SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	)	
Plaintiff,	)	Case No 2012 CA 008263 B
	)	Judge Alfred S. Irving, Jr.
v.	)	
NATIONAL REVIEW, INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S REPLY TO NATIONAL REVIEW INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR STAY OF FEE AWARD AND SUPPLEMENTAL MOTION FOR FEES ON FEES

INTRODUCTION

NRO opposes Dr. Mann's request to stay enforcement or execution of the Court's Amended Order on Fees without bond and, in turn, demands immediate payment of the $530,820.21 amount and an *additional* $10,412.00 as fees-on-fees-on-fees under the D.C. Anti-SLAPP Act. The opposition comes despite the existence of a highly consequential matter before the Court of Appeals directly affecting the Amended Order on Fees at issue and the existence of two appeals already before the Court of Appeals in this particular matter, one of which may render NRO liable for the actions of the defendant Mark Steyn who currently owes Dr. Mann $1,000,001. This mean-spirited and unjustified request by a powerful organization to intimidate a college professor who was defamed in NRO's own publication should not be granted.

ARGUMENT

I. NRO Mischaracterizes the *Banks* Matter and Well-Settled Law in the District of Columbia on Retroactivity.

NRO argues that the validity of the Anti-SLAPP Act cannot be raised in this stage of the litigation and that any future holding in *Banks* would not affect the outcome of this case. NRO Opp. at 4 (Feb. 14, 2025). This is wrong.

First, Dr. Mann first put this Court on notice of the *Banks* matter in his opposition to NRO's first fee request and proposed a stay on any ruling pending the outcome. Pl. Opp. at 6 n.3 (Apr. 10, 2024). There is nothing improper about seeking a separate stay of execution or enforcement without bond on that same ground, nor was there any waiver of this issue being presented again now.

Second, contrary to NRO's characterization of the *Banks* proceeding, the plaintiffs in *Banks* seek to strike down the entirety of the Anti-SLAPP Act as procedurally void, unconstitutionally broad on its face, and unconstitutional as applied. *See* Williams Decl. ISO Reply, Ex. 1 at 1 ("Statement of Issues"); 13 ("*Issue 1*: The D.C. Anti-SLAPP Act is void because it was enacted in violation of the D.C. Home Rule Act (HRA), codified in D.C. Official Code § 1-201.01 *et seq*. (emphasis in original)); 14 ("*Issue 2*: The D.C. Anti-SLAPP Act is unconstitutional, both facially and as applied." (emphasis in original)); 75 ("Appellants respectfully request that the D.C. Anti-SLAPP Act be declared void and unconstitutional[.]"). The very heart of the *Banks* challenge is the standard of review for Anti-SLAPP motions established (for the first time) in this case—a standard that determines whether a plaintiff will pay attorneys' fees in the first place. *See generally id*. (citing *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016) sixteen times). Either implementation of that standard as applied to this case first and to all cases going forward violated the HRA and U.S. Constitution, or it did not. The decision is of such importance that the

Court of Appeals has taken up the matter *en banc.* And, without question, all previous Court of Appeals rulings that currently uphold all or part of the Anti-SLAPP Act are now subject to the final outcome in *Banks*.

Third, well established principles of our judicial system since the Supreme Court decision in *United States v. Schooner Peggy* in 1801 have determined that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." 5 U.S. 103 (1801). The District of Columbia has carried that same logic to their courts by applying a "firm rule of retroactivity" and giving "full retroactive effect in all cases open on direct review." *See Davis v. Moore*, 772 A.2d 204, 230 (D.C. 2001). The law is clear here.

NRO cannot seriously contend that this decade-long case will be fully adjudicated by the time of the *Banks* decision, now scheduled for argument on February 25, 2025. Dr. Mann has already appealed the decisions dismissing NRO and co-defendant CEI, March 8, 2024 Notice of Appeal, as well as the Amended Order on Fees, February 6, 2025 Notice of Appeal. If Dr. Mann succeeds, NRO may, ultimately, need to answer for the writings of Mr. Steyn who currently has a million-dollar judgment against him. *See* February 9, 2024 Final Judgment Order; March 8, 2024 Notice of Appeal, Attach B. (appealing March 19, 2021 Order dismissing Dr. Mann's vicarious liability and agency arguments against NRO). In any retrial that amount may be higher. To date, nine trial and post-trial motions remain pending relating to the February 9, 2024 Final Judgment Order issued against Mr. Steyn and Mr. Simberg. Whatever this Court's decision may be there, further appeals are highly likely, and the entire case will, once again, be before the Court of Appeals in a series of appeals. It is no stretch of imagination to conclude the *Banks* decision will

come well before appellate resolution of this case, and this Court would be well within its discretion to stay the bond requirement under the circumstances.

II. Dr. Mann's Request is Not a Vexatious Tactic.

NRO has demanded for the immediate payment of the entire fee award simply because Dr. Mann has requested a stay of the award without bond, alleging the request was "vexatious" and a "delay tactic[]." *See* NRO Opp. at 1. NRO also appears to have taken the position that any challenge to NRO is deserving of immediate fees. Dr. Mann is within his rights as a largely meritorious litigant in a multi-defendant case, and the relief requested is well within the bounds of this Court to grant under Rule 62, which states "execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise." D.C. Sup. Ct. R. 62(a) (emphasis added). Dr. Mann's request is no more a "vexatious filing[]" or "delay tactic[]" than Mr. Steyn's Motion for Stay of Execution on the Judgment filed on March 8, 2024. NRO Opp. at 1. Although Dr. Mann opposed Mr. Steyn's request, he did not demand immediate payment of the entire judgment (or seek fees). Nor has he sought any form of execution relief while Mr. Steyn's motion remains pending, acknowledging the Court's inherent power to grant the relief requested.

Dr. Mann is simply requesting the same accommodation previously sought by Mr. Steyn. It is unclear why NRO, a multi-million dollar organization, is demanding immediate payment from a college professor, despite that professor already having received a favorable judgment against said organization's own writer. It is also undeniable that this very complex case is not at the end of review and that one of Dr. Mann's current appeals will implicate the issue of exactly who should pay the existing million-dollar verdict owed to Dr. Mann—which may be more upon retrial. Any request for immediate payment of $530,820.21 under these circumstances is unjustified and, more

so, clear indication of spite and ill-will towards Dr. Mann. The attempt to use unjustified fee requests to lock winning plaintiffs out of court should be denied.

III. The Request For More Fees is Premature.

NRO has tortured the Anti-SLAPP Act to its extreme in requesting additional, "fees on fees" to cover its attorneys' fees in preparing its opposition papers. Dr. Mann does agree that the work here is properly classified as appellate work as his motion was filed contemporaneously with his appeal of the Amended Order on Fees. *See* February 6, 2025 Notice of Appeal; NRO Opp. at 5 (citing *D.C. Metro. Police Dep't v. Stanley*, 951 A.2d 65, 68 (D.C. 2008) for the proposition that fees on fees may include "work on appeal"). NRO cites no case law under the Anti-SLAPP Act that such fees-on-fees-on-fees are compensable for appellate work prior to resolution of the appeal. If the Anti-SLAPP Act is upheld and Dr. Mann loses his appeal challenging the Amended Order on Fees, NRO can resurrect its fee-on-fee-on-fee request and Dr. Mann will respond in kind, but it is currently premature.

CONCLUSION

For the foregoing reasons, this Court should grant Dr. Mann's motion, stay any proceedings to enforce the Amended Order on Fees pending the outcome of appeals, and deny NRO's request for additional fees.

Dated: February 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2025, I caused a copy of the foregoing *Plaintiff's Reply to National Review Inc.'s Opposition to Plaintiff's Motion for Stay of Fee Award and Supplemental Motion for Fees* to be served via electronic filing on the following:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al.*, Defendants.	Case No 2012 CA 008263 B Judge Alfred S. Irving, Jr.

DECLARATION OF JOHN B. WILLIAMS IN SUPPORT OF PLAINTIFF'S REPLY TO NATIONAL REVIEW INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR STAY OF FEE AWARD AND SUPPLEMENTAL MOTION FOR FEES ON FEES

Pursuant to Superior Court Rule of Civil Procedure 43, I, John B. Williams, declare:

1. I am currently a member in good standing of the Bar of the District of Columbia. I am an attorney at Williams Lopatto PLLC, and counsel in this matter for Plaintiff Michael E. Mann, Ph.D. I submit this declaration in support of *Plaintiff's Reply to National Review Inc.'s Opposition to Plaintiff's Motion for Stay of Fee Award and Supplemental Motion for Fees*. I have personal knowledge of the facts stated herein and, if called as a witness, I could competently testify to them.

2. Attached hereto as Exhibit 1 is a true and correct copy of the En Banc Opening Brief of Appellants before the District of Columbia Court of Appeals in *Banks v. Hoffman*, case number 20-CV-0318, filed on February 28, 2024.

Executed this 21 day of February, 2025, in Washington, D.C.

/s/ John B. Williams
JOHN B. WILLIAMS

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2025, I caused a copy of the foregoing *Declaration of John B. Williams in Support of Plaintiff's Reply to National Review Inc.'s Opposition to Plaintiff's Motion for Stay of Fee Award and Supplemental Motion for Fees* to be served via electronic filing on the following:

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EXHIBIT 1

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

IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Morgan Banks, *et al.,*

Plaintiffs-Appellants,

v.

David H. Hoffman, *et al.,*

Defendants-Appellees.

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

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

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(a)(2)(A) CERTIFICATE

Plaintiffs-Appellants: Cols. (ret.) L. Morgan Banks III, Debra L. Dunivin, Larry C. James
Counsel: Bonny J. Forrest; Kirk Jenkins; John Williams, Williams Lopatto PLLC; Tom Clare, Joe Oliveri, Clare Locke LLP (below)

Defendants-Appellees: David Hoffman, Sidley Austin LLP, and Sidley Austin (DC) LLP. (According to disclosure statements below, Virginia A. Seitz is a partner in Sidley Austin (DC).)
Counsel: Thomas G. Hentoff, John K. Villa, Stephen J. Fuzesi, Krystal C. Durham, Matthew Greer (below), Eli S. Schlam (below), Alexander J. Kasner (below), Williams & Connolly LLP

Defendant-Appellee: American Psychological Association
Counsel: Barbara S. Wahl, Randall A. Brater, Michael F. Dearington, Karen Carr (below), ArentFox Schiff

Intervenor-Appellee: D.C. Attorney General
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do the procedures created by the District of Columbia Anti-SLAPP Act violate the congressional mandate, as codified in D.C. Code § 11-946, that the Federal Rules of Civil Procedure (FRCP) govern the D.C. Superior Court unless this Court approves a modification to those rules? Argument, Section II.

2. Is the Anti-SLAPP Act unconstitutional under the First Amendment, both facially and as applied, because it impermissibly burdens the right of meaningful access to the courts for citizens with legitimate claims for redress? Argument, Section III.

3. Was summary dismissal of Plaintiffs' defamation claims under the Anti-SLAPP Act inappropriately granted?

   a. Did Defendants produce sufficient evidence to establish as a matter of law that Plaintiffs are "public officials" who must show Defendants acted with "actual malice"? Argument, Section IV.

   b. Did Plaintiffs' evidence create one or more triable disputes of fact regarding negligence and actual malice? Argument, Section V.

   c. Did Defendants produce sufficient evidence to establish as a matter of law that they did not republish the report at issue in 2018, thereby further establishing actual malice? Argument, Section V-B-3-f.

d. Did the trial court err by failing to analyze all claims and, for those it did analyze, impermissibly usurping the role of the jury by deciding triable issues of fact? Argument, Section VI.

STATEMENT OF THE CASE

Plaintiffs are three retired military psychologists who had worked for years to stop the abusive interrogations of detainees—including torture—that occurred after 9/11. Despite their work, the report at the heart of this case falsely accused them of having colluded with American Psychological Association (APA) officials to ensure that APA did not create obstacles to military psychologists' participation in abusive interrogations. The report resulted in headlines in the U.S. and internationally such as "Psychologists Who Greenlighted Torture." JA246-47.

The report resulted from an investigation commissioned in 2014 by the APA after a journalist accused it of colluding with the government to enable torture. The investigation was conducted and the report written by David H. Hoffman, a partner of Sidley Austin LLP.

Soon after the report (Hoffman Report or Report, JA2223-2785) was published in 2015, many APA members with first-hand knowledge of the events it described provided testimony contradicting its conclusions and its allegations about Plaintiffs. Plaintiffs and others provided governmental documents—including documents in Defendants' possession—undercutting its primary assertion that then-

current military interrogation policies allowed for abusive interrogation techniques. JA1371-1374. Plaintiffs then asked for a statement correcting the Report's defamations. JA1267-68. Defendants refused, instead rehiring Hoffman and Sidley to fix the Report. JA312, ¶290. That fix never emerged. JA1456, ¶6.

In February 2017, Plaintiffs sued Hoffman, Sidley Austin LLP, and the APA (together with Sidley Austin (DC) LLP, Defendants) for defamation *per se*, defamation by implication, and false light invasion of privacy. They sued in Ohio, where Plaintiff Dr. Larry James resided. Defendants successfully contested personal jurisdiction in that state, which has no anti-SLAPP statute, and declined to consent to personal jurisdiction except in the District of Columbia. On August 28, 2017, Plaintiffs filed their Complaint in the District. JA39-228.[1]

In October 2017, APA and Sidley/Hoffman each filed a special motion to dismiss under the Anti-SLAPP Act. JA432-734. Plaintiffs then filed (and later supplemented) a 56(d) motion seeking targeted discovery under the Act, including four document requests and three depositions. JA735-80, 822-52. The court, after

[1] When Defendants successfully sought a stay of the D.C. litigation while Plaintiffs' appeal of the Ohio dismissal was pending, Plaintiffs filed a "safety" lawsuit in Massachusetts to assure that they would have a forum somewhere. *See Curtis v. Aluminum Ass'n*, 607 A.2d 509, 512 (D.C. 1992) ("[A] plaintiff must file in all possible fora in order to avoid a later limitations bar . . . ."). Plaintiffs dismissed that suit, without prejudice, after Defendants represented to the Massachusetts court (as they had in Ohio) that Plaintiffs' claims could move forward in D.C.

granting the motion in part and denying it in part, later vacated *sua sponte* its provision for the three depositions. JA1138-39.

In August 2018, in an email from its General Counsel, APA circulated new instructions for accessing both the Report and documents newly accompanying it on the APA website. On February 4, 2019, Plaintiffs supplemented their Complaint, asserting that the Report had been republished and that the republication was evidence of actual malice. JA229-430. On March 21, 2019, Defendants responded with a second pair of special motions. JA313-16, 959-1081.

Defendants' anti-SLAPP motions summarily assert in four paragraphs that Plaintiffs are public officials who must demonstrate Defendants acted with actual malice. JA451-452 (Sidley), 721 (APA). They also assert that Plaintiffs could not make that demonstration, and that no republication occurred in 2018. The motions did not assert the truth of the Report's allegations as a defense, and Defendants did not file 12(b)(6) motions alleging any other basis for a defense.

In March 2019, the trial court ordered two original Plaintiffs, Drs. Stephen Behnke and Russ Newman, both former APA employees, to arbitrate their claims. Both had been fired because of the Report's allegations against them.

Plaintiffs moved to declare the Anti-SLAPP Act void in violation of the Home Rule Act (HRA) and the First Amendment right of meaningful access to the courts. The trial court denied the motion on January 23, 2020. JA2043-56. On March 11,

2020, it granted Defendants' special motions to dismiss. JA2164-92. The next day, it issued *sua sponte* an amended order of dismissal. JA2193-2222. This appeal is from the January 23, 2020, Order and the March 12, 2020, Amended Order that disposed of all of Plaintiffs' claims.

On September 7, 2023, a division of this Court held that the discovery-limiting aspects of the Act's special-motion-to-dismiss procedure conflict with the requirement of D.C. Code § 11-946 that the Superior Court conduct its business according to the FRCP unless this Court approves a modification. The division invalidated the discovery limits and reversed and remanded.

Defendants and Intervenor the District of Columbia then petitioned for rehearing or rehearing en banc. On January 23, 2024, the Division denied rehearing, and this Court vacated the Division's opinion and granted an en banc rehearing.

STATEMENT OF FACTS

In its response to 9/11, the United States captured and interrogated hundreds of detainees. As the media soon reported, some were subjected to horrifying forms of abuse, including waterboarding and other types of torture. After these reports emerged, the Department of Defense (DoD) began to formulate policies that became increasingly rigorous and specific in their prohibitions against abuse (JA403-13,

1363-1442), and to take steps to implement the policies (JA1433-39).[2]

Plaintiffs—mid-level military psychologists with the rank of colonel or lieutenant-colonel—did not formulate these high-level policies. Their superiors established the policies and Plaintiffs, among others, reduced them to writing and implemented them. JA394-400. After Plaintiffs were deployed to help stop abuses at interrogation sites, they did so by drafting documents that confirmed the limits of permissible interrogation, prohibited abuses, and specified that the Geneva Conventions applied. JA272-73; 1541, ¶5. They also provided training in eliciting information without abuse. They monitored interrogations and, on occasion, intervened directly to stop abuses. JA1462-71, 1540-55, 1655-60. An officer in the Judge Advocate General's Corps testified that:

> I am personally aware that Colonel Banks stopped the abuse of at least one detainee. The detainee had some of his blankets taken away during the night, and had been slapped in the stomach by a guard. Colonel Banks was incensed and immediately had the offending individual permanently removed from the facility. . . . Colonel Banks continued to make sure that no abuse occurred . . . .

JA 1754, ¶6.

Despite this work, Plaintiffs and other military psychologists were attacked

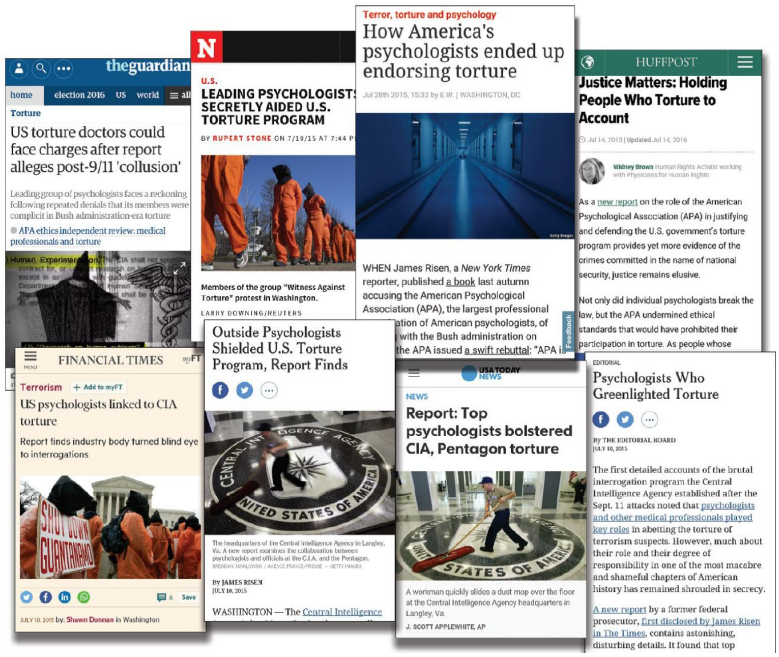
[2] The media and Hoffman often conflated the military and the Central Intelligence Agency (CIA), although military and CIA interrogation policies and practices increasingly differed. Plaintiffs were not involved in the CIA interrogation process, and Hoffman did not find that the CIA influenced the APA's guidelines for the use of psychology in interrogations. JA2246-47.

by those who believed psychologists should withdraw entirely from the interrogation process. While Plaintiffs committed themselves to stopping abuse from within the military, their critics asserted that psychologists who played any role in the interrogation process were complicit in the abuses and should be prosecuted.

The critics continued their attacks for years. They attacked not only individual military psychologists, but also their professional organization, the APA. The attacks culminated in a book by a *New York Times* reporter, James Risen, published in 2014. It accused the APA of colluding with the Bush Administration and the CIA to enable torture. JA237-39.

To respond to these attacks and assuage its critics, the APA commissioned an investigation into Risen's allegations from Sidley and its partner David Hoffman. JA237, ¶2; 1221, fn 16. The specific question APA posed for Hoffman was "whether APA colluded" with DoD, CIA, or other government officials "to support torture." JA2301. The resulting report accused Plaintiffs of colluding with APA officials to promulgate APA guidelines governing interrogations that were too weak to prohibit abuses, such as sleep deprivation, that amounted to torture. It also accused them of colluding to stop APA from banning psychologists from any role in the interrogation process. JA2246-47. But it attached no blame to APA Board members who were themselves heavily involved in the events it described, including the head of the Special Committee that oversaw the investigation. JA1444-52.

Before APA released the report in July 2015, a Word version was leaked to the *New York Times*. Plaintiffs' evidence demonstrates that the leak came from Hoffman or his team. According to APA, Hoffman and Sidley were the only ones who had access to a Word version of the Report that could be emailed anywhere on the relevant date. JA1225, fn 34; 1568-69, ¶¶9-14. The leak led to prominent headlines such as those below in the *Times* and many other places. JA246-47.



APA then published the Report, in a process that Board members acknowledged was "impulsive and not thought through." JA1719-25, ¶5. It was promptly met with uproar from those with first-hand knowledge of the events it described, and they began to provide documents and testimony proving its assertions to be false. Members of the APA Board admitted privately that there was "no evidence" of collusion. They said the Report contains "many inaccuracies." And

they acknowledged "clear evidence" that Hoffman may have "distorted" matters in the Report. JA1658, ¶14; 1719-25, Ex. 1.

Eight former APA presidents and 14 Ethics Committee chairs signed open letters to the APA Board condemning the Report. JA310; 315; 1779, fns 12, 13, 14. Other APA members with first-hand knowledge of the events at issue also spoke up. One such statement came from Dr. Linda Woolf, who *supported* the ban on psychologists' participation in the interrogation process that Plaintiffs were accused of colluding to block. In an unsolicited letter, she said:

> I am stunned by the misinformation, mischaracterization, and biased presentation of this Report . . . . [it] totally disregarded some events and took other events and bent them to fit a destructive narrative.

JA261-62; 1484, ¶34.

Most damningly, in October 2015, Defendants were presented with documents flatly contradicting the Report's conclusion that Plaintiffs colluded to ensure APA did not promulgate interrogation guidelines which created obstacles to abusive interrogations. JA1363-1442.

At the center of the Report are the guidelines produced by an APA task force formed to "explore . . . the use of psychology in national security-related investigations.". (The Psychological Ethics and National Security Task Force (PENS).) The Report falsely asserts that, when the task force met in 2005, existing military interrogation policies did not prohibit abuses that constituted torture:

> . . . then-existing DoD guidance . . . used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation . . . .

That assertion underpins the Report's primary false conclusion:

> [K]ey APA officials . . . colluded with important DoD officials [primarily Plaintiffs] to have [APA's PENS Task Force] issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than *existing* DoD interrogation guidelines. (emphasis added)

JA2246-47, 2249.

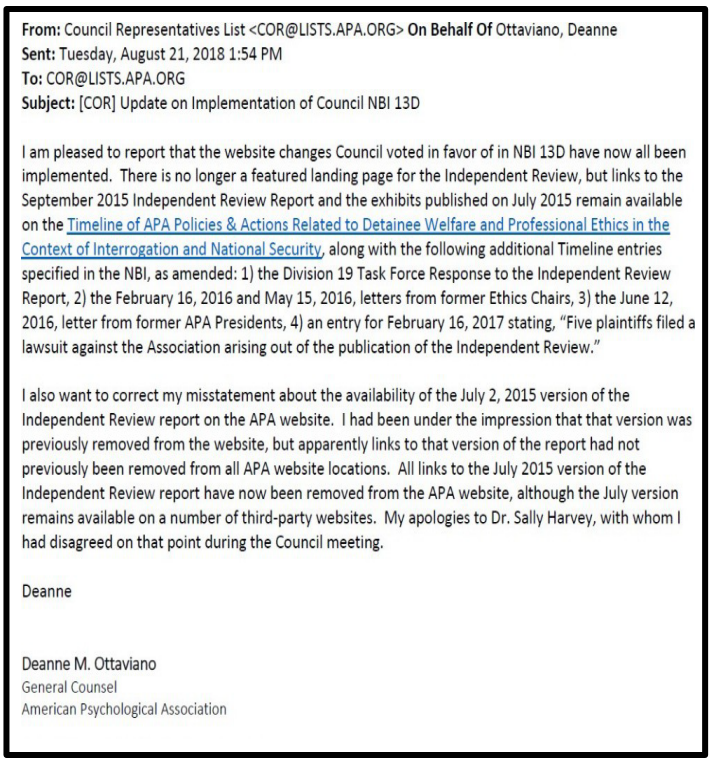
When PENS met, however, the existing DoD policies and military Standard Operating Procedures (SOPs) were specific and detailed about permissible interrogation techniques, and did prohibit techniques such as sleep deprivation and stress positions that amounted to torture. The SOPs, some of which were drafted by Plaintiffs, strictly limited permissible techniques, required psychologists to report any suspicions of abuse, and applied the Geneva Conventions. JA394-400 (Guantanamo SOP), 1464-65. These documents were in Defendants' possession during the investigation. JA1241-43. They do not claim they did not read them. Additional documents which Defendants possessed also prohibited those techniques. *See, e.g.,* JA1241-1245, 1302-1314.

The up-to-date military guidance governing interrogations in Afghanistan, Iraq, and Guantanamo was expressly incorporated by reference in the PENS guidelines, which also stated that psychologists have "an ethical responsibility to . . . follow the most recent applicable regulations and rules." JA1244.

Thus, documents Hoffman possessed contradict his claim that the PENS guidelines did not prohibit abusive techniques such as sleep deprivation and stress positions and that Banks and other DoD officials were reluctant to prohibit them.[3] JA2249, 2305. See Section V-B-2-b infra. In light of those documents, APA rehired Sidley to fix the Report by June 2016. JA1452; JA1456, ¶6. That fix never materialized.

Three years after the Report's initial publication and republications in 2015, on August 21, 2018, APA's General Counsel sent an email to 150 members of the APA Council (its governing body), along with others.

[3] Hoffman also claims that, in Banks' interview with Sidley, Banks stated that he believed sleep deprivation was permitted. JA2302-3. But Sidley's interview notes of Banks, when provided, will show that claim to be false. Plaintiffs requested those notes below, and the court denied the request as cumulative of the complaint. JA899; 1465 ¶¶ 11-13.



From: Council Representatives List <COR@LISTS.APA.ORG> **On Behalf Of** Ottaviano, Deanne
Sent: Tuesday, August 21, 2018 1:54 PM
To: COR@LISTS.APA.ORG
Subject: [COR] Update on Implementation of Council NBI 13D

I am pleased to report that the website changes Council voted in favor of in NBI 13D have now all been implemented. There is no longer a featured landing page for the Independent Review, but links to the September 2015 Independent Review Report and the exhibits published on July 2015 remain available on the Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, along with the following additional Timeline entries specified in the NBI, as amended: 1) the Division 19 Task Force Response to the Independent Review Report, 2) the February 16, 2016 and May 15, 2016, letters from former Ethics Chairs, 3) the June 12, 2016, letter from former APA Presidents, 4) an entry for February 16, 2017 stating, "Five plaintiffs filed a lawsuit against the Association arising out of the publication of the Independent Review."

I also want to correct my misstatement about the availability of the July 2, 2015 version of the Independent Review report on the APA website. I had been under the impression that that version was previously removed from the website, but apparently links to that version of the report had not previously been removed from all APA website locations. All links to the July 2015 version of the Independent Review report have now been removed from the APA website, although the July version remains available on a number of third-party websites. My apologies to Dr. Sally Harvey, with whom I had disagreed on that point during the Council meeting.

Deanne

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The email contained new instructions for accessing the Report and related documents newly posted on APA's website, and provided a link through which they could be accessed. JA313, ¶295. It resulted from the Council's substantive discussion of the Report, including a motion to remove it from APA's website. JA1078-1081; 1815, ¶5. APA also posted on its website the minutes of that discussion, including the same link. JA314, ¶296. At the same time, as the email states, APA removed links to the Report's original July 2, 2015, version and redirected those links to the revised Report. http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

Given the email's content, its wide distribution, and the circumstances surrounding it, it constitutes a republication of the Report. That republication

amounted to a reaffirmation of the Report's content despite Defendants having received notice of its falsehoods, thus constituting further evidence of actual malice.

The Report destroyed Plaintiffs' professional and personal reputations. They were given no effective opportunity to respond before APA published it, and they had no effective access to the media to rebut it. The dramatic disparity in the parties' access to the press makes a mockery of the "uninhibited, robust, and wide-open" discourse underpinning *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The Report also led Plaintiffs' long-time critics to renew their calls for criminal and war-crimes prosecutions. Although Hoffman told APA privately that he found no criminal activity (http://tinyurl.com/25frcm5d (at 4:40)), his Report used language—such as "collusion," "joint venture," and "joint enterprise"—drawn directly from such prosecutions. JA238-39; 286, ¶180; 343, ¶554; 1264, fn. 147.

Plaintiffs appeal from the trial court's dismissal of all their claims. Given their inability to effectively access the media to counter the tsunami of media coverage of the Report's defamations, this suit is the only avenue open to them to redress the severe damage to their reputations and careers. Defendants have steadfastly refused to retract or correct the Report. JA1267-1269.

SUMMARY OF ARGUMENT

Issue 1: The D.C. Anti-SLAPP Act is void because it was enacted in violation of the D.C. Home Rule Act (HRA), codified in D.C. Official Code § 1-201.01 *et seq.*

According to D.C. Code § 1-206.02(a)(4), the D.C. Council has no authority to enact any act, resolution, or rule "with respect to" Title 11 of the Code. (Title 11 codifies the Court Reform and Criminal Procedure Act (CRA).) Title 11 specifically addresses the procedural rules used by the Superior Court, among other topics. The Anti-SLAPP Act is an act "with respect to" Title 11 because it erects a new and separate procedural mechanism for the summary dismissal of disfavored claims. In so doing, it directly violates D.C. Code § 11-946, which requires the Superior Court to conduct its business pursuant to the FRCP unless this Court affirmatively approves a modification to them. Neither this Court nor the Superior Court has ever affirmatively approved the procedures created by the Act.

Issue 2: The D.C. Anti-SLAPP Act is unconstitutional, both facially and as applied. Although SLAPP suits are by definition lawsuits brought for an improper, abusive purpose, this Court has held that the Act does not require defendants to prove that a complaint was brought for such a purpose. *Doe v. Burke*, 133 A.3d 569, 574-76 (D.C. 2016). Thus, defendants may deploy the Act in any suit that involves a communication "[i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501(1)(a)(ii). When citizens bring valid claims to redress real injuries, the Act's overbroad scope burdens their First Amendment right to effective access to the courts, giving large, wealthy defendants

a sledgehammer to attack their claims and seek costs. See Exhibit A (listing special motions filed under the Anti-SLAPP Act 2011-23).

Plaintiffs' undisputed evidence that this lawsuit was brought to redress devastating reputational injuries makes the Act unconstitutional as applied as well. So does the burdening of Plaintiffs' right to access discovery, a crucial step in demonstrating actual malice. Plaintiffs' Motion to Declare the Anti-SLAPP Act Void and Unconstitutional (January 8, 2019), pp. 6-7, 10-13, Ex. D.

Issue 3: The trial court erred in holding that (a) Defendants had met their burden of demonstrating that Plaintiffs were public officials, (b) Plaintiffs had raised no triable issues of fact regarding negligence or actual malice, and (c) APA did not republish the Report in 2018.

a. Defendants failed to show that Plaintiffs met the criteria that define a public official. Plaintiffs were not able to significantly influence the resolution of important public issues; instead, they executed the policy decisions of their superiors. They had no effective ability to access the media to defend themselves, and they did not assume the risk of media coverage by accepting their mid-level military ranks.

b. The trial court erred in holding that Plaintiffs had failed to establish triable disputes of fact respecting negligence and actual malice. It reached that result by considering only some of Plaintiffs' evidence and repeatedly weighing and assessing the evidence it considered, despite the strictures against doing so in *Competitive*

Enter. Inst. v. Mann, 150 A.3d 1213, 1235-36 (D.C. 2016). It also drew all inferences in Defendants' favor. Plaintiffs presented direct and circumstantial evidence more than sufficient for a jury to find actual malice even after the Court improperly limited the evidence they could present. JA1202-1767, 1814-25.

c. The trial court further erred in dismissing Plaintiffs' claim based on the Report's republication in 2018. The court acknowledged that republication occurs when defamations are either transmitted to a new or wider audience or significantly supplemented or altered. JA2203. But the court then disregarded substantial evidence that Defendants' 2018 circulation of the Report satisfied both criteria. Republication of defamatory material after a defendant has been notified of falsehoods may be considered evidence of actual malice.

The court's errors resulted in a gross miscarriage of justice. It left Plaintiffs, who devoted the last years of their military careers to preventing abusive interrogations, with no effective redress for the reputation-destroying allegation that they colluded to support those abuses.

The order of dismissal and judgment should be reversed and the case remanded for full discovery and trial.

ARGUMENT

I. Standards of Review

Issues 1 and 2: The court reviews questions of statutory interpretation as to the Anti-SLAPP Act and the D.C. Code *de novo*. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1040 (D.C. 2014). The issue of whether the Anti-SLAPP Act impermissibly burdens Plaintiffs' First Amendment right to effective access to the courts requires exacting scrutiny and is also reviewed *de novo*. *Facebook, Inc. v. Pepe*, 241 A.3d 248, 260 (D.C. 2020); *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Issue 3a: Whether a plaintiff is a "public official" is a question of federal law reviewed *de novo*. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

Issue 3b: Whether Plaintiffs' evidence is sufficient to allow a jury to find negligence or actual malice is likewise a question of law. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 685 (1989). Thus, the court conducts an independent review of the record, applying the same standard that should be applied by the trial court. *Joeckel v. DAV*, 793 A.2d 1279, 1281 (D.C. 2002). For determining whether Plaintiffs met the Anti-SLAPP Act's "likely to succeed" requirement, the standard "mirrors" the summary-judgment standard: it requires a showing that the evidence suffices to permit a jury to find for Plaintiffs but, mirror-like, reverses the burden of a summary judgment motion, placing it on Plaintiffs rather than Defendants. *Mann*, 150 A.3d at 1238-39 n.32. To avoid "serious constitutional concerns" about the Act,

Mann, 150 A.3d at 1235-36, the court must view evidence in the light most favorable to plaintiffs and give them the benefit of all reasonable inferences. It may not weigh evidence or make credibility determinations. *Anderson v. Ford Motor Co.*, 682 A.2d 651, 654 (D.C. 1996).

Issue 3c: Questions of republication are questions of fact. To prevail, Defendants must prove that there is no genuine dispute as to any material fact and they are therefore entitled to judgment as a matter of law. *Eramo v. Rolling Stone, L.L.C.*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016). Thus, this court reviews the grant of summary judgment regarding republication *de novo*.

II. The Anti-SLAPP Act Is Void: It Creates Procedures Violating the Congressional Mandate that this Court Approve Rules Modifying the FRCP.

For lawsuits to which it applies, the Anti-SLAPP Act's special motion to dismiss fundamentally alters the procedures dictated by the FRCP. It restricts discovery, reverses the burden of defeating the motion under the summary judgment standard this Court has ruled must be applied, and potentially imposes discovery costs and the Defendants' legal fees if Plaintiffs fail to defeat the motion despite not having the discovery guaranteed by the FRCP.

But Congress' intent that the D.C. courts follow the FRCP is clear:

The **U.S. Constitution** grants Congress exclusive power to legislate for the District of Columbia (art. I, § 8, cl. 17).

The **Rules Enabling Act** of 1934 (REA) (now codified at 28 U.S.C. §§ 2071–77) gave the Supreme Court the authority to set rules for all D.C. courts.[4] Since 1938, under the REA, the FRCP apply to all federal and local courts in the District. *See Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 665 n.3 (D.C. 2008) (Super. Ct. Civ. R. 56 is rule made pursuant to federal law); *Flemming v. United States*, 546 A.2d 1001, 1005 (D.C. 1988) (Superior Court rule is the federal rule).

The **District of Columbia Court Reform and Criminal Procedure Act** of 1970 (CRA) (codified in D.C. Code Title 11) unequivocally dictates that D.C. courts follow the FRCP unless this Court approves a modification:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23 [Criminal Procedure]) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court.

D.C. Code § 11-946.

The **Home Rule Act of 1973** (HRA) (codified in D.C. Code § 1-201.01 *et seq.*) is equally unequivocal in prohibiting the D.C. Council from legislating regarding "any provision of Title 11":

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

[4] Available at https://tinyurl.com/3xhcf3v4.

D.C. Code § 1-206.02(a)(4).

Thus, the Anti-SLAPP Act is invalid if (1) it "modif[ies]" the Rules of the Superior Court (which under the REA and CRA are the FRCP) without this Court's approval, or (2) it is an act "with respect to any provision of Title 11."

The Anti-SLAPP Act is invalid under both tests.

1. The Act violates D.C. Code § 11-946 by imposing procedures on the Superior Court that modify the FRCP but have not been approved by this Court. Compare D.C. Code § 16-5502 (Anti-SLAPP Act "special motion to dismiss") to Super. Ct. Civ. R. 56 (burden on moving party, no provision limiting discovery). The Senate report on what became Section 11-946 clearly expresses Congress' intent that such modifications must be pre-approved by this Court:

> The new section 11-946 requires the Superior Court to conduct its business according to the Federal rules unless the court *affirmatively prescribes* modifications thereof. All modifications are to be approved before taking effect by the District of Columbia Court of Appeals.

S. Rep. No. 405, 91st Cong., 1st Sess. 21, 24 (1969), quoted and emphasis added by *Varela v. Hi-Lo Powered Stirrups*, 424 A.2d 61, 64 (D.C. 1980) (en banc).

2. The Act is one "with respect to any provision of Title 11." See *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841 (D.C. 2019) 848-49 (Easterly, dissenting) ("[T]he language of the [HRA] . . . imposes a blanket prohibition on the enactment by the Council of any legislation 'with respect to any provision of Title 11.'" (citation omitted)). Title 11 addresses "a wide range of

topics, including . . . the procedural rules used by the Superior Court and the [Court of Appeals]." *Woodroof v. Cunningham*, 147 A.3d 777, 783 (D.C. 2016). The Act intrudes on Title 11 by erecting a new procedure for certain suits that places the burden on the non-moving party and blocks most if not all discovery.

Below, Defendants argued incorrectly that the language "*any* provision of Title 11" in D.C. Code § 1-206.02(a)(4) is limited by a parenthetical that repeats Title 11's overall title—"any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." But the law is to the contrary.[5]

A. The Anti-SLAPP Act Creates Procedures Governing the Superior Court.

As this Court has consistently found, the Act creates procedures that operate separately from and differ from the Superior Court rules and the FRCP.

In *Mann*, the Court found:

- The Act creates a "burden-shifting procedure." *Mann,* 150 A.3d at 1232. *See also Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 580 (D.C. 2022) ("This standard is akin to the summary judgment standard under Superior Court Rule of Civil Procedure 56, except that the non-moving

[5] *See, e.g.*, *Oppedisano v. Holder*, 769 F.3d 147, 150 (2d Cir. 2014) (explaining that "relating to" parentheticals are an "aid to identification only" and "alert readers to the nature of the otherwise anonymous section numbers"); *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011); *Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 n.1 (5th Cir. 2007); *Mapp v. District of Columbia*, 993 F. Supp. 2d 26, 29 (D.D.C. 2014).

party bears the burden under the Anti-SLAPP Act. ").

- The Act's procedures "significantly advantage the defendant" in comparison to "the procedures usually available in civil litigation." *Mann,* 150 A.3d at 1237.

In other cases, the Court has also emphasized the Act's procedural nature:

Public Media Lab v. District of Columbia, 276 A.3d 1, 11 (D.C. 2022): the Act does not alter a defendant's liability, as a substantive law would, but instead introduces a "procedural mechanism that allows for expedited dismissal." That holding built on *Close It! Title Servs. v. Nadel*, 248 A.3d 132, 142 (D.C. 2021), which emphasizes that the Act provides defendants with "procedural tools."

American Studies Ass'n v. Bronner, 259 A.3d 728, 738-41 (D.C. 2021): the Act is an expedited summary judgment motion with "procedural differences," again stating that the Act provides "procedural tools." *See also Salem Media Grp., Inc. v. Awan*, 301 A.3d 633, 639 ("The Anti-SLAPP Act special-motion-to-dismiss procedure functions essentially like an early motion for summary judgment under Superior Court Civil Rule 56. There are important differences, however—among them, that the special motion to dismiss 'requires the court to consider the legal sufficiency of the evidence presented before discovery is completed.'" (quoting *Mann*, 150 A.3d at 1232)).

Doe No. 1, 91 A.3d at 1036: the Act is "a procedural mechanism . . . ." Finally,

Saudi Am. Pub. Relations Affairs Committee v. Inst. for Gulf Affairs, 242 A.3d 602, 605, 609 (D.C. 2020), also emphasized the special motion's procedural nature.[6]

The Act's legislative history also supports the conclusion that—despite the Council's characterization of it as substantive—the Act is procedural, at least in part. The Committee Report on the Act describes it as adding provisions to the Code "to provide an expeditious process" for litigating SLAPPs. D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010). ("Committee Report"). The Act's preamble states that its purpose is "to provide a special motion for quick and efficient dismissal," a procedural mechanism. D.C. Code 16-5502.[7]

B. The Anti-SLAPP Act's Procedures Violate D.C. Code § 11-946 Because They Modify the FRCP Without This Court's Approval.

The special motion to dismiss burden-of-proof and discovery-limiting procedures are directly contrary to § 11-946's prescription that the Superior Court conduct its business according to the FRCP "unless it prescribes or adopts rules

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[6] During the pendency of this appeal, the Court held the Act's fee provision to be substantive. *Khan v. Orbis Bus. Intelligence*, 292 A.3d 244, 261 (D.C. 2023). That holding does not affect the procedural nature of the burden-shifting mechanism or discovery provisions or of the Act as a whole.

[7] Testifying before the House of Representatives Committee on Oversight and Reform regarding the Washington D.C. Admission Act, the Chairman of the D.C. Council, Phil Mendelson, acknowledged that the Act legislates "judicial process." He said that one reason for granting D.C. statehood was that "the [HRA] also places limitations on what laws the Council can approve. As a result . . . we cannot . . . strengthen our Anti-SLAPP law because we cannot legislate judicial process." Testimony of Council Chair Phil Mendelson, March 21, 2021, p. 9. Mr. Mendelson testified similarly on at least two additional occasions, in 2014 and 2019.

which modify those Rules" by submitting them for approval by this Court. In violating that prescription, the Act also violates the HRA's prohibition against the D.C. Council enacting legislation "with respect to any provision of Title 11." D.C. Code § 1-206.02(a)(4).

At a minimum, the Act's procedures "modify" the FRCP. As the U.S. Supreme Court has explained, "virtually every" definition of "to modify" means "to change moderately" or in a "minor" fashion, including to "enlarge; extend; amend . . ." *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 225 (1994) (surveying dictionary definitions of "modify"); *see also Biden v. Nebraska,* 143 S. Ct. 2355, 2359 (2023). *Cf. Southwestern Bell Corp. v. F.C.C.*, 43 F.3d 1515, 1518 (D.C. Cir. 1995). In fact, the Act's burden-reversal and discovery provisions not only modify the FRCP but also conflict with it. Federal Rule 56, incorporated into the D.C. Superior Court rules as Superior Court Rule 56, establishes a clear standard for summary judgment that cannot co-exist with the special motion's provisions, as the strong consensus among federal Circuits holds.

C. All but One Federal Circuit Considering the Issue Held Anti-SLAPP Statutes Conflict with the FRCP in Whole or Part.

Of the eight federal Circuits that have considered the relationship between anti-SLAPP statutes and the FRCP, six have found that a statute as a whole cannot coexist with the FRCP because of its procedural nature (the 2nd, 5th, 7th, 10th, 11th, and the D.C. Circuit). Of those six, all but one (the 10th) considered statutes that

contained discovery limitations, and three (the 5th, 11th, and D.C.) referred specifically to the statute's discovery procedures in reaching their conclusion. An additional Circuit, the 9th, has held that several provisions of the California statute, including its discovery provisions, cannot coexist with the FRCP. The remaining Circuit, the 1st, held that the Maine statute could coexist with the FRCP only if its discovery provisions were consistent with Federal Rule 56. *Godin v. Schencks*, 629 F.3d 79, 90-91 (1st Cir. 2010).

Notably, the D.C. Circuit has reaffirmed its prior holding (*Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1334-37 (D.C. Cir. 2015)) that the D.C. Act cannot apply in federal court. *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021). The *Tah* court applied the analysis established by *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co*., 559 U.S. 393 (2010): whether a state law or rule can coexist with the FRCP depends on whether a Federal Rule "answer[s] the same question" as the state law (*Abbas*, 783 F.3d at 1333, quoting *Shady Grove* 559 U.S. at 398-399). If it does, the federal rule prevails if it is valid under the REA.

The Act's special motion answers the same question as Rule 56, but answers it differently. The *Tah* court found that this Court's holding in *Mann*, 150 A.3d at 1236, 1238 n.32 (D.C. 2016) "'agree[d] with *Abbas* that the special motion to dismiss is different from summary judgment'" in two respects: placing the burden

on the non-moving party and limiting discovery. *Tah*, 991 F.3d at 238-39. On those grounds, the D.C. Circuit held that the Act cannot coexist with the FRCP.

Although *Tah* addressed the Act's application in federal courts, the question it asked is the same one this Court must answer: do the procedures created by the Act prevent its application in courts that must conduct their business under the FRCP? Under the Rules Enabling Act and the D.C. Court Reform and Criminal Procedure Act, D.C. rules are in fact the FRCP unless this Court approves a modification. *See Cormier*, 959 A.2d at 665 n.3: ("Super. Ct. Civ. R. 56 is a rule made pursuant to federal law . . . ." (citation omitted)); *cf. Goudreau v. Standard Fed. Sav. Loan Ass'n*, 511 A.2d 386, 389 (D.C. 1986) ("[P]ursuant to the Supremacy Clause, state laws 'that interfere with, or are contrary to' federal law are invalidated." (citation omitted)).

In addition to *Tah, see La Liberte v. Reid*, 966 F.3d 79, 86-88 & n.1 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 244-49 (5th Cir. 2019); *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 732 (7th Cir. 2015); *Los Lobos Renewable Power, L.L.C. v. AmeriCulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1349-57 (11th Cir. 2018).

The Ninth Circuit has held that other aspects of the California statute in addition to the discovery limitations cannot co-exist with the FRCP. If the Act survives this case, challenges like those against the California statute are likely to be

raised against it. *See, e.g., Metabolife Int'l v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (discovery); *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (leave to amend); *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) (timing); *Hyan v. Hummer*, 825 F.3d 1043, 1046 (9th Cir. 2016) (motions to strike that do not dispose of entire case); and *Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018) (standards for evaluating a complaint's sufficiency under FRCP 12 and 56). *See also Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Kozinski & Gould concurring) ("We should follow the D.C. Circuit's lead in giving these trespassing procedures the boot.").

To reach its conclusion that the Maine statute could co-exist with the FRCP if its discovery provisions were consistent with Rule 56, the First Circuit held that the statute was substantive in part because of its burden-of-proof standard.[8] But this Court has held that the burden of proof is procedural. *See, e.g., United Sec. Corp. v. Bruton,* 213 A.2d 892, 893-94 (D.C. 1965) (statute relating to burden of proof and rules of evidence is procedural); *Cent. Vermont R.R. v. White*, 238 U.S. 507, 511-12 (1915) (burdens of proof are procedural if the question involves the

[8] *Godin* has been criticized for mistakenly treating Justice Stevens' concurrence in *Shady Grove* as a majority view. *Godin*, decided just nine months later, leaned heavily on a substance-versus-procedure evaluation, a method *Shady Grove* does not support. *Godin*, 629 F.3d at 89. *See Abbas*, LLC, 783 F.3d at 1336-37.

time when and order in which evidence should be submitted); *see also* Fed. R. Evid. 302 adv. comm. n. to 1972 amend. *See also* Adams, Charles W & Mwafulirwa, Mbilike M., *The Last Lecture: State Anti-SLAPP Statutes and the Federal Courts*, St. John's Law Review; Brooklyn Vol. 96, Iss. 1 (Fall 2022): 1-76.

D. The Trial Court Erred in Holding that the Act Does Not Violate the HRA or CRA.

In holding that "the D.C. Anti-SLAPP Act does not contradict the terms of Title 11 in violation of the Home Rule Act" (January 23, 2020, Order at 6, JA2048), the court's analysis went astray in two ways.

First, the court held that an HRA challenge requires demonstrating "an actual conflict between the law and the terms of Title 11 governing the courts' jurisdiction and organization." JA2048. That proposition is contrary to the plain language of D.C. Code § 1-206.02(a)(4), which bars any act "with respect to *any* provision of" the wide-ranging Title 11, not only provisions relating to jurisdiction and organization. It is also contrary to D.C. Code § 11-946, which bars "modif[ying]" the Superior Court rules without this court's approval. In any case, there is an "actual conflict": by creating procedures for the courts that modify the FRCP without this Court's approval, the Anti-SLAPP Act conflicts directly with the terms of Title 11.

Second, the trial court relies on a statement in the legislative history of the Anti-SLAPP Act commenting that the Act created "substantive rights." The court asserted that this Court "approved this position" in *Mann.* JA2201.

But *Mann* did not approve it. The passage the trial court cites merely notes in passing that *the Council* claimed that the Act created "substantive rights"—the Court did not endorse that idea. *Mann* dealt with whether interlocutory orders under the Anti-SLAPP Act were immediately appealable and the standard for applying the Act's "likely to succeed" test. The Court was never asked to determine whether the Act was entirely substantive or procedural or whether it violated the HRA.

Moreover, it is simply irrelevant whether the Act was intended to or did in fact create substantive rights because, even if that were the case, it also created new procedures in violation of Title 11. D.C. Code § 1-206(a)(4) does not say that the Council is merely barred from enacting legislation which "relates to" only Title 11 *and nothing else.* Nor does D.C. Code § 11-946 suggest that the Council may modify Superior Court rules so long as the challenged legislation addresses other issues too.

Neither the trial court nor Defendants have persuasively explained what the "substantive right" they argue the Act creates is. Defendants suggest that it is the right to free oneself of meritless litigation if a defendant asserts that it is advocating on issues of public interest. JA1163-64. But all defendants have that right to avoid meritless suits in *all* cases, through Rule 12 motions to dismiss and Rule 56 motions

for summary judgment, in addition to Rule 11 motions against actions brought for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." D.C. Super. Ct. R. 11(b)(1).

In addition to its two primary arguments, the court also found that the Act did not modify the Superior Court Rules in violation of D.C. Code § 11-946, citing this Court's comment in *Mann* that the Act was not "redundant relative to the rules of civil procedure." JA2050; January 23, 2020, Order at 8, citing *Mann,* 150 A. 3d at 1238. This misreads *Mann*. The passage the court cites simply states that the usual procedural mechanisms for disposing of meritless litigation—Rules 12 and 56—are *also* available to a SLAPP defendant, even after filing a special motion to dismiss.

Finally, the trial court comments that the Anti-SLAPP Act must trump any inconsistent Superior Court rule. JA2050. The court is mistaken. The Act does not fall because it is inconsistent with Rules 12 and 56 (although it is); it falls because it is an Act which "relates to" Title 11 (D.C. Code § 1-206.02(a)(4)) and because it creates a separate procedural mechanism that modifies the Superior Court Rules without having been approved by this Court (D.C. Code § 11-946).

The Anti-SLAPP Act violates the HRA. Moreover, its legislative history makes it clear that its burden-shifting, discovery, and expedited-hearing provisions are all integral to its functioning and therefore not severable. Committee Report at 4, 6. *See McClough v. United States*, 520 A.2d 285, 289 (D.C. 1987) (severance is

not appropriate if the legislature would not have enacted the remaining provisions). In fact, it is unclear how the Act will function if a portion is removed. *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2352 (2020) ("Before severing a provision … the Court must determine that the remainder of the statute is 'capable of functioning independently' . . . .").

The Act should be struck down in its entirety. In so doing, this Court will not infringe upon the Council's authority to legislate changes to substantive rather than procedural law in the District. Nor will it create a conflict with the Court's precedent that "incidental byproduct[s]" of changes in substantive law do not violate the HRA. *Coleman v. District of Columbia*, 80 A.3d 1028, 1035-36 n.9 (D.C. 2013). The Act's procedures are central, not incidental, to its functioning. Nor finally, will it foreclose asking this Court's approval of amendments to Superior Court rules to reflect the Act's provisions, if those amendments pass constitutional muster.

III. The Anti-SLAPP Act Is Unconstitutional, Both Facially and As Applied.

In *Mann,* this Court defined a SLAPP as "an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann,* 150 A. 3d at 1226 (quoting from Committee Report at 1). But the D.C Anti-SLAPP Act does not require a showing that a suit intends to punish or prevent expression—or, even, that it has that effect—before it imposes its onerous procedural burdens. The Council's failure to limit the Act's

scope to SLAPPs renders it unconstitutional, both facially and as applied, because it impermissibly burdens the right to meaningful access to the courts for citizens seeking redress for real harms. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011)*; Stuart v. Walker*, 143 A.3d 761, 767 (D.C. 2016).

Any significant impairment of First Amendment rights must survive "exacting scrutiny," even if any deterrent effect arises "'indirectly as an unintended but inevitable result of the . . . conduct' . . . ." (citation omitted). *Elrod*, 427 U.S. at 362.

The trial court brushed aside "exacting scrutiny," citing *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015) for the proposition that the right to petition involves only the right to file a lawsuit. JA2051. The case does not support that proposition. In *Roberts,* the court implicitly assumed that unlicensed attorneys would file sham petitions. Nothing in *Roberts* suggests that the right to petition involves *only* the right to file a lawsuit. Nor could it have suggested such a thing. The right of access to the courts is necessarily a right of *meaningful* access. *See Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 58 (1993) (the sham exception is driven by the need to protect the right of "meaningful access" to adjudicatory tribunals).

A. The Anti-SLAPP Act Is Facially Unconstitutional.

The trial court found that to show the Act is facially unconstitutional, Plaintiffs must show that "'the law is unconstitutional in all its applications,'"

quoting *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009). JA2051. But courts recognize a second type of facial challenge: a statute is overbroad if "'a substantial number' of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citations omitted); *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 28 (D.D.C. 2018).

The Act's application to well-founded suits to redress real harm constitutes just such overbreadth: it may be deployed in any suit that involves a communication "[i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501(1)(a)(ii). Such suits are not by definition meritless or intended to punish or silence a party—as this case demonstrates. And this court has held that defendants need not prove plaintiffs' improper motivation to invoke the Act. *Doe v. Burke*, 133 A.3d at 574-76. In rejecting Plaintiffs' facial challenge to the Act, JA2052-53, the trial court assumed the Act burdens only "classic" SLAPPs, but never explained why that assumption—central to the Act's constitutionality—is correct.

Under *Elrod,* the party defending a statute's constitutionality must demonstrate that, even when it advances a paramount interest of vital importance, it does so using the least burdensome means available. *Elrod,* 427 U.S. at 363. The D.C. Anti-SLAPP Act fails that test.

See also Am. Studies Ass'n, 259 A.3d at 748 (" [T]he statutory text does not call for inquiry into the plaintiff's motives; it focuses on the claim, not the claimant. . . . This contrasts with some state anti-SLAPP laws that do call for examination of the plaintiff's subjective motivation."); *Fells*, 281 A.3d at 581 ("This is a broadly-worded statute, and for better or worse, its terms extend beyond lawsuits meant to silence one side of a public policy debate.").

The Act's over-broad scope has led to its repeated use in ways inconsistent with its intended purposes. The Committee report on the Act stated that its purpose was to prevent "the attempted muzzling of opposing points of view" and encourage "civic engagement." It described as a typical SLAPP a real-estate developer's suit against two advocates who opposed the developer's efforts to obtain a building permit, and said "[t]he actions that typically draw a SLAPP are often . . . the kind of grassroots activism that should be hailed in our democracy." Committee Report at 3.

In the 44 cases Appellants have located in which the Act was invoked, it has been used repeatedly for purposes that go far beyond those for which it was intended and do not serve its goals. Often, it was deployed against individual citizens by large corporate or institutional defendants, ranging from media companies to a labor union to the Coca-Cola Company. *See* Exhibit A. And a former D.C. Attorney General

has stated that the Act is being misused against governmental enforcement actions, with its protections "turned . . . on their heads."[9]

When the Act is used repeatedly by deep-pocketed organizations to prevent citizens from pursuing legitimate claims, it is being used in a manner antithetical to and destructive of the Council's intent.[10]

To avoid an imbalance of constitutional protections, other states have adopted anti-SLAPP procedures that recognize and protect both the defendant's and the plaintiff's right of access to the courts. *See, e.g., Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012) ("[W]here a plaintiff filed suit genuinely seeking relief for damages for the alleged defamation . . . the suit would not be subject to dismissal under the Act."); *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) ("Despite the apparent purpose of the anti-SLAPP statute to dispose expeditiously of meritless lawsuits that may chill petitioning activity, the statutory language fails to track and implement such an objective. . . . the statute impinges on the adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning."). *See also BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532-33 (2002) ("[T]he genuineness of a grievance does not turn on whether it succeeds.

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[9] Letter of Attorney General Karl A. Racine to Phil Mendelson, Chairman of the D.C. Council, October 28, 2021.

[10] In California, the Court of Appeal has "voiced concerns that the anti-SLAPP law was being used in ways never foreseen." *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 54 Cal.App.5th 738, 760 (Cal. Ct. App. 2020).

Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs.").

These more constitutionally viable approaches are analogous to the approach adopted by the U.S. Supreme Court in a string of cases developing the *Noerr-Pennington* doctrine for determining whether a suit is a sham. *E.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). That approach has been applied broadly. *See, e.g., CSMN Invs. v. Cordillera Metro. Dist.*, 956 F.3d 1276 (10th Cir. 2020). *Noerr-Pennington* employs both objective and subjective prongs. First, a claim must be shown to be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Second, even if a claim is objectively baseless, the court must still examine a plaintiff's subjective motivation. *Prof'l Real Estate Invs., Inc.*, 508 U.S. at 60, 60-61, citing *Noerr* at 144.

In contrast to anti-SLAPP statutes such as Massachusetts', the D.C. Act's procedures are not reasonably designed to serve the Act's goal of protecting against SLAPPs. Instead, they encourage defendants to quash legitimate suits and seek fees.

The Anti-SLAPP Act is unconstitutional on its face, violating the right of meaningful access to the courts. *See* Plaintiffs' Motion to Declare the Anti-SLAPP Act Unconstitutional (January 9, 2019) and Reply, December 13, 2019.

B. The Anti-SLAPP Act Is Unconstitutional as Applied.

The Act is also unconstitutional as applied for two primary reasons.

First, all three Plaintiffs filed affidavits below testifying that they sued to obtain compensation for the grievous injuries inflicted upon them by Defendants, not to punish or silence an opponent. There is no contrary evidence. Any suggestion that Plaintiffs could intimidate the large, wealthy institutions they have sued would be preposterous. In 2023, Sidley had more than 2,000 lawyers and estimated revenue of $2.92 billion.[11] APA boasts over 122,000 members and affiliates and assets of over $48 million.[12] It is Plaintiffs—individuals with limited resources and no institutional support—who have been punished by the Act's operation.

Second, by severely limiting discovery (and ordering Plaintiffs to pay discovery costs) in a case where evidence in Defendants' possession was critical to address issues of actual malice, the Act prevented Plaintiffs from presenting all their evidence before the trial court. An inquiry regarding actual malice revolves around defendants' state of mind. It is therefore highly discovery-intensive, and plaintiffs have the right to rely on a broad range of circumstantial evidence. *Harte-Hanks Commc'ns*, 491 U.S. at 668.

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[11] Profile, Sidley Austin LLP, law.com retrieved January 31, 2024, *available at* https://www.law.com/law-firm-profile/?id=274&name=Sidley-Austin-LLP

[12] APA, Form 990, 2018, retrieved January 31, 2024, *available at*: https://www.apa.org/pubs/reports/2020-form-990.pdf

Plaintiffs limited their discovery requests to comply with the Act's strictures and, in their two Rule 56(d) declarations, detailed how the narrow discovery they requested would defeat Defendants' motions. JA754-80, 838-52. The court granted four interrogatory answers and a computer hard drive. Of the 148 witness-interview notes Plaintiffs requested, they were granted only 18 (excluding their own interview statements). But those 18 were less useful because the witnesses had already provided affidavits. In addition, after granting the only three depositions Plaintiffs requested, the court then denied them *sua sponte*. JA1136-39.[13]

After *Mann*, D.C. case law provides a clear standard for anti-SLAPP motions: a rule 56 standard with a reversed burden on the non-moving party. Apparently relying on the 12(b)(6) standard erroneously advanced by Defendants' counsel, the trial court stated that affidavits Plaintiffs wished to access through discovery were unnecessary because they would be cumulative of the Complaint, despite Plaintiffs' counsel pointing out that she was required to produce evidence, not just rely on the Complaint's allegations. JA864-65, 881-83, 899.

The Act's application to this case denied Plaintiffs meaningful access to discovery important to their case, discovery to which the FRCP and the Rules of the

[13] The three depositions included one of a now former APA employee who warned APA officials during the investigation that Hoffman was omitting from his Report information that contradicted his narrative and that the Report would likely be false and defamatory. JA759-60.

Superior Court entitle them. The Supreme Court has restated Rule 56 as *requiring*, not merely permitting, discovery "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986). As the Ninth Circuit has held, requiring a presentation of evidence without accompanying discovery improperly transforms an anti-SLAPP motion into a motion for summary judgment, without providing any of the procedural safeguards firmly established by the FRCP. *Planned Parenthood Fed'n of Am.*, 890 F.3d at 833-34. That result effectively allows the D.C. anti-SLAPP procedures to usurp FRCP 26 and 56.

The Anti-SLAPP Act as applied to this case is unconstitutional: it imposed impermissible obstacles to seeking redress for real grievances and impermissibly restricted Plaintiffs' ability to present their evidence fully.

IV. Defendants Failed to Meet Their Burden of Demonstrating that Plaintiffs Are Public Officials.

If defamation plaintiffs are "public officials," on summary judgment they must show that a juror could find, under a clear-and-convincing standard, that defendants published defamations with actual malice. *Mann,* 150 A.3d at 1236.

Because Defendants raised the claim that Plaintiffs were public officials as an affirmative defense, they bear the burden of proof: courts "proceed[] upon the initial presumption that the defamation plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public figure [or public official]."

Foretich v. Capital Cities/ABC, 37 F.3d 1541, 1553 (4th Cir. 1994). That principle does not change in the anti-SLAPP context. Although no D.C. court has considered this issue before this case, courts in California have. *See, e.g., Davis v. Elec. Arts, Inc.,* 775 F.3d 1172, 1177 (9th Cir. 2015) ("Although the anti-SLAPP statute 'places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" (citation omitted)).[14]

Addressing the public-official defense, the U.S. Supreme Court has said that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt*, 383 U.S. at 86. In deciding when that interest gives way to "interests in public discussion," the Court found that the "public official" designation applies where a government employee "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt*, 383 U.S. at 86.

Moreover, this public interest cannot result from the defamatory statement, as it did here. It must exist independent of the controversy at hand. *Id.* at 87 n.13.

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[14] According to the D.C. Attorney General, "[g]uidance from the California courts . . . is instructive . . . the District's Act was modeled in substantial part on California's Anti-SLAPP Act." *Br. of Amicus Curiae Dist. of Columbia, Adelson v. Harris*, No. 12-cv-6052, 2013 WL 435912, at *4 (S.D.N.Y. Feb. 4, 2013).

In holding that a Veterans Administration psychologist was not a public official, the First Circuit summarized the "three-legged stool" of the U.S. Supreme Court's public-official analysis. *Kassel v. Gannett Co.*, *Inc.*, 875 F.2d 935, 935-40 (1st Cir. 1989). Public officials (1) are in a position significantly to influence the resolution of issues of public importance (*Rosenblatt,* 383 U.S. at 85); (2) have the ability to access the media to defend themselves (*Gertz v. Robert Welch*, 418 U.S. 323, 344 (1974)); and (3) have assumed the risk of media coverage (*Gertz,* 418 U.S. at 344, 345) (*accord, Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990)).

Plaintiffs pleaded that they were "not in a position to make public or military policy" (JA247-49). They also provided five affidavits supporting their contentions that they did not meet the criteria that characterize public officials: their own three affidavits were supported by a Judge Advocate and a military psychologist who had first-hand knowledge of a military psychologist's role. JA1755, ¶10 (Judge Advocate); 1649, ¶6 (President, Society of Military Psychologists); 1462-67, ¶¶4-6, (Banks); 1540-44, ¶¶4-6 (Dunivin); 1655-60, ¶¶4-5 (James). **Defendants provided no counter affidavits**.

The trial court considered only the first of the prongs summarized by *Kassel,* basing its analysis solely on Defendants' reasoning. Amended Order at 15, 18-19 (JA2207, 2210-11).

In arguing that plaintiffs were public officials, Defendants relied only on Plaintiffs' ranks, their titles for their functions outside their duties at interrogation sites, and words taken out of context from the Complaint that describe plaintiffs as "drafting and implementing policies." Sidley Memorandum in Support of Motion to Dismiss, JA450-52. But nothing Defendants cited meets their burden of demonstrating that, as a matter of law, Plaintiffs were public officials. To focus on the word "policy" is to focus on words, not the substance of the person's function. The Complaint makes it clear that Plaintiffs did not set policy that determined the military's approach to interrogations or influence the outcome of those command and governmental decisions. And, as Plaintiffs demonstrated below, the cases Defendants cited to argue that Plaintiffs fit the profile of military officers found to be public figures in fact demonstrated the opposite. JA1285-86.

Like the Veterans Administration psychologist in *Kassel*, no Plaintiff satisfies the first prong of the Supreme Court test*:* they did not have authority to make the policy decisions that set the military's approach to interrogations. The record evidence shows that their responsibility as mid-level officers was to implement the **policies and directives issued by their superiors,** and all three were limited to drafting implementing documents based on those directives. As the five affidavits testified, they could not influence the resolution of the ongoing governmental debate about interrogation policy. Defendants provided no contrary evidence.

In holding that all three Plaintiffs were public officials, JA2209-11, the trial court ignored Plaintiffs' affidavits and followed the Defendants' lead:

First, the court asserted that the titles describing Plaintiffs' administrative responsibilities mean that all three "comfortably fit within the hierarchy of public officials." JA2210. But titles alone do not make a "public official." The question is whether the individuals holding those titles "are in a position significantly to influence the resolution" of "issues of public importance." *Kassel*, 875 F.2d at 939 (quoting *Rosenblatt*, 383 U.S. at 85). The court cited no evidence—and Defendants presented none—that Plaintiffs met that criterion.

The court then cited language from Plaintiffs' Complaint that includes the word "policy," such as "drafting and implementing policies." JA2210. But the court improperly disregarded Plaintiffs' assertions in the Complaint that they did not set policy and affidavit testimony about the crucial distinction between policies promulgated by senior officials that set direction for the military and documents that *implement* those policies. The former "significantly . . . influence the resolution" of "issues of public importance"; the latter do not. *Rosenblatt*, 383 U.S. at 85.

The court failed to analyze the remaining legs of the Supreme Court's "three-legged stool": having access to "channels of effective communication" and assuming the risk of media attention. As to the second prong, no Plaintiff had authority to speak to the media or general public on behalf of DoD, and none did so. JA1463,

¶5; 1540-41, ¶4; 1656, ¶5. Again, Defendants offered no counter evidence. When the Hoffman Report was published, its allegations were broadcast by the media around the world; in contrast, Plaintiffs have been relatively unable to gain media attention to defend themselves despite pleas to media outlets.

Nor is the third prong satisfied. No individual joining the military, even when they rise to the rank of colonel or lieutenant colonel, expects to assume the risk of attracting media attention. Plaintiffs attracted attention only because of the Report's defamatory allegations, not for reasons that would otherwise place them in the category of public officials. JA1466, ¶18; 1543, ¶17; 1659, ¶17.

No authority holds that individuals are "public officials" when they execute the policies of superiors within an organization, are not in public-facing roles, and do not interact directly with the public. The trial court erred in so holding, and that error mandates reversal of its Order holding Plaintiffs must meet an actual malice rather than a negligence standard.

V. The Evidence Is Sufficient for a Jury to Find Defendants Were Negligent and Acted with Actual Malice.

Plaintiffs should be required to prove only negligence in this case, not actual malice, because they are private citizens, not public officials. However, Plaintiffs presented sufficient evidence—despite restricted discovery—from which a jury could find the Defendants acted with actual malice.

A. Plaintiffs Have Demonstrated Defendants Were Negligent.

Hoffman, Sidley, and APA violated many of the markers identified in case law as part of a negligence standard in an internal investigation. *Pearce v. E.F. Hutton Grp., Inc*., 664 F. Supp. 1490, 1510 (D.D.C. 1987) *rev'd on other grounds*, 828 F.2d 826 (D.C. Cir. 1987):

> [N]egligence in the context of an investigative report may include: (1) failure to pursue further investigation; (2) unreasonable reliance on sources; (3) unreasonable formulation of conclusions, inferences, or interpretations; (4) errors in note-taking and quotation of sources; (5) misuse of legal terminology; (6) mechanical or typographical errors; (7) unreasonable screening or checking procedures; (8) the failure to follow established internal practices and policies.

As discussed in below in Section B-3, Defendants' conduct of the investigation departed from professional standards by its unreasonable reliance on unreliable sources, purposeful avoidance of investigative leads, and misuse of terminology relevant to criminal prosecutions despite Hoffman's statement that he found no criminal activity. JA1265-66. The investigation further deviated from professional standards in the following ways:

- It was overseen by an APA Board committee whose members had been involved in the events the Report described and stood to benefit from a report that protected them by blaming Plaintiffs.[15] JA1444-52, 1265-66.

[15] *See* Holly J. Gregory (Sidley Austin LLP), *Board-Driven Internal Investigations*, Practical Law Journal (May 2016) ("[T]he board committee should be independent

- Defendants failed to inform interviewees that they were potential targets—despite inquiries from interviewees—as is required by a D.C. ethics opinion.[16] They also advised interviewees that they should *not* retain counsel and, misleadingly, that information and communications regarding their military duties were not relevant. JA1465, ¶15; 1478, ¶ 9; 1540, ¶3; 1657, ¶8.
- Even though the engagement letter between APA and Hoffman and Sidley expressly stated that that no attorney-client privilege would be claimed over any documents used in the investigation unless they were already independently privileged, Defendants invoked claims of privilege to deny Plaintiffs access to documents and their own interview testimony to prevent them from rebutting the Report's false conclusions.[17]

"[D]eparture from accepted standards" of professional conduct constitutes circumstantial evidence of actual malice. *Harte-Hanks Commc'ns*, 491 U.S. at 693; *see also Church of Scientology Int'l v. Time Warner, Inc.*, 903 F. Supp. 637, 641 (S.D.N.Y. 1995) ("[A]n extreme departure from standard investigative techniques,"

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of the company and the potential investigation targets and key witnesses . . . ."). JA1265, fn 153.

[16] D.C. Bar, *Ethics Opinion 269: Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation*, *available at* http://tinyurl.com/ypv3a54r

[17] Engagement Letter (Nov. 20, 2014), *available at* https://tinyurl.com/ybf6hhwp; Compl. ¶270-278, JA113-115. *See also* Hentoff Superior Court testimony, JA863-65.

especially coupled with bias, can constitute evidence of "more than mere carelessness—rather as purposeful avoidance of the truth.").

B. The Trial Court Erred by Finding that Plaintiffs Did Not Establish Triable Disputes of Fact as to Actual Malice.

Under *Mann,* a special motion to dismiss may be granted "only if the court can conclude that the claimant could not prevail as *a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Mann,* 150 A.3d at 1236 (emphasis in original). That standard is particularly relevant to the issue of actual malice: "The proof of 'actual malice' calls a defendant's state of mind into question, *N.Y. Times Co.*, 376 U.S. 254, and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

In this case, the trial court not only supplanted the role of the jury by weighing and assessing the evidence of actual malice, but also omitted any reference to much of Plaintiffs' documentary and testimonial evidence. It also ignored case law specifically relevant to negligence in the context of internal investigations. And it failed to apply U.S. Supreme Court and other precedent governing the scope of evidence that may contribute to showing actual malice.

1. Plaintiffs Demonstrated Actual Malice Through Direct and Circumstantial Evidence.

Actual malice may be proven by showing that Defendants either (1) had knowledge of a statement's falsity or (2) acted with reckless disregard for whether the statement was false. *Mann*, 150 A.3d at 1252. Reckless disregard includes the purposeful avoidance of the truth. *Harte-Hanks Commc'ns*, 491 U.S. at 692.

Because a defendant is unlikely to acknowledge having acted with actual malice, the U.S. Supreme Court has stated that "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant. . . ." Quoting 50 Am.Jur.2d *Libel and Slander* n 7, § 455 (1970), the court said: "The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote . . . ." *Herbert v. Lando*, 441 U.S. 153, 160-65 n.12 (1979).

In assessing the evidence of actual malice, courts consider "the cumulation of circumstantial evidence. . . ." *Tavoulareas v. Piro*, 817 F.2d 762, 789 (D.C. Cir. 1987). Among the types of evidence courts have found may contribute to that cumulation are:

- Negligence, motivation, and intent, *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972).
- Bias or ill will, *Harte-Hanks Commc'ns*, 491 U.S. at 668.

- Obvious reasons to doubt a source, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).
- A failure to retract or a republication after receiving evidence of a statement's falsity, *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (citing *Herbert,* 441 U.S. at 164).
- A failure to properly investigate, *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983). The failure to investigate is particularly relevant when it amounts to purposeful avoidance of the truth. *Harte-Hanks Commc'ns*, 491 U.S. at 692.

Courts have repeatedly emphasized the importance of viewing plaintiffs' evidence in its entirety, since "each individual piece of evidence cannot fairly be judged individually." *Tavoulareas*, 817 F.2d at 794, n. 43. Although the trial court acknowledged that the evidence must be subjected to "a holistic examination" (JA2185), it then examined the limited evidence it considered piecemeal—ignoring precedent as to the range of admissible evidence. JA2184-191.

Plaintiffs presented both direct and circumstantial evidence that is more than sufficient for a jury to find actual malice, if Plaintiffs are held to that standard to support their defamation claims. The trial court ignored most of this evidence. As to the evidence it did consider, it improperly substituted its judgment for a jury's and consistently assessed the evidence in the light most favorable to Defendants.

Sections B-2 and 3 below summarize Plaintiffs' direct and circumstantial evidence, which is more fully presented in their Complaint and briefs below.

2. The Direct Evidence Created Triable Issues of Fact on the Basis of Which a Jury Could Find Actual Malice.

Defendants cannot feign ignorance or profess good faith when they possess information that casts doubt on the truth of their statements. D. Elder, *Defamation: A Lawyer's Guide* § 7.12 (July 2016) (collecting cases). Actual malice may be inferred when defendants publish a defamatory statement that contradicts information known to them, even if they testify that they believed the statement was not defamatory and was consistent with facts within their knowledge. *Id.* Consistently failing to acknowledge contradictory information supports a reasonable inference of actual knowledge of falsity or, at a minimum, reckless disregard for truth. *Id.; Mann*, 150 A.3d 1213, 1253:

> We begin our examination by noting that the results of the investigations that Dr. Mann says exonerate him of wrongdoing were made public; appellants do not claim they were unaware of them when they made the challenged statements. In assessing whether these reports provided appellants with 'obvious reasons to doubt the veracity' of their subsequent statements that Dr. Mann engaged in misconduct, we consider (as would a jury) the source of the reports, the thoroughness of the investigations, and the conclusions reached.
>
> Internal citation omitted.

See also Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1070 (5th Cir. 1987).

a. Direct Evidence of Actual Malice: Admissions (JA1227-29)

A jury could find that admissions by former members of the APA Board and by an APA outside counsel support a finding that Defendants acted with actual malice. Business records show that all but one of the APA Board members at the time of the Report's initial publication were involved in the events it discussed.

First, former APA Board members admitted the Report's failings:

- They acknowledged that the report contains "many inaccuracies" and there appeared to be "no evidence of collusion."
- A former Board President stated that APA members had provided "clear evidence" that Hoffman "may have misrepresented, left out or distorted" matters in the Report. The Associate General Counsel stated that APA could not "do nothing" and "had a fiduciary obligation to fix things. . . ."

JA1658, ¶ 14; 1719-1725, Ex. 1, ¶ 5; see also, JA1456, ¶¶6, 8.

Second, David Ogden, a former Deputy Attorney General and APA's outside counsel in 2015, acknowledged that government documents contradicted the foundation of the Report's conclusion that APA and DoD officials, including Plaintiffs, colluded to ensure APA guidelines would not block psychologists' participation in abusive interrogations. JA1456, ¶6 (Affidavit of Barry Anton, APA President during the Hoffman investigation). As a result, he advised APA to rehire

Hoffman to review the Report in light of that contradiction and prepare a supplemental report. APA did so, but the supplemental report never emerged. *Id.*

b. Direct Evidence of Actual Malice: Documents and Testimony in Defendants' Possession Contradicting the Report's Primary Conclusions (JA1236-52)

Plaintiffs' Supplemental Complaint specifically identifies 219 defamatory allegations in the Report, along with evidence that Defendants either knew about, deliberately avoided, or recklessly disregarded evidence that would have caused an investigator to doubt the truth of the allegations. JA1302-1452. Because the trial court limited the evidence Plaintiffs were allowed to present in their briefs, JA1103-12, Plaintiffs attached to their Opposition to Defendants' Special Motions an exhibit (also attached to their Complaint) that contained the 219 false statements, along with links to documents in Defendants' possession that contradicted those statements and the Report's conclusions. JA349-93, 1302-1362. Plaintiffs' counsel expressly directed the trial court's attention to this exhibit in the February 21, 2020, hearing. JA2100, lines 10-14. But the court's opinion failed to consider any of that evidence.

The false statements not only misrepresent specific events and facts. They also enabled Hoffman to construct a false overarching narrative accusing Plaintiffs and others of "colluding" over many years. To build that story, Hoffman omitted facts, mischaracterized them, and repeatedly drew unsupported inferences. That story then became the lens through which the facts and Plaintiffs' motives were

characterized, and the foundation for the Report's primary conclusion that Plaintiffs and key APA officials colluded to ensure APA guidelines set by the task force were too loose to constrain abusive interrogations.

Plaintiffs' opposition briefs below presented voluminous evidence demonstrating the falsity of that conclusion and of each of the 219 false statements. JA1202-1767, 1768-1825. Those motions and that evidence are fully incorporated herein. This brief presents only some of the evidence.

The conclusion rests upon two demonstrably false assertions: (1) "then-existing [June 2005] DoD guidance . . . used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation," and (2) "at the time of the [PENS] report . . . the Bush Administration had defined 'torture' in a very narrow fashion." JA2240-45.

Neither assertion with respect to DoD is true, as abundant ***evidence in Sidley's and APA's possession demonstrated***. The court considered none of this evidence.

By the time the PENS Task Force met in June 2005, the Bush Administration's earlier narrow definition of "torture" had been withdrawn as to the DoD and new legal guidance was in place. Local military interrogation policies prohibited abusive techniques, including the sleep-deprivation and stress-position techniques that the Report claims were permitted. Thus, Plaintiffs had no reason to "collude" to block guidelines that might "constrain" DoD interrogations when

DoD's own guidelines *had already been changed to prohibit abuses.* Those restrictive policies were explicitly incorporated by reference into the PENS Guidelines Statement 4, which the Report omits. JA394-400; 1244.

The Report never expressly identifies the DoD policies in place when the PENS Task Force convened. Instead, it refers to outdated policies and to policies that applied only to the CIA, not the military. Yet the relevant policies were in the Report's binders of exhibits, and others were explicitly referred to in other documents in Defendants' possession and by APA witnesses the Sidley team interviewed. JA1241-44. A jury could find their omission to be evidence of actual malice, not only negligence.

The evidence in Defendants' possession included, in addition to the governmental reports described in section 2-c below:

- Drawing on a legal opinion obtained by APA in February 2014, the APA's Committee on Legal Issues stated that "much of the legal discussion in the [claims of those attacking the APA and Plaintiffs] is confused, inaccurate and/or incomplete" and "relies on outdated law . . . and ignores the current legal authority . . . ." JA1242-43 fn 69. Hoffman relies on that inaccurate information and timeline despite having the opinion in his possession.
- Defendants possessed but omit the substance of the "standard operating procedures" for interrogations at Guantanamo that Plaintiffs Banks and

Dunivin had drafted before the PENS meetings. Those documents prohibited the abuse Hoffman says was permitted. JA1243; 1656, ¶5.

- Dr. James referred to the restrictive military policies at least five times on the APA PENS listserv. Hoffman states that he reviewed the listserv, but the Report omits any mention of those references. JA1243; 1656, ¶6.
- Jennifer Bryson, a civilian interrogator at Guantanamo, explained during her interview that, by 2004 (a year before PENS), interrogators were required to use a computer menu of permitted interrogation techniques that did not permit stress positions and sleep deprivation. The Hoffman Report falsely asserted those techniques *were* permissible. JA1244-45; 1507, ¶6.

c. Direct Evidence of Actual Malice: Defendants' Omission of Exculpatory Reports (JA1236-1250)

As this Court stated in *Mann*, 150 A.3d at 1253, 1258, omitting exculpatory reports that contradict defamatory statements supports a finding of actual malice. More than ***ten*** government agencies and bodies, including the FBI, investigated the same events as Hoffman, looking at much of the same evidence given to Hoffman by the APA critics on whom he relied, and found no reason to act. Hoffman omits these reports' exculpatory conclusions, although his Report cites other pages in them (e.g., in the Senate Armed Services Committee, Schlesinger, and Martinez-Lopez reports). The Schlesinger Report contains a chart describing permissible interrogation techniques on the relevant dates, which do not include sleep

deprivation or stress positions. A jury could find those omissions to be evidence of actual malice. JA1241-42; 1249-50; 1374.

Although the trial court's Amended Order refers to the governmental reports, it discounts them on the grounds that Plaintiffs failed to provide sufficiently specific evidence about their relevance. JA2215. In fact, that evidence was provided. *See, e.g.,* JA1239-1250.

d. Direct Evidence of Actual Malice: APA Board Members' Direct Knowledge that Many of the Report's Allegations Were False (JA1251-52; 1444-1452)

When the APA Board published the Report, most of its members at that time had participated in the events at issue and had first-hand knowledge of them. JA1444-52. Some had also made statements or taken actions that contradicted the Report's descriptions of those events. For example, the Report claims that, in investigating ethics allegations against Major John Leso, among others, APA purposely failed to conduct a thorough investigation. JA2295-2300. But Dr. Kaslow, head of the Special Committee overseeing Hoffman's investigation, had issued a statement commending the "thoroughness" of the Leso ethics investigation, noting that "as complete and careful a review of the available evidence was undertaken as possible." JA1247-48. Both the Board liaison to the Ethics Committee and APA's Associate General Counsel signed off on closing the Leso complaint and briefed other Board members on it at length. JA1252.

Additional evidence relating to APA's knowledge was detailed in Exhibit B to Plaintiffs' First Opposition. JA1444-52. The trial court was directed to the exhibit at argument (JA2069; 2103), but its Amended Order fails to refer to any of this evidence, summarily dismissing the claims against APA without analysis.

3. Circumstantial Evidence Further Supports a Finding of Actual Malice.

In defamation cases, circumstantial evidence is often critical. Courts infer actual malice from facts that "provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982) (citations omitted). JA1252-68.

The record contains several types of circumstantial evidence supporting a finding of actual malice in addition to the evidence of negligence: (a) adherence to a preconceived narrative, (b) purposeful avoidance of the truth, (c) knowing reliance on unreliable and biased witnesses, (d) bias or ill-will, (e) refusal to retract, and (f) republication after the defendants were given evidence refuting the Report's falsehoods. This evidence was presented in Plaintiffs' Superior Court filings and is summarized briefly below. JA1202-1452.

a. Adherence to a Preconceived Narrative (JA1253-57)

"[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the

preconceived story is evidence of actual malice . . . .” *Harris v. City of Seattle,* 152 F. App’x 565, 568 (9th Cir. 2005), quoting Smolla, *1 Law of Defamation* § 3.71 (2d ed.)

Plaintiffs presented abundant evidence from which a jury could reasonably infer “by cumulation and by appropriate inferences” (*Airlie Found., Inc.*, 337 F. Supp. at 429) that Hoffman adhered to a preconceived narrative which assumed Plaintiffs’ culpability and, as Section 3-b below shows, purposefully avoided evidence that contradicted that narrative.

Evidence presented to the trial court included but was not limited to the following. A jury is entitled to assess the evidence’s cumulative weight.

- Hoffman’s claim that Plaintiffs spent years colluding was adopted primarily from their long-time critics on whom he over-relied, and who were determined to bring about their prosecution. See section 3-c below.
- Affidavit testimony from ***twenty-seven*** witnesses interviewed by Hoffman’s team provided credible and convincing evidence that Hoffman distorted, omitted information from, or otherwise misrepresented their interviews.[18]

[18] JA1456-57, ¶¶9,11; 1463 ¶¶4, 5, 7; 1464; ¶¶8, 9; 1465 ¶13; 1479, ¶¶13, 14; 1480-81, ¶¶16 -23; 1482, ¶25; 1483, ¶¶30-33; 1491-92, ¶4; 1492, ¶6; 1492-93, ¶7; 1503, ¶3;1507, ¶¶6,7; 1507-8, ¶¶9-12; 1512, ¶¶ 8; 1512-13, ¶9;1515-16, ¶4; 1516, ¶5; 1519-20, ¶¶4-7;1525, ¶9; 1542, ¶10; 1543, ¶¶14, 15; 1557-58, ¶4; 1558, ¶5; 1559, ¶8; 1560, ¶13; 1560-61, ¶14;1564, ¶7; 1656, ¶5; 1658, ¶¶12; 14; 1659, ¶18; 1662-63, ¶¶4-6; 1667, ¶¶4-7; 1669, ¶15; 1686, ¶5; 1688-91, ¶¶4-9; 1694, ¶¶7 8; 1698, ¶¶6,

Twenty of those witnesses testified that he appeared intent on proving a preconceived story and deliberately avoided any contrary information. JA1455-1767.[19] Defendants submitted no contrary affidavits.

b. Purposeful Avoidance of the Truth (JA1257-1259)

Purposeful avoidance of the truth also demonstrates actual malice. *Harte-Hanks Commc'ns*, 491 U.S. at 692. The evidence of purposeful avoidance includes the following, among other instances described in Plaintiffs' briefs below:

- Defendants' interview of Dr. Dunivin focused on an out-of-date interrogation policy which they claim allowed for abuses. Dr. Dunivin told Defendants she needed DoD clearance to provide more information and, to get that clearance, needed the questions the Defendants wished to explore. They never provided those questions, instead focusing on out-of-date policies. JA1258; 1541, ¶7.
- Hoffman possessed and reviewed a transcript of a tape recording by Jean Maria Arrigo stating that the PENS Task Force was "very, very firm about psychologists don't torture people, don't do all these things. . . . That's what

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7; 1710, ¶7; 1714-15, ¶¶5-9; 1716, ¶¶11 12; 1728, ¶¶ 5-7; 1731-32, ¶4; 1732, ¶¶6, 7; 1733, ¶11; 1737, ¶¶6-7; 1738, ¶14; 1742, ¶¶6, 8; 1743 ¶11; 1744, ¶¶13-14; 1751, ¶¶5, 6; 1758-59, ¶¶ 4-5.

[19] JA1466, ¶19; 1484, ¶37; 1491-92, ¶¶4-5; 1507, ¶7; 1512-13, ¶9; 1515-16, ¶4; 1525, ¶9; 1543, ¶18; 1557-58, ¶4; 1560, ¶11; 1659, ¶19; 1663, ¶7; 1669-70, ¶17; 1691, ¶10; 1698, ¶6; 1710, ¶6; 1717, ¶13; 1728, ¶5; 1732, ¶6; 1732-3, ¶8; 1743, ¶11; 1744, ¶16; 1751, ¶6.

they want to be, a standard operating procedure." JA1244. Despite Dr. James' similar reference to restrictive policies on the APA PENS listserv, Defendants never followed up to inquire about the procedures or policies to which Arrigo and James (and others) referred.

The trial court dealt with none of this evidence.

c. Knowing Reliance on Unreliable and Biased Witnesses with a Motive to Defame (JA 1260-1262)

Reliance on sources which a defendant knows are biased or unreliable, or has obvious reasons to doubt, supports a finding of actual malice. *St. Amant* at 732. Hoffman relied heavily on a few biased and unreliable sources whose views supplied the Report's narrative and false conclusions, while discounting or discarding the views of credible sources whose testimony and evidence flatly contradicted those conclusions. JA1254, fn 107; 1260.

First, Hoffman's story of Plaintiffs' culpability for a multi-year collusion was adopted primarily from long-time critics of military psychologists. They publicly acknowledged they wanted Hoffman to demonstrate that Plaintiffs' acts constituted an ongoing collusive venture, thus defeating statute-of-limitations obstacles to criminal and war-crimes prosecutions. JA1254.[20] Moreover, beyond their

[20] Nathaniel Raymond, *Weaponizing Health Workers: How Medical Professionals Were a Top Instrument in U.S. Torture Program*, Democracy Now! (Dec, 23, 2014) http://tinyurl.com/ypk43skh (at 18:56; 20:35) ("Right now, David Hoffman of the

commitment to proving Plaintiffs' culpability, Hoffman had other reasons for skepticism: Dr. Soldz, a key source, publicly claimed in an online interview that Plaintiff James had gotten his job partly because he was "black," even though "he doesn't show up for work" and "can't write an English sentence." JA1260-61.

Nevertheless, Hoffman treated these sources as allies rather than as witnesses with an axe to grind. In contrast to his treatment of other interviewees, he promised them confidentiality, set out to build their "trust," and over-relied on them for information. JA1260-61, fns 133, 134. In sum, he allied himself with these witnesses' view of the events he was investigating, rather than subjecting their views to the same skepticism with which he uniformly approached Plaintiffs' statements.

Second, the Hoffman Report over-relied on Dr. Trudy Bond, without disclosing that her complaints against Dr. James before the ethics boards of two states and Guam and the United Nations Committee against Torture had not resulted

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law firm Sidley … is conducting an independent probe of the APA, and I'm cooperating with him. And I also analyzed Mr. Gerwehr's emails at the request of the public corruption unit of the FBI in 2012, and I analyzed in the context of a RICO violation, potentially, by the [APA] related to this apparent collusion with the CIA and the White House. . . . The hope here is that with David Hoffman's investigation, new evidence can be unearthed. And the hope is that if it falls within the statute of limitations, he'll refer it to the Department of Justice.").
See also Psychologists for Social Responsibility: An Open Discussion of the Hoffman Report and Where to Go from Here, YouTube (Aug. 6. 2015), available at http://tinyurl.com/55c7n2ua (at 30 seconds) (Dr. Soldz says that Hoffman turned to him whenever he needed a document he could not find).

in any action. Dr. Bond later used the Report to renew calls for criminal actions against Plaintiffs. JA1261-62, fn 139.

d. Evidence of Bias or Ill-Will

Although evidence of motive to defame, bias, and ill will is not enough alone to find actual malice, it may cumulatively support such a finding. *Harte-Hanks Comm'cns, Id.* at 668; *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019).

First, the Report's conclusions and their endorsement by the APA Board served the agendas of the Board, the critics who had sparked the investigation, and Hoffman himself. A jury is entitled to consider the accumulation of circumstantial evidence that Defendants had motive to defame Plaintiffs and, conversely, would have gained no benefit if the Report had not "convicted" them. *Mann*,150 A.3d at 1235-36.

The Report suited the Board by scapegoating Plaintiffs while attaching no blame to Board members who had had full knowledge of the events at issue—including Dr. Kaslow, under whose leadership of the Special Committee the cost of the Hoffman investigation ballooned to over $4 million, five times the original estimate. JA280, 1222, 1263, 1265-66. The Report's narrative enabled Dr. Kaslow to claim publicly that it implicated only a "small underbelly" of the APA, not Board members. JA307. It suited the critics because it reinforced and supported their desire to bring criminal prosecutions. And it suited Hoffman by bolstering his

reputation, developed as a prosecutor, inspector general, and political candidate, as a hard-charging pursuer of corruption.

Second, although Hoffman conceded that he had found no evidence of criminal activity, the Report repeatedly characterizes Plaintiffs' purported conduct using loaded terms drawn from RICO litigation and war-crimes prosecutions: "collude" or "collusion," "joint venture" and "joint enterprise," and "deliberate avoidance." JA1254, fn 107; 1264. As a former federal prosecutor, Hoffman knew the damaging connotations of this language, and would have understood that it comported with the critics' desire to avoid statute-of-limitations obstacles to prosecuting the Plaintiffs. Yet, at a meeting with the APA Council, Hoffman admitted that a term such as "behind-the-scenes communication"—normal in a large organization—would have been more accurate than "collusion." JA1650, ¶ 15, fn 1.

Third, Plaintiffs presented evidence that, before the Report was given to APA, Hoffman took steps to ensure that it would be front-page news by leaking it to the *New York Times*. JA1225. Sidley countered with one affidavit from their expert, creating a material factual dispute. JA1866; 1921. As Hoffman has said with respect to previous investigations, "I use the media to fan the flames." JA1717, ¶13.

This circumstantial evidence, in combination with evidence of purposeful avoidance and reliance on unreliable witnesses, provides ample basis for a jury to conclude that the Report demonstrates a motive to defame, bias, or ill will. Hoffman

acknowledged to APA officials that, in writing the Report, he set out to "make [the] case" to support his conclusions. The record evidence—even without further discovery—would allow a jury reasonably to conclude that he set out from the beginning of his investigation to "make the case" against Plaintiffs.

e. Defendants' Repeated Refusal to Retract or Correct Their Defamatory Statements Despite Additional Evidence of Their Falsity (JA1267-1269)

Evidence of steadfast refusal to correct or retract defamatory statements is properly considered as bearing on the issue of actual malice. *Weaver,* 926 A.2d at 906 (citing *Herbert*, 441 U.S. at 164) (republications, retractions, and refusals to retract are subsequent acts used to demonstrate a previous state of mind). The Amended Order incorrectly asserts that this refusal is irrelevant because Defendants had no duty to correct false statements. Amended Order at 27 (JA2219).

The evidence presented to Defendants after the Report's publication showing that its defamatory statements are false was summarized at length in the filings in Superior Court. JA1202-1452. Despite that evidence, and at least seven requests to retract or correct the Report, Defendants have taken no such steps. JA1267-69.

f. Additional Evidence of Actual Malice: The Trial Court Erred in Finding Defendants Established as a Matter of Law They Did Not Republish the Hoffman Report.

Republication is directly relevant to the issue of actual malice. *See, e.g.*, Restatement (Second) of Torts § 580A cmt. d (1977) ("Republication of a statement

after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard."); *Weaver*, 926 A.2d at 906 (citing the U.S. Supreme Court and explaining that republications, retractions, and refusals to retract can be used to demonstrate a previous state of mind); *Nunes v. Lizza*, 12 F.4th 890, 900 (8th Cir. 2021); *Zerangue*, 814 F.2d at 1072.

Republication is a question of fact determined by a jury. *See, e.g., Eramo,* 209 F. Supp. 3d at 879-80; *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985), *vacated in part on other grounds on reh'g*, *Tavoulareas*, 763 F.2d 1472, *and on reh'g*, *Tavoulareas*, 817 F.2d 762. To hold that there was no republication as a matter of law, therefore, a court would have to find that there are no material issues of fact which could lead a properly instructed jury to find a republication. Plaintiffs' evidence demonstrates that, at a minimum, there are such issues.

On August 21, 2018, almost three years after the initial publication of the revised Hoffman Report, APA sent an email to members of the APA Council, its governing body, and other APA members that was devoted to accessing the Revised Report on the APA website, along with related documents that had not previously accompanied it. The email resulted from a substantive discussion of the Report, including a motion to remove it from the website, at a Council meeting. It included a link for accessing the Report and the related documents. The email's importance was reflected by its author: APA's General Counsel. APA also posted on its website

minutes of the Council meeting that summarized its discussion of psychologists' participation in interrogation settings and provided the same link. It also removed the landing page and first version of the Report, redirecting the old links to the new version of the Report.

As the trial court's Order acknowledges, JA2203, a statement on a website constitutes a republication if it "is directed to a new audience" ***or*** "is substantively altered or added to . . . ." *Eramo*, 209 F. Supp. 3d 862. *See also Seltzer v. Fin. Indus. Regul. Auth.*, 2023 WL 5723460, at *4 (D.D.C. Sep. 5, 2023).

As to the first prong of the *Eramo* analysis, Plaintiffs submitted two affidavits demonstrating that the General Counsel's August 21, 2018, email would have reached new Council members and others who would not have received the initial publication. JA1814-25.

As to the alternative prong of the *Eramo* analysis, courts have uniformly held that "where substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred." Here, APA decided to accompany the Report with several documents about it, including a report by APA's Division of Military Psychology, open letters from former chairs of the APA Ethics Committee, and a letter from former APA presidents.

There is no question that the additional documents dealt with the substance of the Report, demonstrating its falsehoods but also summarizing or quoting its

content. For a republication to have occurred, the additional substantive material need not expand upon the original defamation and, in fact, can criticize it. In *Eramo,* an online magazine published a defamatory article about a college dean's treatment of an alleged rape on campus. A year later, the magazine issued a statement, appended to the online article and on a separate URL, which acknowledged discrepancies in the accuser's accounts. The magazine argued that it could not be held liable for a republication since the statement was a *retraction* of the original defamatory statements. The court rejected this argument, holding that "a reasonable jury could determine that the subsequent Editor's Note 'effectively retracted'" only a portion of the original article. *Eramo*, 209 F. Supp. 3d at 880.

The rationale for this principle is clear: where a defendant takes the affirmative step of adding related material to a defamatory document, even if that material does not expand the original defamations, the defendant is broadcasting its conscious decision to stand by the original material. Defendants undertook "an 'affirmative act' to present the material again . . . ." *Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 571 (S.D.N.Y. 2019). Thus, a jury could find that affirmatively directing readers to the revised Report in the face of the accompanying documents without retracting *any* part of it constituted a republication.

In concluding that there was no republication, the trial court failed to acknowledge the case law holding that adding related statements to a defamatory

statement constitutes republication. In finding that "there is no evidence that Defendant APA intended to, or actually did, reach a new audience" (JA2213), the court disregarded the allegations in the Supplemental Complaint (JA1791-1803) and the testimony of the Newman and Harvey Affidavits stating that the Report did reach a new audience. JA1820-25, ¶6; 1814-18, ¶6. APA did not counter that evidence.

VI. The Trial Court Failed to Analyze All Claims and Evidence and Impermissibly Usurped the Role of the Jury by Deciding Triable Issues of Fact.

On the issue of actual malice, the question to be resolved at summary judgment is whether plaintiffs' proof is sufficient such that a reasonable jury *could* find actual malice under a clear-and-convincing standard, "*not whether the trial judge is convinced of the existence of actual malice.*" *Nader v. de Toledano*, 408 A.2d 31, 50 (D.C. 1979) (emphasis in original). In this case, the trial court usurped the jury's role by deciding what claims and evidence to consider or ignore and—against the instructions of this Court in *Mann*, 150 A.3d at 1235-36—by repeatedly weighing and assessing the credibility of the evidence it did consider.

A. The Court Failed to Analyze the Claims Against APA for Statements to the Media and Against Sidley for Defamation by Implication.

The Defendants' anti-SLAPP motions, which are not made claim-by-claim, fail to fully analyze the claims solely against APA (Count 8) (JA333-35) or the defamation-by-implication claim against Sidley (Count 12) (JA343-45). Nor does

the trial court's opinion analyze the evidence relevant to those claims. *See, e.g.*, JA 1215 fn. 2, 1216 & fn. 4, 1227, 1263-65. At a minimum, they must be analyzed by this Court in the first instance or remanded. As to the remaining claims, the trial court did not undertake a claim-by-claim analysis as to whether the Anti-SLAPP Act applied or whether Plaintiffs had met their burden under the summary judgment standard established by *Mann.* Nor did the court consider the evidence of negligence or actual malice, including what Defendants knew, at the time of each of the Report's publications and republications. JA1786-88; 190-91; 2118; 2120. *See Am. Studies Ass'n*, 259 A.3d at 750 ("[W]hether the plaintiffs . . . are likely to succeed on the merits . . . should be examined . . . claim by claim, by the trial court.").

B. The Court Failed to Consider Core Evidence.

The Amended Order states that the "foundation" for Plaintiffs' contention that their evidence demonstrates Defendants' actual malice consists of 34 affidavits (and one memorandum in lieu of an affidavit) contained in an exhibit to Plaintiffs' Opposition. JA2214-15. That statement is, at best, incomplete. The foundation also includes admissions (JA1236-1244, 1251-52), affidavits, and evidence listed in two other exhibits to Plaintiffs' Opposition that the Order ignores: Exhibits A (JA1301-62) and B (JA1444-52). Most notably, it includes, among much other evidence, governmental documents showing that military interrogation policies at the time of the events the Hoffman Report investigated prohibited the abusive techniques

Hoffman says were permitted. *See, e.g.,* JA1241-44, 1304, 1367, 1382, 1386, 1389-90, 1390, and JA201-211, 209 (testimony of Patrick Philbin, Associate Deputy Attorney General, in July 2004, a year before PENS, stating that sleep deprivation was not a permissible interrogation technique under military policies or the Geneva Conventions).

C. The Court Committed Reversible Error by Repeatedly Weighing and Assessing the Credibility of the Limited Evidence It Considered, Failing to Give Plaintiffs the Benefit of Inferences.

The trial court's discussion of the limited evidence it considered repeatedly reflects the same reversible errors. It improperly weighs and assesses the evidence. It fails to give Plaintiffs the benefit of every reasonable inference and, in fact, resolves *all* inferences *against* Plaintiffs. And it improperly judges the credibility of Plaintiffs' witnesses who provided over 30 affidavits. In effect, the Amended Order argues the Defendants' case.

Specifically:

1. As to government reports in Defendants' possession that contradicted the Report's conclusions (JA1241-45, 1250-51), the court stated Plaintiffs failed to explain whether the reports relied on the same information and focused on the same issues as the Hoffman Report. JA2215. In fact, Plaintiffs provided that explanation (*see, e.g.*, JA1241-42, 1250-51). Moreover, whether the reports considered evidence similar to the Hoffman Report's scope is a question of fact for a jury. "[T]he weight

to be given to the various investigations and reports . . . is a question for the jury." *Mann*, 150 A.3d at 1253-54. A reasonable jury could consider that a finding of actual malice is supported by the Report's failure even to acknowledge the governmental reports' conclusions that conflict with its conclusions. *Id.* at 1253.

2. The Amended Order acknowledges that "the Plaintiffs proffer declarations from multiple witnesses contending that information they provided was not included in the Report or disagreeing with how their declarations were portrayed." But it then characterizes that evidence as showing only the omission of "a comment here or an opinion there." JA2215-16. This misses the point. The declarations demonstrate a *pattern* of omissions and mischaracterizations, and that pattern is not random. Like the pattern of documents in Defendants' possession but omitted from the Report, it always favors the Report's narrative of a collusive enterprise and repeatedly omits contradictory facts and documents. A jury could conclude that evidence of such patterns demonstrates actual malice.

3. Plaintiffs' Complaint alleged that Hoffman undertook the investigation with a preconceived narrative and purposefully avoided evidence that would contradict that narrative. The Amended Order states:

> [T]his argument is rooted in declarations within attached affidavits that echo each other in tenor and vocabulary . . . (record citations omitted) . . . Aside from these statements perhaps representing opinion testimony, it is not possible to tell from this record where along the investigative process involving some 150 witnesses these specific interviews took

> place, and what information investigators had received prior to the interview leading them to focus their inquiry.

JA2216-17.

The Order's analysis fails on several grounds. First, the court judges the credibility of the witnesses' affidavits, as *Mann* warns against. Second, the affidavit evidence is not simply that at some point Defendants began to "focus their inquiry," but that they focused on proving Plaintiffs' culpability to the exclusion of the truth. *See Jackson v. City of Columbus*, 883 N.E.2d 1060, 1065 (Ohio 2008).

Third, the court offers no authority suggesting why these witnesses' testimony is not admissible lay testimony regarding their experience of the interviews and the events described in the Report. A jury could find that the affidavits are similar because they accurately reflect what happened, providing consistent evidence of Defendants' bias, ill-will, and purposeful avoidance of the truth.

4. When the court turns to Plaintiffs' evidence that the Defendants relied heavily on biased and unreliable witnesses, it states: "However, those four individuals were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that those witnesses were biased does not suffice to establish malice." JA2218. Again, this misses the point. What matters—a question for the jury—is the extent of Hoffman's heavy reliance on these key sources despite evidence of their unreliability and to the exclusion or avoidance of evidence contradicting their allegations. JA1260-62.

5. Next, the court addresses Plaintiffs' evidence that many sources provided documents and testimony demonstrating the falsity the Report's allegations, and yet Defendants refused to retract any allegations. According to the trial court, Plaintiffs "fail to make the necessary connection" between Defendants' failure to correct or retract and specific false defamatory statements. JA2219. The court also rules—**citing no authority**—that Defendants had no duty to retract. *Id.*

The first conclusion is simply wrong. In their briefing, Plaintiffs provided specific instances in which their counsel had demonstrated the falsity of specific allegations and Defendants failed to correct or retract. The "necessary connection" was made repeatedly. JA1302-1442, 1241-45, 1250-51.

The second conclusion, that Defendants have no duty to retract or correct, is wrong too. As noted above, steadfast refusal to retract is admissible evidence of actual malice. *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985). *See also* Restatement (Second) of Torts § 580A (1977) cmt. d (1977); *Weaver*, 926 A.2d at 906 (citing *Herbert,* 441 U.S. at 164 n. 12).

6. The trial court also cited emails exchanged among Drs. Banks and James and former Plaintiff Dr. Behnke that were headed "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." The court suggested that the emails' headings were "curious[ ]," and that "it is safe to assume

that investigators reviewed and considered the emails in reaching their conclusions." JA2220. The court thus adopts the Defendants' inferences of collusive intent.

The email headings were not "curious." They were the result of Dr. Banks' status as an active military officer, which prohibited him from speaking publicly. JA1255-57, 1463-64. Three of the emails were copied to other people, including one to the APA General Counsel. And, in fact, *nothing was deleted*. JA1569, ¶18. The trial court mentions none of this, instead construing Defendants' evidence in the light *least* favorable to Plaintiffs.

7. The trial court neglected to undertake the required analysis of Plaintiffs' evidence for negligence. *Airlie Found., Inc.* 337 F. Supp. at 429. At the February 21, 2020, hearing, Plaintiffs' counsel listed the negligence factors, citing a D.C. District Court case regarding an internal-investigation report and a well-known legal treatise. *Pearce,* 664 F. Supp. at 1510, *rev'd on other grounds*, 828 F.2d 826 (D.C. Cir. 1987). JA1265, fn 151; 2116-17. The court ignored those authorities. Instead, referring to negligence in a footnote, it wrongly concluded that "Plaintiffs have failed to proffer evidence in this record that in publishing the Report the Defendants 'fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it . . . . *Kendrick [v. Fox Television*, 659 A.2d 814 (D.C. 1995)] at 822.'" JA2220, fn 10. *Kendrick,* also relied on by Defendants (JA1844, fn 10), dealt with standards of care for media journalists, not for an internal investigation.

Plaintiffs proffered sufficient evidence from which a jury could find Defendants failed to use reasonable care for attorneys and APA Board members conducting an investigation.

CONCLUSION

Appellants respectfully request that the D.C. Anti-SLAPP Act be declared void and unconstitutional and the decisions of the trial court be reversed for Plaintiffs to proceed as private figures under a standard of negligence.

Respectfully submitted this 28th day of February 2024,

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EXHIBIT A
D.C. SUPERIOR COURT CASES 2011-2023
WHERE SPECIAL MOTIONS WERE FILED

Motions filed were motions to dismiss unless noted as a special motion to quash.

	CAPTION	SUPERIOR COURT/COURT OF APPEALS CITATION	TYPE OF CASE
1	*Tran v. WUSA9* Filed by news station against individual.	2023-CAB-003969	Defamation
2	*Salem Media Grp., Inc. v. Awan* Filed by book publisher against former U.S. House of Representatives IT staff.	2020 CA 652 B 22-CV-0004 301 A.3d 633 (D.C. 2023)	Defamation
3	*Pub. Media Lab, Inc. v. District of Columbia* Filed by Public Media Lab against D.C.	2021 CA 0017 B 21-CV-389 & 21-CV-475 276 A.3d 1 (D.C. 2022)	Corporate governance
4	*Sonmez v. Washington Post* Filed by *Washington Post* against individual.	2021 CA 002497 B 22-CV-0274 & 22-CV-0301	Employment discrimination, retaliation, hostile work environment, negligent infliction of emotional distress
5	*Victor v. Khatskevich* Filed by individual against businessman/entrepreneur.	2019 CA 001264 B	Defamation
6	*Fells v. SEIU* Filed by labor union aganst former employee.	2019 CA 3079 B 19-CV-1246 & 20-CV-0387 281 A.3d 572 (D.C. 2022)	Defamation
7	*Toufanian v. Lorenz* Filed by *New York Times* reporter against business.	2020 CA 35 B	Tortious interference

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8	*Lawless v. Mulder* Filed by *Washington Post* reporters against individual claiming he was defamed.	2021 SC3 000441 2021 SC3 000462 2021 SC3 000483	Aiding and abetting fraud (in small claims court)
9	*Berry v. Current Publication; Berry v. American University* Filed by university, university radio station, and university publication against former employee.	2020 CA 004366 B 2021 CA 2726 B 22-CV-0025 22-CV-0025	Defamation, false light, tortious interference with business relationships
10	*Muslim Advocates v. Mark Zuckerberg, et al.* Filed by Facebook against nonprofit organization alleging Facebook made false and deceptive statements.	2021 CA 001114 B	Misrepresentation
11	*Hetta v. Museum of the Bible* Filed by the Museum against individual.	2019 CA 000312 B	False imprisonment, discrimination, defamation
12	*Cunningham v. Berlitz Languages, Inc.* Filed by Berlitz against individual student.	2020 CA 003260 B	Defamation, false light
13	*Fridman v. Orbis Bus. Intelligence Ltd.* Filed by Orbis opposition research company against Russian businessman.	No. 18-CV-919 229 A.3d 494 (D.C. 2020)	Defamation
14	*D.C. v. Precision Contr. Solutions, LP* Filed by home improvement company against D.C.	2019 CA 005047 B 2020 CA 001596 B 20-CV-0472 20-CV-0471	Defamation, tortious interference with business relations, invasion of privacy, civil conspiracy

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15	*Bronner v. The American Studies Association et al.* Filed by the American Studies Association against individual.	2019 CA 001712 B 19-CV-1222 259 A.3d 728 (D.C. 2021)	Breach of fiduciary duties, ultra vires, and breach of contract
16	*The Praxis Project v. Coca-Cola Company et al.* Filed by Coca-Cola Company against non-profit corporation and individuals alleging Coke deceived consumers about sugar characteristics of their beverages.	2017 CA 004801 B	Fraudulent misrepresentation
17	*Close It! Title v. Nadel* Filed by lawyer who spoke in a radio interview on behalf of clients who thought title company had stolen their money.	2018 CA 005391 B 248 A.3d 132 (D.C. 2021)	Defamation, false light, and tortious interference
18	*The Institute for Gulf Affairs et al. v. the Saudi American . Public Relation Affairs Committee et al.* Filed by one special-interest group (SAPRAC) against another.	2018 CA 004709 B 242 A.3d 602 (D.C. 2020)	Defamation, false light invasion of privacy, intentional inflection of emotional distress
19	*Culbreth v. Lotus Muladhara* Filed by one private individual against another.	2018 CA 000264 B	Defamation, invasion of privacy
20	*Jacobson v. National Academy of Sciences et al* Filed by National Academy against individual researcher.	2017 CA 006685 B 22-CV-0523	Defamation, breach of contract, promissory estoppel

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21	*German Khan, et al. v. Orbis Business Intelligence Limited, et al.* Filed by opposition research company against three businessmen.	2018 CA 002667 B 21-CV-0440, 21-CV-0283 292 A.3d 244 (D.C. 2023)	Defamation
22	*TS Media, Inc. v. Public Broadcasting Service* Filed by PBS against talk show host who sued PBS following an allegedly biased and defamatory investigation that accused him of misconduct.	2018 CA 001247 B 20-CV-0538	Defamation, intentional interference with contract and tortious interference with business expectancy, breach of contract. Court dismissed only the last two claims.
23	*Neiweem v. Nicholson* Special motion to quash filed by individual defendant against individual plaintiff.	2017 CA 003122 B	Defamation, tortious interference with business relationships
24	*Wilkenfeld v. Stewart Partners Holdings LLC* Filed by individual attorney against financial services firm suing for defamation.	2017 CA 003420 B	Defamation
25	*Peter Gordon, et al. v. First Hills Neighborhood Alliance, et al.* Filed by Neighborhood Alliance against homeowners claiming that Alliance's efforts to have a house designated as an historic landmark were actionable.	2016 CA 006397 B 17-CV-1202	Fraudulent misrepresentation, tortious interference with contract

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26	*Moore v. Costa* Filed by talk show host against individual.	2016 CA 4038 B	Defamation
27	*Simpson v. Johnson & Johnson et al.* Filed by trade association representing the personal care and cosmetics industry against individual.	2016 CA 001931 B	Violation of DC Consumer Protection Act, negligence, strict liability, negligent misrepresentation, fraud, breach of express warranties, civil conspiracy
28	*JAP Home Solutions, Inc. v. Lofft Construction, Inc. et al.* Filed by reporter and JAP Home Solutions against Lofft.	2017 CA 003390 B	Defamation, conspiracy to injure, tortious interference
29	*CEI et al. v. Mann* Filed by author and publisher of articles against research scientist alleging the articles to be defamatory.	2012 CA 008263 B 14-CV-126 150 A.3d 1213 (D.C. 2016)	Defamation
30	*Burke v. Doe #1 et al.* Special motion to quash filed by anonymous poster of allegedly defamatory statements on Wikipedia against Burke's attempt to learn the poster's identity.	2012 CA 007525 B 91 A.3d 1031 (D.C. 2014); 133 A.3d 569 (D.C. 2016)	Defamation, tortious interference with business advantage, false light invasion of privacy
31	*Park v. Brahmbhatt* Filed by employee against former manager who she alleges counter-sued her in retaliation for her action against him.	2015 CA 005686 B 18-CV-0872 18-CV-0873 18-CV-0874 291 A.3d 211 (D.C. 2023) 299 A.3d 5 (D.C. 2023)	Assault and battery, intentional infliction of emotional distress, tortious interference, blackmail

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32	*Two Rivers Public Charter School, Inc. et al. v. Weiler et al.* Filed by individuals protesting a Planned Parenthood facility to be built next to school against the school when it sued them for intentional infliction of emotional distress and nuisance.	2015 CA 009512 B 16-CV-0558 *Nicdao v. Two Rivers Pub. Charter Sch., Inc.,* 275 A.3d 1287 (D.C. 2022)	Intentional infliction of emotional distress, private nuisance, conspiracy to create a private nuisance
33	*Pitts v. WJLA et al.* Filed by news media organizations against an individual.	2016 CA 002054 B	Defamation, false light, intentional infliction of emotional distress
34	*Moore v. Costa* Filed by talk show host against Liberia's Minister of Public Works.	2016 CA 004038 B	Defamation
35	*Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l et al.* Filed by the Center against shipping company.	2014 CA 002273 B	Defamation, declaratory judgment, tortious interference with business relationships
36	*Vandersloot and Melaleuca, Inc. v. Foundation for Nat'l Progress et al.* Special motion to quash filed by non-parties in a case of businessman plaintiff suing Mother Jones for alleged defamatory remarks.	2014 CA 003684 2 14-CV-1366	Defamation

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37	*The Washington Travel Clinic, PLLC et al. v. Kandrac* Filed by individual posting reviews on Yelp against doctor suing him for defamation.	2013 CA 003233 B 14-CV-1016; 14-CV-0060	Defamation, tortious interference with prospective business advantage
38	*Payne v. District of Columbia et al.* Filed by D.C. against a terminated former employee.	2012 CA 006163 B	Defamation, false light, intentional infliction of emotional distress, constitutional defamation violation of Fifth Amendment liberty interest
39	*Campbell v. CGI Group, Inc. et al.* Filed by information technology company against Chief Operating Officer for the D.C. Department of Health Care Finance ("DHCF"), who sued over alleged defamatory statements that led to her employment termination.	2012 CA 008217 B	Defamation, intentional infliction of emotional distress, interference with contractual relations, intentional interference with employment
40	*Vincent Forras et al. v. Iman Feisal Abdul Rauf, et al.* Filed by individual wanting to build mosque near the site of 9/11and lawyer representing him against individual with a civil-rights leaning foundation and the lawyer representing him who sued for defamation.	2011 CA 008122 B	Defamation, false light, assault, intentional infliction of emotional distress

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41	*Newmyer, et al. v. The Sidwell Friends Sch.* Filed by parent of school student against school psychologist who claimed parent had defamed him.	2011 CA 003727 M 128 A.3d 1023 (D.C. 2015)	Defamation, false light invasion of privacy, tortious interference with contract, intentional infliction of emotional distress
42	*Lehan v. Fox Television Stations, Inc. et al.* Filed by Fox News against individual.	2011 CA 004592 B	Defamation. **Court held Act is procedural**, not substantive, and therefore applies retroactively.
43	*Snyder v. Creative Loafing Inc. et al.* Filed by newspaper against owner of Redskins.	2011 CA 003168 B	Defamation
44	*Dean v. NBC Universal* Filed by MSNBC and a newspaper reporter against individual.	2011 CA 006055 B	Defamation, false light

CERTIFICATE OF SERVICE

The undersigned does hereby certify on this 28th day of February 2024, that a true copy of the foregoing En Banc Opening Brief of Appellants was filed by electronic means through the D.C. Court of Appeal's filing system, concurrent with the filing of this document, and served upon all registered participants.

s/ Bonny J. Forrest
Bonny J. Forrest

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

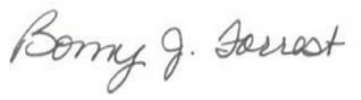
2. Any information revealing the identity of an individual receiving mental-health services.

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

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

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

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



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No. 20-cv-0318

Case Number(s)

February 28, 2024
Date