Nos. 22-CV-274 & 22-CV-301

DISTRICT OF COLUMBIA COURT OF APPEALS

FELICIA M. SONMEZ,

Appellant/Cross-Appellee,

v.

WP COMPANY LLC, *et al.*,

Appellees/Cross-Appellants.

Appeal/Cross-Appeal from Superior Court of the District of Columbia,
Civil Division—Civil Actions Branch
(Case No. 2021 CA 002497 B)
Judge Anthony C. Epstein

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CORPORATE DISCLOSURE STATEMENT

WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

D.C. APP. R. 28(a)(2)(A) STATEMENT

The parties in this action are:

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INTRODUCTION

Plaintiff Felicia Sonmez was a reporter for Defendant WP Company LLC, doing business as The Washington Post ("The Post"). After she issued a public statement expressing "solidarity" with #MeToo allegations, The Post's editors directed her not to cover stories addressing sexual misconduct. They allowed her to resume that reporting once the dust had settled, but Sonmez again chose to assume a public advocacy role by joining contentious Twitter debates over this hot-button social issue and her personal role in it. Seeking to preserve the newspaper's journalistic standards, The Post again limited the stories Sonmez could author. Sonmez then sued The Post and its editors ("Defendants"), characterizing these assignment decisions as discrimination in violation of the D.C. Human Rights Act ("DCHRA"). At bottom, however, this action is really just a misguided attack on The Post's editorial judgments, and the lower court was right to stay out of this First Amendment thicket by dismissing the case.

This Court should affirm at the threshold under D.C.'s Anti-SLAPP Act. Sonmez's claims arise from conduct protected by the Act, because editorial judgments about *who* should (or should not) report the news are "expressive conduct," just like decisions about *what* news to report (or not report). Both First Amendment jurisprudence and statutory anti-SLAPP law from California reinforce that conclusion. Because her claims arose from protected activity, Sonmez was required to present *evidence* to support them. Yet she declined to do so. The Post's *prima facie* showing thus became dispositive, and this Court can therefore affirm the dismissal below without reaching the merits.

If it reaches the merits, the Court should affirm on the grounds articulated by Judge Epstein. Sonmez's discrimination claims are foreclosed by her own allegations, which leave no doubt that The Post acted based on her public advocacy—not based on her sex or her status as a victim of sexual assault. In arguing otherwise, Sonmez largely ignores both her own Complaint and the Superior Court's careful reasoning—instead advancing a host of new theories she did not advance below. The same goes for her retaliation count, which fails to link any protected activity to cognizable adverse action. Again, Sonmez trots out novel and expansive legal theories because she cannot contest the Superior Court's faithful rejection of her allegations under established law.

Finally, Sonmez's claims also fail for other, independent reasons that the Superior Court did not reach (but some of which Sonmez preemptively briefed on appeal). To start, being reassigned to write *other* national political stories is not adverse action under this Court's precedents, and so cannot support a DCHRA claim. Nor do Sonmez's allegations remotely amount to a hostile work environment, which requires severe and pervasive harassment by supervisors or co-workers. On top of all that, on these unique facts, the First Amendment precludes holding The Post liable for editorial decisions about the content of the newspaper.

Each of these points underscores the same theme: This is not really an employment discrimination case. It is instead a continuation of Sonmez's personal campaign against The Post's approach to journalism. Whatever the merits of that campaign, it does not belong in a courthouse. This Court should affirm the decision below.

STATEMENT OF JURISDICTION

The Superior Court (Epstein, J.) issued final judgment on March 24, 2022. JA174-75. Sonmez timely appealed on April 18, 2022 (JA177), and Defendants timely cross-appealed on April 21, 2022 (JA180). This Court has jurisdiction over both the appeal and cross-appeal under D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

I. Whether the D.C. Anti-SLAPP Act compelled dismissal because Sonmez's claims arose from protected expressive conduct—editorial decisions by The Post and its editors regarding which reporters should cover which stories in order to best protect the newspaper's credibility—but were not supported by any evidence.

II. Whether the Superior Court correctly held that Sonmez did not plausibly allege discrimination or retaliation, where the Complaint itself acknowledges that The Post acted based on Sonmez's public advocacy rather than her sex, her victim status, or her supposed participation in any protected opposition to unlawful acts.

III. Whether Sonmez's claims also fail for independent reasons that the Superior Court did not reach, namely (i) Sonmez failed to plausibly allege that she was subjected to adverse employment action; (ii) Sonmez failed to plausible allege that she suffered a hostile work environment; and (iii) her claims challenge editorial judgments protected by the First Amendment on these unique facts.

STATEMENT OF FACTS[1]

A. The Post Hires Sonmez and Assigns Her to Stories Without Any Limitations.

Before her employment at The Post, Sonmez worked as a journalist in China. JA14-15 ¶ 16. She alleges that, in September 2017, she was sexually assaulted after a party in Beijing by Jonathan Kaiman, a male journalist from the L.A. Times. *Id.* After another woman publicly raised similar allegations against Kaiman in early 2018, Sonmez shared her allegations as well. JA15-16 ¶¶ 18-21. The L.A. Times suspended Kaiman pending an internal investigation, in which Sonmez participated. JA16 ¶ 22.

Sonmez began working for The Post as a politics reporter on the breaking news team in June 2018. JA17 ¶¶ 23-24. When she was hired, Defendants had "knowledge that Ms. Sonmez had publicly spoken about the sexual assault by Mr. Kaiman" and thus knew her status as a victim of sexual assault, but imposed no restrictions on her work assignments. JA148-49; *see also* JA17 ¶¶ 23-26. During the first three months, Sonmez wrote more than 140 stories for The Post, including at least seven concerning issues of sexual misconduct, and provided "daily coverage of Donald Trump, a president who had been accused of sexual misconduct by at least a dozen women." JA21-23 ¶¶ 39, 44. As Sonmez later described her first three months on the job, "I wrote #MeToo-related stories with no problem." JA46 ¶ 106; *see also* Sonmez Br. 1 (similar).

[1] Sonmez's allegations are assumed true for purpose of this appellate proceeding only. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011).

B. The Post Alters Sonmez's Coverage Assignments Following Her Public Advocacy on #MeToo Issues.

In September 2018, upon learning that Kaiman had resigned from the L.A. Times after its investigation concluded, Sonmez decided to release a public statement. JA20 ¶ 35. She declared that she stood "in solidarity" with the woman who raised the initial allegations about Kaiman, calling her "brave" for "paving the way for others to follow." *Id.* Emphasizing "the response of institutions" as an "essential part" of "combatting sexual misconduct," Sonmez also criticized the L.A. Times for "unanswered" questions about whether Kaiman had resigned or been terminated, and called out the paper for not being "transparent." *Id.* Defendant Wallsten had raised concerns about the latter aspect of the statement, but Sonmez proceeded anyway. JA19-20 ¶¶ 33, 35.

The next day, Defendants allegedly instituted the "first ban" by "barr[ing]" Sonmez from continuing to cover the confirmation of now-Justice Brett Kavanaugh, which centered on sexual assault allegations by Christine Blasey Ford. JA20-21, 32 ¶¶ 36-37, 66. During a meeting that day, Defendants explained to Sonmez that her statement painted her as "an 'activist'" who had "taken a side on the issue" of how sexual assault allegations should be addressed, thus creating "the appearance of a conflict of interest." JA23-24 ¶ 45. As one Defendant allegedly put it: "We don't have reporters who make statements on issues they are covering," because The Post does not want "the external perception" that a journalist is an "advocate." *Id.* Sonmez alleges that she was barred from covering #MeToo stories until November 2018. JA28-29 ¶¶ 57-59.

After the first ban expired, Sonmez "wrote approximately two-dozen stories on topics related to sexual misconduct or #MeToo." JA29 ¶ 59. But even though Sonmez admits that Defendants advised her that further public discourse "would potentially limit the stories [she] could handle," JA26 ¶ 52, Sonmez chose to speak out publicly again on the same topic. In August 2019, after Reason Magazine published an article that questioned the fairness of how Kaiman was treated, Sonmez "submitted a request for correction" and "posted [it] on her Twitter account," which identified her as a Post reporter. JA31 ¶ 63. Sonmez later "pinned" the correction request "to the top of her Twitter profile" to amplify it (*id.*), and in early September 2019, she engaged in a heated Twitter exchange on related commentary by a writer for The Atlantic (JA31 ¶ 65).

One day later, The Post allegedly reimposed the rule that Sonmez could not cover "any #MeToo-related topics," which Sonmez calls the "[s]econd [b]an." JA31 ¶ 66; *see also* JA30. And in October 2019, Defendants issued her "a written warning for violating the Post's Social Media Policy" in connection with her Twitter activity, explaining that "reporters should make every effort … to report the news, not to make the news" and must not "criticiz[e] other news organizations." JA32-33 ¶¶ 70-72. Defendants further reiterated that the second ban was based on "concern about an appearance of a conflict" on issues related to sexual assault. JA40 ¶¶ 94-95. As a result of the second ban, Sonmez alleges that she was not assigned to cover a series of stories about Joe Biden, Donald Trump, Herman Cain, Andrew Cuomo, and Eric Greitens. *See* JA39, 41, 44 ¶¶ 92, 96-98, 102. Defendants lifted the second ban in March 2021. JA46 ¶ 107.

C. Sonmez's Other Work-Related Complaints.

In addition to the "bans," Sonmez alleges that she was placed on "administrative leave" for two days in January 2020 when, immediately following the death of basketball star Kobe Bryant, she retweeted a years-old story about sexual assault allegations against him, causing a firestorm. JA34-35, 37 ¶¶ 75-78, 83. The Kobe Bryant story did "not pertain to [Sonmez's] coverage area." JA35 ¶ 78. Defendants allegedly explained that the leave would last "while the Post investigated whether her tweets [about Bryant] warranted disciplinary action," and asked Sonmez to delete the tweets in the interim. JA35, 37 ¶¶ 78, 83. Two days later, after the internal investigation determined that the Bryant tweets did not violate the Social Media Policy, the administrative leave was lifted. JA37-38 ¶¶ 83, 87. Sonmez does not allege any loss of pay from the leave.

Sonmez also objects that, on the day she published the Bryant tweets, Defendants did not immediately provide her with The Post's "security services," which she allegedly needed because the tweets prompted "threats via Twitter and email." JA35-36, 48 ¶¶ 78-81, 115. According to Sonmez's Complaint, when she inquired about the threats, Defendants instructed her that The Post's staff could assist her but did not immediately "contact[] [T]he Post's security team" on her behalf. JA36 ¶¶ 79-81. As Sonmez admitted below, however, once The Post's Director of Security was looped into the situation that same evening, he "offered assistance." Opp. to Consol. Mot. to Dismiss ("Opp.") 21 (Nov. 5, 2021); *see also* JA37 ¶ 82.

Finally, Sonmez alleges that she received a "lower rating" on one aspect of her annual review in April 2020, supposedly resulting in a "lower raise." JA39 ¶ 91. In a follow-up meeting, Defendants allegedly indicated that "[t]he basis for the low score was [her] tweets" in response to the Reason article. JA40 ¶ 94.

D. The Superior Court Dismisses Sonmez's Claims.

Sonmez filed suit in July 2021 against The Post and certain of its current and former editors. Counts I-IV alleged, respectively, discrimination based on Sonmez's status as a victim of a sexual offense, discrimination based on sex, retaliation based on protected activity, and a hostile work environment, all under the DCHRA. JA48-53 ¶¶ 112-43. Count V alleged negligent infliction of emotional distress under D.C. common law. JA53-55 ¶¶ 144-48. Defendants filed a consolidated motion to dismiss the Complaint under the D.C. Anti-SLAPP Act and Civil Rule 12(b)(6). JA150.

Rule 12(b)(6). The Superior Court dismissed Sonmez's claims with prejudice under Rule 12(b)(6) for failure to state a legally viable claim. JA148, 174.

At the outset, the Superior Court held that Sonmez's DCHRA claims based on the so-called first ban were time-barred, as Sonmez conceded. JA153; Sonmez Br. 29.

Turning to the merits, Judge Epstein reasoned that the DCHRA discrimination and hostile work environment claims (Counts I-II and IV) failed because Sonmez did not plausibly allege that Defendants took action against her because she is a victim of sexual assault or a woman. JA157, 164. To the contrary, the allegations made clear that the "The Post attributed all of the employment actions about which Ms. Sonmez complains

to her public statements, not to her victim status or sex," and "[this] stated reason—avoiding the appearance or a perception of bias by its reporters—is a basis for the bans that does not implicate the DCHRA." JA158.

The Superior Court further rejected as "affirmatively implausible" the notion that "discrimination was the real reason" for The Post's decisions, because the Complaint acknowledged that The Post hired Sonmez knowing she was a publicly identified victim of sexual assault and assigned her to numerous stories about sexual misconduct—until she chose to make "public statements that could be perceived as associating herself with the #MeToo movement." JA158, 161. The "only plausible inference," Judge Epstein concluded, is that "concern about the appearance of partiality raised by her public advocacy"—not her victim status or sex—"triggered the bans." JA161.

The Superior Court also dismissed the retaliation claim (Count III). Sonmez did not plausibly allege that her objections to the "bans" qualified as protected opposition activity under the DCHRA retaliation provision, or that those objections were causally linked to any adverse retaliatory acts by Defendants. *See* JA166-68.

Finally, the Superior Court dismissed the common law claim for negligent infliction of emotional distress (Count V), reasoning that the relationship between a newspaper and its reporters is not a "special relationship that necessarily implicates the [reporters'] emotional well-being." JA169. (Sonmez does not appeal the dismissal of this claim. *See* Sonmez Br. 17 n.3.)

Having dismissed Sonmez's claims on these grounds, Judge Epstein declined to resolve whether the First Amendment independently barred the claims as well. JA159 n.4. But he stressed that publications like The Post have a "constitutionally protected right to adopt and enforce policies intended to protect public trust in its impartiality and objectivity," including by limiting reporter assignments to prevent "situation[s] 'in which readers might be led to believe that the news reporting is biased.'" JA158. Indeed, the Court had "no[] doubt" that "a newspaper's decisions about assignment of reporters … is protected by the First Amendment." JA173.

Anti-SLAPP Act. After granting dismissal under Rule 12(b)(6), the Superior Court declined to separately dismiss under the Anti-SLAPP Act. It held that Defendants had not made the *prima facie* showing that Sonmez's claims arose from protected activity. JA170. As just noted, the court fully agreed that Sonmez's claims arose from "speech-related conduct" protected by the First Amendment—namely The Post's decisions "exercis[ing] … editorial discretion concerning the assignment of reporters." JA171-74. But in the court's view, those decisions were not "expressive conduct" protected by the Anti-SLAPP Act because they were "not speech." *Id.*

The Superior Court acknowledged, however, that the Anti-SLAPP Act would have compelled dismissal if Defendants had made the *prima facie* showing. In that case, the court explained, the burden would have shifted to Sonmez to present "evidence" that her claims were likely to succeed on the merits—yet Sonmez chose to rely "exclusively" on her allegations rather than proffering *any* supporting evidence. JA170-71.

SUMMARY OF ARGUMENT

I. This Court should affirm the decision below on the threshold ground that all of Sonmez's claims arose from expressive conduct protected by the Anti-SLAPP Act, yet she declined to proffer *any* evidence for those claims. Each claim challenges the "bans," which were decisions about who should cover certain stories for the newspaper. As the Complaint acknowledges, those were editorial judgment calls driven by Defendants' concerns—whether meritorious or not—about the newspaper's integrity and credibility. Those decisions, no less than decisions about which stories to cover and what to say in them, are "expressive conduct" involving The Post "communicating" with "the public" on matters of "public interest." D.C. Code § 16-5501(1). These editorial choices would qualify as protected expression under the First Amendment, and the California Supreme Court has afforded anti-SLAPP protection to media employers on analogous facts.

Even though a defendant's *prima facie* burden under the Anti-SLAPP Act is very low, and its protections are construed very broadly, the Superior Court reasoned that The Post's editorial choices were "not speech." JA171-72. But the Act sweeps beyond pure speech; neither this Court's decisions nor the legislative history suggest otherwise. Properly construed, Defendants satisfied their *prima facie* burden. And because Sonmez declined to submit any evidence to show her claims were likely to succeed on the merits, the statute directs that the Complaint be dismissed with prejudice.

II. Even without the Anti-SLAPP Act's heightened standard, Judge Epstein was right that Sonmez's allegations do not state viable DCHRA claims.

First, Sonmez's discrimination claims fail because it is clear from the Complaint's allegations that The Post acted based on Sonmez's (unprotected) *advocacy*—her press statement about Kaiman, her public #MeToo debates on Twitter, and her Kobe Bryant retweets—not her (protected) *victim status* or *sex*. Chronology alone demonstrates as much, as do Defendants' alleged contemporaneous statements. While Sonmez argues otherwise, her theories variously mischaracterize her own allegations, misunderstand the law, or press new arguments that she forfeited below.

Second, Sonmez's retaliation claim fails too. Most of the conduct she points to was not protected "opposition" activity because it did not amount to a claim of unlawful discrimination. Nor can any of it be causally linked to the supposedly adverse actions Sonmez objects to. Here too, Sonmez tries to muddy the clarity of her own Complaint, confuses the law, and trots out forfeited theories in an effort to save her claim.

III. If all of that were not enough, Sonmez's claims also fail on alternative grounds the Superior Court did not reach. For one, neither the "bans" nor most of Sonmez's other complaints constitute "adverse action" under this Court's precedents, and so they cannot support a DCHRA claim. For another, Sonmez has not come close to pleading the "severe and pervasive" harassment necessary to state a hostile work environment claim. And for a third, coming full circle, the First Amendment precludes the DCHRA claims in this unique circumstance where an employee is truly challenging a newspaper's editorial judgments. The Court could affirm on any of these grounds too.

STANDARD OF REVIEW

This Court reviews *de novo* both the denial of a special motion to dismiss under the Anti-SLAPP Act, and the grant of a motion to dismiss under Rule 12(b)(6). *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 738 & n.22 (D.C. 2021); *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288 (D.C. 2018). This Court has adopted the Rule 12(b)(6) pleading standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016). Under that standard, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Fourth Growth*, 183 A.3d at 1288. While factual allegations are assumed true, "naked assertion[s]" and "mere conclus[ions]" are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678-79. A complaint must be dismissed unless it includes sufficient factual allegations to "state a claim to relief that is plausible on its face." *Fourth Growth*, 183 A.3d at 1288.

ARGUMENT

I. THIS COURT SHOULD AFFIRM AT THE THRESHOLD BECAUSE SONMEZ'S CLAIMS TRIGGERED THE ANTI-SLAPP ACT BUT WERE NOT SUPPORTED BY ANY EVIDENCE.

Although the Superior Court correctly held that Sonmez did not plausibly plead her DCHRA claims, this Court can affirm the dismissal without even reaching the merits. Because Sonmez's claims triggered the Anti-SLAPP Act, she was required to submit some *evidence* to back them up; *allegations* are not enough. Yet she concededly did not. This Court can and should affirm on that antecedent issue alone.

The Anti-SLAPP Act applies if a defendant makes a "*prima facie* showing" that the claim at issue arises from "an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). Such acts are defined "very broadly," *Fells v. SEIU*, 281 A.3d 572, 580 (D.C. 2022), to include not only written or oral statements, but also "[a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest," D.C. Code § 16-5501(1). Indeed, protected acts include "anything that is expressive and communicates views to members of the public." *Fells*, 281 A.3d at 580.

The *prima facie* burden is "not onerous," *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 606 (D.C. 2020), and if satisfied, dismissal with prejudice is mandatory unless the plaintiff adduces actual "evidence"—not mere "allegations"—demonstrating that the claim is "'likely to succeed on the merits,'" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016) (quoting D.C. Code § 16-5502(b)).

Here, there is no dispute that Sonmez failed to present *any* evidence supporting her claims. JA171 ("[R]elying exclusively on her complaint, Ms. Sonmez has not proffered any admissible evidence that supports her claims."). Nor is there any dispute that, as a result, her claims must be dismissed so long as The Post satisfies its *prima facie* burden. *See* JA108 (concession to that effect by Sonmez's counsel); JA170-71 (Superior Court holding that the "Anti-SLAPP Act would provide an alternate basis for dismissal if the Post had made [the] *prima facie* showing"). Because The Post *did* satisfy its "not onerous" burden, the Anti-SLAPP Act compelled dismissal at the threshold.

A. Sonmez's Claims Arise From Activity Protected by the Anti-SLAPP Act.

The Anti-SLAPP Act applies here because Sonmez's claims arise from "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1). In particular, each of her claims challenges the "bans," *i.e.*, The Post's decisions to assign reporters other than Sonmez to cover stories about the #MeToo movement. Those editorial judgments—effectively, The Post's refusal to publish Sonmez's reporting on a particular subject—readily qualify as "expressive conduct" protected by the Act.

Just as decisions about *whether* to publish a story and *what* it should say are classic protected acts, so too are decisions about *who* should author a story—especially when a newspaper's integrity and credibility are implicated. Indeed, in the First Amendment context, courts agree that "exercise of editorial discretion," including decisions about whose content to publish, "constitutes … expressive conduct." *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 250 (D.D.C. 2017). As the Supreme Court has long held, a newspaper's decisions about what "go[es] into a newspaper," including whether to publish an item by a particular author, qualify as protected expression. *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 & nn.22, 24 (1974). Thus, in *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950 (9th Cir. 2010), the Ninth Circuit held that a newspaper's "choice of writers affects the expressive content of its newspaper," so "the First Amendment protects that choice." *Id.* at 962. And in *NetChoice, LLC v. Attorney General*, the Eleventh Circuit recently held that social-media platforms that "exercise editorial judgment"

through content moderation are "unquestionably" engaged in "inherently expressive" conduct. 34 F.4th 1196, 1213-14 (11th Cir. 2022); *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcaster that "exercises editorial discretion in the selection and presentation of its programming" engages in "speech activity"). As these courts recognize, "personnel decisions" that affect "'expressive content'" are a form of expression protected by the First Amendment. *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 378 (D.D.C. 2020) (quoting *McDermott*, 593 F.3d at 962).

The California Supreme Court has adopted this line of reasoning in the anti-SLAPP context. In *Wilson v. Cable News Network, Inc.*, 444 P.3d 706 (Cal. 2019), a writer alleged racial discrimination after CNN fired him upon learning he may have plagiarized a story. Writing for the Court, Justice Kruger held that this "staffing decision" was "'conduct in furtherance of … speech in connection with [a public issue]'" under the California anti-SLAPP law. *Id.* at 711, 722-23 (quoting Cal. Civ. Proc. Code § 425.16(e)(4)). While the statute did not protect all (or even most) personnel decisions by media employers, it did protect decisions that exercise "editorial control" to preserve "the organization's reputation[] and the credibility of what it chooses to publish." *Id.* at 721-23. Those are acts in furtherance of expression on public matters—and, indeed, lie "at the core" of the protected press function—because a news organization's ability to participate in public discourse "depends on its integrity and credibility." *Id.* at 722-23. Once CNN made a *prima facie* showing that its staffing decision was "based on such considerations," it was therefore entitled to invoke the anti-SLAPP statute. *Id.* at 723.

Both before and after *Wilson*, other courts in California rested on the same logic to subject employment actions to the anti-SLAPP regime. In *Hunter v. CBS Broadcasting, Inc.*, 165 Cal. Rptr. 3d 123 (Ct. App. 2013), for instance, a male newscaster alleged that CBS discriminated by selecting younger women as on-air reporters; the court held that "decisions regarding *who* was to report the news" were protected by the anti-SLAPP statute because those decisions directly implicate expression on public matters. *Id.* at 126, 131 (emphasis added); *see also Rall v. Trib. 365, LLC*, 256 Cal. Rptr. 3d 775, 786, 794-95 (Ct. App. 2019) (depublished) (holding that the L.A. Times's "decision not to publish plaintiff's work" was protected); *Wilson*, 444 P.3d at 721 (citing *Hunter* for proposition that staffing decisions "can constitute part of the message").

Applying these principles here, it is clear that Sonmez's claims arise from protected activity. Assigning Sonmez to other stories was effectively just a refusal to publish her writing on the #MeToo movement—an editorial judgment that constitutes "expressive conduct" involving The Post's "communicating" with "members of the public" on "an issue of public interest." D.C. Code § 16-5501(1). The assignment decisions would thus be protected expression under the First Amendment, as the Superior Court agreed (JA173); and were "exercise[s] of editorial control" implicating The Post's credibility, as in *Wilson*, 444 P.3d at 721-23. As the Complaint recounts, Defendants were concerned Sonmez had become an "activist" and "taken a side on the issue" by "speaking out" on matters like "the need for transparency" on accusations of sexual assault, and they thus directed that other reporters cover #MeToo stories to avoid the "appearance of a

conflict" and the "external perception" that Post reporters "make statements on issues they are covering." JA23-24 ¶ 45. Indeed, Sonmez admits that avoiding an apparent "conflict of interest" was the "precise explanation" for The Post's decision. JA26 ¶ 52. Thus, by her own account, The Post's editorial "staffing decision[s]" were protected by the Act. *Wilson*, 444 P.3d at 723. And insofar as Sonmez now claims on appeal that The Post's stated rationale was "pretextual," The Post has at minimum still "made out a *prima facie* case that activity underlying [her] claims is protected." *Id.* at 722.

B. The Superior Court Wrongly Narrowed the Anti-SLAPP Act's Scope.

In holding that The Post did not satisfy its *prima facie* burden, the Superior Court misinterpreted the statute.

The court first reasoned that The Post's assignment decisions were not protected because they were "not speech." JA171-72. But that overlooked the key language of this "broadly-worded statute," *Fells*, 281 A.3d at 581, which (like the First Amendment) also extends to "expressive conduct," D.C. Code § 16-5501(1)(B).

Indeed, the Council knows how to reference bare speech or expression when it wishes, *e.g.*, *id.* § 16-5501(1)(A)-(B), so its decision to use a different term—"expressive conduct"—"must be assumed to be deliberate," *Doe v. Burke*, 133 A.3d 569, 574 (D.C. 2016). By limiting the statute to speech itself, the court essentially read this term out of the statute, defying the "basic principle of statutory interpretation that a court must give effect to *all* of the [statutory] provisions." *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 145 n.55 (D.C. 2021) (emphasis added).

Put another way, the lower court's interpretation is "untenable" because it renders the Anti-SLAPP Act "redundant or superfluous." *Id.* at 145 & n.55. If "expressive conduct" is synonymous with "expression," the Council needlessly repeated itself in extending protection to both "expression" *and* "expressive conduct." D.C. Code § 16-5501(1)(B). Rather than ascribing such redundancy to the Council, this Court should give independent effect to both terms. *See Close It!*, 248 A.3d at 145 & n.55.

Lacking textual support, the Superior Court suggested that this Court in *Bronner* limited the Anti-SLAPP Act to "actual speech." JA172-73. That is incorrect. *Bronner* addressed a distinct issue: how to determine if claims "arise from" protected activity. It did not purport to construe the definition of protected activity, let alone to excise parts of the statutory definition from law. *See Bronner*, 259 A.3d at 744, 746.

The Superior Court also invoked legislative history, pointing out that the Council declined to extend protection to "[a]ny other conduct" in furtherance of speech. JA172 (quoting *Bronner*, 259 A.3d at 747-48). "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation," however, because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *District of Columbia v. ExxonMobil Oil Corp.*, 172 A.3d 412, 435 (D.C. 2017); *see also Hood v. United States*, 28 A.3d 553, 559 (D.C. 2011) ("[R]esort to legislative history to construe a statute is generally unnecessary (if not, indeed, disfavored).") And the failed proposal here is especially uncompelling, because the Council ultimately *did* extend protection to at least one category of conduct: "expressive conduct." D.C. Code § 16-5501(1)(B).

Last, the court reasoned that California authorities like *Wilson* are not persuasive because the California statute uses somewhat different language, protecting "conduct in furtherance of the exercise of … the constitutional right of free speech in connection with … an issue of public interest," Cal. Civ. Proc. Code § 425.16(e)(4). But the D.C. law covers any "act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b), and defines that phrase to include "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest," *id.* § 16-5501(1)(B). It is difficult to discern a meaningful difference between those formulations, which is why this Court has referred to these two laws as "similarly worded" and has followed California precedent on other anti-SLAPP issues. *Bronner*, 259 A.3d at 748 n.87; *see also Mann*, 150 A.3d at 1236 & nn.30-31 (following California precedent). As relevant here, both statutes protect "core" editorial decisions that affect the press's ability to engage in public discourse. *Wilson*, 444 P.3d at 722-23.

Ultimately, the Superior Court's narrow interpretation resulted in the very strange result that The Post's exercise of editorial discretion was *not* covered by the Anti-SLAPP Act even though the court agreed that "a newspaper's decisions about assignment of reporters … is protected by the First Amendment." JA173. Yet the whole point of the statute is "to provide expedited protection … for exercising freedom of expression protected by the First Amendment." *Close It!*, 248 A.3d at 142. Indeed, the statute was intended to "provide *broader* protection than existing [First Amendment] law already provides." *Khan v. Orbis Bus. Intel. Ltd.*, No. 2018 CA 002667, 2018 WL 11232420, at

*4 n.2 (D.C. Super. Ct. Aug. 20, 2018) (emphasis added). The lower court's conclusion that constitutionally protected conduct did not trigger the Anti-SLAPP Act is thus a telltale sign of statutory interpretation gone awry. The easy way to reconcile the Act with its purpose is simply to recognize—as set forth above—that, like the First Amendment, the statute reaches "expressive conduct" in addition to "actual speech."

* * *

By assigning reporters other than Sonmez to cover #MeToo-related stories, The Post exercised editorial discretion directly implicating the newspaper's appearance of objectivity. Those assignment decisions thus qualify as protected expressive conduct under the "broad[]" definition in the Anti-SLAPP Act. *Fells*, 281 A.3d at 581. Because each of Sonmez's claims arose at least in part from that protected activity but none was supported by any evidence, they must be dismissed. *See Mann*, 150 A.3d at 1233.

II. THE SUPERIOR COURT CORRECTLY HELD THAT SONMEZ'S ALLEGATIONS FAILED TO STATE A DCHRA CLAIM.

In all events, the Superior Court correctly held that Sonmez failed to plead DCHRA claims on the merits. Her Complaint's own allegations make clear that The Post acted in response to her unprotected public advocacy on Twitter and elsewhere, not her DCHRA-protected characteristics or any activity protected by the retaliation provision. On appeal, Sonmez advances a multitude of different theories—many not raised below and thus forfeited—but consistently mischaracterizes her allegations and fundamentally misunderstands what it means to discriminate based on a protected trait.

A. Sonmez's Own Allegations Show That The Post Did Not Discriminate Based On Protected Status.

To state a claim for discrimination (Counts I-II) or hostile work environment (Count IV), a plaintiff must allege that she suffered an adverse employment action, or severe and pervasive harassment, because she is a member of a protected class. *Furline v. Morrison*, 953 A.2d 344, 352 n.24 (D.C. 2008); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 888-89 (D.C. 2003). Here, Sonmez asserts discrimination based on her status as a victim of sexual assault and her sex. JA48 ¶ 116; JA50 ¶ 124. Yet, as Judge Epstein observed, the Complaint's allegations *preclude* any inference that Defendants acted based on those grounds. Indeed, Sonmez's allegations "make it affirmatively implausible that her victim status or gender was a reason for the Post's decisions." JA161.

"Most importantly" (*id.*), Sonmez admits that Defendants "kn[ew] that she was a victim of a sexual assault" (and had "publicly" disclosed that fact) when they hired her and assigned her to write stories on sexual misconduct. JA21-23, 29, 46, 54 ¶¶ 39, 44, 59, 106, 146; *see also* JA148-49, 161; Sonmez Br. 1. Her victim status was no barrier; neither was her sex. What changed? According to Sonmez's own account, Defendants imposed restrictions on her coverage assignments only once she chose to *advocate publicly* on sexual misconduct issues. Indeed, Defendants allegedly imposed the "first ban" the day after her press statement about Kaiman's resignation. JA20-21 ¶¶ 35, 37. Likewise, the "second ban" came one day after Sonmez engaged in a heated "Twitter exchange" about the Kaiman matter and #MeToo accusations. JA31 ¶¶ 65-66. That "close

temporal proximity between Ms. Sonmez's public advocacy and the imposition of each ban"—combined with Sonmez's admission that Defendants allowed her to cover any topic both before the "first ban" and again after the "first ban" expired—compels the natural inference that "it was her public advocacy and not her victim status or sex that persuaded the Post to impose the bans." JA161.

Moreover, the Complaint affirmatively *acknowledges* that Defendants acted based on Sonmez's public advocacy, not her victim status or her sex. JA158. As the Complaint recounts, the "bans" stemmed from Defendants' concern that Sonmez had become an "activist" and "taken a side" by "speaking out" publicly on issues like "the need for transparency" into sexual assault accusations. JA23-24 ¶ 45. Defendants cited the potential "appearance of a conflict of interest" and the "perception" of "reporters who make statements on issues they are covering." *Id.* They warned Sonmez that speaking "publicly" could "limit the stories [she] could handle" (JA26 ¶ 52) and advised her that "reporters should make every effort … to report the news, not to make the news" (JA33 ¶ 72). Likewise, the two-day suspension was by all accounts based on Sonmez's tweets about Kobe Bryant. JA34-37 ¶¶ 75-83. And Sonmez admits her allegedly "lower" performance review was also attributed to the way her "tweets" (sent from an account that identifies her as a reporter for The Post) created the "appearance of a conflict." JA39-40 ¶¶ 91, 94. As the lower court observed, "all of the employment actions about which Ms. Sonmez complains" were thus tied "to her public statements, not to her victim status or sex." JA158. Sonmez cannot run from those allegations now.

Of course, unlike victim status and sex, "avoiding the appearance or a perception of bias" based on public statements or advocacy "does not implicate the DCHRA." *Id.* That is because the DCHRA does not protect public statements or advocacy. There is a clear difference between being a victim of sexual assault, on the one hand, and issuing public statements criticizing newspapers for not being "transparent," on the other. JA20 ¶ 35; *see also* JA162. Only the former is protected by the DCHRA.

Sonmez tries to suggest that being a victim of sexual assault and speaking publicly on the topic are "inextricably linked." Sonmez Br. 2. But the two are distinct: One can be a victim without engaging in public advocacy, and one can engage in public advocacy even if not a victim. Being a victim is a protected trait; public advocacy is not. By way of analogy, it would be national origin discrimination for a newspaper to fire a reporter for being Russian—but it could surely preclude him from covering the Ukraine war if he made pro-Putin comments on social media. The Post likewise could not (and would not) punish a reporter for being a victim of assault, but was free to reassign Sonmez away from #MeToo stories based on her public advocacy on the topic.

Sonmez's conflation of victim status with public statements is also inconsistent with the statutory structure. The DCHRA specifically protects not only victim status itself, but also certain conduct that is often linked to sexual assault, such as participation in adjudicative proceedings and mental health treatment. D.C. Code § 2-1402.11(c-1). That confirms that the Council did not understand the Act to protect *all* activity that may simply be correlated with being a victim of sexual assault.

In short, the "only plausible inference" from the Complaint is that Sonmez's public advocacy—not her victim status or sex—triggered the allegedly adverse actions that she complains about. JA161. And since public advocacy is not protected by the DCHRA, Judge Epstein properly dismissed Counts I, II, and IV as a matter of law.

1. Sonmez's Victim-Status Counterarguments Lack Merit.

Sonmez advances a host of underdeveloped arguments that supposedly support her claim of victim-status discrimination. Sonmez Br. 29-35. Many are forfeited, and none seriously grapples with her own allegations that pleaded her out of court.

Direct Evidence. Sonmez first contends that she pleaded "direct" evidence of discriminatory intent, because Defendants supposedly "told Sonmez she was banned from covering #MeToo and given a poor performance review because she had been sexually assaulted." Sonmez Br. 29. That is not what the Complaint alleges.

Sonmez points principally to alleged statements surrounding the "first ban." She says one Defendant commented that her personal experience was "too similar" to the allegations against Judge Kavanaugh. *Id.* (quoting JA21, 24 ¶¶ 37, 45). Sonmez admits, however, that her "similar" experience was no obstacle to covering sexual misconduct *before she issued a public statement*. And she ignores the neighboring allegations that clarify that Defendants deemed her experience relevant only because she chose to "speak[] out publicly" about the #MeToo issues and thus would be viewed as an "advocate." JA23-24 ¶ 45. As Judge Epstein explained, these allegations show that Defendants did *not* think Sonmez's status as a victim somehow disqualified her from reporting on the topic

(as it had not during her first months on the job), but rather were concerned about the "appearance of a conflict" in light of her public statements. *Id.*; *see also* JA157-58.

In all events, Sonmez concedes that any challenge to the "first ban" is time-barred (Sonmez Br. 29), and these statements certainly do not provide a plausible basis to infer that Defendants harbored discriminatory intent in imposing the "second ban" almost a year later. Indeed, the story makes no sense if Defendants were punishing Sonmez "because she had been sexually assaulted" (*id.*); if so, why allow the "first ban" to expire, only to reimpose a "second ban" nine months later?

Even less probative is the assertion that Defendant Ginsberg was "uncomfortable" with Sonmez's tweet about the Reason Magazine article. Sonmez Br. 30 (quoting JA32 ¶ 68). That cannot be stretched to mean he "did not like being reminded of Sonmez's status as a sexual-assault survivor," let alone that he took action based on that status. *Id.* Rather, the obvious inference, particularly in the context of the other allegations, is that Ginsberg was "uncomfortable" because statements by reporters "on issues they are covering" raise the "appearance of a conflict of interest." JA23-24, 33 ¶¶ 45, 72.

Nor can discriminatory intent be inferred from Defendants' alleged statement after the second ban that "reporters should make every effort to remain in the audience, to be the stagehand rather than the star." JA33 ¶ 72; Sonmez Br. 30. In context, this aphorism just summarized the basic journalistic ethics that drove Defendants' actions: Reporters should aim "to report the news, not to make the news." JA33 ¶ 72. It has nothing to do with discrimination against assault victims or anyone else.

Moving to her allegedly lower performance evaluation, Sonmez concedes that its "basis" was her "tweets"—*i.e.*, her public statements, not her victim status. Sonmez Br. 30 (quoting JA40 ¶ 94). Even if the tweets "defend[ed] [against] false claims related to her sexual assault" (*id.*), they were public statements that the DCHRA does not protect.

Finally, Sonmez pivots to assert that acting to prevent a conflict of interest was here *itself* discriminatory by "cater[ing] to … readers' preferences … based on an employee's protected characteristics." *Id.* at 30-31 (citing JA24 ¶ 45). That is mistaken. Sonmez gives no reason to think that The Post sought to indulge readers' discriminatory "prejudices" against victims of sexual assault, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971), particularly since Sonmez's victim status was "publicly" known from the start (JA149). All that changed was her *public advocacy*, which means The Post acted only to indulge its readers' preferences for *objectivity*—a lawful, neutral preference that even Sonmez admits it was "free" to oblige. Sonmez Br. 31.

Indirect Evidence. Sonmez next argues that she alleged "indirect" evidence that The Post's concerns about her advocacy were *pretextual*. Sonmez Br. 32-33. Yet neither her Complaint nor her brief below even used the term pretext, let alone showed one.

The Post's decision to *lift* the second ban under "mounting public pressure," JA13 ¶ 4—some 18 months after the public advocacy that prompted it—hardly indicates that the "real reason[]" for *instituting* the ban in the first place was invidious discrimination. Sonmez Br. 32-33. If anything, the change confirms that The Post was always sensitive to external perceptions, which was precisely the original reason for the "bans."

Even further afield, Sonmez contends that The Post acted pretextually in placing her on administrative leave for two days following her Kobe Bryant tweets because The Post ultimately determined that the tweets "had not violated [its] Social Media Policy." *Id.* at 33. That makes little sense, as Sonmez admits she was placed on leave so The Post could "investigate[] whether her tweets warranted disciplinary action." JA37 ¶ 83. The Post's prompt determination that the tweets did *not* violate policy reveals that the investigation and accompanying leave worked *just as intended*, not that they were driven by animus. *See Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021) ("A paid suspension can be a useful tool for an employer to hit 'pause' and investigate when an employee has been accused of wrongdoing.").

Comparators. Sonmez also tries to raise an inference of discrimination based on comparisons to "similarly situated employees." Sonmez Br. 34-35. As the Superior Court explained, however, an employee is "similarly situated" to a comparator only if "all of the relevant aspects" of their employment situations are "nearly identical." JA156; *see also Johnson v. District of Columbia*, 225 A.3d 1269, 1283 (D.C. 2020). Yet "the relevant aspects of Ms. Sonmez's employment situation are not comparable, much less nearly identical, to those of [any] other employees." JA163-64.

To start, although Michelle Ye Hee Lee allegedly "condemn[ed]" anti-Asian hate crimes (JA42 ¶ 100), Judge Epstein explained that the objectivity and bias concerns that drove The Post's decisions about Sonmez were absent in Ms. Lee's case, rendering them not similarly situated. JA163. Sonmez insists her comments raised no appearance of

bias either, because there is only "one side to the issue" of sexual assault (Opp. 9 n.14), but that is too facile. Everyone condemns sexual assault, just as everyone condemns anti-Asian hate crimes. But the #MeToo movement addressed more nuanced issues, such as how social institutions should respond to disputed allegations like Sonmez's. It was on *those* controversial issues that she had, in The Post's view, "taken a side" by, *e.g.*, expressing "solidarity" with accusers, condemning the L.A. Times for letting Kaiman resign, and attacking Reason Magazine's pushback on #MeToo excesses. There is no plausible comparison to anything Ms. Lee ever said. *See Johnson*, 225 A.3d at 1283-84 (rejecting discrimination claim because alleged comparator took different "actions"); *Doe #1 v. Am. Fed'n of Gov't Emps.*, 554 F. Supp. 3d 75, 105 (D.D.C. 2021) (similar).

Seung Min Kim is even less comparable. While the Complaint alleges that she faced "online harassment" (unlike Sonmez, based on *her work*) (JA42 ¶ 99), there is no hint she was allowed to cover stories related to her personal experiences, let alone that she made "public statements about [those] experiences." JA163. She is not a comparator.

Nor is Defendant Ginsberg. By failing to allege or argue below that Ginsberg is a relevant comparator, Sonmez forfeited any such argument. *Sewell v. Walker*, 278 A.3d 1175, 1177 (D.C. 2022). And even if the argument had been preserved, it is untenable. As in the cases of Ms. Lee and Ms. Kim, the Complaint does not allege that Ginsberg engaged in any public advocacy involving his personal experiences or edited any stories overlapping with that advocacy. JA44-45 ¶¶ 103-04 (alleging only that Ginsberg made a statement about the threats faced by Ms. Kim).

Forfeited New Claims. Shifting gears from the Complaint's claim of discrimination based on her "status as a victim," D.C. Code § 2-1402.11(a), Sonmez tries to add new claims on appeal: that Defendants discriminated against her because she sought "mental health treatment," because of a "disruption at [her] workplace," or because of "threat[s] to [her] employment," *id.* § 2-1402.11(c-1)(1). But this Court does not consider issues—let alone claims—"raised for the first time on appeal." *Sewell*, 278 A.3d at 1177.

In all events, there is a reason why Sonmez did not pursue these claims below: They are meritless. Sonmez contends that the "first ban" was based on her seeking "mental health treatment" by taking a walk around the block after learning of the Blasey Ford allegations. Sonmez Br. 32. But a walk is not "mental health treatment" under any definition; anyway, there is no plausible allegation that Sonmez's walk was the basis for the concededly time-barred "first ban," let alone the "second ban" in 2019.

Sonmez also claims for the first time that the "second ban" was imposed because of a disruption at her workplace or threats to her employment. *Id.* at 31-32. But she merely alleges that messages posted by Twitter users were "abusive" and "false" (JA30-32 ¶¶ 62, 65, 69), not that they "disrupt[ed]" the newsroom or "threat[ened]" her employment, D.C. Code § 2-1402.11(c-1)(1)(C). And even setting aside that flaw, Sonmez does not—and cannot—claim the online attacks motivated the "second ban." JA31-32, 48, 50 ¶¶ 66-67, 116, 124. She instead says "the ban was enacted because she was a victim of a sexual offense *and had spoken out*." JA31-32 ¶¶ 66-67 (emphasis added). Sonmez's new claims are no more legally viable than the original version.

2. Sonmez's Sex Discrimination Counterarguments Lack Merit.

Sonmez fares no better trying to rehabilitate her sex discrimination claim.

First, Sonmez (joined by *amici*) argues that all discrimination against assault victims is also discrimination based on sex. Sonmez Br. 35-36. But as explained, she has not stated a claim for victim-status discrimination, so this argument is a dead-end. Anyway, Sonmez is wrong: If sex discrimination already covered victim-status discrimination, the 2019 amendment barring the latter "would have no practical effect." *Turner v. Bayly*, 673 A.2d 596, 599 (D.C. 1996). To be sure, *sexual assault itself* may constitute sex-based discrimination. L.L. Dunn Amici Br. 5. So if an employer "'condone[d]' or ratifie[d]" a "rape," that could support an inference of sex bias. *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1167 (9th Cir. 2017). Defendants, however, obviously never "'condone[d]' or ratifie[d]" Kaiman's alleged assault, which had nothing to do with The Post. *Id.*

Second, Sonmez contends that The Post committed sex discrimination by banning her "from covering stories related to discrimination against women," because #MeToo is a movement that "focuse[s] on how power dynamics and outdated expectations … have worked to silence women." Sonmez Br. 36. This is yet another forfeited theory, as Sonmez did not argue below that her removal from "stories relating to sexism" was sex discrimination due to the nature of those stories. *Id.*; *see Sewell*, 278 A.3d at 1177. This new theory is a non-starter anyway. Sonmez's reasoning is hard to follow, but the key point is that *the nature of the stories* has nothing to do with *Defendants' reasons* for assigning them. Discrimination law is concerned only with the latter.

Third, Sonmez pivots to argue that Defendants were driven by sexist "perceptions" about the "untrustworthiness" and "bias" of female reporters. Sonmez Br. 36-37. But the Complaint contradicts such an inference. Again, Defendants imposed no limits on Sonmez's assignments before her public advocacy began. JA21, 23 ¶¶ 39, 44; *see supra* at 4. And Sonmez does not allege that these stories were exclusively reassigned to *male* reporters thereafter. Sonmez Br. 37. That Defendants had "no problem" with Sonmez or other women writing these stories (JA46 ¶ 106) defeats any inference that they think women in general (or "*this* woman" in particular) "are incapable of writing objectively." Sonmez Br. 36-37. Rather, as they always said, the issue was *perception* and *appearance* of bias. JA23-24 ¶ 45. And "when the issue is whether an appearance of partiality exists, it is irrelevant whether a person is in fact able to be objective." JA160.

Nor does anything in the Complaint bear out Sonmez's speculation that The Post acted based on sexist perceptions. That Defendant Wallsten allegedly once cautioned her to write a story "straight" does not suggest he was suspicious because of her sex (as opposed to, for example, her public advocacy or other editorial concerns), let alone that he took action on that basis. JA27 ¶ 54. And the claim that a male reporter wrote two #MeToo stories in place of Sonmez (JA41 ¶¶ 96-97) goes nowhere given her admission that female reporters did the same. Sonmez Br. 37. If anything, this "undermines any inference that [The Post] treats female reporters worse." JA163 & n.9; *see also McFarland v. George Washington Univ.*, 935 A.2d 337, 347 (D.C. 2007) (rejecting an "inference of discriminatory intent" where "member of the same protected class" treated better).

Fourth, Sonmez contends that The Post relied on "sexist stereotypes" about female victims of sexual assault, related to the "'hue and cry' rule," "tightrope bias," and "prove-it-again bias." Sonmez Br. 38-40. Like Sonmez's other attempts to inject new issues on appeal, all of this is forfeited, because she advanced no argument below about these stereotypes (or any others). *See Sewell*, 278 A.3d at 1177.

In any event, none of these stereotypes has any connection to Defendants' actions. The "hue and cry rule" posits that women always resist sexual assaults and report them immediately, but Sonmez does not allege that Defendants imposed the "bans" or took other action because she did not resist or report Kaiman's alleged assault. "Tightrope bias" is equally irrelevant. Defendants did not expect Sonmez "to stay silent when her credibility was being questioned online." Sonmez Br. 39. To the contrary, The Post *authorized* her to speak about the assault, with the support of its communication team (JA17, 19 ¶¶ 25, 33), but simply expected that she cease covering #MeToo stories if she chose to speak publicly as an advocate on related issues. That is a reasonable and neutral editorial expectation, not a sex-based stereotype. JA159-61 & n.7. Finally, the "prove-it-again bias" is yet another theoretical distraction. Sonmez claims The Post held her to a higher standard of competence than men, but again her only example is inapposite: The Iraq war veteran who covered military issues is not alleged to have engaged in any public advocacy on those issues. JA41 ¶ 96. He would be a relevant comparator only if he had issued a statement condemning the Pentagon and engaged in anti-war diatribes on Twitter—and The Post would assuredly have reassigned him in that event.

It is not enough simply to identify a sex stereotype. Rather, "a plaintiff alleging sex stereotyping still 'must show that the employer actually relied on her gender in making its decision.'" *Doe v. Lee*, No. 19-cv-0085, 2020 WL 759177, at *5 (D.D.C. Feb. 14, 2020). As Judge Epstein correctly found, Sonmez's allegations do not support any such inference in this case. This new theory fails like the rest.

For these reasons, the Court should affirm the dismissal of Counts I, II, and IV.

B. The Complaint Does Not Support A Reasonable Inference That The Post Retaliated Against Sonmez For Protected Activity.

The Superior Court also correctly dismissed Sonmez's retaliation claim (Count III). A retaliation plaintiff must allege that she "engaged in a protected activity" like "oppos[ing] practices made unlawful by the DCHRA"; her employer "took an adverse personnel action against her"; and there was "a causal connection ... between the two." *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C. 1994). Sonmez splits up the elements, listing three supposedly protected acts (Sonmez Br. 45-47), five supposedly adverse personnel actions (*id.* at 48), and then various alleged causal links (*id.* at 48-50). This mix-and-match approach is designed to obscure that none of the allegations combine into any plausible story of retaliation—as Judge Epstein recognized. JA165-68.

Opposition to "First Ban." The allegations do not support a claim that Defendants retaliated for Sonmez's protests against the "first ban" in 2018. To start, that was not protected activity. Sonmez allegedly complained she was being sidelined "based on what happened to me in Beijing." JA23 ¶ 43. But, at the time, the DCHRA did not yet

"include victims of sexual assaults" as a protected class; that amendment took effect in 2019. JA166. Sonmez's pushback thus was not opposition to *unlawful* discrimination. *McFarland*, 935 A.2d at 360. To be sure, an employee is also protected from retaliation if she "reasonably believed the employer's action was discriminatory." Sonmez Br. 46-47. But Sonmez does not explain why her belief was reasonable—and there is nothing self-evidently "reasonable" about believing that conduct is unlawful in the absence of any statute saying so. *Propp v. Counterpart Int'l*, 39 A.3d 856, 863 (D.C. 2012).

Falling back, Sonmez says her 2018 objection also opposed *sex* discrimination, which was already unlawful. Sonmez Br. 47. Not so. Sonmez complained that she was being penalized for "what happened to [her] in Beijing" (JA23 ¶ 43), *not* based on her sex. As explained above, the former does not inherently entail the latter. And "the onus is on the employee to clearly voice her opposition to illegal discrimination; a vague charge of discrimination will not support a subsequent retaliation claim." JA165-66 (quoting *Vogel v. D.C. Off. of Plan.*, 944 A.2d 456, 465 (D.C. 2008) (cleaned up)).

Even if Sonmez's objection to the first ban was protected activity, it did not cause any adverse action. Sonmez vaguely suggests the objection led to "antagonism" during ensuing months in 2018. Sonmez Br. 50 (citing JA22-24). But Sonmez is undisputedly time-barred from pursuing relief for 2018 events (*see* JA153, 166), and in any event this theory is triply forfeited because it was not alleged in the Complaint, pressed below, or developed in Sonmez's brief, which does not argue that the "antagonism" was adverse action. *See* JA51 ¶ 132; Sonmez Br. 48; *Sewell*, 278 A.3d at 1177.

Nor is it plausible to infer that Sonmez's objection in 2018 precipitated the "second ban" or any other allegedly adverse actions, all of which occurred nearly a year (or more) later. Precedent holds that events must be "very close" in time to "support an inference of causation," *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007), and even a gap of four or five months is insufficient, *e.g.*, *Johnson v. District of Columbia*, 935 A.2d 1113, 1120 (D.C. 2007); *Vogel*, 944 A.2d at 462; *see also Khadem v. Broad. Bd. of Govs.*, No. 18-cv-1327, 2020 WL 6381905, at *10 (D.D.C. Oct. 29, 2020) (three months is usually "outer limit"). And any inference of causation is particularly implausible here given that The Post "ended the ban and assigned her to #MeToo-related stories in the meantime." JA167.

Opposition to "Second Ban." The Complaint does not plausibly allege that Defendants retaliated due to Sonmez's opposition to the second ban in September 2019, either. Again, there was no protected activity. Sonmez points to the allegation that she protested the second ban for "essentially the same reasons" as before (Sonmez Br. 46), but that is much too "general" and "conclusory." JA167. Sonmez objected in 2018 on numerous grounds, including that she "fe[lt] frustrated and uncomfortable"; had performed at a "high level"; and Defendants had "misinterpreted her comments" about the Kavanaugh hearings. JA21-23 ¶¶ 39, 41, 43. The Complaint thus does not plausibly allege that Sonmez complained about *unlawful discrimination* in September 2019. JA167; *see also McFarland*, 935 A.2d at 360 (plaintiff must "clearly complain about unlawful discrimination"); *Vogel*, 944 A.2d at 464-65 ("general" complaints about even "repugnant" mistreatment are not protected if not linked to specific violations).

And again, this retaliation theory founders on causation too. Sonmez says that her objection to the second ban led to a warning she allegedly received in October 2019. Sonmez Br. 48. But a warning is not adverse action at all. *See infra* at 44. And anyway, Sonmez's own factual allegations contradict her current claim. The Complaint alleges that Defendants issued the warning because Sonmez "defend[ed] herself from the false accusations regarding her sexual assault," "ma[de] herself the 'star' of her own sexual assault," and "criticiz[ed] other news organizations" in Twitter activity—*not* because she opposed the "second ban" several months earlier. JA33 ¶ 72. Defending against false claims and criticizing other news media is not protected activity under the DCHRA and so cannot support a retaliation claim. *See* D.C. Code § 2-1402.61(b).

Sonmez does no better connecting her protests of the "second ban" with the allegedly lower rating on her April 2020 review. Sonmez Br. 49 (citing JA39-40). This theory again ignores the Complaint, which unequivocally alleges that "[t]he basis for the low score was Ms. Sonmez's tweets" in August 2019—not her objection to the "second ban" in September 2019. JA40 ¶ 94; *see also* JA31 ¶¶ 63-65. Plus, the seven months that elapsed between the objection and the review preclude any inference that the former caused the latter. JA168; *see also Woodruff*, 482 F.3d at 529; *Johnson*, 935 A.2d at 1120 (finding four months to be insufficient); *Vogel*, 944 A.2d at 462 (finding five months to be insufficient); *Khadem*, 2020 WL 6381905, at *10 (treating three months as the usual "outer limit" for an inference of causation based on temporal nexus).

Sonmez also says her objection led to "increased scrutiny of her social-media activity," ostensibly because Ginsberg allegedly instructed her in October 2019 to "take down" her pinned tweet and "clear all future social media posts and responses related to her assault with her editors." Sonmez Br. 49; JA32-33 ¶¶ 68, 70-71. Sonmez did not allege or argue this theory below, and thus forfeited it. *Sewell*, 278 A.3d at 1177. In any event, scrutiny and supervision do not constitute adverse action. *See infra* at 44. And, all that aside, the only plausible inference is that his instructions were caused by Sonmez's activity on Twitter that immediately preceded the incident in question, not by Sonmez's earlier opposition to the "second ban." *See* JA32-33 ¶¶ 68-72.

Refusal To Remove Pinned Tweet. Last, there is no basis to argue that Defendants retaliated because Sonmez "refused to take down [her] pinned tweet." Sonmez Br. 47. As goes the now-familiar refrain, Sonmez never alleged or argued below that this conduct was protected activity. And, as alleged, Sonmez's "general" resistance to taking down her tweet (JA32-33 ¶¶ 70-71) does not come close to complaining about unlawful discrimination. *McFarland*, 935 A.2d at 359.

As Sonmez herself acknowledged below, "conclusory assertions of retaliation" are "'insufficient'" to withstand a motion to dismiss. Opp. 2-3 (quoting *Carter v. Verizon*, No. 13-cv-7579, 2015 WL 247344, at *6 (S.D.N.Y. Jan. 20, 2015)). As Judge Epstein correctly recognized, that is ultimately all that Sonmez offers here. This Court should therefore affirm the dismissal of the retaliation claim (Count III).

III. THE DCHRA CLAIMS ALSO FAIL FOR INDEPENDENT REASONS THAT THE SUPERIOR COURT DID NOT REACH.

Sonmez's claims were properly dismissed for the reasons given by the Superior Court. But this Court is also "free to affirm for reasons different from those relied on by the trial judge." *In re O.L.*, 584 A.2d 1230, 1232 n.6 (D.C. 1990). The Superior Court did not reach several other grounds for dismissal (JA157, 159 n.4), namely that Sonmez did not adequately plead (i) adverse action or (ii) severe and pervasive harassment, and (iii) the First Amendment bars her claims. Sonmez addressed the first two issues in her opening brief, and all three provide independent grounds for affirmance.

A. Sonmez Largely Failed To Allege That She Suffered "Adverse Action."

Adverse employment action is a critical element of Sonmez's discrimination and retaliation claims (Counts I-III). For discrimination purposes, an "adverse action" is "*a significant change* in employment status," *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 17 (D.C. 2011) (emphasis added), which arises only if the employee suffers "materially adverse consequences or *objectively tangible harm*," *Cesarano v. Reed Smith LLP*, 990 A.2d 455, 465, 467 (D.C. 2010) (emphasis added). For retaliation claims, the test is whether the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Propp*, 39 A.3d at 863-64. That standard is satisfied when an employer's action inflicts "*significant*" harm, "[t]ypically" through "*materially adverse* consequences affecting the terms, conditions, or privileges of employment." *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 112 (D.C. 2018) (emphases added).

Sonmez does not argue that she suffered adverse action under these longstanding standards. *See* Sonmez Br. 41. She instead urges this Court to apply a different standard recently adopted by the D.C. Circuit in *Chambers v. District of Columbia*, 35 F.4th 870 (2022) (en banc). *Chambers* held that a Title VII discrimination plaintiff must show he was discriminated against in the "terms, conditions, or privileges of employment," but need not show "objectively tangible harm." *Id.* at 872-74. But D.C. Circuit decisions are "not binding on this court," *Civic v. Signature Collision Ctrs., LLC*, 221 A.3d 528, 532 (D.C. 2019), and certainly cannot overrule this Court's DCHRA precedent. Divisions of this Court remain "bound to follow" the latter. *Id.*; *see also Washington v. Guest Servs., Inc.*, 718 A.2d 1071, 1075 (D.C. 1998). Because Sonmez advances no argument that she experienced adverse action under controlling D.C. precedent, Counts I-III fail.

In all events, Sonmez's allegations are inadequate under any standard. Even the en banc D.C. Circuit reaffirmed that Title VII does not impose a "general civility code," warned that "not everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment,'" and declined to disturb precedent governing retaliation claims. *Chambers*, 35 F.4th at 874, 877. Thus, for example, even under *Chambers*, "it is still the case that simple 'public humiliation or loss of reputation does not,' without more, 'constitute an adverse employment action'" for discrimination purposes; nor do "petty workplace squabbles" or "harsh, critical, and condescending" "management styles." *Fruge v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 20-cv-02811, 2022 WL 5166031, at *16-17 (D.D.C. Oct. 5, 2022); *see also Kumar*, 25 A.3d at 17.

This case involves none of the quintessential adverse actions, such as refusal to hire, demotion, or termination. *Cesarano*, 990 A.2d at 463; *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 678 (7th Cir. 2010). Sonmez remained employed by The Post as a reporter on its national breaking political news team—the same job she applied for and received in 2018—throughout the events in question. *See* JA13, 46 ¶¶ 5, 107. The "second ban," security issue, administrative leave, and other grievances do not qualify as "significant" or "materially adverse" actions and so cannot support a claim under this Court's tests (or even under *Chambers*). *Kumar*, 25 A.3d at 17; *Bereston*, 180 A.3d at 112.

Start with the "second ban." Recognizing employers' wide discretion in assigning work, this Court has instructed that courts "should be 'hesitan[t] to engage in judicial micromanagement of business practices by second-guessing employers' decisions about which of several qualified employees will work on a particular assignment.'" *D.C. Dep't of Pub. Works v. D.C. Off. of Hum. Rts.*, 195 A.3d 483, 492 n.10 (D.C. 2018). Thus, an assignment decision crosses the line to adverse action only if it results in "significantly different responsibilities." *Id.* at 491; *see also Kumar*, 25 A.3d at 17 (repeating that adverse action requires "significant change in employment status," such as "reassignment with *significantly different responsibilities*" (emphasis added)). By contrast, mere "dissatisfaction with a reassignment, public humiliation, or loss of reputation" are not legally sufficient. *D.C. Dep't*, 195 A.3d at 491. Nor is denial of "plum assignments." *Mohmand v. Broad. Bd. of Governors*, No. 17-cv-0618, 2018 WL 4705800, at *5 (D.D.C. Sept. 30, 2018).

Here, the "second ban" did not lead to "significantly different responsibilities" or otherwise alter the terms, conditions, or privileges of Sonmez's employment. Sonmez asserts that the ban resulted in five particular stories being assigned to others (JA39, 41, 44 ¶¶ 92, 96-98, 102), but otherwise her job and duties did not change (*see* JA13 ¶ 5). Indeed, Sonmez wrote an average of nearly one story every day during the pendency of the "second ban," including significant front-page stories on topics ranging from the COVID-19 pandemic to gun violence, voting rights, and the 2020 Presidential election.[2] While Sonmez might have preferred writing about #MeToo, that is not enough to constitute adverse action under the DCHRA. *See D.C. Dep't*, 195 A.3d at 491.

Sonmez's other theories of adverse action fare no better. With a single sentence and citation to *Hishon v. King & Spalding*, 467 U.S. 69 (1984), she asserts that being "denied" security protection in violation of "protocol" was adverse action. Sonmez Br. 42. But this case does not implicate *Hishon*'s holding that adverse action may occur when an employer "denie[s]" benefits under an "employment contract." 467 U.S. at 74-77. The Complaint does not allege that Sonmez's "employment contract"—or any other source of rights—called for Defendants to provide security services. *See* JA36 ¶ 81 (alleging only that "*protocol* when a reporter is threatened" is to "*contact*[] the Post's security team" (emphases added)). Nor does the Complaint allege that Defendants

[2] *See* https://www.washingtonpost.com/people/felicia-sonmez. The articles written by Sonmez while the ban was in place are judicially noticeable as matters not subject to reasonable dispute. *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003).

"denied" such services, *Hishon*, 467 U.S. at 77—only that they failed to "offer" security as promptly as Sonmez wished (JA48-50 ¶¶ 115, 123; *see also* JA35-37 ¶¶ 78-82). Indeed, Sonmez admitted below that once The Post's Director of Security was looped into the situation *that same evening*, he in fact "offered assistance," Opp. 21; *see* JA37 ¶ 82. This does not come close to adverse action impairing terms, conditions, or privileges of Sonmez's employment. *See Baird v. Gotbaum*, 888 F. Supp. 2d 63, 77 (D.D.C. 2012) (finding no adverse action where employer took some steps to address threats and employee merely objected to the "*way*" employer did so).

As to Sonmez's 48-hour "administrative leave" (with no alleged loss of pay), an abundance of caselaw establishes that it was not adverse action either. JA37-38 ¶¶ 83, 87. Indeed, "[n]o [federal] Circuit has held that a simple paid suspension … constitutes an adverse employment action." *Davis*, 19 F.4th at 1266-67; *see also, e.g.*, *Jones v. Castro*, 168 F. Supp. 3d 169, 180 (D.D.C. 2016) (paid administrative leave not adverse action); *Brown v. Georgetown Univ. Hosp. Medstar Health*, 828 F. Supp. 2d 1, 8-9 (D.D.C. 2011) (11-day paid suspension not adverse action); *Bland v. Johnson*, 66 F. Supp. 3d 69, 73 (D.D.C. 2014). Ignoring these on-point authorities, Sonmez relies exclusively on *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021). Sonmez Br. 42. But *Threat* merely held that a materially harmful change in shift assignments was actionable; it did not address paid suspensions at all, much less overrule longstanding precedent in the Sixth Circuit (and elsewhere) holding that such suspensions do not constitute adverse action. 6 F.4th at 679; *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004).

Last, Sonmez asserts that she suffered adverse action when The Post issued her a written warning for violating the Social Media Policy and scrutinized her social media activity. Sonmez Br. 48. These grievances are not legally sufficient either. *See Bereston*, 180 A.3d at 101 n.15, 113 (criticism, counseling, and warnings were not adverse action); *see also Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (warnings not adverse if no abusive language); *Dudley v. Wash. Metro. Area Transit Auth.*, 924 F. Supp. 2d 141, 179 (D.D.C. 2013) (similar); *Bell v. Fudge*, No. 20-cv-2209, 2022 WL 4534603, at *5 (D.D.C. Sept. 28, 2022) ("monitoring" insufficient even after *Chambers*).[3]

B. Sonmez's Allegations Do Not Amount To A Hostile Work Environment.

As explained above, Sonmez's hostile work environment claim (Count IV) fails because she did not plausibly allege discrimination based on any protected trait. On top of that, Sonmez failed to allege another critical element: that she was subjected to "severe and pervasive" harassment. *Lively*, 830 A.2d at 888-89.

To clear this "high bar," a plaintiff "must show that [her] employer subjected [her] to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Khadem*, 2020 WL 6381905, at *10-11. The *severity* element demands more than "workplace tribulations" like "petty insults, vindictive behavior,

[3] Defendants do not dispute that Sonmez's allegation of a lower raise—while false—could constitute adverse action. *See* Sonmez Br. 41, 48; JA39 ¶ 91. To the extent that Sonmez's claims rely on the allegedly lower raise, they fail for all of the reasons set forth elsewhere in this brief. *See* Parts II.A & II.B, *supra*; Part III.C, *infra*.

and angry recriminations." *Dieng v. Am. Insts. for Rsch. in Behav. Scis.*, 412 F. Supp. 3d 1, 15 (D.D.C. 2019). And the *pervasive* element means "offhand comments" or "isolated incidents" do not suffice. *Martinez v. Constellis/Triple Canopy*, No. 20-cv-0153, 2020 WL 5253851, at *5 (D.D.C. Sept. 3, 2020). In sum, the plaintiff must allege "extreme" conduct that "permeated" the workplace with "intimidation, ridicule, and insult," rendering it both subjectively and objectively abusive. *Id.*; *see also Lively*, 830 A.2d at 888. Not surprisingly, this demanding standard routinely results in dismissal on the pleadings. *E.g.*, *Nurriddin v. Bolden*, 674 F. Supp. 2d 64, 73-77, 93-95 (D.D.C. 2009) (dismissing despite allegations that employer reprimanded and disparaged plaintiff, "stalked" him through constant scrutiny, removed "important assignments," refused support for his work, lowered his evaluations, and denied him promotions).[4]

[4] *See also, e.g.*, *Massaquoi v. District of Columbia*, 81 F. Supp. 3d 44, 47-48, 52-54 & n.10 (D.D.C. 2015) (dismissing claim alleging removal of "essential" job responsibilities, suspension, reprimands, exclusion from meetings, denial of training, yelling, and termination); *Munro v. LaHood*, 839 F. Supp. 2d 354, 365 (D.D.C. 2012) (dismissing claim alleging removal of all assignments, lower performance evaluations, and yelling); *Laughlin v. Holder*, 923 F. Supp. 2d 204, 216, 221 (D.D.C. 2013) (dismissing claim alleging denial of promotion and bonuses, interference with job duties, and manipulation of performance reviews); *Khadem*, 2020 WL 6381905, at *11 (dismissing claim alleging change in work duties and non-promotion); *Hussain v. Gutierrez*, 593 F. Supp. 2d 1, 7 (D.D.C. 2008) (collecting additional cases holding that "complaints over undesirable job responsibilities and office arrangements do not support a hostile work environment cause of action"); *Dieng*, 412 F. Supp. 3d at 14-15 (dismissing claim alleging that employee was denied the ability to telework, had her work constantly questioned, and was alternately yelled at and ignored during meetings); *see also Houston v. SecTek, Inc.*, 680 F. Supp. 2d 215, 225 (D.D.C. 2010) ("Allegations of undesirable job assignments or modified job functions and … unprofessional and offensive treatment are not sufficient to establish [a hostile] work environment.").

The allegations here are far weaker and thus plainly cannot survive. Sonmez points to allegations that Defendant Ginsberg once "rais[ed] [his] voice[]" and instructed her regarding social media use; Defendant Grant "chastis[ed]" her in meetings; Defendant Barr made a "sarcastic" comment; and Defendants Wallsten and Montgomery asked why she did not report her assault to the police. *See* Sonmez Br. 43. But these isolated grievances, spread across a multi-year period, would not (even if true) come close to the extreme "intimidation, ridicule and insult" that can support a hostile work environment claim. *Nurriddin*, 674 F. Supp. 2d at 94-95; *see also Clemmons v. Acad. for Educ. Dev.*, 107 F. Supp. 3d 100, 119-20 (D.D.C. 2015) ("A litany of cases shows that simply having a rude, harsh, or unfair boss is not enough for a hostile work environment claim.").

Sonmez also contends that the two "bans" inflicted "anxiety and humiliation." Sonmez Br. 43. But even the "removal of important assignments" is not "sufficiently intimidating or offensive in an ordinary workplace context," *Nurriddin*, 674 F. Supp. 2d at 93-95, and workplace humiliation and stress are not enough to create a hostile work environment either, *see Singh v. U.S. House of Representatives*, 300 F. Supp. 2d 48, 54, 56-57 (D.D.C. 2004). *See also supra* at 45 n.4 (citing many similar cases).

Because these authorities make clear that *Defendants* did not subject Sonmez to a hostile work environment, Sonmez instead presses a novel argument that "third parties online" did so, and that The Post is somehow liable for that harassment. Sonmez Br. 44 (citing JA36-37). Once again, this is a new argument developed for the first time on appeal, and is therefore forfeited. *Sewell*, 278 A.3d at 1177.

It is also groundless. Sonmez cites no case imposing liability on an employer for actions by unidentified third parties online, and doing so would unreasonably expect employers to police the Internet. As the Supreme Court has explained, employers can be held vicariously liable for harassment by their employees under "principles of agency law." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). But unidentified Internet trolls are not "agents" of The Post by any measure. Sonmez invokes *Freeman v. Dal-Tile Corp.*, but that case held an employer liable for harassment by a regular customer where the employer failed to take prompt remedial action; it did not involve activity by third parties with no relationship to the employer and entirely beyond the employer's control. 750 F.3d 413, 416, 422 (4th Cir. 2014). This novel and forfeited theory cannot save Sonmez's hostile work environment claim.

C. Sonmez's Claims Are Also Barred By the First Amendment.

Even if Sonmez could state the elements of her DCHRA claims, applying D.C. law to prohibit the specific conduct at issue—namely, The Post's editorial decisions about the types of stories to assign to Sonmez in light of her public advocacy—would violate The Post's First Amendment rights. To be clear, The Post is not claiming immunity from the DCHRA or other important anti-discrimination statutes; to the contrary, The Post is firmly committed to those statutes. But as the Superior Court explained below, where a plaintiff bases a claim specifically on how a newspaper has applied journalistic standards to protect its content and preserve "public trust in its impartiality and objectivity," the First Amendment bars judicial intervention. JA158, 173.

The Superior Court was right. As discussed above in the Anti-SLAPP Act context, the First Amendment safeguards newspapers' "editorial control" and "independence," ensuring the press can perform its critical functions of reporting on public affairs and supporting an informed citizenry. *Mia. Herald*, 418 U.S. at 257-58; *Newspaper Guild of Greater Phila., Loc. 10 v. NLRB*, 636 F.2d 550, 558, 560 (D.C. Cir. 1980). That of course means the government may not interfere with the content of newspapers; indeed, a publisher has "absolute discretion to determine the contents of [its] newspaper[.]" *Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012). And because a story's authorship may affect its message and efficacy, the First Amendment also prohibits interference with decisions regarding *which writers* should report which stories.

For example, in *Passaic Daily News v. NLRB*, the D.C. Circuit held that federal labor laws could not be applied to require a newspaper to publish a reporter's weekly column: The statute "must yield," the court reasoned, to the newspaper's "First Amendment interest in retaining control over prospective editorial decisions." 736 F.2d 1543, 1558-59 (D.C. Cir. 1984). Similarly, *NetChoice* held that a state could not regulate the content-moderation decisions of social-media platforms, because such decisions resemble the "editorial judgments" of newspapers and others concerning "whether, to what extent, and in what manner [they will] disseminate third-party-created content to the public," which are "protected by the First Amendment." 34 F.4th at 1203, 1206, 1212-14; *see McDermott*, 593 F.3d at 962 (First Amendment protects "publisher's choice of writers" where that choice affects newspaper's "expressive content").

The First Amendment also affords "special consideration" to decisions intended to further a newspaper's "credibility" and "editorial integrity." *Newspaper Guild*, 636 F.2d at 558, 560-61; *see* JA158. This principle is illustrated by *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123 (Wash. 1997), which involved a reporter who was reassigned to copy-editor work because she engaged in significant political activism and thus raised the appearance of bias. *See id.* at 1124-26. The reporter sued the newspaper under a state discrimination law, but the court held her claim barred by the First Amendment. It reasoned that a newspaper "cannot be required to publish a particular reporter's work," and that the First Amendment safeguards decisions "enforc[ing] the political neutrality of reporters" and preventing "conflicts of interest." *Id.* at 1129, 1131, 1133.

In the words of the Superior Court, there is thus "no[] doubt" that "a newspaper's decisions about assignment of reporters or about adoption and enforcement of a code of ethics for its reporters is protected by the First Amendment." JA173-74 (citing *Newspaper Guild*, 636 F.2d 550, and *Nelson*, 936 P.2d 1123). And that principle means that Sonmez's claims, even if they were otherwise viable, would be barred by the First Amendment. At bottom, Sonmez asks this Court to hold The Post liable for decisions regarding the content of the newspaper and the reporters who should author each story: The two "bans" at the center of this case allegedly mandated that The Post would not publish Sonmez's work regarding sexual misconduct and would instead publish stories by others. As even Sonmez acknowledges, these decisions implicated The Post's First Amendment interests in preventing the appearance of bias resulting from her public

advocacy. *Supra* at 5-6, 17-18. "Freedom of the press leaves such decisions to the press, not the legislature or the courts." *Nelson*, 936 P.2d at 1133. Important as it may be, even the DCHRA "must yield" to the First Amendment in these unique circumstances. *Passaic Daily News*, 736 F.2d at 1558-59. As a constitutional matter, The Post is entitled to "control over [its] editorial decisions" and "the contents of [its] newspaper." *Id.* at 1557, 1559; *NetChoice*, 34 F.4th at 1213-14; *Ampersand Publ'g*, 702 F.3d at 56.[5]

Because Sonmez's claims on their face challenge The Post's exercise of editorial discretion on matters relating to the credibility and impartiality of the newspaper, those claims cannot be squared with constitutional principles, and the Court can affirm on that basis. At minimum, however, Sonmez's claims raise "serious doubt[s]" under the First Amendment, *Coleman v. United States*, 202 A.3d 1127, 1140 (D.C. 2019), and the Court can avoid those constitutional questions by construing the DCHRA to authorize The Post's consideration of reporters' public advocacy in selecting their assignments—for all of the reasons explained above. Either way, this Court should affirm.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

[5] "Given the Court's resolution of the Post's motion on other grounds," Judge Epstein did not directly rule on the First Amendment. JA159 n.4. He also noted that The Post described its First Amendment defense as "subsumed" by its Anti-SLAPP motion. *Id.* Indeed, The Post believes the Anti-SLAPP Act is broader than the First Amendment, and so the "standard for the special motion is lower than the standard to actually prove the First Amendment defense." JA105; *see also* Part I, *supra*. But if the Court construes the Anti-SLAPP Act to sweep more narrowly than the Constitution, then Sonmez's claims should be dismissed on First Amendment grounds.

Dated: January 13, 2023

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

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

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

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

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

/s/ Jacqueline M. Holmes
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22-CV-274 & 22-CV-301
Case Number(s)

January 13, 2023
Date

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2023, I filed the foregoing Opening and Response Brief with the Clerk of Court via the Appellate E-Filing System, causing the filing to be served on counsel for Appellant/Cross-Appellee. In addition, I caused an electronic courtesy copy to be served on counsel for Appellant/Cross-Appellee via email.

Dated: January 13, 2023

/s/ Jacqueline M. Holmes
Jacqueline M. Holmes

Counsel for Appellees/Cross-Appellants

ADDENDUM

TABLE OF CONTENTS

D.C. Code § 16-5501
Definitions

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

D.C. Code § 16-5502
Special motion to dismiss

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When 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. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.