No. 17-1783

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA CITIZENS DEFENSE LEAGUE;
DANIEL L. HAWES, ESQ.; AND PATRICIA WEBB;

Plaintiffs-Appellants,

v.

KATIE COURIC; STEPHANIE SOECHTIG; ATLAS FILMS LLC;
AND STUDIO 3 PARTNERS, LLC d/b/a EPIX

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
(Case No. 3:16-cv-000757, Hon. John A. Gibney, Jr.)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1783 Caption: Virginia Citizens Defense League, et al. v. Katie Couric, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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Signature: /s/ Thomas A. Clare Date: 07/13/2017

Counsel for: Appellants

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INTRODUCTION

Although this case is brought by a gun rights advocacy group and two of its members—experts in firearms law and policy—it is *not* a case about guns. And although this case centers on Plaintiffs' portrayal in Defendants-Appellees' gun control documentary, it does not (and should not) turn on political beliefs or opinions about gun control. Instead, this is a case about speech. It is a case about whether those involved in robust policy debates are entitled to common-law protections from being defamed by Defendants who acted intentionally, portrayed them falsely, and did so with actual malice.

This defamation case arises from Defendants' admittedly "misleading" broadcast of a gun control documentary, *Under the Gun*, including an interview of Plaintiffs by Defendant Katie Couric that Couric has admitted "misrepresented an exchange" she had with Plaintiffs. (JA37-39, JA69-72, ¶85 & Ex.4.) More specifically, it arises from Defendants' deliberate manipulation of video footage to manufacture an exchange between Couric and Plaintiffs that purported to show Couric asking Plaintiffs a question about background checks for firearm purchases—"if there are no background checks for gun purchasers, how do you prevent felons or terrorists from purchasing a gun?"—and to show Plaintiffs, who Defendants invited to participate in the interview because of their gun policy expertise and pro-Second Amendment views, having no answer to that question

whatsoever and instead sitting "speechless," stumped, avoiding all eye contact with Couric, and looking completely hapless for a painfully awkward nine seconds.

In reality, that exchange was a work of fiction: Plaintiffs had in fact begun to answer Couric's question immediately, and they continued to answer it for nearly six minutes including by rebutting multiple incorrect premises underlying her question. Defendants' film did not show any part of Plaintiffs' answer, and as the Complaint alleges, that decision was intentional: Defendants set out to—and did in fact—use deceptive editing techniques to manufacture a false exchange between Couric and Plaintiffs that made Plaintiffs look ridiculous, incompetent, and ignorant in direct relation to firearms—the subject to which Plaintiff VCDL has dedicated its mission (JA16-17, ¶18), to which Plaintiff Hawes has dedicated his profession (JA17-18, ¶20), to which Plaintiff Webb has dedicated her business (JA17, ¶19). Defendants manufactured this exchange to further their own agenda—"to portray opposition to background checks as rare and baseless." (JA22, ¶32.)

To be clear, Plaintiffs do not quibble with Defendants' rights to routine production editing or even Defendants' editorial decision to propagate a pro-gun-control message through *Under the Gun*. Nor do Plaintiffs contend that Defendants were obligated to present Plaintiffs' six-minute-long answer to Couric's question. Plaintiffs would have been happy to have been judged on (even

part of) their actual answer. But Plaintiffs do take issue with—and defamation law prohibits—Defendants creating and broadcasting to a worldwide audience a false exchange that affirmatively conveys that Plaintiffs are incompetent and ignorant on the very subject they have dedicated their organizational mission and professions. *That* is why Plaintiffs brought this suit, and their Complaint more than adequately states claims for defamation and defamation-by-implication under Virginia law.

But rather than administering blind justice to the litigants before it, the district court turned a blind eye to the law and improperly injected its own anti-gun politics into this dispute. At bottom, the district court flatly refused to provide Plaintiffs any protection under longstanding defamation law that safeguards individuals and groups from falsehoods that portray them as "ridiculous" or that brings them "shame or ridicule." Instead, the district court dismissed Plaintiffs' action based on its own politicized view of "the social issues of gun control and the proliferation of firearms in the United States." (JA118.) In the court's subjective political opinion, Plaintiffs did not adequately answer Couric's question, and therefore, by showing no answer to Couric's question whatsoever, the exchange was not false. (Never mind that even *Defendants* did not move to dismiss the case on falsity. And never mind the unequivocal portrayal of Plaintiffs as stumped, shamed, and cowered.) Because in the district court's subjective political opinion, Plaintiffs' answers to Couric's question reflected "the sophistry of the VCDL

members," and because Defendants were merely being "artistic[]" in demonstrating that "sophistry," the exchange was not false or defamatory. (JA123, JA125.)

There is no place for personal politics in the administration of justice. Here, however, the district court improperly substituted its own political judgment for the actual legal standard that should have been applied on a motion to dismiss—that an allegation of falsity "must" be taken as true and whether the fictional exchange with Couric was "reasonably capable of a defamatory meaning." (JA125.) Love or hate guns, agree or disagree with Plaintiffs' response to Couric's question, the law does not permit Defendants to falsely portray Plaintiffs in a manner that made them appear ridiculous and wholly ignorant in their subject-matter expertise. Accordingly, this Court should reverse the district court's decision and remand the case so Plaintiffs may proceed to discovery.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332 because there was (and is) complete diversity of citizenship between Plaintiff-Appellants and Defendant-Appellees and the amount in controversy exceeds $75,000, exclusive of interest and costs. The district court entered final judgment on May 31, 2017. (JA129.) Under Federal Rule of Appellate Procedure 4(a)(1)(A), Plaintiff-Appellants timely filed a Notice of Appeal on June 28, 2017,

fewer than 30 days after final judgment was entered. (JA130.) This Court has jurisdiction to hear Plaintiffs' appeal from the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding at the pleading stage—*sua sponte* without any briefing on the issue—that Plaintiffs' defamation claims failed because the defamatory exchange between Couric and Plaintiffs was not false (even though no Defendant moved to dismiss on the element of falsity), despite Plaintiffs' numerous allegations that the exchange was both literally false and made false implications about Plaintiffs, and despite Defendant Couric's admissions that Defendants "misrepresented" her exchange with Plaintiffs and that Plaintiffs had in fact "answered" her question, because the court found, as a matter of fact adverse to Plaintiffs at the Rule 12(b)(6) stage, that Plaintiffs' actual six-minute-long response to Couric's question "*did not* answer the question posed by Couric." (JA123 (emphasis in original).)

2. Whether the district court erred in finding, on a motion to dismiss, that Plaintiffs' defamation claims failed as a matter of law because the exchange between Couric and Plaintiffs "does not defame" even though Defendants, through the manufactured exchange, affirmatively portrayed Plaintiffs as ignorant and incompetent on the subject to which they have dedicated their organizational

mission and professions by, as Defendant Couric admitted, making Plaintiffs "appear to be speechless" when Plaintiffs "had in fact answered [her] question," and where multiple viewers expressly recognized that the edited exchange between Couric and Plaintiffs negatively and prejudicially portrayed Plaintiffs.

3. Whether the district court erred in finding, on a motion to dismiss, in a footnote and without explanation, that Plaintiff VCDL's defamation claims failed as a matter of law because Defendants' defamatory broadcast was not "of and concerning" the VCDL even though the broadcast identified the VCDL expressly and by name, Defendant Couric admitted that the broadcast's defamatory exchange involved her question "to the VCDL" and the "VCDL Response," persons who saw the defamatory exchange understood it to concern the VCDL, and Defendants intended to refer to and feature the VCDL in the defamatory exchange.

STATEMENT OF THE CASE

A. Factual Background

This case arises from Defendants' intentionally false and admittedly "misleading" "misrepresent[ation]" of Plaintiff-Appellants Virginia Citizens Defense League ("VCDL")—a non-partisan organization dedicated to advancing the rights of responsible gun owners and whose stated mission is "Defending Your Right to Defend Yourself" (JA16-17, ¶18)—and VCDL Executive Members John

L. Hawes, Esq., a VCDL Legal Advisory Council Member[1] and attorney whose practice focuses on firearms and self-defense and is based on his knowledge of the laws and regulations relating to firearm ownership and possession (JA17-18, ¶20), and Patricia Webb, a VCDL Board of Directors Member and licensed firearms dealer and gun store owner who is required to be knowledgeable about firearms, background checks relating to firearm sales, and firearms licensing requirements, and whose store partners with the VCDL to educate the public about Second Amendment rights (JA17, ¶19).

1. Plaintiffs' Actual Interview With Defendants For Defendants' Film *Under the Gun*.

In late 2012, Defendant Katie Couric joined with Defendants Stephanie Soechtig, Atlas Films LLC, and Studio 3 Partners LLC d/b/a Epix ("Epix") to produce, publish, and promote a film, titled *Under the Gun*, advocating for more restrictive gun legislation and background checks. (JA22, ¶32.) Because "[o]ne of the states [they] zero[ed] in on" for their film was Virginia, Defendants contacted the VCDL (through its President, Phillip Van Cleave) and requested an interview, purportedly for the purpose of "includ[ing] all perspectives" and "varied viewpoints" on gun control/rights in the film. (JA22, JA69-72, ¶33 & Ex.4.) Nine VCDL members—including Hawes and Webb—sat for an interview with Couric,

[1] In this role, Mr. Hawes answers, *pro bono*, VCDL members' legal questions regarding firearms. (JA17-18, ¶20.)

as arranged by Atlas Films with VCDL President Van Cleave. (JA22, JA66-68, ¶35 & Ex. 3.)

At the beginning of the interview, Couric repeated her claim that Defendants "want[ed] to get all different points of view" and acknowledged that she "know[s] you guys have a specific point of view on this issue [of gun control] ... that we're tackling." (JA23, ¶36.) Couric then asked the group a few questions, including the question that has given rise to this case:

> If there are no background checks, how do you prevent—***I know how you all are going to answer this,*** but I'm asking anyway—if there are no background checks for gun purchasers, how do you prevent felons or terrorists from walking into say a licensed gun dealer and purchasing a gun?

(JA23, ¶37.)[2]

Less than one second after Couric asked that question, Plaintiffs began to answer it. (JA23, ¶38.) After a first VCDL member responded to Couric's question, Hawes answered it by rebutting one of its premises—that people can purchase guns from licensed gun dealers without a background check. (JA23, ¶39.) Hawes responded:

> The fact is we do have statutes, both at the federal and state level that prohibit classes of people from being in possession of firearms. If you're under 18, in Virginia, you can't walk around with a gun. If you're an illegal immigrant, if you're a convicted felon, if you've been adjudicated insane, these things are already illegal. So, what we're really asking about is a question of prior restraint. How can we

[2] Emphases added unless otherwise indicated.

> prevent future crime by identifying bad guys before they do anything bad? And, the simple answer is you can't. ... Until there is an overt act that allows us to say, "That's a bad guy," then you can't punish him.

(*Id.*) Webb then also answered Couric's question by arguing that no law is going to keep guns out of the hands of criminals and terrorists—and, therefore, requiring licensed gun dealers to perform background checks will ***not*** prevent felons and/or terrorists from purchasing guns. (JA23-25, ¶40.) Webb stated:

> I would take another outlook on this. First, I'll ask you what crime or what law has ever stopped a crime? Tell me one law that has ever stopped a crime from happening. ... [W]ho is to say that that person that was denied a background check did not go out and buy or steal a gun from somewhere else?

(*Id.*) Three other VCDL members also then responded to Couric's question. (JA25, ¶41.) In total, the VCDL members' answer proceeded for nearly six minutes, and a related discussion continued for an additional three minutes. (*Id.*)

Near the end of the interview, completely separate from and unrelated to the above exchange about background checks (the "exchange"), Defendants told Plaintiffs that they were calibrating video equipment, but instead surreptitiously video-recorded Plaintiffs to obtain "b-roll" footage to splice into the documentary. (JA25, ¶42.) At that time, an Atlas Films cameraman asked, "Can I have ten seconds?" (*Id.*) Couric clarified his request, stating: "Oh sorry. Room tone, so ***we can't talk for ten seconds***," conveying that Plaintiffs needed to sit silently so that recording equipment could be calibrated. (*Id.*) Plaintiffs obliged, and Defendants

quietly recorded them sitting silently, looking around the interview room and down at the floor. (*Id.*)

2. Defendants Manipulate Their Recorded Footage To Manufacture An Exchange With Plaintiffs Regarding Background Checks That Never Occurred.

Rather than present the actual exchange between Couric and Plaintiffs in *Under the Gun*—or omit it entirely—Defendants manipulated their footage of Plaintiffs to manufacture an exchange that never actually occurred.

First, Defendants deleted two key parts of the question that Couric actually asked Plaintiffs. Defendants first deleted the portion of Couric's question in which she acknowledged "I know how you all are going to answer this." (JA26, ¶43.) Defendants also deleted the words "walking into say a licensed gun dealer and" from the question. (*Id.*) Defendants thus transformed Couric's question as follows:

Unedited Question in Actual Interview	Edited Question in *Under the Gun* (deleted language shown in bold strikethrough)
If there are no background checks how do you prevent—I know how you all are going to answer this, but I'm asking anyway—if there are no background checks for gun purchasers, how do you prevent felons or terrorists from walking into say a licensed gun dealer and purchasing a gun?	If there are no background checks **~~how do you prevent—I know how you all are going to answer this, but I'm asking anyway—if there are no background checks~~** for gun purchasers, how do you prevent felons or terrorists from **~~walking into say a licensed gun dealer and~~** purchasing a gun?

(*Id.*)

Plaintiffs' Complaint alleges that these alterations were significant and contributed to the falsity and defamatory meaning of the exchange. (JA13-14, JA49, JA55-56 ¶¶11, 112, 131.) By deleting Couric's mid-question acknowledgement that Plaintiffs were about to answer the question, Defendants made it possible to portray Plaintiffs as having had no response to it. (JA26, ¶44.) If Defendants had not deleted Couric's acknowledgement, any portrayal of Plaintiffs as having no answer to Couric's question would have been undermined. (*Id.*)

The Complaint further alleges that, by deleting the words "walking into say a licensed gun dealer and," Defendants materially changed—and broadened—the question's premise and meaning. (JA26-27, ¶45.) As the question was actually phrased, it could be interpreted to have the incorrect premise that the law does not currently require *licensed dealers* to conduct background checks. (*Id.*) However, by cutting the words "walking into say a licensed gun dealer," Defendants materially changed the premise to the claim that *universal* background checks would prevent felons and terrorists from obtaining guns. (*Id.*)

Second, rather than broadcasting Plaintiffs' actual answer to Couric's question—or even an abridged version of it—Defendants deleted the entirety of Plaintiffs' answer, including all six minutes of the answer that Hawes, Webb, and other VCDL members provided and the three additional minutes of related

discussion. (JA27, ¶46.) Defendants did not simply pose Couric's (edited) question rhetorically to the film's audience. Rather, immediately following Couric's (manipulated) question, Defendants spliced in nine seconds of "b-roll" footage of a reaction Plaintiffs did not have: Plaintiffs sitting silently, avoiding eye contact with Couric and others, including looking downward toward the floor as if in shame. (JA11, ¶¶3-5.) In reality, the footage was nothing more than Plaintiffs following Defendants' instructions to sit silently while Defendants purportedly calibrated their video equipment. (JA27, ¶46.)

As the Complaint alleges, as a result of Defendants' deliberate manipulation of the exchange, Defendants portrayed Plaintiffs as having had no response at all to Couric's question. (*Id.*) Defendants portrayed Plaintiffs as entirely ignorant and incompetent on the topic to which they have dedicated their organizational mission and professional lives by, as Couric put it, "misrepresent[ing] [the] exchange" by making Plaintiffs "appear to be speechless" when Plaintiffs "had in fact immediately answered [Couric's] question." (JA37-39, JA69-72, ¶85 & Ex.4.) And because of Defendants' editing of Couric's question that broadened its premise, Defendants portrayed Plaintiffs as ignorant on a broad question they were never even asked. (*Id.*)

3. Defendants Publish *Under The Gun*—Including The Manufactured Exchange—To Worldwide Audiences.

Beginning in April 2016, Defendants published *Under the Gun* to audiences across the country, and subsequently published the film worldwide on cable television and on Epix's website. (JA29, ¶¶53-54.) *Under the Gun* included the false and manufactured exchange between Couric and Plaintiffs and the fictitious non-answer by Plaintiffs to Couric's question. (*Id.*) Defendants specifically and repeatedly identified each Plaintiff in the film as members of the VCDL and as having a profession related to firearms. For example, at the beginning of Couric's interview with Plaintiffs, the film introduced Plaintiffs as "MEMBERS OF THE VIRGINIA CITIZENS DEFENSE LEAGUE." (JA30, ¶56.) The film further introduced Hawes as an attorney and Webb as a gun store owner. (JA30, ¶¶57-58.)

4. In Response To Backlash, Couric Admits That Defendants "Misrepresented" Her Exchange With Plaintiffs And Did "Not Accurately Represent [Plaintiffs'] Response."

Shortly after Defendants released *Under the Gun*, VCDL President Van Cleave contacted Atlas Films producer Kristin Lazure regarding Defendants' edited exchange between Couric and Plaintiffs. Van Cleave informed Lazure that "I have the audio of that entire interview and I know for an absolute fact that our members immediately jumped in to answer the question and did NOT just sit there quietly." (JA35, ¶77.) He continued: "To the person watching the video, it gave the intentionally false appearance of no one in our group having an answer." (*Id.*)

When Lazure stood by Defendants' editing, Van Cleave issued a statement on behalf of VCDL entitled "Unethical Journalism: Couric Alters Words of VCDL Members," and released the full, unedited audio of the interview. (JA36, ¶78.)

Nonetheless, Defendants stood by their portrayal of Plaintiffs in *Under the Gun*. (JA36, ¶79.) To her credit, Couric released a statement acknowledging Defendants' manipulation of the footage of her exchange with Plaintiffs and admitting that Defendants had affirmatively "misrepresented" it. In that statement, Couric acknowledged that her question "to the VCDL" about background checks "was followed by an extended pause, making the participants appear to be speechless," and admitted that "[w]hen VCDL members recently pointed out that they had in fact immediately answered this question, I went back and reviewed it and agree that those eight seconds [of added b-roll footage] ***do not accurately represent their response.***" (JA22, JA69-72, ¶33 & Ex.4.) Couric then acknowledged that Plaintiffs had, in fact, answered her question, writing that "VCDL members have a right for ***their answers*** to be shared."[3] (*Id.*) Couric further acknowledged that Defendants' edits to the exchange were "misleading." (*Id.*)

[3] Although Couric claimed to then post "a transcript of [Plaintiffs'] responses," she still cut more than 70% of Plaintiffs' responses from the transcript she posted and even edited the responses she did post. (JA39, ¶86.)

Epix, despite knowing about Defendants' acknowledged manipulation of the exchange, not only issued a statement that it "stands behind Katie Couric, director Stephanie Soechtig, and their creative and editorial judgment," but actually used the controversy Defendants generated to encourage new audiences to view *Under the Gun*. (JA36, ¶79.) Epix's statement provided that "[w]e [Epix] encourage people to watch the film and decide for themselves" thereby expressly using the controversy Defendants' wrongful conduct had generated to promote the film. (*Id.*) Epix continued to publish and promote *Under the Gun* to new audiences. (JA18-19, ¶24.)

5. Viewers Of The Manipulated Exchange Recognized That It Negatively Portrayed Plaintiffs.

As Plaintiffs' Complaint pleads, following Defendants' publication of *Under the Gun*, multiple viewers recognized that the edited exchange between Couric and Plaintiffs negatively portrayed Plaintiffs. (JA35-37, ¶¶75, 81.) For example, a Hollywood Reporter reviewer who viewed the film wrote that "[a] group of blustery members of the Virginia Citizens Defense League [] suddenly remain painfully quiet when Couric asks them the hard questions." (JA35, ¶75.) And after Soechtig tried to spin Defendants' insertion of b-roll footage of Plaintiffs as adding "a pause for the viewer to have a moment to consider this important question," a Washington Post reporter who viewed the film wrote that "[t]he artistic 'pause' provides the viewer not a 'moment to consider this important

question'; it provides viewers a moment to lower their estimation of gun owners. That's it." (JA36-37, ¶¶80-81.)

B. Procedural History

When Defendants refused to retract the manufactured exchange between Couric and Plaintiffs and continued to promote and republish *Under the Gun* to new audiences (JA41, ¶92), Plaintiffs filed this lawsuit (JA16, ¶17).

Plaintiffs assert two counts in their Complaint. ***First***, Plaintiffs bring a defamation claim against Defendants for publication of the false exchange. As Plaintiffs allege, the exchange is literally false:

> The Defendants ***did not merely imply*** that the Plaintiffs had no response to Couric's question by, for example, cutting away to a different scene. Instead, the Defendants spliced in nine seconds of silent footage of the Plaintiffs immediately following Couric's edited question—and then ended the exchange with the image of a [gun] cylinder being closed—to affirmatively represent that the Plaintiffs had ***no*** answer and ***no*** basis for their opposition to background checks. In reality, the VCDL, Hawes, and Webb did ***not*** sit silently, as the Defendants made it appear. Rather, they promptly answered and provided numerous bases supporting their position, for approximately six minutes, and engaged in a related discussion for an additional three minutes.

(JA 46, ¶107 (first emphasis added).) ***Second***, Plaintiffs bring a defamation-by-implication claim against Defendants for publication of the exchange. As Plaintiffs allege, whether or not the exchange is literally false:

> By presenting footage of the VCDL members, Webb, and Hawes sitting silently immediately following edited footage of Couric's question regarding background checks, the Defendants' film falsely

> implies that the Plaintiffs have no basis for their opposition to background checks and that they are therefore unfit for their respective roles as a firearms advocacy organization, licensed firearms dealer, and attorney who practices litigation involving firearms and personal defense. In reality, the VCDL, Hawes, and Webb did ***not*** sit silently, as the Defendants made it appear. Rather, they promptly answered and provided numerous bases supporting their position, for nearly six minutes, and engaged in a related discussion for an additional three minutes.

(JA55, ¶131 (emphasis in original).) Under both their defamation and defamation-by-implication claims, Plaintiffs further allege that the exchange is defamatory and defamatory *per se* because it conveyed that Plaintiffs are ignorant and incompetent regarding, and prejudiced them in, their organizational mission and professions. (JA49-51, ¶¶112-18; JA59-60, ¶¶136-42.)

Defendants moved to dismiss under Rule 12(b)(6).[4] (DE 26-29.) Couric and Atlas Films moved to dismiss Plaintiffs' claims on the ground that Defendants' manufactured exchange is not capable of a defamatory meaning and to dismiss Plaintiff VCDL's claims because the exchange was not "of and concerning" it. (DE 27.) Epix moved to dismiss for failure to adequately allege actual malice. (DE 29.) No Defendant moved to dismiss on the ground that Plaintiffs failed to adequately allege falsity.

[4] Because of questions whether the court could exercise personal jurisdiction over Defendant Soechtig, Plaintiffs voluntarily dismissed their claims against her and Plaintiffs and Soechtig entered into a stipulation whereby Soechtig agreed to participate in this case as the corporate representative of Atlas Films LLC and "as if she were a party." (DE 30, 30-1.)

When the parties appeared before Judge Gibney for oral argument on the motions, the court acknowledged that Defendants' manufacturing of the exchange "was dirty pool" and "made [Plaintiffs] look like they had not even thought about that issue." (JA96, 24:4-7.) Nevertheless, the district court granted Defendants' motions to dismiss for three reasons.

First, although no Defendant moved to dismiss on the element of falsity, the court found that Defendants' manufactured exchange in *Under the Gun* was not false. The court reached this conclusion, despite Plaintiffs' allegations that the exchange was both literally false and made false implications about Plaintiffs, and despite Defendant Couric's admission that Defendants "misrepresented" her exchange with Plaintiffs and that Plaintiffs had "answered" her question, based on the court's conclusion that Plaintiffs in fact "did not answer the question posed by Couric." (JA118.) The court based that finding on its interpretation and evaluation of Plaintiffs' response to Couric's question, which it believed "did not actually answer the question" and which it characterized as "sophistry." (JA118, JA123.)

Second, the district court concluded that Defendants' manufactured exchange with Plaintiffs was not defamatory. The court based this conclusion on its finding that "at worst, [the exchange] shows artistically that [Plaintiffs] either cannot or will not answer the question," and "their verbal responses showed the same thing." (JA125.)

Finally, the district court concluded in a footnote, without any analysis or explanation, that Plaintiff "VCDL's claims also fail[] because the footage ... was not 'of and concerning' VCDL." (JA128 n.9.)[5] This appeal follows.

SUMMARY OF ARGUMENT

The district court reversibly erred in dismissing Plaintiffs' defamation claims on the grounds that Defendants' manufactured exchange between Couric and Plaintiffs was not false and was not reasonably capable of having a defamatory meaning. The court further erred in dismissing Plaintiff VCDL's defamation claims on the additional ground that the exchange was not "of and concerning" it.

First, the district court erred in finding that the defamatory exchange was not false. A defamation-plaintiff's allegations of falsity, which raises a question of fact, *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 48 (2009), must be accepted as true at the pleadings stage, *e.g.*, *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 330 n.4 (4th Cir. 2005); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993), and Plaintiffs expressly alleged that the exchange was literally false and conveyed false implications about Plaintiffs. (*See* JA13-14, JA23-27, JA29, JA44, JA46, JA54-58, ¶¶11, 38-41, 43-46, 53-54, 103, 107, 127, 131-32.) Plaintiffs

[5] The district court did not adjudicate Defendants' contentions that Plaintiffs failed to adequately allege actual malice, of which Plaintiffs pleaded extensive direct and circumstantial evidence in their Complaint. (*See* JA46-48, JA56-58, ¶¶108(a)-(r), 132(a)-(r) (listing allegations of actual malice); *see also* JA13-15, JA20-22, JA25-28, JA33-37, JA39-41, ¶¶11-14, 28-34, 42-52, 68-73, 77-83, 86-92 (explaining evidence of actual malice).)

pleaded that the defamatory exchange was literally false (as confirmed by raw audio of the actual exchange and as Defendants concede) because Defendants affirmatively edited the question that Couric actually asked Plaintiffs so as to materially change it and further replaced Plaintiffs' actual answer to Couric's question with nine seconds of silent "b-roll" footage of the VCDL members sitting silently looking about the room to convey an affirmative non-answer by Plaintiffs rather than Plaintiffs' actual answer. (*Id.*) Under settled U.S. Supreme Court precedent, that is false as a matter of law. *See Masson v. N.Y. Magazine, Inc.*, 501 U.S. 496, 518 (1991) (holding that "a deliberate alteration of the words uttered by a plaintiff" constitutes not only falsity but "knowledge of falsity for purposes of [actual malice]" where "the alteration results in a material change in the meaning conveyed by the statement"). In addition, the Complaint pleads that Defendants' edited version of the exchange conveyed numerous false implications about Plaintiffs, including that they were ignorant on the subject of firearm background checks and firearm issues generally and, thus, incompetent in their organizational mission and professions, when in reality Plaintiffs are all highly knowledgeable on those subjects and highly competent in their mission and professions. (JA16-18, ¶¶18-20.)

Moreover, in finding that Plaintiffs failed to adequately allege falsity because it believed that Plaintiffs in fact "did not answer the question posed by

Couric" (JA123), the district court compounded its error by engaging in improper—and incorrect—fact-finding at the Rule 12(b)(6) stage. The court ***did not hold*** that the ***only*** reasonable interpretation of Plaintiffs' actual response to Couric's question is that Plaintiffs did not answer it; rather, the court simply opined that ***it*** did not believe Plaintiffs answered Couric's question ***adequately***. And, even if such fact-finding were proper, the district court's factual finding was wrong, both because it is irrelevant whether Plaintiffs "answered" Couric's question during the exchange—what matters is that Plaintiffs (indisputably) *responded* to Couric's question and did not sit "speechless," as Defendants affirmatively conveyed—and because, as Plaintiffs pleaded, Plaintiffs did answer Couric's question, including by rebutting the question's faulty premises. (JA23-27, ¶¶37-40, 45.)

Second, the district court erred in finding that the exchange was not defamatory—rather than using the appropriate standard at the pleading stage and determining whether it was "reasonably capable of a defamatory meaning." To be defamatory under Virginia law, a statement—which can be made directly *or* indirectly—need only "tend[] to injure one's reputation" or "tend to prejudice [plaintiff] in the eyes of a substantial and respectable minority of [the community or plaintiff's associates]." *Schaecher v. Bouffault*, 290 Va. 83, 92 (2015); *Tomblin v. WCHS-TV8*, 434 F. App'x 205, 218 (4th Cir. 2011); Restatement (Second) of

Torts § 559 cmt. e. And a statement is defamatory *per se* if it "impute[s] to a person unfitness to perform the duties of an office or employment of profit, ***or*** want of integrity in the discharge of the duties of such an office or employment," ***or*** (2) "prejudice[s] such person in his or her profession or trade," ***or*** "cast[s] aspersion on [an entity's] honesty, credit, efficiency ***or*** its prestige ***or*** standing in its field of business." *Tronfeld v. Nationwide Mut. Ins. Co.*, 22 Va. 709, 713 (2006); *Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954); *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1071 (4th Cir. 1993).

Here, Plaintiffs alleged that Defendants set out to—and did in fact—use deceptive editing techniques to manufacture a false exchange between Couric and Plaintiffs that made Plaintiffs look ridiculous, incompetent, and ignorant in direct relation to firearms—the subject to which Plaintiffs have dedicated their organizational mission and professions (JA16-18, JA50, JA59-60, ¶¶18-20, 115, 137, 141)—and alleged detailed facts about how Defendants did so, including by presenting Plaintiffs as experts on and advocates for gun rights and then presenting them as being asked a question on an issue within that expertise and replacing their actual answer with unrelated b-roll footage to affirmatively misrepresent them as having no answer whatsoever to it. (*Id.*) Further confirming that a reasonable viewer could understand that exchange as making Plaintiffs look ridiculous, prejudicing them in the eyes of members of the community, or harming them in

their organizational mission and professions, Plaintiffs plead examples of actual viewers of the exchange as understanding it to do just that. (JA35-37, ¶¶75, 81.)

These well-pleaded allegations are more than sufficient to adequately allege that Defendants' manipulated footage of the exchange between Couric and Plaintiffs can reasonably be understood as having a defamatory meaning—and as being defamatory *per se*. To the extent the district court based its conclusion on its improper factual-finding that "[Plaintiffs'] verbal responses during the interview showed" that "they either cannot or will not answer [Couric's] question" (JA125), it reversibly erred.

Third, the district court erred in finding that the defamatory exchange was not "of and concerning" the VDCL. Under Virginia law, a publication is "of and concerning" a plaintiff if it "'was intended to refer to him and would be so understood by persons reading it who knew him.'" *WJLA-TV v. Levin*, 264 Va. 140, 152 (2002) (quoting *The Gazette, Inc. v. Harris*, 229 Va. 1, 37 (1985)). In addition, an entity-plaintiff may bring a defamation action in its own name where a person publishes a defamatory statement about its officers or members that has a "direct relation to the trade or business of the [entity-plaintiff]." *Schaecher*, 290 Va. at 99. The question of whether a defamatory statement is "of and concerning" the plaintiff is a question of fact. *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 801 F.2d 719, 725 (4th Cir. 1986); *Eramo v. Rolling Stone LLC*, No. 15-

cv-23, 2016 WL 5942328, at *1 (W.D. Va. Oct. 11, 2016). Here, Plaintiff VCDL expressly alleged that the defamatory exchange in *Under the Gun* was "intended to and did expressly refer to the [VCDL], and those who watched [it] understood the defamatory exchange to concern the VCDL" (JA44, JA54, ¶¶104, 128), and pleaded numerous facts to support that allegation, including that Defendants specifically sought out and targeted the VCDL for the interview in *Under the Gun* because "[o]ne of the states [Defendants] zero[ed] in on" was Virginia (JA22, JA66-68, ¶33 & Ex.3); that Defendants reached out to the VCDL directly, through its President, "to ask ***the VCDL*** to be interviewed for *Under the Gun*," and to "schedule[] interviews with ***VCDL*** and its members" (JA19-20, JA22, ¶¶26, 33); Defendants identified the VCDL ***expressly and by name*** in *Under the Gun*, introducing the panelists as "MEMBERS OF THE VIRGINIA CITIZENS DEFENSE LEAGUE" (JA30, JA44, JA54, ¶¶56, 104, 128); that "those who watched *Under the Gun* understood the defamatory exchange to concern the VCDL" (JA44, JA54, ¶¶104, 128; *see also* JA37-39, ¶85 (specifically identifying one such viewer)); and that Couric publicly admitted that her question during the exchange regarding background checks and felons/terrorists was posed "***to the VCDL***" (JA37-39, JA69-72, ¶85 & Ex.4) and released a "Transcript with ***VCDL*** Response" to that question (*id.*). And Plaintiffs further alleged that, even if the exchange were not about the VCDL itself, it was nonetheless "of and concerning"

it for the separate and independent reason that Defendants' false and defamatory statement was "in direct relation to the trade or business of" the VCDL. *See Schaecher*, 290 Va. at 99.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's dismissal of a complaint under [Rule] 12(b)(6)." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017); *Hatfill*, 416 F.3d at 329. To survive a motion to dismiss, a plaintiff's complaint need only "state a claim to relief that is plausible on its face." *Hall*, 846 F.3d at 765 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). This standard is "not a probability requirement," but simply "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Iqbal*, 556 U.S. at 678). In evaluating whether a complaint states a claim, the court "must accept as true all of the factual allegations contained in the complaint," and "draw all reasonable inferences in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). Ultimately, a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (quotation marks omitted). And as this Court has "emphasized," "a complaint is to be construed liberally so as to do substantial justice." *Hall*, 846 F.3d at 765.

ARGUMENT

I. The District Court Erred In Concluding That The Defamatory Exchange—Which Defendants Have Admitted "Misrepresented" Plaintiffs' "Answer[]" To Couric's Question—Was Not False.

The district court erred when it concluded, contrary to the well-pleaded allegations in Plaintiffs' Complaint and Defendants' own admissions, that the exchange between Couric and Plaintiffs was not false.

A. Virginia Law Creates A Very Low Threshold For Pleading Falsity, Which Presents A Question Of Fact.

As an initial matter, as this Court has repeatedly recognized, at the motion-to-dismiss stage, a defamation-plaintiff's allegations that factual assertions and implications are false ***must*** be "take[n] as true." *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 330 n.4 (4th Cir. 2005); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) ("On a motion to dismiss a libel suit because of no actionable statement, the court must of course credit the plaintiff's allegation of the factual falsity of a statement."); *see also, e.g.*, *McCray v. Infused Sols., LLC*, No. 14-cv-158, 2017 WL 4111958, at *3 (E.D. Va. Sept. 15, 2017); *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604, 609 (E.D. Va. 2005); *Jenkins v. Snyder*, No. 00-cv-2150, 2001 WL 755818, at *3 (E.D. Va. Feb. 6, 2001).

This rule makes sense. As the Supreme Court of Virginia has explained:

> Unlike the determination whether an allegedly defamatory statement is one of fact or opinion, which presents a legal question to be decided by a trial judge, ***the determination whether an allegedly defamatory statement is false ordinarily presents a factual question to be***

> ***resolved by a jury.*** Thus, once a trial judge has determined that an allegedly defamatory statement is capable of being proved false, the jury's function is to evaluate the evidence presented and to determine whether the plaintiff has met her burden of proving that the allegedly defamatory statement is false.

Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 48 (2009); *Jordan v. Kollman*, 269 Va. 569, 576 (2005) ("Whether a plaintiff has sufficiently proven the falsity of the alleged defamatory statements is a jury question.").[6] Moreover, even at the summary judgment stage after discovery:

> [o]nly if a plaintiff unequivocally has admitted the truth of an allegedly defamatory statement, including the fair inferences, implications, and insinuations that can be drawn from that statement, may the trial judge award summary judgment to the defendant on the basis that the statement is true.

Hyland, 277 Va. at 48.

Here, as alleged in Plaintiffs' Complaint and summarized above, the defamatory exchange between Couric and Plaintiffs was literally false ***and*** conveyed false implications about Plaintiffs.

[6] Federal courts in this Circuit have consistently applied this rule. *See, e.g.*, *Bates v. Strawbridge Studios, Inc.*, No. 11-cv-216, 2012 WL 1635051, at *3 (W.D. Va. May 9, 2012) ("Under Virginia law, the issue of whether a plaintiff has sufficiently proven the falsity of the alleged defamatory statements is a jury question."); *Dangerfield v. WAVY Broad., LLC*, 228 F. Supp. 3d 696, 704, 706 (E.D. Va. 2017) (similar); *Vaile v. Willick*, No. 07-cv-11, 2008 WL 2754975, at *6 (W.D. Va. July 14, 2008) (similar).

B. Plaintiffs More Than Adequately Alleged That Defendants' Manufactured Exchange Between Couric And Plaintiffs Is Literally False In Support Of Their Defamation Claim.

Plaintiffs have more than adequately alleged that the defamatory exchange was literally false, and the district court erred in ignoring Plaintiff's well-pleaded allegations of literal falsity and finding to the contrary.

As Plaintiffs alleged (and confirmed by the raw audio of Couric's interview with Plaintiffs), Defendants published an exchange between Couric and Plaintiffs that never occurred. Defendants did so by affirmatively editing the question that Couric actually asked to materially it and eliminate the false premises on which it was based (and that Plaintiffs' rebutted in their answer to it), and by publishing b-roll footage of Plaintiffs' affirmative silence supposedly in response to that question instead of Plaintiffs' actual answer—or even an abridged version of Plaintiffs' actual answer. (JA26-27, JA29, ¶¶43-46, 53-54.) During the ***actual*** interview, Couric asked Plaintiffs: "If there are no background checks, how do you prevent—*I know how you all are going to answer this, but I'm asking anyway*—if there are no background checks for gun purchasers, how do you prevent felons or terrorists from *walking into say a licensed gun dealer and* purchasing a gun?" (JA13-14, JA23, JA26, JA44, JA46, ¶¶11, 37, 43, 103, 107). And during the ***actual*** interview, Plaintiffs "spent nearly six minutes responding to

Couric's question and another three minutes engaging in a related discussion." (JA13, JA23-25, ¶¶10, 38-41.)

In *Under the Gun*, however, Defendants published a materially different question as if Couric had asked it to Plaintiffs: "If there are no background checks for gun purchasers, how do you prevent felons or terrorists from purchasing a gun?" (JA13-14, JA23, JA26, JA44, JA46, ¶¶11, 37, 43, 103, 107.) And for publication in *Under the Gun*, Defendants deleted the responses "that Plaintiffs had ***actually*** [given to] Couric's question, and spliced in nine seconds of the silent b-roll footage" (JA13-14, ¶11 (emphasis in original)) of Plaintiffs "appearing silent and stumped in the background" (JA11, ¶4), "sitting silently and shifting his gaze toward the floor" (JA11, ¶5), "looking up, blinking, and then looking away" (JA11, ¶3), and "silently look[ing] at the floor and then away" (JA11 ¶4)—in Couric's own words, "appear[ing] to be speechless" (JA37-39, JA69-72, ¶85 & Ex.4.). Defendants thereby affirmatively portrayed Plaintiffs as having ***no*** answer, ***no*** response to Couric's question and as instead sitting stupefied, painfully awkwardly for nine seconds—to a question directly related to their organizational mission and professions. (JA46, ¶107). Defendants' portrayal of Plaintiffs was, simply put, false.

The district court, however, ignored these well-pleaded facts and allegations of literal, direct falsity and instead found that "[a]lthough the plaintiffs here claim

direct defamation, they cannot point to a directly defamatory statement pertaining to them," and that, as such, "this case involves [only] defamation by implication." (JA124.) But under U.S. Supreme Court precedent, Defendants' manipulation of Plaintiffs' words to materially alter the meaning of what Plaintiffs actually said is false as a matter of law. The U.S. Supreme Court has expressly held that "a deliberate alteration of the words uttered by a plaintiff" not only satisfies the falsity element but further "equate[s] with knowledge of falsity for purposes of [actual malice]" where "the alteration results in a material change in the meaning conveyed by the statement." *Masson v. N.Y. Magazine, Inc.*, 501 U.S. 496, 518 (1991) (evaluating a defamation claim, not a defamation-by-implication claim); *see also id.* at 517 ("[A] statement is ... considered false ... [if] it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"). As the Court explained, "quotations add authority to a statement and credibility to [an] author's work" and, as such, "quotations may be a devastating instrument for conveying false meaning." *Id.* at 497, 517. And as the Ninth Circuit recently admonished (extensively citing *Masson*), the importance of accurately representing supposed quotations—and the danger of manipulated quotations—is especially great where, as here, a defendant "published [a statement] using a medium in which the viewer actually sees and hears the plaintiff

utter the words." *Price v. Stossel*, 620 F.3d 992, 1002 (9th Cir. 2010) (evaluating a defamation claim and citing *Masson*, 501 U.S. at 511-13).[7]

Here, the Complaint alleges (and Defendants do not dispute) that Defendants did exactly what the Supreme Court in *Masson* and the Ninth Circuit in *Price* held to be capable of giving rise to a defamation action: they manipulated Plaintiffs' quotation, in response to Couric's question about background checks, so as to materially change what Plaintiffs actually said, and then presented that false footage to their audiences as if it were Plaintiffs' actual response. (JA11, JA32-33, JA46, ¶¶3-5, 64-67, 107.) In fact, Defendants went far further than the defendants in *Masson* and *Price*, who took actual quotations from the plaintiffs and altered their context; here, Defendants deleted Plaintiffs' entire answer to Couric's question and affirmatively presented Plaintiffs as having given no answer and as instead having sat haplessly and bewildered by Couric's question.

Plaintiffs have thus adequately pleaded that Defendants' manufactured exchange between Couric and them is literally false as required to plead the falsity element of their defamation claim, and the district court reversibly erred in finding to the contrary.

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[7] Although defamation claims are brought under state law, the falsity requirement is the same under California law (as applied in *Masson* and *Price*) and Virginia law. *Compare Masson*, 501 U.S. at 510 ("False attribution of statements to a person may constitute libel[.]"), *with Newspaper Publ'g Corp. v. Burke*, 216 Va. 800, 805 (1976) (false statements incorrectly "attributed to [plaintiff]" capable of being defamatory).

C. Plaintiffs Likewise More Than Adequately Alleged That Defendants' Manufactured Exchange Between Couric And Plaintiffs Conveyed False Implications About Plaintiffs.

Moreover, even if the defamatory exchange were not literally false, Plaintiffs have pleaded in their Complaint that the exchange broadcast numerous false implications about Plaintiffs.

For example, Plaintiffs' Complaint alleges that Defendants' "manipulated footage falsely implies that [Plaintiffs] had been stumped" by Couric's question on an issue fundamental to their organizational mission and professions (when in reality they had readily answered that question). (JA54, ¶127.) Defendants thereby falsely implied that Plaintiffs were ignorant on the subject of firearm background checks and firearm issues generally and, thus, incompetent in their organizational mission and professions, whereas in reality Plaintiffs are all highly knowledgeable on those subjects and highly competent in their mission and professions. (JA16-18, ¶¶18-20.) As pleaded in the Complaint, the VCDL is an advocacy organization whose entire mission is dedicated to responsible firearms policy (JA16-17, ¶18); Hawes is an attorney whose practice focuses on firearms and self-defense, is based on his knowledge of the laws and regulations relating to firearm ownership and possession, and requires him to be an effective oral advocate (JA17-18, ¶20); and Webb is a licensed firearms dealer and gun store owner who is required to be knowledgeable about firearms and background checks

relating to firearm sales and who works to educate the public about Second Amendment rights (JA17, ¶19). In addition, through the defamatory exchange, Defendants implied that, although Plaintiffs oppose background checks, they have no rational or articulable basis for that opposition. (JA59-60, ¶¶136-42.) As Plaintiffs' Complaint alleges, that implication, too, is false. (JA54-58, ¶¶127, 131-32.)

Plaintiffs have thus adequately pleaded that Defendants' manufactured exchange between Couric and them conveyed false implications about Plaintiffs so as to plead the falsity element of their defamation-by-implication claim, and the district court reversibly erred in finding to the contrary.

D. The District Court Compounded Its Error In Finding Plaintiffs' Did Not Adequately Allege Falsity By Engaging In Improper (And Incorrect) Fact-Finding At The Pleadings Stage.

Critically, in concluding that Plaintiffs failed to adequately allege falsity, the district court not only disregarded Plaintiffs' well-pleaded factual allegations but found as a matter of fact adverse to Plaintiffs that, contrary to Plaintiffs' pleadings, Plaintiffs in fact "*did not* answer the question posed by Couric" (JA123 (emphasis in original)). In so doing, the district court (at best) compounded its error by engaging in improper—and incorrect—fact-finding at the Rule 12(b)(6) stage, and (at worst) injected its own politics into this matter.

As explained above, the Supreme Court of Virginia and courts in this Circuit have repeatedly admonished that the question of whether an alleged defamatory statement is false is a question of fact. *See, e.g.*, *Hyland*, 277 Va. at 48; *Jordan*, 269 Va. at 576; cases cited *supra* note 6. And although it is improper for a court to engage in fact-finding at the motion-to-dismiss stage, where all factual allegations must be taken as true and all reasonable inferences construed in Plaintiffs' favor, *E.I. du Pont de Nemours & Co.*, 637 F.3d at 440, the district court's opinion makes clear that that it made a factual finding adverse to Plaintiffs. According to the court:

> The plaintiffs' defamation claims fail because the interview scene is not false. *Under the Gun* portrays members of the VCDL not answering the question posed by Couric. ***In reality, members of the VCDL did not answer the question posed by Couric***. They talked about background checks and gun laws generally, but did not answer the question of how to prevent felons or terrorists from purchasing guns without background checks. The editing simply dramatizes the sophistry of the VCDL members.

(JA123.)

Notably, in so finding, the district court ***did not hold*** that the ***only*** possible interpretation of Plaintiffs' responses to Couric's question is that Plaintiffs did not answer it; rather, the court simply opined, in its own politicized opinion, that it did not believe Plaintiffs adequately answered Couric's question. That is a textbook example of improper fact-finding at the pleading stage. *See, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (admonishing that, even at summary

judgment, a court errs in finding facts if "inferences contrary to those drawn by the trial court might be permissible"); *N.C. Network for Animals, Inc. v. U.S. Dep't of Agric.*, 924 F.2d 1052, at *2 (4th Cir. 1991) (holding that a court errs in granting summary judgment "[i]f the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance").

Moreover, the district court's factual finding—even if it were permissible—was wrong. To begin, it is irrelevant whether Plaintiffs "answered" Couric's question during the exchange; what matters is that Plaintiffs (indisputably) *responded* to it—that they did not sit "speechless," in dumbfounded silence for nine seconds. (JA12-13, JA23-25, ¶¶7-9, 38-41.) But even more fundamentally, as part of Plaintiffs' six-minute-long answer to Couric's actual question, Plaintiffs ***did*** answer the question. How do you prevent felons and terrorists from obtaining guns without background checks? Plaintiffs responded affirmatively that you cannot—regardless whether background checks are mandated or not. In particular, Plaintiff Webb stated:

> [W]hat law has ever stopped a crime? Tell me one law that has ever stopped a crime from happening. ... [W]ho is to say that that person that was denied a background check did not go out and buy or steal a gun from somewhere else?

(JA23-25, ¶40.) And while the district court may have not liked the substance of Plaintiff Hawes' answer, he, too, answered the question by rebutting a premise on

which it was based: Hawes explained that there already are laws governing purchases from licensed gun dealers—thus rebutting the premise that there are not already laws requiring background checks for gun purchasers from "licensed gun dealer[s]." (JA26-27, ¶¶37-40, 45.)

Notably, Couric has admitted that Plaintiffs answered her question during the defamatory exchange. In a statement released after Defendants' deceptive editing came to light, Couric admitted that Defendants had affirmatively "misrepresented" her exchange with Plaintiffs by making "[Plaintiffs] appear to be speechless." (JA37-39, JA69-72, ¶85 & Ex.4.) Couric continued, acknowledging that "[w]hen VCDL members recently pointed out that they had in fact immediately answered [her] question, [she] went back and reviewed it and agree that those eight seconds [of added b-roll footage] do not accurately represent their response." (*Id.*) And Couric agreed that Plaintiffs "ha[d] a right for ***their answers*** to be shared," thus acknowledging that Plaintiffs had answered her question. (*Id.*)

The district court, by disregarding Plaintiffs' well-pleaded facts demonstrating the falsity of the exchange and instead engaging in improper and incorrect fact-finding to reach a contrary conclusion, reversibly erred, and this Court should reverse on this ground.[8]

[8] In light of the district court's expression of its subjective, political opinion that Plaintiffs' pro-Second Amendment answer to Couric's question reflects Plaintiffs' "sophistry" and its personal beliefs regarding Plaintiffs' answer to Couric's

II. The District Court Erred In Concluding That The Exchange Did Not Have A Defamatory Meaning—Despite Defendants Portraying Plaintiffs As Ignorant In Their Area Of Expertise And Despite Actual Viewers Stating That It Caused "Viewers A Moment To Lower Their Estimation Of" Plaintiffs.

The district court further erred when it found that the exchange between Couric and Plaintiffs was not capable of having a defamatory meaning.

A. Virginia Law Creates A Low Threshold For Pleading Defamatory Meaning.

Under Virginia law, to have a defamatory meaning, a statement need only "'tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Schaecher v. Bouffault*, 290 Va. 83, 92-93 (2015) (quoting Restatement (Second) of Torts § 559; *accord Tomblin v. WCHS-TV8*, 434 F. App'x 205, 218 (4th Cir. 2011). A statement has the "requisite defamatory 'sting' to one's reputation" if it "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, ***or*** which tends to hold him up to scorn, ridicule, ***or*** contempt, ***or*** which is calculated to render him infamous, odious, ***or*** ridiculous." *Schaecher*, 290 Va. at 92. Notably, the standard is disjunctive. It is not necessary that a defamation-plaintiff prove each of these results—a showing

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question and improper, pleadings-stage fact-finding based thereon—indicating bias and impartiality (JA118, JA123)—Plaintiffs request reassignment of this case to a different judge on remand. *See, e.g.*, *United States v. Levin*, 383 F.3d 191, 221-22 (4th Cir. 2004) (reassignment warranted in light of bias or even "suspicion of partiality").

that a statement rendered him "ridiculous" is sufficient. Moreover, it is also not necessary for a statement to "tend to prejudice [plaintiff] in the eyes of everyone ... or of all of [plaintiff's] associates, nor even in the eyes of a majority of them" to be defamatory; rather "[i]t is enough that the communication would tend to prejudice [plaintiff] in the eyes of a substantial and respectable minority of them." Restatement (Second) of Torts § 559 cmt. e; *Wells v. Liddy*, 186 F.3d 505, 526 (4th Cir. 1999).[9]

A defamatory publication is actionable *per se* if it (1) "impute[s] to a person unfitness to perform the duties of an office or employment of profit, ***or*** want of integrity in the discharge of the duties of such an office or employment," ***or*** (2) "prejudice[s] such person in his or her profession or trade." *Tronfeld v. Nationwide Mut. Ins. Co.*, 22 Va. 709, 713 (2006); *Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954). Thus, the Supreme Court of Virginia and federal courts applying Virginia law have repeatedly held that statements suggesting incompetence or poor performance in one's trade or profession are defamatory *per se*. *See, e.g.*, *Cashion v. Smith*, 286 Va. 327, 337 (2013) (accusations suggesting professional incompetence held defamatory *per se*); *Tronfield*, 272 Va. at 714 (statement that attorney "just takes people's money" held defamatory *per se* because it implied he provided incompetent legal services); *Fuste v. Riverside*

[9] The Supreme Court of Virginia has adopted Restatement (Second) of Torts Section 559. *Schaecher*, 290 Va. at 92.

Healthcare Ass'n, 265 Va. 127, 133 (2003) (statements that there were "concerns about the[] competence" of doctors held defamatory *per se*); *Andrews v. Va. Union Univ.*, No. 07-cv-447, 2008 WL 2096964, at *11 (E.D. Va. May 16, 2008) (accusation that professor "misadvised" students held defamatory *per se*); *Echtenkamp v. Loudoun Cty. Pub. Schs.*, 263 F. Supp. 2d 1043, 1064 (E.D. Va. 2003) (statements suggesting counsellor's "overall performance remains in need of improvement" held defamatory *per se*). Similarly, an organization "may be defamed *per se* by statements "'which cast aspersion on its honesty, credit, efficiency ***or*** its prestige ***or*** standing in its field of business.'" *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (applying Virginia law); *Gilbertson v. Jones*, No. 16-cv-255, 2016 WL 4435333, at *7 (E.D. Va. Aug. 18, 2016) (same); *Bay Tobacco, LLC v. Bell Quality Tobacco Prod., LLC*, 261 F. Supp. 2d 483, 501 (E.D. Va. 2003) (same).

Importantly, "it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Carwile*, 196 Va. at 7. Thus, "a defamatory charge may be made by inference, implication or insinuation." *Id.* Accordingly, in *Carwile*, the Supreme Court of Virginia held that a newspaper report was defamatory *per se* because it alleged that officials had declined to comment on whether they were considering a recommendation that an

attorney be disciplined for violating the state bar's ethical code because he made a charge of police graft for which a grand jury declined to indict. *Id.* at 3. Even though the newspaper did not argue explicitly that the state bar ***should*** take action, the Court held that its statements were defamatory *per se* because:

> [I]t is ***a*** reasonable ***implication*** of this language, read in connection with the whole article, that the plaintiff is guilty of unethical and unprofessional conduct for his charges made against the Police Department; for which conduct the [newspaper] suggests in a veiled but pointed way that the [attorney] could and should be subjected to disbarment proceedings. ... While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo, operating within the scope of its legitimate functions, it does impute conduct tending to injure him in his profession.

Id. at 9. Moreover, "[b]ecause Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning 'not apparent on its face,' evidence is admissible to show the circumstances surrounding the making and publication of the statement which would reasonably cause the statement to convey a defamatory meaning to its recipients." *Pendleton v. Newsome*, 290 Va. 162, 172 (2015) (vacating dismissal).

Finally, in assessing the defamatory content of a video publication, "a court and jury cannot confine their analysis to the words alone" but "are necessarily required to also consider the impact of the video portion of the program since the television medium offers the publisher the opportunity, through visual presentation, to emphasize and convey ideas in ways that cannot be ascertained

from a mere reading of the words in a written transcript." *Battle v. A&E Tel. Networks, LLC*, 837 F. Supp. 2d 767, 772 (M.D. Tenn. 2011). "The defendant's defamatory words, standing alone, cannot readily be identified in isolation without also considering the accompanying visual images, the tone of voice of the announcer or reporter, along with the combined audio and video editing effects." *Id.* Thus, the court "must scrutinize the juxtaposition of the audio and video portions" and "should be sensitive to the possibility that a transcript which appears relatively mild on its face may actually be, when the total mix of creative ingredients are considered, highly toxic" because "a clever amalgamation of half-truths and opinion-like statements, adorned with orchestrated images and dramatic audio accompaniment, ***can be devastating when packaged in the powerful television medium***." *Corporate Training v. NBC*, 868 F. Supp. 501, 507 (E.D.N.Y. 1994).

Importantly, on a motion to dismiss, the court must decide only whether the exchange is "***reasonably capable*** of defamatory meaning" and, in making that initial determination, must make "all inferences in favor of the plaintiff." *Schaecher*, 290 Va. at 93; *see also Hatfill*, 416 F.3d at 331 (citing *Carwile*, 196 Va. at 8). Thus, if allegedly defamatory statements "are capable of multiple interpretations" or "there ***could be*** a question of fact as to whether the broadcast produced a false 'implication, innuendo or insinuation' about [plaintiff]," dismissal

is inappropriate. *Tomblin*, 434 F. App'x at 209-10, 218; *Pendleton*, 290 Va. at 172.

B. Defendants' Manufactured Exchange Between Couric and Plaintiffs Is Reasonably Capable Of Being Understood As Defamatory, And As Defamatory *Per Se*.

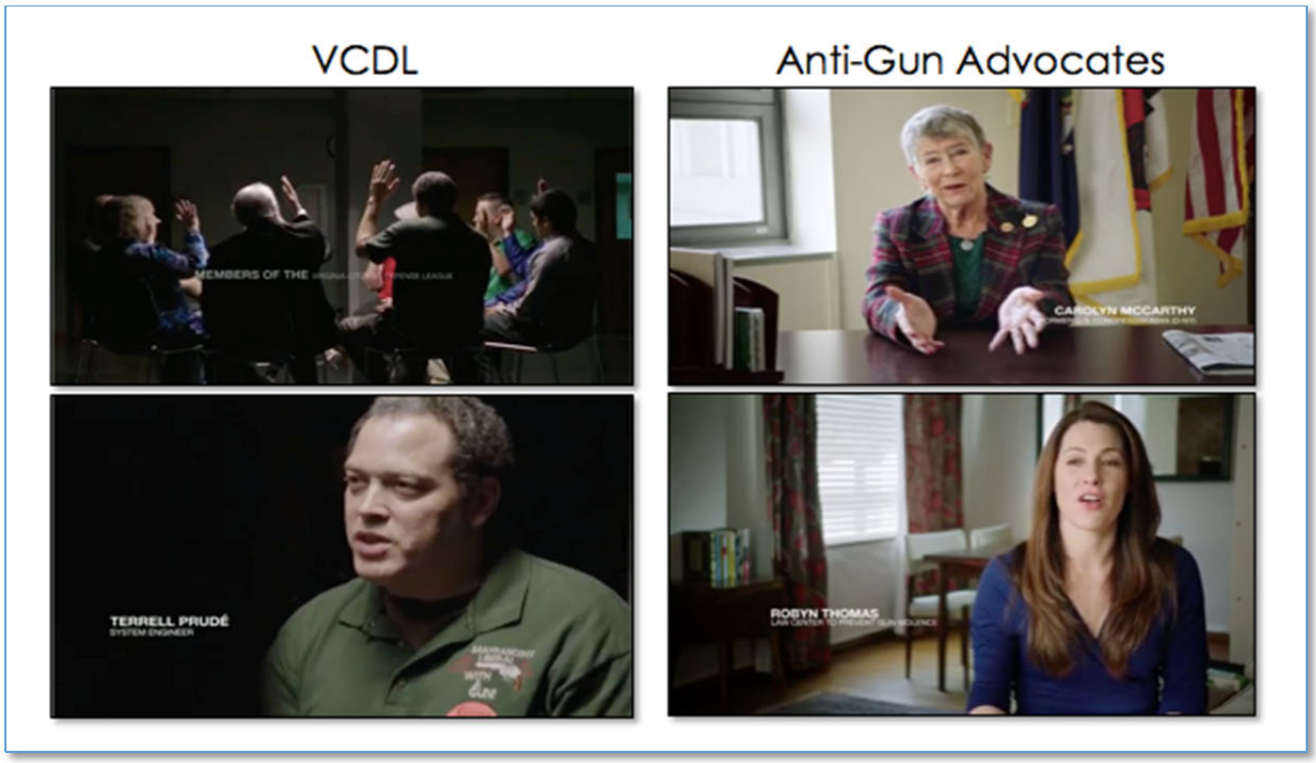
Here, Plaintiffs' Complaint more than adequately alleges that the exchange between Couric and Plaintiffs, as manipulated by Defendants, is reasonably capable of a defamatory meaning and even further is reasonably capable of being defamatory *per se*. In other words, Plaintiffs have pleaded that Defendants' manipulated exchange is capable of being understood to make Plaintiffs appear "ridiculous" or "prejudice [them] in the eyes of a substantial and respectable minority of [their associates or the community]"—as is necessary to be defamatory—and is also reasonably capable of being understood to impute "unfitness to perform the duties of" Plaintiffs' "employment' or "prejudic[ing] [them] in [their] profession or trade."

1. Defendants' Manufactured Exchange Between Couric And Plaintiffs Is Reasonably Capable Of Having A Defamatory Meaning.

Plaintiffs allege Defendants set out to—and did in fact—use deceptive editing techniques to manufacture a false exchange between Couric and Plaintiffs that made Plaintiffs look ridiculous, incompetent, and ignorant about firearm ownership and sales, including the policies surrounding background checks: the

subject to which the VCDL has dedicated its mission (JA16-17, ¶18), to which Hawes has dedicated his profession (JA17-18, ¶20), and to which Webb has dedicated her business (JA17, ¶19). And they did so "to portray opposition to background checks as rare and baseless." (JA22, ¶32.)

To that end—notwithstanding Couric's representation that Defendants "want[ed] to get all different points of view" on firearms issues—Defendants negatively portrayed Plaintiffs, including by, among other things, "intentionally clos[ing] the window blinds, dimm[ing] the lighting, and us[ing] other lighting and editing techniques to cast literal shadows upon [Plaintiffs'] faces and to portray them as sinister and untrustworthy." (JA46-48, ¶108.) Indeed, Defendants went so far as to use manipulative lighting techniques to portray pro-gun control advocates with friendly, natural light, highlighting their (in Defendants' view) righteous position. A simple visual comparison, *see* JA31, ¶61, demonstrates this:



Also to portray Plaintiffs negatively, during the interview Defendants "instructed the Plaintiffs to sit in silence" and "surreptitiously and quietly recorded b-roll footage of the Plaintiffs sitting in silence." (JA46-48, ¶108.) And as explained above, although Couric asked Plaintiffs a specific question about background checks and felons/terrorists—which Plaintiffs answered for nearly six minutes—Defendants broadcast in *Under the Gun* a materially different, broader question, "cut all of [Plaintiffs'] responses that had ***actually*** followed Couric's question, and spliced in nine seconds of the silent b-roll footage" (JA13-14, ¶11), intentionally deceiving viewers into believing that Plaintiffs' response to the question consisted of "appearing silent and stumped in the background" (JA11, ¶4), "sitting silently and shifting his gaze toward the floor" (JA11, ¶5), "looking

up, blinking, and then looking away" (JA11, ¶3), and "silently look[ing] at the floor and then away" (JA11, ¶4).

Notably, Defendants did not merely insert a brief "pause" (as Soechtig later claimed) or simply pose the question rhetorically to the film's audience. Rather, Defendants portrayed the question being posed directly to Plaintiffs, and Plaintiffs responding with lengthy, awkward silence. To drive home the point that the exchange was over and that Plaintiffs had given no answer to Couric's question, Defendants spliced in footage of someone closing the cylinder of a fully-loaded revolver. (JA12, ¶6.) Defendants did not present ***any*** of Plaintiffs' ***actual*** answers to Couric's question, but instead cleverly juxtaposed unrelated footage, voiceover, and b-roll footage to affirmatively misrepresent to viewers that Plaintiffs' ridiculous, cowered non-response ***was*** their answer. (JA64, Ex. 1.)

Viewers of this exchange—particularly coupled with the deceptive editing and manipulative lighting techniques—could certainly reasonably understand it to make Plaintiffs look "ridiculous" or to "prejudice [them] in the eyes of a substantial and respectable minority of [their associates or the community]." *Schaecher*, 290 Va. at 91-92; Restatement (Second) of Torts § 559 cmt. e. Indeed, Defendants featured Plaintiffs in their film *because* they are firearms advocacy experts, thus making clear that they agreed to respond to questions about firearms

policy, and, through their deceptive editing, made Plaintiffs appear to lack the competence to actually do so.

Moreover, viewers of *Under the Gun* actually understood the exchange that way. Of course, Plaintiffs were only obligated to *allege* that the exchange was "reasonably capable of a defamatory meaning" to survive a motion to dismiss, but Plaintiffs went even further by providing *evidence* that *Under the Gun* viewers did, in fact, understand the exchange to harm Plaintiffs' reputations. For example, a Hollywood Reporter reviewer who watched the film stated that "[a] group of blustery members of the Virginia Citizens Defense League [] suddenly remain[ed] ***painfully*** quiet when Couric asks them the hard questions." (JA35, ¶75.) And another viewer, a Washington Post writer, concluded that the b-roll footage Defendants inserted in place of Plaintiffs' answer to Couric's question, the so-called "artistic 'pause[,]' provides the viewer not a 'moment to consider this important question'; it provides viewers a moment ***to lower their estimation of gun owners***. That's it." (JA36-37, ¶81.)

2. Defendants' Manufactured Exchange Between Couric and Plaintiffs Is Reasonably Capable Of Being Understood to Be Defamatory *Per Se*.

Not only is Defendants' manipulated exchange between Couric and Plaintiffs capable of being understood to portray Plaintiffs as "ridiculous," it is also capable of being understood to "cast aspersion" on VCDL's "prestige or standing

in its field," and to impute to Hawes and Webb "unfitness to perform the duties of" their employment or "prejudic[e] [them] in [their] profession or trade." *See Swengler*, 993 F.2d at 1071; *Tronfeld*, 272 Va. at 713.

As the Complaint alleges, Plaintiffs are experts in the fields of firearms policy and law. (JA16-18, ¶¶18-20.) The VCDL is a Second Amendment advocacy organization dedicated to advancing the rights of responsible gun owners, opposing anti-gun-rights measures like universal background checks, and "provid[ing] an effective voice for [its] members and other supporters of the Second Amendment." (JA16-17, ¶18.) It is dedicated to the mission of "Defending Your Right to Defend Yourself"—it is in the business of advocating for gun rights. (*Id.*) Defendants' manipulated exchange between Couric and Plaintiffs, by conveying that the VCDL was unable to provide any answer whatsoever to a pointed question about background checks, is reasonably capable of being understood to show that the VCDL failed to deliver on its mission, thereby casting aspersion on the VCDL's prestige and standing in its field of Second Amendment advocacy. (JA59, ¶137.) The exchange is therefore reasonably capable of being understood as defamatory *per se* of Plaintiff VCDL. *See, e.g.*, *Swengler*, 993 F.2d at 1071; *Bay Tobacco*, 261 F. Supp. 2d at 501.

Plaintiff Hawes is an attorney whose practice focuses on firearms and self-defense and is based on his knowledge of the laws and regulations relating to

firearm ownership/possession. (JA17-18, ¶20.) As such, his profession requires that he employ oral advocacy skills to articulate the legal and practical bases for his clients' right to defend themselves, their homes, and their families. (JA60, ¶141.) Defendants' manipulated exchange between Couric and Plaintiffs, by conveying that Hawes was unable to provide any answer whatsoever to a pointed question about gun policy, is reasonably capable of being understood as imputing that Hawkes lacks the required competencies and abilities for his profession, including oral advocacy skills, and as prejudicing him in his profession as an attorney whose practice focuses on firearms issues. That is all that is required for the exchange to be reasonably capable of being understood as defamatory *per se* of Hawes. *See, e.g.*, *Cretella v. Kuzminiski*, 640 F. Supp. 2d 741, 763 (E.D. Va. 2009); *Tronfeld*, 272 Va. at 714.

In an apparent attempt to avoid this conclusion, the district court found dispositive that "[Hawes'] participation in the interview as a member of the VCDL does not involve his practice of law," and that some "cases cited by Hawes where the alleged statements imputing attorney incompetence [were held defamatory *per se*] focused on the attorneys' conduct while actually practicing law." (JA127.) But that is a distinction without a difference, and in making it dispositive, the district court misapplied Virginia law. Virginia law does ***not*** require that, to be defamatory *per se*, a statement assail one's professional abilities while actively

practicing his profession; rather, for a statement to be defamatory *per se* it need simply "relate to 'the skills or character required to carry out the particular occupation of the plaintiff.'" *Swengler*, 993 F.2d at 1070-71 (quoting *Fleming v. Moore*, 221 Va. 884 (1981)). That is precisely the case here, where Defendants portrayed Hawes as lacking oral advocacy skills—even the ability to respond, at all, to a question—which goes to the very heart of his required skills as a lawyer—and as lacking knowledge in the subject-area in which his legal practice is focused.

Plaintiff Webb is a licensed firearms dealer and gun store owner whose "business requires her to be knowledgeable" not only about how to perform background checks, but also about "the right of individuals to purchase firearms." (JA17, JA50, ¶¶19, 115.) As part of her business, Webb partners with the VCDL to educate the public about Second Amendment rights. (JA17, ¶19.) Defendants' manipulated exchange, by conveying that Webb was unable to provide any answer whatsoever to a pointed question based on an anti-gun premise, is reasonably capable of being understood as prejudicing Webb in her trade by conveying to her customers that, when given a public platform to advocate for their individual right to purchase firearms from her without governmental interference, she failed to do so, and that "she lacks knowledge regarding integral aspects of her business," *i.e.*, background checks and the right of individuals to purchase firearms. (JA17, JA50, ¶¶19, 115.)

The district court based its conclusion that Defendants' portrayal of Webb was not capable of having a defamatory meaning on its assessment that "the implications from the interview had no bearing on Webb's fitness in her trade as a gun store owner." (JA126.) But in doing so the district court disregarded the well-pleaded facts in Plaintiffs' Complaint that gun store customers are different than customers of department stores or grocery stores, which attract people of all political stripes and views, and that "[s]ince Webb is in the business of selling firearms to individuals, her customers and prospective customers—by definition—support the right of individuals to purchase firearms." (JA 50, ¶115.) Defendants' portrayal of Webb as unable to provide any answer whatsoever to Couric's question is therefore reasonably capable of prejudicing Webb in the eyes of her customers and prospective customers and is thus defamatory *per se*. *See, e.g.*, *Cretella*, 640 F. Supp. 2d at 763; *Tronfeld*, 272 Va. at 714.

In addition, Defendants' false portrayal of Hawes and Webb prejudices them in their VCDL executive roles—as a VCDL Executive Member and Legal Advisory Council Member and VCDL Executive Member and VCDL Director, respectively (JA16-17, ¶¶18-19)—by imputing to each ignorance about a subject the heart of the VCDL's mission to "speak in defense of the Second Amendment and in opposition to gun control measures like background checks," and incompetence in advancing that mission. (JA59, ¶137.) The exchange is therefore

reasonably capable of being defamatory *per se* of Hawes and Webb for that additional reason. *See, e.g.*, *Swengler*, 993 F.2d at 1071; *Bay Tobacco*, 261 F. Supp. 2d at 501.

These well-pleaded allegations more than sufficiently allege that Defendants' manipulated footage of the exchange can reasonably be understood as having a defamatory meaning—and as defamatory *per se*—and the district court erred in disregarding them—and the well-pleaded supporting facts—and finding to the contrary. The court's conclusion that "[a]t worst, [the manufactured exchange] shows artistically that they either cannot or will not answer the question," and that "[e]ither way, not having an answer to a question on a difficult and complex issue is not defamatory" (JA125-26), entirely ignores Plaintiffs' well-pleaded facts showing that Defendants portrayed Plaintiffs as ***unable*** to answer Couric's question in the manufactured exchange. And it further ignores, as Plaintiffs pleaded, the devastating effect on Plaintiffs of being portrayed as ignorant in light of Plaintiffs' well-pleaded facts that Defendants featured Plaintiffs in their film *because* they are firearms advocacy experts (and conveying to the film's audience that they are experts) and, through their deceptive editing, made Plaintiffs appear to lack competence in that area of expertise. (JA50-51, JA59-60, ¶¶114, 116, 118, 138, 140, 142.)

To the extent the district court based its conclusion on its impermissible factual-finding that "[Plaintiffs'] verbal responses during the interview showed the same thing that "they either cannot or will not answer [Couric's] question" (JA125), it reversibly erred for the same reason it reversibly erred in finding that the exchange was not false. (*See supra* Part I.)

III. The District Court Erred In Concluding That The Defamatory Exchange—Which Specifically Identified The VCDL And Related Directly To Its Organizational Mission—Was Not "Of and Concerning" The VCDL.

The district court further erred when it concluded, in a footnote without any explanation, that Plaintiff VCDL's claims "also fail[] because the footage was not really about VCDL or, in the words of the common law, was not 'of and concerning' VCDL." (JA128 n.9.) Contrary to the court's conclusion, Plaintiff VCDL pleaded more than sufficient facts to adequately allege that the exchange was "of and concerning" it.

Under Virginia law, a publication is "of and concerning" a plaintiff if "the publication was intended to refer to him and would be so understood by persons reading it who knew him." *WJLA-TV v. Levin*, 264 Va. 140, 152 (2002) (quoting *The Gazette, Inc. v. Harris*, 229 Va. 1, 37 (1985)). This "test is met if the plaintiff shows that the publication was in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to [it]." *Gazette*, 229 Va. at 37; *Hatfill*, 416 F.3d at 330 n.4. Thus, a

statement need not even identify a plaintiff by name to be "of and concerning" it. *Hatfill*, 416 F.3d at 330 n.4. Even where a "publication on its face does not show that it applies to the plaintiff," it is still "of and concerning" the plaintiff if "contemporaneous facts connect the libelous words to the plaintiff." *Gazette*, 229 Va. at 37; *see also* Restatement (Second) of Torts § 564 cmt. b.

In addition, an entity-plaintiff "may bring a defamation action on its own behalf" for a defamatory statement made not directly about it but about its representatives when there is "a sufficient nexus between the alleged defamatory nature of the statement and the business." *Schaecher*, 290 Va. at 99. Thus, an entity-plaintiff may bring a defamation action where a person publishes a defamatory statement about its officers or members that has a "direct relation to the trade or business of the [entity-plaintiff]." *Id.*[10] This makes sense: after all, an organization can only act through its members.

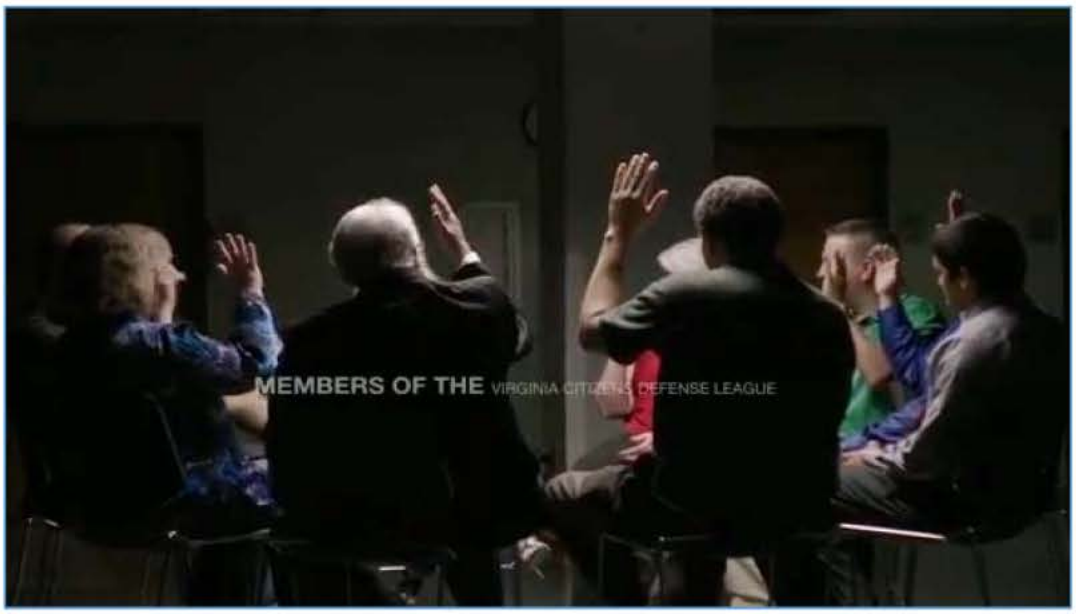
[10] Of course, an entity-plaintiff cannot bring a defamation action where a defamatory statement relates "solely" to one of its officers or members and there is no "direct relation to the trade or business of the [entity-plaintiff]." *Id.* Thus, in *Schaecher*, the Court held that the entity-plaintiff, a dog kennel, could not assert a defamation claim based on a statement that an employee had difficulties paying the mortgage on her personal house because it had no bearing on the kennel's trade of caring for dogs. *Id.* at 100. That is obviously factually different than the situation here, where the VCDL (through its President) was invited to participate in the film, and where Hawes, Webb and other VCDL members were identified as representatives speaking on behalf of VCDL. (JA22, JA30, JA44-45, JA54-55, ¶¶32-35, 56-58, 104-06, 128-30.)

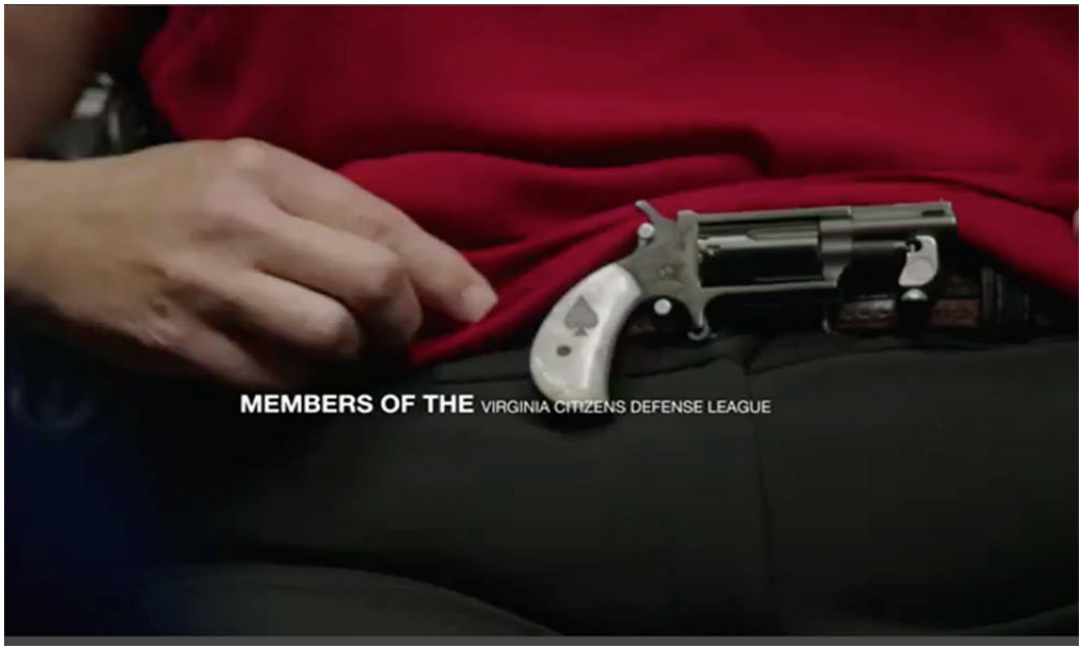
Critically, the question of whether a defamatory statement is "of and concerning" the plaintiff is generally a matter for the jury, as fact-finder, to determine. *Murdaugh Volkswagen, Inc. v. First Nat. Bank of S.C.*, 801 F.2d 719, 725 (4th Cir. 1986) (approving jury instruction that "of and concerning" element "is a question of fact for [the jury] as a trier of fact to determine"); *Eramo v. Rolling Stone LLC*, No. 15-cv-23, 2016 WL 5942328, at *1 (W.D. Va. Oct. 11, 2016).

Here, Plaintiff VCDL more than adequately alleged that the defamatory exchange "was intended to refer to [it] and would be so understood by persons reading it who knew [it]." *WJLA-TV*, 264 Va. at 152; *Gazette*, 229 Va. at 37. To begin, Plaintiffs' Complaint expressly alleges that "Defendants intended to and did expressly refer to the Virginia Citizens Defense League." (JA44, JA54, ¶¶104, 128.) Moreover, Plaintiffs' Complaint goes further and alleges why and how Defendants did so. Plaintiffs allege that Defendants specifically sought out and targeted the VCDL for an interview because "[o]ne of the states [Defendants] zero[ed] in on" was Virginia. (JA22, JA66-68, ¶33 & Ex.3.) Defendants reached out to the VCDL directly—through its President—to request persons to be the face of the VCDL in the defamatory interview. (*Id.*) To that end, Plaintiffs' Complaint alleges that Defendants "recruited members of the Virginia Citizens Defense League to participate in on-camera interviews" and that a producer for Atlas Films

"emailed Virginia Citizens Defense League President Philip Van Cleave ... on behalf of the Defendants to ask ***the VCDL*** to be interviewed for *Under the Gun*," and "scheduled interviews with ***VCDL*** and its members." (JA19-20, JA22, ¶¶26, 33.) As a direct result of that request (and only because of it), Webb—a VCDL Director and Executive Member—and Hawes—a VCDL Executive Member and VCDL Legal Advisory Council Member—were selected, among other VCDL members, to be on the VCDL panel. (JA17-19, JA22, ¶¶19-20, 26, 35.)

In addition, as Plaintiffs allege (and borne out by the film), Defendants identify the Virginia Citizens Defense League ***expressly and by name*** in *Under the Gun*, introducing the panelists as "MEMBERS OF THE VIRGINIA CITIZENS DEFENSE LEAGUE" at the beginning of Couric's interview with Plaintiffs:





(JA30, JA44, JA54, ¶¶56, 104, 128.)

Moreover, Plaintiffs further allege that "those who watched *Under the Gun* understood the defamatory exchange to concern the VCDL." (JA44, ¶104.) Notably, and as expressly pleaded, this allegation is supported by the admissions of one of Defendants herself. After Defendants' manipulation of their footage of Plaintiffs came to light, Couric issued a statement admitting that "[m]y question ***to the VCDL*** regarding the ability of convicted felons on the terror watch list to legally obtain a gun, was followed by an extended pause, making the participants appear to be speechless." (JA37-39, JA69-72, ¶85 & Ex.4.) Again making clear that her exchange was with "the VCDL," Couric appended at the end of her statement what she represented was the "Transcript with ***VCDL*** Response." (*Id.*)

These allegations more than sufficiently plead that the defamatory exchange was "of and concerning" the VCDL at the pleadings stage, and the district court erred in concluding otherwise. However, even if those well-pleaded allegations were not sufficient, the exchange is nonetheless "of and concerning" the VCDL for the separate and independent reason that, as explained above, Defendants' misrepresentation during the exchange is "in direct relation to the trade or business of" the VCDL, a Second Amendment advocacy organization with a stated mission of "Defending Your Right to Defend Yourself" and, accordingly, is "of and concerning" the VCDL for that additional reason, *see Schaecher*, 290 Va. at 99.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court reverse the district court's judgment dismissing their claims against Defendants-Appellees and remand this case to a new judge to proceed to discovery.

REQUEST FOR ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and Local Rule 34(a)(1), Plaintiff-Appellants VCDL, Hawes, and Webb request oral argument in this case. This case presents an issue of fundamental importance: whether those involved in robust policy debates are entitled to common law protections from being defamed by Defendants who acted intentionally, portrayed them falsely, and did so with actual

malice. And it arises from a deeply flawed district court decision in which that court substituted its own political judgments for a faithful application of Virginia defamation law and the governing legal standards at the pleadings stage.

Date: October 25, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Party Name: Plaintiff-Appellants Virginia Citizens Defense League; Daniel L. Hawes, Esq.; and Patricia Webb

Dated: October 25, 2017

CERTIFICATE OF SERVICE

I certify that on October 25, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system, which will send notification to the following:

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