No. 20-CV-318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

L. MORGAN BANKS, III, *et al*.,
APPELLANTS,

v.

DAVID H. HOFFMAN, *et al*.,
APPELLEES.

ON APPEAL FROM ORDERS OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

The District of Columbia's Anti-SLAPP Act is designed to prevent the use of private lawsuits to chill protected speech. To this end, it allows a defendant to file a "special motion to dismiss" to ensure expeditious resolution of legally insufficient claims that fall within the Act's scope. The issues presented are:

1. Whether the Anti-SLAPP Act's "special motion to dismiss" provision is consistent with the Home Rule Act, where the Act does not directly conflict with or amend the organization or jurisdiction of the District's courts but is simply an exercise of the Council's broad authority to create a substantive right.

2. Whether the Anti-SLAPP Act's "special motion to dismiss," discovery, and fee-shifting provisions comply with the First Amendment right to petition the courts where this right does not preclude dismissal of meritless lawsuits, the Act sufficiently accommodates a plaintiff's interest in allowing the opportunity for targeted discovery when necessary, and fee-shifting provisions do not implicate the Constitution.

STATEMENT OF THE CASE

Plaintiffs L. Morgan Banks III, Debra L. Dunivin, and Larry C. James filed this suit seeking compensatory and punitive damages against defendants Sidley Austin LLP, Sidley Austin (DC) LLP, David Hoffman, and the American Psychological Association ("APA") for defamation per se, defamation by

implication, and false light. JA 318-47. Defendants filed special motions to dismiss under the District's Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* JA 432, 702. When plaintiffs moved to declare the Act void under the District's Home Rule Act and unconstitutional under the First Amendment, *see* JA 2043, the District intervened to defend its legislation, 11/15/19 District Br. 1. After rejecting those challenges, JA 2043, the Superior Court granted the special motions and dismissed the case with prejudice, JA 2221. Plaintiffs filed a timely appeal.

STATEMENT OF FACTS

1. The District's Anti-SLAPP Act.

Like most states, the District has enacted an anti-SLAPP statute to protect free expression and the exercise of political rights. D.C. Code § 16-5501 *et seq.*; D.C. Council, Report on Bill 18-893, at 3 (Nov. 18, 2010). A "SLAPP" is a "strategic lawsuit against public participation," "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) (quoting Report on Bill 18-893, at 1). The goal is "not to win the lawsuit but to punish the opponent[s] and intimidate them into silence." *Id.* (quoting Report on Bill 18-893, at 4). To protect the targets of such suits, the District's Anti-SLAPP Act "allow[s] a defendant to more expeditiously, and more equitably, dispense of a SLAPP." Report on Bill 18-893, at 1.

Among its provisions, the Anti-SLAPP Act authorizes a defendant to file a "special motion to dismiss" to quickly eliminate meritless claims. D.C. Code § 16-5502. In such motion, the defendant must first make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). If the defendant makes a prima facie showing, the burden shifts to the plaintiff to demonstrate "that the claim is likely to succeed on the merits." *Id.* This Court has interpreted the Act to require that the "plaintiff present an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann*, 150 A.3d at 1261-62. "If the plaintiff cannot meet that burden, the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Id.* at 1227.

Once a special motion to dismiss is filed, "discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). However, "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted." *Id.* § 16-5502(c)(2). It is "difficult" for a plaintiff to meet this standard, as he must show "more than 'good cause.'" *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 512 (D.C. 2020). A plaintiff bears the burden "to articulate how targeted discovery will enable him to

defeat the special motion to dismiss" and to "show that it is 'likely' the discovery will produce that result." *Id.* at 512-13.

The Act further directs the court to "hold an expedited hearing on the special motion to dismiss" and "issue a ruling as soon as practicable" afterward. D.C. Code § 16-5502(d).

2. The Present Case.

a. Plaintiffs' complaint.

Plaintiffs are three retired military psychologists. JA 247-50.[1] According to their complaint, in the wake of September 11, 2001, the American public began to closely scrutinize "the role of psychologists and psychiatrists" in alleged torture programs. JA 258; *see* JA 257. In 2004, "[a]mid [this] growing press coverage," "*The New York Times* published an article regarding the possible involvement of psychologists in abusive interrogations." JA 258.

In response to the article's accusations, the APA assembled a group—known as the Psychological Ethics and National Security ("PENS") Task Force—"to explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." JA 258 (quotation marks

[1] Originally, five plaintiffs brought this suit, but two were referred to arbitration with defendants as a result of their employment contracts. JA 25, 1785-86.

omitted). Two plaintiffs were members of the task force, and the other plaintiff "propose[d] members for it." JA 250; *see* JA 259.

The PENS Task Force met for three days in 2005. JA 259. At the conclusion of its meetings, it issued "twelve statements about the ethical obligations of the APA members" to establish guidelines as to how psychologists could ethically assist with national security interrogations. JA 259; *see* JA 2167. But the recommendations did not outright ban psychologists from assisting with interrogations. *See* JA 2167. The APA Board approved and endorsed the recommendations less than a week after the task force issued them. JA 259-60.

In 2014, then-New York Times reporter James Risen published a book titled *Pay Any Price: Greed, Power and Endless War*. JA 237. The book claimed that the APA had "colluded with the Bush administration, the Central Intelligence Agency[,] . . . and the U.S. military to support torture." JA 237; *see* JA 2165.

In response to the book, the APA commissioned the law firm Sidley Austin LLP ("Sidley") to conduct an independent review of issues relating to the APA's ethical guidance for interrogations. JA 237; *see* JA 2224. David Hoffman was the lead Sidley partner assigned to the matter. JA 251. The review culminated in Sidley's investigative report to the APA, JA 237, entitled "Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture" ("the Report"), JA 2225. Ultimately, the Report concluded that "key APA

officials . . . colluded with important [Department of Defense] officials to have APA issue loose, high-level ethical guidelines that did not constrain [the Department of Defense] in any greater fashion than existing [Department of Defense] interrogation guidelines." JA 2246. According to the complaint, the Report specifically "identifie[d] each [p]laintiff by name as being an active partner or participant . . . in this collusive joint enterprise." JA 238.

Plaintiffs alleged that the Report was false in three primary respects. JA 241. First, it asserted that the plaintiffs and others colluded by ensuring that the task force's guidelines "were no more restrictive than 'existing' military guidelines," which were, according to the Report, "too loose to constrain abuses that amounted to torture." JA 241. Second, the Report stated that from 2006 to 2009, plaintiffs and others "prevent[ed] the APA from banning psychologists' participation in national-security interrogations." JA 241. Finally, the Report concluded that plaintiffs and others "mishandl[ed] ethics complaints to protect national-security psychologists from censure." JA 241.

b. The special motion to dismiss.

Defendants filed special motions to dismiss under the District's Anti-SLAPP Act, D.C. Code § 16-5502. JA 432, 702. Both motions argued that, because the Report was "in furtherance of the right of advocacy on issues of public interest," JA 449, 716, the Act shifted the burden to plaintiffs to show a likelihood of success on

the merits—and that plaintiffs were unable to meet this burden. JA 449-64, 716-33. Defendants asserted that the plaintiffs were public officials, and that plaintiffs' allegations failed to demonstrate that defendants had acted with malice. JA 456-64, 720-33. Plaintiffs moved for targeted discovery under the Act, and following a hearing, the court granted that motion in part. JA 735, 853, 952-56.

During briefing, plaintiffs moved to declare the Act void under the District of Columbia Home Rule Act and unconstitutional under the First Amendment, JA 1161, and the District intervened to defend the Act, 11/15/19 District Br. 1. The court denied plaintiffs' motion. JA 2043. It held that the Act "does not alter the jurisdiction of the courts, or otherwise interfere with the court's structure or core functions contrary to the Home Rule Act." JA 2049. It further held that the Act did not violate the First Amendment—it was neither overbroad, nor did it burden plaintiffs' right to petition the courts because it did not prevent meritorious claims from proceeding. JA 2051-55.

On March 11, 2020, after completion of targeted discovery and supplemental briefing, the court granted defendants' special motions to dismiss. JA 2164-66. The court first held that defendants had made a prima facie showing that each activity challenged by the plaintiffs was covered under the Act. JA 2175-78. It also noted that the Report was protected "advocacy." JA 2176. The court then found that each plaintiff was a "public official" for purposes of defamation law. JA 2178-82.

The burden then shifted to plaintiffs to show a likelihood of success on the merits. JA 2211. The court first held that one of plaintiffs' arguments—that the APA had "republished" the Report by linking to it on its website—failed as a matter of law. JA 2182-84. The court then found that plaintiffs had not proffered evidence to convince a reasonable jury that defendants had acted maliciously in publishing the Report. JA 2184-91. But even if plaintiffs were private figures, the court held that they had still not offered evidence that defendants "fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others." JA 2191 n.10 (alteration in original) (quoting *Kendrick v. Fox Television*, 659 A.2d 814, 822 (D.C. 1995)). Holding that plaintiffs' claims were legally insufficient, the court dismissed the case with prejudice. JA 2191-92. The parties submitted a joint motion to defer applications for attorneys' fees under the Act. JA 37-38.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *Mann*, 150 A.3d at 1233.

SUMMARY OF ARGUMENT

This Court should affirm the validity of the District's Anti-SLAPP Act.

1. The Act does not violate the District of Columbia Home Rule Act. This Court has construed limits on the Council's authority under the Home Rule Act

narrowly to preclude the Council only from enacting laws that directly conflict with either the organization or jurisdiction of the District's courts. Indeed, even legislation that wholly prevents plaintiffs from bringing causes of action does not run afoul of the Home Rule Act. This Court has also repeatedly upheld statutes that expand the class of people who may access the courts as long as those laws do not *directly* conflict with the courts' existing jurisdiction. This Court's precedent is in line with Congress's intent decades ago to preserve the organization and jurisdiction of the newly formed District courts and allow the judicial system to mature before any major modifications.

Thus, the Anti-SLAPP Act, which merely allows defendants to obtain prompt dismissal of meritless suits, does not offend the Home Rule Act. Even assuming, as plaintiffs suggest, that the Home Rule Act precludes the Council from enacting certain rules of procedure for the Superior Court, the Anti-SLAPP Act is substantive not procedural, which both the Council and this Court have recognized. Moreover, the Act does not directly conflict with or amend D.C. Code § 11-946 or the Superior Court Civil Rules. And despite plaintiffs' contention to the contrary, D.C. Code § 11-946 itself does not restrict the Council's authority to enact legislation.

2. The Act does not violate plaintiffs' First Amendment right to petition the courts because claimants do not have a right to pursue legally insufficient claims. Courts around the country have consistently held that statutes that offer a mechanism

to preclude or quickly dismiss meritless claims do not violate plaintiffs' right to access the courts. The District's Act is no different—by allowing plaintiffs an opportunity to show that they are likely to succeed on the merits, the Act bars only legally insufficient claims.

Nor do the Act's discovery and fee-shifting provisions run afoul of the First Amendment. Parties have no constitutional right to discovery, and in any event, the Act is carefully tailored to accomplish the District's interest in promoting free expression. Plaintiffs' passing challenges to the Act's fee-shifting provision lack merit as well. The Constitution does not prohibit fee-shifting requirements, and for good reason—otherwise, it would toss aside swaths of well-accepted law allocating litigation costs. Even if the provision did implicate the Constitution, it is carefully tailored to promote public expression as well.

ARGUMENT

I. The Anti-SLAPP Act Does Not Violate The Home Rule Act.

Plaintiffs argue that the Act runs afoul of the Home Rule Act, but this claim fails because the Anti-SLAPP Act is a valid exercise of the Council's broad authority to enact local legislation. The Council enjoys a wide degree of authority under the Home Rule Act, and this Court has interpreted D.C. Code § 1-206.02(a)(4) narrowly to impede only the Council's ability to pass laws that directly alter the jurisdiction and organization of the District's courts. The Anti-SLAPP Act, which merely allows

for swift disposition of certain claims, plainly comports with this exception. But even under plaintiffs' strained interpretation of Section 1-206.02(a)(4), their argument still fails because the Act is substantive law that does not impermissibly conflict with Title 11 or the Superior Court's procedural rules.

A. The Home Rule Act grants the Council broad legislative authority, subject to a narrow exception preserving the fundamental structure and jurisdiction of the District of Columbia Courts.

While possessing "plenary power to legislate for the District of Columbia," Congress passed the Home Rule Act in 1973 to allow the District to exercise self-governance. *Apartment & Off. Bldg. Ass'n of Metro. Wash. v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772, 778 (D.C. 2019). The "paramount purpose" of the Home Rule Act is "to grant the inhabitants of the District of Columbia powers of local self-government." *Id.* at 779 (quoting *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016)). Therefore, the Home Rule Act "giv[es] the D.C. Council broad authority to legislate upon 'all rightful subjects of legislation within the District.'" *Andrew v. Am. Import Ctr.*, 110 A.3d 626, 628 (D.C. 2015) (quoting D.C. Code § 1-203.02). Congress carved out some limited exceptions. Relevant here, the Council lacks 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).

This Court construes this provision as a "narrow exception to the Council's otherwise broad legislative power 'so as not to thwart the paramount purpose of the [Home Rule Act].'" *Andrew,* 110 A.3d at 629 (alteration in original) (quoting *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010)). Accordingly, this Court has held that this exception prohibits only laws that "run directly contrary to" or "amend" either the organization or jurisdiction of the District's courts. *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019) ("[This Court] has construed this provision narrowly to mean that the Council is precluded from amending Title 11 itself."); *Woodroof*, 147 A.3d at 784 ("When the Council's actions do not run directly contrary to the terms of Title 11 . . . [this Court] construe[s] this limitation on the Council's power in a flexible, practical manner."); *see Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 723 n.15 (D.C. 1995) (explaining that Section 1-206.02(a)(4) "simply means that the Council may not change the manner in which [T]itle 11 operates to prescribe the jurisdiction of the courts in administering those laws"); *District of Columbia v. Greater Wash. Cent. Lab. Council*, 442 A.2d 110, 117 (D.C. 1982) (characterizing Section 1-206.02(a)(4) as "prohibiting the Council from enacting any act, resolution, or rule affecting the organization or jurisdiction of the local District of Columbia courts"); *Bergman*, 986 A.2d at 1225-26.

Bergman illustrates that this exception serves merely to preserve the structure of the local courts. In *Bergman*, a member of the District of Columbia Bar challenged the District's White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, which prohibited practitioners from, in some circumstances, personally soliciting "a client, patient, or customer within 21 days of a motor vehicle accident." 986 A.2d at 1211 (quoting D.C. Code § 22-3225.14(a)(1)). The challenger argued that this statute violated Section 1-206.02(a)(4) because it intruded upon this Court's authority under D.C. Code § 11-2501(a) to regulate the District of Columbia Bar. *Id.* at 1225-26. This Court rejected that challenge. *Id.* at 1225-26, 1230. Because "restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed," and because "[o]n its face, the [a]ct d[id] not affect the organization or jurisdiction" of the District's courts, the Court held that this statute did not violate the Home Rule Act. *Id.* at 1225-26; *see id.* at 1230.

This Court has repeatedly upheld other legislation against similar challenges based on Section 1-206.02(a)(4). *See Price*, 212 A.3d at 846 (holding that an act granting the Superior Court jurisdiction "to provide initial review of Ethics Board decisions d[id] not violate . . . D.C. Code § 1-206.02(a)(4)"); *Woodroof*, 147 A.3d at 782 (holding that an act allowing a party to appeal a Superior Court order denying or granting a motion to compel arbitration did not violate § 1-206.02(a)(4) because

"applying th[e] legislation d[id] not threaten the independence of the judiciary or undermine the purposes of the Hume Rule Act," and the law "ha[d] not attempted to amend D.C. Code § 11-721 itself"); *Andrew*, 110 A.3d at 628 (similar); *Hessey v. Burden*, 584 A.2d 1, 8 (D.C. 1990) (upholding an act expanding the class of people who may appeal tax assessments); *Greater Wash. Cent. Lab. Council*, 442 A.2d at 117-18 (upholding an act providing for judicial enforcement of workers' compensation orders). Conversely, this Court has struck down legislation only when it directly expanded the jurisdiction of the District's courts. *See Capitol Hill Restoration Soc., Inc. v. Moore*, 410 A.2d 184, 187-88 (D.C. 1979) (holding that the Council lacked authority to "expand[] [this Court's] traditional jurisdictional grant under Title 11 to encompass noncontested cases").

Applying this standard, this Court has held that the Council may change the substantive law to remove certain cases from a court's jurisdiction. In *District of Columbia v. Sullivan*, 436 A.2d 364 (D.C. 1981), this Court considered whether the Traffic Adjudication Act of 1978—which redesignated certain traffic violations from crimes to administrative offenses—was valid under Section 1-206.02(a)(4). 436 A.2d at 364-65. Recognizing the Council's "broad delegation of police power from Congress," the Court held that legislating the "criminal status of specific acts" did "not purport to change the criminal jurisdiction or the specific responsibilities" of the District's courts and therefore did not contravene the Home Rule Act, as the

courts' criminal jurisdiction still "remain[ed] intact." *Id.* at 365-66. This Court reached the same conclusion in *Coleman v. District of Columbia*, 80 A.3d 1028 (D.C. 2013), for acts that foreclose civil causes of action. *Id.* at 1035 & n.9 (holding that the District's Comprehensive Merit Personnel Act did not violate Section 1-206.02(a)(4) even though it did not allow job applicants to challenge hiring decisions in Superior Court).

Through its precedent, this Court has fulfilled Congress's intent in construing this restriction narrowly. "Early drafts of the [Home Rule] Act did not preclude the Council from enacting legislation that affected the local courts." *Woodroof*, 147 A.3d at 783. But because it appeared that the Home Rule Act therefore "would 'authorize[] the Council eighteen months after it takes office, to completely alter and thus to obliterate the structure, organization and jurisdiction of the District of Columbia courts,'" the Chief Judges of this Court and the Superior Court "strongly suggested 'that the new judicial system be allowed to mature and gain experience before [being] subject[ed] . . . to further major modifications.'" *Id.* (alterations in original) (quoting House Comm. on the District of Columbia, 93d Cong., Home Rule for the District of Columbia 942, 1417, 1421 (Comm. Print 1974)). Thus, the addition of Section 1-206.02(a)(4) "was primarily concerned with preserving the organization and structure of the newly created court system (established in Title 11) and the independence of the judiciary." *Woodroof*, 147 A.3d at 784. Recognizing

that the "broad language" of Section 1-206.02(a)(4) is "not self-explanatory" and demands "keeping in mind the purposes of the provision and the breadth of matters addressed in Title 11," *id.* at 783, this Court has construed Section 1-206.02(a)(4) to prohibit the Council only from passing laws that directly conflict with or amend the jurisdiction or structure of the District's courts, *id.* at 783-85.

B. The Anti-SLAPP Act does not alter the Superior Court's structure or jurisdiction in violation of the Home Rule Act.

Consistent with this precedent, the District's Anti-SLAPP Act does not directly conflict with or amend the jurisdiction or structure of the District's courts. Indeed, the Act "affect[s] the kinds of cases that the courts adjudicate" *less* than other statutes this Court has upheld against challenge. *Woodroof*, 147 A.3d at 781; *see, e.g.*, *Sullivan*, 436 A.2d at 365-66. It does not remove any case from the Superior Court's jurisdiction—a plaintiff may still bring a claim that arises from a defendant's protected activity and may still prevail if she can demonstrate her claim's merits. *See* D.C. Code § 16-5502(b). The Act "is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case." *Mann*, 150 A.3d at 1239. It simply confers on defendants the "substantive right" to avoid lengthy and burdensome litigation when they face legally insufficient claims. *Fridman*, 229 A.3d at 502. Such a statute does not affect the courts' organization or jurisdiction any more than one that wholly forecloses a cause of action. *See*

Coleman, 80 A.3d at 1035 n.9; *Sullivan*, 436 A.2d at 365-66. The Act is therefore valid under Section 1-206.02(a)(4).

Nevertheless, plaintiffs argue that the Act impermissibly "relates to" the Superior Court Rules of Civil Procedure, which are addressed in D.C. Code § 11-946. Pl. Br. 58; *see* Pl. Br. 52-53. They assert that because the Act establishes a novel procedural framework, it violates Section 1-206.02(a)(4)'s prohibition on "[e]nact[ing] any act . . . with respect to any provision of Title 11." *See* Pl. Br. 53. This argument fails. As an initial matter, as discussed *supra*, Section 1-206.02(a)(4) restricts the Council only from passing laws that run directly contrary to the "organization" or "jurisdiction" of the courts, not their rules of procedure. But even under plaintiffs' attempted expansion of this narrow exception, their argument still misses the mark for two reasons.

First, both the Council and this Court have recognized that the Act is substantive—not merely procedural—law. Worried that lawsuits filed by "one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view" "ha[d] been increasingly utilized over the past two decades as a means to muzzle speech," the Council passed the Act "to remedy this nationally recognized problem here in the District of Columbia." Report on Bill 18-893, at 1, 4. To fix the problem, the Council conferred on SLAPP defendants "substantive rights to expeditiously and economically dispense of litigation to prevent their

engaging in constitutionally protected actions on matters of public interest." *Id.* at 4. The Council explained that in order to safeguard SLAPP defendants' substantive rights to quickly avoid legally insufficient SLAPP litigation, the Act allows a defendant to file a special motion to dismiss early in the litigation, toll discovery while the motion is pending, and quash a subpoena to protect a defendant's identity. *Id.*

This Court has agreed that the Act confers substantive rights on defendants. "[T]he D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988). This Court has thus emphasized that the "the [Act] extends" "substantive rights" to SLAPP defendants. *Doe v. Burke*, 133 A.3d 569, 575-76 (D.C. 2016) (quotation marks omitted). More precisely, this Court in *Mann* explained that the "Act's purpose [was] to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures" when defendants face legally insufficient claims that arise from protected activity. 150 A.3d at 1231.

Plaintiffs mistakenly point to *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), which held that the Act should not be applied in a diversity action because it conflicts with federal rules of civil procedure, *id.* at 1333-34. They argue that despite the Council's plain intent and this Court's binding precedent, the

D.C. Circuit's characterization of the Act in an entirely separate context should control. Pl. Br. 55. It should not. This Court—not the D.C. Circuit—is "undeniably the final arbiter" on questions of District law. *Meiggs v. Associated Builders, Inc.*, 545 A.2d 631, 633 (D.C. 1988). In fact, the D.C. Circuit reached its conclusion in *Abbas* in light of the fact that, at the time, this Court "ha[d] never interpreted the . . . Act's likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56." 783 F.3d at 1335. But that is precisely what this Court did one year later in *Mann*. 150 A.3d at 1238 n.32.

Indeed, *Mann* squarely rejected *Abbas*'s reasoning. It concluded that the denial of a special motion to dismiss is appealable to this Court "in light of the . . . Act's purpose to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures, a right that would be lost if a special motion to dismiss is denied and the case proceeds to discovery and trial." *Id.* at 1231. Moreover, the Court noted that while it would not address the distinctly federal issue of diversity jurisdiction, it was aware that its new interpretation of the Act's special motion to dismiss would "no doubt factor into future analysis of the dicta in *Abbas* concerning the applicability of the Anti-SLAPP Act in litigation brought in federal courts." *Id.* at 1238 n.32. Although the D.C. Circuit recently declined to retreat from *Abbas*'s dicta in *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021), this Court has reiterated at least four times since *Abbas* that the

Act was intended to confer substantive rights, *see Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 612 (D.C. 2020); *Fridman*, 229 A.3d at 502; *Mann*, 150 A.3d at 1231, 1238 n.32; *Doe*, 133 A.3d at 575-76.

Second, even if the Act were primarily procedural—which it is not—plaintiffs would still have to show that it directly conflicts with or amends Section 11-946. *Woodroof*, 147 A.3d at 782, 787. But it does not. The Act in no way "amends" Section 11-946. This section generally directs that "[t]he Superior Court shall conduct its business according to the Federal Rules" of civil and criminal procedure, although it may modify those rules with approval of this Court. D.C. Code § 11-946. The Superior Court may also adopt and enforce any other rules if they do not modify the federal rules. *Id.* The Anti-SLAPP Act does not purport to alter the process by which the Superior Court's rules of civil procedure are adopted or modified. Nor does the Act even purport to amend the rules themselves. After the Act, "[a] defendant may still file a motion to dismiss a complaint at the onset of litigation under Rule 12, based solely on deficiencies in the pleadings." *Mann*, 150 A.3d at 1238. The Act merely "gives the defendant the option to up the ante early in the litigation, by filing a special motion to dismiss that will require the plaintiff to put his evidentiary cards on the table." *Id.* And "if the Anti-SLAPP special motion to dismiss is unsuccessful, the defendant preserves the ability to move for summary

judgment under Rule 56 later in the litigation, after discovery has been completed." *Id.*

Separately, plaintiffs erroneously suggest that D.C. Code § 11-946 *itself* invalidates the Act. Pl. Br. 59. They argue that, because the Act modifies the Superior Court's rules of civil procedure and the Council never submitted the Act to this Court for approval, the Act is invalid. Pl. Br. 59. But as discussed *supra*, the Act is substantive law that does not conflict with or amend the Superior Court's procedural rules. *Fitzgerald v. Fitzgerald*, 566 A.2d 719, 728 (D.C. 1989) ("[A] Superior Court rule . . . cannot curtail substantive rights."), *superseded by statute on other grounds*, D.C. Code § 16-916, *as recognized in A.S. v. District of Columbia ex rel. B.R.*, 593 A.2d 646 (D.C. 1991).

More fundamentally though, Section 11-946 only constrains the *Superior Court's* ability to prescribe and adopt procedural rules, not the Council's. Plaintiffs have pointed to no case in which this Court has interpreted Section 11-946 to cabin the *Council's* authority to enact legislation—because this Court never has. Indeed, this Court has repeatedly "annulled Superior Court rules that [run] contrary" to statutes passed by the Council. *Ford v. ChartOne, Inc.*, 834 A.2d 875, 879 (D.C. 2003) (listing cases). Section 11-946 merely "grant[s] the Superior Court the power to amend its rules, subject to approval by this [C]ourt." *Neill v. D.C. Pub. Emp. Rels. Bd.*, 93 A.3d 229, 237 n.31 (D.C. 2014).

At bottom, the Act is a valid operation of the Council's "broad authority" to enact substantive law of local concern. *Andrew*, 110 A.3d at 628.

II. The Act Does Not Violate The First Amendment Right To Petition.

Although plaintiffs to some extent challenge the Act "as applied" by the trial court under the First Amendment, Pl. Br. 67, they also argue that the Act is "facially unconstitutional," Pl. Br. 61. Their constitutional arguments would invalidate the Act in most, if not all, instances. *See, e.g.*, Pl. Br. 60 ("[The Act's] failure to limit [its] scope to actual SLAPPs renders it unconstitutional . . . ."). The District takes no position on whether the trial court properly granted defendants' special motion to dismiss based on the facts of this case. *See* Pl. Br. 65, 68-69. Rather, the District has intervened solely to defend the validity of the Act. *See* D.C. App. R. 44; Super. Ct. Civ. R. 5.1.

A. The Anti-SLAPP Act's special motion to dismiss does not infringe on the right to petition because it simply weeds out meritless litigation.

Plaintiffs argue that the Act's special motion to dismiss "significant[ly] impair[s]" plaintiffs' ability to pursue litigation and thereby violates their First Amendment right to petition the courts for redress of grievances. Pl. Br. 61; *see* Pl. Br. 60. But that right "is not absolute." *Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016). Specifically, "a constitutional right of access to the courts" does not extend to "vexatious and meritless litigation." *In re Sibley*, 990 A.2d 483, 491 (D.C.

2010) (quotation marks omitted); *see In re Yelverton*, 105 A.3d 413, 421 n.8 (D.C. 2014) ("[B]aseless litigation is not immunized by the First Amendment Right to Petition." (quoting *In re Ditton*, 980 A.2d 1170, 1173 n.3 (D.C. 2009))). For example, as plaintiffs recognize, this right does not protect "sham" lawsuits. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741-44 (1983); *see* Pl. Br. 64.

Courts have consistently upheld statutes like the District's Anti-SLAPP Act—which screen out or expeditiously dispose of legally insufficient claims—against constitutional challenge based on the right to petition the courts. In *Equilon Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685, 691 (Cal. 2002), for example, the California Supreme Court considered whether, to protect a plaintiff's right to petition, a defendant should be required to show a plaintiff's bad faith before a court dismissed an action under California's anti-SLAPP act. The court held that such a showing was not "constitutionally compelled" because the act already allowed plaintiffs to demonstrate that their claims were likely to succeed. *Id.* It concluded that the act did "not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning," but that, instead, it "subject[ed] to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits." *Id.*

Courts in other states have reached similar conclusions. *Cf. Sandholm v. Kuecker*, 962 N.E.2d 418, 429 (Ill. 2012) (construing state's anti-SLAPP act to

require proof of a plaintiff's bad faith to effectively screen out meritless claims because the act did not otherwise allow plaintiffs to show a likelihood of success); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) (same); *Hall v. Callahan*, 727 F.3d 450, 456-57 (6th Cir. 2013) (rejecting a right of access challenge to a statute that precludes frequent "vexatious litigators" from filing suit unless the claimant can demonstrate that her claim has reasonable grounds); *Smith v. Att'y Gen.*, 637 F. App'x 574, 575 (11th Cir. 2016) (similar); *Wolfe v. George*, 486 F.3d 1120, 1126 (9th Cir. 2007) (similar); *Mayer v. Bristow*, 740 N.E.2d 656, 666-67 (Ohio 2000) (same).

Likewise, the District's Act does not violate the right to petition because it does "not prevent [plaintiffs] from bringing a meritorious claim." *Bernardo v. Planned Parenthood Fed'n of Am.*, 9 Cal. Rptr. 3d 197, 228 (Cal. Ct. App. 2004). A claim that is legally sufficient may still proceed through the courts because the Act allows plaintiffs to show that their suits are "likely to succeed on the merits." D.C. Code § 16-5502(b); *see id.* § 16-5502(c)(2). Indeed, the Act merely serves to "weed[] out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence." *Mann*, 150 A.3d at 1233. In other words, the special motion to dismiss "shields only those defendants who face unsupported claims that do not meet established legal standards." *Id.* at 1239.

Plaintiffs proffer the same argument that *Equilon* rejected—that an anti-SLAPP act must also require a defendant to show that a plaintiff has filed suit with an improper motive. Pl. Br. 63. But plaintiffs misunderstand the law. The Constitution only requires—at most—that anti-SLAPP legislation have a legitimate mechanism to sort out unjustified claims. That *may* take the form of showing that plaintiffs had an improper motive. *See Duracraft*, 691 N.E.2d at 942-43. But statutes may instead allow plaintiffs an opportunity to demonstrate their claims' merits. *See Equilon*, 52 P.3d at 691. The right to petition does not require both. Indeed, this Court had no difficulty interpreting the District's Anti-SLAPP Act to reject an improper motive requirement. *Doe*, 133 A.3d at 574-76.

Some of the cases plaintiffs cite underscore that proof of improper motive is not constitutionally necessary. *See* Pl. Br. 65 n.12. Although *Duracraft* and *Sandholm* required a showing of improper motive, neither statute allowed plaintiffs to prove that they were likely to succeed. *Duracraft*, 691 N.E.2d at 942 ("The Massachusetts statute makes no provision for a plaintiff to show that its own claims are not frivolous."); *Sandholm*, 962 N.E.2d at 431 (imputing an improper motive requirement to "distinguish meritless from meritorious claims," avoid "absolute or qualified privilege for defamation," and "strike a balance between" plaintiffs' right to petition and defendants' right of free expression); *see Ryan v. Fox Television Stations, Inc.*, 979 N.E.2d 954, 961 (Ill. App. Ct. 2012) ("The trouble with the

[Illinois act] as written, however, is that . . . the Act would mandate dismissal of *every* lawsuit that implicated a defendant's first amendment activities regardless of whether the plaintiff's claims were meritorious or not . . . ."). By contrast, the District's Act *does* allow plaintiffs an opportunity to show their claims' merits and thereby already contains a mechanism to sift out meritless claims. D.C. Code § 16-5502(b); *cf. Equilon*, 52 P.3d at 691.

The remaining authorities on which plaintiffs rely do not help their case either. *See* Pl. Br. 65 n.12. While they cite to *Gaudette v. Davis*, 160 A.3d 1190 (Me. 2017), Maine in fact does *not* require a defendant to show that the plaintiff brought suit with an improper motive, *id.* at 1200-01 ("The court determined that 'Davis's statements clearly fit within the broad definition of petitioning activity' . . . . The burden then shifted to Gaudette."). And despite their citation to *Jang v. Trustees of St. Johnsbury Academy*, 331 F. Supp. 3d 312 (D. Vt. 2018), Vermont has not held that its anti-SLAPP act requires proof of improper motive either, *Cornelius v. The Chronicle, Inc.*, 206 A.3d 710, 716-17 (Vt. 2019) (applying Vermont's anti-SLAPP act but not requiring proof of intent).

B. The Anti-SLAPP Act's discovery and fee-shifting provisions do not infringe on the right to petition.

Plaintiffs' challenges to the Act's discovery and fee-shifting provisions fare no better. Plaintiffs wrongfully suggest that the Act encroaches on their right to petition because it "denie[s] [them] meaningful access to discovery." Pl. Br. 69; *see*

Pl. Br. 13-14. But plaintiffs posit a constitutional right that does not exist. "There is no general constitutional right to discovery [even] in a criminal case." *Guest v. United States*, 867 A.2d 208, 212 (D.C. 2005) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997)). If a criminal defendant facing loss of life or liberty has no general constitutional entitlement to discovery, then a civil plaintiff seeking merely money damages surely has none either. *Gunter v. Va. State Bar ex rel. Seventh Dist. Comm.*, 399 S.E.2d 820, 823 (Va. 1991). Discovery is simply a procedural mechanism authorized by legislation or court rule. Its prevalence is also a relatively recent development. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691, 694 (1998) ("Historically, discovery had been severely limited in both England and the United States."). In federal courts, discovery was virtually non-existent until the adoption of the modern federal rules. *Id.* at 698-701.[2]

Even if the Act's discovery provision did implicate the right to petition, it is narrowly tailored to accomplish the District's compelling interest in protecting free expression. As the Council explained, discovery is tolled during the motion's

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[2] *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), cited by plaintiffs, is inapposite. *See* Pl. Br. 69. In relevant part, the court there considered only whether an anti-SLAPP act's automatic stay of discovery conflicted with the Federal Rules of Civil Procedure. *Id.* at 833. It did not hold that the act was therefore unconstitutional. *Id.*

pendency to "ensure a defendant is not subject to extensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish" protected speech. Report on Bill 18-893, at 4. If lengthy discovery were to be allowed as a matter of course, this would defeat the Act's goal of an expedited hearing on the motion and prompt issuance of a ruling, D.C. Code § 16-5502(d), so that meritless litigation can be "expeditiously" resolved, Report on Bill 18-893, at 4.

The Act is also carefully tailored to advance its purpose. It still allows a court to order "targeted discovery" that would enable the plaintiff to defeat the special motion. D.C. Code § 16-5502(c)(2). It does not dispose of a plaintiff's action merely because a defendant can make a prima facie showing of protected activity. *Mann*, 150 A.3d at 1239. At the same time, the Act's discovery provision is not redundant of Super. Ct. Civ. R. 12(b) and 56. *Id.* at 1238. Those rules simply do not address the problem of "extensive and time consuming discovery that is often used in a SLAPP case as a means to prevent and punish." Report on Bill 18-893, at 4. A meritless lawsuit can still survive a motion to dismiss under Rule 12(b). *Satkar Hosp., Inc. v. Fox TV Holdings*, 767 F.3d 701, 704 (7th Cir. 2014). And the granting of summary judgment under Rule 56, after full discovery, would come far too late, after the harms that the Act is designed to prevent have already occurred.

Nor does the Act's fee-shifting provision impose any cognizable burden on plaintiffs' constitutional rights, as plaintiffs suggest. Pl. Br. 66. Under this provision

of the Act, the defendant is presumptively entitled to an award of costs, including reasonable attorneys' fees, if her special motion to dismiss is granted in whole or part, and a plaintiff is entitled to such an award if the motion is frivolous or solely intended to cause unnecessary delay. D.C. Code § 15-5504; *see Doe*, 133 A.3d at 576. Plaintiffs argue that the fee-shifting provision "potentially dissuad[es] plaintiffs with limited resources from accessing the courts at all," thereby rendering the Act "unconstitutional on its face." Pl. Br. 66. But again, they seek a constitutional entitlement that does not exist.

"[T]he proposition that the first amendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987). Such statutes do not bar the filing of a claim (or defense). "Fee-shifting simply requires the party that creates the costs to bear them." *Equilon*, 52 P.3d at 691. "This is no more a violation of the first amendment than it is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press." *Premier Elec. Const. Co.*, 814 F.2d at 373. "The exercise of rights may be costly, and the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." *Id.*

Indeed, countless statutes have long authorized an award of reasonable attorneys' fees to prevailing parties. *See, e.g.*, 42 U.S.C. § 1988. And fee-shifting provisions are typically *more* expansive than the provision here, allowing fee-shifting if a party prevails at *any* stage of the litigation. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016). Plaintiffs' challenge would not only call into question the constitutionality of fee-shifting statutes generally, but other well-accepted provisions requiring payment of the costs of litigation as well. *E.g.*, D.C. Code § 15-714 (witness fees); Super. Ct. Civ. R. 201 (transcript fees); Super. Ct. Civ. R. 202 (filing fees).

Even assuming the First Amendment has "anything to say" about the Act's fee-shifting provision—and it does not—the Act easily withstands scrutiny. As discussed *supra*, the Act serves a compelling interest in protecting public expression from meritless litigation. But the prospect of incurring attorneys' fees to defend against such suits stifles protected speech. *See Doe*, 133 A.3d at 575-76; Report on Bill 18-893, at 1 (noting that SLAPP defendants "must dedicate a substantial[] amount of money, time, and legal resources" to their defense), 3 (discussing one example of a SLAPP that "would have resulted in outlandish legal costs to defend" but for pro bono assistance). The fee-shifting provision is precisely tailored to address this problem, by requiring that the plaintiff who creates those fees bear them when the lawsuit is shown to lack merit. D.C. Code § 15-5504(a). Because the

purpose of a SLAPP is not to win the suit but to silence protected expression, *see* *Mann*, 150 A.3d at 1226, only the Anti-SLAPP Act provides a solution.

CONCLUSION

This Court should reject plaintiffs' challenges to the validity of the District's Anti-SLAPP Act.

Respectfully submitted,

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April 2021

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