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

IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Morgan Banks, *et al.*,

Plaintiffs-Appellants,

v.

David H. Hoffman, *et al.*,

Defendants-Appellees.

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

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

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(A)(2) CERTIFICATE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

   a. Did Defendants produce sufficient evidence to establish as a matter of law that Plaintiffs are "public officials" who must show Defendants acted with "actual malice" in publishing the defamatory statements?

   b. Did the evidence proffered by Plaintiffs create one or more triable disputes of fact regarding actual malice?

   c. Did Defendants produce sufficient evidence to establish as a matter of law that they did not republish the report at issue in 2018?

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

3. Is the District of Columbia Anti-SLAPP Act unconstitutional under the First Amendment, both facially and as applied, because it impermissibly burdens the right of meaningful access to the courts?

STATEMENT OF THE CASE

Plaintiffs are three retired military psychologists who had worked for years to stop the abusive interrogations of detainees—including torture—that occurred after

9/11. Despite their work, the widely publicized report at the heart of this case resulted in headlines in the U.S. and internationally that branded them as "Psychologists Who Greenlighted Torture." JA246-47.

The report resulted from an investigation commissioned in 2014 by the American Psychological Association (APA) after a journalist accused it of colluding with the government to enable torture. The investigation was conducted and the report written by David H. Hoffman, a partner of Sidley Austin LLP. It accused Plaintiffs of having colluded with APA officials to ensure that APA did not create obstacles to military psychologists' participation in abusive interrogations.

The report (Hoffman Report or Report) was published in 2015. Soon afterwards, many APA members provided testimony and documents contradicting its conclusions. After presenting that evidence to Defendants, Plaintiffs asked for a statement correcting the Report's defamations. JA1267-68. Defendants refused.

In February 2017, Plaintiffs sued Hoffman, Sidley Austin LLP, and the APA (together with Sidley Austin (DC) LLP, Defendants) for defamation *per se*, defamation by implication, and false light invasion of privacy. The suit was filed in state court in Ohio, where Plaintiff Col. (Ret.) Larry James resides. Defendants successfully contested personal jurisdiction in that state, which has no anti-SLAPP statute, and declined to consent to personal jurisdiction except in the District of Columbia, which has an anti-SLAPP statute more onerous for plaintiffs than almost

any other in the country.[1] Plaintiffs filed their Complaint in the District of Columbia on August 28, 2017. JA229-430.

Defendants filed their first set of special motions to dismiss under the Anti-SLAPP Act in October 2017. JA432-734. Plaintiffs then filed (and later supplemented) a motion seeking targeted discovery under the Act, which the court granted in part and denied in part. JA735-80; 822-52. The court later vacated *sua sponte* its provision for three depositions. JA1138-39.

In August 2018, via email, Defendants provided instructions for accessing the Report and new documents accompanying it on their website. Plaintiffs supplemented their complaint on February 4, 2019, to allege a further claim based on that republication, and the Defendants responded with a second set of special motions on March 21, 2019. JA313-16; 1814-25.

In March 2019, the trial court ordered two original Plaintiffs, Drs. Stephen Behnke and Russ Newman, both former APA employees, to arbitrate their claims.

Plaintiffs moved for an order declaring the Anti-SLAPP Act void in violation of the Home Rule Act and unconstitutional under the First Amendment. The trial court denied the motion on January 23, 2020. JA2043-56. On March 11, 2020, it

[1] Plaintiffs filed this action in the District in August 2017. When Defendants successfully sought a stay of the D.C. litigation while Plaintiffs' appeal of the Ohio dismissal was pending, Plaintiffs filed a "safety" lawsuit in Massachusetts, as required by D.C. precedent (*Curtis v. Aluminum Ass'n*, 607 A.2d 509 (D.C. 1992)), to assure that they would have a forum somewhere. That action has been stayed.

granted the Defendants' four special motions to dismiss under the Anti-SLAPP Act. JA2164-92. The following day, the court issued *sua sponte* an amended order of dismissal. JA2193-2222. This appeal is from the January 23, 2020, order and the March 11 order (as amended) that disposes of all Plaintiffs' claims.

STATEMENT OF FACTS

In its response to 9/11, the United States captured and interrogated hundreds of detainees. As the media soon reported, some were subjected to horrifying forms of abuse, including waterboarding and other types of torture. After these reports emerged, military commanders began to formulate policies that became increasingly rigorous and specific in their prohibitions against abuse, and to take steps to implement the policies.[2] JA403-13; 2107; 1363-1442; 1433-39.

Plaintiffs—military psychologists with the rank of colonel or lieutenant-colonel—did not formulate these high-level policies. But they were a critical part of their implementation. They were assigned by their commanders to help stop abuses at Guantanamo and interrogation sites in Iraq and Afghanistan. They did so by drafting regulations specifying the limits of permissible interrogation, prohibiting abuses, and specifying that the Geneva Conventions applied. JA1541, ¶5. They

[2] The media and Hoffman often conflated the military and the CIA, although military and CIA interrogation policies and practices increasingly differed. Plaintiffs had no involvement in the CIA interrogation process. Hoffman did not find that the APA colluded with the CIA.

provided training in eliciting information without abuse. They monitored interrogations and, on occasion, intervened directly to stop abuses. An officer in the Judge Advocate General's Corps testified that:

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

JA272-73; 394-400; 1462-71; 1540-55; 1655-60; 1754, ¶6.

As Plaintiffs were doing this work, they and other military psychologists were attacked publicly by those who believed psychologists should withdraw entirely from the interrogation process. Plaintiffs committed themselves to stopping abuse and torture from within the military. But these critics asserted that psychologists who played any role in the interrogation process were necessarily complicit in the abuses and should be criminally prosecuted.

Unaware of the changes implemented by Plaintiffs and others on the ground, the critics continued their attacks for years. They attacked not only individual military psychologists, but also their professional organization, the APA. The attacks culminated in a high-profile book by a *New York Times* reporter, James Risen, published in 2014. It accused the APA of colluding with the Bush Administration and the Central Intelligence Agency (CIA) to enable torture. JA237-60.

In response, the APA commissioned an investigation into Risen's allegations from Sidley and its partner David Hoffman. JA237, ¶2; 1221, fn 16. The resulting report accused Plaintiffs of colluding with APA officials to promulgate APA guidelines governing interrogations that were too weak to prohibit abuses such as sleep deprivation. It also accused them of colluding to stop APA from banning psychologists from any role in the interrogation process. JA2246-47. But it attached no blame to APA Board members, including the head of the Special Committee that supervised the investigation, who had been heavily involved in the events it described and who oversaw the conduct of the investigation. JA1444-52.

Before APA released the report in July 2015, it was leaked to the *New York Times* reporter whose book sparked the investigation. Plaintiffs' evidence demonstrates that the leak came from Hoffman or his team. JA1225, fn 34; 1568-69, ¶¶9-14. It led to prominent headlines in the *Times* and many other places such as "Psychologists Who Greenlighted Torture," "Leading Psychologists Secretly Aided U.S. Torture Program," and "US Torture Doctors Could Face Charges After Report Alleges Post-9/11 'Collusion'." JA246-47.

APA then promptly published the Report, in a process that Board members privately acknowledged was "impulsive and not thought through." JA1719-25.

Almost immediately, those with first-hand knowledge of the events the Report described began to provide evidence that its accusations were false. JA309-11.

Members of the APA Board admitted privately that there was "no evidence" of collusion. They said the Report contains "many inaccuracies." And they acknowledged "clear evidence" that Hoffman may have "distorted" matters in the Report. JA1658, ¶14; 1719-25, Ex. 1.

Eight former APA presidents and 14 Ethics Committee chairs signed open letters to the APA Board condemning the Report. JA310; 315; 1779, fns 12, 13, 14.[3]

Other APA members with first-hand knowledge of the events at issue also spoke up. One such statement came from Dr. Linda Woolf, who *supported* the ban on psychologists' participation in interrogations that Plaintiffs were accused of colluding to block. She said:

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

JA262; 1484, ¶34.

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[3] The documents listed at JA1779 can be accessed here:
Robert Kinscherff, *et al.*, *Open Letter to the APA Board of Directors from Former Chairs of the APA Ethics Committee*, APA (Feb. 16, 2016), *available at* https://www.apa.org/news/press/statements/ethics-chairs-letter01.pdf
Robert Kinscherff, *et al.*, *Open Letter from Former Chairs of the APA Ethics Committee to the Board of Directors: Perceived, Potential or Actual Conflicts of Interest in Attorney Hoffman Self-Review*, APA (May 15, 2016), *available at* https://www.apa.org/news/press/statements/ethics-chairs-letter02.pdf
Past APA Presidents' Open Letter to the Board of Directors, Council of Representatives, Divisions and Staff (June 11, 2016), *available at* https://www.apa.org/news/press/statements/past-presidents-letter.pdf

The Report destroyed Plaintiffs' professional and personal reputations. They were given no effective opportunity to respond to it before APA published it, and had no effective access to the media to rebut the headlines that condemned them.

The Report also led Plaintiffs' long-time critics to renew their calls for criminal and war-crimes prosecutions. Although Hoffman told APA privately that he found no criminal activity, his Report used language—such as "collusion," "joint venture," and "joint enterprise"—drawn directly from such prosecutions. JA238-39; 257; 274; 286, ¶180; 343; 1239-64.

Plaintiffs now appeal from the trial court's dismissal of all their claims.

SUMMARY OF ARGUMENT

Issue 1:

The trial court held that (1) Defendants had met their burden of demonstrating that Plaintiffs were public officials, and (2) Plaintiffs had raised no triable issues of fact regarding actual malice. JA2164-2222.

First, Defendants failed to show that Plaintiffs were public officials. Plaintiffs met none of the established criteria. They were not in a position to influence significantly the resolution of important public issues; instead, they only executed the policy decisions of their superiors rather than making such decisions themselves. They had no ability to access the media to defend themselves, and they did not

assume the risk of media coverage by accepting their mid-level military ranks. JA1463, ¶5; 1466, ¶18; 1540-41, ¶4; 1543, ¶17; 1656, ¶5; 1659, ¶17.

Second, the trial court erred in holding that Plaintiffs had failed to establish triable disputes of fact respecting actual malice. It reached that result by repeatedly weighing and assessing the limited selection of facts it considered, despite the strictures against doing so in *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1235-36 (D.C. 2016). It also drew all inferences in Defendants' favor. JA2193-2222.

The court's assessing of limited evidence was particularly unsuited to the nature of this defamation. The Report's damage results not only from many specific false statements, but also from their weaving together into a false narrative by a skillful process of selection, omission, characterization, and inference. That narrative then becomes the basis for the overarching false statements that Plaintiffs and APA officials engaged in a long-running collusive joint venture to protect abusive interrogations and those who conducted them. JA1217 fn 6, 1264.

Plaintiffs presented direct and circumstantial evidence more than sufficient for a jury to find actual malice in Hoffman's creation of that narrative and the false statements it contains, as well as in APA's publication of the Report. JA1202-1767.

As to direct evidence, the operative Complaint identifies 219 defamatory statements in the Report and identifies evidence in Hoffman and/or APA's possession contradicting them. JA1301-1362. For one example, the Report claimed

that military interrogation policies in 2005—which were incorporated by reference into the APA interrogation guidelines—were too loose to prevent abuses. To make that claim, Hoffman relies on outdated policies, while ignoring documents in his possession that showed the policies had been revised (with Plaintiffs' participation) to prohibit abuses, including techniques such as sleep deprivation and stress positions that the Report says were permitted. JA1236-52.

Moreover, many former members of APA's governing bodies who had first-hand knowledge of the events described in the Report have testified to its misstatements, as have many other APA members. JA1455-1767. Plaintiffs' evidence demonstrates that Board members knew the statements to be false when the Report was published because of their involvement in those events. JA1444-52.

In assessing evidence of actual malice, courts take into account not only direct evidence but also "the cumulation of circumstantial evidence. . . ." *Tavoulareas v. Piro*, 817 F.2d 762, 789 (D.C. Cir. 1987). Plaintiffs provided several types of circumstantial evidence that support a finding of actual malice. JA1252-69.

Among that evidence: Hoffman relied far more heavily on long-time critics of the Plaintiffs and the APA than on other witnesses he interviewed. JA260-62. He ignored warnings that witnesses on whom he relied were unreliable. JA1261-62. Many witnesses provided affidavits stating that Sidley's investigators seemed intent on proving a preconceived story and avoiding contrary information. JA1455-1767.

Plaintiffs presented evidence of motive and intent to defame, including evidence that Hoffman leaked his Report to the media before presenting it to the APA Board. JA1266, 1567. They also presented evidence that the Report protected Board members who oversaw his investigation despite having been deeply involved in the events it described. JA1216. In writing the Report, as Hoffman acknowledged to the APA Council, its governing body, he set out to "make [his team's] case" to support his conclusions, not to present the evidence objectively. JA1215, fn 3.

In sum, Plaintiffs provided voluminous evidence that Hoffman acted as a prosecutor making a case against targets whose guilt he assumed. Indeed, he was so far removed from neutrality that he explicitly took sides against Plaintiffs on a critical issue hotly debated within APA: Can military psychologists help both to make interrogations effective and to prevent abuses? JA2264.

Further, after the Report's publication, Defendants refused to retract their defamatory statements despite being provided with stacks of evidence contradicting those statements. JA1267-69.

The trial court not only improperly viewed the selection of evidence it considered in the light most favorable to Defendants, but also repeatedly invaded the jury's province by weighing that evidence. For example, the court judged the scope and reliability of government reports contradicting the Report's conclusions, rather than leaving that task to a jury. JA2186. The court shrugged off multiple declarations

from witnesses Sidley interviewed pointing to a pattern of omissions and mischaracterizations of their testimony in the Report. JA1455-1767. The court was equally dismissive of testimony that Sidley investigators appeared intent on proving a preconceived narrative to the exclusion of contrary evidence. JA2186-88. With respect to the Report's heavy reliance on biased witnesses, the court rejected this qualitative argument with a meaningless statistic—the percentage of Sidley's total witness interviews accounted for by those linchpin witnesses. JA2188-89. The trial court concludes by holding that Defendants had no duty to correct or retract their statements. That holding is flatly wrong as a matter of law and contradicted by statements in February 2016 by APA's own in-house counsel. JA2190.

The trial court further erred in dismissing Plaintiffs' claim based on the republication of the Report through a widely distributed email in 2018. The court acknowledged that republication occurs when defamations are either transmitted to a new or wider audience or significantly supplemented or altered. JA2174. The court disregarded substantial evidence that Defendants' 2018 circulation of the Report satisfied both criteria. JA1791-1800; 1814-25.

Issue 2:

The trial court erred by rejecting Plaintiffs' analysis demonstrating that the D.C. Anti-SLAPP Act is void because it was enacted in violation of the D.C. Home Rule Act. According to D.C. Code § 1-206.02(a)(4), the D.C. Council has no

authority to enact any act, resolution, or rule "with respect to" Title 11 of the Code. Title 11 specifically addresses the procedural rules used by the Superior Court, among many other topics. The Anti-SLAPP Act is an act "with respect to" Title 11 because it erects a new and separate procedural mechanism for the summary dismissal of disfavored claims. The Act specifically violates D.C. Code § 11-946, which requires the Superior Court to conduct its business pursuant to the FRCP unless this Court affirmatively approves a deviation from them. This Court has never affirmatively approved the Anti-SLAPP Act.

Issue 3:

The judgment should be reversed for a final reason: The D.C. Anti-SLAPP Act is unconstitutional, both facially and as applied. Although SLAPP suits have long been defined as lawsuits brought for an improper, abusive purpose, this Court has held in the context of an attorneys' fee award that the D.C. Anti-SLAPP Act does not require defendants to prove that the complaint at issue was brought for such a purpose. As a result, the Act unconstitutionally burdens plaintiffs' First Amendment right to effective access to the courts by giving large, wealthy defendants a metaphorical sledgehammer to try to crush valid claims brought to redress substantial injuries—the primary use to which the D.C. Act has been put since it was enacted. Plaintiffs' undisputed evidence that this lawsuit was brought to redress devastating reputational injuries makes the Act unconstitutional as applied

as well. So does the burdening of Plaintiffs' right to access discovery, a crucial step in demonstrating actual malice. (Plaintiffs' Motion to Declare the Anti-SLAPP Act Void and Unconstitutional (January 8, 2019), pp. 6-7; 10-13; Ex. D.)

The order of dismissal and judgment are erroneous for each of these reasons. They should be reversed and remanded for full discovery and trial.

ARGUMENT

I. Standards of Review.

Issue 1a: Whether a Plaintiff is a "public official" for purposes of defamation is a question of federal law reviewed *de novo*. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

Issue 1b: Whether Plaintiffs' evidence is sufficient to allow a jury to find actual malice is likewise a question of law. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 685 (1989). Thus, the court conducts an independent review of the record, applying the same standard that should be applied by the trial court. *Joeckel v. DAV*, 793 A.2d 1279, 1281 (D.C. 2002). For determining whether the plaintiff failed to make the Anti-SLAPP Act's required "likely to succeed" showing, the standard "mirrors" the summary-judgment standard: It reverses the burden by requiring plaintiffs, the nonmoving party, to show the evidence suffices to permit a jury to find for them. *Mann*, 150 A.3d at 1238-39 n.32. To avoid "serious constitutional concerns" about the Act, *Mann*, 150 A.3d at 1235-36, the court must

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

Issue 1c: Because questions of publication and republication are questions of fact, to prevail on their Motions Defendants must prove that the publication at issue in Plaintiffs' Claim 11 is not a republication as a matter of law. *Eramo v. Rolling Stone, L.L.C.*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016). Thus, this court reviews the grant of summary judgment regarding republication *de novo*.

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

II. The Trial Court Erred by Repeatedly Weighing and Assessing the Limited Evidence It Considered to Find that Plaintiffs' Claims Presented No Triable Issues of Fact.

The trial court held that (1) Defendants had met their burden of demonstrating that Plaintiffs were public officials, and (2) Plaintiffs had raised no triable issues of fact regarding Defendant's actual malice. The court reached that result by

disregarding much of Plaintiffs' evidence and impermissibly weighing the evidence it did consider, usurping the role of the jury. The result was a gross miscarriage of justice: It left Plaintiffs, who devoted the last years of their military careers to preventing abusive interrogations, with no recourse against the reputation-destroying allegation that they colluded to support those abuses. The judgment must be reversed. JA1097-1100; 2207; 2213-2220.

A. Defendants Failed to Meet Their Burden of Demonstrating that Plaintiffs Were Public Officials.

If a defamation plaintiff is a "public official," he or she must show at the summary judgment stage that a reasonable juror could find under a clear-and-convincing standard that the Defendant published the defamatory material with actual malice. *Mann*, 150 A.3d at 1236.

Because Defendants raised the claim that Plaintiffs were public officials as an affirmative defense, they bear the burden of proof: Courts "proceed[] upon the initial presumption that the defamation plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public figure [or public official]." *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1553 (4th Cir. 1994). That principle does not change in the anti-SLAPP context. Although no D.C. court has yet considered this issue, courts in California, on whose anti-SLAPP statute the D.C. statute was modeled, have. *See, e.g.*, *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015) ("Although the anti-SLAPP statute 'places on the plaintiff the burden

of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" (citation omitted)); *Br. of Amicus Curiae Dist. of Columbia, Adelson v. Harris*, No. 12-cv-6052, 2013 WL 435912, at *4 (S.D.N.Y. Feb. 4, 2013) (D.C. Attorney General: "Guidance from the California courts . . . is instructive because the District's Act was modeled in substantial part on California's Anti-SLAPP Act.").

In its discussion of the public-official defense, the U.S. Supreme Court has said that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt*, 383 U.S. at 86. In delimiting the circumstances in which that interest gives way to "interests in public discussion [that] are particularly strong, as they were in [*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)]," the Court found that the "public official" designation applies where a government employee "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt*, 383 U.S. at 86. The D.C. District Court has stated that the public-official category "is limited to high-ranking Government officers." *Lewis v. Elliott*, 628 F. Supp. 512, 519 (D.D.C. 1986).

Moreover, this public interest cannot be the result of the defamatory statement itself. It must exist independent of the controversy at hand. *Id.* at 87 n.13.

According to the First Circuit, the U.S. Supreme Court's public-official cases are based on a "three-legged stool." *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 935-40 (1st Cir. 1989). Public officials (1) "are in a position significantly to influence the resolution" of "issues of public importance" (quoting *Rosenblatt*, 383 U.S. at 85); (2) have the ability to access the media to defend themselves (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 344 (1974)); and (3) have assumed the risk of media coverage (quoting *Paris Adult Theatre I v. Slaton*, 418 U.S. 939, 940 (1974)).

The trial court considered only the first of these prongs.

No Plaintiff satisfies that prong of the *Kassel* test. Plaintiffs' evidence would lead a reasonable jury to conclude that they did not have authority to make policy decisions on behalf of the Department of Defense (DoD) or formulate military policy. JA1463, ¶5; 1540-41, ¶4; 1543, ¶17; 1656, ¶5; 1659, ¶17; 1755, ¶10. All three were limited to executing directives issued by their commanders. *Id.* Affidavits presented to the Superior Court—including one from a former Judge Advocate General—testified that Plaintiffs could not set policy or influence the resolution of the ongoing governmental debate about interrogation policy. Instead, once their superiors had determined to put an end to abuses, they set out to implement those directives. JA1463, ¶5; 1540-41, ¶4; 1656, ¶5. The court ignored these affidavits.

To argue the contrary, Defendants relied on only two sets of facts: Plaintiffs' titles for their administrative functions, and cherry-picked descriptions in the

Complaint of their military roles. JA450-52. The trial court followed the Defendants' lead. In holding that all three Plaintiffs were public officials, JA2180-82, the trial court relied entirely on Defendants' selection and interpretation of the relevant "facts" from the Complaint. But none of those facts show that Defendants met their burden of demonstrating that, as a matter of law, Plaintiffs were public officials.

Initially, the court asserts that the titles describing their administrative responsibilities mean that all three "comfortably fit within the hierarchy of public officials." JA2181. But titles alone do not make a "public official." The question is whether the individuals holding those titles "are in a position significantly to influence the resolution" of "issues of public importance." *Kassel*, 875 F.2d at 939 (quoting *Rosenblatt*, 383 U.S. at 85). The court cited no evidence—and Defendants presented none—that Plaintiffs met that criterion.

The court then cites language from Plaintiffs' Complaint that refers to their role in drafting and implementing policies and procedures. However, the court improperly disregards Plaintiffs' testimony about the crucial distinction between policies promulgated by senior government and military officials that set direction for the military, and policies that *implement* those senior-level policies decided by others. JA1463, ¶5; 1540-41, ¶4; JA1656, ¶5; JA1755, ¶10. In this case, senior officials determined that the military should put an end to abusive interrogation techniques. They then ordered Plaintiffs and others to execute that policy, as they

did by putting in place implementing policies, procedures, and training. The difference between interrogation policies emanating from the Department of Justice Office of Legal Counsel, the DoD, and regional military commanders on the one hand and, on the other, documents implementing those policies is a difference in kind, not in degree.

Nor do plaintiffs satisfy the second prong of the *Kassel* analysis, access to "channels of effective communication." None had authority to speak to the media or general public on behalf of DoD, and none did so. JA1463, ¶5; 1540-41, ¶4; 1656, ¶5. When the Hoffman Report was published, its allegations were broadcast by the media around the world; in contrast, Plaintiffs have been unable to gain media attention for their repeated and significant rebuttals of the allegations.

Nor is the third prong of *Kassel* satisfied. A reasonable juror could conclude that no individual joining the military, even when they rise to the rank of colonel, expects to assume the risk of attracting media attention. Plaintiffs attracted attention only because of the Report's defamatory allegations, not for reasons that would place them in the category of public officials. JA 1466, ¶18; 1543, ¶17; 1659, ¶17.

No authority holds that individuals who execute the policies of superior officers are transformed into "public officials." The trial court erred in so holding, and that error mandates the reversal of its Order dismissing Plaintiffs' case.

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

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

In this case, the trial court not only supplanted the role of the jury by weighing and assessing evidence as to actual malice, but also omitted any reference to much of Plaintiffs' documentary and testimonial evidence. **Those omissions included all the separate evidence relevant to the claims against APA, and to the defamation by implication and false-light claims.** The court ignored case law specifically relevant to internal investigations. It also failed to apply U.S. Supreme Court and other precedent governing the scope of evidence relevant to showing actual malice.

1. Actual Malice May Be Shown Through Direct and Circumstantial Evidence.

Actual malice may be proven by showing that the defendant either (1) had subjective knowledge of the statement's falsity or (2) acted with reckless disregard for whether the statement was false. *Mann*, 150 A.3d at 1252. Reckless disregard

includes the purposeful avoidance of the truth. *Harte-Hanks Commc'ns*, 491 U.S. at 692.

Because a defendant is unlikely to acknowledge having acted with actual malice, "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant," as the U.S. Supreme Court has stated:

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties [or] facts tending to show a reckless disregard of the plaintiff's rights.

Herbert v. Lando, 441 U.S. 153, 165, 165 n.12 (1979).

In assessing the evidence of actual malice, courts should take into account "the cumulation of circumstantial evidence. . . ." *Tavoulareas v. Piro*, 817 F.2d 762, 789 (D.C. Cir. 1987). Among the types of evidence courts have found may contribute to that cumulation are negligence, motivation and intent, *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972); bias or ill will, *Harte-Hanks Commc'ns*, 491 U.S. at 668; obvious reasons to doubt a source, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); a failure to retract or a republication after receiving evidence of a statement's falsity, *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007); and a failure to properly investigate, *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983). The failure

to investigate is particularly relevant when it amounts to the purposeful avoidance of the truth. *Harte-Hanks Commc'ns*, 491 U.S. at 692.

Moreover, courts have repeatedly emphasized the importance of viewing the plaintiffs' evidence in its entirety rather than one piece at a time, since "each individual piece of evidence cannot fairly be judged individually." *Tavoulareas*, 817 F.2d at 794. This warning applies with special force to Plaintiffs' case, which relies not only on specific defamatory statements but also on a pattern of omissions, mischaracterizations, and unfounded inferences in the Hoffman Report and on a pattern of behavior both during and after Hoffman's investigation.

The trial court acknowledged that the evidence must be subjected to "a holistic examination" JA2185. But it then examined the evidence piece by piece, ignored controlling precedent as to the range of admissible evidence, and consistently weighed the evidence it considered in the light most favorable to the Defendants. JA2184-191.

Plaintiffs presented both direct and circumstantial evidence that is more than sufficient for a jury to find actual malice, if Plaintiffs are held to that standard. The trial court ignored most of this evidence and, as to the evidence it did consider, improperly substituted its judgment for a jury's. Section 2 and 3 below summarize Plaintiffs' direct and circumstantial evidence; Section C summarizes the much more limited evidence the trial court considered and its weighing of that evidence.

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

Defendants cannot feign ignorance or profess good faith when they possessed information that cast doubt on the truth of their statements. D. Elder, *Defamation: A Lawyer's Guide* § 7.12 (July 2016) (collecting cases). Actual malice may be inferred when defendants publish a defamatory statement that contradicts information known to them, even though they testify that they believed the statement was not defamatory and was consistent with facts within their knowledge. *Id.* Consistently failing to acknowledge contradictory information supports a reasonable inference of actual knowledge of falsity or, at a minimum, reckless disregard for truth. *Id.; Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070 (5th Cir. 1987). JA1229-30; 1234-52.

a. Direct Evidence of Actual Malice: Admissions

A jury could reasonably find that admissions by members and former members of the APA Board, other APA officials, and an APA counsel contribute to finding that Defendants acted with actual malice.

First, the APA Board, despite refusing to retract the Report, has privately admitted its failings:

- In a meeting with former Board members, the Board acknowledged that the report contains "many inaccuracies" and there appeared to be "no evidence of collusion."
- In a February 2016 Council meeting, during a discussion of rehiring Hoffman, a former Board President stated that APA members had provided "clear evidence" that Hoffman "may have misrepresented, left out or distorted" certain matters in the Report. The Associate General

> Counsel stated that they could not "do nothing" and "had a fiduciary obligation to fix things if they became aware that something was wrong."

JA1658, ¶ 14; 1719-1725, Ex. 1, ¶ 5.

A jury could reasonably find those admissions to show that the Board knew at least some of the Report's allegations were false when they were published, and refused to retract them after their publication despite that knowledge.

Second, numerous former members of APA's governing bodies with first-hand knowledge of the events described in the Report have attested to its falsities. JA1456, ¶¶6, 8. Their statements constitute additional evidence on the basis of which a jury could find that, when APA published the Report, it acted at a minimum with reckless disregard of its truth or falsity.

Third, David Ogden, APA's outside counsel in 2015, acknowledged that a foundation of its first primary conclusion (see section b below) was contradicted by government documents. In the Report's narrative, a key event is the meeting and report of an APA task force formed to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." (The PENS Task Force, "PENS" standing for Psychological Ethics and National Security.) The Report falsely asserts that, when the task force met in 2005, military interrogation policies did not prohibit abuses and torture. That assertion is the cornerstone of its false conclusion that Plaintiffs and some APA

officials colluded to ensure APA policies set by the task force—which incorporated by reference the most recent military policies, some of which Plaintiffs drafted—were equally loose, failing to prohibit abusive interrogation techniques such as sleep deprivation.

While in the Obama Administration, Mr. Ogden helped oversee the Department of Justice Office of Professional Responsibility Report about the Office of Legal Counsel's earlier legal memoranda relating to interrogation policy. When he read the Report, therefore, he would have known that its assertions about the OLC guidance in 2005 were inaccurate. JA310.

When Mr. Ogden acknowledged that the policies in place in 2005 contradicted the Report's assertions but were not analyzed in it, he advised APA to rehire Hoffman to review the Report in light of that contradiction and prepare a supplemental report. APA did so, but the supplemental report never emerged. JA1456, ¶6.

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

Plaintiffs' Supplemental Complaint specifically identifies 219 defamatory allegations in the Report, along with evidence that Sidley and Hoffman either knew about or deliberately avoided evidence that would have caused a truly independent investigator to doubt the truth of the allegations. Because the trial court limited the

evidence Plaintiffs were allowed to present in their briefs, JA1103-12, Plaintiffs attached to their Opposition an exhibit (also attached to their Complaint) that contained the 219 false statements, along with links to documents in Defendants' possession that contradicted those statements and the Report's conclusions. JA349-93; 1302-1362. Plaintiffs' counsel expressly directed the trial court's attention to this exhibit in the February 21 hearing. JA2100, lines 10-14. But the court's opinion failed to consider any of that evidence.

Beyond its false statements about specific events, the Report created a false overarching narrative accusing Plaintiffs and others of "colluding" over many years.[4] To build that story, Hoffman omitted facts, mischaracterized them, and repeatedly drew unsupported inferences about them. That story then became the lens through which the facts and Plaintiffs' goals and motives were characterized, and the foundation for the Report's three primary false conclusions:

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

[4] Before the trial court, the Defendants argued for the first time in their reply briefs that defamatory statements about initial Plaintiffs Drs. Behnke and Newman were no longer relevant since both were required to pursue their claims in arbitration. The contention is mistaken. The Hoffman Report expressly identifies each Plaintiff by name as an active participant in a collusive joint venture or enterprise between the APA and DoD. (*See, e.g.*, JA 2273, 2280, 2623, 2630.) As a result, each Plaintiff is defamed by statements alleging actions taken by any other named participant in the so-called collusive enterprise. The trial court pre-emptively ruled that Plaintiffs could not file any sur-replies to issues raised for the first time in replies. JA1135.

(2) "We also found that in the three years following the adoption of the 2005 PENS Task Force report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. The principal APA official involved in these efforts was once again the APA Ethics Director, who effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA's statements and actions fell squarely in line with DoD's goals and preferences."

(3) "Finally, we found that the handling of ethics complaints against prominent national security psychologists was handled [sic] in an improper fashion, in an attempt to protect these psychologists from censure."

JA2246-47.

As to the Report's first primary conclusion:

This false conclusion rests upon two demonstrably false assertions: (1) "then-existing DoD guidance . . . used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation," JA2240-45, and (2) "at the time of the [PENS] report . . . the Bush Administration had defined 'torture' in a very narrow fashion." *Id.* JA262-72, ¶¶87-121; 1366-67, fns 8-11; 1368-77.

Neither assertion is true, as evidence in Sidley's possession demonstrated. (The Order considered none of this evidence.) Those assertions are the foundation of the Report's first conclusion, and it collapses without them. JA401-03; 1241.

By the time the PENS Task Force met in June 2005, the Bush Administration's earlier narrow definition of "torture" had been withdrawn as to the DoD and new legal guidance was in place. Local military interrogation policies prohibited abusive techniques, including the sleep-deprivation and stress-position techniques that the Report claims were permitted. Thus, there was no reason for Plaintiffs to "collude" to block guidelines that might "constrain" DoD interrogations when DoD's own guidelines *had already been changed to prohibit abuses*. Those restrictive policies were explicitly incorporated by reference into the PENS Guidelines' Statement 4, which the Report ignores. JA394-400; 1244.

The Report never expressly identifies the DoD policies in place when the PENS Task Force convened—it refers instead to outdated policies and to policies that applied only to the CIA, not the military. Yet some of the relevant policies were in the Report's binders of exhibits, and others were explicitly referred to in other documents in their possession and by witnesses the Sidley team interviewed. JA1241-44. A jury could find their omission to be evidence of actual malice, not only negligence. JA1363-1378. The evidence in Hoffman's possession included:

- Governmental documents, among others, discussed the correct timeline of relevant interrogation policies. The Report omitted citations to the relevant pages even though some were adjacent to other statements it *did* cite. JA1241-45; 1250-51. Although the Report acknowledges that the earlier

guidance had been withdrawn, JA2390, it still relies on the superseded guidance to describe "existing" interrogation policy in 2005. JA1241-45. A jury could conclude that relying on superseded guidance to mischaracterize "existing" policy was evidence of actual malice.

- Drawing on a legal opinion obtained by APA in February 2014, the APA's Committee on Legal Issues expressly recognized the changes in applicable guidelines, stating that "much of the legal discussion in the [critics' claims] is confused, inaccurate and/or incomplete" and "relies on outdated law . . . and ignores the current legal authority . . . ." JA1242-43 fn 68.
- Hoffman possessed but failed to take into account four copies of the "standard operating procedures" for interrogations at Guantanamo that Plaintiffs Banks and Dunivin had drafted before the PENS meetings. JA1243; 1656, ¶5.
- Plaintiff Larry James referred to the restrictive applicable policies at least five times on the PENS listserv. Sidley and Hoffman admit that they reviewed the communications from the PENS listserv, but the Report omits any mention of those references. JA1243; 1656, ¶6.
- When Hoffman's team interviewed Jennifer Bryson, a civilian interrogator at Guantanamo, she explained that, by 2004, interrogators were required to use a computer menu of permitted interrogation techniques that did not

permit techniques such as stress positions and sleep deprivation. The Hoffman Report falsely asserted those techniques *were* permissible. JA1244-45; 1507, ¶6.

As to the Report's second primary conclusion:

According to the Defendants, Plaintiffs engaged in a "joint enterprise" to "collaborat[e] with APA" to keep the APA Council from banning psychologists' participation in national security interrogations. JA2273, 2600.

Hoffman knew that APA Council meetings were open and transparent, making it impossible to dictate a result by collusion. For example, in an email to former Plaintiff Stephen Behnke, Dr. Linda Woolf, who moved the resolution for a ban, said the discussion was "very open to debate" and "Council did have the opportunity to review, discuss, debate, challenge, etc. all of the changes prior to voting . . . ." JA1245-46.

Hoffman failed to acknowledge this evidence and published defamatory allegations to the contrary that told a far different and false story.

As to the Report's third primary conclusion:

The Report asserted that the APA deliberately mishandled ethics complaints to protect psychologists involved in national security interrogations from censure. JA2247. In particular, the Defendants claimed that the Ethics Office, led by former

Plaintiff Behnke, had done little to investigate a claim against Dr. James Leso beyond "conducting internet searches." JA2297.

As with the Report's first and second primary conclusions, Defendants do not attempt to defend the truth of this allegation. Instead, they argue that Plaintiffs cannot produce adequate evidence of actual malice. They are mistaken.

Sidley and Hoffman had a list of the voluminous evidence that the APA Ethics Office had gathered and analyzed in reviewing the Leso Complaint. They deliberately disregarded this evidence. JA1247-48. See also section d below.

Hoffman interviewed former APA Ethics Committee Chair Dr. Robin Deutsch. JA1248-49; 1525, ¶9. In her affidavit, Dr. Deutsch states that Hoffman's questions left her:

> with the distinct impression that [Hoffman] had a preconceived narrative and had already concluded that . . . Dr. Stephen Behnke had engaged in inappropriate behavior [Dr. Behnke was the APA official whom Hoffman placed at the center of the alleged collusion] . . . the information I provided in response to the series of questions posed would have communicated my experience that at no point did Dr. Behnke pressure me to reach any particular conclusion regarding the Plaintiff James ethics complaint, or any other ethics complaint.

Sidley and Hoffman ignored Deutsch's testimony, as did the Court.

c. Direct Evidence of Actual Malice: The Defendants' Omission of Exculpatory Reports.

Omitting exculpatory reports that contradict the defamatory statements supports a finding of actual malice. *Mann*, 150 A.3d at 1253, 1258. More than ten

government agencies and bodies investigated the same events as Sidley and Hoffman, looking at much of the same evidence given to Hoffman by the APA critics on whom he relied, and found no reason to act. Sidley and Hoffman omit the conclusions in these reports. A reasonable jury could find those omissions to be evidence of actual malice. JA1241-42; 1249-50; 1374.

Although the trial court's Order refers to the governmental reports, it discounts them on the grounds that Plaintiffs failed to provide sufficiently specific evidence about their relevance. JA2215. Evidence had been provided, and more could have been provided in response to questions at the court's hearing and certainly would be available to a jury. (See Section C-2-1 below.) In deciding the relevance of the reports, the court usurped the jury's role.

d. Direct Evidence of Actual Malice: APA Board Members' Direct Knowledge that Many of the Report's Allegations Were False.

When the APA Board published the Report, most of its members at that time had participated in the events at issue and had first-hand knowledge of them. JA1444-52. Some had also made statements or taken actions that contradicted the Report's descriptions of those events. For example, Dr. Kaslow, head of the Special Committee overseeing the investigation, commended the "thoroughness" of the Leso ethics investigation, noting that "as complete and careful a review of the available evidence was undertaken as possible." JA1247-48. Both the Board liaison

to the Ethics Committee and APA's Associate General Counsel signed off on closing the Leso complaint and briefed other Board members on it at length. JA1252.

Additional evidence relating to APA's knowledge was detailed in Exhibit B to Plaintiffs' First Opposition. JA1444-52. It provides supporting evidence of the involvement of all but one APA Board member in the events discussed in the Report, in the form of APA Rosters, Council Minutes, and historical business records. The trial court was directed to the exhibit at argument but the Order fails to refer to any of this evidence, summarily dismissing the claims against APA without analysis.

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

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

The record contains at least five types of circumstantial evidence supporting a finding of actual malice: (a) adherence to a preconceived narrative, (b) purposeful avoidance of the truth, (c) knowing reliance on unreliable and biased witnesses, (d) motive and bias, (e) failure to adhere to proper investigatory practices, and (f) refusal to retract or correct. This evidence was presented in Plaintiffs' Superior Court filings and is summarized briefly in Sections 3a-f below.

a. Adherence to a Preconceived Narrative.

"[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005) (quoting Rodney A. Smolla, *1 Law of Defamation* § 3.71 (2d ed.).)

Plaintiffs presented abundant evidence from which a jury could reasonably infer "by cumulation and by appropriate inferences" (*Airlie Found., Inc.*, 337 F. Supp. at 429) that Hoffman adhered to a preconceived narrative which assumed Plaintiffs' culpability and, as Section (b) below shows, purposefully avoided evidence that contradicted that narrative. JA1253-57.

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

- Hoffman's claim that Plaintiffs spent years colluding was adopted primarily from their long-time critics on whom he relied heavily, and who were determined to bring about their prosecution. (See section c below.)
- Affidavit testimony from *twenty-seven* witnesses interviewed by Hoffman's team provided credible and convincing evidence that Hoffman distorted,

omitted information from, or otherwise misrepresented their interviews.[5] *Twenty* witness testified that he appeared intent on proving a preconceived story and deliberately avoided any contrary information. JA1455-1767.[6]

b. Purposeful Avoidance of the Truth.

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

- When the Defendants interviewed Plaintiff Dunivin, they focused exclusively on an out-of-date interrogation policy which they later claimed allowed for abuses. Col. Dunivin told Defendants she needed DoD clearance to provide more information and, to get that clearance, she needed the questions the

[5] JA1456-57, ¶¶9,11; 1463 ¶¶4, 5, 7; 1464; ¶¶8, 9; 1465 ¶13; 1479, ¶¶13, 14; 1480-81, ¶¶16 -23; 1482, ¶25; 1483, ¶¶30-33; 1491-92, ¶4; 1492, ¶6; 1492-93, ¶7; 1503, ¶3;1507, ¶¶6,7; 1507, ¶7; 1507-8, ¶¶9-12; 1512, ¶¶ 8; 1512-13, ¶9;1515-16, ¶4; 1516, ¶5; 1519-20, ¶¶4-7;1525, ¶9; 1542, ¶10; 1543, ¶¶14, 15; 1543, ¶15; 1557-58, ¶4; 1558, ¶5; 1559, ¶8; 1560, ¶13; 1560-61, ¶14;1564, ¶7; 1656, ¶5; 1658, ¶¶12; 14; 1659, ¶18; 1662-63, ¶¶4-6; 1667, ¶¶4-7; 1669, ¶15; 1686, ¶5; 1688-91, ¶¶4-9; 1694, ¶¶7 8; 1698, ¶¶6, 7; 1710, ¶7; 1714-15, ¶¶5-9; 1716, ¶¶11 12; 1728, ¶¶ 5-7; 1731-32, ¶4; 1732, ¶¶6, 7; 1733, ¶11; 1737, ¶¶6-7; 1738, ¶14; 1742, ¶¶6, 8; 1743 ¶11; 1744, ¶¶13-14; 1751, ¶¶5, 6; 1758-59, ¶¶ 4-5.

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

Defendants wished to explore. They never provided those questions. JA1258; 1541, ¶7.

- During her interview, Jennifer Bryson told Defendants about the changes to interrogation policies that banned abusive techniques. The Defendants deliberately avoided that information, which contradicted their predetermined conclusions. JA1258-59; 1507, ¶6.

c. Knowing Reliance on Unreliable and Biased Witnesses.

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

First, Hoffman's story of Plaintiffs' culpability for a multi-year collusion was adopted primarily from long-time critics of military psychologists. They publicly acknowledged they wanted Hoffman to demonstrate that Plaintiffs' acts constituted an ongoing collusive venture that would defeat statute-of-limitations obstacles to criminal prosecution. JA1254. Nevertheless, he treated them as allies rather than as witnesses with an axe to grind. In contrast to his treatment of other interviewees, he promised Drs. Stephen Soldz and Nathaniel Raymond and other critics

confidentiality, set out to build their "trust," and relied on them heavily for documents and information. JA1260-61, fns 133, 134. He advised APA to give them advance access to the Report. JA60-62.

Moreover, beyond their commitment to proving Plaintiffs' and APA's culpability, Hoffman had other reasons for skepticism: Dr. Soldz had publicly claimed in an online interview that Plaintiff James had gotten his job partly because he was "black" even though "he doesn't show up for work" and "can't write an English sentence." JA1260-61. Nevertheless, Hoffman largely allied himself with their view of the events he was investigating, rather than subjecting their views to the same skepticism with which he uniformly approached Plaintiffs' statements.

Second, Sidley and Hoffman also relied heavily on notes of PENS meetings taken by one of its members, Jean Maria Arrigo, even though they had been cautioned by PENS Task Force observer Dr. Barry Anton (APA's 2015 President) that Dr. Arrigo and her notes were not reliable. JA1261-62; 1455, ¶11.

Third, the Hoffman Report also relied heavily on information from Dr. Trudy Bond, without disclosing that her complaints against Plaintiff James before the ethics boards of two states and Guam and the United Nations had been unsuccessful. Dr. Bond used the Report to renew calls for action against all Plaintiffs. JA1261-62, fn 139.

d. Motive to Defame Plaintiffs and Bias and Ill Will Against Them.

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

The Report's conclusions and their endorsement by the APA Board served the agendas of the Board, the critics who had sparked the investigation, and Hoffman himself. A jury is entitled to consider the accumulation of circumstantial evidence that Defendants had motives to defame Plaintiffs and, conversely, would have gained no benefit if the Report had not "convicted" them.

First, the Report suited the Board by scapegoating the current and former Plaintiffs while deflecting blame for Board members' own role in the events at issue—including the role of Dr. Kaslow, under whose leadership of the Special Committee the cost of the Hoffman investigation ballooned to over $4 million, five times the original estimate. JA280, 1222.

Second, although Hoffman conceded that he had found no evidence of criminal activity, the Report repeatedly uses loaded terms drawn from RICO litigation and war-crimes prosecutions—"collude" or "collusion," "joint venture" and "joint enterprise," and "deliberate avoidance"—to refer to Plaintiffs' purported conduct. JA1254, fn 107; 1264. As a former federal prosecutor, Hoffman knew the damaging connotations of this language. Yet, at a meeting with the APA Council,

Hoffman admitted that a term such as "behind-the-scenes communication"—normal in a large organization—would have been more accurate than "collusion." JA1650, ¶ 15, fn 1.

Third, Plaintiffs provided evidence that could lead a jury to conclude that, in his conduct of the investigation and writing of the Report, Hoffman took on the role of a prosecutor making a case against targets whose guilt was assumed. Much of this cumulative evidence is described elsewhere in this Section (II-A). Most strikingly, Plaintiffs presented evidence that, before the Hoffman Report was presented to APA, Hoffman took steps to ensure that it would be front-page news by leaking it to James Risen, the *New York Times* reporter whose allegations had sparked the investigation. JA1225. As Hoffman has said with respect to previous investigations, "I use the media to fan the flames." JA1717, ¶13.

This circumstantial evidence provides ample basis for a jury to conclude that the Report was fatally infected by a motive to defame, bias, or ill will.

e. Failure to Adhere to Proper Investigation Practices.

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

techniques," especially coupled with bias, can constitute evidence of "more than mere carelessness—rather as purposeful avoidance of the truth"). JA1265-66.

Here, the investigation departed egregiously from professional standards in the following ways, among others:

i. The investigation was overseen by a committee of the APA Board whose members had been intimately involved in the events the Report described and stood to benefit from a report that protected them by blaming Plaintiffs.[7] JA1444-52; 1265-66.

ii. Defendants failed to inform interviewees that they were potential targets—despite questions from interviewees about the investigation's scope—as is required by a D.C. ethics opinion. They also advised interviewees that they should *not* retain counsel. JA1465, ¶15; 1478, ¶ 9; 1540, ¶3; 1657, ¶8.

f. Defendants' Repeated Refusal to Retract or Correct Their Defamatory Statements Despite Additional Evidence of Their Falsity.

Evidence of the Defendants' steadfast refusal to correct or retract their defamatory statements is properly considered as bearing on the issue of actual

[7] *See* Holly J. Gregory (Sidley Austin LLP), *Board-Driven Internal Investigations*, Practical Law Journal (May 2016) ("The composition of the board committee should be independent of the company and the potential investigation targets and key witnesses…") JA1265, fn 153.

malice. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (citing *Herbert v. Lando*, supra, 441 U.S. at 164, explaining that republications, retractions, and refusals to retract are subsequent acts used to demonstrate a previous state of mind). The Order incorrectly asserts that this refusal is irrelevant because Defendants had no duty to correct false statements. JA2219.

The evidence that the Report's defamatory statements are false was summarized in the Statement of Facts above and at more length in the filings in Superior Court. Despite that evidence, Defendants have taken no effective steps to correct the Report. JA1267-69.

C. The Trial Court Impermissibly Usurped the Role of the Jury by Deciding Triable Issues of Fact and Making Inferences Against Plaintiffs.

1. The Trial Court Failed to Consider Evidence at the Core of Plaintiffs' Case.

The Order states that the "foundation" for Plaintiffs' contention that their evidence demonstrates Defendants' actual malice consists of 34 affidavits (and one memorandum in lieu of an affidavit) contained in an exhibit to Plaintiffs' Consolidated Opposition to Defendants' first Anti-SLAPP Motions. JA2214-15. That statement is, at best, incomplete. The evidentiary foundation includes the many affidavits and evidence listed in two other exhibits to Plaintiffs' Opposition that the Order ignores: Exhibits A (JA1301-62) and B (JA1444-52). Most notably, as described in Section II-B above, it includes, among much other evidence:

- Governmental documents showing that military interrogation policies at the time of the PENS Task Force meetings were specific in their prohibitions of abusive techniques. JA1302-1442.
- APA business records contradicting the Report's assertions that the review of ethics complaints against military psychologists was designed to protect them. JA1444-52.

2. The Trial Court Repeatedly Committed Reversible Error by Weighing the Parties' Evidence, Judging Credibility, and Failing to Give Plaintiffs the Benefit of Reasonable Inferences.

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

Specifically:

1. With respect to government reports in Defendants' possession that contradicted the Report's conclusions, the court stated Plaintiffs failed to explain whether the reports relied on the same information and focused on the same issues as the Hoffman Report. JA1241-45; 1250-51; 2215. (In fact, some explanation had already been provided (see, e.g., JA 1241-42; 1250-51), and more could have been

provided if the court had asked Plaintiffs' counsel during its hearing.) But whether the governmental reports considered evidence similar to the Hoffman Report's scope is a question of fact for a jury. "[T]he weight to be given to the various investigations and reports . . . is a question for the jury." *Mann*, 150 A.3d at 1253-54. Moreover, a reasonable jury could consider the Report's failure even to acknowledge the governmental reports' conclusions relevant to a finding of actual malice.

2. Although the Order acknowledges that "the Plaintiffs proffer declarations from multiple witnesses contending that information they provided was not included in the Report or disagreeing with how their declarations were portrayed," it characterizes that evidence as showing only the omission of "a comment here or an opinion there." JA2215-16. This entirely misses the point. The declarations demonstrate a *pattern* of omissions and mischaracterizations, and that pattern is not random. Like the pattern of documents in Sidley and Hoffman's possession but omitted from the Report, it always favors the Report's narrative of a collusive enterprise, never the Plaintiffs'. A jury could reasonably conclude that evidence of such a pattern supports a finding of actual malice.

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

> Again, this argument is rooted in declarations within attached affidavits that echo each other in tenor and vocabulary . . . (record citations

> omitted) . . . Aside from these statements perhaps representing opinion testimony, it is not possible to tell from this record where along the investigative process involving some 150 witnesses these specific interviews took place, and what information investigators had received prior to the interview leading them to focus their inquiry.

JA2216-17.

The Order's analysis fails on several grounds. First, the court impermissibly judges the credibility of the witnesses' affidavits, as *Mann* explicitly warns against. Second, the affidavit evidence is not simply that at some point Defendants began to "focus their inquiry," but that they focused on proving Plaintiffs' culpability to the exclusion of all else. Third, the court offers no authority suggesting why these witnesses' testimony, reporting their impressions of interviews they participated in and giving the reasons for those impressions, is not admissible lay testimony regarding their experience of the interviews.

4. When the court turns to Plaintiffs' evidence that the Defendants relied heavily on biased and unreliable witnesses, including Drs. Stephen Soldz, Nathaniel Raymond, Jean Maria Arrigo, and Trudy Bond, it states: "However, those four individuals were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that those witnesses were biased does not suffice to establish malice." JA2218. Again, this misses the point. What matters is the extent of Hoffman's reliance on these sources despite the evidence of their unreliability. JA1260-62. To merely observe that Defendants talked to many other

people is no response at all. Plaintiffs' argument is qualitative, requiring the jury to assess the nature of Defendants' reliance on these clearly biased witnesses.

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

The first conclusion is simply wrong. In their briefing, Plaintiffs demonstrated a host of specific instances in which their counsel had demonstrated the falsity of specific allegations and Defendants failed to correct or retract. Each instance included specific references to the allegations disproven and the materials disproving them. The "necessary connection" was made repeatedly. JA1302-1442; 1241-45; 1250-51. Moreover, at the heart of this defamation is not only the multitude of specific defamatory statements, but their use to construct an overarching false narrative about "collusion."

The second conclusion, that Defendants have no duty to retract or correct, is flatly wrong too. As noted above, steadfast refusal to retract is admissible evidence of actual malice. *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985). *See*

also Restatement (Second) of Torts § 580A (1977) cmt. d (1977) ("Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard."); *Weaver*, 926 A.2d at 906 (citing *Herbert v. Lando*, 164 n. 12, (1979) and explaining that republications, retractions, and refusals to retract are subsequent acts used to demonstrate a previous state of mind).

6. The trial court neglected to undertake the required analysis of Plaintiffs' evidence for negligence, which is admissible in combination with other factors to demonstrate actual malice. *Airlie Found., Inc.* 337 F. Supp. at 429. At the February 21, 2020, hearing, Plaintiffs' counsel listed the factors which could be used in demonstrating negligence, citing a D.C. District Court case regarding an internal-investigation report and a well-known legal treatise precisely on point. *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987) *rev'd on other grounds*, 828 F.2d 826 (D.C. Cir. 1987). JA1265, fn 151; 2116-17. But the trial court ignored Plaintiffs' evidence and citations. Instead, it referred to negligence only in a footnote and, mistakenly, as relevant only if Plaintiffs were private figures, concluding that "Plaintiffs have failed to proffer evidence in this record that in publishing the Report the Defendants 'fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others. *Kendrick [v. Fox Television*, 659 A.2d 814 (D.C. 1995)] at 822.'" JA2220, fn 10. (*Kendrick*, a

case relied on by Defendants (JA1844, fn 10), dealt with the ordinary standards of care applicable to media journalists, not the standard of care applicable to a report of an internal investigation.) In fact, Plaintiffs proffered substantial evidence, and their Complaint alleged many facts, that a jury could reasonably find to demonstrate a failure to observe "an ordinary degree of care."

7. Finally, the trial court cited a few emails exchanged among Col. Banks, Col. James, former Plaintiff Dr. Behnke, and others that were headed "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." The trial court suggested that the emails' headings were "curious[ ]," and that "it is safe to assume that investigators reviewed and considered the emails in reaching their conclusions." JA2220. The court thus implicitly adopts the Defendants' inferences of a collusive intent behind those emails.

But the headings were not "curious." Plaintiffs explained in their briefing that the headings were the result of Col. Banks' status as an active military officer, which prohibited him from speaking publicly about governmental or military topics. JA1255-57. Three of the emails were copied to other people, including one to APA General Counsel Nathalie Gilfoyle. And, in fact, *nothing was deleted*. JA1569, ¶18. The trial court mentions none of these facts presented by Plaintiffs. By ignoring that proffered evidence and construing the evidence in the light *least* favorable to Plaintiffs, the trial court in effect took on the role of Defendants' advocate.

III. The Trial Court Erred in Finding the Defendants Established as a Matter of Law that They Did Not Republish the Hoffman Report.

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

As the trial court's Order acknowledges, JA2203, a statement on a website constitutes a republication if it "is directed to a new audience" *or* "is substantively altered or added to . . . ." *Eramo*, 209 F. Supp. 3d 862.

On August 21, 2018, almost three years after the initial publication of the revised Hoffman Report, APA's General Counsel sent an email to members of the APA Council, its governing body, and other APA members that was devoted solely to accessing the Revised Report and related documents on the APA website. As Plaintiffs' affidavit evidence demonstrates, the August 21, 2018, email reached Council members and others who would not have received the communications that accompanied the initial publishing of the Report. JA1814-25.

As to the alternative prong of the *Eramo* analysis, courts have uniformly held that "where substantive material is added to a website, and that material is related to

defamatory material that is already posted, a republication has occurred." This principle holds even when there is no change to the location of the original material. *Davis v. Mitan* (*In re Davis*), 347 B.R. 607, 612 (W.D. Ky. 2006) (holding addition of "update" section below original article constituted republication of article); *Larue v. Brown*, 333 P.3d 767, 773 (Ariz. Ct. App. 2014) (holding addition of "updates" to articles constitutes republication of original articles).

As Defendants conceded below, only where modifications to a website are "mere technical changes . . . such as changing the way an item of information is accessed," or are otherwise "unrelated" to the defamatory content, can there be no republication. *Davis*, 347 B.R. at 612. JA978, 1044.

For a republication to have occurred, the additional substantive material need not continue or expand upon the original defamation. In *Eramo,* an online magazine published a defamatory article about a college dean's treatment of an alleged rape on campus. An investigation demonstrated that the accuser's story could not be corroborated. A year after the article was first published, the magazine issued a statement, appended to the online article and on a separate URL, which acknowledged discrepancies in the accuser's accounts. The magazine argued that it could not be held liable for a republication since the statement was a *retraction* of the original defamatory statements. The court rejected this argument, holding that "a

reasonable jury could determine that the subsequent Editor's Note 'effectively retracted'" only a portion of the original article. *Eramo*, 209 F. Supp. 3d at 880.

Here, the new documents that accompanied the Revised Report were not a retraction of any part of the Report; they were only documents from APA members criticizing the Report. JA313-15, ¶¶295-305; 1799. A jury could reasonably find that affirmatively directing readers to the Report in the face of those documents without retracting *any* part of it constituted a republication.

In concluding that there was no republication, the trial court failed to acknowledge any of the case law holding that adding related statements to a defamatory statement constitutes republication. In finding that "there is no evidence that Defendant APA intended to, or actually did, reach a new audience," the court disregarded the testimony of the Newman and Harvey Affidavits that stated that the Report did reach a new audience. JA1791-1803; 1814-1825. And, in emphasizing that the Revised Report and the new related documents were each accessed through a link from the same webpage, rather than actually appearing on the same webpage, the trial court failed to recognize the difference between print and internet media. As courts in the District of Columbia and elsewhere have repeatedly held, when a person posts a hyperlink to a document on a webpage, he incorporates the document into that webpage and publishes it on that webpage for purposes of defamation law. *See, e.g.*, *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 262 (D.D.C. 2013). Moreover,

the email providing instructions for accessing the Report explicitly referred to links from the same webpage to both the Report and the related documents. JA2213.

In these instances, the trial court again impermissibly weighed and assessed evidence, in addition to ignoring Plaintiffs' affidavit evidence. This usurping of the jury's role in regard to this issue is especially problematic because the "'question of whether Internet republication has occurred is highly factual . . . .'" *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 19210, at *31 (D. Utah Feb. 17, 2016) (citation omitted; emphasis in original).

IV. The Anti-SLAPP Act Is Void: It Creates Procedures Governing the D.C. Superior Court that Violate the Congressional Mandate that the D.C. Court of Appeals Approve Any Rules Modifying the Federal Rules of Civil Procedure.

Under U.S. Const. art. I, § 8, Congress has the exclusive power legislate for the District of Columbia. Under the 1973 Home Rule Act, while Congress delegated to the D.C. government certain powers to legislate local concerns, Congress retained ultimate legislative authority and kept control of the District of Columbia courts. The D.C. Council has "no authority" to "[e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." D.C. Code § 1-206.02(a)(4).

Title 11 provides that the D.C. Superior Court:

> . . . shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it prescribes or adopts rules which modify those Rules. 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.

Id. § 11-946.

Consequently, the Anti-SLAPP Act is invalid if (1) it is an act "with respect to any provision of Title 11," or (2) if it "modif[ies]" the Rules of the Superior Court, which are drawn directly from the FRCP, in ways that have not been approved by the D.C. Court of Appeals.

The Anti-SLAPP Act is invalid under both tests.

1. The Act is one "with respect to any provision of Title 11." Title 11 addresses "a wide range of topics, including . . . the procedural rules used by the Superior Court and the [Court of Appeals]." *Woodroof v. Cunningham*, 147 A.3d 777, 783 (D.C. 2016). The Act intrudes on Title 11 by erecting an entirely separate procedural mechanism for certain defendants that blocks most if not all discovery, permits a quick dismissal unavailable under the FRCP, and potentially shifts the burden of defendants' attorneys' fees to plaintiffs.

Below, Defendants argued incorrectly that the language "*any* provision of Title 11" in D.C. Code § 1-206.02(a)(4) is limited by a parenthetical that repeats Title 11's overall title—"any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." But the law is unanimously to the contrary. *E.g.*, *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011)

(parentheticals aid a section's identification rather than limiting its application); *United States v. Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999) (same).

2. The Act intrudes more specifically on D.C. Code § 11-946 Title 11 by imposing rules on the Superior Court that modify the Federal Rules but have not been approved by the D.C. Court of Appeals. *Compare* D.C. Code § 16-5502 (Anti-SLAPP Act "special motion to dismiss") to Super. Ct. Civ. R. 56 (burden on moving party, no provision that filing of motion halts most discovery or that non-movant must pay the costs of discovery necessary to oppose the motion, and no prima facie entitlement to attorneys' fees). The Senate report on what became Section 11-946 of the Code clearly expresses Congress' intent that such modifications must be approved by the D.C. Court of Appeals before they take effect:

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

S. Rep. No. 405, 91st Cong., 1st Sess. 21, 24 (1969), quoted in *Varela v. Hi-Lo Powered Stirrups*, 424 A.2d 61, 64 (D.C. 1980) (emphasis added by *Varela*).[8]

[8] Even the legislative history of the D.C. Anti-SLAPP Act itself supports the conclusion that the Act is, at least in part, procedural and therefore contrary to D.C. Code § 11-946. The Council Committee Report on the Act describes it as adding provisions to the Code "to provide an expeditious process" for litigating SLAPPs. D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010). The preamble to the Act states that its purpose is "to provide a special motion for quick and efficient dismissal" and "to provide a motion to quash"—procedural mechanisms. 58 D.C. Reg. 741 (Jan. 28, 2011).

No court has disputed that the Anti-SLAPP Act creates procedures that govern the work of the Superior Courts and that modify the procedures established by the Federal rules. As this court noted in *Mann*, the Act creates a "burden-shifting procedure" that applies to special motions to dismiss. *Mann*, 150 A.3d at 1232. The court recognized that, collectively, the procedures set forth in the Act "significantly advantage the defendant" in comparison to "the procedures usually available in civil litigation." *Id.* at 1237. Earlier, the court recognized that the Anti-SLAPP Act is "a *procedural mechanism* that allows a named defendant to quickly and equitably end a meritless suit." *Doe No. 1*, 91 A.3d at 1036 (emphasis added).

The U.S. Court of Appeals for the D.C. Circuit has agreed. In an opinion by then-Judge Brett Kavanaugh, the court quoted the language from *Doe* calling the Act a "procedural mechanism." *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1335 (D.C. Cir. 2015). The D.C. District Court has repeatedly agreed since *Mann*. *See, e.g.*, *Libre by Nexus v. BuzzFeed, Inc.*, 311 F. Supp. 3d 149, 160 (D.D.C. 2018); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 94-95 (D.D.C. 2018).

Courts in nearly every Circuit have agreed that anti-SLAPP acts set up procedural mechanisms.[9]

[9]*E.g.*, *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020); *Gilead Scis., Inc. v. Abbott Lab'ys, Inc.*, No. 13-2034-GMS, 2015 WL 1191129, at *6 (D. Del. Mar. 13, 2015); *ABLV Bank, AS v. Ctr. For Advanced Def. Stud. 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

In holding that the Anti-SLAPP Act was not contrary to the Home Rule Act, the trial court relied primarily on two reasons, both mistaken.

First, the court wrote that a Home Rule Act challenge requires that the movant "demonstrate an actual conflict between the law and the terms of Title 11 . . . ." JA2048; Order at 6, citing *Hessey v. Burden*, 584 A.2d 1, 7 (D.C. 1990).

The "actual conflict" test is contrary to the plain language of D.C. Code § 1-206.02(a)(4), which bars any act "with respect to *any* provision of" the wide-ranging Title 11, and D.C. Code § 11-946, which bars "modif[ying]" the Superior Court rules without this court's approval. To run afoul of these prohibitions, the Act need not relate solely to the courts' jurisdiction or organization, as explained above, and need not conflict with, rather than modifying, Title 11's terms.[10]

(5th Cir. 2019); *Lampo Grp., L.L.C. v. Paffrath*, NO. 3:18-cv-01402, 2019 WL 3305143, at *3 (M.D. Tenn. July 23, 2019); *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 732 (7th Cir. 2015); *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 542 (D.Minn. 2015); *Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018); *Los Lobos Renewable Power, L.L.C. v. AmeriCulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1355 (11th Cir. 2018).

[10] In fact, however, the Act does so conflict, because it requires a court to consider the legal sufficiency of the evidence presented before discovery. As the U.S. Court of Appeals for the D.C. Circuit has held: "unlike the D.C. Anti–SLAPP Act, the Federal Rules do not require a Plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal. Under *Shady Grove [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)], therefore, we may not apply the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Abbas*, 783 F.3d at 1334. *See also Fairbanks v. Roller*, 314 F. Supp. 3d 85, 94 (D.D.C. 2018) ("But like a mirror, the anti-SLAPP statute reverses the image that it reflects: . . . the statute

Nor is *Hessey v. Burden* to the contrary. The language quoted by the trial court appears nowhere in *Hessey*. It is a characterization of *Hessey* from *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723-24 n.15 (D.C. 1995). *Hessey* addresses a statute relating to who may appeal from a tax assessment. *Hessey*, 584 A.2d at 7. *Umana* relates to the appealability of an arbitration order which failed to dispose of all parties or claims (and concluded that the order would violate the Home Rule Act). *Umana*, 669 A.2d at 723-24. Neither suggests that *only* acts which directly change the courts' jurisdiction run afoul of D.C. Code § 1-206(a)(4).

Nor does *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841 (D.C. 2019), also cited by the trial court, support the court's holding. *Price* involved an amendment to the contested-case requirement of the D.C. Administrative Procedure Act. The *Price* court pointed out that there was no provision in Title 11 relating to the contested case requirement—the relevant provision was found in Title 2. Therefore, the D.C. Council had not attempted to amend Title 11, which it was precluded from doing. *Id.* at 845. Besides, the court noted, the Home Rule Act itself provided that this Court could review decisions of agencies "to the extent provided by law"—that extent being exactly what the challenged statute, the Administrative Procedure Act, addressed. *Id.*

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differs from Rule 56 by requiring the plaintiff to show a likelihood of success on the merits instead of placing the burden on the defendant.")

Second, the trial court points to a statement in the legislative history of the Anti-SLAPP Act commenting that the Act created "substantive rights." JA2199. The court asserted that this court "approved this position" in *Mann*. *Id.*

This argument fails for two reasons.

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

Second, neither the trial court nor the Defendants have persuasively explained what the "substantive right" supposedly *is*. The Defendants suggest that it is the right to free oneself of meritless litigation if a defendant asserts that it is advocating on issues of public interest. JA1163-64. But all defendants have that right to avoid meritless suits in *all* cases. It is what Rule 12 motions to dismiss and Rule 56 motions for summary judgment are for.

Nor did *Mann* "approve" the notion that the Act created substantive rights. The passage cited by the trial court merely notes in passing that *the Council* claimed that the Act created "substantive rights"—the court did not endorse that idea. *Mann* involved the issues of whether interlocutory orders under the Anti-SLAPP Act were

immediately appealable and the standard for applying the Act's "likely to succeed" merits standard. The court was never asked to determine whether the Act was entirely substantive or procedural, nor whether it violated the Home Rule Act.

In addition to its two primary reasons, the trial court also found that the Act did not modify the Superior Court Rules in violation of D.C. Code § 11-946, citing this court's comment in *Mann* that the Act was not "redundant relative to the rules of civil procedure." JA2250; Order at 8, *citing Mann*, 150 A. 3d at 1238. This misread *Mann*. The passage it cites simply states that the usual procedural mechanisms for disposing of meritless litigation—Rules 12 and 56—are *also* available to a SLAPP defendant, even after filing a special motion to dismiss.

Finally, the trial court comments that the Anti-SLAPP Act must trump any inconsistent Superior Court rule anyway. JA2200. The court is mistaken. The Anti-SLAPP Act doesn't fall because it is inconsistent with Rules 12 and 56 (although it is); it falls because it is an Act which "relates to" Title 11 (D.C. Code § 1-206.02(a)(4)) and because it creates a separate procedural mechanism that modifies the Superior Court Rules (*id.* § 11-946) without having been approved by this Court.

The Anti-SLAPP Act violates the Home Rule Act. It is void. The Act must be struck down and the trial court's judgment and order reversed.

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

In *Mann,* this Court defined a SLAPP as "an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann*, 150 A. 3d at 1226 (quoting from Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010)). But the D.C Anti-SLAPP Act does not require a showing that a suit intends to punish or prevent expression before it imposes its onerous procedural burdens—a showing that courts in many states have held to be necessary if an anti-SLAPP statute is to pass constitutional muster.[11] Thus, these burdens fall on plaintiffs who have solid grounds for suing to redress harm to their reputations and livelihoods, not only on those whose goal "'is not to win the lawsuit but to punish the opponent and intimidate them into silence.'" *Id.* This failure to limit the Act's scope to actual SLAPPs renders it unconstitutional, both facially and as applied, because it impermissibly burdens citizens' First Amendment right to effective access to the courts to seek redress for real harms.

The First Amendment protects, among other rights, the right to petition the government for redress of grievances. The right of petition includes the right of

[11] Including in Illinois, where Hoffman is licensed to practice law. *See, e.g.*, *Sandholm v. Kuecker*, 356 Ill. Dec. 733, 745 (Ill. 2012) ("In deciding whether a lawsuit should be dismissed pursuant to the Act, a court must first determine whether the suit is the type of suit the Act was intended to address.")

meaningful access to the courts. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government. (citations omitted)'"); *Stuart v. Walker*, 143 A.3d 761, 767 (D.C. 2016). American and English common law have recognized the centrality of that right for centuries.

Any significant impairment of First Amendment rights must survive "exacting scrutiny." *Elrod*, 427 U.S. at 362. This scrutiny is required even if any deterrent effect arises not from direct government action, but "indirectly as an unintended but inevitable result of the government's conduct." *Id.* And the scrutiny is critical when the impairment blocks a defamation-plaintiff's only means of redress:

> 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, 383 U.S. at 92-93 (Stewart, J., concurring)

A. The Anti-SLAPP Act Is Facially Unconstitutional.

The trial court found that to show that the Anti-SLAPP Act is facially unconstitutional, Plaintiffs were required to show that "'the law is unconstitutional

in all its applications,'" JA2051, quoting *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009). In the First Amendment context, however, the courts recognize a second type of facial challenge where a statute is overbroad if "'a substantial number' of its applications are unconstitutional, '"judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citations omitted); *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 28 (D.D.C. 2018). The Act's application to well-founded suits to redress real harm, often filed by individuals with limited resources against well-funded defendants, constitutes just such overbreadth. In the 28 cases Appellants have located in which the D.C. Act has been invoked, the Act has not been used to protect individual citizens or community organizations advocating against deep-pocketed opponents about issues of public interest, the circumstance it was intended to address. Instead, the Act has been deployed by mostly large institutional defendants in contract, employment, fraud, negligence, conspiracy, and defamation suits.

The trial court brushed aside "exacting scrutiny," citing *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015) for the proposition that the right to petition involves nothing more than the right to file a lawsuit. The case does not support that proposition. In *Roberts*, the court rejected the notion that attorney licensure laws invaded the right of petition because they implicitly assumed that unlicensed attorneys would file nothing but

sham petitions. Nothing in *Roberts* suggests that the right to petition involves *only* the right to file a lawsuit.

Nor could it have suggested such a thing. The right of access to the courts is necessarily a right of *meaningful* access. *See Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 58 (1993) (explaining that the sham exception to the *Noerr-Pennington* doctrine is driven by the need to protect the right of "meaningful access" to adjudicatory tribunals). To hold that the right of access is fully satisfied by merely allowing a disfavored plaintiff to file a complaint is to entirely obliterate the doctrinal distinction between substantially *burdening* a fundamental constitutional right and totally abrogating it.

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

First, as this suit demonstrates, it does not guard only against suits designed to "punish or prevent the expression of opposing points of view." *Mann*, 150 A. 3d at 1226. This court has held that defendants need not prove plaintiffs' improper motivation to invoke the Act. *Doe v. Burke*, 133 A.3d 569, 574-76 (D.C. 2016). It is the lack of this element that renders the Act a blunt—and facially unconstitutional—instrument for wealthy defendants to use against plaintiffs they have injured.

To avoid an imbalance of constitutional protections, other states have adopted anti-SLAPP procedures that more effectively "recognize and protect both the defendant's actions that might constitute an exercise of his First Amendment right to petition . . . and the plaintiff's . . . right of access to the courts to seek redress . . . ." *Gaudette v. Davis*, 160 A.3d 1190, 1195 (Me. 2017). These more constitutionally viable approaches are analogous to the approach adopted by the U.S. Supreme Court in a string of cases developing the *Noerr-Pennington* doctrine for determining whether a suit is a sham. *E.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). While that approach arose in the context of antitrust litigation, it has been applied broadly to petitioning activity before the courts. *See, e.g.*, *CSMN Invs. v. Cordillera Metro. Dist.*, 956 F.3d 1276 (10th Cir. 2020).

To test whether petitioning activity is a mere sham, *Noerr-Pennington* employs both objective and subjective prongs. As the Supreme Court later explained, if a claim is to be deemed a sham it must first be shown that it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Invs., Inc.*, 508 U.S. at 60. Even if a court finds a claim to be objectively baseless, it must still examine a plaintiff's subjective motivation: Is the claim "an attempt to interfere *directly* with the business relationships of a competitor . . . ." *Prof'l Real Estate Invs., Inc.*, 508 U.S. at 60-61,

citing *Noerr* at 144 (emphasis in original).

By establishing mechanisms analogous to the *Noerr-Pennington* approach, other states protect a plaintiff's right to petition for non-SLAPP claims (as well as the defendant's speech rights) by ensuring that anti-SLAPP laws are applied only to SLAPPs.[12] In contrast, the D.C. Act's procedures are not reasonably designed to serve the Act's goal of protecting against SLAPPs. Instead, they swing a sledgehammer against legitimate as well as sham suits.

In rejecting Plaintiffs' facial challenge to the Act on the grounds that it provides for dismissal only of meritless suits, JA2052-53, the trial court engaged in circular reasoning. It assumed the Act burdens only "classic" SLAPPs, but never explained why that assumption—central to the Act's constitutionality—is so.

Second, the Act also fails the "least burdensome" test because, as drafted and interpreted by the courts, it does not limit its scope solely to acts "in furtherance of the right of advocacy on issues of public interest . . . ." D.C. Code § 16-5502(a). In this case, the trial court ruled that Defendants' prima facie burden could be met by a document explicitly intended to report an investigation into facts, not to advocate, as long as the facts were of public interest. JA2205. That is a very low bar.

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[12] *Blanchard v. Steward Carney Hosp.*,483 Mass. 200, 203-05 (Mass. 2019); *Sandholm*, 962 N.E.2d at 431 (Ill. 2012); *see also Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940-41, 943 (1998); *Gaudette*, 160 A.3d at 1195 (Me. 2017); *Jang v. Trs. of St. Johnsbury Acad.*, 331 F. Supp. 3d 312, 335 (D. Vt. 2018)

Third, if defendants meet their prima facie burden under the Act, then, whether plaintiffs' suits are SLAPPs or not, they face "requirements and burdens . . . that significantly advantage the defendant." *Mann* 150 A. 3d at 1237. If plaintiffs are granted discovery at all, they will be limited to only "targeted" and non-burdensome discovery. They may have to reimburse defendants' costs of responding to such discovery and, ultimately, if that barrier makes it impossible for them to assemble sufficient evidence to persuade the trial court, they may be saddled with the defendants' attorneys' fees. That result is potentially ruinous for plaintiffs who, as in this case, are private individuals with limited resources facing large, expensive law firms representing large organizations. Litigation is inherently uncertain. It defies common sense to suggest that risking potentially overwhelming costs will not discourage even legitimate claimants from seeking redress for serious wrongs.

The Anti-SLAPP Act is unconstitutional on its face, violating the First Amendment right of meaningful access to the courts even for plaintiffs with legitimate claims—and, in fact, potentially dissuading plaintiffs with limited resources from accessing the courts at all. (Plaintiffs Motion to Declare the Anti-SLAPP Act Unconstitutional (January 9, 2019) and Reply, December 13, 2019)

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

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

First, all three Plaintiffs filed affidavits below testifying that they filed suit to obtain compensation for the grievous injuries inflicted upon them by Defendants, not a desire to "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). There is no contrary evidence in the record, nor could there be. Any suggestion that Plaintiffs could intimidate the wealthy institutions they have sued would be preposterous. Defendant Sidley Austin is one of the largest law firms in the world. In 2018, it had estimated income of $2.33 billion.[13] The APA boasts over 121,000 members and an income of $45 million.[14] It is Plaintiffs, not Defendants, who have been substantially burdened by the Act's operation: Their legal costs have been greatly increased and their case delayed by years—all in the face of uncontradicted evidence that this is not a SLAPP.

Second, by severely limiting discovery in a case where evidence in Defendants' possession was critical to address issues of malice, the Anti-SLAPP Act

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[13] Profile, Sidley Austin LLP, law.com retrieved January 22, 2021, *available at* https://www.law.com/law-firm-profile/?id=274&name=Sidley

[14] American Psychological Association, Form 990, 2018, retrieved January 22, 2021, *available at*: https://www.apa.org/pubs/info/reports/2018-form-990.pdf

prevented Plaintiffs from presenting all evidence before the trial court, which then improperly weighed the limited evidence it considered to dismiss their suit.

Although Plaintiffs demonstrated above that the trial court erred in ever reaching the question of actual malice, for a defamation plaintiff to show that the challenged statements were published with malice, he or she must demonstrate that the statements were (1) published notwithstanding the defendants' subjective knowledge that they were false, or (2) published with reckless disregard for whether or not the statement was false. *Mann*, 150 A. 3d at 1252. Both halves of the actual malice test—subjective knowledge and reckless disregard—essentially come down to the same questions: "What did [the defendant] know and when did they know it?" and "What did they avoid learning because it would contradict their views?"

Because this inquiry revolves around defendants' state of mind, it is highly discovery-intensive, and plaintiffs have the right to rely on a broad range of circumstantial evidence. *Harte-Hanks Commc'ns*, 491 U.S. at 668. Defamation plaintiffs inevitably need substantial discovery from third parties about what defendants should have known, as well as from defendants themselves about they knew and what documents they had when they published the challenged statements.

In this case, Plaintiffs filed two Rule 56(d) declarations detailing how the narrow discovery they requested would defeat Defendants' motions. JA754-80; 838-52. Plaintiffs were granted four interrogatory answers and a physical copy of a

computer hard drive. Of the 148 witness-interview notes they requested, they were granted only 18 (excluding their own interview statements). Those 18 were less useful than the other notes would have been because the 18 witnesses had already provided affidavits. In addition, after first granting the only three depositions Plaintiffs requested, the court then denied them *sua sponte*. JA1132-39.

D.C. case law provides for only one standard for anti-SLAPP motions: a rule 56 standard with a reverse burden on the non-moving party. Apparently relying on the 12(b)(6) standard erroneously advanced by Defendants' counsel, the trial court stated that affidavits Plaintiffs wished to access through discovery were unnecessary because they would be cumulative of the Complaint. JA864-65; 883; 899.

The Act's application to this case denied Plaintiffs meaningful access to discovery important to their case, discovery to which the FRCP and the Rules of the Superior Court entitled them. As the Ninth Circuit has held, requiring a presentation of evidence without accompanying discovery improperly transforms an anti-SLAPP motion into a motion for summary judgment, without providing any of the procedural safeguards that have been firmly established by the FRCP. *Planned Parenthood Fed'n of Am.*, 890 F.3d at 833-34. That result effectively allows a state anti-SLAPP rule to usurp Fed. Rul. Civ. Pr. 26 and 56. Plaintiffs' entitlement to discovery under D.C. Sup. Ct. Rul. Civ. Pr. 26 is especially strong when, as here, a defendant's state of mind is relevant to the issue of actual malice. *Palin*, 940 F.3d at

812 (“courts are not free to bypass rules of procedure that are carefully calibrated to ensure fair process to both sides.”).

The Anti-SLAPP Act as applied to this case is unconstitutional: It imposes impermissible obstacles to seeking redress for real grievances and has impermissibly restricted Plaintiffs’ ability to present their evidence fully before the trial judge weighed and assessed the limited evidence he permitted.

CONCLUSION

Appellants respectfully request that the decision of the trial court be reversed, and the D.C. Anti-SLAPP Act be declared void and unconstitutional.

Respectfully submitted this 25th day of January 2021,

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