ORAL ARGUMENT NOT YET SCHEDULED
No. 20-cv-0318

IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Morgan Banks, *et al.,*

Plaintiffs-Appellants,

v.

David H. Hoffman, *et al.,*

Defendants-Appellees.

On Appeal from the Superior Court for the District of Columbia
(No. 2017 CA 005989 B, Honorable Hiram E. Puig-Lugo)

EN BANC CONSOLIDATED REPLY BRIEF OF APPELLANTS COLS. (RET.) L. MORGAN BANKS III, DEBRA L. DUNIVIN, AND LARRY C. JAMES

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(A)(2) CERTIFICATE

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INTRODUCTION

The statutory language that renders the D.C. Anti-SLAPP Act invalid could not be clearer: "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure, unless it prescribes or adopts rules that modify those Rules." And the D.C. Council "shall have no authority to … [e]nact any act, resolution, or rule with respect to any provision of Title 11" of the D.C. Code—including § 11-946, which directs the Superior Court to employ the FRCP.[1]

Defendants and the District try to avoid these unambiguous Congressional directives by creatively reinterpreting the plain language. They also repeatedly emphasize Congress's intent to grant limited self-government while reducing to near-invisibility its intent that D.C. courts be governed by the FRCP and that the courts, not the Council, have authority to modify those rules. Until Congress grants the District full self-government, both intents carry equal weight.

Defendants and District make two other unsuccessful attempts to avoid the Congressional directives. First, although the Anti-SLAPP Act operates only through its procedures, not by creating or changing substantive rights, Defendants and the District claim the Act is substantive rather than procedural. They cite no case that found the Act wholly substantive, while Plaintiffs point to many cases finding it at

[1] D.C. Code § 11-946, codifying the relevant section of the Court Reform and Criminal Procedures Act of 1970 (CRA); D.C. Code § 1-207.18(a), codifying the relevant section of the Home Rule Act (HRA).

least partly procedural and thus preempted by the FRCP. Second, Defendants and District assert that the Act does not modify the FRCP's pre-trial procedures—even though it by default severely limits discovery and shifts the burden of defeating a motion under the summary judgment standard. Courts across the country, including the federal Court of Appeals for the District of Columbia, have found that provisions such as these conflict with and are preempted by the FRCP.

Defendants also fail to demonstrate that the Superior Court was correct in finding Plaintiffs to be public officials and then finding they had not presented sufficient evidence to raise triable issues of fact that would permit a jury to find Defendants acted with actual malice. As to the first, the court and Defendants do not confront all the criteria established by the Supreme Court and this Court relevant to stripping plaintiffs of their private-citizen status, and they fail to undertake anything like a full analysis of Plaintiffs' responsibility and authority. Section IV *infra*. As to the second, Defendants mischaracterize the law governing what evidence may contribute to finding actual malice, and then try to pick apart specific pieces of evidence while ignoring inferences a jury could reasonably draw and the cumulative weight of the evidence as a whole. Section V *infra*.

Wrapped around Defendants' claims about this case's facts and law is their pervasive mischaracterization of its nature. The case is not filed to punish speech. Unlike many other anti-SLAPP statutes, the District's Act does not require any

showing that a suit is a SLAPP before it is subjected to the Act's burdens. (That overbreadth, along with the presumptive restriction on discovery, interferes unconstitutionally with Plaintiffs' First Amendment rights, as Section II *infra* demonstrates.) Plaintiffs—individuals with limited resources and no institutional backing—did not challenge one of the country's largest and richest law firms and a major professional association to harass them. They sued to restore their reputations, which have been wrecked by the Report despite their having devoted the final years of their careers to preventing abusive interrogations.

The Supreme Court has stated the need to strike a balance between society's "pervasive and strong interest in preventing and redressing attacks upon reputation" and its "interests in public discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). It is time, in this multi-year litigation, for that balance to be struck.

ARGUMENT

I. The Anti-SLAPP Act Is Invalid: Defendants Fail to Avoid Congressional Acts Requiring D.C. Courts to Follow the Federal Rules of Civil Procedure or Supreme Court Tests for Deciding Conflicts Between Federal and Local Laws.

The Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, renders invalid laws that "interfere with, or are contrary to" federal law. *Goudreau v. Standard Fed. Sav. Loan*, 511 A.2d 386, 389 (D.C. 1986) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)). Under that standard, the Anti-SLAPP Act is invalid because it interferes with and is contrary to the federal laws that preempt it.

As this Court has held, federal law preempts state law if federal statutes reveal "an explicit congressional intent to pre-empt state law" or if a conflict between federal and state laws "stands as an obstacle to the accomplishment and execution of the full purposes and objections [sic, for "objectives"] of Congress." *In re Estate of Couse,* 850 A.2d 304, 308 (D.C. 2004) (citations omitted). Here, federal law preempts the D.C. Anti-SLAPP Act in both ways.

First, Congress exercised its plenary power to legislate for the District of Columbia by repeatedly mandating that its courts follow the FRCP, absent a modification approved by this Court. Congress thus demonstrated its explicit intent to preempt D.C. law as to D.C. court procedures.

Second, under the tests established by the Supreme Court for determining whether a state law or rule conflicts with federal law or rule, the Anti-SLAPP Act does not only modify the FRCP, but conflicts irreconcilably with the federal rules and is therefore preempted by them. *See, e.g.*, *Peach v. Hagerman*, No. 4:22-cv-000133-RGJ, 2024 WL 1748443, at *5 (W.D. Ky. Apr. 23, 2024) ("[T]he Court finds that the [Kentucky Anti-SLAPP Act] is preempted by the [FRCP]"). *See* Section I.D *infra*.

The District (at 43) contends that these tests are relevant only to federal diversity suits, and that Plaintiffs assume the relevant question is "whether the Anti-SLAPP Act would apply in a federal diversity suit." That misstates the

question. By Congressional mandate, the D.C. rules are the federal rules. *See Flemming v. United States*, 546 A.2d 1001, 1005 (D.C. 1988) (D.C. rules are the federal rules, not "conceptually distinguishable rule[s] with identical language.")[2] Thus, Supreme Court guidance in diversity cases regarding preemption addresses the same question this Court faces: in courts that must follow the FRCP, may the procedures the Act created override or coexist with the FRCP? They may not.

The Anti-SLAPP Act is preempted by federal law and therefore invalid. To avoid this conclusion, the District and amicus Council focus on Congress's intent to grant the District self-governance while minimizing or ignoring its clear intent that D.C. courts be governed by the FRCP. But that is to ignore Congress's "full purpose and objectives." Congress embodied its second intent in the Rules Enabling Act of 1934 (REA), which delegated to the Supreme Court authority to set rules for District as well as federal courts; the CRA, which mandated the District's use of the FRCP; and the HRA, which strictly limited the Council's ability to legislate for the courts. By allocating authority over court rules to the D.C. courts rather than retaining it, Congress did not contradict its intention to grant self-government: it gave different branches of government different roles in

[2] *Gubbins v. Hurson*, 885 A.2d 269, 277 n.3 (D.C. 2005) (Superior Court Rules were adopted from the FRCP pursuant to D.C. Code § 11-946, and the court construes them "'in light of' the corresponding federal rule, taking guidance from" both advisory committee notes and federal court decisions" (citations omitted).

the District's governance.

As a preliminary matter, the District and Council's briefs are pervaded by a mischaracterization of Plaintiffs' position. That position would not prevent the Council from enacting all legislation that affects court procedures. *See, e.g.,* Dist. at 33, 39; Council at 17.[3] Instead, as Plaintiffs have emphasized, this Court has held that the Council's substantive legislation may have incidental effects on court procedures without violating the CRA or HRA. That holding applies to the statutes the District claims would be eviscerated by the Act's invalidation. But it does not apply here, because the Act functions solely through its procedures.

This mischaracterization goes hand-in-hand with the District's and Council's insistence that the Act is substantive, without undertaking the necessary analysis of how the Act functions, which is through procedures; or whether it alters the existing substantive law of defamation or free speech, which it does not; or whether it creates substantive immunities, which it also does not.

A. Federal Statutes Preempt the Council's Ability to Legislate Court Procedures that Modify the FRCP.

The United States Constitution vests in Congress plenary power to legislate for the District of Columbia. U.S. Const., art. I, § 8, cl. 17. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 397 (1973) (Congress has "plenary" power to legislate

[3] We will refer to Plaintiff's opening brief as "Op.," the District's opening brief as "Dist.," and other briefs by the short form of the party's or amicus's name.

for the District). Under that power, Congress limits the D.C. Council's legislative authority through both the CRA and the HRA. *See, e.g., In re Perrow*, 172 A.3d 894, 896 (D.C. 2017) ("the District's voyeurism statute infringes on 'the duties or powers of the United States Attorney,' in violation of the Home Rule Act") (quoting D.C. Code § 1–206.02 (a)(8) (2012 Repl.)). As one limitation, Congress has denied the Council authority to legislate procedures for the D.C. courts.

The mandate that the FRCP govern D.C. courts rests on three Acts:

First, the Rules Enabling Act (REA) empowered the Supreme Court to prescribe rules of "practice and procedure" for U.S district courts and the courts of the District of Columbia.[4] The REA led to the Supreme Court's promulgation of the FRCP, and the FRCP "have applied in all of the District of Columbia Courts, local and federal" since their inception. *Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 665 n.3 (D.C. 2008) (quoting *Varela v. Hi-Lo Powered Stirrups*, 424 A.2d 61, 62 (D.C. 1980 (en banc)).

Second, the CRA, enacted in 1970, mandates that the D.C. Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure … unless it prescribes or adopts rules which modify those Rules." D.C. Code § 11-946.[5] It also instructs that any such rules "shall be submitted for the approval of

[4] Pub.L. 73-415, 48 Stat. 1064; https://tinyurl.com/yc46pyhk.
[5] Pub. L. 91-358, 84 Stat. 473 (amending Title 11 of the D.C. Code related to organization and jurisdiction of the courts).

the District of Columbia Court of Appeals, and they shall not take effect until approved by that court." *Id.* Although the language of § 11-946 is unambiguous, its intent is reinforced by the CRA's legislative history, "which reflects the congressional intent that the local courts were to be governed by the *federal* rules." *Varela*, 424 A.2d at 64 (emphasis added).

Third, the HRA reinforced the Congressional intent embodied in the CRA that District courts be governed by the FRCP.[6] The HRA was intended "to create[e] a tripartite form of government with limited legislative powers." *District of Columbia v. Bender*, 906 A.2d 277, 279 (D.C. 2006) (citations omitted). As one explicit limitation, the HRA directed that the District of Columbia court system "shall continue as provided under the … Court Reorganization Act," "subject to … [D.C. Code] § 1-206.02(a)(4)." D.C. Code § 1-207.18(a). That section of the Code, part of its codification of the HRA, states that the Council "shall have no authority to … [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia Courts)" of the Code. *Id.* § 1-206.02(a)(4). Among its provisions is § 11-946, which directs the Superior Court to employ the FRCP unless this Court approves a modification.

[6] Pub. L. 93-198, 87 Stat. 774 (relevant provision codified now at D.C. Code § 1-206.01, *et seq*.).

As this Court has stressed, the HRA only "delegates to the Council legislative power over 'all rightful subjects of legislation within the District.'" *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1351 (D.C. 1980) (en banc) (quoting *McIntosh v. Washington*, 395 A.2d 744, 750 n.11 (D.C. 1978). This Court's "role—indeed our duty—is to interpret the [HRA] without undue deference to either legislative body, but always with a central focus: the intent of Congress." *Id.*

Congress' intention is clear: The Superior Court shall follow the FRCP unless this Court approves a modification to those rules.[7] The procedures created by the Anti-SLAPP Act, which at a minimum modify the FRCP, were never approved by this Court or adopted by the Superior Court. They are therefore invalid, and the Anti-SLAPP Act is thus preempted by federal law.

B. The Anti-SLAPP Act Violates the Home Rule Act's Prohibition Against the Council Legislating "with Respect to Any Provision of Title 11."

To claim that the Act does not violate the HRA's limits on the Council's authority to legislate for the courts, Defendants, Intervenor, and Council mount two arguments. First, the District (at 18-19), Council (at 12), and Sidley (at 15) argue that the limitation set out in § 1-206.02(a)(4)—the prohibition against the

[7] *Banks v. Hoffman,* 301 A.3d 685, 698 (D.C. 2023). Although the opinion has been vacated and may not be cited as precedent, Plaintiffs refer to it for its reasoning.

Council's enacting "any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia Courts)"—pertains only to the Council's ability to pass laws that "attempt[] to amend Title 11 itself" or "run[] directly contrary to the terms of Title 11." Dist. at 18. The Act, they contend, does neither. Second, they argue, the prohibition applies only to legislation that affects the courts' organization or jurisdiction.

Both arguments fly in the face of the statutory language's plain meaning.

First, the HRA bars the Council from enacting "any act, resolution or rule with respect to any provision of Title 11." D.C. Code § 1-206.02(a)(4). The phrase "with respect to," when used to preempt state action, asserts exclusive power over any subject having "some relation to" the Congressional act. *See In re Crawley*, 978 A.2d 608, 613, 618-20 (D.C. 2009) ("the ordinary meaning of ['relating to'] is a broad one—to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association with or connection with ...." (quoting *Morales v Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). Thus, the limits on the Council's authority apply to all Title 11 provisions, including § 11-946.[8]

[8] The District argues incorrectly that the parenthetical in § 1-206.02(a)(4), which repeats the title of Title 11, is not merely descriptive. District at 36, n.8. The single case it cites—*Voss v. Comm'r*, 796 F.3d 1051, 1058-61 (9th Cir. 2015)—is inapposite: the parenthetical there contained substantive details about a provision of the tax code. The law is unanimously against the District's position. *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011); *United States v. Monjaras-*

Further, the HRA's legislative history demonstrates that the limitation was intended to extend to every provision of Title 11. A draft version of the Home Rule statute permitted the Council to "'pass acts affecting *all aspects* of [the District of Columbia] courts'" after waiting for 18 months after the statute's enactment. *See Woodroof v. Cunningham*, 147 A.3d 777, 783 (D.C. 2016) (quoting H. Comm. on the District of Columbia, 93d Cong., 2d Sess., Home Rule for the District of Columbia 942). But the draft raised concerns, among others, that the legislation could threaten the judiciary's independence, including its authority under the CRA to adopt court rules. *Banks,* 301 A.3d at 698.

Congress went on to reject the draft and determined instead to "freez[e] … current law," *id.* at 698, and mandate that the courts "shall continue as provided under the … Court Reorganization Act," "subject to … [D.C. Code] § 1-206.02(a)(4)." D.C. Code § 1-207.18(a). Thus, the language of § 1-206.02(a)(4) was specifically intended to continue all provisions adopted through the CRA.

Second, the Anti-SLAPP Act does in fact "amend" and "run directly contrary to" Title 11. The District contends that it does not because "it does not change a word of D.C. Code § 11-946" and because "the court's rulemaking authority remains intact." Dist. at 2, 12. But the Act need not change the actual

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Castaneda, 190 F.3d 326, 330 (5th Cir. 1999); *United States v. Kassouf*, 144 F.3d 952, 959-960 (6th Cir. 1998). *Banks*, 301 A.3d at 697-8.

words of § 11-946 to effectively amend it. The District's argument, if accepted, would mean that § 11-946 now provides that the FRCP must govern except when the Council legislates otherwise—but, nevertheless, § 11-946 has not been amended. That would be an absurd result. Also, the Act has interfered with the courts' exclusive authority to make modifications to the FRCP. Plaintiffs have not assumed, as the District alleges, that "the Superior Court's rulemaking authority on *any* matter of procedure is exclusive." Dist. at 12 (emphasis added). But it is exclusive as to rules that modify the FRCP's application in D.C. courts.

Third, the District (at 44-45) and Council (at 12) vastly overstate the relevance to this case of previous cases in which this Court has interpreted § 1-206.02(a)(4) "in a flexible, practical manner" to accommodate Council actions that "do not run directly contrary to the terms of Title 11." *Woodroof*, 147 A.3d at 784.[9] That flexible interpretation has been applied only when Council legislation affects court procedures as an incidental byproduct of changes in the substantive law. But that is not the case here, where the Anti-SLAPP Act's impact derives

[9] Most of this Court's previous decisions involving § 1-206.02(a)(4) have involved challenges to Council actions that arguably affected the Court's appellate jurisdiction. The Court has not previously considered a claim that Council legislation violates the HRA because the legislation conflicts with the mandate of § 11-946, thus violating the CRA as well as the HRA. *Banks*, 301 A.3d at 698-99. Because of that conflict, the Act runs up against "a limitation expressed by title 11 itself." *Id.* at 700 (quoting *Hessey v. Burden*, 584 A.2d 1, 7 (D.C. 1990)).

solely from its creation of new procedures that modify and conflict with the FRCP.

The District (at 21) cites two cases for the proposition that "this Court has repeatedly 'annulled Superior Court rules that [run] contrary' to District statutes—not the other way around." Both cases are inapposite. *Ford v. Chartone, Inc.,* 834 A.2d 875, 879 (D.C. 2003) makes clear that it is referring to rules that modify substantive law or alter the court's jurisdiction without statutory authorization. The Anti-SLAPP Act modifies procedures, not substantive law. *Flemming*, 546 A.2d at 1004, dealt with a clash between a Superior Court Criminal Rule and a D.C. Code provision dealing only with criminal proceedings that authorized the Superior Court to make rules for conducting business in the Criminal Division "consistent with statutes applicable to such business …." D.C. Code § 16-701. There is no such qualification to the courts' authority as to the Civil Division.

The District (at 13-14) and Council (at 20-21) also cite *Bergman v. District of Columbia,* 986 A.2d 1208 (D.C. 2010) to contend that the Act is within the Council's authority. But *Bergman* has no application here. It dealt with a substantive statute—§ 11-2501, addressing the regulation of lawyers—with no procedural components. *Id.* at 1225-26. The Court recognized that this regulation, although an inherent power of the courts, is not exclusive to them, and Title 11 does not foreclose the Council's concurrent jurisdiction to enact substantive law in this area. *Id.* at 1229-30.

C. Under the U.S. Supreme Court's Tests for Resolving Conflicts Between State and Federal Laws and Rules, the FRCP Preempts the Anti-SLAPP Act's Procedures.

1. Federal Cases Resolving Conflicts Between State Court Rules and the FRCP Apply to this Case.

Contrary to the District's and Council's claims, the Court may appropriately turn to Supreme Court and other federal cases providing guidance about conflicts between state and federal laws or rules because D.C. courts, like federal courts, must follow the FRCP. These federal court analyses apply not only when the FRCP is at issue but also when there is a federal directive on point, including Congressional mandates and the Constitution.

As a threshold matter, the District argues incorrectly that conflicts between federal laws and District statutes should be assessed by a different standard than conflicts of laws in diversity cases. The test for whether a state law or rule applies in federal court "is broadly preemptive, so as to ensure 'a uniform and consistent system of rules governing federal practice and procedure' from state to state." Dist. at 43 (quoting *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987)). In contrast, it contends, for conflicts between Council legislation and the District courts' rule-making authority, the controlling criterion should be "respecting the 'paramount purpose' of the [HRA] to grant District residents self-governance." Dist. at 44.

But the HRA and CRA place explicit limits on the Council's role in self-governance. Those limits reflect a balance between the HRA's purpose of

furthering self-governance and "the congressional intent that the local courts were to be governed by the *federal* rules." *Varela,* 424 A.2d at 64. Only when Council legislation does not run afoul of that Congressional intent are the deference to Council and flexible interpretation of § 11-946 that the District espouses available. This Court has provided that flexibility when it is appropriate (see Section I.E *infra*). It is not appropriate here.

Moreover, the principle for which the District cites *Burlington*—consistency in the rules governing federal practice and procedure—applies equally to this case.[10] Litigants should not get one version of the FRCP in the District's federal courts but another version in the Superior Court. That point is demonstrated by the District's statement (at 44) that federal courts looking to federal directives treat the federal rules as broadly occupying the field in the interest of uniformity across courts. In the District, the Superior Court rules, which are the federal rules (*Flemming*, 546 A.2d at 1005) unless this Court has approved a modification, also "occupy the field." They govern "in all civil actions and proceedings in the Civil Division" and apply in the "determination of ***every action and proceeding***." Super. Ct. Civ. R. 1. (emphasis added).

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[10] *See Parker v. K & L Gates, LLP*, 76 A.3d 859, 880 (D.C. 2013) (McLeese, J., concurring) (in enacting the CRA, Congress "likely intended" to "maintain[] uniformity between the law of this jurisdiction and federal law …."). As one commentator observed, "there was no question that the [CRA] was not promoted by its sponsors as a home rule measure ….." *Banks*, 301 A.3d at 695, n.11.

2. Under the Supreme Court's Tests for Resolving Conflicts, the Anti-SLAPP Act Conflicts Impermissibly with the FRCP.

Since *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), although the case produced a majority for only part of Justice Scalia's opinion, clarity has emerged about the appropriate tests for addressing "vertical" conflicts between federal and state law. They are summarized by *Abbas v. Foreign Pol'y Grp., LLC,* 783 F.3d 1328 (D.C. Cir. 2015), as the District notes. Dist. at 43-44. The *Abbas* analysis is persuasive.[11]

Based on the Supreme Court guidance, *Abbas* establishes a two-step process for deciding whether a federal law or rule prohibits the application of a state law or rule: "(1) a Federal Rule of Civil Procedure 'answers the same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas,* 783 F. 3d at 470 (quoting *Shady Grove,* 559 U.S. at 398-99).

For the first step, *Abbas* relies on the majority opinion in *Shady Grove* (at 398-99). The principle underlying this step is also supported by a previous case

[11] As *Abbas* makes clear, *Shady Grove* contains three opinions. Justice Scalia is joined by the Chief Justice and Justices Thomas and Sotomayor. Justice Stevens concurs with him as to Parts I and II–A of his opinion, creating a majority in concluding that the Federal rule at stake (FRCP 23) covers the issue in dispute in the case. Thus, *Abbas* holds that "[t]hose sections govern our analysis of whether a federal rule answers the same question as a state law." *Abbas*, 783 F. 3d at 1333 n.1. However, Justice Stevens disagrees with Justice Scalia on the second part of the test: how to assess the validity of the Federal Rule under the REA. Justice Ginsburg dissents with Justices Kennedy, Bryer, and Alito, concluding that state law governs because FRCP 23 does not cover the issue in dispute.

cited by *Shady Grove*: in diversity cases, state law applies ***"[e]xcept in matters governed by the Federal Constitution or by Acts of Congress***…." *Walker v. Armco Steel Corp.,* 446 U.S. 740, 745 (1980) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (alteration in original, emphasis added). Here, of course, D.C. courts, including their procedures, are governed by the Congressional Acts cited in Section I.A *supra*.[12]

For the second step, *Shady Grove* produced no majority view about the proper analysis. Instead, a four-justice opinion looked to an earlier case: *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). *Shady Grove,* 559 U.S. at 407-10. Because no *Shady Grove* majority opined on the appropriate definition of the second step, *Abbas* concluded that *Sibbach* "remains good law and is binding on lower courts." *Abbas*, 783 F.3d at 1337.

In *Sibbach*, as *Abbas* states, the Supreme Court held that:

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[12] Immediately after the District quotes from *Abbas's* reliance on *Shady Grove's* language, it quotes (at 44) language from an earlier Supreme Court opinion that arguably describes a narrower standard than that adopted by *Shady Grove*:

> The initial step is to determine whether, when fairly construed, the scope of [the FRCP] is "sufficiently broad" to cause a "direct collision" with the state law or, implicitly, to "control the issue" before the court, thereby leaving no room for the operation of that law.

Burlington, 480 U.S. at 4-5 (citing *Walker*, 446 U.S. at 749-750, 750 n.9; *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

If the *Burlington* and *Shady Grove* language would lead to different results, *Shady Grove* should control. However, *Shady Grove* cites this passage from *Burlington* as support for its phrasing. *Shady Grove* 559 U.S. at 398. That suggests the two descriptions of the framework's first step should lead to the same result.

> …the test for whether a Federal Rule violates the Rules Enabling Act is whether that Rule "really regulates procedure"—that is, really regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach*, 312 U.S. at 14….

Abbas, 783 F.3d at 1336.[13]

As *Abbas* notes, a later case cited by *Burlington* applies the *Sibbach* test: *Hanna v. Plumer*, 380 U.S. 460, 464, 470-71 (1965). *Hanna* warned that "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the ***Constitution's grant of power over federal procedure or Congress' attempt to exercise that power*** …." *Id.* at 473-74 (emphasis added). In *Shady Grove,* only five justices speak on the question of whether important state interests should be considered in the second step of the test. Four say "no," Justice Stevens says "yes," and the dissenters do not weigh in.[14]

In the two-step analysis *Abbas* summarized, there can be no question about the outcome of the second step here: a Rule 56 motion for summary judgment, which the Act's special motion to dismiss replaces for some suits, is procedural

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[13] *Banks*, 301 A.3d at 696-97.

[14] *Abbas,* 783 F.3d at 1336-37. *See also* Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the Shady Grove Plurality Was Right*, 44 Akron Law Review 979, 996 (2011) (noting that the dissenters did not apply an analysis under the REA (as opposed to the Rule of Decision Act), so their dissenting view on important state interests "does not bear as much emphasis as [the dissent] suggests").

and therefore does not violate the REA—and so the Act provision answering the same question cannot supersede the Rule 56 motion. *See Shady Grove*, 559 U.S. at 404 (majority opinion) (rules governing summary judgment are rules "addressed to procedure"); *Abbas*, 783 F. 3d at 1337; *see also Competitive Enterprise v. Mann*, 150 A.3d 1213, 1238 n.32 (D.C. 2016) (recognizing that the Anti-SLAPP Act's special motion to dismiss effectively functions as a Rule 56 motion for summary judgment, but with differences). Under the CRA, Superior Court Rule 56 is the federal rule, and therefore is equally valid under the REA. *Flemming,* 546 A.2d at 1005.

As to the first step, Section I.D *infra* demonstrates that the Act answers the same question as Rule 56, but answers it differently. The differences prevent the Act from co-existing with the FRCP.

D. The Anti-SLAPP Act Creates Procedures that Conflict with and Thus "Modify" the FRCP, Violating Both the Congressional Mandates and the *Shady Grove/Sibbach* Test.

As this Court has repeatedly stated, the Act's provisions establish procedures. Those procedures modify the FRCP, thus violating the Congressional mandate against doing so without this Court's approval. And they answer the same question the FRCP ask—what rules govern the dismissal of a suit before trial?—but answer it in ways that conflict with the FRCP, rendering the Act's procedures invalid under the *Shady Grove/Sibbach* analysis. That conclusion is reinforced by

the many federal courts that have found that anti-SLAPP statutes conflict with the FRCP. *See* Op. at 6; *Banks*, 301 A.3d at 702 n.24 (listing cases from six circuits). In addition, the Ninth Circuit has agreed to revisit California's Anti-SLAPP statute. *See Martinez v. ZoomInfo Techs., Inc.*, 82 F.4th 785, 794 (9th Cir. 2023) (McKeown, M., concurrence), *reh'g granted by en banc*, 90 F.4th 1042 (9th Cir. Jan. 18, 2024) (noting that the California Supreme Court holds the statute to be procedural).[15]

The only two cases cited by appellees (APA at 18-19 and Council at 6-7) that upheld a state anti-SLAPP statute are *Godin v. Schencks,* 629 F. 3d 79, 86 (1st Cir. 2010), which relied on Justice Stevens' concurrence in *Shady Grove* rather than the majority opinion, and *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 182 (5th Cir. 2009), decided a year before *Shady Grove* and held by the Fifth Circuit in 2019 to be not binding.[16]

1. The Anti-SLAPP Act Creates Procedures that Are Central—Not "Incidental"—to Its Function and Purpose.

This Court's case law holds that the Act's provisions create procedures. These procedures are not incidental to the Act's purpose; they are the sole means by which the Act achieves that purpose. The Act deals only with the procedural

[15] The Ninth Circuit vacated the oral argument date based on a pending settlement.
[16] *See Klocke v. Watson*, 936 F.3d 240, 248-49 (5th Cir. 2019). *Banks*, 301 A.3d at 704 n.24.

conduct of a lawsuit; it creates no rights independent of underlying substantive law, and its only purpose is the swift termination of a subset of lawsuits.

This Court has stated that a rule is procedural if it does not address "rights or liabilities" but instead "outlines the method by which the … action may proceed." *Nunley v. Nunley*, 210 A.2d 12, 14 (D.C.1965). The Supreme Court has described procedural law as relating to "the manner and the means by which the litigants' rights are enforced," whereas substantive law "alters the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove*, 559 U.S. at 407 (citations and internal quotation marks omitted; brackets in original).

The Council's labeling of the Act as partially substantive does not make it so. That depends on its content and function. As a D.C. federal court states, the claim that the Act is substantive is "largely a masquerade" that attempts to clothe "a summary dismissal procedure … in the costume of the substantive right of immunity." *3M Co. v. Boulter*, 842 F. Supp. 2d 85,110-11 (D.D.C. 2012).

At the heart of the Act are its likelihood-of-success and discovery-limiting provisions.[17] There is no doubt that its burden-shifting and discovery provisions

[17] APA asserts that Plaintiffs below never argued their right to discovery and the Act's interference with that right. *See* APA at 12, 16. APA is mistaken. Appellants repeatedly noted the conflict between the Act and Rule 56's requirement that discovery be exhausted on a dispositive motion. *See* Plaintiffs' Motion to Declare the Anti-SLAPP Act Void and Unconstitutional, January 2019, Record Document 84, pp. 8-12; Plaintiffs' Rule 56 motion, November 30, 2017; replies to the Defendants, December 21, 2017; and supplemental declaration, January 7, 2019.

are procedural. The likelihood-of-success standard "simply mirror[s] the standards imposed by Federal Rule 56." *Mann*, 150 A.3d at 1238 n.32 (internal quotation marks omitted). As *Shady Grove* stated, "rules governing summary judgment" are procedural, as are rules governing "pretrial discovery." *Shady Grove*, 559 U.S. at 404. While a burden of proof may be substantive when it involves a substantive element of a claim or defense (Fed. R. Evid. 302 Advisory Committee's note to 1972 Proposed Rules), it is procedural if—as with the special motion to dismiss—it alters only the time when and the order in which evidence should be submitted. *Cf. United Sec. Corp. v. Bruton*, 213 A.2d 892, 893-94 (D.C. 1965) (a statute relating to the burden of proof in the context of rules of evidence is procedural).

The District (at 29) relies on *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000) for the proposition that "the burden of proof [is] a 'substantive' aspect of a claim," but it wrenches the quotation out of context. The paragraph quoted goes on to say, "[t]hat is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Id.* The burden established by the special motion does not affect the burden of proof for the underlying claim of defamation. It simply changes the time when and order in which evidence is presented.

As Plaintiffs' opening brief described (Op. at 22-23), this Court has

repeatedly emphasized the procedural nature of the Act.[18] Neither appellees nor amici cite a single case holding that the Act is entirely substantive based on the Court's own analysis, rather than the Council's characterization. Instead, the District (at 24) cites *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 502 (D.C. 2020), which merely quotes from the Committee Bill Report and does not itself hold that the Act is substantive.[19] Indeed, even the legislative history of the D.C. Anti-SLAPP Act supports the conclusion that the Act is, at least at its core, procedural, providing "an expeditious process" for litigating SLAPPs. D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010). *See also* Op. at 23.

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[18] The Council challenges Plaintiffs' reliance on *Public Media Lab v. District of Columbia*, 276 A.3d 1 (D.C. 2022). The Court held that the Act does not alter a defendant's ultimate liability (as a substantive law would), but instead introduces a "procedural mechanism for expedited dismissal." *Id.* at 11. Council claims this case does not support appellants' position because the Council's authority to make substantive changes affecting claims and defenses extends to "creat[ing] substantive defenses or immunities for use in adjudication…." Council at 6 n.6. But the full context of the Court's holding was that the Council had the ability to remove a procedural mechanism only because it was attempting to exempt itself from the statute. *Public Media Lab*, 276 A. 3d at 9.

[19] During the pendency of this appeal, the Court held that the Act's fee provision "provides a substantive remedy…." *Khan v. Orbis Bus. Intelligence*, 292 A.3d 244, 261 (D.C. 2023). Although the District (at 46) asserts that *Khan* upheld the provision against an HRA challenge, in fact *Khan* found that the appellants had forfeited that challenge because they had not raised it below. *Id.* at 260. *Banks,* 301 A.3d at 695 (recognizing same). *Khan's* holding does not affect the procedural nature of the burden-shifting and discovery provisions that are the core of the special motion to dismiss, nor of the procedural nature of the Act as a whole.

The "substantive" right that the District (at 23), Council (at 12), and Sidley (at 15) claim the Act bestows has no "substantive" content. The Act does not authorize its defendants to do anything they would not otherwise have the right to do: to speak, petition the government, assemble, or anything else. Nor does it create immunity from liability for the underlying tort. Nor does it create a new substantive burden for defeating a special motion; instead, it simply changes the timing and sequence for the presentation of evidence. *See, e.g., Boulter*, 842 F. Supp. 2d at 108 ("The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure…."); *Abbas,* 783 F.3d at 1334-35; *Los Lobos Renewable Power, LLC v. Americulture, Inc.,* 885 F.3d 659, 672 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 591 (2018) ("*only* where the law exempts one from liability can one claim a substantive right not to stand trial….") (emphasis in original).

2. The Anti-SLAPP Act's Procedures Modify and Conflict with the FRCP.

For Council legislation to violate the limitation on the Council's authority embodied in D.C. Code § 11-946, the legislation need only "modify" the FRCP without this Court's agreement. As the Supreme Court has stated, even a small change constitutes a modification. *See MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 225 (1994) (surveying dictionary definitions of "modify" and holding

that "virtually every" definition of "to modify" means "to change moderately" or in a "minor" fashion, including to "enlarge; extend; amend"); *see also Biden v. Nebraska,* 143 S. Ct. 2355, 2358-69 (2023) (quoting *MCI Telecomms. Corp.*, 512 U.S. at 225). *Cf. Southwestern Bell Corp. v. F.C.C.*, 43 F.3d 1515, 1518 (D.C. Cir. 1995) (same). The procedures created by the Anti-SLAPP Act easily satisfy this test, and they are therefore invalid under the Supremacy Clause because they contravene statutes enacted by Congress.

Under the *Shady Grove* framework, the question is whether the FRCP "answers the same question" as the Anti-SLAPP Act. It does: both answer the question of when a court must dismiss a case before trial. But the Act answers it differently, and in ways that cannot be reconciled with the FRCP (as incorporated into the Superior Court rules) so that they can live in harmony, as the District claims. Dist. at 29. Superior Court Rule 56 and the anti-SLAPP law "answer the same question about the circumstances under which a court must dismiss a case before trial…differently," and the anti-SLAPP law "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." *Abbas*, 783 F.3d at 1333–34 (internal quotation marks omitted).

In *Mann*, this Court "agree[d] with *Abbas* that the special motion to dismiss is different from summary judgment" in two respects: it "imposes the burden on plaintiffs" and it restricts discovery, with the result that the motion will usually be

decided "before discovery is completed." *Mann*, 150 A.3d at1238 n.32.

As to discovery:

We dispose first of the District, Council, and APA's argument that Rule 56 and the Anti-SLAPP procedures can co-exist (Dist. at 26-31, Council at 8, APA at 16) because "the Act's discovery-limiting provisions *do not apply* to actual summary judgment motions, but only the Act's special motion." Dist. at 29 (emphasis in original). This argument fails for two reasons. First, the Congressional mandate that D.C. courts apply the FRCP does not allow for carve-outs for sub-sets of favored or disfavored parties. Second, Superior Court rules, which are the federal rules, apply in the "determination of every action and proceeding." Super. Ct. Civ. R. 1. Thus, the Council does not have the authority to substitute its own preferred rules to make the pre-trial path more difficult for some plaintiffs. *Cf. Shady Grove*, 559 U.S. at 401 (explaining that because "Rule 23 permits all class actions that meet its requirements … a State cannot limit that permission by … impos[ing] additional requirements.").

The Act mandates that "upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). True, that general rule is subject to the exception that "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome,

the court may order that specified discovery be conducted." D.C. Code § 16-5502(c)(2). But "discovery normally will not be allowed …." *Fridman*, 229 A.3d at 512. Even if discovery is allowed, it is typically less than that available under Rule 56—as this case demonstrated. Therefore, and as *Mann* stated, "the special motion to dismiss is different from [Rule 56] summary judgment in that it … requires the court to consider the legal sufficiency of the evidence presented before discovery is completed." 150 A.3d at 1238 n.32. By contrast, under Rule 56, "summary judgment is premature unless all parties have 'had a full opportunity to conduct discovery.'" *Convertino v. U.S. Dep't of Just.*, 684 F.3d 93, 99 (D.C. Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).[20]

As the Ninth Circuit has observed, while Rule 56 "facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson*, 477 U.S. at 250 n.5).

To support the claim that discovery provisions under the Anti-SLAPP Act

[20] FRCP 56(d); Super. Ct. Civ. R. 56(d)(2). *See also* JA825-833 (memo in support of Plaintiffs' Motion for targeted discovery).

do not modify or conflict with the Rule 56 provisions, the District (at 32-3) cites two cases. Neither supports the District's claim. In *Nawaz v. Bloom Residential, LLC*, 308 A.3d 1215, 1230 (D.C. 2024) , Nawaz requested discovery to oppose a summary judgment motion but did not cite Rule 56(d) or file a motion with the requisite affidavit requesting discovery. In contrast, Plaintiffs filed two Rule 56(d) declarations for discovery, describing specifically how the discovery was relevant to the motion at hand. The second case cited is also irrelevant. *Sibley v. St. Albans Sch.*, 134 A.3d 789, 799 (D.C. 2016), concluded that the trial court did not abuse its discretion in denying appellant's motion to compel discovery because he did not "explain *how* these documents would support his claim …."

As to the pre-trial burden:

Although this Court has held that the Act's "likely to succeed" standard mirrors substantively the standard under a Rule 56 summary judgment motion, the procedures for sustaining or defeating the motion under that standard differ. *See Cent. Vermont R.R. v. White*, 238 U.S. 507, 511-12 (1915) 238.

Rule 56 "requires the moving party to wait until discovery has been completed and then shoulder the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts." *Mann*, 150 A.3d at 1237. *See also Anderson*, 477 U.S. at 256; *accord Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231,

239 (D.C. Cir. 2021). At a minimum, the moving party must show an absence of evidence to support the non-moving party's case before the burden shifts to the non-moving party to proffer evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). *See also La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020) (the California Anti-SLAPP statute "conflicts with Rule 56, which permits summary judgment only if 'the movant shows that there is no genuine dispute as to any material fact'") (internal citations omitted).

In contrast, the Act requires more than a determination that there are no disputed facts that would prevent the court from deciding the claims as a matter of law. It requires evidence supporting the truth of the non-movant's allegations. Moreover, it requires the moving party to show initially only that the plaintiff's claims arise from the moving party's exercise of a protected right—which means no more than showing an "[a]ct in furtherance of the right of advocacy on issues of public interest." That showing triggers **"a burden-shifting procedure"** after which the burden is placed on the non-moving party to show that their claims should proceed. *Mann*, 150 A.3d at 1232, 1237 (emphasis added).

The District cites *Celotex,* 477 U.S. at 325, to argue that the allocations of burdens under the Act and Rule 56 are the same because *Celotex* rejects any burden on the "party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact …." Dist. at 30. But *Celotex* actually

contradicts the District's argument. It holds that the moving party need not "produce evidence" in the form of "affidavits or other similar materials …," **but** it reinforces the moving party's obligation to identify documents in the record "which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The Act imposes no such obligation on defendants.

The District (at 31) also cites three cases in which, it claims, this Court addressed "burden-shifting frameworks" that are like the Act's and therefore would have to be found void if the Act's is. In fact, the burden frameworks in those cases differ in critical ways from the Act's: they simply lay out a framework for specific claims to which the Rule 56 summary judgment will apply.

In *Freeman v. D.C.*, 60 A.3d 1131, 1140 (D.C. 2012), a case under the D.C. Whistleblower Protection Act, the Court found that the claimant must initially demonstrate merely that they engaged in activity protected by that Act before the burden shifts to the respondent to show that the action taken against the purported whistleblower was not retaliatory. Similarly, in *Cain v. Reinoso*, 43 A.3d 302, 306 (D.C. 2012), an age-discrimination case, the Court said that the claimant must initially make only a prima facie showing that they are a member of a protected class and discriminated against, before the burden shifts to the respondent to show a nondiscriminatory basis for its action. Finally, in *Gomez v. Indep. Mgmt.*, 967 A.2d 1276, 1288-90 (D.C. 2009), a case under the D.C. Rental Housing Conversion

and Sale Act, the Court found simply that the claimant must initially show that they engaged in one of "six enumerated activities" to trigger the presumption that "retaliatory action has been taken …."

E. This Court Has Deferred to Council Legislation Changing Court Procedures Only When the Effects on Procedures Are Incidental.

As noted in Section I.A *supra*, this Court has held that Council legislation that has an "incidental" impact on its exercise of its jurisdiction under Title 11 does not contravene § 1-206.02(a)(4). In *Coleman v. District of Columbia,* 80 A. 3d 1028, 1035 n.9 (D.C. 2013), for example, this Court agreed that "[a]lthough the foreclosure of a cause of action can certainly be said to affect the jurisdiction of the courts in a sense," such "incidental byproduct[s]" of changes in the substantive law "do[] not amount to an alteration of … jurisdiction" in violation of the Home Rule Act." (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 189-90 (D.C. Cir. 1986)) (internal quotation marks and brackets omitted).

This Court has also upheld Council legislation that affected the Court's exercise of its jurisdiction under Title 11 where a separate provision of the HRA specifically gave the Council authority to "classify an act as a crime, or to decriminalize certain behavior." *District of Columbia v. Sullivan*, 436 A.2d 364, 366 (D.C. 1981) (legislation that decriminalized traffic offenses, thereby

eliminating the Superior Court's original jurisdiction over those offenses).[21]

Nothing about the grounds for holding the Act invalid contradict those precedents. The procedures created by the Act are not an incidental byproduct of changes in the District's substantive tort law. Rather, the special, expedited procedures for certain lawsuits are the core of the Act, and for those suits they replace the Superior Court's rules governing pre-trial disposition of civil cases.[22]

This Court has stated that "[w]hen the Council's actions do not *run directly contrary* to the terms of Title 11, … its past decisions have chosen not to interpret [the language of § 1-206.02(a)(4)] rigidly, but rather to construe this limitation on the Council's power in a flexible, practical manner." *Woodroof*, 147 A.3d at 784 (emphasis added).[23] But a "flexible" construction of the § 1-206.02(a)(4) restriction on the Council's legislative authority is not warranted here, where Council legislation does run directly contrary to the terms of Title 11. The Council's powers do not permit it to curtail the pre-trial civil regime provided for in the FRCP, and therefore mandated by Congress, "without running headlong into

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[21] *See also McIntosh*, 395 A.2d at 751 ("In precluding the Council from legislating 'with respect to' Title 22, Congress merely inserted a time constraint on the Council's authority to make changes, modifications, or amendments in local criminal statutes until such time as a local Law Revision Commission could make a complete reevaluation and revision of the District's Criminal Code.").

[22] *Banks,* 301 A.3d at 700.

[23] *Cf. Woodroof*, 147 A.3d at 780, 785, 787; *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019). *Banks,* 301 A.3d. at 699-700.

[one of the] limitation[s]" of § 1-206.02(a). *Crawley*, 978 A.2d at 618.

Thus, a holding that the Anti-SLAPP Act is invalid under the HRA and CRA would not run counter to this Court's precedents. Nor would it commit the Court to find Council legislation invalid if it has only incidental effects on procedure.

F. Invalidating the Anti-SLAPP Act Would Not Have the Damaging Effects the District Claims.

Before turning to the District's claims, Plaintiffs note and do not dismiss lightly amici's concerns about the effect of invalidating the Anti-SLAPP Act on plaintiffs faced with the kind of attacks against which the Act was intended to protect. But those concerns do not address the issues now before this Court: is the Act invalid under the preemption analysis above, and does it unconstitutionally interfere with the First Amendment rights of plaintiffs with well-founded claims (Section II *infra*)? The appropriate path for addressing amici's concerns would be through specific amendments to the Superior Court Civil Rules (made with this Court's approval) or by specific changes to substantive laws protecting, for example, victims of stalking. *See* Brief of Amici National Women's Law Center. It is not to enforce an invalid law infected with significant constitutional problems.

The District warns ominously that voiding the Act could risk "gutting … a wide range of other statutory provisions," "threaten whole swaths of the D.C. Code," "disrupt statutory schemes," and potentially "open a gap in Home Rule." Dist. at 2, 39, 41. But its laundry list of statutes supposedly at risk (Dist. at 33-34)

does not support its sky-is-falling rhetoric. Instead, its examples fall squarely under the "incidental impact" umbrella and, in two cases, actually require that existing Superior Court rules be followed.[24]

It cites two cases that include discovery stays: the False Claims Act, D.C. Code § 2-381.03, and the Medical Malpractice Amendment Act of 2006, § 16-2821. The first *permits* a court only to stay discovery by a qui tam plaintiff, initially for not more than 60 days, if it would interfere in an investigation or prosecution by the District or the U.S. Attorney's Office. D.C. Code § 2-381.03(g)(1). The second stays discovery only during the mandatory mediation of a medical malpractice suit, not if the suit proceeds. *Id.* § 16-2821.

The other D.C. Code chapters cited as affecting discovery either create discovery procedures incidental to a substantive purpose or, in fact, do not modify Superior Court rules. In all four chapters of the Uniform Business Organization Code cited, discovery is stayed only while a special committee appointed by a business entity completes its investigation. In the statutes cited (at 33) "that control the scope of discovery in certain types of proceedings," § 22-4135(e)(4) states that a defendant moving to vacate conviction "shall be entitled to invoke the processes of discovery available under Superior Court Rules" if the judge "grants leave to do so, but not otherwise." § 13-441-449 apply Superior Court rules to subpoenas

[24] *Banks*, 301 A. 3d. at 700.

issued under the Uniform Interstate Depositions and Discovery Act. § 44-805 simply prohibits (with exceptions) discovery from a peer review body.

Nothing about the reasons for which the Anti-SLAPP Act is invalid under the CRA and HRA would render these statutes invalid.

G. The Entire Act Is Invalid and Not Severable.

The issue of severability was first raised in the Division's opinion *Banks*, 301 A.3d at 707. It was then addressed by the District in its en banc Petition for Review (at 12). Plaintiffs have always challenged the validity of the entire Act. *See, e.g.,* Plaintiffs' Motion to Declare the Anti-SLAPP Act Void and Unconstitutional, January 2019, Record Document 84, pp. 8-12. As the severability issue is purely legal and the parties have now had the opportunity to brief it, the Court may decide it. *See BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 993 (D.C. 2014) ("an appellate court has discretion, in the interests of justice, to consider an argument that is raised for the first time on appeal if the issue is purely one of law …"); *State v. Weber*, 164 Wis. 2d 788, 791 (Wis. 1991) ("Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court.").

The District's Petition for Review (at 12-13) claimed that the Act's "protections are integrally tied to the discovery-limiting provisions," and "if full" discovery must always occur unless the complaint fails to state a claim under Rule

12(b)(6), a SLAPP defendant would then suffer the very harm that the Act sought to prevent …." It also asserted that "even if the defendant later wins at summary judgment, the Act will have secured him no benefit; attorneys' fees are *available only* if the defendant prevails on the special motion." (emphasis added).

But the District now argues that the Act is severable. Dist. at 46-7 n.10. It argues that, for example, the Act's fee-shifting provision would still apply if a special motion to dismiss were granted on grounds sufficient also to dismiss under Rule 12(b)(6), or if there were no claimed need for discovery. However, *Mann* foreclosed the notion that the Act was severable into Rule 12(b)(6) and 56 components, finding that the statute's language required something more than a 12(b)(6) motion and that the plaintiff must proffer evidence to defend against a special motion. *Mann*, 150 A.3d at 1233. If the standard for the special motion were to become the same as 12(b)(6) but with fees, then the Act would conflict with Superior Court Rule 12(b)(6).[25] Even if that were not the case, it is unclear on what basis fees would be awarded if the Act's other procedures disappear. Fees as a sanction would be available under Rule 11 without the need for a separate ground for granting them.

[25] The Rule 12(b)(6) standard is not available here. Defendants referred to Plaintiffs' obligation to present "evidence" to support the allegations in the Complaint. JA441, 448-50, 456, 969, 717-18, 720-21. They also proffered two affidavits. JA1921-1926; JA1052-1081. A Rule 12(b)6) motion must be decided solely on the complaint.

For those who wish to implement the principles of the Act, the appropriate path runs through changes in the substantive laws of the District or in the rule-making process envisioned in D.C. Code § 11-946 and outlined by the Superior Court Rules Committee. *The Rulemaking Process*, District of Columbia Courts. https://www.dccourts.gov/superior-court/rules-committee/rule-making-process. A step in that process took place on October 20, 2023, when the Superior Court issued a notice requesting comments as to whether its Rules of Procedure should be amended to incorporate rules similar to the Act's discovery-limiting rules. No one weighed in by the November 20 deadline to suggest the Rules be amended.[26]

II. The Anti-SLAPP Act, Both on Its Face and as Applied, Unconstitutionally Interferes with the First Amendment Rights of Plaintiffs.

The Anti-SLAPP Act is unconstitutional for two reasons. First, it contains no mechanism limiting its application only to actual SLAPP suits, and thus imposes its onerous burdens on plaintiffs who are legitimately suing to redress wrongs as well as on those attempting to stifle speech. *See Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 581 (D.C. 2022) ("This is a broadly-worded statute, and for better or worse, its terms extend beyond lawsuits meant to silence one side of a public

[26] Superior Court of the District of Columbia Notice, *Request for Comments: Anti-SLAPP Discovery Limiting Rules*, https://tinyurl.com/ymsbbfeh. Information about lack of response in email communication from Pedro E. Briones, Associate General Counsel, District of Columbia Courts, to B. Forrest, November 28, 2023.

policy debate."). Second, it grants defendants virtually an open season for defaming purported public figures and public officials by making the highly discovery-intensive showing of actual malice nearly impossible.

Intervenor and Defendants have failed to respond effectively to either point. Dist. at 47-50; Sid. at 15-17; APA at 23 (adopting Sidley's arguments). Their response is circular. They argue that the Act passes constitutional muster because it bars only meritless claims not protected by the First Amendment. Dist. at 48-50, Sid. at 15-16. But they acknowledge that the decision about whether a claim may proceed on its merits takes place only *after* the Act's onerous conditions, including its limits on discovery, have already been applied. And they fail to acknowledge that claims which fail to survive the special motion are not by definition meritless. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532-33 (2002) (referring to "our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs.").

Neither the District nor Sidley offers any explanation of what rational basis there could be (let alone under the "exacting scrutiny" required here, *see Elrod v. Burns*, 427 U.S. 347, 362 (1976)) for applying the Anti-SLAPP procedural barriers to claims that are not SLAPPs.[27] Doing so expands the circumstances in which

[27] Sidley (at 15) argues that "strict scrutiny" does not apply, citing *In re Yelverton*, 105 A.3d 413 (D.C. 2014). But that case has nothing to do with the level of scrutiny to be applied. The District does not contest the level of scrutiny.

defendants can avoid trial beyond reasonable bounds. The Supreme Court has cautioned against broad assertions of immunity from suit and has instructed courts to "view claims of a right not to be tried with skepticism, if not a jaundiced eye." *Dig. Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 873 (1994).

A. The Anti-SLAPP Act Cannot Constitutionally Be Applied to Claims Without Proof the Claim Is in Fact a SLAPP.

According to the District and Sidley, the requirement that plaintiffs demonstrate their claims have merit by proving they are "likely to prevail"—despite being denied almost all discovery—is a constitutionally acceptable substitute for requiring proof that a complaint actually is a SLAPP. Dist. at 47-49; Sid. at 15-17. This cannot be true when suits that are not SLAPPs face a much higher bar for avoiding dismissal than they would outside the Act's mechanisms.

The authority cited by the District (at 48) is the California Supreme Court's decision in *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002). However, in *Equilon* the plaintiff's only *constitutional* claim was that *fee-shifting* without proof of intent burdened the right to petition. *Id.* at 691.[28] Moreover, the aftermath of *Equilon* demonstrated the validity of concerns about the

[28] The District (at 49) cites a California Court of Appeal case, *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 357-58 (Cal. Ct. App. 2004) for the proposition that the Act does not violate the right of access to the courts because it does "not prevent [plaintiffs] from bringing a meritorious claim." *Bernardo* relied on *Equilon's* analysis as it pertains to fee shifting.

constitutionality of California's anti-SLAPP statute. The *Equilon* court predicted that its holding "will not allow the anti-SLAPP statute itself to become a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances." *Id.* at 693. The court's confidence was unjustified. A year later the legislature amended the law, stating that "there has been a disturbing abuse" of the statute. *Grewal v. Jammu*, 191 Cal. App.4th 977, 997 (Cal. Ct. App. 2011). One of the professors whose work was the basis for California's anti-SLAPP act wrote in support of the amendment: "corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon." *Id.* at 997 n.10.

Neither the District nor Sidley persuasively confronts the differences between the D.C. Anti-SLAPP Act and the provisions of other states' statutes created to protect plaintiffs' First Amendment rights. For example, in Illinois "[I]f the plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill defendants' rights of petition" then "it is not a SLAPP" and does not fall under the Act. *Sandholm v. Kuecker*, 962 N.E.2d 418, 429 (Ill. 2012). *See also, e.g., Bristol Asphalt Co. v. Rochester Bituminous Prods.,* 493 Mass. 539, 551 (Mass. 2024).

Sidley argues that a showing of bad intent is unnecessary in the District because it, unlike Illinois, requires a determination of whether a plaintiff is likely to succeed on the merits. That misses the point. Illinois ensures that plaintiffs with

legitimate claims are not subject to its statute; in contrast, the District subjects even those claims not brought to harass or silence to its statute's onerous burdens.

Those burdens are particularly destructive for defamation claims against public officials because the claims require proof of actual malice, almost always a discovery-intensive endeavor. *See In re Kline*, 113 A.3d 202, 213 (D.C. 2015) ("Direct proof of a lawyer's state of mind is 'rarely available.'" (citations omitted)). *Banks*, 301 A.3d at 705. Plaintiffs' Opening Brief showed that the overall structure of the Act makes it, at minimum, unconstitutional as applied to these cases. It requires an almost immediate showing that the claim can proceed under a summary-judgment standard despite—and in contrast to summary judgment under the Superior Court rules—limited or no discovery and despite the plaintiff bearing the burden of making that showing. Op. at 31-36.

The District's and Sidley's only response is that there is no constitutional right to discovery and attorney fees awards are not constitutionally suspect. Dist. at 47-49; Sid. at 15-17. That is no answer at all. The proposition that access to the court rules and procedures, including discovery, offered to other plaintiffs could constitutionally be denied to all litigants in all cases does nothing to show that it can be granted to some good-faith plaintiffs and denied to others. A First Amendment violation cannot be excused by an Equal Protection violation. When they filed suit, Plaintiffs were constitutionally entitled to access the same rules of

procedure accessed by other plaintiffs. Super. Ct. Civ. R. 1.[29]

Those criticizing purported public figures *already* have the protection of requiring proof of actual malice. *See Calder v. Jones,* 465 U.S. 783, 790-91 (1984). The Act makes public-official defamation claims virtually impossible to prove, no matter how legitimate. *See* Justin W. Aimonetti & M. Christian Talley, *How Two Rights Made a Wrong: Sullivan, Anti-SLAPP, and the Under-Enforcement of Public Figure Defamation Torts*, 131 Yale L. J. 708, 715-16 (2021).

Neither the District nor Defendants have any response to Plaintiffs' demonstration that the Act's overbreadth enables its misuse in ways that infringe on the constitutional right of meaningful access to the courts.[30] Op. at 34-35.

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[29] *See Standridge v. Ramey*, 323 N.J. Super. 538, 547-48 (App. Div. 1999) (encouragement of summary judgment "in defamation actions does not mean that a defamation plaintiff has a more circumscribed right to discovery than plaintiffs in other types of cases. To the contrary, there is an especially strong need for full discovery in a defamation action brought by a plaintiff who is classified as a 'public official.'… the issue of a defendant's state of mind 'does not readily lend itself to summary disposition.'" (quoting *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n. 9 (1979)). *Banks*, 301 A.3d at 705.

[30] The District cites (at 48) *Estate of Smith v. Marasco*, 318 F.3d 497, 511 (3d Cir. 2003) for the proposition that "only prefiling conduct that either prevents a plaintiff from filing suit or renders the plaintiff's access to the court ineffective or meaningless constitutes a constitutional violation." The case addressed the claim that a police cover-up blocked the plaintiff's access to critical evidence. *Id.* That situation has no relevance here, where plaintiffs assert that the entire framework of the Anti-SLAPP Act renders their access "ineffective" because, among other reasons, it denied them access to the discovery allowed under the FRCP. Similarly, Sidley (at 16) cites *City of Hampton v. Williamson*, 887 S.E.2d 555, 558-59 (Va. 2023) for the proposition that there is no general constitutional right to discovery

B. The Anti-SLAPP Act Was Unconstitutionally Applied.

The Act's application blocked Plaintiffs' meaningful access to the discovery to which the FRCP and the Rules of the Superior Court entitle them when they are required to defend the merits of their case against dismissal.[31] D.C. Super. Ct. R. 1. As the Ninth Circuit has held, "[r]equiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without providing any of the procedural safeguards that have been firmly established by the [FRCP]." *Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018).[32]

Plaintiffs' entitlement to discovery under the Superior Court Rules is especially strong when, as here, a defendant's state of mind is central to the issue of actual malice. *See Herbert v. Lando*, 441 U.S. 153, 169-70 (1979). Instead of addressing Plaintiffs' point, Defendants change the subject. First, Sidley argues

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in a civil case. That case addressed whether Virginia law provided a right to discovery in disciplinary or grievance hearings, a situation far removed from this case. In any event, the general proposition for which Sidley cites it (and for which the case cites only other Virginia cases) cannot stand in the face of the cases cited in Section II.B *infra*.

[31] Plaintiffs served with their Complaint (Feb. 28, 2017) discovery requests for documents, interrogatories, and depositions.

[32] *See Secord v. Cockburn*, 747 F. Supp. 779, 786 (D.D.C. 1990) ("[D]iscovery must be exhausted before a court rules upon a dispositive motion for summary judgment." (citing *Hutchinson,* 443 U.S. at 120 ; *Herbert,* 441 U.S. at 159-61)).

that Plaintiffs should have contested the Court's denial of targeted discovery as an "abuse of discretion." Sid. at 17. The judge's exercise of discretion to block discovery and deny Plaintiffs' counsel's request to be heard on one of his rulings are a distraction from the constitutional question. JA1136-9. Second, APA falsely claims that Plaintiffs never challenged the discovery provisions (or others) as conflicting with the HRA. APA at 15-16;12, n. 8. That claim is refuted in Section I.D, n.17 *supra*.

The Act's discovery limitations are void as applied in this case because they violate Plaintiffs' First Amendment right to petition, a right that is rendered ineffective if they cannot access the same rules of procedure, including discovery procedures, accessed by other plaintiffs in the D.C. Superior Court. *Palin v. N.Y. Times Co*., 940 F.3d 804, 812 (2d Cir. 2019) ("[C]ourts are not free to bypass rules of procedure that are carefully calibrated to ensure fair process to both sides."); *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1048 (N.D. Ill. 2013) ("[The Anti-SLAPP statute] conflicts with Rule 12(d) and Rule 56 by restricting a plaintiff's 'procedural right to maintain [an action]' established by the federal rules ...." (quoting *Shady Grove*, 559 U.S. at 401 n.4).

III. Defendants Were Negligent.

As the District notes (at 11), the Superior Court judge held that Plaintiffs had not "offered evidence" that Defendants had "fail[ed] to observe an ordinary

care in ascertaining the truth of an assertion before publishing it to others." JA2220, n. 10. To reach that conclusion, the court ignored Plaintiffs' evidence of negligence (JA1265-67) as well as case citations in their brief (JA1265-66) and arguments at the hearing on the special motions (JA2098-99, 2216-17).

Sidley (at 44) argues incorrectly that evidence of negligence does not matter because their special motion was based on an actual malice standard to which evidence of negligence cannot contribute. Although negligence alone is not enough to find actual malice, it can contribute: "evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences, [can] support[] the existence of actual malice." *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).[33]

Plaintiffs demonstrated in their Opening brief (at 45-46) that Defendants violated many of the markers identified in case law as part of a negligence standard in an internal investigation. *See Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp.

[33] *See also Harte-Hanks Comms. v. Connaughton*, 491 U.S. 657, 668 (1989) ("[I]t cannot be said that evidence concerning motive or care never bears any relation to … actual malice …"); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 n.35 (3d Cir. 1988); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 711-12 (4th Cir. 1991) (citing *Harte-Hanks*); *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992); *Armstrong v. Shirvell*, 596 F. App'x 433, 447 (6th Cir. 2015) (citing *Harte-Hanks*); *Harris v. City of Seattle*, 152 F. App'x 565, 567-68 (9th Cir. 2005) (citing *Harte-Hanks*); *Oao Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 56 (D.D.C. 2005) (quoting *Harte-Hanks*).

1490, 1510 (D.D.C.), *rev'd on other grounds*, 828 F.2d 826 (D.C. Cir. 1987). The markers include several for which Plaintiff provided evidence: (1) failure to pursue further investigation (Op. at 59; JA1257-59, 1265); (2) unreasonable reliance on sources (Op. at 60; JA1254, n. 107, 1260-62); (3) unreasonable formulation of conclusions, inferences, or interpretations (Op. at 57-9, JA1263-65); (4) misuse of legal terminology (Op. at 63, JA1264-66); and (5) failure to follow established internal practices and policies (Op. at 45-7, JA1265-66).

At a minimum, Plaintiffs' evidence is sufficient to demonstrate that the fact-intensive issue of negligence, whether as contributory to actual malice or as the standard applicable to Plaintiffs' claims, belongs before a jury.

IV. Defendants Fail to Meet Their Burden for Establishing a Public-Official Defense.

In claiming Plaintiffs are public officials, Defendants raise a privilege for which they bear the burden, as Sidley conceded in its December 13, 2019, reply below.[34] Op. at 39-44. For two reasons, Defendants fail to meet this burden.

First, they fail to address two of the three major Supreme Court criteria for establishing public-official status and Plaintiffs' evidence as to those criteria, instead refusing to acknowledge the criteria's relevance. Sid. at 24-25, Reporter's Committee for Freedom of the Press (RCFP) at 12. Second, as to the criterion they

[34] JA1840: "Defendants have the burden of persuasion on public figure or public official status …."

do address—whether Plaintiffs had the requisite "substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)—they rely solely on *their interpretations* of Plaintiffs' military ranks and titles and some language in Plaintiffs' Complaint, while omitting the context the Complaint provides for that language as well as Plaintiffs' affidavit evidence. Sid. at 19.

If the balance is to be struck between society's "pervasive and strong interest in preventing and redressing attacks upon reputation" and its "interest in debate on public issues," the "substantial responsibility for or control" test requires analyzing a person's responsibilities and authority. *See Rosenblatt*, 383 U.S. at 86. Neither the Superior Court nor Defendants undertook that inquiry. Indeed, their conclusions are contradicted by their cited cases, in which plaintiffs held to be public officials differed in critical ways from the Plaintiffs. Section IV.B *infra*.

A. Defendants Fail to Address All the Relevant Legal Standards and Plaintiffs' Evidence that They Met Those Standards.

The Supreme Court has established a three-part test to determine if a defamation plaintiff is a public official.[35] In addition to the responsibility or control question, the relevant questions are (a) whether the plaintiff's position invited public scrutiny and discussion of the person holding it, entirely apart from

[35] *Banks*, 301 A.3d at 710 (noting this Court has adopted the Supreme Court's criteria).

the scrutiny and discussion occasioned by the charges in controversy, and (b) whether the plaintiff enjoyed significantly greater access to channels of effective communication and hence had a more realistic opportunity to counteract false statements. Below, Sidley addressed only the responsibility or control test.[36]

Plaintiffs meet none of the criteria.[37]

1. Did the Plaintiffs have (or appear to have, if public facing) substantial responsibility for or control over the conduct of governmental affairs? Were they "in a position significantly to influence the resolution of" public issues? *Rosenblatt*, 383 U.S. at 85-86. Defendants fail to show Plaintiffs meet that test.

Policies that significantly influenced the resolution of such public issues as whether the Geneva Conventions applied to post-9/11 interrogations, or whether "torture" should be defined narrowly or broadly, were created by more senior officials. Plaintiffs had no ability to create or influence those policies; their responsibility was only to implement them after they were decided. The officials who created those policies did have "substantial responsibility for or control over the conduct of governmental affairs"—but Plaintiffs did not.

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[36] JA451-452, APA adopts Sidley's argument, JA721.

[37] As discussed *infra* (at 51-52, 52-53), Sidley and amicus RCFP now attempt to argue additional facts that, in addition to being incorrect, are not properly before this Court. *See Jonathan Woodner Co. v. Laufer*, 531 A.2d 280, 285 (D.C. 1987) (a factual issue is "properly reserved for the trial court as trier of fact; we may not decide it for the first time on appeal…." (internal citations omitted)).

Defendants fail to acknowledge this key distinction or the evidence supporting Plaintiffs' well-pleaded allegations that they were "not in a position to make public or military policy."[38] Plaintiffs provided five affidavits supporting that fact: affidavits from a Judge Advocate and a military psychologist who both had first-hand knowledge of a military psychologist's role, in addition to Plaintiffs' own affidavits.[39] Defendants offered no controverting affidavits.

Sidley fails to demonstrate that the documents Plaintiffs drafted or the actions they took exhibited "substantial responsibility for or control over the conduct of governmental affairs." It makes much of the facts that some documents were called "policies" and that, for example, Plaintiffs "institute[ed] procedures" and "train[ed] personnel." But these actions were undertaken at the direction of their superiors, and none are of a kind that satisfies the *Rosenblatt* test. Nor did any of those actions place Plaintiffs in roles analogous to the roles of officers found to be public officials in the cases cited by Sidley and the RCFP. Section IV.B *infra*.

In the face of the Complaint's allegations and the uncontroverted affidavit evidence, it is not enough simply to assert in conclusory fashion that Plaintiffs had the necessary substantial responsibility or control (Sid. at 19 (citing Superior Court

[38] JA247-49; 297; 1095-1104; 2114-2116.
[39] JA1755 ¶10 (Judge Advocate); 1649 ¶6 (President, Society of Military Psychologists); 1463-66 ¶¶4-6, 18 (Banks); 1540-44 ¶¶4-6, 17 (Dunivin); 1656-59 ¶¶4-5, 17 (James).

March 11, 2020, Amended Order ("Order"), at JA2210)), or that military officers with Plaintiffs' former ranks or functional titles "readily meet" the *Rosenblatt* test (Sid. at 22). In relying on language in the Complaint that Plaintiffs were responsible for "drafting policies and instituting procedures to prevent abusive interrogations" (Sid. at 20), Sidley makes unsupported assumptions about the content and function of those policies and procedures, without regard to their actual content and function. In fact, the documents Plaintiffs drafted to guard against abusive interrogations were titled "standard operating procedures," a clear indication that they were implementation rather than policy-setting documents. Moreover, that a person held the rank of lieutenant colonel or colonel in the military is not sufficient alone to confer public official status.[40] In deciding whether a military officer is a public official, courts consider the context in which the officer acted, as the cases listed in Section IV.B *infra* demonstrate.[41]

The distinction between private-individual and public-official status turns on substance, not labels. And there is evidence in the record that the substance of Plaintiffs' roles did not rise to the level of substantial responsibility for and control over governmental affairs. For example, Dr. Dunivin's duties at Walter Reed

[40] Sidley at times asserts that Plaintiffs were all lieutenant colonels (JA1098) and at other times, and most recently, that they were all colonels. JA1838, Sid. at 19. Their ranks differed (and changed) during the APA events Hoffman investigated.
[41] *See generally, Spitler v. Young*, 6 Mass. L. Rep. 123 (1996) (Sup. Ct. Middlesex Co. Oct. 3, 1996) (reviewing cases and criteria).

involved a "clinical psychology practice in psychopharmacology and consultation to Walter Reed's Clinical Breast Care Project," and "conducting research in psycho-oncology and telehealth." JA1442. She then deployed to Guantanamo as a member of a Behavioral Science Consultation Team (BSCT) (JA2380), which the Hoffman Report defines as a "team of psychologists, psychiatrists, and mental health specialists *who provided behavioral science consultation in support of interrogation*." (emphasis added) JA2765.

Sidley asserts—again in conclusory fashion and for the first time—that Plaintiffs were "high-ranking officers." Sid. at 20. As partial support for that conclusion, it enters into the record, also for the first time, the fact that appointments as lieutenant colonel or colonel "must be made by the President and with the advice and consent of the Senate." *Id.* at 23. But it fails to point out that appointments of all officers, including second lieutenants in the Army and ensigns in the Navy, must be made in the same way. Its truncated quotations from Plaintiffs' affidavits fare no better.[42]

[42] Sidley (at 23) refers to "JA1462 (affidavit reiterating that Banks had 'oversight' responsibilities for Special Operation Command psychologists)." The full sentence states: "In that position I provided *ethical as well as technical oversight* for USASOC Psychologists." ¶3 (emphasis added). Sidley also asserts that another Plaintiff's affidavit states that he had "shared responsibility" for detention operations. But the affidavit nowhere states that he had that broad responsibility. It instead states that he had "responsibility to implement policies to prohibit detainee abuses and to require the reporting of any abuses of which people were aware." JA1754 ¶¶ 4-10.

Moreover, Defendants have stated that the relevant time for considering when someone is a public official is the time of the events described in the Hoffman Report. JA1834. The record evidence shows that, during the years in which Plaintiffs participated in the APA activities that Hoffman investigated, their influence was limited, at most, to private APA deliberations about APA policies that had no effect on governmental policies. JA1281. Indeed, APA policies have (and can have) no binding effect on military personnel, including military psychologists. JA1281 n.193. And the Report's attacks on Plaintiffs dealt only with their purported activities within the APA, not their duties within the military.

Defendants' claim that Plaintiffs are public officials is supported by the RCFP, which makes new factual and legal arguments not raised by the Defendants.[43] New arguments are not properly before the Court where Plaintiffs cannot submit evidence to counter them and, to the extent they allege new facts, are not properly advanced by amici. Amici briefs that introduce new facts at the appellate stage are not permitted.[44]

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[43] For example, RCFP cites articles not in the record, some of which are irrelevant because they pertain to the CIA. *See* RCFP at 10-16. None of the Plaintiffs were part of the CIA, nor did Hoffman find that APA colluded with the CIA. JA2247. RCFP also incorrectly asserts (at 11, n.3) that Plaintiffs took a "leadership role on detainee questioning" and "supervised subordinates." But there is no evidence on either of those issues in the record.

[44] *See Reps. Comm. for Freedom of the Press v. United States*, 94 F.4th 746, 751 (8th Cir. 2024) (rejecting RCFP arguments raised for the first time on appeal and

In addition to failing to meet *Rosenblatt's* substantial responsibility or control standard, Plaintiffs also lack two other characteristics courts have established to ensure the public-official defense is not unjustifiably expanded to rob individuals of their right to defend themselves against attacks on their reputation. Defendants failed to contest these criteria below.[45] These additional factors were outlined in *Kassel v. Gannett Co.*, 875 F.2d 935, 938-40 (1st Cir. 1989) (drawing on U.S. Supreme Court cases); *see also* Op. at 41-42 (citing *Kassel* for the clarity of its summary of Supreme Court precedent, not as precedent itself). The factors were also set forth in this Court's recent opinion addressing the distinction between private individuals and public officials, a case Defendants and the RCFP ignore. *Salem Media Grp. v. Awan*, 301 A.3d 633, 646-47 (D.C. 2023).

2. Did the plaintiff's position invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the charges in controversy? Is the plaintiff's position one with such apparent

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in a reply by RCFP); *California Assn. for Safety Education v. Brown*, 30 Cal.App.4th 1264, 1274 (Cal. Ct. App. 1994) ("[A]n amicus curiae accepts a case as he or she finds it …. Amicus curiae may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record.'" (internal citations omitted)). *See also Bell v. Wolfish*, 441 U.S. 520, 531, n. 13 (1979); *Nebraska ex rel. Bruning v. United States Department of Interior*, 625 F.3d 501, 512 n.10 (8th Cir. 2010) (collecting cases); *cf. Eldred v. Ashcroft*, 255 F.3d 849, 853 (D.C. Cir. 2001) (noting courts can disregard claims raised only by amici that "rais[ed] issues beyond the purview of the case before the Court").

[45] JA445, 451-52, 721, 1838-1842, 1969.

importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the public interest in the qualifications and performance of all government employees? *Rosenblatt* 383 U.S. at 86; *Gertz v. Robert Welch*, 418 U.S. 323, 345 (1974).

The U.S. Supreme Court has admonished: "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135-36; *accord Rosenblatt*, 383 U.S. at 86 n.13 (recognizing that plaintiffs' duties did not "invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy").

Here, Plaintiffs were subjected to press and public scrutiny *only* because of the attacks that prompted Hoffman's investigation and Report. Moreover, nothing about Plaintiffs' roles created the expectation of exposure to the media or an increased risk of injury from defamation. Their roles were internal to the military, not public-facing. Unlike the military officers found to be public officials in the cases discussed below, they did not have combat or command roles likely to attract media coverage (nor did they have the responsibility for ordering or conducting interrogations). They volunteered privately in APA activities,[46] and the Hoffman

[46] JA240-297 ¶¶13, 39, 41, 42, 48, 221-22.

Report's statements that they spoke for the DoD are false.[47] In contrast, the *Rosenblatt* plaintiff worked for elected officials in a public-facing role on issues that directly affected the public. *Rosenblatt*, 383 U.S. at 77, 87.

3. Did Plaintiffs enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements? *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990) (citing *Rosenblatt*, 383 U.S. at 85-86); *Salem*, 301 A.3d at 646-47; *Gertz*, 418 U.S. at 344. Or did they have no effective voice in the "robust and unfettered debate concerning issues related to governmental affairs" envisioned by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)?

Gertz established the relevance of "effective channels of communication":

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy … [footnote 9] [T]he fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

Gertz, 418 U.S. at 344, 344 n.9; *see also Kassel*, 875 F.2d at 939-40 (quoting *Gertz*); *accord Moss*, 580 A.2d at 1029; *Salem*, 301 A.3d at 646-47. JA1283-1284.[48]

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[47] JA1463 ¶5; JA1540 ¶ 4; JA1656 ¶5.

[48] *See also* 1 Smolla, Law of Defamation § 2:108 (2d ed. 2023) ("[C]ourts have begun to emphasize the degree of policy-making authority … as well as the plaintiff's level of access to the media….").

RCFP (at 12) misstates Plaintiffs' position as asserting that "the Superior Court erred by not requiring discovery regarding the access to the media." The record evidence already establishes that Plaintiffs have ***not*** had access to the media or other forms of public communication that comes remotely close to that of "public officials" as recognized by *Kassel, Gertz, Moss,* and *Salem*.[49]

B. Defendants Rely on Cases Whose Facts Differ Critically from the Facts of This Case.

In the cases cited by Sidley (and RCFP), the plaintiffs differed in critical ways from Plaintiffs here: they had a higher level of authority, held positions that dealt directly with the public or a segment of it, and/or communicated directly with the media. Sidley asserts (at 22) that "[c]ourts in D.C. and elsewhere consistently have held that military officers with duties like plaintiffs readily meet that [public official] standard," but without specifying what Plaintiffs' duties were. The cases cited in fact contradict that assertion and do not meet Defendants' burden.

Arnheiter v. Random House, Inc., 578 F.2d 804, 805 (9th Cir. 1978). Sid. at 22. Plaintiff, a senior officer, was removed as a ship commander during wartime. He "used every conceivable effort to gain public exposure and to make his case a 'cause celebre,'" rendering him a public figure and public official.

Davis v. Costa-Gavras, 595 F. Supp. 982, 987 (S.D.N.Y. 1984). Sid. at 22.

[49] JA1466 ¶18, JA1543 ¶17, JA1659 ¶17.

Plaintiff did not contest his public official status. He was a Commander of the U.S. Military Group and Chief of the U.S. Navy Mission to Chile, with substantial decision-making authority and autonomy.

MacNeil v. Columbia Broad. Sys., Inc., 66 F.R.D. 22, 24-25 (D.D.C. 1975). Sid. at 22. Plaintiff, who did not contest his public official status, was a Department of Defense spokesperson filmed with his permission during "National Security Seminars" intended to present the military to the world.

Harvey v. Cable News Network, Inc., 48 F.4th 257, 262-63, 272-73 (4th Cir. 2022) (citations omitted). Sid. at 21. After retiring from the military as a colonel, Harvey was appointed to the National Security Council and later became Senior Advisor to the then-Chairman of the House Select Permanent Committee on Intelligence. The court relied on these positions to find him a public official. Plaintiffs held no positions of equivalent scope, visibility, or influence.

Beeton v. District of Columbia, 779 A.2d 918, 920-21, 924 (D.C. 2001); *Thompson v. Armstrong*, 134 A.3d 305, 308, 311-12 (D.C. 2016). Sid. at 22. In *Beeton*, a correctional officer, and in *Thompson,* a Treasury Inspector General special agent, were held to be public officials. The roles of officers imbued with police power and responsible for enforcing laws applicable to the public or segments of it differ too significantly from the role of psychologists working within the military to be relevant. *Beeton* and *Thompson* establish that a government

employee's position may meet the public official criterion by virtue of control over policy, direct interaction with the public, or supervisory authority over other employees. Plaintiffs do not meet those criteria.[50]

Sidley (at 25-26) now contends the public-official question must be decided promptly to give Defendants the full benefit of the special motion to dismiss. On this record, however, Defendants fail to show Plaintiffs are public officials. If there is any doubt that they are private individuals for the purposes of this suit, the appropriate remedy is remand for further development of the record.[51]

V. Plaintiffs Established Triable Disputes of Fact As to Defendants' Actual Malice.

Defendants' arguments are, at their core, an attempt to make the actual malice standard insuperable when the facts are as complex as in this case and when the Anti-SLAPP Act is deployed to block most discovery. That attempt fails: Plaintiffs have presented voluminous evidence establishing issues of fact that would allow a jury, properly instructed and drawing reasonable inferences, to find Defendants acted with actual malice. At a minimum, Plaintiffs' evidence demonstrates the need for fuller

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[50] *Banks*, 301 A.3d at 710.

[51] *See, e.g.,* Complaint ¶222 (JA297): "If Hoffman had wanted to pursue the truth about the military Plaintiffs' role, he could have easily found it. Two former Army Surgeon Generals, Maj. Gen. (Ret.) Kevin Kiley (whom Hoffman interviewed) and Lt. Gen. (Ret.) Eric Schoomaker (to whom Col. Banks pointed Hoffman), have told Plaintiffs' counsel that Banks, Dunivin, and James could not set policy or speak on behalf of the DoD." DoD will not allow plaintiffs to obtain affidavits from those officers. JA1284-85.

discovery. "[T]here is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340.

In their mischaracterization of the actual malice standard, Defendants avoid three key points relevant to this Court's review of the Superior Court's ruling and Defendants' arguments on appeal:

First, because a defendant will rarely admit having doubted the truth of a defamatory statement, a court will typically infer actual malice from a ***cumulation*** "of objective facts." *Bose Corp.*, 692 F.2d at 196. Whether any single fact is enough to show actual malice is the wrong question: "A brick is not a wall."[52] Only when all the evidence is in place, and the wall as a whole can be tested, can the "clear and convincing" standard be applied. Defendants focus solely on bricks, ignoring the pattern of activities from which a jury could find actual malice.[53]

Moreover, Defendants ignore—as did the motions judge—this Court's admonition that a court considering a special motion should not "mak[e] credibility determinations and weigh[] the evidence to determine whether a case should proceed to trial," thus encroaching on the jury's role. *Mann*, 150 A.3d at 1235. The Superior

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[52] Fed. R. Evid. 401, Advisory Committee's Note to 1972 Proposed Rules (quoting what is now 1 McCormick On Evid. § 185 (8th ed.)).

[53] APA's conclusory response is that the aggregate of Plaintiffs' circumstantial evidence is not enough. APA at 38, n. 30. That is no response at all. While Sidley notes (at 29) that the Superior Court's opinion "expressly considered plaintiffs' arguments '[c]ombined,'" the opinion did not analyze all the evidence or the "cumulation" of evidence, despite saying that it did.

Court and Defendants encroach enthusiastically on the jury's role, repeatedly weighing the evidence of actual malice and drawing all inferences against Plaintiffs.

Second, proving actual malice is a discovery-intensive endeavor because it involves a defendant's state of mind. Exploring that state of mind typically requires both depositions, none of which were permitted here, and discovery of circumstantial evidence. Defendants repeatedly complain that evidence Plaintiffs provided does not fully prove a point—but the details they ask for could not be provided absent full discovery and most are permissible inferences by a jury.

Third and finally, Defendants have deemed "[t]he facts alleged in the complaint … to be admitted."[54] Despite that acknowledgment, Defendants now repeatedly try to argue that specific facts alleged are incorrect. *See, e.g.,* Sid. at 28-36; APA at 34-38.

The questions now before this Court are narrow: First, taking into account all evidence in the record, along with all permissible inferences, ***could*** the jury find that Defendants were aware of the falsity of their defamatory statements or

[54] During a February 8, 2019, hearing in Superior Court, Barbara Wahl, representing APA, stated "The facts alleged in the complaint are deemed by us to be admitted and now we're just arguing about where [sic] you conclude from that … We're saying for purposes of the motion, everything you've said in the complaint, all the facts that you've said in the complaint are true." JA874-875 (hearing transcript); JA862-863 (Thomas Hentoff, representing Hoffman and Sidley, stated "But we very, you know, specifically said assume to be true all the non-conclusory allegations in the complaint ….").

exhibited a reckless disregard for whether those statements were true or false? Second, does the court's failure to consider evidence creating triable issues of fact, as well as its failure to consider all claims, require remand? Third, is remand required for full discovery regarding the Defendants' state of mind?

A. Defendants Mischaracterize Relevant Law and the Plaintiffs' Allegations.

As to the law:

Defendants' mischaracterizations form a pattern: all try to make it as difficult as possible to demonstrate actual malice.

First, in response to *Hutchinson*, 443 U.S. at 120 n.9, which states that actual malice "does not readily lend itself to summary disposition," Defendants assert that the Supreme Court later "clarified" that *Hutchinson* merely expressed a "general reluctance to endorse special procedural protections" for defamation defendants. APA at 25, n.18 (quoting *Anderson*, 477 U.S. at 256 n.7); *see also* Sid. at 27-28, n.8. But there is no contradiction between these quotations. *Anderson's* language reinforces the dangers of summarily disposing of the actual malice issue. And, although Defendants point to cases that emphasize the need "to expeditiously weed out unmeritorious defamation suits" (Sid. at 25-26), that need should not override the need to ensure all the relevant facts are in the record. *See Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir. 1981) ("Even those cases strongly urging summary judgment describe it as proper only where the record is 'devoid of

genuine issues of fact' on the actual malice question." (internal citation omitted)).[55]

Second, APA misstates the breadth of evidence that can contribute to proving actual malice. The Supreme Court has held that relevant evidence may consist of "any direct or indirect evidence relevant to the state of mind of the defendant …." *Herbert*, 441 U.S. at 164 n.12, 165. APA claims incorrectly (at 27, n.20) that *Herbert* was referring only to common-law malice. But *Herbert* provides that statement to show that "[r]eliance upon such state-of-mind evidence is by no means a recent development arising from *New York Times*." *Id.* at 161. The statement appears a few pages after that reference.[56]

In contrast to *Herbert's* view, according to APA circumstantial evidence matters only in three limited scenarios: "when the statement was (i) fabricated by the defendant, (ii) the product of the defendant's imagination, or (iii) based wholly on an unverified anonymous source or some other source that a defendant had obvious reasons to doubt." APA at 26 (citing *Oao Alfa Bank*, 387 F. Supp. 2d at 50). That case does not support APA's claim. It merely refers to three situations

[55] *See also Nader v. de Toledano*, 408 A.2d 31, 44 (D.C. 1979) ("[T]he Supreme Court has recently sounded a note of caution in this area. The Court recognized that 'proof of "actual malice" calls a defendant's state of mind into question … and does not readily lend itself to summary disposition.'" (internal citations omitted)).
[56] *Herbert's* statement about the scope of relevant evidence is echoed in *Rebozo,* 637 F.2d at 381; *United States v. Curtin*, 489 F.3d 935, 955 (9th Cir. 2007); *Carroll v. Trump*, No. 20-cv-7311 LAK, 2024 WL 1786366 at *7 n.45 (S.D.N.Y. Apr. 25, 2024).

which, *without more,* would establish actual malice. It does not suggest that no other circumstantial evidence is relevant, a point reinforced by other cases APA cites. *See also St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (noting that "[p]rofessions of good faith" publication are unlikely to be persuasive "for example" in the three "scenarios" described in *Oao Alfa Bank*). The court never suggests that other forms of circumstantial evidence are irrelevant. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1512-13 (D.C. Cir. 1996), makes the same point, and *Jankovic v. Internat'l Crisis Grp*., 822 F.3d 576, 589-90 (2nd Cir. 2016), makes it clear that the three scenarios listed are "example[s]."

Third, APA asserts that the Superior Court did not err by failing to conduct a "claim-by-claim" analysis, as *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 734 (D.C. 2021) requires, because all the claims "require a showing of actual malice." APA at 23. That misses the point: the actual malice standard may be the same, but the relevant evidence differs across claims. For example, the court analyzed none of the evidence for the claims against APA.[57] On that basis alone, the court's order

[57] APA (at 40) contends that Dr. Kaslow's statements to the media need not be analyzed because the judge found no actual malice as to Sidley. APA is mistaken. Plaintiffs alleged (JA305 ¶¶ 261-69, JA333-35) that Kaslow's statements—which had nothing to do with Sidley—were made with her knowledge they were false and defamatory. For example, in a July 21, 2015, radio interview she stated:

> [W]e didn't realize that there was sort of an underbelly … that was having … loose ethical guidelines that may have allowed for psychologists to engage in enhanced interrogations.

JA306-7.

must be reversed. *See U.S. Bank Tr. v. Omid Land Grp.*, 279 A.3d 374, 377-78 (D.C. 2022) (summary judgment must be reversed if the court "erroneously excluded from its consideration evidence … sufficient to create a genuine dispute as to a material fact").

As to Plaintiffs' allegations:

Defendants also mischaracterize the nature of Plaintiffs' allegations.

First, contrary to their claim that Plaintiffs fail to demonstrate actual malice "in conjunction with a false defamatory statement," Plaintiffs assert the falsity of 219 specific statements. Sid. at 28, APA at 31-2.

For example, the Hoffman Report states that "key APA officials … colluded with important DoD officials" and that "APA officials engaged in a pattern of secret collaboration with DoD officials" that amounted to a "collusive" joint enterprise (JA2246). It defines "collusion" as "a secret agreement, understanding, or cooperation for some harmful, improper, dishonest, or illegal purpose," making the term defamatory (JA2301). In pointing to those statements, Plaintiffs are not making a generalized complaint about the Report, as Sidley asserts. Sid. at 28. They are asserting the falsity of specific statements.

The Report names each Plaintiff as a participant in this collusive joint venture or enterprise between the APA and DoD (*e.g.*, JA2273, 2280, 2623, 2630), and identifies Banks and Dunivin as "key players" in the collusion (JA2249-50).

Because the Hoffman Report alleges "collusion" within a small group in which each Plaintiff is a named member, any defamatory statement about a member of the group is actionable by other members.[58] Thus, APA's assertion (at 25) that a "plaintiff cannot prove actual malice merely by proving that the defendant knew of 'collateral falsehoods' … 'unrelated to [the] plaintiff'" is irrelevant.[59]

Second, APA contends that, if Plaintiffs make an allegation against Sidley without simultaneously making it against APA, they have waived it as to APA. APA at 36, 39, 41, n.34. APA is mistaken. Evidence of actual malice on the part of an institution's *agents* may be imputed to the institution. *See, e.g.*, *Dongguk Univ. v. Yale Univ.*, 873 F. Supp. 2d 460, 465 (D. Conn. 2012).[60] The relationship between client and attorney is a quintessential principal-agent relationship.

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[58] Although statements about a group will often be precluded by the "group defamation" rule, if a defamer identifies people by name, "the group defamation rule no longer applies." *Pratt v. Nelson*, 164 P.3d 366, 383 (Utah 2007). *See also Elias v. Rolling Stone L.L.C.*, 872 F.3d 97, 107-08 (2d Cir. 2017) (same); *Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 64 (D.D.C 2018) (discussing the "of and concerning" theory to establish the first element of defamation).

[59] Before the motions judge, the Defendants argued for the first time in their reply briefs that defamatory statements about initial Plaintiffs Drs. Behnke and Newman were no longer relevant since both were required to pursue their claims in arbitration. The claim is mistaken for the reasons set forth above. The trial court pre-emptively ruled that Plaintiffs could not file sur-replies to issues raised for the first time in replies. JA1135.

[60] *Dongguk* is cited by APA for other purposes. APA at 32, n.24.

Comm'r v. Banks, 543 U.S. 426, 436 (2005).[61] In this case, Sidley was not only APA's attorney; APA participated in Sidley's work by arranging interviews, advising interviewees that they did not need counsel (JA1478 ¶9), providing documents, and, through its Special Committee, overseeing Sidley's investigation. JA252, 299-301. Evidence of Sidley's actual malice may be imputed to APA.[62]

Even if that were not the case, the Complaint includes sufficient allegations that APA itself acted with actual malice. They include (i) adherence to a preconceived narrative that it knew was false based on the APA Board and Council's participation in the underlying events described in the Report (*see, e.g.,* JA240 ¶16; JA 286-88 ¶¶181-188); (ii) purposeful avoidance of the truth when it repeatedly republished the Hoffman Report (*see, e.g.*, JA247 ¶38; JA269, ¶108); and (iii) knowledge that the Report omitted information in Sidley's and APA's possession, including exculpatory reports (*see, e.g.,* JA242 ¶¶21-2; JA299-301

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[61] *See also, e.g., Immunocept, LLC v. Fulbright & Jaworski, LLP,* 504 F.3d 1281, 1287 (Fed. Cir. 2007); Restatement (Second) of Agency § 9(3) (1958); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 634 (1962) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"); *Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994); *Coleman v. Smith*, 814 F.2d 1142, 1146 (7th Cir. 1987); *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141-42 (9th Cir. 1989).

[62] In claiming that "[c]ourts have declined to find fault where, as here, a law firm was hired to conduct an independent investigation and then the findings were published," APA relies (at 29, n.21) on a case decided under a "grossly irresponsible" standard under New York law: *Konikoff v. Prudential Insurance Co. of America*, 234 F.3d 92, 100 (2d Cir. 2000). The court expressly stated that the grossly irresponsible test is a "different" test than actual malice. *Id.* at 104.

¶¶231-241). The motions judge failed to analyze any of these allegations. JA2217.

Plaintiffs have come forth with more than enough evidence to prove the existence of material issues of fact that warrant the actual-malice issue proceeding to a jury or, at a minimum, being remanded for fuller discovery. For just one example, 27 witnesses interviewed by Hoffman's team testified in affidavits that Hoffman distorted, omitted information from, or otherwise misrepresented their interviews (JA1219), and 20 stated he undertook the interviews to support a preconceived story and omitted evidence from their interviews that did not support that story (JA1254). Defendants have presented no evidence controverting this testimony. For another example, Exhibit A to the Complaint (JA349-393) detailed 219 false statements, and Plaintiffs then presented evidence of actual malice in regard to each. JA1222, 1238, 1240-44, 1250-51, 1258, 1302-1452. Counsel for Plaintiffs directed the court's attention to the document (February 21, 2020, Transcr., JA2100-01), but the court's Order contains no indication that the Court analyzed it. JA748-76. It had previously stated it would limit the evidence it would consider. JA1113-14, 1238 n.52.

B. Defendants Misstate the Legal and Factual Relevance of the Direct Evidence They Attack.

1. Admissions by APA Officials (JA1227-29).

In their Opening Brief (at 51-52), Plaintiffs pointed out multiple admissions by members and former members of the APA Board, other APA officials, and an

APA outside counsel that could lead a jury to conclude that APA officials involved in the Report's publication knew key allegations in it were false or "entertained a serious doubt" (*Bose*, 692 F.2d at 196) about their veracity. Defendants respond by repeatedly inviting the court to weigh the evidence and construe it in the light most favorable to the *Defendants* and by questioning the inferences a jury could draw from the evidence. Their complaints about specific evidence simply highlight the need for the full analysis not undertaken by the court below and fuller discovery. *See, e.g.,* APA at 30-31, Sid. at 30.

Plaintiffs' evidence of admissions included three affidavits which Defendants claim are insufficiently detailed. APA at 12, 32, 33 n.26. In each case, any lack of detail could be resolved by further discovery. Even without that discovery, Defendants' complaints attack an affidavit's credibility, which should be tested at trial, not summary judgment.

1. Robert Resnick testified that "some [APA] Board members … acknowledged that the Report contain[s] many inaccuracies," that former presidents of the APA voiced concerns that the Board had engaged in a "rush to judgment," and that Board members "acknowledged that their actions were impulsive and not thought through." JA1720 ¶¶4-5.

2. Larry James testified that a former APA President told the APA Council that Hoffman "may have distorted matters in the report." JA1658 ¶14.

3. Plaintiffs cited former members of APA's governing bodies with first-hand knowledge of the events at issue who attested to the Report's falsehoods. Op. at 51. APA focuses on the affidavit of Dr. Barry Anton, a former APA President, complaining that his testimony was "hearsay regarding the unspecified 'beliefs' of unidentified third parties that are not connected to any alleged defamatory statement concerning plaintiffs is not evidence of actual malice by APA." Admission by a party is an exception to the hearsay rule.

In addition, David Ogden, APA's outside counsel in 2015, admitted that the Report's first primary conclusion was based upon outdated interrogation policies. JA310. (APA implies doubt whether Ogden made the statement (APA at 33-34), but the Court must assume he did because Plaintiffs' evidence must be construed in the light most favorable to them.) APA argues that its counsel's recognition that one of the Report's principal conclusions relied on incorrect facts was not evidence of actual malice on the part of APA. *Id.* However, for purposes of assessing APA's liabilities, its lawyer's knowledge is imputed to it.[63]

2. Defendants Possessed and Reviewed Documents and Testimony Contradicting the Report's Primary Conclusion (JA1240-45).

The Report's first primary conclusion—that "key APA officials … colluded

[63] *See also* the cases cited *supra* in relation to the agency relationship between APA and Sidley.

with important DoD officials" to have the PENS Task Force issue "loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines"—was built on two assertions contradicted by documents Defendants possessed and reviewed: (1) existing DoD guidance was too loose to prohibit techniques such as sleep deprivation and stress positions, and (2) the Bush Administration's narrow definition of "torture" applied to the DoD at the time of the PENS meetings. JA1242, citing JA262-72, 1366-67; 1367-77, ns. 8-11; 2240, 2249, 2265, 2302, 2304. Plaintiffs pleaded the relevance of these documents, attached some of them to the Complaint, and again presented them to the Defendants in October 2015. These are the policies that caused APA and Sidley to rehire Hoffman to revisit his Report. JA245, 394-430, 1368-1378.[64]

Sidley now argues that the Report never intended to refer to guidelines for interrogators—only to guidelines for psychologists. Sid. at 31-36. That is a distinction without a difference, as the language of the Report demonstrates. It charges that the goal of the alleged "collusion" was "to create ethics guidelines that placed no significant additional constraints on DoD interrogation practices" and

[64] APA argues (at 35) that it was under no obligation to consult its files with respect to the truth of the Report's allegations. That misses the point: APA Board members had reason to know that the Report's allegations were false because they participated in the events it described and therefore had first-hand knowledge of the falsity of the allegations about those events at the time they published the Report. In the cases APA cites, defendants had no similar reason to doubt the truth of a statement. *See Mann*, 150 A.3d at 1257-58.

"to produce ethical guidelines that were the same as, or not more restrictive than, the DoD guidelines for interrogation activities." JA2247, 2249.

Sidley is also wrong that the language of guidelines for psychologists might mean that psychologists are not constrained by policies that governed interrogations. That contention is irreconcilable with Statement Four of the PENS Task Force, which requires psychologists to be bound by all rules and regulations, including any military policies that govern their work:

> Psychologists involved in national security-related activities follow ***all applicable rules and regulations that govern their roles***. Over the course of the recent United States military presence in locations such as ***Afghanistan, Iraq, and Cuba***, such rules and regulations have been significantly developed and refined. ***Psychologists have an ethical responsibility to be informed of, familiar with, and follow the most recent applicable regulations and rules.*** The Task Force notes that certain rules and regulations incorporate texts that are fundamental to the treatment of individuals whose liberty has been curtailed, such as … the ***Geneva Convention Relative to the Treatment of Prisoners of War***.

JA271 ¶117 (emphasis added).

In addition to numerous other documents defining "the most recent applicable rules and regulations," Defendants possessed before the PENS meetings at least four copies of the "standard operating procedures" (SOP) governing interrogations at Guantanamo, drafted by Banks and Dunivin. Sidley attempts to excuse its omission of this SOP by contending it "used high-level concepts," thus supporting Hoffman's claim about the military interrogation policies in place at the

time of the PENS meetings, and that it was "substantively the same as draft DoD guidance" that used high-level concepts." Sid. at 33-34.

But the SOP states that "it is the responsibility of all BSCT personnel to familiarize themselves with *and adhere to* the UCMJ [Uniform Code of Military Justice], Geneva Conventions, applicable rules of engagement, local policies." JA399-400 (emphasis added). The Geneva Conventions and UCMJ prohibit, for example, sleep deprivation, which the Hoffman Report falsely claims was permitted at the time of the PENS meetings (*see, e.g.*, JA2240, 2249, 2265). Sidley contends that a document is "high-level and non-specific" if the specific prohibitions against abuses to which it requires adherence are contained in other documents it names. That contention violates common sense: it would require every document that requires adherence to a set of laws or regulations to include all of them in the document itself.

Regarding a copy of the SOP that Defendants obtained from Dr. James Bow (a former APA ethics chair interviewed during the investigation), Dr. Bow said:

> I provided the interviewers with the actual [APA] file containing … the March 2005 … (SOP) for Guantanamo … this was the controlling SOP providing guidance and restrictions regarding interrogations for military psychologists at Guantanamo at the time of the PENS Task Force, but it was omitted from the Report. This information in the ethics case file, which Sidley Austin was in possession of for the independent review, directly contradicts the Report's finding that existing policies at the time of PENS were loose and "high-level" and did not prohibit abusive techniques (Report, p.12).

JA1492 (Bow) ¶6.

Here as throughout their briefs, Defendants scrutinize specific pieces of evidence without regard to the cumulation that demonstrates actual malice. Here, the cumulation includes, among much else, a report from the Department of Justice's Office of Professional Responsibility (OPR) that provides an accurate timeline of military interrogation policies, demonstrating that Hoffman's characterization of those policies at the time of the PENS meetings was false. The report was overseen by David Ogden, who later became APA's lawyer.[65] JA1302-1442. Based on the OPR report and other documents presented by Plaintiffs to the Defendants in October 2015, APA rehired Hoffman in April 2016 to review the accuracy of his Report and issue a supplement to it, which never emerged.[66] At that point, Defendants most certainly had doubts about Hoffman's findings, but they did nothing and, in fact, republished the Report in August 2018. That alone is enough to demonstrate purposeful avoidance or reckless disregard.[67]

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[65] May 4, 2009, Letter to Deputy Attorney General David Ogden from counsel for the Honorable Jay Bybee, https://irp.fas.org/agency/doj/opr-bybee2nd.pdf (referencing the investigation of policies for the Office of Professional Responsibility Report). *See also* JA1363-1442, 1367, 1382.

[66] Press Release, American Psychological Association, *APA Seeks Clarification of Relevance of Specific Defense Department Policies to Independent Review* (2016), https://www.apa.org/news/press/releases/2016/04/independent-review; JA1363-1442.

[67] *See* April 15, 2016, Letter to APA Council of Representatives (COR) from Cynthia Belar, APA President https://tinyurl.com/2datd7tf (explaining Hoffman's

Sidley argues that honest misinterpretations of facts or "missing key information" does not constitute actual malice. Sid. at 36. But Plaintiffs allege much more. Sidley reviewed numerous documents that contradicted the Report's main conclusion, and repeatedly ignored them. JA1302-1442.

3. APA Board Members Were Directly Involved in the Events at Issue (JA1251-52).

Plaintiffs pleaded that APA Board members were directly involved in the events described in the Report (JA277 ¶¶143, 151, 235, 238) and, therefore, knew that the Report's description of those events was false. JA1247-48. Faced with the trial court's limitation on the evidence Plaintiffs could submit, they attached an Exhibit (B) to their Opposition below providing citations to evidence from APA files of the involvement of all APA Board members except one. JA1443-52. They also directed the Court's attention to the exhibit in the hearing. JA2103.[68]

APA may not deny the facts pleaded in Plaintiffs' Complaint about Board members' involvement in the events Hoffman investigated, having acknowledged below that it deemed them admitted. Plaintiffs have alleged that their involvement

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rehiring to reexamine some of his work). About the non-appearance of the supplemental report, Sidley (at 18, n.5) says that "one consequence of a defamation lawsuit like this is to inhibit further speech." But Defendants received Plaintiffs' initial demand letter after the supplement was due, and Plaintiffs did not file their suit until February 2017. Plaintiffs did not "chill" Sidley's speech.

[68] With respect to Board member knowledge and Exhibit B, *see also* JA1246, 1251, 1252, 1263, 1444-1452.

gave them knowledge that the Report's allegations were false or, at a minimum, obvious reasons to doubt their truth. JA299-301. Reasonable inferences are for a jury to make, based on the objective facts.

C. Defendants Mischaracterize the Legal Standards Governing Plaintiffs' Circumstantial Evidence.

Throughout, Defendants try to discard one type of circumstantial evidence after another by asserting either that it is not legally relevant to finding actual malice or that, alone, it is not enough to sustain that finding. The first assertion is contradicted by the case law, as demonstrated below. The second is beside the point. Each type of circumstantial evidence can contribute to "the cumulation of circumstantial evidence …" by which "a plaintiff may prove the defendant's subjective state of mind …." *Tavoulareas v. Piro*, 817 F.2d 789 (D.C. Cir. 1987) (en banc). The trial court similarly analyzed Plaintiffs' evidence piece by piece, drawing its own inferences and ignoring some important evidence altogether.

1. Plaintiffs' Ample Evidence of Negligence Supports Finding Actual Malice (JA1265-67).

Plaintiffs argued (Op. at 45-47) that the evidence discussed in Section III *supra* plainly raises triable issues of fact with respect to negligence. Sidley responds mistakenly that negligence is irrelevant to the issue of actual malice. Sid. at 44-45; APA at 41. The case law is to the contrary:

> Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of

> recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact …. *See St. Amant,* 390 U.S. at 732-733.

Goldwater, 414 F.2d at 343.

2. Adherence to a Preconceived Narrative Is Evidence of Actual Malice (JA1253-57).

Plaintiffs argued that the false statements in the Report were built around a preconceived narrative that a few APA and DoD officials colluded to ensure that APA actions conformed to DoD preferences by not constraining its ability to employ abusive interrogation tactics. The goal of the narrative was to shift public pressure and condemnation from APA as an organization and its Board members to a few scapegoats, including Plaintiffs. *See* Op. at 57-9.

Sidley claims incorrectly that evidence a defendant "concocted a pre-conceived storyline" does not establish actual malice. *See US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 63 (D.D.C. 2021) ("But here, the Complaint … also alleges that Lindell recklessly disregarded the truth by relying on obviously problematic sources to support a preconceived narrative ….").[69] Here, Hoffman's

[69] *See also Gilmore v. Jones*, Civil Action No. 3:18-cv-00017, 2021 WL 68684, at *8 (W.D. Va. Jan. 8, 2021) ("[E]vidence of a preconceived narrative may be relevant to the actual malice inquiry, *Harris v. City of Seattle,* 152 F.App'x 565, 568 (9th Cir. 2005)…."). *Gilmore* also cited *Eramo v. Rolling Stone, LLC* , 209 F. Supp. 3d 862, 872 (W.D. Va. 2016) for the proposition that evidence of a defendant's conduct in an investigation could be probative of actual malice because it "could lead a jury to determine that [she] had a preconceived story line and may have consciously disregarded contradictory evidence.").

preconceived narrative adopted its key themes from unreliable and biased sources.

In this case, 27 witnesses testified that Hoffman distorted or otherwise misrepresented their interviews or selectively omitted information, thus favoring his preferred narrative and ignoring evidence that contradicted it. Op. at 58; JA1219. Systematically disregarding exculpatory witnesses and testimony *is* evidence of actual malice. *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1092 (3d Cir. 1988) ("[H]is choice to credit only the portions that were damaging to Schiavone and not the portion that would have neutralized those damaging statements bears on his subjective state of mind and may point to actual malice.").

3. Defendants Purposefully Avoided the Truth by Disregarding Evidence Contradicting Their Preconceived Storyline (JA1257-59).

Purposeful avoidance of the truth is also evidence of actual malice. *See Harte-Hanks*, 491 U.S. at 692; *see also Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 108 (D.D.C. 2009). The Hoffman Report disregards the testimony of individuals who contradicted its preconceived narrative. Op. at 59-60; JA1257-59. *See US Dominion, Inc. v. Fox News Network,* LLC, No. N21C-03-257 EMD, 2021 WL 5984265 at *28 (Del. Super. Ct. Dec. 16, 2021) (although failing to investigate a statement's truth standing alone is not evidence of actual malice, "[i]f the plaintiff offers 'some direct evidence' that the statement 'was probably false,' the Court can infer that the defendant 'inten[ded] to avoid the truth.'" (internal citations

omitted)).

Sidley's only response is to point again to the number of interviews conducted and documents reviewed. Sid. at 39-40. But that volume is irrelevant to the issue of purposeful avoidance, as *Jackson v. City of Columbus*, 117 Ohio St. 3d 328, 332 (Ohio 2008) demonstrates: an investigative report and its 969 pages of exhibits gave "the appearance of thoroughness," but the investigator did not ask about the specific allegation at issue and thus failed to elicit exculpatory evidence.

Defendants possessed the BSCT policy (and others) that prohibited the abusive techniques such as sleep deprivation that Hoffman says were allowed by DoD. Hoffman's team was pointed to that policy by an APA witness. *See, e.g.,* JA2249; JA1492 ¶6; JA1541 ¶¶7-8. But Hoffman purposely avoided asking the military Plaintiffs about that policy and disregarded the language in Statement Four of PENS that incorporated such local policies by reference. A jury could infer that Hoffman purposefully avoided asking questions that might have elicited information that contradicted his allegations and acted with reckless disregard.

4. Defendants Knowingly Relied on Unreliable and Biased Witnesses (JA1260-62).

Plaintiffs also argued that Sidley's knowing reliance on unreliable and biased witnesses who were pursuing a crusade against Plaintiffs was further circumstantial evidence of actual malice. JA1260. Sidley responds that even if Defendants "acted on the basis of a biased source and incomplete information,"

that does not prove actual malice. Sid. at 40-41. Sidley misstates Plaintiffs' argument. The flaw in the Hoffman investigation was not merely relying on witnesses with an axe to grind. It was reliance on sources "*which a defendant knows are biased or unreliable, or has obvious reasons to doubt.*" Op. at 60.

Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C. Cir. 2003), cited by Defendants (APA at 43; Sidley at 37, 40, 44, 46), directly supports Plaintiffs' point: "where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts." *Id.* at 1284. The number of interviews conducted and documents reviewed is irrelevant to the question of whether Hoffman relied unduly on unreliable sources. That question could be settled only by a jury.

5. Defendants' Motive to Defame and Bias and Ill Will Against Plaintiffs Are Circumstantial Evidence of Actual Malice (JA1262-65).

Defendants argue incorrectly that motive to defame and evidence of bias or ill will are not relevant to determining whether they acted with actual malice. Sid. at 41, APA at 39. For that proposition, they cite three cases from the U.S. District Court for the District of Columbia, but ignore cases from the Supreme Court and this Court that include bias or ill will among the factors relevant to actual malice.[70]

[70] Sidley's argument that *Harte-Hanks* "specifically distinguished 'actual malice' from 'a showing of ill will or "malice" in the ordinary sense of the term'" misses

See also Op. at 62.

6. *Defendants' Refusal to Retract and Republication Are Circumstantial Evidence of Actual Malice (JA1267-69).*

Since the Hoffman Report was first published, Defendants have repeatedly been provided with evidence—by many others as well as Plaintiffs—demonstrating that the Report's allegations are false. JA245, 349-430, 1302-1452, 1455-1767. Op. at 64. They rehired Hoffman to review the Report because they had reason to doubt its primary conclusion. JA245 ¶33, JA1452. Nevertheless, they have steadfastly refused to retract the Report.

a. Refusal to Retract Is Additional Evidence of Actual Malice (JA1267).

Sidley (at 45-6) and APA (at 42) claim incorrectly that refusal to retract when faced with evidence of falsity is irrelevant to actual malice at the time a statement is published. Evidence of a steadfast refusal to retract is properly considered as bearing on the issue of actual malice.[71]

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the point. JA1865. The case says: "evidence of motive" may be "supportive" of a finding of actual malice. *Harte-Hanks,* 491 U.S. at 668; *see also Mann*: "[B]ias providing a motive to defame by making a false statement may be a relevant consideration in evaluating other evidence to determine whether a statement was made with reckless disregard ….." *Mann,* 150 A.3d at 1259.

[71] *See US Dominion,* 554 F. Supp. 3d at 63; *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985) *vacated in part on other grounds on reh'g en banc*, 817 F.2d 762 (D.C. Cir. 1987); *Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1014 (D. Minn. 2014) ("most authorities" hold that refusal to retract may be evidence of actual malice), *rev'd on other grounds*, 825 F.3d 876 (8th Cir. 2016); *Milsap v. Journal/Sentinel,*

b. Republication Is Evidence of Actual Malice (JA1269).

Despite being urged by APA members to remove the Report from its website JA1078-1081, APA doubled down by republishing the Report in 2018. *See* Op. at 11-13, 64-68. "Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard." *Nunes v. Lizza*, 12 F.4th 890, 901 (8th Cir. 2021) (quoting Restatement (Second) of Torts § 580A cmt. d (1977).[72]

Republication is a factual question that is "normally for the jury to resolve." *See Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985) (discussing responsibility for republication), *vacated in part on other grounds on reh'g en banc*, 763 F.2d 1472 (D.C. Cir. 1985), *and on reh'g*, 817 F.2d 762 (D.C. Cir. 1987); *see also Eramo*, 209 F. Supp. at 879. To prevail, therefore, Defendants must show that there are no relevant issues of material fact relevant to whether the Defendants

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Inc., 100 F.3d 1265, 1271 (7th Cir. 1996); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); Restatement (Second) of Torts § 580A, comment d (1977).

[72] *See Dombey v. Phoenix Newspapers, Inc*., 150 Ariz. 476, 490 (Ariz. 1986) ("[D]efendants had the correct information in their possession. The allegations in dispute were called to its attention several times. Nevertheless it continued to publish … thus repeating earlier factual inaccuracies even though it had been told they were untrue. We believe that these circumstances might impel the jury both to discredit defendants' protestations in its subjective belief and also to infer from objective evidence that defendants continued to publish, while entertaining doubts and thus in reckless disregard of truth."). *See also Weaver v. Lancaster Newspapers, Inc*., 926 A.2d 899, 906 (Pa. 2007).

republished and therefore "affirmatively reiterated" the statements Plaintiffs have challenged. *Eramo*, 209 F. Supp. 3d at 880. *See also* JA1269.

Courts resolving claims for web-based defamation have found that a statement on a website is republished if the material "is directed to a new audience" or "is substantively altered or added to" by the addition of new documents to the website. *Eramo*, 209 F. Supp. 3d 879 (internal citations and quotation marks omitted). C*f. Seltzer v. Fin. Indus. Regulatory Auth*., No. 1:22-cv-00330 JMC, 2023 WL 5723460, at *43 (D.D.C. Sep. 5, 2023); s*ee also* Op. at 65-6. Those fact-intensive issues are directly at issue. Plaintiffs affirmatively pleaded that both criteria have been met. JA313-16, 340-43. Defendants disagree.

As to the question of a new audience, while a separate communication of "the same defamatory matter … to the same person" is enough to constitute a republication (*Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 n.3 (1984)), Plaintiffs provided two affidavits attesting that the August 2018 communication was in fact received by "new person[s]." JA1815 ¶6, JA1821 ¶6. Defendants produced no evidence to the contrary. Instead, APA (at 47) now contends that "new readers can access the same statement." But that phrasing concedes the critical question: whether the statements did in fact reach new readers.

APA (at 45) also argues that the single publication rule applies. But "the single publication rule is of import only where res judicata or statute of limitations

defenses are at issue." *Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1106 (N.D. Ill. 2016). Neither of those defenses is raised by Defendants.

As to whether defamatory statements were substantively added to or altered, "[W]here substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred." *Davis v. Mitan (In re Davis)*, 347 B.R. 607, 612 (W.D. Ky. 2006). This principle does not require changes to the text of the original defamatory material. It applies when additional documents are added to accompany the original defamatory material, even if, as in *Eramo*, the additional material partially retracts the defamatory material. *Eramo*, 209 F. Supp. 3d at 880. The related material posted by APA included documents commenting on the substance of the Report, including quotes from and criticism of specific sections. *See* JA313 ¶ 295.

Moreover, APA took other actions that represented a conscious decision to reiterate the Report. It widely circulated the General Counsel's email drawing renewed attention to the Report. It removed the website landing page that previously allowed direct access to the Report, instead directing readers to a "Timeline" page that contained links to the related documents as well as the second version of the Report. And it redirected links to the removed version of the Report to a new URL. Those changes were not mere incidental or technical changes to

the website.[73] They reaffirmed APA's commitment to the Report.

The facts of this case take it beyond the reach of the Defendants' cases. Here, the question before the Court is whether, after Defendants had been informed of the Report's falsehoods and APA rehired Hoffman because of those doubts, could a jury find that Defendants' republication amounts to purposeful avoidance or reckless disregard of the truth?

c. Sidley Is Liable for Foreseeable Republications. (JA1800-1803).

Sidley (at 47) grossly misstates the case law asserting it cannot be held liable for republication unless "Sidley had any involvement in the August 2018 APA timeline changes or email." In *Tavoulareas,* 759 F.2d at 136 n.56, cited by Sidley below (JA1959), the D.C. Circuit held the opposite: "[t]he maker of a [defamatory] statement may be held accountable for its republication if such republication was reasonably foreseeable," and "there is no need to require proof that [defendant] knowingly participated in [another person's] republication."

[73] *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 278-79 (S.D.N.Y. 2016) (citing cases); *Larue v. Brown*, 333 P.3d 767, 773 (Ariz. Ct. App. 2014) (defendants' later comments on a website added to and altered the substance of the original material by providing additional information).

CONCLUSION

Plaintiffs respectfully request that the D.C. Anti-SLAPP Act be declared void and unconstitutional and that the decisions of the trial court with respect to public officials, negligence, and actual malice be reversed.

Respectfully submitted this 13th day of May 2024.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify on this 13th day of May 2024, that a true copy of the foregoing En Banc Consolidated Reply Brief of Appellants Cols. (Ret.) L. Morgan Banks III, Debra L. Dunivin, and Larry C. James was filed by electronic means through the D.C. Court of Appeals' filing system, concurrent with the filing of this document, and served upon all registered participants.

s/ Bonny J. Forrest
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