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)

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

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(A)(2) CERTIFICATE

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I. INTRODUCTION

This lawsuit is not a SLAPP, as Sidley asks the Court to assume. Sidley Br. at 2. It is the opposite. After the Hoffman Report destroyed Plaintiffs' reputations, they had no effective means of redress except through the courts. Defendants are large organizations with access to media that provided a megaphone for their defamations; Plaintiffs are retired military psychologists with limited resources and no effective access to the media. Despite voluminous documentary and testimonial evidence that the Report's defamatory conclusions are false—including testimony from many with first-hand knowledge of the events at issue—Defendants have refused to correct the Report, and it remains on the APA website. Unless Plaintiffs can redress their reputations through the courts, the defamations will live on in perpetuity.

Nothing about this suit makes it a lawsuit "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016). Sidley asserts that the case "exemplifies the need for" the Anti-SLAPP Act's protections (Sidley Br. at 2), but it instead exemplifies the Act's abuse. It has failed to function "as a tool calibrated to take due account of the constitutional interests" of both plaintiffs and defendants. *Mann,* 150 A.3d at 1239.

Defendants side-step the core of Plaintiffs' positions and the supporting case law. Instead, they construct arguments that would make the Anti-SLAPP Act's strict

limits on discovery an insuperable obstacle for defamation plaintiffs who are deemed public officials (as the Superior Court incorrectly held Plaintiffs to be). A showing of actual malice, which requires evidence as to the defamers' state of mind, is an especially discovery-intensive exercise that must often rely on a "cumulation of circumstantial evidence." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987).

Here, despite very limited discovery and no depositions, Plaintiffs have provided more than enough evidence that, if reviewed by the standards established by *Mann*, enables the Court to conclude that a jury could find actual malice. Defendants repeatedly raise points that "can fairly be characterized as arguments that could be made to a jury," *Mann*, 150 A.3d at 1258, and complain that Plaintiffs' evidence is not of the kind that could emerge only after full discovery.

II. DEFENDANTS FAIL TO MEET THEIR BURDEN FOR ESTABLISHING A PUBLIC-OFFICIAL DEFENSE.

In claiming Plaintiffs are public officials, Defendants raise an affirmative defense for which they bear the burden of proof, which they have not contested. Opening Br. at 16-17. They have failed to meet this burden. Rather than providing any evidence that Plaintiffs had the "substantial responsibility for or control over the conduct of governmental affairs" that would render them public officials, *Rosenblatt v. Baer*, 383 U.S. 75, 76 (1966), Defendants rely solely on *their interpretations* of Plaintiffs' military ranks and titles and of some language in Plaintiffs' Complaint. Sidley Br. at 18. In Superior Court, Plaintiffs proffered five affidavits contesting

Defendants' interpretations and demonstrating that their roles did not render them public officials. *Defendants provided no evidence to counter those affidavits or support their interpretations.*

If the balance is to be struck between society's "pervasive and strong interest in preventing and redressing attacks upon reputation" and its "interests in public discussion," *Rosenblatt*, 383 U.S. at 86, *Rosenblatt's* "substantial responsibility or control" test requires analyzing the actual nature of a person's responsibilities. Neither the Superior Court nor Defendants undertook that inquiry. Indeed, their conclusions are contradicted by the cases they cite, in which plaintiffs held to be public officials differed in critical ways from Plaintiffs in this case. Section II-B.

A. Defendants Fail to Address Plaintiffs' Evidence and the Relevant Legal Standards.

The Sidley Brief simply repeats Defendants' arguments before the Superior Court, rather than confronting Plaintiffs' three central points:

First, they did not have the ability to set or influence policy in ways that gave them "substantial responsibility for or control over the conduct of governmental affairs." Their superiors determined interrogation policies and they then implemented those policies. Defendants fail to acknowledge this key distinction.

Their limited responsibility is demonstrated not only by their own affidavits, but also by two affidavits from former military officers with first-hand knowledge of the roles of military psychologists. JA1463 ¶5, JA1540-1 ¶4, JA1656 ¶5, JA1755

¶10, JA1649 ¶4. In the face of the uncontroverted affidavit evidence, it is not enough simply to assert without evidence that Plaintiffs had the necessary substantial responsibility or control (Sidley Br. at 17-18, citing Superior Court March 11, 2020, Amended Order ("Order"), JA2210), or that military officers with Plaintiffs' former ranks or functional titles "readily meet" the *Rosenblatt* test (Sidley Br. at 17-18).

Second, Defendants' reliance on language in the Complaint—for example, that Plaintiffs were responsible for "drafting policies and instituting procedures to prevent abusive interrogations" (Sidley Br. at 18-19)—suffers from the same defect as their reliance on military titles. It makes unsupported assumptions about the content and function of those "policies," without regard to their actual content and function: to implement policies established by their superiors.

Third, in addition to failing to meet *Rosenblatt's* "substantial responsibility or control" standard, Plaintiffs also lack other characteristics courts have established to ensure the public-official defense is not unjustifiably expanded to rob individuals of their right to defend themselves against attacks on their reputation. These additional factors were outlined in *Kassel v. Gannett Co.*, 875 F.2d 935, 935-40 (1st Cir. 1989), drawing on U.S. Supreme Court cases decided after *Rosenblatt—Gertz v. Robert Welch*, 418 U.S. 323 (1974) and *Paris Adult Theatre I v. Slaton*, 418 U.S. 939 (1974)—as well as on *Rosenblatt*. Opening Br. at 18-20. Contrary to Defendants'

implication, Sidley Br. at 18, Plaintiffs did not offer *Kassel* as controlling precedent, but as an appropriate framework for a full analysis based on Supreme Court cases.

The *Kassel* framework asks two questions directly relevant to this case:

1. Did defamation plaintiffs have the ability to access the media to defend themselves? As *Gertz* states, "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344, quoted by *Kassel*, 875 F.2d at 939-40; *accord Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990).

Here, the record evidence establishes beyond doubt that Plaintiffs have ***not*** had access to the media or other forms of public communication that comes remotely close to that of "public officials" as recognized by *Kassel, Gertz,* and *Moss*. JA1466 ¶18, JA1543 ¶17, JA1659 ¶17.

2. Did defamation plaintiffs, by taking on public employment, "voluntarily expose[ ] themselves to increased risk of injury from defamatory falsehoods concerning them"? *Kassel* at 940, quoting *Gertz,* 418 U.S. at 345.

Nothing about Plaintiffs' roles created the expectation of exposure to the media or an increased risk of injury from defamation. Their roles were internal to the military, not public-facing, and did not involve combat or command situations likely to attract media coverage. They volunteered in APA activities as private

individuals,[1] and the Hoffman Report's statements that they spoke for the DoD are false.[2] In contrast, the *Rosenblatt* plaintiff worked for elected officials in a public-facing role on issues that directly affected the public. *Rosenblatt*, 383 U.S. at 87.

The *Rosenblatt* court warned that, for a person to be deemed a public official, "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 86 n.13. Here, Plaintiffs were subjected to public scrutiny and discussion *only* as a result of the attacks that prompted Hoffman's investigation and of the Hoffman Report itself.

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

In the cases cited by Defendants, the plaintiffs differed in critical ways from Plaintiffs: they had a higher level of authority, held positions that dealt directly with the public or a segment of it, and/or communicated directly with the media.

Secord v. Cockburn, 747 F. Supp. 779 (D.D.C. 1990). Sidley Br. at 17. Secord was a major general who held "highly influential positions" and appeared on television. He did not dispute he was a public *figure* (not a public *official*).

MacNeil v. Columbia Broad. Sys., Inc., 66 F.R.D. 22, 25 (D.D.C. 1975). Sidley Br. at 17, n.3. Plaintiff was a DoD spokesperson filmed with his permission

[1] JA46-103 ¶¶13, 39, 41, 42, 48, 221-22.
[2] JA53-103 ¶¶39, 41, 42, 220-222; JA1463 ¶5; JA1540 ¶ 4; JA1656 ¶5.

during "National Security Seminars" intended to present the military to the world. He did not dispute his status as a public official.

Arnheiter v. Random House, Inc., 578 F.2d 804, 805 (9th Cir. 1978). Sidley Br. at 17, n.3. Plaintiff, a senior officer, was removed as a ship commander during wartime. He "used every conceivable effort to gain public exposure and to make his case a 'cause celebre,'" rendering him a public figure and public official. *Id.* at 805.

Davis v. Costa-Gavras, 595 F. Supp. 982, 987 (S.D.N.Y. 1984). Sidley Br. at 17, n.3. Plaintiff was a Commander of the U.S. Military Group and Chief of the U.S. Navy Mission to Chile, with substantial decision-making authority and autonomy. He did not contest his public-official status.

Beeton v. District of Columbia, 779 A.2d 918, 924 (D.C. 2001); *Thompson v. Armstrong*, 134 A.3d 305 (D.C. 2016), 312; and *Paul v. News World Commc'ns*, 2003 WL 23899002, at *2 (D.C. Super. Ct. Sept. 15, 2003). Sidley Br. at 16-17. In those cases, a correctional officer *(Beeton)*, a Treasury Inspector General special agent (*Thompson*), and a school administrator (*Paul*) were held to be public officials. As to *Beeton* and *Thompson*, as *Thompson* notes (at 312), *Beeton* relied on "several cases from other jurisdictions holding that law enforcement officers are public officials." *Beeton*, 779 A.2d at 924. The roles of officers responsible for enforcing laws applicable to the public or segments of it differ too significantly from the role of psychologists working solely within the military to be relevant. As to *Paul*, the

plaintiff was a senior official in a large public school system whose appointment was announced in the press and who oversaw a budget of approximately $100 million and a staff of approximately 150, participated in lobbying for funding, and made public appearances. Given those facts, *Paul* has no relevance here.

III. PLAINTIFFS' PROOF ESTABLISHES TRIABLE DISPUTES OF FACT ON DEFENDANTS' ACTUAL MALICE.

A. Defendants Mischaracterize or Misapply the Relevant Legal Standards.

Defendants begin their discussion of actual malice by attempting to make the actual-malice standard insurmountable. In that attempt, they mischaracterize, omit, or misstate the relevant legal standards.

First, in response to the statement by *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) that actual malice "does not readily lend itself to summary disposition," Defendants claim that the Supreme Court subsequently "clarified" *Hutchinson* as merely acknowledging that "the Court was reluctant to endorse special protections for defamation defendants." Sidley Br. at 20, n.5; APA Br. at 13, n.4, quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256 n.7 (1986). But there is no contradiction between those quotes. In fact, the *Anderson* quote reinforces the dangers of disposing of the actual-malice issue summarily.

Second, Plaintiffs cite *Herbert v. Lando,* 441 U.S. 153, 165 (1979): To show actual malice, "[c]ourts have traditionally admitted any direct or indirect evidence

relevant to the state of mind of the defendant . . . .” Opening Br. at 22. *Herbert* then describes the “many ways” in which actual malice may be shown, quoting 50 Am.Jur.2d *Libel and Slander* n.7, § 455 (1970). *Id.* at 164 n.12. Defendants claim this description refers only to common-law malice. (Sidley brief at 20, n.5; APA brief at 15, n.6.) They are wrong. *Herbert* provides it to show that “[r]eliance on such state-of-mind evidence is by no means a recent development arising from *New York Times . . . .” Id.* at 161. The statement Plaintiffs cite appears just a few pages later.

Third, Defendants assert that Plaintiffs fail to demonstrate actual malice “in conjunction with a false defamatory statement,” rather than “in the abstract.” Sidley Brief at 21, APA Brief at 13, both citing *Tavoulareas*, 817 F.2d at 794. It is unclear how they believe that principle can apply, given the text of the Hoffman Report: “key APA officials . . . colluded with important DoD officials” and “APA officials engaged in a pattern of secret collaboration with DoD officials.” JA2246. The Report explicitly names Cols. Banks and Dunivin as “key players” in the alleged collusion (JA2249-50), and repeatedly names Col. James as a participant (see, e.g., JA2258, JA2273, and JA2280). The Report later states that common definitions of collusion define it “as a secret agreement, understanding, or cooperation for some harmful, improper, dishonest, or illegal purpose”—making the term clearly defamatory. JA2301.

Plaintiffs have provided evidence showing that Sidley, when it accused Plaintiffs of collusion and made the 219 false statements pleaded in Exhibit A to Plaintiffs' Supplemental Complaint (JA349-393), possessed and had reviewed documents and testimony that show it knew the statements were false or acted with reckless disregard. Much of that evidence was obtained from APA's files.

Defendants shoehorn this case into the model of a suit based solely on isolated statements. But the Report does not fit that model. Hoffman built the Report knowing that the person who controls the story controls the interpretation of the facts. Having asserted "collusion" as the story, he then attributes every action to it. In the context of the true story—Plaintiffs and APA officials collaborated to ensure APA actions supported Plaintiffs' work to prevent abusive interrogations—the facts take on an entirely different character.

Moreover, because the Hoffman Report alleges "collusion" within a small group, any defamatory statement about a member of the group is actionable by other members. Although statements about a group will often be precluded by the "group defamation rule," if a defamer identifies people by name, "the group defamation rule no longer applies." *Pratt v. Nelson*, 164 P.3d 366, 383 (Utah 2007). *See also Elias v. Rolling Stone L.L.C.*, 872 F.3d 97, 108 (2d Cir. 2017); *Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 64 (D.D.C 2018)(same). Thus, Defendants' assertion that a "plaintiff cannot prove actual malice merely by proving that the defendant

knew of 'collateral falsehoods' . . . 'unrelated to [the] plaintiff'" is irrelevant.[3] APA Br. at 14.

Fourth, APA incorrectly claims that only evidence of actual malice by an institution's employees is evidence of institutional actual malice. APA Brief at 15-16. In fact, evidence of actual malice by an institution's *agents* is also probative. *See, e.g., Dongguk Univ. v. Yale Univ.,* 873 F. Supp. 2d 460, 465 (D. Conn. 2012)(citing *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 287 (1964)). (*Dongguk* is cited by APA for other purposes. APA Br. at 24.) Sidley was carrying out an assignment defined by APA; APA participated by arranging interviews, advising interviewees that they did not need counsel (JA1478 ¶9), and providing documents; and Sidley's investigation was overseen throughout by the APA Special Committee. The relationship between client and attorney is a quintessential principal-agent relationship. *Comm'r v. Banks*, 543 U.S. 426, 436 (2005). Thus, evidence of actual malice by Sidley attorneys is evidence of APA's actual malice.

B. Admissions by APA Officials and Former Officials

In their Opening Brief, Plaintiffs pointed out multiple admissions by members and former members of the APA Board, other APA officials, and an APA outside

[3] For this proposition, APA cites *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1512–13 (D. Minn. 1988). There, however, the plaintiff did not claim the "collateral falsehoods" were related to him, but instead offered them as "probative of the author's reckless state of mind with respect to statements about him." *Id.*

counsel that could lead a jury to conclude that APA officials involved in the Report's publication knew key allegations in it were false or "entertained a serious doubt" about their veracity when they were published.

Defendants respond by repeatedly inviting the court to weigh the evidence and construe it in the light most favorable to the *Defendants*. Most strikingly, they repeatedly and illogically argue that an admission made after the Report was published cannot refer to knowledge the person had when it was published. At best, Defendants' arguments belong in front of a jury, not in a motion under a summary judgment standard—especially when discovery has been so severely limited. Plaintiffs respond here to only some of these instances, to demonstrate the pattern.

1. In his affidavit, Robert Resnick testified that "some [APA] Board members . . . acknowledged that the Report contain[s] many inaccuracies," that former presidents of the APA voiced concerns that the Board had engaged in a "rush to judgment," and that Board members "acknowledged that their actions were impulsive and not thought through." JA1720. APA claims this affidavit should be disregarded because, for example, it registers his "impressions," he did not name the speakers, and there was "apparently not a quorum." APA Br. at 22-23. All these issues go to the affidavit's credibility, which should be tested at trial.

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

APA's response: the affidavit does not say Hoffman "did" distort matters. APA Br. at 24. At best, that argument is for a jury.

3. The Plaintiffs also cited former members of APA's governing bodies with first-hand knowledge of the events at issue who attested to the Report's falsehoods. Opening Br. at 25. APA focuses on the affidavit of Barry Anton, speculating that the speakers "may not have even been APA members, much less APA Board members." APA Br. at 25-26. That ignores the record: Anton describes "individuals who were named in the Report" and therefore highly likely to be APA members. He also refers "former APA Presidents and a number of Board of Director members." JA1456, ¶¶6, 8. APA's speculation is a credibility issue for a jury.

Additionally, Plaintiffs cited open letters from former APA Presidents and 14 Ethics Committee chairs condemning the Report as evidence of Defendants' actual malice. Opening Br. at 7. APA claims the letters are not in the appellate record. But Plaintiffs expressly brought them to the trial court's attention, so they are properly before this Court. JA1779, ns. 12, 13, 14 (citing where the letters could be found).

4. David Ogden, APA's outside counsel in 2015, admitted that the Report's first primary conclusion was based upon outdated interrogation policies. APA implies doubt whether Ogden made the statement. APA Br. at 27. Because Plaintiffs' evidence must be construed in the light most favorable to Plaintiffs, the Court must assume he did. APA also argues that its counsel's recognition that one

of the Report's principal conclusions relied on incorrect facts was not evidence of actual malice. *Id.* But Ogden—who was involved throughout APA's dealings with Hoffman and his Report—derived his knowledge from his time in the Obama White House. He therefore knew *when the Report was published* that the conclusion was based on false assumptions, and that knowledge is imputed to Defendants. *See, e.g., Immunocept, LLC v. Fulbright & Jaworski, LLP,* 504 F.3d 1281, 1287 (Fed. Cir. 2007); Restatement (Second) of Agency § 9(3) (1958).

C. Defendants Possessed and Reviewed Documents and Testimony Contradicting the Report's Primary Conclusions.

To respond to Plaintiffs' showing that Defendants possessed and reviewed evidence that directly contradicted the Report's primary conclusions, Defendants make four claims.

First, APA claims that Plaintiffs' argument is directed only against Sidley and is therefore "waived" as to APA. APA Br. at 28. As discussed above, the actual malice of their agent—their counsel at Sidley—is imputed to APA. In any event, the majority of the documents listed in Exhibit A to Plaintiffs' Opposition to Defendants' Special Motions to Dismiss (JA1302-1442) were actually in APA's possession and had been previously seen by APA, giving them equal knowledge of the documents' content that gave Defendants' knowledge that the 219 defamatory statements and the "collusion" narrative were false.

Second, APA argues that it was under no obligation to consult its files with respect to the truth of the Report's allegations. APA Br. at 30. APA mischaracterizes Plaintiffs' argument. Unlike the cases APA cites, APA Board members had reason to know that the Report's allegations were false because they had first-hand knowledge proving that falsity. In the cases APA cites, defendants had no similar reason to doubt the truth of a statement. *Mann*, 150 A.3d at 1258 ("Reports of those investigations were published and were known to appellants prior to Mr. Simberg's and Mr. Steyn's articles continuing to accuse Dr. Mann of misconduct based on the emails that were the subject of the investigations. . . . we conclude that a jury could find that appellants' defamatory statements were made with actual malice.").

Third, Defendants argue that the trial court failed to consider Exhibit A to their Opposition, detailing evidence supporting a finding of actual malice. Counsel for Plaintiffs explicitly directed the Court's attention to the document. February 21, 2020, Transcr., JA2100-01. Defendants appear to disagree about whether the court considered the evidence (Sidley Br. at 41, APA Br. at 29), but its Order contains no indication that it did. JA748-76. Among the reasons for which Defendants assert this Court may not consider the evidence now, only one warrants attention: Sidley asserts that Plaintiffs have waived any argument based on the trial court's failure to consider the evidence because their briefs below did not apply the law to that evidence. Sidley

Br. at 41. But Sidley knows, and Plaintiffs' Opposition stated, that the court blocked that application by limiting the evidence it would consider. JA1238 n.52. JA1113.

As demonstrated below, under the standards for reviewing the evidence established by *Mann,* Defendants fail to show that a jury could not reasonably find under a clear-and-convincing standard that Defendants acted with actual malice.

1. The Report's First Primary Conclusion

The Report's first primary conclusion—that "key APA officials . . . colluded with important DoD officials" to have the PENS Task Force issue "loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines"—was built on two assertions contradicted by documents Defendants possessed and reviewed: (1) existing DoD guidance was too loose to prohibit techniques such as sleep deprivation and stress positions, and (2) the Bush Administration's narrow definition of "torture" still applied to the DoD at the time of the PENS meetings. Opening Br., p. 28, citing JA262-72, 1366-67, ns. 8-11; 1368-77. Sidley responds by changing the subject: it now argues that the Report never intended to refer to guidelines governing interrogators—only to guidelines for psychologists. Sidley Br. at 23-26.

Sidley's theory is contrary to the language of the Report. Hoffman charged that the goal of the alleged "collusion" was "to create ethics guidelines that placed no significant additional constraints on DoD interrogation practices" and "to produce

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

Sidley is also wrong that the language of guidelines for psychologists might mean that psychologists are not constrained by policies that governed interrogations. The 2005 Behavioral Sciences Consultation Team Standard Operating Procedure for Guantanamo required psychologists to adhere to all policies applicable to interrogations, including the local interrogation policies—which were increasingly restrictive as to permitted interrogation techniques. JA394-400. Sidley's point is also irreconcilable with Statement Four of the PENS Task Force:

> Psychologists involved in national security-related activities follow all applicable rules and regulations that govern their roles. Over the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba, such rules and regulations have been significantly developed and refined. Psychologists have an ethical responsibility to be informed of, familiar with, and follow the most recent applicable regulations and rules.

JA271 ¶117.

That statement does not refer to regulations written just for psychologists, nor does it simply "advise[ ] psychologists to familiarize themselves" with the most recent regulations and rules, as Sidley claims. Sidley Br. at 26, n.10. It tells them they have an ethical obligation to obey those regulations.

Sidley also attempts to excuse its decision to omit the Guantanamo Standard Operating Procedures, drafted by Plaintiffs Banks and Dunivin, by arguing that the

document was "substantively the same as the draft DoD guidance" and "used high-level concepts." Sidley Br. at 26. Once again, Sidley is ignoring the record on appeal: the Standard Operating Procedures expressly incorporated policies that limited permissible interrogation techniques, required psychologists to report any suspicions of abuse, and applied the Geneva Conventions, which did not permit the sleep deprivation or stress positions Hoffman states were allowed. JA394-400.

Finally, Sidley argues that honest misinterpretations of facts or "missing key information" does not constitute actual malice. Sidley Br. at 27. But Plaintiffs are not alleging merely honest misinterpretation or missing some documents among many. Sidley possessed and reviewed documents that contradicted the foundation of the Report's first conclusion. That is enough for a jury to conclude that Defendants either knew those assertions were false or recklessly disregarded their truth or falsity.

2. The Report's Second Primary Conclusion

The Hoffman Report alleges that "APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives" to ban psychologists' participation in interrogations. JA2246. Sidley responds by focusing only on email traffic before the Council meetings. Sidley Br. at 27-28. This misses the point.

Here as elsewhere in the Report, Hoffman avoids and omits evidence that casts doubt on his storyline. Plaintiffs pointed to evidence in Hoffman's

possession—including testimony from a leading proponent of the ban—that APA Council meetings were open and transparent, including through the discussion of proposed policy language and changes to drafts, thus making the process impossible to manipulate. JA1245-46, 1484 ¶34. Hoffman ignored this evidence, failed to explain how the emails he describes could manipulate a large group conducting extensive debate before voting, and failed to explain how—aside from his assumption of a collusive intent for bad purposes—the emails differed from the usual internal communications about policy issues and important meetings.

3. The Report's Third Primary Conclusion

The Report's third principal conclusion was that Plaintiffs had manipulated APA ethics investigations to shield psychologists involved in interrogations. Defendants argue that these allegations are irrelevant because they do not discuss the Plaintiffs' conduct. Sidley Br. at 28. This is wrong for the reasons discussed above—under the "small group defamation" rule, each statement about an alleged "colluder" is "of and concerning" all named members. Moreover, Plaintiff James is one of the psychologists allegedly "shielded." JA2755-57.

Astonishingly, APA argues that the conclusion about ethics investigations is unrelated to the investigation of Dr. James Leso (APA Br. at 32), even though the Report's discussion of the Leso case comprises over half of the discussion of the third principal conclusion (26 of 48 pages, see JA2730-57). For the Leso case in

particular, the evidence in Sidley's possession clearly contradicted its conclusion. Opening Br. at 31-32.

D. APA Board Members Were Directly Involved in the Events at Issue.

Plaintiffs noted that APA Board members were directly involved in the events at issue and, therefore, knew that Report's description of them was false. Opening Br. at 33-34. Faced with the trial court's limitation on the evidence Plaintiffs could submit, they attached an Exhibit (B) to their Opposition below providing citations to evidence from APA files of the involvement of all APA Board members except one. JA1443-52. They also directed the Court's attention to the exhibit in an evidentiary hearing. JA2103. APA argues that Plaintiffs "waived" their reliance on the evidentiary exhibit (APA Br. at 33) but offers no explanation of how Plaintiffs could "waive" an argument which the trial court refused to allow them to develop.

E. Defendants Mischaracterize the Legal Standards Governing the Relevance of Plaintiffs' Voluminous Circumstantial Evidence.

APA begins its discussion of circumstantial evidence by misstating the applicable legal standards. According to APA, only three limited scenarios are relevant circumstantial evidence: (1) the defendant fabricates an allegation out of his imagination; (2) the allegation is so improbable that only a reckless person would have made it; and (3) the allegation is based solely on a report the speaker had obvious reasons to doubt. APA Br. at 14, citing *Oao Alfa Bank v. Ctr. for Pub.*

Integrity, 387 F. Supp. 2d 20, 50 (D.D.C. 2005); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1512-13 (D.C. Cir. 1996); *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589-90 (D.C. Cir. 2016).

None of those cases supports APA's attempt to sharply limit circumstantial evidence of actual malice. In *OAO Bank,* the court refers to three situations which, *without more,* would establish actual malice. It does not suggest that no other circumstantial evidence is relevant. As Plaintiffs pointed out in their Opening Brief, while categories of circumstantial evidence may not establish actual malice without more, they are nevertheless admissible for the court to consider. *St. Amant* merely notes that professions of good faith publication are unlikely to be persuasive "for example" in the three "scenarios" described in *OAO Bank*. The court never suggests that other forms of circumstantial evidence are irrelevant. *St. Amant*, 390 U.S. at 732. *McFarlane* is the same, *McFarlane*, 91 F.3d at 1512-13, and *Jankovic*, 822 F.3d at 589-90 makes it clear that the list of three "scenarios" is merely an "example."

Throughout, Defendants try to discard one type of circumstantial evidence after another by asserting that it is not relevant to finding actual malice or that, alone, it is not enough to sustain that finding. The first assertion is contradicted by the case law, as demonstrated below. The second is beside the point. Each type of circumstantial evidence can contribute to the "the cumulation of circumstantial

evidence. . . .” by which “a plaintiff may prove the defendant's subjective state of mind . . . .” *Tavoulareas*, 817 F.2d at 789.

1. The Hoffman Report Was Built Around a Preconceived Narrative of Collusion to Conform APA Policy to DoD Preferences.

Plaintiffs argued that the Hoffman investigation and Report were built around a preconceived narrative: a few APA and DoD officials colluded to ensure that APA actions conformed to DoD preferences and, in particular, did not constrain its ability to employ abusive interrogation tactics. The goal was to shift public pressure and condemnation from APA as an organization and its Board members to a few scapegoats—including Plaintiffs. Sidley’s attempts to dismiss this evidence fails.

First, Sidley claims that evidence that a defendant “concocted a pre-conceived storyline” does not establish actual malice. Sidley Br. at 29. But Plaintiffs also argue, and provide evidence, that Defendants “consciously set out to make the evidence conform to the preconceived story,” which “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.)).

Second, Plaintiffs argue that Defendants adopted their preconceived storyline from biased and unreliable long-time critics of APA and Plaintiffs. Sidley responds that it reviewed thousands of documents and interviewed 150 witnesses. Sidley Br.

at 30. Although Sidley has made that argument often, it has never managed to explain its *non sequitur.* Counting interviews and pieces of paper proves nothing at all, of course, about how those documents and interviews were used. *See, e.g., Jackson v. City of Columbus,* 117 Ohio St. 3d 328, 332 (2008).

Second, Sidley argues that reliance on APA critics to guide its investigation does not prove *its* actual malice. Sidley Br. at 30. Nonsense. Beginning what was supposed to be an impartial investigation by interviewing passionate long-term critics of APA and Plaintiffs, promising them confidentiality, repeatedly relying on them for documents, asking them for suggestions as to potential witnesses, and advising APA to provide them with the Report before its publication—all in contrast to the treatment of Plaintiffs—is strong support for the view that the investigation was a stacked deck from the outset. JA1260-61, ns. 133, 134; JA1260-62.

Third, Sidley states that the *twenty witnesses* who testified that Hoffman seemed intent on building evidence to support a preconceived storyline and deliberately avoiding contrary information failed to "provide any basis for that impression." Sidley Br. at 30-31. This is simply wrong. See, for example:

Lefever affidavit: "[N]umerous distortions, mischaracterizations and omissions in the Report regarding what I told the interviewers led me to conclude that the interviewers were attempting to confirm a preconceived narrative rather than understand and learn from my perspective." JA1691 ¶10.

Sammons affidavit: "The questions asked of me during my interview, combined with Dr. Kaslow's earlier response to my question about the implications of the independent review, led me to believe that the investigation had a predetermined outcome. [T]he Report . . . omit[ted] information I had provided the interviewers and that contradicted the Report's narrative." JA1728 ¶5.

Sidley's dismissal of this testimony amounts again to improperly inviting this Court to invade the province of the jury by weighing the evidence.

Finally, Sidley argues that the fact that Hoffman's Report "omitted certain views of witnesses" does not prove actual malice. Sidley Br. at 31. But that is not what the evidence shows. *Twenty-seven* witnesses testified that Hoffman distorted or otherwise misrepresented their interviews or selectively omitted information. Opening Br. at 35-36. Systematically disregarding exculpatory witnesses and testimony *is* evidence of actual malice. *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1092 (3d Cir. 1988) ("[H]is choice to credit only the portions that were damaging to Schiavone and not the portion that would have neutralized those damaging statements bears on his subjective state of mind and may point to actual malice.")

2. Defendants Purposefully Avoided the Truth by Disregarding Evidence Contradicting Their Preconceived Storyline.

Purposeful avoidance of the truth is also circumstantial evidence of actual malice. *See Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 692 (1989); *see*

also Parsi v. Daioleslam, 595 F. Supp. 2d 99, 108 (D.D.C. 2009). The Hoffman Report entirely disregards the testimony of key individuals who contradicted its preconceived narrative. Opening Br. at 36-37. Sidley's only response is to point to the number of interviews and the number of documents reviewed. Sidley Br. at 32.

In the cases cited by Sidley, the facts differ dramatically from the facts of Hoffman's investigation. In *Talley v. Time, Inc.*, 923 F.3d 878, 898 (10th Cir. 2019), the court said that "[d]efendants did not deliberately ignore sources that might have disputed their account. . . . Rather, they interviewed multiple sources around the country who substantially corroborated each other." In *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1241 (11th Cir. 1999), "most of the evidence that related to actual malice was undisputed."

Another case cited by Sidley illustrates the flaw in Sidley's numbers-over-substance argument. The court wrote:

> Methvin's failure to investigate, therefore, may be considered as part of the evidence of actual malice, particularly if Methvin's own sources indicated that what he was writing might not be true. In analyzing whether the appellant could show actual malice, this Court must look at each source to determine whether it was reliable and whether it indicated that more research was required to determine what the truth was.

Perk v. Reader's Digest Ass'n, 931 F.2d 408, 411-12 (6th Cir. 1991); Sidley Br at 32.

Perk describes Plaintiffs' evidence here. For example:

- Sidley's interview with Dr. Dunivin focused on superseded interrogation policies. Dunivin offered to seek clearance to provide additional information—an unmistakable indication that "more research was required." The Sidley team purposely avoided that information. JA1541-42 ¶¶7, 8.

- Both Jennifer Bryson and Dr. James told Sidley about the changes that resulted in the interrogation policies in place when the PENS Task Force met. Sidley purposely avoided that information. JA1507 ¶6; 1656 ¶6.

- Dr. Banks told Hoffman that he should interview Army Surgeon General Eric Schoomaker, who was largely responsible for the decision to deploy Plaintiffs to help prevent detainee abuses. Hoffman agreed it was a good idea but never followed up. JA1466 ¶16.

3. Defendants Knowingly Relied on Unreliable and Biased Witnesses.

Plaintiffs also argued that Sidley's knowing reliance on unreliable and biased witnesses who were pursuing a crusade against Plaintiffs was further circumstantial evidence of actual malice. Sidley responds that even if Defendants "acted on the basis of a biased source and incomplete information," that does not prove actual malice. Sidley Br. at 33. Sidley misstates Plaintiffs' argument. The flaw in the Hoffman investigation was not merely relying on witnesses with an axe to grind. It was reliance on sources "*which a defendant knows or should know are biased or unreliable, or has obvious reasons to doubt.*" Opening Br. at 37-38.

Sidley had ample reason to question information received from those sources. Hoffman knew that they were actively promoting the criminal prosecution of Plaintiffs and others; they had tried to get the FBI and SASC to support their attacks; Dr. Bond had filed meritless ethics complaints against Dr. James; and Dr. Soldz had made racist attacks on Dr. James' job qualifications and performance and had collaborated with James Risen of the *New York Times* in his attacks on APA and some of its members. Opening Br. at 38; JA1261. Yet, despite what Hoffman knew about their biases, he gave their information and views a privileged role in his investigation, while omitting exculpatory information from others.

Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C. Cir. 2003), cited by Defendants, directly supports Plaintiffs' point: "where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts." *Id.* at 1284. Although Sidley points again to the number of people investigators interviewed and the number of documents they reviewed, those numbers are irrelevant to the question of whether Sidley consciously relied unduly on sources it knew to be unreliable. Again, that question should be settled through further discovery, reversal, and at trial, not now.

4. Defendants' Motive to Defame and Bias and Ill Will Against Plaintiffs Are Circumstantial Evidence of Actual Malice.

Both Defendants argue that motive to defame and evidence of bias or ill will are not relevant to a determination of actual malice. For that proposition, they cite

three cases from the U.S. District Court for the District of Columbia. Sidley Br. at 35; APA Br. at 35.[4] But they discount, misstate, or ignore cases from the U.S. Supreme Court, the D.C. Court of Appeals, and the Court of Appeals for the D.C. Circuit that include bias or ill will among the factors relevant to actual malice.

Harte-Hanks: Sidley argues that the case "specifically distinguished 'actual malice' from 'a showing of ill will or "malice" in the ordinary sense of the term.' *Harte-Hanks Commc'ns*, 491 U.S. at 666." Sidley Br. at 35, n.13. That misses the point. The case says exactly what it was cited it for: "evidence of motive" may be "supportive" of a finding of actual malice. *Id.* at 668.

Herbert v. Lando: "As a general rule, any competent evidence, either direct or circumstantial, can be resorted to," including "circumstances indicating the existence of . . . ill will, or hostility . . . ." *Herbert*, 441 U.S. at 164 n.12.

Mann: "Although animus against Dr. Mann and his research is by itself insufficient to support a finding of actual malice . . . bias providing a motive to defame by making a false statement may be a relevant consideration in evaluating

[4] Read as a whole, neither *Arpaio v. Zucker*, 414 F. Supp. 3d 84 (D.D.C. 2019) nor *Parsi v. Daioleslam*, 890 F. Supp. 2d 77 (D.D.C. 2012) provides support for the general proposition that evidence of bias or ill-will may never be considered. In both, the language Defendants cite is followed immediately by a quotation from *Harte-Hanks* stating that "motive in publishing a story . . . cannot provide a *sufficient* basis for finding actual malice." 414 F. Supp. 3d at 91-92, 890 F. Supp. 2d at 90; both quoting 491 U.S. at 665 (emphasis added).

other evidence to determine whether a statement was made with reckless disregard for its truth." *Mann,* 150 A.3d at 1258-59.

Tavoulareas, 817 F.2d at 795: "[U]nder some circumstances, the probative value of ill-will evidence in establishing 'intent to inflict harm through falsehood' outweighs the risk that admitting such evidence will chill honestly believed speech."

The overwhelming weight of this precedent holds in favor of considering bias, ill will, and other inappropriate motives along with other indicia of actual malice.

Plaintiffs also point to Hoffman's deliberate use of loaded terms drawn from criminal law such as "joint venture," "joint enterprise," "deliberate avoidance," and "collusion" to suggest criminal misconduct. Opening Br. at 39. Sidley responds first with the illogical argument that the Report used the word "collusion" because APA asked it to determine whether "collusion" occurred. Sidley Br. at 36. But that request did not force Hoffman to adopt the term; he claimed to be "independent."

Sidley then claims that the language used in a publication can never be evidence of actual malice. *Id.* Neither of the cases it cites supports this proposition. In *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 10 (1970), the Supreme Court said only that the court below erred by permitting the jury "to find liability merely on the basis of a combination of falsehood and general hostility." In *Wash. Post Co. v. Keogh*, 365 F.2d 965, 969 (D.C. Cir. 1966), the court rejected the argument that the "'character and content of the publication itself' is *sufficient* to take the case to

the jury on actual malice . . . .” (emphasis added) Neither case held that the language used in a publication can never support such a finding. If Sidley’s position were the law (which it is not), it would entirely eviscerate the settled doctrine of defamation by implication, which the trial court failed to analyze at all. *See, e.g., White v. Fraternal Order of Police,* 909 F.2d 512, 520 (D.C. Cir. 1990). JA343-346

Defendants’ other objections are easily disposed of:

First, Plaintiffs point out that Hoffman took on the role of a prosecutor, building a case to support a preconceived conclusion. Sidley claims that a one-sided commentary proves nothing about actual malice. Sidley Br. at 37. But Plaintiffs’ evidence was much more than the language of the Report. It includes reliance on biased sources, deliberate avoidance of contrary testimony and evidence, and the disregarding of documents in the Report’s exhibits that contradict its conclusions.

Second, Plaintiffs provided evidence that could lead a jury to reasonably conclude that the Sidley team leaked the Report to James Risen at the *New York Times.* JA1225. Sidley mischaracterizes the evidence in Plaintiffs’ expert report and disagrees about what the evidence shows (Sidley Br. at 37), but this dispute belongs in front of a factfinder. Sidley also argues that even if it did leak the Report, that does not “establish Sidley’s belief that anything in it was false.” *Id.* This misses the point. The leak shows an intent to wreak as much damage as possible to the reputations of those the Report attacked—evidence of ill will.

5. Defendants' Failure to Follow Proper Investigative Practices Is Circumstantial Evidence of Actual Malice.

Plaintiffs argue that Defendants' departure from proper investigative practices in connection with the Report, considered together with all the other evidence, is circumstantial evidence of actual malice. Opening Br. at 40-41.

Sidley claims even "an extreme departure from professional standards" has no relevance to actual malice. Sidley Br. at 38. APA accuses Plaintiffs of "misstat[ing] the law," but then cites cases exactly in line with Plaintiffs' position: departures from proper investigative practices are insufficient to prove actual malice *without more*. APA Br. at 37. Here, there is much more. "[A]n extreme departure from standard investigative techniques," especially coupled with evidence of bias, can amount to evidence of "purposeful avoidance of truth." *Church of Scientology Int'l v. Time Warner*, 903 F. Supp. 637, 641 (S.D.N.Y. 1995). Both *Harte-Hanks,* 491 U.S. at 693, cited by Plaintiffs, and *Lohrenz v. Donnelly,* 223 F.Supp.2d 25, 45 (D.D.C. 2002), cited by Sidley Br. at 38, 39, are in accord.

APA argues that Plaintiffs never explain what professional investigative standards the Hoffman Report disregarded. APA Br. at 36. Not so. Plaintiffs did so in their Opening Brief at 41 and in the Supplemental Complaint. JA280-92.[5]

[5] APA repeats its claim that any argument which does not expressly relate to the APA's own actions is "waived" with respect to the APA. For the reasons described above (*supra* at III-A), it is wrong.

6. Defendants' Steadfast Refusal to Retract Their False Allegations Is Circumstantial Evidence of Actual Malice.

Since the Hoffman Report was first published, Defendants have repeatedly been provided with evidence—by many others as well as Plaintiffs—demonstrating that the Report's allegations are false. Nevertheless, they have steadfastly refused to retract the Report—further circumstantial evidence of actual malice.

Sidley and APA offer only a single response: Refusal to retract when faced with evidence of falsity is irrelevant to actual malice at the time a statement is published. They are mistaken: "Evidence of the [Respondent's] steadfast refusal to retract [is] properly considered as bearing on the issue of actual malice." *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985) *vacated in part on other grounds on reh'g*, 817 F.2d 762 (D.C. Cir. 1987). *See also Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1014 (D. Minn. 2014) ("most authorities" so hold), *rev'd on other grounds*, 825 F.3d 876 (8th Cir. 2016); *Suzuki Motor Corp. v. Consumers Union of U.S.*, 330 F.3d 1110, 1134 (9th Cir. 2003); *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1271 (7th Cir. 1996); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 948-49 (5th Cir. 1983); Restatement (Second) of Torts § 580A, comment d (1977).

7. Plaintiffs Provided Ample Evidence of Negligence—Additional Circumstantial Evidence of Actual Malice.

Plaintiffs also argued that the evidence discussed above plainly raises triable issues of fact with respect to negligence. Sidley responds that negligence is irrelevant to the issue of actual malice. Sidley Br. at 41-42. APA offers no response.

Sidley is mistaken. "There is no doubt that evidence of negligence . . . may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or his knowledge of falsity." *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969); *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972); *see also Curtis Pub. Co. v. Butts*, 388 U.S. 130, 165-66 (1967).[6]

The *Goldwater* court explained why this was so (at 343):

> Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact . . . *See St. Amant v. Thompson,* 390 U.S. at 732-733.

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[6] Sidley asserts that *Airlie "*was criticized by a later case, which emphasized that "[a]s *St. Amant* makes clear, negligence . . . cannot support a finding of actual malice." Sidley Br. at 42, n. 18, citing *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 958, 960 (D.D.C. 1976). That assertion is wrong. *Martin Marietta* ***does not*** "criticize" *Airlie*; it simply distinguishes between the facts in *Airlie* and the facts before it. *Id.* at 960. More substantively, *St. Amant* ***does not*** hold that negligence can never contribute to a finding of actual malice; the Court stated that there is no "one infallible" definition. *St. Amant,* 390 U.S. at 730.

See also Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) (including evidence of negligence among the types of evidence relevant to finding actual malice).

F. The Trial Court Improperly Invaded the Province of the Jury by Weighing the Evidence and Interpreting It in the Light Most Favorable to the Moving Party.

The trial court repeatedly accepted Defendants' invitation to weigh Plaintiffs' evidence, invading the province of the jury and ignoring the applicable legal standards by interpreting the evidence in the light most favorable to the *Defendants*. Perhaps the most egregious example is its treatment of emails exchanged among Col. Banks and others headed "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." JA2220.

Plaintiffs have already explained this evidence. Opening Br. at 48. The headings on the emails were mandated by Col. Banks' status as an active-duty military officer, which prohibited him from speaking publicly about military topics without authorization—as his affidavit testifies. JA1463 ¶5, JA1255-1257. At a minimum, his testimony raises a material issue of fact for the jury. But the trial court adopted Defendants' viewpoint, calling the headings "curious" and suggesting that Sidley had taken them into account in reaching its conclusions. JA2220.

Sidley's attempted defense of the trial court's error—that the court was merely "recognizing the high burden imposed by actual malice"—is frivolous. Sidley Br. at

42. It cites no authority for its bizarre implication that a trial court is required in actual-malice cases to construe evidence in the light most favorable to a defendant.

IV. DEFENDANTS FAILED TO SHOW THAT, AS A MATTER OF LAW, APA DID NOT REPUBLISH THE HOFFMAN REPORT IN 2018.

Republication is a factual question that is "normally for the jury to resolve." *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985), *vacated in part on other grounds on reh'g*, 763 F.2d 1472 (D.C. Cir. 1985), *and on reh'g*, 817 F.2d 762 (D.C. Cir. 1987). *See also Eramo v. Rolling Stone, L.L.C.*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016). To prevail, therefore, Defendants must show that there are no relevant issues of material fact. But the parties disagree about material facts as well as about the relevant legal standards.

After a substantive discussion of the Report at a meeting of the APA Council, its governing body, a discussion that included rejecting a motion to remove the public posting of the Report (JA314 ¶296):

- the APA General Counsel acted on the discussion by sending an email to numerous people advertising a link to the Report on a revised webpage;
- that email, sent almost three years after the initial distributions of the Report, was received by people who did not receive those 2015 distributions;
- APA posted publicly minutes from the Council meeting demonstrating that much more was at issue than administrative changes to a website; and

- APA included on the revised webpage hyperlinks to other documents directly related to the Report's content.

Defendants attempt to avoid these facts by describing the email as simply "about changes to the website" (APA Br. at 40), and by reducing the ground for republication to "changes APA made to its website" (Sidley Br. at 43) and "[m]erely linking to" or referencing the Report (APA Br. at 43). These attempts are unavailing.

A. APA Published the Report Through New Communications in 2018.

In August 2018, all 150-plus members of APA's Council, along with others, received the email below. APA's description of its content as "about changes to the [APA] website" (APA Br. at 40) is misleading. The email resulted from the Council's substantive discussion about the Report.

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

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

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

Deanne

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JA313 ¶295.

As the email announced, APA removed the prior landing page containing the Report and directed readers to another page with the link. JA314 ¶296, JA315 ¶303.

A properly instructed jury could reasonably find that the email is a transmission of the Hoffman Report governed by the "general rule" that "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." *Keeton v. Hustler Mag., Inc.,* 465 U.S. 770, 774 n.3 (1984) (quoting Restatement (Second) of Torts § 577A cmt. a.).

Although *Keeton* does not require that the email be received by a "new person," it was in fact received by persons who would not have received the 2015 emails and tweets publishing the Report. Plaintiffs provided two affidavits attesting to this fact; Defendants provided no contrary evidence. JA1815 ¶6, JA1821 ¶6.

Additionally, APA posted minutes from the Council meeting demonstrating that more was at issue than administrative changes to a website. The minutes remain publicly accessible: https://www.apa.org/about/governance/council/minutes-summer-2018.pdf (p. 9). JA314 ¶296. They provide the same hyperlink as the August 21 email and, like the email, make clear that the website changes result from a substantive discussion of the Report. JA314 ¶296.

These communications alone are enough for a jury to find that republication occurred. But there is more:

"[W]here substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred." *Davis v. Mitan* (*In re Davis*), 347 B.R. 607, 612 (W.D. Ky. 2006). This principle does not require changes to the text of the original defamatory material and, as discussed below, it holds even if, as in *Eramo*, the additional material partially retracts the defamatory material. *Eramo*, 209 F. Supp. 3d at 880. As the General Counsel's email states, the same webpage that provides a link to the Report contains links to substantive material related to the Hoffman Report.

As Section C below demonstrates, Defendants' reliance on the Superior Court finding on this issue—that "'there was no modification, or revision, to the Report,' and the hyperlinked letters 'did not appear on the same webpage as the Report'"—does not help them. APA Br. at 47-48.

Given these facts, a jury could reasonably find that APA "affirmatively reiterated" its reliance on the Report, which Defendants acknowledge would constitute a republication. APA Br. at 42.

B. The "Single Publication Rule" Does Not Render the 2015 and 2018 Publications the Same Publication.

Defendants misstate the scope of the single-publication rule. It applies to a "single, integrated publication of a periodical or edition of a book or similar aggregate communication," *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990), and to "a single communication heard at the same time by two or more third

persons," Restatement (Second) of Torts § 577A(2) (1977). The purpose is to protect publishers from greater liability based on, for example, multiple editions of a newspaper over a short span of time, or multiple sales of a book at a single point in time. Those considerations are not present here.

As the U.S. Supreme Court has explained, the single-publication rule constitutes an "exception" to the "general rule" that "each communication of the same defamatory matter" constitutes "a separate cause of action . . . ." *Keeton*, 465 U.S. at 774 n.3 (citing Restatement (Second) of Torts § 577A (1977)) cmt. a. The rule does not apply to "separate . . . publications on different occasions." Restatement (Second) of Torts § 577A cmt. d. *See also Weaver v. Beneficial Fin. Co.*, 199 Va. 196, 200 (1957) ("[E]ach time defamatory matter is brought to the attention of a third person there is a new publication . . . .") (quoting 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 83, at 136).

Contrary to Defendants' contentions, therefore, the single-publication rule does not affect the conclusion that APA republished the Report in 2018. The General Counsel's August 21, 2018, email constituted a separate communication of the defamatory Report to both the same persons and new persons. No more is needed.

C. Defendants Fail to Meet Their Burden to Demonstrate that There Is No Triable Issue of Fact Regarding Republication.

In contending that no republication occurred, APA cites cases—and the Superior Court's Order—holding that it is not enough to continue "to host the

allegedly defamatory content on its website" or provide a link or reference to it. APA Br. at 42, 43, 45. APA ignores the facts: it did far more than continue to host the Report on its website or provide references or links to it. After discussions in the APA Council, the General Counsel distributed an email devoted solely to the Report and related material, with a link for accessing the Report. This reaffirmation that APA sanctioned the Report took place despite evidence in the related material about the Report's falsehoods. It is difficult to imagine a more emphatic republication.

In arguing that the Superior Court was correct to hold that there was no republication, Defendants rely primarily on three assertions:

1. The General Counsel's email "did not attach, display, quote from, or even link to the Report . . . ." APA Br. at 45. The first three components of that objection are throwbacks to the days when a document could be circulated electronically only by being attached to an email or imbedded in it. As courts in the District of Columbia and elsewhere have consistently held, when a person provides a hyperlink to a document, they incorporate the document and publish it for purposes of defamation law. *See, e.g., Boley v. Atl. Monthly Grp.,* 950 F. Supp. 2d 249, 262 (D.D.C. 2013) ("And in referring to [plaintiff] as a warlord in his February 11, 2010, article, [defendant] provided a hyperlink to his January 27, 2010, article, thus incorporating that article by reference . . . .").

The final component of Defendants' objection—that the General Counsel's email links not directly to the Report but to a webpage where, as the email states, a link to the Report "remains available"—is equally without foundation. In the electronic context, that page is analogous to a table of contents in a printed binder: It is an aid—not an obstacle—to accessing documents. *See, e.g., Yahoo! Inc. v. La. Ligue Contre Le Racisme,* 433 F.3d 1199, 1202 (9th Cir. 2006) (noting the ease with which "any user" can click a link and view the linked content).

The August 2018 communication constituted a republication of the Hoffman Report. To hold otherwise would lead to the conclusion that, in the 21st century, a separate communication of a document through hyperlinks, years after the initial communication, can never republish the document.

2. Defendants also contend that the August 2018 email did not "direct the Report to a new audience." Although a separate communication of "the same defamatory matter . . . to the same person" is enough to constitute a republication, *Keeton*, 465 U.S. 774 n.3, the August 2018 communication was in fact received by "new person[s]." Plaintiffs provided two affidavits attesting to that fact (JA1815 ¶6, JA1821 ¶6); Defendants produced no evidence to the contrary. Instead, they contend that "a change in the Council's membership does not demonstrate that by sending an email to Council, APA sought to publicize the Report to a new audience." APA Br. at 47. But that phrasing evades the critical question: not whether a new

communication "sought to publicize" to a new audience, but whether it did in fact reach new recipients. Restatement (Second) of Torts § 577A cmt. c, d.

3. Although a finding that a defamatory statement has been republished does not require that the statement be revised, Defendants rely on the Superior Court's finding that "there was no modification, or revision, to the Report." APA Br. at 48. Yet Plaintiffs cited cases demonstrating that such a modification does not require changes to the original statement, but only the addition of other documents relevant to its substance. In fact, the *Eramo* court held that, even when the addition was an "Editor's Note" retracting part of the original defamatory article, that addition created a triable issue of fact as to whether a republication had occurred. *Eramo*, 209 F. Supp. 3d at 880. Similarly, the addition of documents critical of the Report by its publisher, APA, creates a triable issue of fact as to republication.

Defendants' reliance on the Superior Court's finding that the additional documents "did not appear on the same webpage as the Report," JA2213, but were hyperlinked from the page that contained a link to the Report, is equally without merit. APA Br. at 47-48. The Council minutes stated that "APA will include the Independent Review report and related materials on its website in the context of the Timeline of APA Policies & Actions related to" interrogation issues. That Timeline functioned as a table of contents, enabling easy access to all the documents it listed.

While Defendants cite a plethora of cases, those cases do not confront facts where republication is asserted on the basis of much more than a mere reference or hyperlink, or a document's continued hosting on a website, or changes to the website. The facts of this case—the context, content, and purpose of the General Counsel's email; the content of the publicly available minutes of the Council meeting; and the posting alongside the link to the Hoffman Report of links to documents directly related to it—take it beyond the reach of the Defendants' cases.

D. Sidley Is Liable for the Republication Because It Was Foreseeable.

Sidley asserts that the Superior Court's ruling that there was no republication should be upheld as to Sidley because Plaintiffs failed to show that it "had any involvement in an August 2018 vote by the APA Council of Representatives . . . ." Sidley Br. at 43. Sidley grossly misstates the case law to assert that it cannot be held liable for the republication unless it "published or knowingly participated in publishing the defamation" (quoting *Tavoulareas*, 759 F.2d at 136) and "had some responsible participation" in the publication (citing *Tavoulareas v. Piro*, 93 F.R.D. 11, 15 (D.D.C. 1981)[7]). Sidley Br. at 43-44.

[7] This case involved a summary judgment motion against *The Washington Post* and Katherine Graham, the chair of its board and chief executive officer. The question was her responsibility as an individual for the publication of the defamatory statements at issue, not the foreseeability of a republication.

In *Tavoulareas,* the D.C. Circuit held the opposite: Under D.C. law, "[t]he maker of a [defamatory] statement may be held accountable for its republication if such republication was reasonably foreseeable," and "there is no need to require proof that [defendant] knowingly participated in [another person's] republication" of his defamatory statements for the defendant to be liable for their republication. *Tavoulareas*, 759 F.2d at 136 n.56.

Here, the record evidence confirms that the republication was entirely foreseeable. That evidence includes public statements by APA that:

- it would "undertake an aggressive communications program to inform members and the general public of the report's findings" (JA1801 n.53);
- "the APA Board will make [the Report] available . . . to the APA Council of Representatives, APA members and the public" (JA1801 n.54); and
- APA "will take actions in response to the report and the recommendations of the special committee as it finds appropriate" (JA1801 n.55).

Courts have held far less than this evidence sufficient to demonstrate that republication was reasonably foreseeable to a defendant. *See, e.g., Stephan v. Baylor Medical Center*, 20 S.W.3d 880, 889 (Tex. App. 2000) ("It is clear the NPDB released the report at its discretion to others and not at Baylor's direction. Baylor made its report, however, with full knowledge of how the information would be used and potentially disseminated by the NPDB." (citations omitted)).

V. UNDER THE PLAIN LANGUAGE OF THE HOME RULE ACT AND D.C. CODE TITLE 11, THE D.C. COUNCIL MAY NOT ESTABLISH PROCEDURES MODIFYING THE F.R.C.P. WITHOUT THIS COURT'S APPROVAL.

To avoid the conclusion that the Anti-SLAPP Act (the "Act") violates the D.C. Home Rule Act (Opening Br., pp. 52-59), Intervenor and Defendants try to construe away the plain language of the Act and Title 11 to limit their scope. These attempts fail in the face of the language itself. (Section A.) Nor is their argument saved by asserting that the Anti-SLAPP Act "is substantive, not procedural." Intervenor's Br. at 9. As descriptions of the Act by D.C. courts and the D.C. Council itself demonstrate, the Act functions as a procedural mechanism. Even if it were held to be primarily substantive, which it is not, it contains procedures that modify the Federal Rules of Civil Procedure and that the Superior Court must follow, in contravention of § 11-946. Contrary to their contention, case law from this Court, including *Mann*, does not support their conclusions. (See Section B below.)

The Home Rule Act provides that 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). Section 946 of Title 11 provides that "The [D.C.] Superior Court shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it prescribes and 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."

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that [the lawmaker] has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc). It is "axiomatic that the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Tippett v. Daly*, 10 A.3d 1123, 1126 (D.C. 2010).

A. Section 1-206.02(a)(4) Cannot Be Read to Preclude Only Laws Altering the Courts' Organization or Jurisdiction.

Intervenor and Sidley argue that the broad language of Section 1-206.02(a)(4) should be construed to prohibit enactment only of laws that directly conflict with the existing organization or jurisdiction of D.C. courts. Intervenor's Br. at 8-9, Sidley Br. at 45-46. They are mistaken, and they are also mistaken that the cases they cite from this Court support that construction.

First, their construction is contrary to the statute's plain language, which bars the Council from enacting "any act, resolution or rule with respect to *any provision of Title 11*." D.C. Code § 1-206.02(a)(4) (emphasis added). The phrase "with respect to," when used by Congress to preempt state action, asserts exclusive power over any subject having "some relation to" the Congressional act. *In re Crawley*, 978 A.2d 608, 613, 619-20 (D.C. 2009) ("As the Supreme Court has held, 'the ordinary

meaning of ['relating to'] is a broad one—to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association with or connection with' . . . . *Morales v Trans World Airlines, Inc.*, 504 U.S. 7 (1992) . . . .").

That same meaning should be applied in interpreting the Home Rule Act. Title 11's provisions address several issues relating to the D.C. court system, and Council action "with respect to" any one of them is barred by the Act's plain language.

Second, the law is unanimously against the Intervenor's argument that the parenthetical in Section 1-206.02(a)(4)—("relating to organization and jurisdiction of the District of Columbia courts")—imposes a limiting construction on the section's broad language. Intervenor's Br. at 8-9. As Plaintiffs pointed out in their Opening Brief, when a parenthetical states the title of the statute or section referred to, courts do *not* presume that it limits the plain language of a statute. *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011); *United States v. Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999); *United States v. Kassouf,* 144 F.3d 952, 959-960 (6th Cir. 1998). This parenthetical is simply the title enacted *for the entirety* of Title 11, not a clause limiting its language. Intervenor offers no response.

The cases Intervenor cites provide no support for its position:

- *Price v. D.C. Board of Ethics & Gov't,* 212 A.3d 841 (D.C. 2019): Not only is this case factually distinguishable (Opening Br. at 57), but it holds that, under Section 1-206.02(A)(4), the Council is precluded from "amending Title 11 itself."

As we show below, that is precisely the effect of the Anti-SLAPP Act, which creates an unapproved exception to Congress' mandate that the Superior Court "conduct its business according to the Federal Rules of Civil Procedure" unless this Court approves a modification. The Intervenor's contention that the Anti-SLAPP Act does not change court procedures fails for the reasons discussed in Section B.

- *Woodroof v. Cunningham,* 147 A. 3d 777 (D.C. 2016): *Woodroof* states, "When the Council's actions do not run directly contrary to the terms of Title 11 . . . [we] have chosen not to interpret this language rigidly." *Id.* at 784. The Anti-SLAPP Act *does* run directly contrary to the terms of Section 11-946.

- *Umana v. Swidler & Berlin, Chartered,* 669 A.2d 717 (D.C. 1995), also supports Plaintiffs' position: to the extent a statute "modifies the practice" under Federal Rule 54(b), it conflicts with D.C. Code § 11-946. *Id.* at 721, n.12. The Anti-SLAPP Act "modifies the practice" under Federal Rules 12 and 56.

- *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010): The court merely comments in passing that Section 1-206.02(a)(4) is "narrowly construed," without offering any explanation.

- *District of Columbia v. Greater Washington Labor Council, AFL-CIO,* 442 A.2d 110 (D.C. 1982): The Intervenor's short quotation is from a description of *the trial court's ruling,* which this court reversed. *Id.* at 115.

B. The Anti-SLAPP Act Creates Procedures Governing the Superior Court, Thus Violating D.C. Code § 11-946.

Intervenor and Sidley argue that the Act falls outside the scope of D.C. Code § 11-946 because it grants certain defendants "substantive rights . . . ." Intervenors' Br. at 17-18, Sidley Br. at 45-46. That argument fails for two reasons.

First, the Council's description of the Act cannot disguise the fact that it functions as a procedural mechanism. As a D.C. federal court has stated, the Attorney General's argument is "largely a masquerade" that attempts to clothe "a summary dismissal procedure . . . in the costume of the substantive right of immunity . . . ." *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 108, 110-11 (D.D.C. 2012). Whether the Act is substantive depends on the Act's actual function—which is procedural.

The "substantive" right the Intervenor claims the Act bestows has no "substantive" content. The Act does not authorize its defendants to do anything they would not otherwise have the right to do: to speak, petition the government, assemble, or anything else. Nor does it create immunity from liability for the underlying tort, as would be necessary to make it substantive. *See, e.g., Boulter*, 842 F. Supp. 2d at 108 ("The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure . . . ."); *Los Lobos Renewable Power, L.L.C. v. AmeriCulture, Inc.*, 885 F.3d 659, 672 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 591 (2018).

Second, even if the Act were deemed "substantive" because the Council said it was, it clearly contains procedures that govern the Superior Court. Every one of Intervenor's statements describing the Act's operation speaks of a procedural mechanism: a mechanism to dispose of lawsuits more quickly (Intervenor's Br. at 17-18); dramatically increasing the burden on plaintiffs to justify discovery (*Id.* at 3); providing a procedural mechanism making it easier to obtain quick dismissals (*Id.* at 28); and mirroring the standards of Federal Rules 12 and 56 (*id.* at 19).

Calling access to a specially erected procedural mechanism a "substantive" right robs the term of any meaning. Intervenor's use of the word "substantive" is entirely conclusory, and the Sidley brief adds nothing to the Intervenor's argument.

Mann, cited by the Intervenor, does not "find" that the Anti-SLAPP Act is substantive. Intervenor's Br. at 18. The Court was asked only to decide whether it had jurisdiction to hear the interlocutory appeal of a dismissal of an anti-SLAPP special motion, as well as the standard applicable in considering the merits of a special motion. *Mann,* 150 A.3d at 1220. Although it acknowledged that the D.C. Council intended "to create a substantive right not to stand trial," *Id.* at 1231, it did not confront directly the question of whether the Act is substantive or procedural.

In fact, *Mann's* description of the Act reinforces its procedural nature: "The rights created by the Act comprise a special motion to dismiss a complaint, D.C. Code, § 16-5502, and a special motion to quash discovery orders, requests for

information, or subpoenas for personal identifying information in suspected SLAPPs, D.C. Code § 16-5503.)" *Id.* at 1226-27. Both mechanisms are procedural.

Nor does *Mann* hold that the Anti-SLAPP special motion to dismiss in total "simply mirror[s]" Federal Rules 12 and 56. Intervenor's Br. at 19. *Mann* recognizes that the Act imposes onerous procedural hurdles on plaintiffs not found in the Federal Rules, including flipping the burden of persuasion from defendants to plaintiffs, *Mann,* 150 A.3d at 1237, 1238, n.32, and making plaintiffs liable to an award of costs and fees if that motion succeeds. *Id. Mann* held that the reversed burden of the Act is substantively the same as that of a Rule 56 motion, but it did not (nor could it) make the holding with respect to Rule 12, and the court expressly noted the additional burdens on the non-moving party.

Moreover, although the *Mann* court drew an analogy between the Act's provisions and qualified immunity, *Mann*, 150 A.3d at 1229, it applied the analogy insofar as the Act protects "meritless" SLAPPs. An immunity from meritless lawsuits is not the type of immunity that makes a statute substantive.[8]

[8] *See, e.g., United Sec. Corp. v. Bruton,* 213 A.2d 892, 893-94 (D.C. 1965) (statute relating solely to burden of proof and rules of evidence is procedural); *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) ("[Q]ualified immunity allows defendants to avoid liability even when they may have violated the law so long as they acted reasonably. Qualified immunity (on its own) does not tell a court what showing is necessary at the motion to dismiss or summary judgment stages in order to dismiss a case before trial. Rather, Federal Rules 12 and 56 do that. The D.C. Anti–SLAPP Act, to use the words of the D.C. Court of Appeals,

Federal courts, including the D.C. Circuit, have repeatedly cited *Mann*'s highlighting of these procedural burdens to hold that the Act cannot be applied in Federal court because it is at least partly procedural. *See, e.g.*, *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 238-239 (D.C. Cir. 2021). Intervenor and Sidley briefly acknowledge the D.C. Circuit's recent opinion in *Tah,* but neither makes any attempt to address its reasoning. Intervenor's Br. at 19; Sidley Br. at 47, n.19.

Nor do any of the other cases cited by the Intervenor withstand scrutiny. *Doe v. Burke,* 133 A.3d 569, 575-576 (D.C. 2016) is similar to *Mann*: It merely mentions without analysis the Council's description of quick dismissals and attorney fee awards as "substantive rights." *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 502 (D.C. 2020) follows *Mann* by characterizing a quick motion to dismiss and a stay of discovery—both procedural mechanisms—as "substantive" rights without offering any supporting analysis. The decision in *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 612 (D.C. 2020) merely quotes the Council report for the Anti-SLAPP Act as characterizing the Act as creating "substantive" rights.

Even the legislative history of the Act supports the conclusion that the Act is, at least in part, procedural. The Council Committee Report describes the Act as creating provisions "to provide an expeditious process" for litigating SLAPPs. D.C.

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establishes a new 'procedural mechanism' for dismissing certain cases before trial. . . . And it differs from those Federal Rules."(internal citations omitted)).

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 "a motion to quash"—procedural mechanisms. 58 D.C. Reg. 741 (Mar. 31, 2011). Before the Act was passed, the D.C. Attorney General warned the Council of the Act's conflict with the Home Rule Act. JA1167.

C. Section 11-946 and the Home Rule Act Provide That Only the D.C. Courts—Not the Council—May Change Procedural Rules.

Finally, Intervenor briefly argues that D.C. Code § 11-946 "only constrains the Superior Court's ability to prescribe and adopt procedural rules, not the Council's." Intervenor's Br. at 21. Intervenor's argument attempts to create a distinction where there is none. If the Council imposes procedural rules that the Superior Court must follow, the result is the same as if the Superior Court adopted the rules directly without approval by this Court.

The Intervenor's reading of Section 11-946 is also irreconcilable with the Home Rule Act. Section 1-206.02 is headed "Limitations on the Council." It provides that "*The Council* shall have no authority" to enact any act, resolution, or rule "with respect to *any provision of Title 11*." D.C. Code § 1-206.02(a)(4) (emphasis added). *Neill v. D.C. Pub. Emp. Rels. Bd.,* 93 A.3d 229, 237 n.31 (D.C. 2014), cited by Intervenor, merely cites Section 11-946 as authority for the Superior Court to amend a formatting rule. It says nothing about the Council doing so.

The power to modify the D.C. courts' procedural rules is exclusively vested in the D.C. courts. The D.C. Council has no authority to legislate respecting Title 11 of the Code—including Section 11-946. D.C. Code § 1-206.02(a)(4).

VI. THE ANTI-SLAPP ACT, BOTH ON ITS FACE AND AS APPLIED, UNCONSTITUTIONALLY INTERFERES WITH THE FIRST AMENDMENT RIGHTS OF PLAINTIFFS WITH WELL-FOUNDED CLAIMS.

The Anti-SLAPP Act is unconstitutional for two reasons: (1) the Act contains no mechanism limiting its application only to actual SLAPP suits, and thus imposes its onerous burdens on plaintiffs who are legitimately suing to redress wrongs as well as on those attempting to stifle speech; and (2) it grants defendants virtually an unlimited privilege for defaming purported public figures and public officials by making the highly discovery-intensive showing of actual malice nearly impossible. Intervenor and Defendants have failed to respond effectively to either point.

Intervenor and Sidley's only response is circular. They argue that the Act passes constitutional muster because it bars only meritless claims not protected by the First Amendment. Intervenor's Br. at 22, 24; Sidley Br. at 48-49. (APA adopts Sidley's arguments; APA Br. at 49.) But they acknowledge that the decision about whether a claim is meritless takes place only *after* the Act's onerous conditions, including the likely-to-succeed test, have already been applied. Neither offers any explanation of what rational basis there could possibly be (let alone under the "exacting scrutiny" required here, *Elrod v. Burns*, 427 U.S. 347, 362 (1976)) for

applying the Anti-SLAPP procedural barriers to claims that are not SLAPPs as well those that are. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.,* 859 F.3d 720, 726 (9th Cir. 2017) ("The Supreme Court has cautioned against broad assertions of immunity from suit and has instructed us to 'view claims of a right not to be tried with skepticism, if not a jaundiced eye.' *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).").

Intervenor and Sidley offer no response to Plaintiffs' discussion of the barriers the Act imposes on actual-malice claims by purported public figures and officials.

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

According to Intervenor and Sidley, the requirement that plaintiffs demonstrate their claims have merit by proving they are "likely to prevail"—despite being denied almost all discovery—is a constitutionally acceptable substitute for requiring proof that a complaint actually is a SLAPP suit. Intervenor's Br. at 23-25; Sidley Br. at 48-49. This cannot be true, when suits that are not SLAPPs face a much higher bar for avoiding dismissal than they would outside the Act's mechanisms.

The principal authority cited by Intervenor is the California Supreme Court's decision in *Equilon Enter., LLC v. Consumer Cause, Inc.*, 52 P.3d 685 (2002). However, in *Equilon* the plaintiff's only *constitutional* claim was that *fee-shifting* without proof of intent burdened the right to petition. *Id.* at 62-65.

Pointing to "substantive and procedural limitations" within the statute designed to protect plaintiffs, the *Equilon* court predicted that its holding "will not allow the Anti-SLAPP statute itself to become a weapon to chill the exercise or protected petitioning activity by people with legitimate grievances." *Id.* at 65-66. The court's confidence was almost immediately proven unjustified. A year later, in 2003, the California legislature enacted Code of Civil Procedure section 425.17:

> [T]here has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.

Grewal v. Jammu, 191 Cal.App. 4th 977, 997 (2011).

One of the law professors whose work was the basis for the original Anti-SLAPP Act wrote in support of the 2003 amendment:

> How ironic and sad . . . that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head.

Id. at 997, n.10.

The abuse of California's statute had already been noted in a dissent signed by three of the seven Supreme Court Justices. Then-Justice Brown wrote: "The cure has become the disease—SLAPP motions are now just the latest form of abusive litigation." *Navellier v. Sletten*, 29 Cal. 4th 82, 96 (2002) (Brown, J., dissenting).

In the District of Columbia, a similar history has unfolded. Plaintiffs have located 29 cases in which the D.C. Act has been deployed by a defendant since its passage. (See Exhibit A.) It does not appear the Act has been used to protect activists protesting about issues of public interest. Instead, the Act has been deployed by mostly large institutional defendants. When the Act is used to prevent citizens from pursuing legitimate claims against deep-pocketed institutional defendants, it is being deployed in a manner exactly opposite to the D.C. Council's intent.

Other cases cited by Intervenor are no more helpful:

- *Sandholm v. Kuecker*, 962 N.E.2d 418 (Ill. 2012) squarely supports Plaintiffs' position: "[I]f the plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill defendants' rights of petition, speech, association or participation in government, it is not a SLAPP and does not fall under the purview of the Act." *Id.* at 429. Intervenor claims the *Sandholm* court construed the state's anti-SLAPP act to require proof of a plaintiff's bad faith "because the act did not otherwise allow plaintiffs to show a likelihood of success." Intervenor's Br. at 23-24. *Sandholm* says nothing of the kind. The court says a suit may move forward if a defendant fails to show "that the claims against it are 'based on' the petitioning activities *alone* and have *no substantial basis other than or in addition* to the petitioning activities implicated." *Id.* at 431 (citations omitted) (emphasis added).

- In *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998), the court said the same thing as the *Sandholm* court.

- *Ryan v. Fox Television Stations, Inc.,* 979 N.E.2d 954 (Ill. 2012) does not create an improper-motive requirement because of the lack of a merits standard, as Intervenor's Brief claims at 25-26. Instead, it follows *Sandholm,* requiring a showing *both* that a claim is a SLAPP *and* that it lacks substantive merit. *Id.* at 961.

- Four cases cited by the Intervenor involve litigants previously adjudicated to be vexatious who then filed a new lawsuit. But a vexatious litigant statute *already* requires an implicit determination that future filings are likely to be driven by the plaintiff's bad faith. Intervenor Br. at 24.

B. Plaintiffs Bringing Discovery-Intensive Public-Figure or Public-Official Defamation Claims Cannot Constitutionally Be Required to Prove Their Cases Without Sufficient Discovery—Otherwise, the Act Has Created an Absolute Privilege for Defamatory Speech.

Plaintiffs' Opening Brief showed that the overall structure of the Act makes it unconstitutional, at minimum as applied to discovery-intensive public-figure defamation cases: It requires an almost immediate showing not just of plausibility but that a plaintiff is likely to prevail; it denies access to most discovery; and it imposes a threat of liability for attorney fees that is likely to dissuade many plaintiffs with good-faith claims from petitioning. Opening Br. at 68-70.

Intervenor and Sidley's only response is that there is no constitutional right to discovery and attorney fees awards are not constitutionally suspect. Intervenor's Br.

at 27-29; Sidley Br. at 49-50. That is no answer at all. The proposition that discovery could constitutionally be denied to all litigants in all cases does nothing to show that it can be granted to some good-faith plaintiffs and arbitrarily denied to others. A First Amendment violation cannot be excused by an Equal Protection violation.

As shown in Section II, the trial court should never have reached the question of actual malice because Plaintiffs are not public officials. But once it did, Plaintiffs were required to show Defendants' states of mind. That endeavor is discovery-intensive. *Harte-Hanks Commc'ns,* 491 U.S. at 668. Opening Br. at 68-70.

Although Intervenor insists that defendants need protection from abusive discovery (Intervenor's Br. at 29), this is unjustifiable double-counting. Those criticizing purported public figures *already* have the protection of requiring proof of actual malice. *Calder v. Jones,* 465 U.S. 783, 790-791 (1984) ("[T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.").

The Act makes public-official or public-figure defamation claims virtually impossible to prove, no matter how legitimate they are. *See* Justin W. Aimonetti & M. Christian Talley, "*How Two Rights Made a Wrong: Sullivan, Anti-SLAPP, and the Under-Enforcement of Public Figure Torts*," 130 Yale L. Journal 708 (2021).

VII. CONCLUSION

Because defendants are unlikely to admit they "entertained serious doubts as to the truth of [their] statements," actual malice is typically proved by "an accumulation of the evidence and appropriate inferences. . . ." *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1085 (9th Cir. 2002) (citations omitted). If the Superior Court's decision is allowed to stand despite Plaintiffs' accumulation of evidence, under the weight of the actual-malice standard there is essentially no defamation cause of action anymore for citizens in low-level and mid-level governmental positions who have no access to the press to defend themselves. This is especially true if the Anti-SLAPP Act is deployed. This court's doors will be closed to their petitions and there will be no access to justice for falsehoods against them.

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 19th day of July 2021.

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

	CAPTION	SUP. CT./APPEAL NO.	TYPE OF CASE
1	*Cunningham v. Berlitz Languages, Inc.*	2020 CA 003260 B	Defamation, false light
2	*D.C. v. Precision Contr. Solutions, LP*	2019 CA 005047 B 2020 CA 001596 B 20-CV-0472 20-CV-0471	Defamation, tortious interference with business relations, civil conspiracy
3	*Bronner v. The American Studies Association et al.*	2019 CA 001712 B 19-CV-1222	Breach of fiduciary duties, ultra vires, and breach of contract
4	*The Praxis Project v. Coca-Cola Company et al.*	2017 CA 004801 B	Fraudulent misrepresentation
5	*Close It! Title v. Nadel*	2018 CA 005391 B *Close It! Title Servs. v. Nadel*, 248 A.3d 132 (D.C. 2021)	Defamation, false light, and tortious interference
6	*The Institute for Gulf Affairs et al. v. the Saudi American Public Relation Affairs Committee et al.*	2018 CA 004709 B *Saudi Am. Pub. Rels. Affairs Comm. v. Inst. for Gulf Affairs*, 242 A.3d 602 (D.C. 2020)	Defamation
7	*Jacobson v. National Academy of Sciences et al.*	2017 CA 006685 B	Defamation, breach of contract, promissory estoppel
8	*German Khan, et al. v. Orbis Business Intelligence Limited, et. al.*	2018 CA 002667 B *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494 (D.C. 2020)	Defamation
9	*TS Media, Inc. v. Public Broadcasting Service*	2018 CA 001247 B 20-CV-0538	Court dismissed only the two tort claims: intentional interference with contract and tortious interference with business expectancy
10	*Wilkenfeld v. Stewart Partners Holdings LLC*	2017 CA 003420 B	Declaratory judgment
11	*Peter Gordon, et al. v. First Hills Neighborhood Alliance, et al.*	2016 CA 006397 B 17-CV-1202	Fraudulent misrepresentation, tortious interference with contract
12	*Simpson v. Johnson & Johnson et al.*	2016 CA 001931 B	Negligence, fraud, conspiracy
13	*JAP Home Solutions, Inc. v. Lofft Construction, Inc. et al.*	2017 CA 003390 B	Defamation, conspiracy to injure, tortious interference

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14	*CEI et al. v. Mann*	2012 CA 008263 B *Competitive Enter. Inst v. Mann*, 150 A.3d 1213 (D.C. 2016)	Defamation
15	*Burke v. Doe #1 et al.*	2012 CA 007525 B *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014); *Doe v. Burke*, 133 A.3d 569 (D.C. 2016)	Defamation
16	*Park v. Brahmbhatt*	2015 CA 005686 B 18-CV-0872	Assault and battery, abuse of process, tortious interference, and blackmail
17	*Two Rivers Public Charter School, Inc. et al. v. Weiler et al.*	2015 CA 009512 B 16-CV-0558	Intentional infliction of emotional distress, private nuisance/ conspiracy to create a private nuisance
18	*Pitts v. WJLA et al.*	2016 CA 002054 B	Defamation, false light, misrepresentation, intentional infliction of emotional distress
19	*Moore v. Costa*	2016 CA 004038 B	Defamation
20	*Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l et al.*	2014 CA 002273 B	Defamation, declaratory judgment
21	*Vandersloot and Melaleuca, Inc. v. Foundation for Nat'l Progress et al.*	2014 CA 003684 2 14-CV-1366	Defamation, motions to compel/quash
22	*The Washington Travel Clinic, PLLC et al. v. Kandrac*	2013 CA 003233 B 14-CV-1016; 14-CV-0060	Defamation, tortious interference
23	*Payne v. District of Columbia et al.*	2012 CA 006163 B	Defamation, false light, intentional infliction of emotional distress, constitutional defamation violation of Fifth Amendment liberty interest
24	*Vincent Forras et al. v. Iman Feisal Abdul Rauf, et al.*	2011 CA 008122 B	Defamation, false light, assault, intentional infliction of emotional distress

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WHERE ANTI-SLAPP MOTIONS WERE FILED

25	*Newmyer, et al. v. The Sidwell Friends Sch.*	2011 CA 003727 M *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023 (D.C. 2015)	Defamation, false light invasion of privacy, tortious interference with contract, intentional infliction of emotional distress
26	*Lehan v. Fox Television Stations, Inc. et al.*	2011 CA 004592 B	Defamation. Court held Act is **PROCEDURAL**, not substantive, and therefore applies retroactively.
27	*Snyder v. Creative Loafing Inc. et al.*	2011 CA 003168 B	Defamation
28	*Campbell v. CGI Group, Inc. et al.*	2012 CA 008217 B	Defamation, intentional infliction of emotional distress, interference with contractual relations
29	*Dean v. NBC Universal*	2011 CA 006055 B	Defamation

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Reply Brief of Appellants Cols. (Ret.) L. Morgan Banks, III, Debra L. Dunivin, and Larry C. James was served by electronic means through the D.C. Court of Appeal's filing system, concurrent with the filing of this document on this 19 day of July 2021.

/s/*Kirk Jenkins*
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