No. 20-CV-318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

L. MORGAN BANKS, III *et al.*,
Appellants,

v.

DAVID H. HOFFMAN, *et al.*,
Appellees.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE COUNCIL OF THE DISTRICT OF COLUMBIA

IN SUPPORT OF APPELLEES AND AFFIRMANCE

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April 15, 2024

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STATEMENT OF INTEREST OF AMICUS CURIAE

The District of Columbia Charter provides that the legislative power of the District of Columbia ("District") is "vested in and exercised by" the Council of the District of Columbia ("Council"). D.C. Code § 1-204.04(a). Pursuant to that grant of authority, the Council enacted the Anti-SLAPP Act of 2010 ("Anti-SLAPP Act" or "Act")[1]. A provision of the Act, D.C. Code § 16-5502, grants individuals who are sued for engaging in acts in furtherance of the right of advocacy on issues of public interest the right to pursue a special motion to dismiss, which can have the effect of limiting discovery. The Council seeks to defend the Act against Appellants' contention that it violates section 602(a)(4) of the Home Rule Act[2] (D.C. Code § 1-206.02(a)(4)) and to preserve the Council's prerogative, as the District's only democratically elected legislature, to pass laws that create or protect substantive rights, even if such laws may affect the procedures of the District's local courts. The Council submits this brief as *amicus curiae* pursuant to D.C. App. R. 29(a)(2)[3], to respectfully urge the Court to hold that the Anti-SLAPP Act does not violate section 602(a)(4) of the Home Rule Act.

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[1] D.C. Law 18-351; 58 DCR 741 (2010).
[2] Pub. L. 93-198; 87 Stat. 774 (1973).
[3] Consistent with D.C. App. R. 29(a)(2), the Council may submit this brief without consent of the parties or leave of Court. The Council timely files it no later than seven days following the filing of Appellees' briefs on April 8, 2024. *See* D.C. App. R. 26(a)(2); D.C. App. R. 29(a)(6).

ARGUMENT

I. The Anti-SLAPP Act's conferral of the right to pursue a special motion to dismiss that may have the effect of limiting discovery is an exercise of the Council's broad legislative power to create substantive rights.

In 1973, Congress passed the Home Rule Act with the stated purpose of granting the "powers of local self-government" to District residents. D.C. Code § 1-201.02. Complementary to Congress's aim of granting District residents self-government was its further goal of relieving itself "to the greatest extent possible . . . [of] the burden of legislating upon essentially local District matters."[4] *Id.* In light of these dual purposes, the legislative power Congress delegated to the Council is necessarily broad, "extend[ing] to all rightful subjects of legislation within the District . . .", D.C. Code § 1-203.02, and is limited only by: 1) Congress's retention of plenary constitutional authority; 2) certain expressly enumerated limitations in the Home Rule Act; and 3) traditional separation-of-powers principles. *See* D.C. Code § 1-206.01 *et seq.*; *Apartment & Off. Bldg. Ass'n v. Pub. Serv. Comm'n,* 203 A.3d 772, 779 (D.C. 2019); *Wilson v. Kelly*, 615 A.2d 229, 231–32 (D.C. 1992). One of the primary drafters of the Home Rule Act characterized Congress's delegation of legislative authority to the Council as a "blanket transfer of power" that would make the Council capable of passing

[4] This Court has described the latter aim as the Home Rule Act's "core and primary" purpose. *In re Crawley*, 978 A.2d 608, 610 (D.C. 2009) (*quoting McIntosh v. Washington,* 395 A.2d 744, 753 (D.C.1978)).

"whatever legislation is necessary." House Comm. on the District of Columbia, 93d Cong., 2d Sess., Home Rule for the District of Columbia (Comm. Print 1974) at 1034 ("Home Rule Comm. Print"). The Council's power to make laws is therefore analogous to that of a state legislature, *see id.* at 463; *Gary v. United States*, 499 A.2d 815, 852 (D.C. 1985) (Mack, J., concurring in part), and it encompasses the power to decide the appropriate balance among competing policy objectives and to prescribe the means for achieving that balance. *See Quattlebaum v. Barry*, 671 A.2d 881, 885 (D.C. 1995) (*en banc*); *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 908-09 (D.C. 1981) (*en banc*); *Ysla v. Lopez*, 684 A.2d 775, 778 (D.C. 1996).

The Council passed the District's Anti-SLAPP Act in response to a demonstrated need to protect individuals who engage in the right of advocacy on issues of public interest from being harassed and muzzled by what have come to be known as "SLAPPs" — Strategic Lawsuits Against Public Participation. *See* D.C. Council, Report of Comm. on Public Safety and the Judiciary on Bill 18-893 (Nov. 18, 2010), at 1 ("Report on Bill 18-893"). In a SLAPP, a plaintiff on "one side of a political or public policy debate [files suit] to punish or prevent the expression of opposing points of view." *Id.* The Council's Report on Bill-18-893 makes clear that, in such suits, "litigation itself" — pre-trial processes, generally, and discovery, specifically — "is the plaintiff's weapon of choice." *Id.* at 4.

During the hearing on the Anti-SLAPP Act, the Council received testimony regarding the toll that SLAPPs exact from individuals who exercise their rights to petition the District government and to speak or write publicly on issues of local import. *Id.*, Attachment 2. In response to these concerns, the Council crafted a comprehensive scheme to rebalance the burdens of litigation and thereby protect those individuals from meritless suits. *See id.* at 4, 6; *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016). This scheme is codified at D.C. Code § 16-5501 *et seq.* Specifically, D.C. Code § 16-5502 confers upon a SLAPP defendant the right to seek early dismissal of an unmeritorious suit through a special motion to dismiss, which includes the right to stay discovery during the pendency of the special motion unless the plaintiff can show that targeted discovery would enable her to defeat the motion.[5]

This court repeatedly has recognized that the Anti-SLAPP Act created new rights for litigants in furtherance of legitimate policy goals. *See Khan,* 292 A.3d at

[5] The Act confers other rights as well. For example, it allows an anonymous individual from whom information is sought in a SLAPP the right to avoid being subjected to discovery through a special motion to quash (D.C. Code § 16-5503). It also authorizes a party that prevails on a special motion to dismiss or a special motion to quash made pursuant to the Act the right to recover litigation costs and attorneys' fees (D.C. Code § 16-5504), a right that this Court previously upheld as a valid exercise of the Council's authority in *Khan v. Orbis Bus. Intelligence Ltd.,* 292 A.3d 244, 258 (D.C. 2023). Here, Appellants have challenged only the Council's creation of the right to pursue a special motion to dismiss as violative of section 602(a)(4) of the Home Rule Act.

258; *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 512 (D.C. 2020); *Mann*, 150 A.3d at 1228-30; *Doe No. 1 v. Burke*, 91 A.3d 1031, 1038 (D.C. 2014). In the case of the special motion to dismiss, these rights amount to a qualified immunity from discovery and trial. As this Court explained in *Fridman*, "the Anti-SLAPP Act created substantive rights which accelerate the often lengthy process of civil litigation," and the discovery stay that the act affords SLAPP defendants after filing a special motion is a "substantive protection". 229 A.3d at 511. This substantive protection from potentially harassing discovery amounts to a non-disclosure privilege — or a qualified immunity against discovery — for a SLAPP defendant. It is analogous to other evidentiary privileges the Council has enacted, such as legislative immunity, *see* D.C. Code § 1-301.42; *Vining* v. *Council of D.C.*, 140 A.3d 439, 449 (D.C. 2016) (examining § D.C. Code § 1-301.42), except that rather than prohibiting discovery altogether, it merely suspends it until the plaintiff establishes the legal sufficiency of her claims. *See Fridman*, 220 A.3d at 504.

This Court also has recognized that the special motion operates as a qualified immunity from trial. In *Mann*, the Court cited its earlier decision in *Burke* to explain that "the special motion to dismiss created by the Anti-SLAPP Act 'explicitly protects the right not to stand trial' in a SLAPP." 150 A.3d at 1229 (quoting *Burke*, 91 A.3d at 1039). It further explained that "the circumstance under which the Anti-SLAPP Act creates immunity from trial is a meritless SLAPP." *Id.*

Importantly, this Court twice has emphasized that the question the special motion to dismiss answers — "whether the defendant is entitled to immunity from trial" — is distinct from the question of whether the defendant is liable. *Id.* at 1230; *Burke*, 91 A.3d at 1038 (citing *Henry v. Lake Charles Am. Press, L.L.C.,* 566 F.3d 164, 175 (5th Cir. 2009)). In *Mann*, the Court explained the interest-balancing the Act effectuates:

> The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. Thus, the special motion to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection and of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial.

150 A.3d 1239. The fact that the Council established a qualified immunity from discovery and trial by means of a procedural mechanism does not remove the creation or abrogation of that right from the legislative realm. *See Pub. Media Lab v. District of Columbia*, 276 A.3d 1, 11 (D.C. 2022).[6] As this Court has recognized,

[6] Appellants cite *Public Media Lab* for the proposition that the special motion to dismiss is merely "procedural" in nature. Br. 22. However, this Court characterized the special motion to dismiss as a "procedural mechanism" in the context of explaining that "[t]he Council has the authority to make substantive changes affecting claims or causes of action, including creat[ing] substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether." *Public Media Lab*, 276 A.3d at 11 (citation omitted). It follows, the Court explained, that the Council also possesses the power to exempt certain defendants from the right to pursue a special motion to dismiss. *Id.* Rather than supporting Appellants' position, *Public Media Lab* reinforces that establishing the contours of the rights the Anti-SLAPP Act creates is a legislative prerogative.

the Anti-SLAPP Act "embodies a legislative determination that parties should be immune from certain abusive tort claims" and, in such instances, "there is little room for the judiciary to gainsay its importance." *Mann*, 150 A.3d at 1231 (quoting *Henry*, 566 F.3d at 181).

The Anti-SLAPP Act's statutorily created rights are of particular and unique import to District residents, workers, and visitors. As the capital of our democracy, the District is the locus of hundreds of demonstrations, protests, and marches each year. *See* Marissa J. Lang, *D.C. is becoming a protest battleground. In a polarized nation, experts say that's unlikely to change,* WASH. POST, Jan. 1, 2021, *available at* https://tinyurl.com/WashPost1A (last visited Apr. 13, 2024). It is home to "thousands of lobbying firms, think tanks, professional associations, non-governmental organizations, . . . the federal government[,]" and the District government, all of whom participate in or are the audience for advocacy on issues of public interest. Amici Curiae Public Interest Advocacy Organizations Br. 8, Oct. 27, 2023. Moreover, the rights the Anti-SLAPP Act protects are not coextensive with the rights the First Amendment protects. The Council defined the right the Anti-SLAPP Act protects as, "act[s] in furtherance of the right of advocacy on issues of public interest," to afford even broader protections than courts have recognized under the First Amendment. *See* Report on Bill 18-839, Attachment 4 at 1. In short, the Anti-SLAPP Act represents a quintessential exercise of the

Council's legislative power: it assigns rights and responsibilities to members of the public generally, pursuant to policy choices made after careful weighing of public testimony and the opinions of District agencies, as well as "broad relevant surveys, studies, and published reports." *Chevy Chase Citizens Ass'n v. D.C. Council*, 327 A.2d 310, 316-17 (D.C. 1974).

II. The Anti-SLAPP Act does not violate section 602(a)(4) of the Home Rule Act.

A. Consistent with the legislative history of the Home Rule Act, this Court construes section 602(a)(4) narrowly to prohibit the Council only from legislating in a manner that runs directly contrary to the terms of Title 11.

Section 602(a)(4) appears as part of an enumerated list of "Limitations on the Council" in Title VI of the Home Rule Act, which is entitled "Reservation of Congressional Authority". It provides, in relevant part:

> (a) The Council shall have no authority . . . to:
> * * *
> (4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)[.]

Contrary to Appellants' assertion that the language of section 602(a)(4) should be construed broadly to "prohibit[] the D.C. Council from legislating regarding 'any provision of Title 11'", Br. 19, this Court has counseled repeatedly that limitations on the Council's authority in the Home Rule Act, generally, and in section 602, specifically, are to be construed narrowly so as not to subvert the dual purposes of

home rule: granting self-government to the people of the District and relieving Congress of the burden of legislating on purely local matters.[7] *See Apartment & Off. Bldg. Ass'n,* 203 A.3d at 779; *In re Crawley*, 978 A.2d at 610; *McIntosh,* 395 A.2d at 753.

Appellant's basic contention is that the Anti-SLAPP Act "creates procedures,"[8] Br. 21, and therefore implicitly violates section 602(a)(4) as an act "with respect to any provision of Title 11" because section 11-946 speaks to the rules that the Superior Court uses to conduct its business. Br. 19. However, nearly forty years of this Court's precedents demonstrate that a Council law may touch on or affect the same subject matter that a provision in Title 11 addresses without violating section 602(a)(4). *See Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 ("We have construed this provision narrowly to mean that the Council is precluded from amending Title 11 itself.") (citing *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016)).

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[7] Moreover, as a general matter, "the D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988).

[8] Appellants cite Chairman Mendelson's statement before Congress that the "Council cannot legislate judicial process" in support of this position. To be clear, whatever limits section 602(a)(4) may place on the Council, it is the Council's view that section 602(a)(4) does not preclude the application of D.C. Code § 16-5502 by the courts. Notably, it was Chairman Mendelson himself who chaired the Council committee that first passed the Anti-SLAPP Act, which at that time included section 16-5502 in its near-current form.

Of particular importance to this appeal is this Court's decision in *McIntosh*, in which the Court determined that Home Rule Act section 602(a)(9)'s (D.C. Code § 1-206.02(a)(9)) temporary prohibition against enacting any act "with respect to any provision" in Title 22 merely constrained the "Council's authority to make changes, modifications, or amendments" to laws codified in Title 22. 395 A.2d at 751. The Court squarely rejected the argument that this limitation invalidated a Council law merely because it dealt with the same "subject matter" as a chapter in Title 22. *See id.* ("The thrust of this argument is that the phrase 'with respect to any provision of law codified in Title 22' means with respect to the Subject matter of any provision of Title 22. This is simply not the case."). To hold otherwise, the Court recognized, would render the "Council powerless to act in many areas" within its legislative authority. *Id.* Here, there is no reason to interpret the phrase "with respect to any provision", as it appears in section 602(a)(4), any differently from the identical language found in section 602(a)(9).[9] *See District of Columbia v.*

[9] The textual difference between section 602(a)(4)'s prohibition against enacting "an act . . . with respect to *any provision* in Title 11" and 602(a)(9)'s prohibition against enacting "an act . . . with respect to *any provision of law codified* in Title 22" is not material. Title 11 is an enacted title of the D.C. Official Code, meaning that Congress passed it in its entirety. Conversely, Title 22 is an unenacted title, meaning that it is a compilation of discrete laws codified under a single title. *See* COUNCIL OF THE DISTRICT OF COLUMBIA LEGISLATIVE DRAFTING MANUAL at 9 (2019) *available at* https://tinyurl.com/CouncilDM (last visited April 10, 2024). The difference in phrasing between paragraphs (4) and (9) in section 602(a) simply reflects the distinction between enacted and unenacted titles.

Sullivan, 436 A.2d 364, 366 (D.C. 1981) (relying on *McIntosh's* analysis of section 602(a)(9) to interpret section 602(a)(4)). In other words, section 602(a)(4) should not be read as a wholesale prohibition on the Council legislating with respect to the "subject matter" of a provision of Title 11.

The legislative history of section 602(a)(4) further underscores that Congress intended it to limit only the Council's ability to amend Title 11 itself. Early drafts of section 602 reflect that members of Congress favored allowing the Council to pass laws affecting the court's jurisdiction, organization, and structure. *See* Home Rule Comm. Print at 560. However, this Court and the Superior Court were opposed to the enactment of this earlier version of section 602 and advocated for provisions that would insulate themselves from perceived local political pressures. *See id.* at 1416-1422. In response to these concerns, the House Committee on the District of Columbia accepted an amendment that became section 602(a)(4). *Id.* at 1097-98. The member of Congress who offered it explained that it "provides for power over the judiciary as one of the reserve powers for the Congress," *id.* at 1098, and that it was motivated by "the very strong argument made by the courts . . . that the Reorganization Act had just gone into effect." *Id.* at 1081. Accordingly, "the structure of the courts should have an opportunity for that Reorganization Act to be completely carried out." *Id.* In fact, the Committee Report on the bill expressly states that section 602(a)(4) was intended to provide

that "Title 11 of the D.C. Code (pertaining to organization, jurisdiction and administration of the D.C. Courts) may not be *amended* by the local Council." *Id.* at 1444 (emphasis added).

As the foregoing demonstrates, the legislative history of section 602(a)(4) does not evince a congressional intent to broadly prohibit Council action on any *subject matter* addressed in Title 11. *Sullivan,* 436 A.2d at 366. Rather, Congress merely sought to reserve for itself the legislative power to directly amend Title 11, primarily because it wanted to retain the sole authority to make changes to the courts' nascent structure, jurisdiction, and organization (as the parenthetical text of 602(a)(4) reflects). *See Woodroof*, 147 A.3d at 784. And, as noted above, this Court's decisions applying section 602(a)(4) consistently reflect that legislative history. From *Sullivan* through *Price*, the constant throughline is that "[w]hen the Council's actions do not run directly contrary to the terms of Title 11" this Court has chosen "to construe [section 602(a)(4)'s] limitation on the Council's power in a flexible, practical manner." *Id.* at 783. The Court should not abandon that approach here.

B. The Anti-SLAPP Act's conferral of the right to pursue a special motion to dismiss does not run directly contrary to D.C. Code § 11-946.

D.C. Code § 11-946 provides:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

> (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules.

Importantly, the Anti-SLAPP Act does not amend a single word of section 11-946.[10] It does not repeal or otherwise alter the establishment of the Federal Rules of Civil Procedure ("FRCP" or "Federal Rules") as the default rules for the conduct of Superior Court business; it does not prohibit or prevent the Superior Court from making its own rules or proposing modifications to the Federal Rules; and it does not repeal or alter the relationship between the Superior Court and this Court with respect to this Court's approval of proposed modifications to the Federal Rules.

Appellants argue that the Anti-SLAPP Act's special motion to dismiss nonetheless violates section 11-946 "by imposing procedures on the Superior Court that modify the FRCP but have not been approved by this Court". Br. 20. This argument fundamentally misconstrues section 11-946. Section 11-946 confers

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[10] The Anti-SLAPP Act is codified in Title 16, along with numerous other Council laws affecting court procedure. *See, e.g.,* Uniform Mediation Act of 2006 (D.C. Law 16-87; D.C. Code § 16-4201 *et seq.*); Arbitration Amendment Act of 2007 (D.C. Law 17-111; D.C. Code § 16-4401 *et seq.*); Uniform Unsworn Foreign Declaration Act of 2010 (D.C. Law 18-191; D.C. Code § 16-5301 *et seq.*).

rulemaking authority on the Superior Court. *See Ford v. ChartOne*, *Inc.*, 834 A.2d 875, 880 (D.C. 2003). In contrast, the Home Rule Act confers *lawmaking* authority on the Council. D.C. Code § 1-204.04. The Anti-SLAPP Act is not a rule; it is statutory law. Even assuming without conceding that the Anti-SLAPP Act's special motion somehow "modifies" the FRCP,[11] nothing in section 11-946 or the Home Rule Act purports to give the District's courts the authority to "approve" or "disapprove" provisions of Council-enacted laws simply by exercising their rulemaking authority. Reading section 11-946 in such a way would impermissibly infringe on the Council's policy-making authority and would distort the section's meaning to the point of absurdity.[12] *Cf*. *Ex parte Ward*, 540 So.2d 1350, 1352 (Ala.

[11] Both the District's brief, District Br. 27-34, and the dozens of Superior Court cases since 2011 in which the Anti-SLAPP Act has been applied (summarized in Exhibit A to Appellants' Brief) make clear that the Anti-SLAPP Act readily co-exists with the FRCP provisions regarding pre-trial discovery and dispositive motions that have been incorporated into the Superior Court's Rules of Civil Procedure. With particular respect to discovery, Super. Ct. Civ. R. 26(b)(1) already expressly contemplates that discovery of privileged matters is unavailable. And, as the District articulates, District Br. 32-33, there is no absolute right to discovery in any event for a litigant who is opposing a dispositive pre-trial motion. It also should not escape notice that the trial court in this case in fact permitted Appellants to conduct discovery prior to the dismissal of their lawsuit.

[12] Although the courts enjoy a mandate to invalidate Council laws that are unconstitutional or invalid under the Home Rule Act, the reading of section 11-946 that Appellants advance would effectively make the courts' discretionary exercise of their rulemaking authority under that section a condition precedent to the effectiveness of Council-enacted laws. Under Appellants' reading, the courts could choose to give effect to all of the rights afforded under the Anti-SLAPP Act or just some of them. And they could do so now, later, or never. Such an approach is

1988) (holding that judicial order delaying effectiveness of legislation to allow for court promulgation of procedural rules to implement it was violative of state constitution).

By its own terms, section 11-946 does not in any way prohibit the Council from enacting laws that affect the Superior Court's procedures; indeed, the section does not contemplate the exercise of the legislative power at all. This should surprise no one. When Congress passed the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, 84 Stat. 475, which added section 11-946 to Title 11, Congress was the only legislature for the District. It is axiomatic that whatever rulemaking authority Congress delegated to the Superior Court would be subordinate to Congress's legislative authority. *See Varela v. Hi-Lo Powered Stirrups, Inc.,* 424 A.2d 61, 63 (D.C. 1980). Accordingly, the directive that "[t]he Superior Court *shall* conduct its business according to the Federal Rules of Civil Procedure" is simply that: a direction to the Superior Court. Because Congress did not consider that it would be delegating its legislative authority over the District to the Council when it enacted section 11-946, the section's text should not be understood as a limitation on the Council's legislative power.[13]

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inconsistent with the Home Rule Act's vesting of the legislative power in the Council.

[13] In fact, this Court has invalidated Federal Rules the Superior Court adopted under section 11-946's general directive to use the Federal Rules because a court rule "may not 'supersede an inconsistent provision of the District of Columbia

As noted above, when Congress did take up the question of what legislative authority to delegate to the Council and settled on section 602(a)(4) as a limitation on that authority, it was primarily motivated to "reserve[] to the Congress the right to modify the composition or the structure or jurisdiction of the courts." Home Rule Comm. Print at 1358. To the extent concerns about the courts' authority to regulate procedure factored into Congress's thinking about limitations on the Council's legislative authority at all, the most that can be inferred is that Congress intended to preserve the courts' then-existing rulemaking authority.[14] That authority did not encompass the authority to make, enlarge, or abridge substantive rights, which is quintessentially the role of the legislature. *See In re C.A.P.*, 356 A.2d 335, 343 (D.C. 1976). Further, although Congress apparently intended for the Superior Court to use the FRCP as the default rules to conduct its business, *see Ford*, 834 A.2d at 880, it recognized that deviation from those rules may be necessary "because of the peculiar local jurisdiction or because of the particular

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Code'." *Ford*, 834 A.2d at 880 (quoting *Flemming v. United States*, 546 A.2d 1001, 1005 (D.C. 1988).

[14] Superior Court Chief Judge Harold H. Greene stated in a letter to the House Committee on the District of Columbia that "it is unclear whether and the extent to which under H.R. 9056 provisions relating to such matters as the assignment of judges, their disqualification, authority to adopt court rules, and the like would survive the enactment of this bill." Home Rule Comm. Print at 1422. A staff memo responded to specific amendments recommended by Chief Judge Greene, noting that a few specific provisions of Title 11 would have their "concept included in" or be "frozen in" by the new section 602(a)(4), but pointedly did not include the court's authority to adopt rules among them. *Id.* at 1424-1425.

exigencies of the local situation." *See* S. Rep. No. 91-405, at 21 (1969). Under the approach envisioned by Congress, then, it is the responsibility of the courts to conform their rules to changes in local law when such changes occur.[15]

Because section 11-946 itself places no limitations on the Council's authority to enact substantive law, it should not be read together with section 602(a)(4) to impede the Council's exercise of that authority in a manner that may affect court procedure. *See Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (rejecting reading section 602(a)(4) and Title 11 provision "together in such a way that the whole exceeds the sum of its parts"). Indeed, under such a reading, many more Council-enacted acts would be subject to invalidation, and the Council's primary function of weighing and balancing competing interests and crafting laws responsive to those interests would be in serious jeopardy. District

[15] In fact, the Superior Court has made such changes on several occasions in response to Council-enacted legislation. The Superior Court amended Civil Rule 56 in April 2022 in response to Council changes to D.C. Code § 28-3814, requiring a debt collector to attach additional documentation to a complaint. It has previously amended or adopted Civil Rules 9-I, 62-III, and 70-I to conform its rules of procedure to Council legislation. It amended Rule 9-I in response to the Council's passage of the Uniform Unsworn Foreign Declaration Act of 2010, D.C. Code § 16-5301 *et seq*. It promulgated Rule 62-III (formerly Rule 72) to implement the Uniform Enforcement of Foreign Judgments Act of 1990, D.C. Code § 15-351 *et seq.* And it promulgated Rule 70-I to implement the Council's enactment of the Arbitration Act of 2007, which adopted the Revised Uniform Arbitration Act for the District. Again, however, *see supra*, note 12, the authority of the courts to adopt corresponding changes to their rules to accommodate duly enacted local laws should not be turned on its head to permit the courts to effectively annul such laws when they choose not to exercise their authority.

Br. 39-40. Rather, as discussed above, *see* Part II.A., *supra*, section 602(a)(4) only invalidates a Council act if the act amends or runs directly contrary to a provision in Title 11, *Woodroof*, 147 A.3d at 784-85; in other words, only if a Council act and a provision in Title 11 irreconcilably conflict. *See U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1087 (D.C. 1997) (explaining that the parties advocating that one law implicitly repealed another law had the burden to show those laws "are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation") (citation omitted).

Appellants attempt to establish that section 11-946 and the Anti-SLAPP Act irreconcilably conflict by pointing to recent cases from the D.C. Circuit, in which that court declined to apply the Anti-SLAPP Act's special motion to dismiss in diversity suits under the Supreme Court's *Erie* doctrine. Br. 25-27. In *Abbas v. Foreign Policy Group, LLC* and *Tah v. Global Witness Publishing, Inc.*, the D.C. Circuit determined that FRCP 12 and 56 provide the exclusive mechanisms for disposing of cases before trial in federal court. 783 F.3d 1328 (D.C. Cir. 2015); 991 F.3d 231 (D.C. Cir. 2021). Specifically, the D.C. Circuit concluded that, because the Anti-SLAPP Act's special motion to dismiss is addressed to the same question as FRCP 12 and 56 — when can a case be dismissed before trial? — but answers it differently, the trial court could not apply the Anti-SLAPP Act's special motion to dismiss. *Tah*, 991 F.3d at 239, *Abbas*, 783 F.3d at 1334. However, the

D.C. Circuit's analysis from *Abbas* and *Tah* has no bearing here. Although section 11-946 directs the Superior Court to default to the application of the FRCP in its proceedings, "once [a Federal Rule] becomes a Superior Court rule, it must behave like a Superior Court rule . . . ." *Flemming*, 546 A.2d at 1005 (explaining that although Superior Court Rule of Criminal Procedure *was* Federal Rule of Criminal Procedure, it did not supersede inconsistent D.C. Code provision). In other words, doctrines animating federal court decisions about how to resolve potential conflict between a Federal Rule and state law are inapposite in this local-court proceeding. *See Ford*, 834 A.2d at 880.

Additionally, the issue presented in this case is distinct from the issue presented in *Abbas* and *Tah*. In this case, the relevant inquiry is not whether the FRCP-derived Superior Court Rules of Civil Procedure are broadly preclusive of the Anti-SLAPP Act's special motion to dismiss. Rather, as discussed above, the relevant question remains whether the Superior Court's obligation to apply the Anti-SLAPP Act's special motion to dismiss in appropriate cases runs directly contrary to section 11-946, such that it effectively amends that section. In contrast to the D.C. Circuit in *Abbas* and *Tah*, this Court must base the answer to that question on local precedent, and local precedent "avoid[s] too rigid a view of what constitutes a[n] . . amendment" to controlling congressional laws, like the District's Charter or Title 11, when doing so risks stripping the Council of its

power to address local problems. *See Apartment & Off. Bldg. Ass'n*, 203 A.3d at 781 (quoting *Potomac Elec. Power Co. v. District of Columbia*, 651 F. Supp. 907, 911 (D.D.C. 1986)).

On this point, this Court's decision in *Bergman* is instructive. In *Bergman*, the Court considered whether section 602(a)(4), read in conjunction with D.C. Code § 11-2501 and the Rules of Professional Conduct promulgated thereunder, invalidated a Council law that penalized lawyers for the in-person solicitation of accident victims within the 21-day period following an accident. 986 A.2d 1208. The appellee in *Bergman* argued that the Council's law reflected a different policy choice than the Court's rule and was therefore invalid.[16] *See id.* at 1229. However, this Court determined that even when the Court's rule and the Council law had the same primary focus — penalizing attorney conduct — the two could coexist because the Council law did not unduly interfere with the Court's core functions, reflected in D.C. Code § 11-2501, regarding the practice of law in the District.[17]

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[16] D.C. Code § 11-2501 gives this Court the authority to issue rules "respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion", and Rule 7.1 prohibits solicitation of potential clients when their "physical or mental condition [] would make it unlikely that the potential client could exercise reasonable, considered judgment." However, Rule 7.1 does not impose an express temporal ban on soliciting clients following an accident. *See id.* at 1230.

[17] The separation-of-powers analysis this Court conducted in *Bergman,* and which is apt here, is the same as that applied to separation-of-powers disputes that arise directly under the District's Charter. The test in those cases is whether one

See id. at 1230. Key to this Court's analysis was the fact that the Council's law was a narrowly drawn consumer protection law that — but for the potential section 11-2501 conflict vis-à-vis section 602(a)(4) — was otherwise clearly within its legislative purview. *Id.* at 1225. The Court therefore determined that its core function of regulating attorney conduct under the Home Rule Act and section 11-2501 was not so exclusive as to preclude operation of the Council's law. *Id.* at 1230.

Similarly, the judiciary's authority under section 11-946 to apply and modify the FRCP is not so exclusive that it precludes application of the Anti-SLAPP Act's special motion to dismiss. Like the District's local courts, courts around the country are imbued with either constitutional or statutory authority to issue procedural rules. *See, e.g., Seisinger v. Siebel*, 203 P.3d 483, 486 (Ariz. 2009), *McDougall v. Schanz*, 597 N.W.2d 148, 156 (Mich. 1999). In some states, establishing court procedure may be the exclusive province of the courts.[18] *See, e.g.*, *Antero Treatment LLC v. Veolia Water Tech., Inc.*, --- P.3d ---, 2023 WL 8361332 at *3 (Colo. 2023); *Spratt v. Toft*, 324 P.3d 707, 714 (Wash. App. 2014); *Seisinger*, 203 P.3d at 486-487. Nonetheless, procedural rulemaking authority may never abridge substantive rights. *See In Re C.A.P.,* 356 A.2d at 343-344;

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branch's action unduly interferes with or impermissibly burdens another branch's exercise of a core function. *See Hessey v. Burden*, 584 A.2d 1, 6 (D.C. 1990).

[18] As the District notes, this appears to be a minority of states. District Br. 22.

McDougall, 597 N.W.2d at 156; *Ward*, 540 So.2d at 1351. Thus, although separation-of-powers principles under some state constitutions may prevent certain state legislatures from passing laws that abrogate or conflict with their courts' procedural rules when those laws do not confer substantive rights, a legislature does not impermissibly infringe on the rulemaking authority of the courts when it passes laws that substantively implicate the rights and responsibilities of the citizenry while also having some collateral effect on court processes and procedures. *See Antero Treatment LLC*, at *5 ("At its core, we simply ask whether the basic purpose of a statute is one of public policy.") (citation omitted); *Seisinger*, 203 P.3d at 490-491 ("The ultimate question is whether the statue enacts, at least in relevant part, law that effectively creates, defines, and regulates rights") (citation omitted); *People v. McKenna*, 585 P.2d 275, 278 (Colo. 1978)) ("Seen in the light of the policy it embodies, the statute represents far more than merely a legislative attempt to regulate the day-to-day procedural operation of the courts."). In such instances, conflicting court rules yield to statutory law. *See, e.g., Spratt,* 324 P.3d at 715; *Seisinger*, 203 P.2d at 490*; McDougall*, 597 N.W.2d at 156 ("[A] statutory rule of evidence violates [the state constitution] only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified") (citations omitted). State courts' accommodation of their legislatures' substantive "procedural" laws within the separation-of-powers

context thus provides an appropriate framework for reconciling any perceived conflict between the Anti-SLAPP Act and section 11-946 vis-à-vis section 602(a)(4).

Under that framework, even if section 11-946, when read in conjunction with section 602(a)(4), makes the establishment of procedural rules to conduct the court's business a core function of the judiciary, the Anti-SLAPP Act does not unduly interfere with that function because it unquestionably confers substantive rights. *See*, *supra*, Part I; *cf. Mellowitz v. Ball State University*, 221 N.E.3d 1214, 1222 (Ind. 2023); *Spratt*, 324 P.3d at 715 (explaining Washington's Anti-SLAPP Act's special motion to dismiss prevailed over court's rules of procedure because it was substantive). Importantly, the Anti-SLAPP Act's conferral of the right to pursue a special motion to dismiss does not implicate the Superior Court's conduct of its business in the general sense. *Cf. Mellowitz*, 221 N.E.3d at 1222 (explaining that, in passing its Anti-SLAPP law, the Indiana "General Assembly was addressing a substantive concern: a chill on citizens' free speech rights. It was not trying to micromanage the courts."). Rather, it is aimed at preventing litigants from weaponizing the trial court's processes in a discrete set of cases that have proven ripe for abuse. *See id.* ("But because the source of the substantive harm [in a SLAPP] is procedural—the abuse of court procedures—so too is the remedy of

altering motion practice, shortening deadlines, resequencing discovery, and expediting a ruling."); *supra* Part I.

Like the anti-solicitation law at issue in *Bergman*, the Anti-SLAPP Act is a narrowly drawn statute intended to protect a discrete class of individuals against a particularized form of harassment. 986 A.2d at 1216. Permitting certain defendants an additional procedural tool to use as protection against abuse in a limited class of cases does not unduly interfere with the courts' authority to apply the FRCP and to establish procedures to conduct their business. *See Mellowitz*, 221 N.E.3d at 1222-23. Further, reading section 11-946 in a manner that accommodates the Council's legislative power to confer substantive rights through procedural mechanisms accords with this Court's holdings in other contexts that section 602(a)(4) "does not prevent the Council from changing the District's substantive law." *Woodroof*, 147 A.3d at 782 ("Although the Council now has changed the law . . . applying that legislation does not threaten the independence of the judiciary or undermine the purposes of the Home Rule Act.") (citing *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 724 n.15 (D.C. 1995)).

Finally, adopting Appellants' understanding of section 602(a)(4)'s limitations on the Council's authority would create a vacuum in local governance. The Superior Court cannot issue rules that abridge, enlarge, or modify substantive rights, *In re C.A.P.* 356 A.2d at 343, but, under Appellants' approach, the Council

would be prohibited from passing any law that governs substantive rights if it even marginally affects the courts' procedures. This outcome is antithetical to the Home Rule Act's purposes of granting the powers of local self-government to District residents and relieving Congress of the burden of legislating on local matters. *See Bergman*, 986 A.2d at 1230 n.24 (warning of "potential consequences of the lack of any reasonable limiting principle" to position that Council cannot legislate with respect to matters within courts' rulemaking authority under Title 11). Recognizing the authority of the Council to pass substantive laws that may implicate court procedures advances these aims and does not unduly interfere with the judiciary's authority to conduct its business according to its rules.

CONCLUSION

For the reasons stated herein, we respectfully ask this Court to hold that the Anti-SLAPP Act, including its provisions regarding the filing of a special motion to dismiss and the staying of discovery codified at D.C. Code § 16-5502, does not violate section 602(a)(4) of the Home Rule Act.

Respectfully submitted,

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April 15, 2024

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual's social-security number
- Taxpayer-identification number
- Driver's license or non-driver's' license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

  (1) the acronym "SS#" where the individual's social-security number would have been included;
  (2) the acronym "TID#" where the individual's taxpayer- identification number would have been included;
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- (4) the year of the individual's birth;
- (5) the minor's initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Daniel P. Golden
Signature

20-CV-318
Case Number

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CERTIFICATE OF SERVICE

I certify that on April 15, 2024, this *amicus* brief was served through this Court's electronic filing system to:

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