DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318
Notice of Appeal Filed April 6, 2020; Docketed April 21, 2020
All Court Deadlines Tolled Until May 31, 2020

L. Morgan Banks, III, Debra L. Dunivin, and Larry C. James

Appellants,

vs.

David H. Hoffman, Sidley Austin LLP, Sidley Austin (DC) LLP,
American Psychological Association, and
JOHN AND/OR JANE DOES 1-50

Appellees.

D.C. Attorney General on behalf of the District of Columbia

Intervenor Below

Appeal from the Superior Court of the District of Columbia
(CAB5989-17)
Hon. Hiram E. Puig-Lugo, Trial Judge

MOTION TO EXPEDITE APPEAL

Louis J. Freeh, Esq.
(D.C. Bar No. 332924)
FREEH SPORKIN & SULLIVAN, LLP
2550 M Street NW,
First Floor
Washington, DC 20037
(202) 390-5959
bescript@freehgroup.com

Bonny J. Forrest, Esq.
(*pro hac vice submitted*)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
bonforrest@aol.com

John B. Williams, Esq.
(D.C. Bar No. 257667)
WILLIAMS LOPATTO PLLC
1200 New Hampshire Avenue NW,
Suite 750
Washington, DC 20036
(202) 296-1665
jbwilliams@williamslopatto.com

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Exhibit B lists all D.C. Superior Court cases and active Court of Appeals cases involving the D.C. Anti-SLAPP Act that have been located.

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I. INTRODUCTION

Pursuant to D.C. App. R. 4(c)(1)(A), Plaintiffs-Appellants Cols. (Ret.) L. Morgan Banks, Debra Dunivin, and Larry C. James respectfully move this Court for an order setting an expedited schedule for their appeal from decisions by the Honorable Hiram E. Puig-Lugo that resulted in the premature dismissal under the D.C. Anti-SLAPP Act of their well-founded defamation suit. The record has been certified and transmitted to the D.C. Court of Appeals. Neither the Appellees nor the Intervenor consent to expedited treatment of the appeal.

An expedited appeal is warranted because the issues raised may affect the outcome of anti-SLAPP cases in D.C. Superior Court as well as at least five other appeals now before this Court.[1] Expedited treatment is also warranted because the damage to Plaintiffs' reputations and livelihoods caused by the defamatory statements at issue—statements that led to international headlines asserting that they "shielded," "bolstered," and "endors[ed]" torture—will continue until the voluminous evidence demonstrating the falsity of the defamations is presented to a jury. Falsehoods based on those defamations have been republished as recently as March 15, 2020.[2]

This appeal raises three issues that have broad application to pending suits:

1. Plaintiffs contend that the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act (Anti-SLAPP Act or Act), D.C. Code §§ 16-5501 to 5505 (2012 Repl.),

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[1] *Peter Gordon, et al., v. Forest Hills Neighborhood Alliance, et al.*, No. 17-CV-1202; *German Khan, et al., v. Orbis Business Intelligence Limited, et al*., No. 18-CV-0919; *Saudi American Public Relations Affairs Committee, et al., v. Institute for Gulf Affairs, et al.*, No. 18-CV-1296; *American Studies Association, et al., v. Simon Bronner, et al.,* No. 19-CV-1222; *Close It Title Services, Inc., et al., v. Nadel*, *et al.,* Consolidated Case No. 19-CV-0646. *See also The Washington Travel Clinic, PLLC v. Kandrac,* Nos. 14-CV-1016, 14-CV-0060; *Park v. Brahmbhatt* No. 18-CV-0872.

[2] Athey S. (2020) *Psychology, Torture, Networks: Or, Structure as the Subject of Human Rights*, in Moore A., Pinto S. (eds) *Writing Beyond the State. Palgrave Studies in Literature, Culture and Human Rights*. Palgrave Macmillan, Cham. pp. 278-9.

is void because it establishes procedures that modify the Federal Rules and have not been approved by the D.C. Court of Appeals, as required by D.C. Code § 11-946. Most courts that have considered whether an anti-SLAPP statute is procedural or substantive, including the D.C. Circuit, have found it to be procedural. See Section IV-A below.

2. Plaintiffs also contend that, in its present form and application, the Act violates the First Amendment right of meaningful access to the courts for all prospective plaintiffs because, as in Plaintiffs' case, it blocks suits brought by individuals in good faith to redress real harms. Rather than fulfilling its goal of protecting citizens against sham suits designed to punish their right to advocate on issues of public interest, it is being wielded primarily by large organizations to silence individuals with legitimate claims. See Section IV-B.

3. There is wide variation among Superior Court judges' application of the Act's "likelihood of success" standard. This Court has held that the standard mirrors the summary-judgment standard (*Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 n.32 (D.C. 2016)), and that a court applying the standard should not usurp the jury's role of weighing the evidence and determining credibility. *Id.* at 1235. Nevertheless, since *Mann* the 11 D.C. Superior Court judges who have applied the Act have relied on differing interpretations, or no interpretation, of the Act's standard. In Plaintiffs' case, the judge repeatedly weighed evidence, assessed its credibility, and drew inferences against Plaintiffs. See Section IV-C.

II. BACKGROUND

A. Plaintiffs' efforts to end abusive military interrogations

Plaintiffs are three retired military psychologists seeking redress for the damage done to their reputations and livelihoods by two large, wealthy organizations: the law firm of Sidley Austin LLP and its partner David Hoffman (together, Sidley) and the American Psychological Association

(APA) (together, Defendants). Plaintiffs are represented by counsel working primarily on a *pro bono* basis and are self-funding the now-extensive expenses incurred during this litigation.

During their military service, Plaintiffs worked within the Department of Defense (DoD) to carry out their commanders' orders to take actions, implement policies, and conduct training to prevent abusive interrogations of the kind that occurred after 9/11. With those orders, Plaintiffs were dispatched to Iraq, Guantanamo, and Afghanistan. However, a group of self-described dissident members of the APA disagreed with the military psychologists' decision to work within the DoD to end abusive interrogations. They believed instead that psychologists should not be involved at all in overseeing the interrogation process. They broadcast their attacks in the media for years, culminating in a book by a *New York Times* reporter, James Risen, that amplified their accusations.

Faced with these ongoing attacks, APA hired Mr. Hoffman as an independent, objective investigator to get to the bottom of the facts. But, far from conducting an objective investigation, Mr. Hoffman adopted the dissidents' perspective. (In fact, he explicitly supported, without evidence, their belief that psychologists could not oversee interrogations to prevent abuses while also aiding in the interrogations' effectiveness. (Hoffman Report, p. 27)) That perspective became the distorting lens through which he conducted the investigation, as the testimonial and documentary evidence demonstrates.

Mr. Hoffman then omitted and mischaracterized evidence to write a report that accused Plaintiffs, among others, of colluding to block APA from preventing psychologists' participation in abusive interrogations that constituted torture. The Report led to a flood of front-page media coverage that began when an advance copy was leaked to James Risen.

Since the Report was first published in July 2015, voluminous testimonial and documentary evidence has emerged to demonstrate that its factual assertions about Plaintiffs were false, that facts and documents in Defendants' possession during the investigation show they knew the assertions were false or acted in reckless disregard of whether they were false, and that they purposefully avoided the truth. Indeed, members of the APA Board have admitted that there is "no evidence" of collusion, that the Report contains "many inaccuracies," and that there was "clear evidence" that Mr. Hoffman may have "distorted" matters in the Report.[3]

Nevertheless, Defendants have repeatedly refused to correct or retract their false statements. The Report remains displayed on the APA's website, as well as that of *The New York Times*, and the falsehoods continue to be accepted as true in the media. Plaintiffs, in contrast, have no effective access to the media. Their only means of redress is in the courts, through this lawsuit:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. . . . [I]mperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)

B. The case's unwarranted summary dismissal

After Defendants filed anti-SLAPP motions in the D.C. Superior Court,[4] Plaintiffs requested limited discovery, relying on the Act's provision that "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be

[3] James Aff., ¶14; August 13, 2016, notes of APA Board Members' meeting, Resnick Aff., Ex. 1.
[4] Plaintiffs first filed their complaint in Ohio, where one Plaintiff resided, but were unable to obtain jurisdiction over Defendants. Defendants consented to being sued only in D.C., waiving a statute-of-limitations defense, in order to take advantage of the D.C. Anti-SLAPP Act. However, when Defendants refused to file all their pre-answer motions after being sued in D.C., Plaintiffs were forced to file a safety suit in Massachusetts to ensure they had a forum certain, as D.C. Court of Appeals precedent requires. That suit is currently stayed.

unduly burdensome, the court may order that specified discovery be conducted." D.C. Code § 16-5502(c)(2). Plaintiffs requested three depositions, four interrogatories, a copy of a computer hard drive, the witness interview notes relied on in the Report, and a report, if any, by Defendants' forensic examiner of emails. The trial court denied the forensic expert report; curtailed discovery of interview notes to only the 18 interviewees (of 148) from whom Plaintiffs already had affidavits; and ordered production of a copy of the hard drive and answers to the four interrogatories. The Court denied additional witness notes because their production would be "cumulative" to what was in the complaint, a finding that presumes a 12(b)(6) rather than a summary-judgment type of analysis (Feb. 8 Trans. pp. 11-12; 25, 46). After initially ordering the three depositions, the trial court subsequently rescinded the Feb. 8 order *sua sponte*, after having denied Plaintiffs' counsel's request to be heard on the issue of scheduling those depositions (September 24 and 25, 2019, Orders).

More recently, the trial court (1) denied Plaintiffs' motion that the Act violated the Home Rule Act because it contained procedures that had not been approved by the D.C. Court of Appeals, as required by D.C. Code § 11-946; (2) denied Plaintiffs' motion arguing that the D.C. Anti-SLAPP Act, as written and as applied, violated their First Amendment guarantees of meaningful access to the courts; (3) weighed and assessed facts Plaintiffs proffered to demonstrate they were private citizens for purposes of this suit, concluding they were instead public officials subject to a heightened actual-malice standard to sustain their defamation claims; (4) denied Plaintiffs' arguments that precedent governing choice-of-law decisions in anti-SLAPP cases dictated that the Illinois or Massachusetts anti-SLAPP act, not the D.C. Act, applied to the case; and (5) denied Plaintiffs' supplemental cause of action asserting that, after their initial complaint had been filed,

APA's reposting of the Report even though Board members had admitted its inaccuracies constituted a republication for defamation purposes. (Jan. 23, Mar. 11, Mar. 12, 2020 Orders)

Finally, in dismissing Plaintiffs' case, the trial court repeatedly engaged in a process that *Mann* held was impermissible: weighing and assessing the credibility of evidence and then drawing all possible inferences in favor of the moving party, the Defendants. (See Section IV-C below.) The Court also failed to address any of Plaintiffs' separate evidence against APA, instead dismissing the separate claims of actual malice against APA cursorily and without analysis.

III. THE INITIAL PURPOSE AND SUBSEQUENT ABUSE OF THE D.C. ANTI-SLAPP ACT

When the D.C. Anti-SLAPP Act was enacted in 2011, it was intended to be employed by citizens faced with suits designed "not to win the lawsuit but punish the opponent and intimidate them into silence," and thus prevent them "from engaging in political or public policy debates." Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893 (Committee Report), p. 4 (Nov. 18, 2010). Attached as Exhibit A.

In that report, the Committee described an archetypal example of the litigation at which the Act was aimed: When a real-estate developer was unable to obtain a building permit, it sued two grassroots activists and a community organization, alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of . . . signs, and gave statements and interviews to various media." (Committee Report, p. 3) Those acts of advocacy were met with years of litigation that, without the assistance of the American Civil Liberties Union (ACLU), would have resulted in unsupportable legal costs for the individual defendants.

The Act's language was modeled on the California anti-SLAPP statute but with a significant change: The ACLU requested that, instead of the Act applying to all "free speech," its

scope should be limited to speech "in furtherance of the right of advocacy on issues of public interest." (Committee Report, p. 4) Yet the Act's definition of such speech is so broad that it has opened the door to the Act's use against those it was intended to protect: private citizens attempting to assert their rights against large organizations that have the ability to sustain lengthy litigation before the merits of a case are ever reached. Anti-SLAPP statutes were intended ***to protect*** citizens from David-and-Goliath power differences, not to exacerbate them. This kind of unintended consequence has led jurisdictions across the country to modify or interpret their anti-SLAPP statutes to ensure they block ***only*** sham or meritless suits, while protecting citizens' right of meaningful access to courts to pursue legitimate claims.

Plaintiffs have located 27 cases in which the D.C. Act has been deployed by a defendant since its passage. (See Exhibit B) In none was the Act used to protect individual activists protesting about issues of public interest. Instead, the Act has been deployed by mostly large institutional defendants in contract, employment, fraud, negligence, and defamation suits. It has been wielded as a summary-procedure mechanism operating outside the D.C. Superior Court Rules to dismiss ordinary individuals' attempts to obtain justice, primarily without the benefit of discovery. When the Act is used to prevent private citizens from pursuing legitimate and well-founded claims against deep-pocketed institutional defendants, it is being deployed in a manner exactly opposite to the Council's intent.

In the present case, the Act is being used by a $2-billion law firm and a $45-million corporation to shield their publications and republications of the Hoffman Report, including by private emails, and its continued display on APA's website. The Report was never intended to be an act of advocacy. To the contrary, APA went out of its way to state that the Report would be an

independent investigation to determine "the facts."[5] A report that purports to be about facts by an investigator paid $4.1 million to find facts should not be deemed the kind of speech the Act was intended to address. *See, e.g., Hamilton v. Woodsum,* 223 A.3d 904, 908 (Me. 2020) (the submission of an investigative report by a neutral investigator was not the type of petitioning activity the legislature intended to cover under the Maine anti-SLAPP statute).

This Court has stated that the Act "is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Mann, supra*, 150 A.3d at 1239. Yet in this and other cases in D.C. Superior Court, it is being deployed as just such a sledgehammer against individuals attempting to assert their rights to seek redress for harms inflicted on them. (Indeed, APA's former Associate General Counsel stated to a third party that Defendants' litigation strategy was to deplete Plaintiffs' resources.) This Court's intervention is urgently needed.

IV. ISSUES RAISED BY THIS APPEAL IMPACT OTHER ANTI-SLAPP CASES.

A. The D.C. Anti-SLAPP Act created new procedures.

1. The Act establishes new summary-dismissal procedures that have not been approved by the D.C. Court of Appeals.

This Court has not previously decided the question of whether the D.C. Anti-SLAPP Act is void because it violates the Home Rule Act. *See* Pub. L. No. 93-198; 87 Stat. 774 (codified at D.C. Code §§ 1-201.01 *et seq.*). The Home Rule Act places strict limits on the D.C. Council's authority to legislate regarding D.C. courts. As relevant here, D.C. Code § 1-206.02(a)(4) provides that "[t]he Council shall have no authority to . . . [e]nact any act, resolution, or rule with respect to any provision of [D.C. Code] Title 11 (relating to organization and jurisdiction of the District of

[5] APA press release April 30, 2015: "His report will determine the facts." Available at: https://www.apa.org/news/press/response/new-york-times.

Columbia courts)." That prohibition is further specified by D.C. Code § 11-946, which mandates that (1) the D.C. courts must follow the Federal Rules of Civil Procedure unless they adopt rules that modify the Federal Rules, ***and*** (2) rules that modify the Federal Rules must be approved by the D.C. Court of Appeals before they take effect:

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

Here, it is undisputed that the D.C. Anti-SLAPP Act created "special motions" and created rules for those motions. D.C. Code § 16-5502(b). It is also undisputed that the D.C. Court of Appeals did not approve those rules before they took effect. Plaintiffs argued below that, because the Act imposes procedures that modify the Federal Rules and have not been approved by this Court, it is void. *See, e.g., Barnes v. District of Columbia,* 611 F. Supp. 130, 133 (D.D.C. 1985) (state legislation is preempted by federal law if it conflicts with a "clear and manifest purpose of Congress").

The issue here posed turns on whether the Act is in whole or relevant part procedural or, instead, wholly substantive (that is, it creates a new immunity from liability). This issue cannot be decided simply by reference to the D.C. Council's intention to create a substantive right; it must be decided by the Act's actual language, structure, and function. Nor is it merely an academic exercise in classification: the deployment of a summary-dismissal procedure outside the D.C. Superior Court Rules has eviscerated time-tested rules calibrated to strike the appropriate balance between enabling well-founded suits to proceed to trial and blocking unfounded ones.

In *Mann*, *supra*, this Court recognized that the Act created and imposed procedures on the D.C. courts. For example, the Court explained that "[t]he Anti-SLAPP Act's special motion to

dismiss ***creates a burden-shifting procedure*** that is triggered by the party seeking to invoke the special protections afforded by the Act." 150 A.3d at 1232 (emphasis added). Indeed, the *Mann* court noted that "[a] comparison of ***the procedures*** usually available in civil litigation makes clear that the complement of provisions of the Anti-SLAPP Act impose requirements and burdens . . . that significantly advantage the defendant." *Id.* at 1237 (emphasis added). Similarly, in *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014), this Court recognized that the Act ***"creates*** a 'special motion to dismiss,' ***a procedural mechanism*** that allows a named defendant to quickly and equitably end a meritless suit" and provides "two procedural protections." (emphasis added)[6]

Most courts to consider the issue have found anti-SLAPP statutes to be procedural. In its leading case interpreting the Act, the D.C. Circuit Court of Appeals explained that "[t]he D.C. Anti-SLAPP Act, to use the words of the D.C. Court of Appeals, ***establishes a new 'procedural mechanism'*** for dismissing certain cases before trial." *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014)) (emphasis added). The *Abbas* Court also found that, even if the Act did create a qualified immunity, this did not dictate the "showing . . . necessary at the motion to dismiss or summary judgment stages in order to dismiss a case before trial. Rather, Federal Rules 12 and 56 do that." *Abbas* at 1335. Since *Mann* was decided, ten D.C. District Court decisions have followed the *Abbas* analysis.[7] In addition, every Circuit to have considered the issue has held anti-SLAPP

[6] *Mann* referred to the D.C. Council's intention to create substantive rights (*Mann* at 1226, 1231, 1235), and stated that, in analyzing the Act's application, "[a]n analogy to qualified immunity is apt." 150 A.3d at 1229. However, the Court warned that the Act does not immunize defendants from "liability for common-law claims," and that "[t]he immunity created by the Anti-SLAPP Act shields only those defendants who face **unsupported** claims that do not meet established legal standards." (emphasis added) *Id.*

[7] *See Arpaio v. Zucker*, 414 F. Supp. 3d 84, 93 (D.D.C. 2019); *Arpaio v. Cottle*, 404 F. Supp. 3d 80, 87 (D.D.C. 2019); *Akhmetshin v. Browder*, 407 F. Supp. 3d 11, 18 (D.D.C. 2019); *Tah v. Glob.*

statutes to be procedural or, in the case of the First Circuit, both procedural and substantive.[8] The California Supreme Court has interpreted the broader California statute, on which the D.C. Act was based, to be procedural.[9]

2. *The Act conflicts with the established rule that discovery must be exhausted before summary judgment may be granted.*

In *Mann,* this Court held that the Act's likelihood-of-success standard "mirrors" the summary-judgment standards imposed by D.C. and Federal Rule 56. *Mann*, 150 A.3d at 1240 n.32. But it is well settled that discovery must be exhausted before summary judgment is granted, especially when, as here, Defendants have put their state of mind at issue as a defense against a finding that they acted with actual malice.[10] *Secord v. Cockburn*, 747 F. Supp. 779, 786 (D.D.C. 1990) ("this Court of course recognizes that discovery must be exhausted before a court rules upon

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Witness Publ'g, No. CV 18-2109 (RMC) (unpublished) (D.D.C. June 19, 2019), appeal filed Oct. 25, 2019, No.19-7132; *Fridman v. Bean LLC*, No. CV 17-2041 (RJL), 2019 WL 231751, at *2 (D.D.C. Jan. 15, 2019); *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158, 165 (D.D.C. 2018); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 93-95 (D.D.C. 2018); *Libre By Nexus v. Buzzfeed, Inc*., 311 F. Supp. 3d 149, 158-59 (D.D.C. 2018); *Democracy Partners v. Project Veritas Action Fund*, 285 F.Supp.3d 109, 127-28 (D.D.C. 2018); *Deripaska v. Associated Press*, No. 17-cv-913, 2017 WL 8896059, at *1 (D.D.C. Oct. 17, 2017).

[8] *See e.g., Liberty Synergistics Inc. v. Microflo Ltd.,* 718 F. 3d 138, 154 (2nd Cir. 2013); *Gilead Scis., Inc. v. Abbott Labs., Inc.,* No. 13-cv-2034, 2015 WL 1191129, at *6 (D.Del. March 13, 2015); *ABLV Bank, AS v. Ctr. For Advanced Def. Studies Inc.,* No. 14-cv-1118, 2015 WL 12517012, at *3 (E.D. Va. Apr. 21, 2015); *Klocke v. Watson,* 936 F. 3d 240, 245-46 (5th Cir. 2019); *Lampo Grp., LLC v. Paffrath,* No. 18-cv-1402, 2019 WL 3305143, at *3 (M.D. Tenn. July 23, 2019); *Intercon Solutions, Inc. v. Basel Action Network,* 791 F.3d 729, 732 (7th Cir. 2015); *Unity Healthcare, Inc. v. Cty. of Hennepin,* 3-9 F.R.D. 537, 542 (D.Minn. 2015); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress,* 890 F. 3d 828, 833-34 (9th Cir. 2018); *Los Lobos Renewable Power LLC v. Americulture, Inc.,* 885 F. 3d 659, 673 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.,* 910 F.3d 1345, 1355 (11th Cir. 2018). *See also Godin v. Schencks,* 629 F. 3d 79, 89 (1st Cir. 2010)(Anti-SLAPP Act both substantive and procedural).

[9] *See, e.g., Flatley v. Mauro,* 46 Cal. Rptr. 3d 606, 615 (2006) (the statute "establishes a procedure"). *See also*, *Lehan v. Fox Television Stations, Inc. et al.*, No. 2011 CA 004592 B, 2011 D.C. Super. LEXIS 14 (D.C. Super. Ct., Nov. 30, 2011), ***finding the act to be procedural***.

[10] *See Mann*, 150 A.3d at 1255, 1258 ("It is for the jury to determine the credibility of appellants' protestations of honest belief in the truth of their statements, and to decide whether such a belief, assuming it was held, was maintained in reckless disregard of its probable falsity.").

a dispositive motion for summary judgment." (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 (1979); *Herbert v. Lando*, 441 U.S. 153, 159-61 (1979))). *See also First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1381 (D.C. Cir. 1988) ("[S]ummary judgment is appropriate only after plaintiff has had a full opportunity to conduct discovery . . . ."); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018) ("[W]hen an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Fed. R. Civ. P. 56 standard will apply. But in such a case, discovery must be allowed . . . before any decision is made by the court. A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules . . . .").

Without further guidance from this Court, the Act will continue to operate outside the D.C. Superior Court Rules as a summary-dismissal procedure to which different judges apply different standards. (See Section IV-C below) In this case, it operated inappropriately to usurp a jury's role in weighing facts and making credibility determinations.

B. The Act as drafted and applied violates a plaintiff's First Amendment rights to meaningful and effective access to the courts.

The D.C. Anti-SLAPP Act goes to the heart of the tension in modern defamation law between plaintiffs' First Amendment rights to redress private reputational injury by meaningfully accessing the courts and defendants' free-speech rights. As courts across the country have gained more experience with the application of anti-SLAPP statutes, they have recognized the need to ensure the protection of plaintiffs' as well as defendants' First Amendment rights by establishing clear guidelines for the statutes' application. For example, four state supreme courts have found that, to save their anti-SLAPP statutes from violating the First Amendment, the courts must ensure the statutes address only sham or meritless suits, not suits that "genuinely seek redress for damages from defamation . . . ." *Sandholm v. Kuecker*, 962 N.E.2d 418, 433 (Ill. 2012). A fifth supreme

court has adopted the same approach in dicta.[11]

Courts have repeatedly recognized that the First Amendment right to petition the government includes "'[t]he right of access to courts for redress of wrongs . . . .'" *Stuart v. Walker*, 143 A.3d 761, 767 (D.C. 2016) (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011)). It is "firmly established" that ***any*** "significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). "'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct.'" (citation omitted) *Id.* And as especially relevant here, a person's right of access to the courts to seek redress of grievances stands on equal footing with a defamation-defendant's rights: "a private citizen exercises a constitutionally protected First Amendment right *anytime* he or she petitions the government for redress . . . . the First Amendment does not pick and choose its causes." *Van Deelen v. Johnson*, 497 F.3d 1151, 1156 (10th Cir. 2007) (emphasis in original).

Mann recognized the need to balance plaintiffs' and defendants' rights: the Act "must be

[11] *See* **Illinois:** *Sandholm*, 962 N.E.2d at 433 ("If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts," then it "does not constitute a SLAPP" and is "not . . . subject to dismissal . . . ."). **Massachusetts:** *Blanchard v. Steward Carney Hosp., Inc*., 75 N.E.3d 21, 38 (Mass. 2017) (defendant must show that the putative SLAPP suit was "solely based on [the moving party's] own petitioning activities."); **Maine:** *Gaudette v. Davis*, 160 A.3d 1190, 1194 (Me. 2017) (Maine's anti-SLAPP statute addresses "litigation instituted not to redress legitimate wrongs, but instead to 'dissuade or punish' the defendant's First Amendment exercise of rights through the delay, distraction, and financial burden of defending the suit."). **Vermont:** *Felis v. Downs Rachlin Martin P.L.L.C.*, 133 A.3d 836, 851 (Vt. 2015) (holding that "the anti-SLAPP statute should be construed as limited in scope and that great caution should be exercised in its interpretation" and that "unless [a suit] can be shown to be sham petitioning, the [anti-SLAPP] statute impinges on the adverse party's exercise of its right to petition"). *See also Davis v. Cox*, 183 Wash. 2d 269, 291 (Wash. 2015) ("the United States Supreme Court has interpreted the petition clause to expansively protect plaintiffs' constitutional right to file lawsuits seeking redress for grievances. The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation . . . ." (citations omitted)).

interpreted as a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." 150 A.3d at 1239 (emphasis in the original). But however well-intentioned the Act is, as presently drafted and applied it is ill-suited to weed out only meritless or sham lawsuits brought with the intention of dissuading or punishing acts of advocacy. Instead, it serves to block legitimate claims brought in good faith and with supporting evidence.

If Plaintiffs cannot survive the Act's application, although their suit is clearly not meritless or a sham and despite having submitted over 200 discrete documents (including corporate records) and 34 affidavits to support their claims, then the Act has become the "sledgehammer" against which *Mann* warned, 150 A.3d at 1239, and that sledgehammer has been wielded against the First Amendment.

Indeed, the Act not only threatens to destroy legitimate suits once they have entered the courthouse; it also dissuades individuals with legitimate complaints from entering the courthouse at all because it threatens them with attorneys' fees if their suit fails at the anti-SLAPP stage. When an individual with limited resources confronts corporate defendants represented by large law firms, those fees are potentially ruinous. That risk creates an impermissible obstacle to plaintiffs' rights to access the courts.

The Act's infringement on First Amendment rights is even more pernicious where, as here, it amounts to a doubling up of protections for defendants' defamatory speech. In defamation suits, when a court finds plaintiffs to be public officials, defendants are already given substantial protections through a heightened standard of proof (actual malice by clear and convincing evidence). Here, the trial court found—mistakenly, as Plaintiffs will demonstrate—that Plaintiffs

were public officials. The United States Supreme Court has refused to grant exactly this sort of additional procedural protection because it would constitute "a form of double counting." *Calder v. Jones*, 465 U.S. 783, 790-91 (1984).

In this case, the doubling up of protections for Defendants leads to an absurd result: despite the volume of available evidence demonstrating not only that the Report's key factual conclusions were false but also that the conduct of the investigation, the Report's contents, and APA's actions after its completion meet the legal definitions of negligence and, if required, actual malice, a court may nevertheless—after severely restricting discovery—weigh the very limited evidence it considered to conclude Plaintiffs could not prove actual malice to its satisfaction at the summary-dismissal stage. Consequently, Defendants can leave the defamatory Report posted on the internet to inflict harm on Plaintiffs in perpetuity, unless this Court intervenes.

C. D.C. trial courts apply differing standards to anti-SLAPP motions.

Because the Act operates outside the D.C. Superior Court Rules, it is perhaps not surprising that—despite *Mann*—judges are applying the Act's "likelihood of success" standard inconsistently. In *Mann,* this Court decided the standard should "mirror" the summary-judgment standard. 150 A.3d at 1240 n.32 ("*Abbas* recognized that at the time, this court 'has never interpreted the D.C. Anti–SLAPP Act's likelihood of success standard to simply mirror the standards imposed by' Federal Rule 56. . . . We do so now." (citation omitted)). That standard prohibits a judge from usurping the jury's role of weighing evidence and assessing credibility. *Id.* at 1235.[12]

[12] *See Nader v. de Toledano*, 408 A.2d 31, 50 (D.C. 1979) ("the court examines the evidence, taking all permissible inferences and resolving questions of credibility in plaintiff's favor to determine whether *a reasonable jury acting reasonably could find actual malice with convincing clarity.* The question to be resolved at summary judgment is whether plaintiff's proof is sufficient

Since *Mann,* the Act has been used by defendants in at least 11 cases, five of which are now on appeal, exclusive of this case. (See Ex. B, p. 1, cases 1-11 for case numbers.) In those cases—some of which follow *Mann* and some of which do not—the standards used to determine the merit of the lawsuit varied widely.

For example:

- In *Bronner v. The American Studies Association, et. al.*, a breach of duty and contract case now appealed to this Court, the court interpreted the standard for determining whether a suit is meritless to be somewhere between a motion to dismiss and summary judgment standard.
- In *Close It Title Services, Inc., et al.* v. *Nadel, et al.,* the court interpreted the Act broadly as including "potential concerns about cybercrime" and then summarily applied a 12(b)(6) standard in dismissing the suit. It also awarded attorneys' fees. This case is also on appeal.
- In *Khan, et al., v. Orbis Business Intelligence*, *et al.,* also now on appeal, the court denied targeted discovery but then went on to conclude that the plaintiff had failed to produce enough evidence. After the suit was dismissed, a government report was released vindicating plaintiffs' factual assertions and, retrospectively, the need for discovery.
- In *Gordon et al., v. Forest Hills, et al.,* also on appeal, the court made numerous findings of fact, drawing inferences in favor of the defendants, and denied discovery.

During the discovery hearing, Sidley's counsel asserted that a 12(b)(6) standard governed the Defendants' anti-SLAPP motions; Plaintiffs disagreed, relying instead on the "mirror" of

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such that a reasonable jury could find malice with convincing clarity, *and not whether the trial judge is convinced of the existence of actual malice.*" (emphasis in original))

summary-judgment standard established in *Competitive Enter. Inst v. Mann*, 150 A.3d 1213, 1240, n. 32 (D.C. 2016). (Feb. 8, Trans. pp. 11-12; 25, 46) The court did not resolve that disagreement.

In its Amended Opinion, the court cites *Mann* for the proposition that, if Defendants make a prima facie case, "the burden shifts to Plaintiffs to offer evidence that would permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find that Defendants are liable for defamation. *See Mann*, 150 A.3d at 1232." (Amended Opinion, p. 19) But the Amended Opinion, in weighing evidence and determining credibility, ignores *Mann's* critical guidance:

> An interpretation that puts the court in the position of making credibility determinations and weighing the evidence to determine whether a case should proceed to trial raises serious constitutional concerns because it encroaches on the role of the jury.

Mann, 150 A.3d at 1235.

The *Mann* plaintiff proffered four government investigations that contradicted the defendants' assertions. Regarding that evidence, this Court stated:

> [w]e are struck by the number, extent, and specificity of the investigations, and by the composition of the investigatory bodies. We believe that a jury would conclude that they may not be dismissed out of hand. Although we do not comment on the weight to be given to the various investigations and reports, which is a question for the jury, what is evident from our review is that they were conducted by credentialed academics and professionals.

Id. at1253.

In this case, Plaintiffs submitted 34 affidavits, multiple government reports, and multiple corporate records, documents, and minutes from which a jury could reasonably find that Plaintiffs were not public officials and that, even if they were, actual malice could be proven even under a clear and convincing standard. In its Amended Order, the trial court assessed the credibility and weight of some of this evidence with respect to just one of the 219 false statements pleaded, while ignoring other evidence and the majority of causes of action in the complaint. It thus engaged in exactly the kind of factual determinations that *Mann* warned against and that have led states to

declare their anti-SLAPP statutes unconstitutional.[13] It also drew inferences from the absence of evidence that would have been provided by the discovery Plaintiffs requested or if the trial court had asked the relevant questions at its hearing on the anti-SLAPP motions.

Three examples among others of this approach:

- Plaintiffs provided 27 affidavits from those interviewed by Mr. Hoffman's team attesting that the Report misrepresented what an interviewee said or that interviewers sought only information to support their pre-conceived conclusions. Those affidavits demonstrate what a jury could reasonably conclude was a pattern in the conduct of the investigation and the writing of the Report that demonstrates actual malice. However, the trial court's Amended Order characterizes the affidavits as simply showing the omission of "a comment here or an opinion there . . . ." It also draws adverse credibility inferences because the affidavits "echo each other in tenor and vocabulary" and because it is unclear when during the course of the investigation the interviews were conducted—a question that would have been answered if the Court had asked it of Plaintiffs' counsel at the hearing or had looked to the Report, which lists the dates of the interviews. (Amended Order, p. 24, 25)

[13] *Mann*, 150 A.3d at 1236 n. 29 ("*See Davis v. Cox*, 183 Wash.2d 269 (2015) (en banc) (". . . Washington State's anti–SLAPP special motion to dismiss . . . violates the state's constitutional guarantee to a jury trial because it required trial court to weigh the evidence and make factual determination whether there was 'clear and convincing evidence [of] a probability of prevailing on the claim'"); *Opinion of the Justices* (*SLAPP Suit Procedure*), 138 N.H. 445 (1994) (proposed anti–SLAPP legislation would violate right to trial by jury guaranteed by state constitution because it would require court to "weigh the pleadings and affidavits on both sides and adjudicate a factual dispute" in determining whether claimant has shown "a probability of prevailing on the merits"); *Unity Health care, Inc. v. Cty. of Hennepin* , 308 F.R.D. 537, 549 (D. Minn. 2015) (Minnesota anti–SLAPP provision requiring that party opposing dismissal must persuade judge by clear and convincing evidence that defendant is not immune from liability violates Seventh Amendment right to jury trial and conflicts with the Federal Rules because it requires judge to weigh evidence and make credibility determinations).

- Plaintiffs assert that, if a jury were to accept the descriptions of their military roles in their papers, it would reasonably conclude that they do not meet the legal standard for being deemed public officials (that is, they do not "have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." *Rosenblatt v. Baer,* 383 US. 75, 88 (1966)). The Amended Order selectively weighs and interprets some facts to conclude that Plaintiffs are public officials, in the process improperly broadening the standard to become whether the Report addressed "their performances of their official duties in matters of public interest." (Amended Order, Mar. 12, p. 17) *See Fridman v. Bean L.L.C.*, No. 17-2041 (RJL), 2019 WL 231751, at *10 (D.D.C. Jan. 14, 2019) (refusing to resolve the public-figure issue on the limited record because, as here, the plaintiffs disputed the facts relevant to application of the appropriate test); *Mandel v. Bos. Phx., Inc.*, 456 F.3d 198, 205-06 (1st Cir. 2006) (reversing summary-judgment determination of public-official status for failing to address crucial questions under the relevant test where "'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are not functions to be performed by a judge on summary judgment.'")
- Plaintiffs presented several governmental reports that were in Defendants' possession and that contradicted the Report's key facts and factual conclusions. The Amended Order discounts these reports because, it asserts, Plaintiffs did not explain whether the governmental entities issuing the reports had access to the same information used for the Report and whether the reports had the same scope and purpose. (Amended Order, March 12, p. 23) The first assertion is incorrect (Plaintiffs' First Opposition, pp. 36-37), and the

second could have easily been answered by Plaintiffs' counsel had she been asked at the hearing.[14] Again, the trial court improperly weighed the evidence.

More generally, although Plaintiffs' direct and circumstantial evidence includes many specific documents and facts in Defendants' possession during the investigation, Plaintiffs also asserted that the pattern of omitting contradictory evidence, purposefully avoiding contradictory evidence, making unsupported inferences, and mischaracterizing facts, among other problems, demonstrates actual malice when considered in light of the appropriate legal standards established by U.S. Supreme Court and other precedent that Plaintiffs cited. The Amended Order fails to consider Plaintiffs' discussion of those standards, much less demonstrate why they do not apply. Instead, it engages in a free-form assessing of selected evidence favoring the Defendants while ignoring other evidence Plaintiffs presented, thus usurping a jury's role.

V. CONCLUSION

For the reasons stated above, Plaintiffs-Appellants ask this Court to grant expedited review of this appeal.

Dated: June 11, 2020

Respectfully submitted,

/s/ John B. Williams

John B. Williams, Esq.
(D.C. Bar No. 257667)
WILLIAMS LOPATTO PLLC
1200 New Hampshire Avenue NW, Suite 750
Washington, DC 20036
(202) 296-1665
jbwilliams@williamslopatto.com

Bonny J. Forrest, Esq.
(*pro hac vice submitted*)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
bonforrest@aol.com

Attorneys for Plaintiffs-Appellants

[14] *See Mann*, 150 A.3d at 1258 ("objections to the reports can fairly be characterized as arguments that could be made to a jury as to why the reports' conclusions should not be credited or given much weight.").

EXHIBIT A

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893, the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).

[2] *Id.* at 7-8.

[3] *Id.* at 8-9.

[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

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plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary*, Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

[8] *Id.* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.*, Civil Action No. 01-1732 (D.D.C)).

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony "[*l*]*itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants -- in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out -- the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010 — Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

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[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register.*
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register.*
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. Opper-Weiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Members of the Council

From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)
Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, June 29, 2010. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Anti-SLAPP Act of 2010", B18-0893

INTRODUCED BY: Councilmembers Cheh and Mendelson

CO-SPONSORED BY: Councilmember M. Brown

The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Phil Mendelson

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmembers Mary M. Cheh and Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation (SLAPPs), to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

(1) "Act in furtherance of the right of free speech" means:

(A) Any written or oral statement made:

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

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

(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

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

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

(4) "Government entity" means the Government of the District of Columbia and its branches, subdivisions, and departments.

Sec. 3. Special Motion to Dismiss.

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

(b) A party filing a special motion to dismiss under this section must make a prima facie showing that the claim at issue arises from an act in furtherance of the right of free speech. If the moving party makes such a showing, the responding party may demonstrate that the claim is likely to succeed on the merits.

(c) Upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until notice of entry of an order disposing of the motion, except that the court, for good cause shown, may order that specified discovery be conducted.

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

(e) The defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with an action arising from an act in furtherance of the right of free speech may make a special motion to quash the discovery order, request, or subpoena.

(b) The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the right of free speech. If the person makes such a showing, the claimant in the underlying action may demonstrate that the underlying claim is likely to succeed on the merits.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

(a) This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Testimony of the
American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

Committee on Public Safety and the Judiciary
of the
Council of the District of Columbia

on

Bill 18-893, the
"Anti-SLAPP Act of 2010"

September 17, 2010

The ACLU of the Nation's Capital appreciates this opportunity to testify on Bill 18-893. We support the purpose and the general approach of this bill, but we believe it requires some significant polishing in order to achieve its commendable goals.

Background

In a seminal study about twenty years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits filed by one side of a political or public policy dispute—usually the side with deeper pockets and ready access to counsel—to punish or prevent the expression of opposing points of view. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They pinpointed several criteria that identify a SLAPP:

— The actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id.* at 150.

— The defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— The legal claims filed against the speakers tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy, and conspiracy. *Id.* at 150-51.

— The lawsuit often names "John or Jane Doe defendants." *Id.* at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id.*

The authors "conservatively estimate[d] that ... tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *Id.* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id.*, they proposed the adoption of anti-SLAPP statutes to address the problem. *Id.* at 201.

Responding to the continuing use of SLAPPs by those seeking to silence opposition to their activities, twenty-six states and the Territory of Guam have now enacted anti-SLAPP statutes.[1]

The ACLU of the Nation's Capital has been directly involved, as counsel for defendants, in two SLAPPs involving District of Columbia residents.

In the first case, a developer that had been frustrated by its inability promptly to obtain a building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media," and when they created a web site that urged people to "call, write or e-mail the mayor" to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal.[2] But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.

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[1] Links to these statutes can be found at http://www.casp.net/menstate.html.

[2] *Father Flanagan's Boys Home v. District of Columbia, et al.*, Civil Action No. 01-1732 (D.D.C.), *aff'd*, 2003 WL 1907987 (No. 02-7157, D.C. Cir. 2003).

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

As professors Pring and Canan demonstrated, a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents and intimidate them and others into silence. *Litigation itself* is the plaintiff's weapon of choice; a long and costly lawsuit is a victory for the plaintiff even if it ends in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically.

Bill 18-893

Bill 18-893 would help end SLAPPs quickly and economically by making available to the defendant a "special motion to dismiss" that has four noteworthy features:

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.
- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

Speaking generally, this is sensible path to the desired goal, and speaking generally, the ACLU endorses it. If a lawsuit looks like a SLAPP, swims like a SLAPP, and quacks like a SLAPP, then it probably is a SLAPP, and it is fair and reasonable to put the burden on the plaintiff to show that it isn't a SLAPP.

We do, nevertheless, have a number of suggestions for improvement, including a substantive change in the definition of the conduct that is to be protected by the proposed law.

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[3] *Guam Greyhound, Inc. v. Brizill,* 2008 Guam 13, 2008 WL 4206682.

Section 2(1). The bill begins by defining the term "Act in furtherance of the right of free speech," which is used to signify the conduct that can be protected by a special motion to dismiss. In our view, it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. It would be akin to defining the term "fruit" to mean "a curved yellow edible food with a thick, easily-peeled skin." This specially-defined term deserves a special name that will not require a struggle to use correctly. We suggest "Act in furtherance of the right of advocacy on issues of public interest."

Section 2(1)(A). Because there is no conjunction at the end of section 2(1)(A)(i), the bill is ambiguous as to whether sections 2(1)(A)(i) and (ii) are conjunctive or disjunctive. That is, in order to be covered, must a statement be made "In connection with an ... official proceeding" *and* "In a place open to the public or a public forum in connection with an issue of public interest," or is a statement covered if it is made *either* "In connection with an ... official proceeding," *or* "In a place open to the public or a public forum in connection with an issue of public interest"?

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement made "In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves anti-SLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding regarding the construction of a slaughterhouse has yet begun.[4]

[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H.R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee (*available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4364.IH:). In that bill it is clear that speech or activity that falls under any one of these definitions is covered.

Section 2(1)(B). Section 2(1)(B) expands the definition of protected activity to include "any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." We fully agree with the intent of this provision, but we think it fails as a definition because it is backwards—it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest."

Section 2(4). Section 2(4) defines the term "government entity." But that term is never used in the bill. It should therefore be deleted.[6]

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[5] The Supreme Court of Guam ultimately rejected the argument that "Constitutional rights" meant "constitutionally protected rights," *see id.* at ¶ 32, but that was hardly a foregone conclusion, and the D.C. Court of Appeals might not reach the same conclusion under Section 2(1)(B).

[6] The same term is defined in H.R. 4364, but it is then used in a section providing that "A government entity may not recover fees pursuant to this section."

Section 3(b). We agree with what we understand to be the intent of this provision, setting out the standards for a special motion to dismiss. But the text of this section fails to accomplish its purpose because it never actually spells out what a court is supposed to do. We suggest revising Section 3(b) as follows:

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

Section 3(c). We agree that discovery should be stayed on a claim as to which a special motion to dismiss has been filed. This is an important protection, for discovery is often burdensome and expensive. Because expression on issues of public interest deserves special protection, a plaintiff who brings a claim based on a defendant's expression on an issue of public interest ought to be required to show a likelihood of success on that claim without the need for discovery.

A case may exist in which a plaintiff could prevail on such a claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPs.

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

Finally, we note that this section provides that discovery shall be stayed "until notice of entry of an order disposing of the motion." That language tracks H.R. 4364, but "notice of entry" of court orders is not part of D.C. Superior Court procedure. We suggest that the bill be amended to provide that "... discovery proceedings on the claim shall be stayed until the motion has been disposed of, including any appeal taken under section 3(e), ..."

Sections 3(d) and (e). We agree that a special motion to dismiss should be expedited and that its denial should be subject to an interlocutory appeal. The Committee may wish to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal. The D.C. Court of Appeals often takes years to rule on appeals.

Section 4. Section 4 is focused on the fact that SLAPPs frequently include unspecified individuals (John and Jane Does) as defendants. As observed by professors Pring and Canan, this is one of the tactics employed by SLAPP plaintiffs to intimidate large numbers of people, who fear that they may become named defendants if they continue to speak out on the relevant public issue.

There can be very legitimate purposes for naming John and Jane Does as defendants in civil litigation. The ACLU sometimes names John and Jane Does as defendants when it does not yet know their true identities—for example, when unknown police officers are alleged to have acted unlawfully.[7] It is therefore necessary to balance the right of a plaintiff to proceed against an as-yet-unidentified person who has violated his rights, and to use the court system to discover that person's identity, against the right of an individual not to be made a defendant in an abusive SLAPP that was filed for the purpose of retaliating against, or chilling, legitimate civic activity.

We believe that Section 4 strikes an appropriate balance by making available to a John or Jane Doe a "special motion to quash," protecting his or her identity from disclosure if he or she was acting in a manner that is protected by the Anti-SLAPP Act, and if the plaintiff cannot make the same showing of likely success on the merits that is required to defeat a special motion to dismiss.

Like Section 3(b), however, Section 4(b) never actually spells out what a court is supposed to do. We therefore suggest revising Section 4(b) in the same manner we suggested revising Section 3(b):

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[7] *See, e.g., YoungBey v. District of Columbia, et al.*, No. 09-cv-596 (D.D.C.) (suing the District of Columbia, five named MPD officers, and 27 "John Doe" officers in connection with an unlawful pre-dawn SWAT raid of a District resident's home).

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 6(a). Section 6(a) provides that "This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest." This language is vague and tremendously broad. Almost any plaintiff can and will assert that he is bringing his claims "to enforce an important right affecting the public interest," and neither this bill nor any other source we know gives a court any guidance regarding what "an important right affecting the public interest" might be. The plaintiffs in the two SLAPP suits described above, in which the ACLU of the Nation's Capital represented the defendants, vigorously argued that they were seeking to enforce an important right affecting the public interest: the developer argued that it was seeking to provide housing for disadvantaged youth; the gambling entrepreneur argued that he was seeking to prevent vicious lies from affecting the result of an election.

Thus, this provision will almost certainly add an entire additional phase to the litigation of every SLAPP suit, with the plaintiff arguing that the anti-SLAPP statute does not even apply to his case because he is acting in the public interest. To the extent that courts accept such arguments, this provision is a poison pill with the potential to turn the anti-SLAPP statute into a virtually dead letter. At a minimum, it will subject the rights of SLAPP defendants to the subjective opinions of more than 75 different Superior Court judges regarding what is or is not "an important right affecting the public interest."

Moreover, we think the exclusion created by Section 6(a) is constitutionally problematic because it incorporates a viewpoint-based judgment about what is or is not in the public interest—after all, what is in the public interest necessarily depends upon one's viewpoint.

—Assume, for example, that D.C. Right To Life (RTL) makes public statements that having an abortion causes breast cancer. Assume Planned Parenthood sues RTL, alleging that those statements impede its work and cause psychological harm to its members. RTL files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But Planned Parenthood responds that its lawsuit is not subject to the Anti-SLAPP Act because it was

"brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

—Now assume that Planned Parenthood makes public statements that having an abortion under medical supervision is virtually risk-free. RTL sues Planned Parenthood, alleging that those statements impede its work and cause psychological harm to its members. Planned Parenthood files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But RTL responds that its lawsuit is not subject to the Anti-SLAPP Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to life.

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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[8] Section 10 of H.R. 4364, on which Section 6(a) of Bill 18-893 is modeled, begins with the catchline "Public Enforcement." It therefore appears that Section 10 was intended to exempt only enforcement actions brought by the government.

Even if that is true, we see no good reason to exempt the government, as a litigant, from a statute intended to protect the rights of citizens to speak freely on issues of public interest. To the contrary, the government should be held to the strictest standards when it comes to respecting those rights. *See, e.g., White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (holding that the advocacy activities of neighbors who opposed the conversion of a motel into a multi-family housing unit for homeless persons were protected by the First Amendment, and that an intrusive eight-month investigation into their activities and beliefs by the regional Fair Housing and Equal Opportunity Office violated their First Amendment rights).

We therefore urge the complete deletion of Section 6(a), as noted above. However, if the Committee does not delete Section 6(a) entirely, its coverage should be limited to lawsuits brought by the government.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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[redacted]

ATTORNEY GENERAL

[redacted]

September 17, 2010

The Honorable Phil Mendelson
Chairperson
Committee on Public Safety & the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Ste. 402
Washington, D.C. 20004

Re: Bill 18-893, the "Anti-SLAPP Act of 2010"

Dear Chairperson Mendelson:

I have not yet had the opportunity to study in depth Bill 18-893, the "Anti-SLAPP Act of 2010" ("bill"), which will be the subject of a hearing before your committee today, but I do want to register a preliminary concern about the legislation.

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]." As you know, the Superior Court subsequently adopted rules of procedure for civil actions, including Rules 12(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that – if you have not already done so – you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Vincent C. Gray** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**November 16, 2010**
SUBJECT:	**Fiscal Impact Statement – "Anti-SLAPP Act of 2010"**
REFERENCE:	**Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010**

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

[1] Defined in the proposed legislation as (A) Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

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

(A) Any written or oral statement made:

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

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

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

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

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

Sec. 3. Special Motion to Dismiss.

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

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

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

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

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

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

EXHIBIT B: D.C. SUPERIOR COURT CASES
WHERE ANTI-SLAPP MOTIONS WERE FILED

	CAPTION	SUP. CT./APPEAL NO.	TYPE OF CASE
1	*Bronner v. The American Studies Association et al.* APPEAL PENDING	2019 CA 001712 B **19-CV-1222**	breach of fiduciary duties, ultra vires, and breach of contract
2	*The Praxis Project v. Coca-Cola Company et al.*	2017 CA 004801 B	fraudulent misrepresentation
3	*Close It! Title v. Nadel* APPEALS PENDING	2018 CA 005391 B **19-CV-0646**	defamation, false light, and tortious interference
4	*The Institute for Gulf Affairs et al. v. the Saudi American Public Relation Affairs Committee et al.* APPEAL PENDING	2018 CA 004709 B **18-CV-1296**	defamation
5	*Jacobson v. National Academy of Sciences et al.*	2017 CA 006685 B	defamation, breach of contract, promissory estoppel
6	*German Khan, et al. v. Orbis Business Intelligence Limited, et. al.* APPEAL PENDING	2018 CA 002667 B **18-CV-0919**	defamation
7	*TS Media, Inc. v. Public Broadcasting Service* *Case ongoing*	2018 CA 001247 B	court dismissed only the two tort claims: intentional interference with contract and tortious interference with business expectancy
8	*Wilkenfeld v. Stewart Partners Holdings LLC*	2017 CA 003420 B	declaratory judgement
9	*Peter Gordon, et al. v. First Hills Neighborhood Alliance, et al.* APPEAL PENDING	2016 CA 006397 B **17-CV-1202**	fraudulent misrepresentation and tortious interference with contract
10	*Simpson v. Johnson & Johnson et al.*	2016 CA 001931 B	negligence, fraud, and conspiracy
11	*JAP Home Solutions, Inc. v. Lofft Construction, Inc. et al.*	2017 CA 003390 B	defamation, conspiracy to injure, and tortious interference

EXHIBIT B: D.C. SUPERIOR COURT CASES
WHERE ANTI-SLAPP MOTIONS WERE FILED

12	*CEI et al. v. Mann*	2012 CA 008263 B *Competitive Enter. Inst v. Mann*, 150 A.3d 1213 (D.C. 2016)	defamation
13	*Burke v. Doe #1 et al.*	2012 CA 007525 B *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014); *Doe v. Burke*, 133 A.3d 569 (D.C. 2016)	defamation
14	*Park v. Brahmbhatt* APPEAL PENDING	2015 CA 005686 B **18-CV-0872**	assault and battery, abuse of process, tortious interference, and blackmail
15	*Two Rivers Public Charter School, Inc. et al. v. Weiler et al.*	2015 CA 009512 B	intentional infliction of emotional distress and private nuisance/ conspiracy to create a private nuisance
16	*Pitts v. WJLA et al.*	2016 CA 002054 B	defamation, false light, misrepresentation, and intentional infliction of emotional distress
17	*Moore v. Costa*	2016 CA 004038 B	defamation
18	*Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l et al.*	2014 CA 002273 B	defamation; declaratory judgment
19	*Vandersloot and Melaleuca, Inc. v. Foundation for Nat'l Progress et al.*	2014 CA 003684 2	defamation, motions to compel-quash
20	*The Washington Travel Clinic, PLLC et al. v. Kandrac* APPEALS PENDING	2013 CA 003233 B **14-CV-1016; 14-CV-0060**	defamation and tortious interference
21	*Payne v. District of Columbia et al.*	2012 CA 006163 B	defamation, false light, intentional infliction of emotional distress, and constitutional defamation violation of Fifth Amendment Liberty Interest 42 U.S.C. § 1983.

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22	*Vincent Forras et al. v. Iman Feisal Abdul Rauf, et al.*	2011 CA 008122 B *Forras v. Abdul-Rauf*, 2012 D.C. Super. LEXIS 16 (Aug. 7, 2012)	defamation, false light, assault, and intentional infliction of emotional distress
23	*Newmyer, et al. v. The Sidwell Friends Sch.*	2011 CA 003727 M *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023 (D.C. 2015)	defamation, false light invasion of privacy, tortious interference with contract, and intentional infliction of emotional distress
24	*Lehan v. Fox Television Stations, Inc. et al.*	2011 CA 004592 B *Lehan v. Fox TV Stations Inc.*, 2011 D.C. Super. LEXIS 14 (Nov. 30, 2011)	defamation; Act is **PROCEDURAL** not substantive and applied retroactively.
25	*Snyder v. Creative Loafing Inc. et al.*	2011 CA 003168 B	defamation
26	*Campbell v. CGI Group, Inc. et al.*	2012 CA 008217 B	defamation, intentional infliction of emotional distress, and interference with contractual relations
27	*Dean v. NBC Universal*	2011 CA 006055 B	defamation

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2020, a true and correct copy of the foregoing Motion to Expedite Appeal and accompanying exhibits were served by electronic means through the Court's electronic filing system.

/s/John B. Williams
John B. Williams, Esq.