DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318

MORGAN BANKS, et al.,
Plaintiffs–Appellant,

v.

DAVID D. HOFFMAN, et al.,
Defendants–Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, 2017 CA 005989 B
Hon. Hiram E. Puig-Lugo, Associate Judge

BRIEF OF AMICI CURIAE PUBLIC INTEREST ADVOCACY ORGANIZATIONS IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations, each of which certifies it has no parent corporation and has not issued any shares of stock to any publicly held corporation.

INTEREST OF AMICUS CURIAE[1]

Amici are public interest advocacy organizations for whom the protections of the First Amendment and anti-SLAPP statutes are critical to their missions. Acceptance of the Appellants' arguments that the D.C. Anti-SLAPP Act is unconstitutional or void would severely undermine the ability of amici to freely advocate on issues of national importance. Amici submit this brief to underscore the critical First Amendment values at stake in this appeal that extend far beyond the specific interests of the parties before the Court.

A more detailed description of amici is in the accompanying Motion for Leave and in Appendix A to this Brief.

SUMMARY OF ARGUMENT

This case arises out of speech on an issue of the gravest public concern: U.S. military policy regarding treatment of detainees during the War on Terror, and the degree to which elite institutions enabled the implementation of that policy. Public debate on issues of national political, moral and social importance lies at the heart of the free speech protections of the First Amendment. *See, e.g., Garrison v. State of La.*, 379 U.S. 64, 76–77 (1964) ("speech concerning public affairs is more than

[1] No party's counsel authored the brief in whole or part or contributed money intended to fund preparing or submitting the brief, and none other than amici contributed money to fund preparing or submitting the brief. Counsel for all parties have consented to the filing of this brief pursuant to D.C. App. R. 29(a)(2).

self-expression; it is the essence of self-government"). In recognition of the need to ensure that public debate and freedom of express have the necessary "breathing space … to survive," the Supreme Court has held that the First Amendment imposes heavy burdens on a public official or public figure seeking to hold a speaker liable for such speech, including the requirement to show by clear and convincing evidence that statements were made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (citation omitted).

Over time, courts and state governments alike have recognized that merely being able to defeat a libel lawsuit at the end of the long process of civil litigation does not mitigate the potentially devastating chilling effects that come from exposure to such lawsuits – including defamation suits – that arise out of the exercise of First Amendment rights.

As public interest organizations that frequently speak out about and criticize powerful figures in society including government officials and large corporations—amici are regularly faced with efforts to silence their advocacy, including through civil litigation that can take many years and millions of dollars to resolve. Both the District of Columbia Council and this Court have recognized that, even when such lawsuits are "without merit," they "achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights" by requiring the defendant to expend vast amounts

of "money, time, and legal resources" to fight the lawsuit in court. *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 501–02 (D.C. 2020) (quoting Council of the District of Columbia, Report of Comm. on Public Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010) ("Council Report")).

In order to mitigate this problem, the D.C. Council – like the legislatures of more than thirty other states around the country – passed an "anti-SLAPP" statute that provides vital protections for speakers from "Strategic Lawsuits Against Public Participation." Although these statutes differ in their particulars, they are animated by the importance of facilitating efficient disposal of lawsuits arising out of public speech, while minimizing the burdens of litigation in the interim. *See infra*.

Appellants in this case attack the D.C. Anti-SLAPP Act as inconsistent with federal and D.C. statutes (including the Home Rule Act of 1973, D.C. Code § 1-201.01 et seq.) and unconstitutional, because, Appellants argue, the statute infringes on the First Amendment right to petition the courts for relief. In arguing that the Act is unconstitutional as applied to them, Appellants place particular importance on the fact that the Act allowed disposal of the action before they were able to take full discovery of the defendants.

The substance of Appellants' arguments is amply addressed in the three Appellees' briefs. Amici submit this brief to underscore that, contrary to Appellants' argument that the D.C. Anti-SLAPP Act infringes First Amendment rights, the

statute – and its counterparts in other states – provides critical *protection* for the speech that lies at the very heart of the First Amendment. Indeed, acceptance of Appellants' arguments to invalidate or neuter the D.C. Anti-SLAPP Act would make potentially meritless SLAPPs significantly more difficult to dispose of at the early stages of a case. That, in turn, would inevitably reinvigorate the ability of powerful figures to "use litigation as a weapon to chill or silence speech" in the District of Columbia. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014).

ARGUMENT

I. THE ANTI-SLAPP ACT'S PROTECTIONS, INCLUDING LIMITING BURDENSOME PRE-TRIAL DISCOVERY, ARE ESSENTIAL FOR PROTECTING PUBLIC ADVOCACY

The Supreme Court's defamation jurisprudence is founded on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment's speech protections were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Public interest advocacy organizations play a vital role in organizing and developing the speech that informs public debate and holds those in power to account.

In enacting the Anti-SLAPP Act more than a decade ago, the District of Columbia joined the growing majority of states that had passed legislation to

minimize the cost and time required to defend against Strategic Lawsuits Against Public Participation ("SLAPPs"). As this Court has explained, the Council of the District of Columbia was responding to the reality that SLAPPs had been "increasingly utilized over the past two decades as a means to muzzle speech … on issues of public interest." *Fridman*, 229 A.3d at 501–02 (quoting Council Report at 1). Accordingly, the Act grants defendants certain "substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP" (Council Report at 1), including "a special motion to dismiss which provides for the expeditious dismissal of a complaint, and the ability to stay discovery until that motion has been ruled upon." *Fridman*, 229 A.3d at 502 (internal citation omitted); *see also Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016) ("The D.C. Anti-SLAPP Act provides not only immunity from having to stand trial but also protection from 'expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish' by 'toll[ing] discovery while the special motion to dismiss is pending.'") (quoting Council Report at 4).

The Act's stay of discovery is consistent with anti-SLAPP statutes around the country,[2] as well as the model "Public Expression Protection Act" developed by the

[2] *See* Ark. Code Ann. § 16-63-507; Cal. Civ. Proc. Code § 425.16(g); Colo. Rev. Stat. § 13-20-1101(6); Conn. Gen. Stat. Ann. § 52-196a(d); Ga. Code Ann. § 9-11-11.1(b)(2), (d); Hawaii Public Expression Protection Act, S.B. 3329, sec. 1 §§ 3(b)(1), (e); 735 Ill. Comp. Stat. Ann. 110/20(b); Ind. Code Ann. § 34-7-7-6; Kan.

Uniform Law Commission (finalized in 2020), which emphasized that a stay "furthers the purpose of the Act by protecting a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the [SLAPP] motion …."[3]

Courts and commentators have long recognized the "potentially enormous expense of discovery" in modern civil litigation – such that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial on the merits. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). When the source of potential liability is speech on matters of public concern, fear of such burdens inevitably causes some to stay silent – or at least to think twice before speaking. As Judge Wilkinson keenly observed about such cases:

> Even if liability is defeated down the road, the damage has been done. … The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well. To allow litigation to impose large costs will dull democracy at the local level,

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Stat. Ann. § 60-5320(e); Kentucky Uniform Public Expression Protection Act, H.B. 222, § 4(1), (4); Me. Rev. Stat. Ann. tit. 14, § 556; Nev. Rev. Stat. Ann. § 41.660; N.Y. C.P.L.R. § 3211(g); Okla. Stat. tit. 12 §§ 1432(A), 1435(B); Or. Rev. Stat. Ann. § 31.152; R.I. Gen. Laws § 9-33-2(b); Tenn. Code Ann. § 20-17-104(d); Tex. Civ. Prac. & Rem. § 27.003(c); Utah Code Ann. § 78B-25-104; Vt. Stat. Ann. tit. 12, § 1041(c); 2021 Wash. Legis. Serv., ch. 259, § 4(1)(a), (4).

[3] *See* Nat'l Conf. of Comm'rs of Uniform State Laws, Uniform Public Expression Protection Act, Section 4, cmt. 1 (2020), https://tinyurl.com/mr3v4atb.

> because the monetary impacts of litigation for all but the largest media organizations will prove unacceptably high.

Hatfill v. New York Times Co., 427 F.3d 253, 254–55 (4th Cir. 2005) (Wilkinson, J., dissenting from denial of rehearing en banc).

II. AMICI HAVE FIRSTHAND EXPERIENCE DEFENDING AGAINST SLAPPS

This threat is one that public advocacy organizations like amici know all too well. That is why a number of them have joined together with other organizations – including the American Civil Liberties Union, Amnesty International, Freedom of the Press Foundation, Human Rights Watch, Natural Resources Defense Council, Public Citizen, Rainforest Action Network, and the Sierra Club – to form the "Protect the Protest" Task Force to track SLAPPs and advocate to strengthen protections for speech on matters of public concern. *See* Protect the Protest, About, https://protecttheprotest.org/about/.[4] In September 2022, task force member Earth Rights International published a report cataloging and analyzing 152 different legal actions by the fossil fuel industry against critics and activists, including 93 SLAPPs.[5]

In two of the most prominent examples, over the past eight years, members of

[4] Members of the task force have worked with activists across the country, including in Weed, California; Uniontown, Alabama; and New York City to help clients fight back against SLAPPs. *See* https://tinyurl.com/2s3s6dzw.

[5] *See* Earthrights Int'l, *The Fossil Fuel Industry's Use of SLAPPs and Judicial Harassment in the United States* (Sept. 2022), https://tinyurl.com/mr3wa5m8.

the Greenpeace network of organizations have been defending themselves in two SLAPP cases in which large corporations sued the organization not only for defamation but also for fraud (and treble damages) under the federal Racketeering Influenced Corrupt Organization Act, 18 U.S.C. §§ 1962 et seq. ("RICO") – the statute used to prosecute the mafia. In the first, one of Canada's largest logging companies, Resolute Forest Products, sought $300 million in damages for statements criticizing the company's forestry practices. In the second, oil company Energy Transfer Partners sued multiple Greenpeace entities – along with other local organizations and activists – for $900 million for allegedly orchestrating the Standing Rock Sioux tribe's protests of the Dakota Access Pipeline in 2016.

The use of RICO conveyed the unmistakable message that political speech and activism was not only tortious—it was *criminal*. Energy Transfer's CEO made no secret that the "primary objective" of his company's lawsuit was not to obtain "monetary damages," but to "send a message" to Greenpeace and anyone who would speak out against the company's environmental practices that "you can't do this" and "it's not going to be tolerated in the United States."[6]

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[6] *See We were greatly harmed, lost millions of dollars: Energy Transfer Partners CEO*, CNBC (Aug. 15, 2017), https://tinyurl.com/2udwe7wf (video at 5:04); *see also Too Far Too Often: Energy Transfer Partners' Corporate Behavior on Human Rights, Free Speech, and the Environment*, Greenpeace Reports (June 18, 2018), https://www.greenpeace.org/usa/reports/too-far-too-often/.

In both cases, the Greenpeace defendants successfully dismissed the RICO claims and, in the Resolute case, not only won summary judgment on the remaining defamation claims but was awarded nearly $600,000 in attorneys' fees under the California anti-SLAPP statute.[7] But the Energy Transfer case was refiled in state court in North Dakota, which does not have an anti-SLAPP statute; the case has continued through years of massive discovery, with trial set for July 2024. As Deputy General Counsel for Greenpeace USA[8] testified in 2022 before Congress (in support of the passage of a federal anti-SLAPP statute), "here we are, more than six years from when the first SLAPP was filed against us, still forced to invest time and resources into these legal battles that otherwise would have been used to protect communities and the environment from toxic pollution and the existential threat of climate change."[9]

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[7] *See Energy Transfer Equity, L.P. v. Greenpeace Int'l*, No. 17-cv-173, 2019 U.S. Dist. LEXIS 32264, at *11 (D.N.D. Feb. 14, 2019) (dismissing RICO claims and declining jurisdiction over state law claims); *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-2824, 2019 WL 281370, at *18 (N.D. Cal. Jan. 22, 2019) (dismissing RICO claims and claims as to 292 out of 294 allegedly defamatory statements); *id.*, 2020 WL 8877818 (Apr. 22, 2020) (granting fees motion); *id.*, 2023 WL 3568077 (Apr. 21, 2023) (granting summary judgment on remaining claims). Resolute's appeal to the Ninth Circuit was dismissed by stipulation of the parties on April 8, 2024. *See* Dkt. No. 19, 23-15782 (9th Cir. Apr. 8, 2024).

[8] Greenpeace USA is incorporated as Greenpeace, Inc., one of the amici filing this brief.

[9] *Free Speech Under Attack (Part III): The Legal Assault on Environmental Activists*

III. THE NEED FOR ROBUST ANTI-SLAPP PROTECTIONS FOR D.C.-BASED ORGANIZATIONS IS PARTICULARLY ACUTE

Protecting public advocacy within D.C. is a particularly urgent necessity. The capital is home to thousands of lobbying firms, think tanks, professional associations, non-governmental organizations, and, of course, the federal government itself. Speech on issues of serious public concern invariably involve D.C.-based entities – both as speakers and the subjects of criticism. And, indeed, organizations and individuals in this district frequently find themselves the target of SLAPPs concerning public interest advocacy and political activism.[10] In testimony submitted to the D.C. Council in support of the initial passage of the Act, ACLU-DC described two cases in which it represented two such D.C. residents; in both cases, the defendants prevailed, but only after years of litigation that would have

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and the First Amendment: Hearing Before the Subcomm. On Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform, 117th Cong. 9 (2022), https://tinyurl.com/345wx5ym. The next day Rep. Raskin introduced a federal anti-SLAPP statute. *See* SLAPP Protection Act of 2022, H.R. 8864.

[10] *See, e.g.*, *Am. Studies Ass'n v. Bronner*, 259 A.3d 728 (D.C. 2021) (nonprofit research organization sued by former members over positions organization took on Israel-Palestine conflict); *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021) (international human rights organization sued by former Liberian government officials for publishing report about alleged corrupt oil leases involving major oil company); *Hindu Am. Found. v. Viswanath*, 646 F. Supp. 3d 78, 86 (D.D.C. 2022) (activists and academic sued by political organization over criticism of ties between organization and Hindu nationalist figures in Indian government).

been prohibitively expensive without pro bono counsel from ACLU-DC.[11]

Acceptance of Appellant's arguments seeking to invalidate the D.C. Anti-SLAPP Act would leave speech connected to our nation's capital uniquely vulnerable to the weaponized litigation the Council sought to prevent.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to reject Appellants' effort to invalidate the D.C. Anti-SLAPP Act, and affirm the Order of the Superior Court dismissing the complaint.

Dated: April 15, 2024

Respectfully submitted,

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[11] *See* Council Report, Attachment at 2-4 (discussing *Father Flanagan's Boys Home v. Dist. of Columbia, et al.*, No. 01-1735 (D.D.C.), *aff'd*, No. 02-7157, 2003 WL 1907987 (D.C. Cir. Apr. 17, 2003), and *Guam Greyhound, Inc. v. Dorothy Brizill*, 2008 Guam 13, 2008 WL 4206682 (Guam Sept. 11, 2008)).

APPENDIX A

Amazon Watch is a nonprofit organization focused on protecting the rights of Indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people and farmers living in and around the "Oriente" region of the Ecuadorian Amazon, where the operations of Chevron's predecessor, Texaco, caused one of the worst environmental disasters in history. For two decades, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities' efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

The American Civil Liberties Union of the District of Columbia (ACLU-DC) is the Washington, D.C., affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil liberties of all Americans, including their right to freedom of speech. The ACLU-DC played a leading role in supporting passage of the D.C. Anti-SLAPP Act, and, having represented defendants in several SLAPP suits, is familiar with the intimidating effect such lawsuits can have on free speech.

The Center for Biological Diversity (the "Center") is a non-profit organization that works through science, law, and creative media to ensure the preservation, protection, and restoration of biodiversity, native species, wild places, and public health. The Center has more than 1.7 million members and online

activists, with staff and offices in the District of Columbia and other locations. The Center carries out a significant part of its advocacy and litigation work in the District of Columbia. In pursuit of its mission, the Center has a strong interest in ensuring that robust and effective anti-SLAPP laws are enforced, including in the District of Columbia.

The Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the "Protect the Protest" Task Force's litigation, advocacy, education and outreach work.

Direct Action Everywhere (DxE) is a grassroots network of animal activists working to achieve revolutionary social and political change for animals. DxE's work includes community organizing, public outreach, demonstrations, investigations, animal rescues, and legal advocacy.

Electronic Frontier Foundation (EFF) is a member-supported, nonprofit organization that has worked for more than 30 years at the intersection of civil liberties and technology. On behalf of its more than 33,000 dues-paying members, EFF's lawyers, activists, and technologists work to protect free expression, privacy, and innovation in the digital world. EFF has advocated against abusive SLAPP suits and for strong anti-SLAPP laws in the states and at the federal level, particularly

through participation in Protect the Protest and the Public Participation Project. EFF, based in San Francisco, also regularly works in D.C. by meeting with members of Congress and federal agencies, speaking on panels in the District, filing comments on proposed federal agency regulations, and filing briefs in D.C. courts.

Greenpeace, Inc. (Greenpeace) is an independent campaigning organization, which uses non-violent, creative confrontation to expose global environmental problems, and to force the solutions which are essential to a green and peaceful future. Greenpeace, which maintains an office in Washington, D.C., campaigns to keep coal, oil, and gas in the ground and build a United States powered by 100 percent renewable energy. It is currently a defendant in two multi-year SLAPPs aimed at silencing its advocacy.

The Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

People for the Ethical Treatment of Animals, Inc. (PETA) is the largest animal rights organization in the world, together with its affiliates having more than 9 million members and supporters. It maintains an office in Washington, D.C., blocks away from the White House. PETA is guided by the principles that animals are not ours to experiment on, eat, wear, use for entertainment, or abuse in any other way. PETA's advocacy has made it a target of litigation, and it has used anti-SLAPP

statutes to obtain dismissal or otherwise resolve multiple lawsuits, including one in Washington, D.C.

The Union of Concerned Scientists is a national non-profit organization that puts rigorous, independent science to work to solve our planet's most pressing problems. With offices in Washington, DC and three other cities, the organization combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2024, I caused the foregoing Brief of Amici Curiae Public Interest Advocacy Organizations to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated: April 15, 2024

/s/ Laura R. Handman
Laura R. Handman

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;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (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/ Laura R. Handman
Signature

20-cv-0318
Case Number(s)

Laura R. Handman
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April 15, 2024
Date

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