LOHIER, *Circuit Judge*, *concurring in part and dissenting in part*:

The majority opinion now permits every Phi Kappa Psi fraternity member to hold Rolling Stone liable under New York defamation law for publishing an article even though it is a "close call" that the only members arguably referenced in the article have a claim. Until this error is corrected by the New York Court of Appeals, publishers should beware.

Before explaining the error in greater detail, let me start with the many areas where I agree with the majority. While it is a close call, I am persuaded by and concur in the majority's opinion insofar as it concludes that fraternity members Elias and Fowler plausibly alleged that the Rolling Stone article reasonably could be interpreted to be "of and concerning" them. I also agree that we should affirm the District Court's dismissal of Hadford's primary defamation claim even though, as the majority points out, the plausibility threshold is exceedingly low. See Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184–85 (2d Cir. 2012). As to all three plaintiffs, the "of and concerning" standard that ultimately compels these varying results is well established in New York law, long familiar to our Court, and relatively cleanly applied in this case.

Unfortunately, I have to part ways with the majority on whether the allegations in this case also support the plaintiffs' claims of small group defamation as a matter of New York law. It is not at all clear that these claims can survive even under our lenient plausibility standard.

New York State courts have on occasion recognized what has variously been called the small group libel or group defamation doctrine. See Three Amigos SJL Rest., Inc. v. CBS News Inc., 28 N.Y.3d 82, 87 (2016); see also 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 2:9.4, at 2-158–66 (5th ed. 2017). Only one appellate court, decades ago, Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786 (2d Dep't 1981), has tried to define how we might evaluate such a claim. In doing so, the Appellate Division recognized that the facts in that case landed on the outer edges of the doctrine and suggested not factors so much as a broad framework to explain the doctrine. But however the doctrine is defined under New York law, here the alleged facts and claimed defamatory statement fall even further afield, for reasons to which I now turn.

First, as we have previously explained in affirming the dismissal of a complaint premised on the small group defamation doctrine, "[t]he claim that

the Appellate Division allowed in Brady concerned a statement made against all members of the group." Algarin v. Town of Wallkill, 421 F.3d 137, 140 (2d Cir. 2005). Here, whatever the Rolling Stone article may imply, the complaint fails to allege that the article itself refers to all of the fraternity members as complicit either in committing gang rapes or in the knowledge that they routinely occurred. Instead, the complaint relies on reading the article in conjunction with Erdely's interview, which, according to the majority, "show[s] that the Article can reasonably be read as describing a fraternity in which many members committed gang rapes and all members were aware of the crimes." Majority Op. at 24 n.8; see also id. at 25–26. To the extent that the article implicates "some" or even "many" rather than "all" of the members as rapists, we suggested in Algarin that it is not actionable under the small group defamation doctrine. See 421 F.3d at 140. And to the extent that the article remotely suggests that "all" of the members knew of one or more rapes, Erdely herself indicated that this interpretation is unreasonable, correcting her suggestion that all of the brothers had guilty knowledge by admitting "maybe not everybody" would have known of a rape, given that Phi Kappa Psi is a "fairly large fraternity." Joint App'x 26.

Second, even if Brady's standard clearly applied to this case, I am not persuaded by the majority opinion's references to university campuses as "intimate communities" and Phi Kappa Psi as sufficiently prominent "on the UVA campus" to support the plaintiffs' theory. Majority Op. at 26. While I agree that universities can be "intimate," it is not at all clear that the New York Court of Appeals would accept the analogy between police officers in a small town and fraternity brothers on a university campus. Nor am I convinced that the Court of Appeals would adopt the factors set forth in Brady (whether the plaintiffs are part of an intimate community and are "prominent" within that community, among others) as part of the "intensity of suspicion" test that Brady employs, rather than some other factors (or even an altogether new test) yet to be devised. 445 N.Y.S.2d at 792–95.

For that reason, I proposed to my colleagues that we certify the question of small group defamation to the New York Court of Appeals, rather than rely on one New York Appellate Division case (even one cited by the Court of Appeals for another reason, see Three Amigos, 28 N.Y.3d at 87). This is a potentially important area of New York policy, and one that we have previously acknowledged "presents 'thorny questions.'" Algarin, 421 F.3d at

139 (quoting 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 2.9.4.1, at 2-134 (3d ed. 2005)). Even with the benefit of Brady, we have observed that it is unclear how "rigorous or lenient the standards might be for permitting a member of a group to complain about defamatory statements directed at the group." Id. at 140. Under similar circumstances, where there are virtually no State appellate decisions on an issue, or where the decisions that exist are distinguishable in a relevant and important way, and where we have no precedent of our own, we have certified the question. See, e.g., Doe v. Guthrie Clinic, Ltd., 710 F.3d 492, 497–98 (2d Cir. 2013). Here, though, the majority opinion not only relies on a distinguishable case,[1] but extends the doctrine by holding that individuals who live or work in close proximity may be defamed with "guilty

[1] In Brady, twenty-seven Newburgh City police officers brought a libel action against a newspaper that printed an editorial about the reorganization of the city's police department. See 445 N.Y.S.2d at 787. The editorial discussed past accusations of criminal activity levied against other members of the police department, and then added the following: "[T]he entire department was under a cloud. It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department. If so, they all were accessories after the fact, if not before and during." Id. (emphasis added). The plaintiffs were among the fifty-three police officers who were not charged with any criminal activity. Id. at 788.

knowledge" whenever one in their midst is falsely accused of misconduct. Majority Op. at 25–26. Whether New York defamation law protects them is an important policy issue for the New York State courts or legislature to decide, not us. In refusing to certify the question, my colleagues in the majority cite only to Cornejo v. Bell, 592 F.3d 121 (2d Cir. 2010), which, they say, obliges us to apply the law as interpreted by a single New York intermediate court. Cornejo does no such thing. First, in contrast to this case, the factual situation in Cornejo was "comparable to" the situation in the single Appellate Division case on which it relied. 592 F.3d at 130. Second, the majority's central reason for not certifying ultimately traces back to our decision in Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125 (2d Cir. 1999), which we cited in Cornejo. In declining to certify the State law question in Pahuta, however, we pointed to the existence of multiple relevant New York intermediate court decisions—not, as here, one inapposite case. For these reasons, we should have sought guidance from the New York Court of Appeals.

Without the ability to certify, I would hold that the District Court properly dismissed the small group defamation claim. To explain, let me

return to the specific allegations and claim actually made in this case. Relying primarily on two statements from the article—"Don't you want to be a brother" and "We all had to do it, so you do, too"—the plaintiffs claim that the article alleged that gang rape was an initiation ritual or a condition of membership in Phi Kappa Psi, and that all members had "guilty knowledge" of the specific alleged rape described in the article.[2] Therefore, the plaintiffs claim, all the men who were Phi Kappa Psi members at the time the rape purportedly occurred were defamed. The majority accepts this claim. As the District Court explained, however, the plaintiffs read too much into these words and rely on an interpretation that is untenable (and yes, implausible) when the statements are examined in the context of the article. Under New

[2] The complaint in this case also alleges that the article referred to two other female students who asserted that they were "Phi Kappa Psi gang-rape victims" around the time of the alleged rape that is the main focus of the article. Joint App'x 25–26, 50. Even these additional statements alleged in the complaint fall short of supporting a claim of small group defamation. The majority suggests that I ignore the article's additional description of a "decades-long 'trail' of sexual violence leading back to the fraternity, including a gang rape committed there in 1984." Majority Op. 26 n.10. But in assessing the plaintiffs' small group defamation claim, I, unlike the majority, rely on the actual allegations and limited claims in their complaint, which point only to the article's references to the three recent rapes, not a long "trail" of past rapes.

York law it is well established that "innuendo . . . may not enlarge upon the meaning of words so as to convey a meaning that is not expressed." Tracy v. Newsday, Inc., 5 N.Y.2d 134, 136 (1959). Words "cannot be made [defamatory] by a strained or artificial construction." Golub v. Enquirer/Star Grp., 89 N.Y.2d 1074, 1076 (1997) (quotation marks omitted). Here, the plaintiffs' proffered interpretation is entirely unsupported by either the plain text of the statements or the text read in the context of the article as a whole. Though the article discussed issues of sexual assault on college campuses generally (including at the University of Virginia and Phi Kappa Psi), it focused largely on one specific alleged rape. Interpreting the article to mean that all members of the fraternity were either aware of or committed acts of rape warps the language beyond its plausible meaning and surrounding context.

I therefore concur in part and respectfully dissent in part.