a hate group, initiated the 2017 reinvestigation after learning of the purported DIS–US Inc. connection, approved the original 2018 designation, and remained involved in subsequent redesignations through at least 2019. Doc. 114-10 at 3; Doc. 114-7 (Beirich Dep. 85:5–25, 104:14–105:11, 13:11–16). Hankes’s 2021 approval rested directly on that institutional foundation—with the first brick laid around 2011.

The actual-malice inquiry examines the states of mind of the persons who bore responsibility for the designation and its successive renewals. Beirich’s decade of institutional knowledge and her central role in the original designation and early redesignations form part of that

inquiry. An institutional defendant cannot immunize itself by designating one late-stage “approver,” obtaining his self-serving declaration, then declaring the states of mind of everyone else who researched, drafted, reviewed, and originally approved the designation legally irrelevant. That is precisely the strategy the district court permitted, and precisely the strategy *New York Times*, *Harte-Hanks*, and Professor Smolla reject.

SPLC’s theory therefore supplies no basis for affirming the district court’s single-actor analysis. The correct standard—faithful to *New York Times*’s plural formulation and to the full-record review required by *Harte-Hanks*—requires considering the knowledge and states of mind of *all* persons within SPLC who bore responsibility for tracking DIS, designating it as a “hate group,” and successively renewing that designation. Under that standard, the district court’s exclusive focus on Hanks’s declaration was legal error, and the summary-judgment record, even as truncated by the discovery rulings, contains sufficient evidence—from financial motive (Doc. 69 at 10–13), to preconceived storylines about Plaintiffs’ involvement in the so-called “Tanton Network” (Doc. 114-7 at 23–24), to SPLC’s longstanding aim to “completely destroy” ideologically

opposing organizations (Doc. 69 at 13)—from which a reasonable jury could find actual malice.

C. SPLC cannot invoke the First Amendment journalist’s privilege because it is not a newsgathering agency.

SPLC contends (RB34–35) that this Court could affirm the denial of Plaintiffs’ motion to compel on the independent and alternative ground that the so-called First Amendment Reporter’s Privilege shields the requested records. That argument is meritless for three reasons.

First, SPLC cannot invoke a qualified First Amendment journalist’s privilege because it lacks standing. SPLC isn’t a newspaper “engaged in investigative reporting.” *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998). Instead, SPLC is a nonprofit legal advocacy organization that focuses on civil rights and public interest litigation. RB5. That mission isn’t “traditionally inherent to the press.” *In re Madden*, 151 F.3d at 129–30; *cf. 2 Discovery Proceedings in Federal Court* § 31:1 (3d ed.) (“Obviously, protection of the news gathering process is not an issue if the person gathering information is not a journalist.”).

Second, SPLC cannot plausibly invoke the First Amendment journalist privilege because the privilege only “protects the refusal to disclose the identity of confidential informants.” *Miller v. Transamerican*

Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980) (“*Miller I*”) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)), *modified on reh’g*, 628 F.2d 932 (5th Cir.1980) (per curiam) (“*Miller II*”). The journalist’s privilege articulated in *Miller I* is inapplicable because it is “limited to the protection against disclosure of the names of ‘confidential informants’ by traditional reporters.” *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 2006 WL 8440554, at *2 (N.D. Ala. Apr. 10, 2006).

Plaintiffs’ discovery requests seek non-confidential information, chiefly internal communications and editorial statements, and not information about “informants,” of which there are none in this matter. As with the non-media defendants in *New Life Art*, who unsuccessfully tried to invoke the privilege, SPLC cannot point to “the existence of any binding case in which the journalist privilege has been applied to persons outside of the traditional reporting and/or investigative reporting role.” *Id.*

Third, and relatedly, this Court has never expressly held that a nonmedia defendant may shield non-confidential processes from a defamation plaintiff; to do so would conflict with the longstanding view that “[e]videntiary privileges in litigation are not favored, and even those

rooted in the Constitution must give way in proper circumstances.” *Miller I*, 621 F.2d at 725 (citing *Herbert v. Lando*, 441 U.S. 153, 175 (1979)).

II. The record shows that a reasonable jury could infer that SPLC acted with actual malice.

As the Supreme Court observed, “proof of ‘actual malice’ calls a defendant’s state of mind into question,” thus it “does not readily lend itself to summary disposition.” *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (citations omitted). Even though the clear and convincing evidence standard applies to the actual-malice inquiry, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), jury questions remain jury questions. That being so, to survive summary judgment, a plaintiff “need only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.” *Id.* at 257 (emphasis added). Thus, the test isn’t what a jury *should* or *would* find, but what a reasonable jury *could* find. Applying the correct test, Plaintiffs adduced sufficient evidence that a reasonable jury *could* find that SPLC acted with actual malice.

A. Actual malice may be proven by circumstantial evidence, including evidence of financial motive, preconceived storylines, and even ill will.

SPLC doesn't dispute that a plaintiff may offer circumstantial evidence as proof of actual malice. *See Harte-Hanks*, 491 U.S. at 667–68. SPLC nevertheless contends that “bad motive” isn't relevant to the actual-malice inquiry. RB51–52. SPLC relies on various decisions of this Court for the proposition that ill will “plays no role” in the inquiry. RB51 (quoting *Moore v. Cecil*, 174 F.4th 862, 881 (11th Cir. 2026)); *id.* at 51–52 (collecting cases).¹

To the extent that this Court categorically holds that ill will may never be offered as circumstantial evidence of actual malice, such a holding, in the words of one district court, “may be in tension” with Supreme Court precedent and sister circuits' decisions. *Block v. Matesic*, 789 F. Supp. 3d 1131, 1172 (S.D. Fla. 2025); *see also* David Elder, *Defamation: A Lawyer's Guide* § 7:3 (Dec. 2025 Update) (“In analyzing

¹ SPLC mistakenly cites *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987), as an Eleventh Circuit case. RB25–26, 33–34, 46. *Speer* is an Eighth Circuit case. In any event, *Speer* is inapposite. Unlike the numerous Intelligence Project staff members who jointly contributed to Plaintiffs' designation, *Speer* held that actual malice could not be based on the statement of an “outside source” who had no hand in drafting, reviewing, or approving the challenged editorial. *Id.* at 477.

the totality of circumstances underlying a constitutional actual malice claim, the *undoubted, prevailing general rule* is that evidence of negligence, motive, and intent ‘may be adduced for the purposes of establishing, by accumulation and appropriate inference,’ reckless disregard of falsity.” (quoting *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969)) (emphasis added)).

In *Harte-Hanks*, the Supreme Court rejected a categorical bar against motive evidence. 491 U.S. at 668. The Court cautioned that courts “must be careful not to place too much reliance” on motive, but it refused to declare the evidence irrelevant: “it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.” 491 U.S. at 668. That statement is a deliberate limitation on the rule SPLC now asks this Court to enforce without qualification.

Other courts of appeals have read *Harte-Hanks* contrary to SPLC’s position. Motive is never sufficient by itself, but it remains admissible and potentially probative when joined with other circumstantial evidence. *See, e.g., Sindi v. El-Moslimany*, 896 F.3d 1, 17 (1st Cir. 2018); *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 183 (2d Cir. 2000); *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 315 n.10 (5th Cir. 1995);

Tavoulareas v. Piro, 817 F.2d 762, 795 (D.C. Cir. 1987) (en banc). “That’s logical: A defendant who is particularly motivated to hurt the plaintiff might well be motivated to lie to do so.” *Block*, 789 F. Supp. 3d at 1172.

Consider the D.C. Circuit’s observation, in an opinion joined by then-Judge Scalia:

The mere existence of a preconceived plan to “get” the subject of a defamatory story does not prove that the publisher acted knowingly or recklessly in publishing false information. But it is beyond question that one who is seeking to harm the subject of a story—whether motivated by simple ill will, or partisan political considerations, or otherwise laudable concern for the safety of the nation, or a mere desire to attract attention and boost circulation—is more likely to publish recklessly than one without such motive.

Tavoulareas v. Piro, 759 F.2d 90, 98 (D.C. Cir. 1985) (internal citations omitted), *vacated and superseded on other grounds by Tavoulareas*, 817 F.2d at 772. It follows that an advocacy organization with an ideological opposition to certain groups is more likely than not to reach a particular result by discounting or ignoring contrary evidence. Although ideological opposition doesn’t by itself prove actual malice, it can help explain why the contrary evidence was disregarded.

Or consider financial motive. A jury could infer that an advocacy organization that reaps millions of dollars annually in donations by

identifying and fighting “hate groups” has a financial motive to expand its portfolio of such groups. Doc. 69 at 10–12. On its own, that incentive doesn’t prove actual malice, yet it can help explain why the defendant would disregard contrary evidence. *Cf. Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1136 (9th Cir. 2003) (en banc) (“There is sufficient circumstantial evidence of a financial motive to support the ultimate conclusion of actual malice. While CU is correct that financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry.”). But if SPLC is correct that this Court categorically bars motive evidence, then such a rule doesn’t preserve First Amendment values—it rewards not getting caught.

SPLC’s other argument is factual. Plaintiffs, SPLC asserts (RB52), cite no record evidence tying institutional motive to the people who made the designation. That is incorrect. Beirich assigned the investigation into Plaintiffs and approved the initial designation, which every later redesignation renewed. RB45; Doc. 134 at 23, 31. The record ties Beirich—as director of the Intelligence Project—to a financial motive, Doc. 69 at 10–14, and to the theory that DIS’s purported fundraising through a Tanton-linked entity somehow meant it “was working very

closely with white supremacists,” Doc. 114-7 at 24. And it ties SPLC’s leadership to a stated goal of working to “completely destroy” the organizations it opposes. Doc. 69 at 13.

Such motives are probative of a “willingness to publish unsupported allegations.” *Tavoulareas*, 817 F.2d at 796. In fact, the record shows that SPLC worked *backwards* to designate DIS as a “hate group.” A reporter told Beirich that DIS took donations through an entity John Tanton founded. Doc. 114-14 at CONF.0004, 0142, 0145. She didn’t know about that connection before the call. Doc. 114-7 at 23 (Beirich Dep. 85:5–25). She knew Tanton, though, and called him a driver of “racist fervor against immigrants.” *Id.* at 24 (Beirich Dep. 87:12–15). From a single call with a reporter writing a hit piece on Plaintiffs, she concluded DIS “was working very closely with white supremacists.” *Id.* (Beirich Dep. 88:2–4).

That’s a big pop from a small kernel. However Beirich interpreted that new information, it doesn’t show DIS worked with white supremacists, met with them, or agreed with them. Beirich made the leap anyway, and fast: in that same call, SPLC told the reporter it was reopening its file on DIS. Doc. 114-14 at CONF.0004, 0142. Conclusion first, investigation second. That’s exactly the preconceived-storyline

pattern courts treat as evidence of actual malice. *See, e.g., Goldwater*, 414 F.2d at 337, 339 (actual malice may be established through circumstantial evidence of a “predetermined and preconceived plan to malign” the plaintiff, and “a possible preconceived plan to attack [him] regardless of the facts”); *Harris v. City of Seattle*, 152 F. App’x 565, 568 (9th Cir. 2005) (“[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence.” (quoting Smolla, *supra*, § 3:71)).

The timeline looks worse next to what preceded it. This is the same Beirich who told a reporter in 2011 that DIS’s advocacy “is not something we can quibble with.” Doc. 114-10 at 3. SPLC kept DIS at the lesser “nativist extremist” label for six years on that basis. Doc. 114-10 at 9. Nothing about DIS’s own conduct changed in 2017. A reporter’s call did. A jury could find that Beirich used that one call to skip past six years of contrary evidence in order to “get” Plaintiffs.

B. Actual malice is determined by all those responsible for designating DIS as an “anti-immigrant hate group,” not just those responsible for maintaining that designation.

SPLC contends that Beirich’s knowledge cannot be imputed to SPLC for the 2020 and 2021 Redesignations because they “were published after she left SPLC.” RB46. In SPLC’s view, Hanks’s subjective belief “is all that is relevant for the actual malice requirement.” *Id.* That argument oversimplifies the governing principle and misreads the record.

By SPLC’s own account, when Beirich learned in 2017 that DIS was tied to the so-called “Tanton Network,” she assigned a research analyst to investigate the connection, reviewed the resulting memorandum, and personally approved the 2018 hate group designation because she found the “totality-of-evidence” persuasive. RB45 (citing Doc. 114-6 at 31–32; Doc. 114-7 at 24, 31–32, 48–49; Doc. 114-14 at CONF.0004, 0007–0009, 0142). SPLC concedes (RB45) that this made her knowledge SPLC’s knowledge for the 2018 designation and the 2019 redesignation. Nothing in the record shows that knowledge was purged before 2020 and 2021.

To the contrary, SPLC’s own process carries it forward: “[o]nce SPLC designates a group as a hate group, SPLC looks for new

information about the group to determine whether to redesignate the group on the next year's Hate Map." Doc. 134 at 23. Hankes didn't reinvestigate DIS from the ground up in 2020 or 2021. He approved those redesignations "based on a research analyst's analysis and report on DIS's activities for the previous years," a report that necessarily builds on the file Beirich created and approved. Doc. 134 at 31 (citing Doc. 116 at 23). By SPLC's own characterization, Beirich exercised editorial responsibility for the content that carried through to 2020 and 2021, and Hankes simply renewed it.

The actual-malice inquiry necessarily examines the states of mind of the persons who bore responsibility for monitoring the target, designating the target, and renewing the designation of that target. *See generally* Smolla, *supra*, § 3:42.50. Beirich's decade-long knowledge and her role in creating that designation remain part of the inquiry even after she left SPLC. The district court's exclusive reliance on Hankes's declaration that he "never had any reason to doubt" the 2021 redesignation therefore was legal error.

C. A jury could find that SPLC recklessly disregarded the ordinary meaning of “anti-immigrant” in favor of an undisclosed definition of its own making.

“Defamation law should be grounded in common sense, in how ordinary readers read and ordinary viewers view.” Smolla, *supra*, § 4:17. As argued in the opening brief (at 50–51), SPLC’s internal definition of what is “anti-immigrant” does not preclude a finding of actual malice. A reasonable jury could infer that SPLC recklessly disregarded the fact that an ordinary reader would interpret “anti-immigrant” to mean opposition “to the introduction of all foreign-born people to this country.” Doc. 123 at 9. SPLC asserts that Plaintiffs are trying to import an objective standard into actual malice and that the undisputed record shows everyone at SPLC believed Plaintiffs were “anti-immigrant.” RB46, 48. Both points fail.

SPLC cites this Court’s decision in *Moore* for the proposition that “[f]ocusing on readers’ interpretations rather than the publisher’s intent ‘would allow a defamation plaintiff to hold a defendant liable for defamatory implied statements negligently conveyed’ and ‘would eviscerate the First Amendment protections that the Supreme Court established in *New York Times* and its progeny.’” RB48–49 (quoting 174

F.4th at 886). But *Moore* is a defamation-by-implication case that focused on implied statements that carry “multiple meanings—some defamatory and some not”—making it impossible to presume whether defendant knew it was making a defamatory statement at all. 174 F.4th at 882.

Here, by contrast, SPLC concedes that “anti-immigrant” carries one ordinary meaning: opposition to “the introduction of all foreign-born people to this country.” RB49. There is no second reading competing for the jury’s attention. The question, therefore, is whether SPLC defamed Plaintiffs as “anti-immigrant,” regardless of its own internal definition, knowing or recklessly disregarding that an *ordinary reader* would understand the term in that sense.

In fact, this Court implicitly refuted SPLC’s position in *Moore* when it observed that the defendant “included citations to the news articles that it relied on in the ad itself.” 174 F.4th at 886. As the Court observed, “[w]here a publisher gives readers sufficient information to weigh for themselves the likelihood of [a statement’s] veracity, it reduces the risk that readers will reach unfair (or simply incorrect) conclusions, even if the publisher itself has.” *Id.* (quoting *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016)).

Unlike the defendant in *Moore*, SPLC gave readers no inkling that it was re-defining “anti-immigrant.” The 2018 Intelligence Report never disclosed that SPLC’s “anti-immigrant” meant something broader than the term’s ordinary meaning. Readers had no way of knowing that SPLC’s label rested on a private definition covering opposition to illegal immigration too. Under *Moore*’s own logic, that’s the scenario that raises the actual-malice concern, not the one that avoids it.

SPLC’s second argument, that the record shows everyone at SPLC believed Plaintiffs were “anti-immigrant,” fares no better. RB50. SPLC relies on a pair of cases for the proposition that it may apply its own understanding of the term even if that understanding reflects a “misconception.” *Id.* (citing *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 316 (5th Cir. 1995); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984)). Neither helps SPLC. *Duffy* tolerated a vernacular use of “sexual harassment” because the vernacular and technical senses of that phrase overlap enough that no reader is misled. 44 F.3d at 316. SPLC concedes no such overlap is present here; it agrees the ordinary meaning of “anti-immigrant” is opposition to all foreign-born people, while applying a broader private definition it never disclosed. RB49–50.

Bose excused an imprecise description of an ambiguous listening experience, not a publisher's undisclosed replacement of the ordinary definition with another. 466 U.S. at 513.

Nor is the record disputed on this point. Beirich told a reporter in 2011 that DIS's tactics "have generally not been to get up in the face of actual immigrants and threaten them" and that its legal advocacy "is not something we can quibble with." Doc. 114-10 at 3. She held that view for six years, classifying DIS only as a lesser "nativist extremist" group. Doc. 114-10 at 9. What changed her position in 2017 was not new evidence of DIS's own conduct but a potential connection to the so-called "Tanton Network," which led her to suddenly conclude that DIS "was working very closely with white supremacists." Doc. 114-7 at 24. A jury could find that conclusion reckless rather than honest.

SPLC's reliance on other authorities fares no better. It cites *Morgan v. Tice*, 862 F.2d 1495 (11th Cir. 1989), for the proposition that the defendant's statements "represented his honest belief." *Id.* at 1500. But SPLC omits the next sentence: "The plaintiff made no effort to show that the comments... were false." *Id.* Here, Mr. King testified that SPLC's defamatory statements about Plaintiffs were false. Doc. 114-3 at 7–8.

Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247 (11th Cir. 2021), is no answer either. This Court addressed only whether “hate group” is too ambiguous a term to be provably false, expressly leaving open whether more specific terms are. *Id.* at 1252 n.7, 1253. “Anti-immigrant” isn’t the same as a “hate group,” the latter of which, this Court noted, “SPLC put its own definition ... on its website.” *Id.* at 1252 n.7. SPLC put no definition of “anti-immigrant” on its website. And both sides now agree what “anti-immigrant” means in its ordinary sense as understood by an ordinary reader. What’s still disputed is whether SPLC knew Plaintiffs didn’t fit that ordinary definition. That’s a question for the jury.

III. Factual reports supplied to law enforcement agencies cannot be characterized as “nonactionable statements of opinion.”

SPLC offers an alternative ground for affirmance: the challenged statements are nonactionable opinion. RB52–55. The argument cannot be squared with the nature of SPLC’s Intelligence Project, with the record, or with the governing test under *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990).

A statement is actionable if it's "sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21. To determine whether a statement could be reasonably interpreted as stating or implying a fact, the court must examine each statement in context, considering "the circumstances in which the statement was expressed." *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). "[T]he tone of the speech and its medium of expression can often signal opinion or nonliteral assertions of fact," *Bennett v. Hendrix*, 325 F. App'x 727, 741 (11th Cir. 2009), as does "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made," *Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting).

The label "anti-immigrant hate group," as an ordinary reader would understand it, meets that test. The parties largely agree on the ordinary meaning of "anti-immigrant": opposition to the introduction of *all* foreign-born people. Whether DIS's public advocacy, legislative goals, and rhetoric in fact express that opposition is a question that can be answered by examining its own statements and conduct. That is a factual inquiry.

A jury can look at what DIS has said and done and decide whether the factual characterization is true.

SPLC also has a practical problem. It holds itself out as a premier investigative organization that offers expert analysis to the media and public. Doc. 22 at 37–38. It doesn’t market its Hate Map or its Extremist Profiles as the musings of civil rights lawyers. It distributes them as factual investigative reports. Doc. 22 at 37–38; Doc. 114-13 at 18–22. In fact, it uses these reports to “train law enforcement officers” in combating extremist groups. Doc. 114-7 at 18 (Beirich Dep. 64:1–17). An organization that holds its designations out to the FBI, newsrooms, and the public as the product of investigation and expertise cannot, when sued for defamation, suddenly recharacterize the same designations as non-verifiable opinion.

IV. The single-publication rule does not bar the Extremist Profile claim.

SPLC’s annual republication of the DIS designation to new audiences lies outside the single-publication rule as Alabama has defined it. SPLC defends the district court’s contrary result on two grounds: that the Alabama Supreme Court would extend the rule to internet postings because every court to consider the question has done so (RB36–38), and

that the rule then forecloses Count 4 because the Extremist Profile’s allegedly defamatory material has not changed since January 7, 2019 (RB38–42). SPLC’s threshold assertion (RB36) that Plaintiffs concede the time bar on the initial designation and the 2019 and 2020 redesignations merely restates the scope of the appeal. Br. 62–68. On the merits, SPLC’s defense fails for two independent reasons.

First, SPLC contends (RB36–38) that the Alabama Supreme Court would extend the rule to internet postings because every court to consider the question has done so. But the Alabama Supreme Court has described the single-publication rule as “generally applicable *only to newspapers and similar media*,” and has confined its republication exception to “situations where subsequent acts of defamation are verbatim republications of previously made libelous or slanderous statements.” *Poff v. Hayes*, 763 So. 2d 234, 242 n.5 (Ala. 2000) (citing *Age-Herald Publ’g Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921)) (emphasis added). SPLC is not a newspaper distributing a single-dated edition. It is an advocacy organization that maintains a continuously updated “Hate Map” and actively re-promotes it to law enforcement agencies, reporters, and donors on an annual cycle. If the single publication rule were to be

applied outside the media context, as SPLC asserts, then any defendant could repeat and re-publicize defamatory statements with impunity.

Second, SPLC's brief avoids addressing one of the two ways a publication can constitute a "republishing" that re-starts the statute of limitations: a republishing occurs when the same publication is marketed to new audiences. *See* Restatement (Second) of Torts § 577A cmt. c, d. Even where courts have extended single-publication treatment to internet postings generally, as in *Firth v. State*, 98 N.Y.2d 365 (2002), the protection of the single publication rule is denied and republishing occurs when "the subsequent publication is intended to and *actually reaches a new audience*." *Firth*, 98 N.Y.2d at 371 (citing *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 433 (1981)) (emphasis added).²

SPLC cannot dispute that it annually marketed its Extremist Profiles, along with the Hate Map and related materials, to a "new audience," including potential donors and media outlets. It contends

² SPLC correctly notes (RB45 n.11) that Plaintiffs' opening brief attributed (Br. 66) a quotation from *Firth v. State*, 98 N.Y.2d 365 (2002) to *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422 (1981). In consolidating citations for that passage during editing, Plaintiffs' brief mistakenly attributed *Firth's* language to *Rinaldi*. *Firth* quotes *Rinaldi*, 52 N.Y.2d at 433, 435, so the point Plaintiffs draw from the passage is unaffected, but the citation should have read *Firth*, not *Rinaldi*.

(RB38–40) only that the substantive text of the Extremist Profile went unchanged. Even if the Extremist Profile’s content remained unchanged (and it did not), marketing it to a new audience suffices to re-start the limitations period. That makes sense. Reaching a new audience inflicts a new injury. The act of marketing, much like a change in the content of the published materials, also provides evidence that the defendant reconsidered the defamatory content of its materials yet chose to republish it anyway. Here, SPLC has been notified, at least by this lawsuit, of the false and defamatory character of its publications, yet it continues to publish its Extremist Profile to this day.

SPLC’s contrary authorities are inapposite. RB37–39 (citing cases). None addressed an organization’s affirmative, annual act of republicizing updated content for advocacy and fundraising purposes. Because the record shows SPLC’s annual “Hate” cycle is intended to reach new audiences, Count 4 is not barred by the single-publication rule, and the district court’s contrary ruling should be reversed.

CONCLUSION

For the above reasons, this Court should reverse the discovery order and summary judgment, remand for completion of editorial-process discovery and renewed summary judgment proceedings under the correct legal standards, and reverse the application of the single-publication rule to Count 4.

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Todd V. McMurtry
THE MCMURTRY LAW FIRM, PLLC
405 Garrard St., Ste. 204
Covington, KY 41011
(859) 999-1074
todd@mcmurtry-law.com

Respectfully submitted,

s/ Horatio G. Mihet

Mathew D. Staver
Horatio G. Mihet
Daniel J. Schmid
Daniel J. Piedra
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org
hmihet@lc.org
dschmid@lc.org
dpiedra@lc.org

James R. McKoon, Jr.
McKoon & Gamble
P.O. Box 3220
Phenix City, AL 36868
(334) 297-2300
jrmckoon@aol.com

Counsel for Plaintiffs-Appellants

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,440 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(f) and Eleventh Circuit Local Rule 32-4.

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Respectfully submitted,

s/ Horatio G. Mihet

Horatio G. Mihet

*Counsel for Plaintiffs-
Appellants*

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Respectfully submitted,

s/ Horatio G. Mihet

Horatio G. Mihet

*Counsel for Plaintiffs-
Appellants*