ORAL ARGUMENT APRIL 20, 2022
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)

MOTION OF APPELLANTS COLS. (RET.) L. MORGAN BANKS III, DEBRA L. DUNIVIN, AND LARRY C. JAMES TO STRIKE APPELLEE'S BRIEF OF THE DISTRICT OF COLUMBIA; MEMORANDUM IN SUPPORT

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(A)(2) CERTIFICATE

Plaintiffs-Appellants: L. Morgan Banks III, Debra L. Dunivin, Larry C. James
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Defendants-Appellees: David Hoffman, Sidley Austin LLP, and Sidley Austin (DC) LLP
Counsel: Thomas G. Hentoff, John K. Villa, Stephen J. Fuzesi, Krystal C. Durham, Matthew J. Greer, Williams & Connolly LLP

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

Intervenor-Appellee: D.C. Attorney General
Counsel: Karl A. Racine, Loren L. AliKhan, Caroline S. Van Zile, Carl J. Schifferle, James C. McKay

TABLE OF AUTHORITIES

State Cases

State Statutes

Other

MOTION TO STRIKE APPELLEE'S BRIEF OF THE DISTRICT OF COLUMBIA AND BAR THE DISTRICT FROM ORAL ARGUMENT

Appellants Cols. (Ret.) L. Morgan Banks III, Debra L. Dunivin and Larry C. James respectfully move, pursuant to Rule 27 of this Court, for an order striking in its entirety the Appellee's Brief filed by the District of Columbia on April 26, 2021, and barring the District from participating in oral argument.

The ground for this motion is that District of Columbia officials—Attorney General Karl A. Racine and Council Chair Phil Mendelson—have publicly and in official forums taken positions squarely contrary to the two key arguments the District makes in its Appellee's Brief. The District has not moved this Court for permission to withdraw its brief; indeed, it has not informed the Court that its officials are taking diametrically opposed positions in different fora.

The Court should not permit the District to change its positions on critical legal issues depending on the forum. Its Brief should be stricken and it should be barred from participating in oral argument. On March 7, 2022, the District refused to consent to this motion when contacted by Plaintiffs' counsel and expressed their intention to oppose it. The Defendant-Appellants failed to respond to Plaintiffs-Appellants' request for consent, which was made on March 7, 2022, at approximately 4 PM ET. Counsel indicated in such request, that if they did not hear back by 10 AM ET on March 8th from the Defendants, that they would treat the motion as contested.

MEMORANDUM OF POINTS AND AUTHORITIES

Both before the lower court and in its Appellee's Brief, the District relies on two arguments to oppose Plaintiffs' demonstration that the Anti-SLAPP Act is (1) invalid under Title 11 of the D.C. Code because it modifies (and conflicts with) the Federal Rules of Civil Procedure[1] and the Superior Court Rules without this Court's approval and (2) unconstitutional (both facially and as applied) because it impermissibly burdens citizens' First Amendment right to effective access to the courts to seek redress for real harms. Appellants' Opening Brief, pp. 52-59, 60-70.

First, as to the Anti-SLAPP Act's validity, the District argued to this Court that the Act was within the authority of the District of Columbia Council to enact:

> 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. . . . 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.

District's Appellee's Brief, pp. 10-11, 17; *see* pp. 11-17.

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[1] *See* D.C. Code § 11-946. *See also Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) ("The legislative history of § 11-946 reflects the congressional intent that the local courts were to be governed by the *federal* rules, and not by local rules or custom . . . ."(emphasis in original)).

However, the District has now publicly taken a contrary position: the Council cannot amend the Anti-SLAPP Act because it regulates judicial process—precisely the argument *Appellants* make. Appellants' Opening Brief, pp. 52-59. On March 22, 2021, Phil Mendelson, the Chair of the D.C. Council, testified before the House of Representatives Committee on Oversight and Reform in regard to the Washington D.C. Admission Act. He said that one reason for statehood was that:

> As you know, the Home Rule Act also places limitations on what laws the Council can approve. As a result . . . *we cannot* update the limits on small claims or *strengthen our Anti-SLAPP law because we cannot legislate judicial process*.

Testimony of Council Chair Phil Mendelson, March 21, 2021, p. 9 (emphasis added); attached as Ex. A hereto.

Mr. Mendelsohn gave similar testimony on at least two additional occasions, in 2014[2] and 2019[3], while advancing the Council's case for D.C. statehood.[4] Thus,

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[2] *The New Columbia Admissions Act of 2013: Hearing on S. 132 before the Senate Homeland Security and Governmental Affairs Committee,* 113th Cong. (2014) (statement of Chairman Phil Mendelson, Council of the District of Columbia, Sept. 15, 2014); *available at* https://www.hsgac.senate.gov/imo/media/doc/Testimony-Mendelson-2014-09-15-REVISED.pdf

[3] *The Washington D.C. Admission Act: Hearing on H.R. 51 before the House Committee on Oversight and Reform,* 116th Cong. (2019) (statement of Chairman Phil Mendelson, Council of the District of Columbia, Sept. 19, 2019); *available at* https://statehood.dc.gov/sites/default/files/dc/sites/statehood/page_content/attachments/Chairman%20Mendelson%20House%20Hearing%20Testimony%202019.pdf

[4] Despite that testimony, however, the D.C. Council has amended the statute on a temporary and "emergency" basis. DC Code § 16-5505 *available at* https://code.dccouncil.us/us/dc/council/code/sections/16-5505

the District has repeatedly conceded the correctness of Appellants' position in another forum.

Second, the District argued to this Court that the Anti-SLAPP Act neither has nor is constitutionally required to have any requirement that a court determine a suit was filed for an improper motive before dismissing it:

> 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* [*v. Holmes Prods. Corp.*], 691 N.E.2d [935 (1998)] at 942-43. But statutes may instead allow plaintiffs an opportunity to demonstrate their claims' merits. *See Equilon* [*Enters. v. Consumer Cause, Inc.,* 52 P.3d 685, 689 (Cal. 2002)] at 691.The right to petition does not require both.

District's Appellee's Brief, p. 25.

On this issue as well, the District has now publicly taken a contrary position: anti-SLAPP protections apply only to suits designed to punish speech and, therefore, require a finding of a retaliatory motive.

On October 28, 2021, Attorney General Karl A. Racine wrote to Council Chair Mendelson to transmit a proposed amendment to the District's Anti-SLAPP Act providing that the Act does not apply to lawsuits filed by the District. In that transmittal, Attorney General Racine made it plain that he now believes the Act should protect only against lawsuits designed solely to punish speech and that, as Appellants argued, it is being abused by large corporations to attack meritorious lawsuits:

> As you know, anti-SLAPP . . . laws are statutes that insulate people and entities that speak out on matters of public interest from baseless SLAPP lawsuits, *designed solely to punish speech and drain financial resources* . . . Anti-SLAPP protections work by cutting off a SLAPP suit in its tracks, halting all proceedings until *both the trial and appellate courts determine whether the suit is in fact retaliatory*. Recently, however, corporations have turned these protections on their heads to stop legitimate government enforcement actions by claiming that government suits are in fact SLAPP suits. Consequently, important government cases have been halted while courts resolve specious SLAPP claims.

Letter to Council Chair Phil Mendelson, October 28, 2021 (emphasis added); attached as Ex. B hereto.[5]

Attorney General Racine's position—that a SLAPP is by definition designed to retaliate against protected speech—is exactly the position taken by the Appellants. The District has thus conceded its correctness. Appellants have argued to this Court that, if the Anti-SLAPP Act is to pass constitutional muster, D.C. courts should look to a suit's purpose to determine whether it is indeed a strategic lawsuit against public participation filed to silence speech protected by the First Amendment. Appellants' Opening Brief, pp. 60-70. *See also Thurlow v. Nelson*, 2021 Me. 58, 13-14 (Me.

[5] From the letter's language, it appears Attorney General Racine erroneously believes that D.C. Courts are now undertaking such an analysis of retaliatory intent. *But see Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 748 (D.C. 2021) ("Appellants propose that a claim should nonetheless be deemed to arise from protected activity if the plaintiff's subjective motivation for asserting the claim was a desire to chill or punish speech. But the statutory text does not call for inquiry into the plaintiff's motives; it focuses on the claim, not the claimant. Nor does anything in the legislative history suggest the Council envisioned an examination of the plaintiff's motives in connection with special motions to dismiss.").

2021) (decided since Plaintiffs' briefs were filed, changing the procedures for applying Maine's anti-SLAPP statute to read into it a process that requires courts to balance the competing Constitutional interests).

The District of Columbia may of course change its mind about the legal issues raised by this appeal. The proper way to do that is to voluntarily withdraw its brief and join the Appellants in supporting reversal. The District has chosen not to do so, and the Court should not tolerate it making different arguments according to its political aims. The District's Appellee's Brief should be stricken, and the District should be barred from participating in oral argument.

Respectfully submitted this 8th day of March 2022.

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EXHIBIT A

COUNCIL OF THE DISTRICT OF COLUMBIA

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TESTIMONY OF CHAIRMAN PHIL MENDELSON
COUNCIL OF THE DISTRICT OF COLUMBIA

H.R. 51, THE WASHINGTON, D.C. ADMISSION ACT

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND REFORM

MARCH 22, 2021

Thank you ChairwomanMaloney, Ranking Member Comer, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia. I am pleased to testify today in support of H.R. 51, the Washington, D.C. Admission Act. Full and fair representation for the over 700,000 citizens residing in the District of Columbia is only possible through achieving statehood, and so I urge this Committee, and this Congress, to move favorably and expeditiously on this measure.

I want to thank this Committee for its ongoing support for the District of Columbia.In particular, I would like to thank the Delegate for the District of Columbia, Congresswoman Eleanor Holmes Norton, for her staunch representation of the District and for introducing H.R. 51. I also want to thank Chairwoman Maloney for cosponsoring this legislation, for agreeing to hold this hearing today, and for the House's historic adoption of H.R. 51 last year.

THE CASE FOR STATEHOOD FOR THE DISTRICT OF COLUMBIA

Forover 200 years, the United States citizens residing in the District of Columbia have been denied the same rights of citizenship that areenjoyed by United Statescitizens everywhere else: full self-governance and representation in the national legislature. Denying this tothe District of Columbia deprives these citizens of the fundamental rights of our democracy. This is inconsistent with the principles of our American revolution and I do not think this was intended by our Founding Fathers.Regardless, this civil rights injustice must be corrected, just like other anomalies of the Founding Era,like the disenfranchisement of women and Blacks. Statehood would do that.

Self-governance is the essence of democracy and freedom. It is more sensitive to constituents. It reflects community values and priorities. Self-governance is the lifeblood of every town hall, city council, county board, and state legislature in the United States of America. The only option to gain both full voting representation and full self-governance is to pass H.R. 51 and grant statehood to the District of Columbia.

Our Founding Fathers did not envision eliminating the rights of the citizens of the federal district. In fact, James Madison, in Federalist No. 43, contemplated that the residents of the District would not be disenfranchised when he wrote: "they [the citizens of the federal district] will have had their voice in the election of the government which is to exercise authority over them[.]" And when the District of Columbia was established in the 1790s, its citizens had voting rights and self-governance. This was not immediately taken away. Nowhere in the Federalist Papers or James Madison's notes will you find a discussion that it was a goal of the Founding Fathers to take our citizenship rights away.

Actually, what was of concern to the Founding Fathers was to protect the government from riots. Like Shays' Rebellion literally months before the Constitutional Convention. "The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. … Without it, …the public authority might be insulted and its proceedings interrupted with impunity…"[1] Like what happened here at the Capitol on January 6, 2021.

Ironically, January 6th helps make our case for statehood. Rather than "insult" and interrupt Congressional proceedings, the District came to the rescue – sending our Metropolitan Police and DC National Guard to quell the riot. Yet because we are not a state we were unable to send the Guard directly and immediately; we had to ask the President of the United States. And, as you know, sending the Guard to help was then delayed for hours.

[1] The Federalist No. 43 (James Madison)

It has been over 200 years since Congress rescinded voting rights from the last group of Washington residents who had previously voted in Maryland and Virginia. To add to this injury, it is Congress that has plenary authority over all matters in the District.[2] It is taxation without representation.

Numerous efforts have been made to correct this injustice, and some incremental changes have been made. In 1960, the 23rd Amendment was adopted, granting District residents the ability to vote for the President.[3] In 1970, the District of Columbia Delegate Act[4] was enacted to give the District a representative in the House of Representatives. But, as you know, that position is non-voting – the same status as that of members from U.S. territories. In these measures Congress has recognized that the structure put in place by the Founding Fathers must adapt.

In 1973, Congress adopted the Home Rule Act, a major reform for District governance, but that act is silent as to Congressional representation.[5]And this limited home rule, as I will later explain, is inadequate and problematic.

In 1978, the District's non-voting delegate in the House of Representatives, Walter Fauntroy, introduced a constitutional amendment that would have given the Districttwo senators, a representative, and an unrestricted vote for President.[6] Congress approved the amendment,but it was not ratified by the necessary three-quarters of the states within the seven-year time limit.

In 2007, Senators Liberman and Collins reported bipartisan legislation to add two full-voting seats in the House of Representatives:one for the District and one for Utah.[7] This approach relied on Congress's authority to legislate on matters for the District as well as to create and adjust the number of Congressional seats in the House of Representatives.[8] Unfortunately, a Senate cloture vote on the measure fell short by three votes.

The idea of the Washington D.C. Admission Act was first proposed in 1971.[9] This approach is consistent with long standing practice, having already been employed 37 times. Congress has granted statehood to several territories that were

[2] District of Columbia Organic Act, 6th Congress, 2nd Sess., ch. 15, 2 Stat. 103.
[3] U.S. Const. amend. XIII § 1, granting the District the same number of presidential electors as the smallest state.
[4] District of Columbia Delegate Act, Pub. L. No. 91-405, § 201, 84 Stat. 848 (1970).
[5]District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774, D.C. OFFICIAL CODE § 1-201.01 *et seq.* (1973) [hereinafter Home Rule Act].
[6] H.R.J. Res. 554, 95th Cong. (1978).
[7]*See* District of Columbia House Voting Rights Act, S. 1257, 110th Cong. (2007).
[8] S. Rep. No. 110-12, at 3 (2007).
[9]*City and State: D.C. State Bill*, Washington Post, July 7, 1971, at C4.

in existence for less than 10 years. On the other hand, the last three states admitted to the Union – Hawaii, Alaska, and Arizona – were territories for 61, 47, and 49 years, respectively, before being granted statehood. The District has been around for 214 years. Long enough.

In 1992, the Congressional report that accompanied H.R. 4718, the New Columbia Admission Act, laid out three main requirements to evaluate statehood petitions.[10] First, that the residents support the principles of democracy. Second, that a majority of the electorate support statehood. Third, that the proposed new State has sufficient population and resources to support itself as well as provide its share to the Federal government.

Regarding the first two requirements: over 85 percent of District residents who voted in our 2016 general election approved a referendum to grant authority to the Council to petition Congress to enact a statehood admission act and to approve the District's Constitution.[11] Passage of the referendum established that the citizens of the District: (1) agree that the new state shall guarantee an elected representative form of government; (2) agree that the District should be admitted to the union as a state; (3) approve a Constitution of the state of Washington, Douglass Commonwealth; and (4) approve the boundaries for the state.

As to the third requirement:

Yes, the District has sufficient population. It is currently larger than two states – Wyoming and Vermont. It is only slightly smaller than North Dakota and Alaska.

Yes, the District has sufficient resources. Our Fiscal Year 2021 budget[12]totals $16.9 billion and is the District's twenty-fifth consecutive balanced budget and the fifth to be adopted under local budget autonomy.[13] The District's budget prioritizes principles of responsible budgeting, fiscal responsibility, and efficient use of public resources. Indeed, our fiscal position has become the envy of other states, counties, and cities. Both our pension and Other Post-Employment Benefits funds are fully funded, using conservative actuarial assumptions. At the conclusion of fiscal year 2020, our reserves continue to equal to 60 days operating costs – a Government Finance Officers Association best practice.

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[10] *See* H. Rep. No. 102-909 (1992). The three requirements are as follows: (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government; (2) That a majority of the electorate wish statehood; and (3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government.

[11] *See* Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016, effective July 12, 2016 (Res. 21-570; 63 DCR 9627).

[12] *See* the Fiscal Year 2021 Local Budget Act of 2020, effective October 20, 2020 (D.C. Law 23-136; 67 DCR 13201); *See* Fiscal Year 2021 Federal Portion Budget Request Act of 2020 (D.C. Act 23-409; 67 DCR 10652).

[13] *See* the Local Budget Autonomy Act of 2012, effective July 25, 2013 (D.C. Law 19-321; 60 DCR 12135).

Yes, the District is able to provide its share of the cost to fund the Federal government. In this regard I wish to make three points. First, on a per capita basis District residents currently pay more in federal taxes than residents in any of the 50 states. Second, the District is a so-called "donor state," contributing more in taxes to the federal government than it receives in grants, subsidies, and other payments. Third, while decades ago the District relied on a substantialannual payment from the United States (approximately $660 million annually in the mid-1990s, about 16% of the District's budget) in Fiscal Year 2020, the approved federal payments budget amounted to only $136.7 million or 0.9 percent of the District's gross funds budget.

Hurdles

While I staunchly advocate for District statehood, I recognize that there are hurdles. Many of these hurdles are simply a matter of national politics and efforts by parties jockeying for majorities in Congress.Many state legislatures see a disadvantage to admitting a new state that might affect their state's influence in the House or Senate,and many state legislatures do not understandthat the United States citizens of the District of Columbia raise their own taxes and pay for their own governance but are not equal to the United States citizens in any of the 50 states.

It is also important to recognize that educating the nation of the District's half-status is another important hurdle to clear. But most people will agree that the idea of tax-paying citizens without full representation in the United States Congress is a concept against everything we are taught in school about the basic democratic values of our country. Many do not believe it,or are forced to square this injustice using misconceptions about the District. The District of Columbia is unique in many ways, but no unique qualities should support disenfranchisement of its citizens.

REBUTTING ARGUMENTS AGAINST STATEHOOD

Finances.Opponents of statehood have long argued that the District is not capable of governing itself in a fiscally responsible manner. Dissenting views in the committee report on H.R. 4718 raised doubts as to whether the District had the economic viability – meaning both population and resources – to support a state government that was independent of other states and the federal government, and whether the District had the resources to bear its equitable share of the cost of the federal government.[14]Well, the District's financial status is the envy of jurisdictions around the country. Our fundamentals are solid, with 16.7 percent population growth since 2010 – highest compared to the 50 states. Revenues are growing

[14]H. Rep. No. 102-909 on the New Columbia Admission Act (1992).

steadily and at a rate greater than most states. And we don't have unfunded liabilities -- unlike most states.

We have established a system for multi-year capital planning to bring all capital assets to a state of good repair by fiscal year 2028; no other jurisdiction has this.[15] Our independent Chief Financial Officer has developed resiliency strategies that include recession planning and cybersecurity analysis. The District continues to grow in population, is diversifying its economy, and was growing in jobs before the pandemic. As a result, revenues to support the budget were growing on average more than 3 percent annually prior to the pandemic. This fiscal strength has resulted in ratings for our general obligation bonds being upgraded by all three rating agencies, including AAA by Moody's. The District has more than answered the doubts raised almost 30 years ago about its economic viability. The District is flourishing and is capable of meeting the financial cost of becoming the 51st state.

Retrocession.There have been efforts at restoring voting rights for District residents by retroceding all populated areas of the city back to the State of Maryland. The most recent iteration of this idea was introduced in the House in 2013.[16] Advocates of retrocession have argued that it is the most practical and constitutionally sound way to give District residents votes in both the House and the Senate, and that it makes historical sense when compared to the previous retrocession of Arlington to Virginia.[17] This may be theoretically logical. But the citizens of both the District and Maryland do not support it, so it is unpopular. More importantly, Congress can't force this on Maryland. So it is impractical. Full statehood is the most practical way to fully restore the rights of those who now live in the nation's capital.

Small Population.Some have argued that the population of the District should be a disqualification for full participation in the Union. While decidedly small, population is not, and should not be a requirement to become a state. Historically, most states had less population when admitted than the District does now. Currently, the District's population is greater than that of two existing states, Vermont and Wyoming, and only slightly smaller than North Dakota and Alaska. At the growth rate we have seen over the past decade, it is possible that the District will out rank these other states.

Federal land.Some say that the vast amount of land owned or controlled by the federal government within the District is another disqualification for statehood. There is, to be sure, a substantial amount of federal land in the District. However,

[15] The District continues to make these capital investments while still remaining below our locally-mandated 12 percent debt cap. *See* D.C. OFFICIAL CODE § 47-335.02(a). Incidentally, Congress mandated an 18 percent limit.
[16] District of Columbia-Maryland Reunion Act, H.R. 2681, 113th Cong. (2013).
[17] *See Legislative Hearing on H.R. 5388*, *the District of Columbia Fair and Equal Housing Voting Rights Act of 2006* (testimony for the record of Lawrence H. Mirel for the Committee for the Capital City) (Sept. 20, 2006).

there are over 700,000 disenfranchised U.S. citizens on the non-federal land. Moreover, as a percentage of total land, the District has the third lowest total number of acres under federal control and has the 13th lowest number of federal acres when compared against the 50 states. This ranks behind a few notable states including Alaska, Montana, Arizona, and Wyoming.[18] Under the provisions of the Washington, D.C. Admission Act, much of the federal acreage in our borders would be retained as a federal enclave, leaving the state of Washington, Douglass Commonwealth with even less land under federal control.

Federal payment.Some argue that large, current federal grants and payments to the District are a disqualification for statehood. In truth, however, the vast majority of the federal dollars that the District receives consists of Medicaid and other federal program subsidies received by all the states. As explained earlier, we used to receive a substantial federal payment in addition to the federal program allocations, but that was eliminated over two decades ago.

Another way to look at the issue of federal grants is to compare it to how much in taxes a state remits to the federal government. The District of Columbia paid $27.5 billion in taxes in 2019.[19] The amount paid is more than 22 other states.[20] This fact is astonishing when considering the size of the District compared to other states.

Attached to my testimony is a chart that compares the federal funding received and taxes paid by the District to ten states with populations comparable to that of the District. First, it shows that the difference between what the District pays in taxes and what it receives in federal grants is more than $23 billion.[21] Second, it shows that the District's total payment to the federal government minus the funding it receives is significantly higher than that of Vermont, Wyoming, Alaska, and North Dakota – states with populations similar to the District.[22] Finally, the facts show that, in the end, the District is a *significant* contributor to the federal government, more so than many other states in the country.

Governance. In spite of evidence to the contrary, some argue that the District is incapable of governing itself. Look no further than the state of our finances to rebut this. But I want to say more about governance. Even in the face of the hurdles that no other jurisdiction must endure, the District is capable of

[18]CAROL HARDY VINCENT, LAURA A. HANSON, CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, at 7-9 (2017).
[19]Internal Revenue Service SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5, https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last visited March 10, 2021).
[20]*Id.*
[21]*See* Exhibit 1.
[22]*Id.*

managingits affairs just like any state. We stand on our record of responsible governing.

An example of the District's sound governing practice is the management of our budget after the Council initiated, and the voters by referendum ratified, the Local Budget Autonomy Act of 2012.[23] Removing uncertainty over the District's bud-get authority has ensured that its budget is not being inefficiently spent on unnecessary borrowing costs or paying a premium for services. The flexibility of bud-get autonomy has allowed the District to address the urgent service and program-matic needs of the city, from trash collection to public safety response, and ensured that these services are delivered efficiently in terms of both time and resources.

Another advantage to budget autonomy: it has ensured that the delivery of services – even to the federal government – is not disrupted due to federal budget battles that have no relation to the District or its budget. As U.S. Representative Tom Davis noted in 2003: while Congress' involvement in the District's budget stems from a desire to ensure the financial well-being of the nation's capital, "the unfortunate reality is that the city's local budget can get tied up in political stalemates over Congressional appropriations that rarely have anything to do with the District's budget."[24]

As for oversight, the Council conducts rigorous oversight over all of the District agencies that report directly to the Mayor of the District of Columbia, as well as numerous independent and regional agencies and bodies, e.g., DC Water, the Metropolitan Washington Council of Governments, and the Washington Metropolitan Airports Authority. The Council, through its tencommittees, holds performance and budget oversight hearings on every District agency. During these hearings the committees scrutinize the past and present performance and budgetary needs of each agency. The Council also holds numerous public oversight hearings throughout the year over agencies and specific subject-matter areas. Further, the Council holds hearings on legislation and resolutions throughout the year since the Council is a full-time legislature.

During Council Period 23 (January 2, 2019 to January 1, 2020) the Council and its various committees held hundreds of meetings, hearings, and roundtables. The Council itself held 41 Legislative Meetings in Council Period 23. The Committee of the Whole held 19 regular meetings and 18 additional meetings to consider legislation in the Committee and process reports from other committees.

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[23] *Supra* note 14.

[24] *Budget Autonomy for the District of Columbia: Restoring Trust in Our Nation's Capital, Hearing Before the H. Comm. On Government Reform,* 108th Cong., Serial No. 108-36, at 2 (statement of U.S. Representative Tom Davis).

This is further evidence that the District government is more than capable of governing itself and that Congressional interference is unnecessary.

CONGRESSIONAL INTERFERENCE

For the citizens of the District of Columbia, a compelling argument for statehood is to end Congressional interference in our affairs. Every year we watch as members of Congress, who have no connection with the District,introduce legislation or insert appropriation riders that detrimentally impact the functions ofgovernment. The policies of the District government are many times at the mercy of whichever party is in control of Congress. As a District policymaker, I can tell you that this hurts our ability to manage the affairs of our government.

One case in point is the restriction of the District's ability to tax and regulate marijuana. When District residents overwhelmingly approved Initiative 71[25] in 2014 to provide for the legalization of possession of minimal amounts of marijuana for personal use,we were reflecting a trend among the 50 states. But Congress stepped in to prohibit the District from passing laws to regulate this industry; that rider remains on the books. TheCouncil was challenged on whether the mere act of having a public hearing on the regulation of marijuana was a violation of the Anti-Deficiency Act.[26] One has to think that Congress surely has more important things to worry aboutthan aboutthis*uniquely local issue*. Worse, we are in an untenable situation: residents may possess and use marijuana (just like many other states) but government (the District government) is unable to regulate the sale.Perhaps this rider will be rescinded in the next Appropriations bill.

Another case in point is the appropriation rider that prohibited needle exchange – a government program to reduce the spread of HIV and other diseases. The program exists in many cities. It is proven to reduce infection, the spread of disease, and fatalities. Yet the District was precluded from implementing the program while Congress provided no alternative help. After many years the rider was finally lifted, but the damage to the public health remains to this day. The essential point here is that the District requires full self-governance. The nation's capital should be a model for the country. The current governance situation holds us back.

As you know, the Home Rule Act also places limitations on what laws the Council can approve. As a result, we cannot fix inequities in criminal sentencing without the approval of the United State Attorney General, and we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process. We can't even regulate the filing fee for evictions – which at $15 is by far the lowest in the country. Further, the Home Rule Act requires

[25]*See* the Legalization of Possession of Minimal Amounts of Marijuana Personal Use Initiative of 2014, effective February 26, 2015 (D.C. Law 20-153; 62 DCR 880).
[26]*See* 31 U.S.C. § 1341.

Congressional review of all permanent and temporary bills passed by the Council. But that review has not resulted in a single Congressional disapproval in almost three decades.

Congressional review of legislation is not only unnecessary it has a significant impact on the operations of the Council. In 2009, the Council's General Counsel estimated that between 50 and 60 percent of the legislative measures the Council adopts could be eliminated if there were no Congressional review requirement.[27] He added that the Congressional review requirement from time to time has resulted in gaps in critical pieces of criminal legislation that cannot be cured with a retroactive applicability date because of the *ex postfacto* clause of the Constitution.[28] Under section 602 of the Home Rule Act, the Council has passed thousands of laws and transmitted thousands of pages to Congress, which requires significant staff time and effort, and only three acts have been disapproved and none since March 21, 1991.Our General Counsel correctly noted at the time "Congress may not legislate with the District in mind very often, but we always legislate with Congress in mind."[29]Congressional review of District legislationhas proven to be inefficient, ineffective, and unnecessary.

Congressional review is not only burdensome, but it has a deleterious effect on the District government's finances. Our ability to go to the bond markets to finance capital improvements costs more or less dependingupon our bond ratings. And while the District has a triple-A rating from Moody's, the other agencies have held back. Why? A primary reason cited by the rating agencies is Congressional review and interference. This costs us money because it means higher interest rates.

These are a few examples of how the current Home Rule structure is sometimes harmful to the District and is a poor governance structure that would be rectified by statehood.

RESPECTING THE WILL OF DISTRICT RESIDENTS

In April of 2016, the New Columbia Statehood Commission announced that the District of Columbia would pursue statehood through an approach modelled on the Tennessee Plan. This would entail the creation of a contemporary constitution and boundaries for the state of Washington, Douglass Commonwealth. The Commission convened a series of town hall meetings, culminating with a three-day

[27]*Pathways to Statehood, From Voting Rights to Full Self-Determination: Political and Constitutional Considerations: Public Hearing before the Council of the District of Columbia Special Committee on Statehood and Self-Determination*, June 1, 2009 (written testimony of Brian Flowers, General Counsel of the Council of District of Columbia, at 5).
[28]*Id.*at 6.
[29]*Id.*

District-wide constitutional convention. The Commission then adopted a draft Constitution and state boundaries.

The draft Constitution and boundaries were then sent to District residents for ratification. Over 85 percent of District residents who voted in our 2016 general election approved the referendum to grant authority to the Council to petition Congress to enact a statehood admission act and to approve the District's Constitution.[30]

In light ofthis action, Congress needs to respect the will of District citizens.They want and deserve fair and equal representation. Continuing to ignore their request for statehood is to ignoredemocratic values.Until it is grantedour citizens will continue to feel left out of the democratic process – because they are -- which is inconsistent with the principles upon which our country was founded.

CONCLUSION

One of the most important arguments that is never addressed by the opponents of District statehood is that we are the only national capital in the free world where the citizens do not enjoy a vote in the national legislature. Indeed, Mexico, which had modeled its federal system after ours– including a federal district as its national capital – recently granted statehood to Mexico City. It is now our time. The United States is the greatest democracy in world, and the fact that the citizens of its capital city do not have voting representation is indefensible and a stain on our democracy. We implore Congress to treat us as equals and no longer as second-class citizens.

Statehood is the only practical way that our citizens can participate in a fully democratic government. It is the only way to ensure that our local government will never be subject to a shutdown because of quibbling over purely federal matters, and our local services not suspended because of partisan disagreements. It is the only way to ensure that our local laws will no longer be victims to national debates over divisive social issues.It is the only way to ensurea judicial system that is sensitive to our community values. Statehood is the only way to give residents a full, guaranteed, and irrevocable voice in the Congress of the United States. The same voice enjoyed by our fellow citizens across the country.

Statehood is the most practical solution to right the historical wrong of denying voting rights to citizens of the District and to guarantee the right to local self-governance. The District of Columbia has a proven track record of prudent fiscal management and good governance. The State of Washington, D.C. would

[30] *See* Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016, effective July 12, 2016 (Res. 21-570; 63 DCR 9627).

enter the Union as a 51st state with an economy envied by other jurisdictions. Politics must be set aside,and allof the excuses used to justify denial of our inalienable rights must be shelved. Our limited home-rule power delegated by Congress is appreciated, but too tenuous and too often a bargaining chip in political battles. Limited home-rule cannot make up for all of the rights withheld by Congress that we could have only with statehood.

The Council appreciates the Committee's consideration of the Washington, D.C. Admission Act, and urges that it be brought before the Committee for a favorable markup and before the House and Senate for a vote. The Council and I look forward to working with the Committee to move this bill forward to ensure that the next time I am called to testify it will be as Speaker of the Legislative Assemblyof the state of Washington, D.C.

EXHIBIT B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE

October 28, 2021

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

I write to transmit the "Anti-SLAPP Amendment Act of 2021," "Anti-SLAPP Emergency Amendment Act of 2021," "Anti-SLAPP Temporary Amendment Act of 2021," (collectively "legislation") for consideration and enactment by the Council of the District of Columbia. As you know, anti-SLAPP (Strategic Lawsuit Against Public Participation) laws are statutes that insulate people and entities that speak out on matters of public interest from baseless SLAPP lawsuits, designed solely to punish speech and drain financial resources. Numerous jurisdictions, including the District of Columbia,[1] have anti-SLAPP laws to ensure that people can highlight corporate misbehavior without fear of being tied up in retaliatory litigation. Anti-SLAPP protections work by cutting off a SLAPP suit in its tracks, halting all proceedings until both the trial and appellate courts determine whether the suit is in fact retaliatory. Recently, however, corporations have turned these protections on their heads to stop legitimate government enforcement actions by claiming that government suits are in fact SLAPP suits. Consequently, important government cases have been halted while courts resolve specious SLAPP claims.

This legislation would clarify that government enforcement suits are not subject to the District's anti-SLAPP law. This change is especially urgent because local enforcement actions have been obstructed by invocation of anti-SLAPP statutes. What's more, large oil companies have used anti-SLAPP laws to stop state enforcement cases across the country, and OAG's pending suit against these companies for deception regarding climate change is vulnerable to this sort of attack without amendments to clarify the law's reach.

OAG thanks the Council for moving swiftly to remedy the misuse of the District's anti-SLAPP law so that we can continue to enforce our statutes and protect the people and resources of the District of Columbia. If you have any questions, you may contact me, or your staff may contact Deputy Attorney General Emily Gunston at (202) 805-7638.

Sincerely,

Karl A. Racine
Attorney General for the District of Columbia

[1] D.C. Code § 16-5502.

Chairman Mendelson
at the request of the Attorney General

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Mendelson, at the request of the Attorney General, introduced the following bill, which was referred to the Committee on _____.

To amend the Anti-SLAPP Act of 2010 to clarify that it does not apply to actions brought by the District.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Temporary Amendment Act of 2021".

Sec. 2. Section 6 of the Anti-SLAPP Act of 2010, effective March 31, 2011 (D.C. Law 18-351; D.C. Official Code § 16-5505), is amended as follows:

(a) The existing text is designated as subsection (a).

(b) A new subsection (b) is added to read as follows:

"(b) This chapter shall not apply to any claim for relief brought by the District."

Sec. 3. This act shall apply as of March 31, 2011, and shall apply to any cases pending at the time of the enactment of the Anti-SLAPP Temporary Amendment Act of 2021, passed on 2nd reading on XXX, 2021 (Enrolled version of Bill 24-XXX).

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5. Effective date.

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

(b) This act shall expire after 225 days of its having taken effect.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

Legal Counsel Division

MEMORANDUM

TO: Ronan Gulstone
Director
Office of Policy and Legislative Affairs

FROM: Brian K. Flowers
Deputy Attorney General
Legal Counsel Division

DATE: October 6, 2021

RE: Legal Sufficiency Certification of Draft Legislation, the "Attorney General Anti-SLAPP Amendment Act of 2021"
(AE-21-137)

This is to Certify that this Office has reviewed the above-referenced draft legislation and found it to be legally unobjectionable. If you have any questions, please do not hesitate to call me at 724-5524.

Brian K. Flowers by CPE

Brian K. Flowers

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Motion to Strike 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 8th day of March 2022.

/s/*Kirk Jenkins*
Kirk Jenkins, Esq.

SCHEDULED FOR ORAL ARGUMENT ON APRIL 20, 2022

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

OPPOSITION OF THE DISTRICT OF COLUMBIA TO APPELLANTS' MOTION TO STRIKE

Appellee the District of Columbia opposes appellants' motion to strike its brief and bar it from participating in oral argument. The District intervened below as of right pursuant to the rules of the Superior Court to defend the Anti-SLAPP Act of 2010 against appellants' challenges under the Constitution and Home Rule Act. The sole ground for the motion to strike is that statements last year by the Chairman of the Council of the District of Columbia and the Attorney General for the District of Columbia concerning proposed legislation are purportedly inconsistent with arguments in the District's brief. Appellants have shown no such inconsistency, and in any event, do not cite any authority or legal theory to support their remarkable request that the District be barred from defending its own statute in court. The motion should be denied.

BACKGROUND

1. Procedural History.

In August 2017, plaintiff-appellants Morgan Banks, Debra Dunivin, and Larry James filed a complaint in the Superior Court for defamation against David Hoffman, an attorney; his law firm, Sidley Austin; and the American Psychological Association. Joint Appendix ("JA") 39. Defendants filed special motions to dismiss under the Anti-SLAPP Act. JA 432, 702. *See* District Br. 4-8.

In January 2019, plaintiffs filed a motion to declare the Anti-SLAPP Act void and unconstitutional. JA 18 (Record Document ("RD") 84). The trial court granted the District's consent motion to intervene and for additional time to respond to appellants' challenges. JA 28 (RD 143). On January 23, 2020, after the District filed a brief in support of the anti-SLAPP Act, the court denied plaintiffs' motion to declare the Act void and unconstitutional. JA 2043-56. Following limited discovery and a hearing, the Superior Court granted defendants' special motions to dismiss and dismissed plaintiffs' complaint with prejudice on March 11, 2020. JA 2164, 2193.

After their timely appeal, appellants filed a notice to the Court pursuant to D.C. App. R. 44 that they intended to challenge the constitutionality and validity of the Anti-SLAPP Act. In their briefs, appellants then argued that the Anti-SLAPP Act both violated the District's Home Rule Act, D.C. Code § 1-206.02(a)(4), by changing Superior Court rules of procedure, and unconstitutionally interfered with the First Amendment rights of plaintiffs to bring well-founded claims. *See, e.g.*, Reply Br. 45-60.

The parties completed briefing in July 2021, and this Court recently set oral argument for April 20, 2022.

2. Present Motion To Strike.

Appellants now move to strike the District's brief and bar its participation in oral argument because of two general statements made by District officials in legislative contexts last year. The first is a statement in the testimony of Council Chairman Phil Mendelson before the Committee on Oversight and Reform of the United States House of Representatives on March 22, 2021 in support of H.R. 51, the Washington, D.C. Admission Act. Explaining that D.C. statehood was necessary to prevent congressional interference in local affairs, the Chairman gave as examples of Home Rule Act limitations that "we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process." Mot. Ex. A at 9.

The second is a statement in a letter by Attorney General Karl Racine to Chairman Mendelson on October 28, 2021 in support of a bill to amend the Anti-SLAPP Act to exempt enforcement actions by the District. Describing the purpose of anti-SLAPP statutes generally, the Attorney General stated: "As you know anti-SLAPP (Strategic Lawsuit Against Public Participation) laws are statutes that insulate people and entities that speak out on matters of public interest from baseless SLAPP lawsuits, designed solely to punish speech and drain financial resources." Mot. Ex. B at 1. The Attorney General continued: "Anti-SLAPP protections work by cutting off a SLAPP suit in its tracks, halting all proceedings until both the trial and appellate courts determine whether the suit is in fact retaliatory." Mot. Ex. B at 1.

Suggesting that these statements somehow concede the unconstitutionality and invalidity of the District's anti-SLAPP statute, appellants argue that "[t]he Court should not permit the District to change its positions on critical legal issues depending on the forum." Mot. 1. Appellants contend that, as a result, the District must "withdraw its brief and join the Appellants in supporting reversal." Mot. 6.

DISCUSSION

There is no dispute that the District properly intervened in this matter and has a right to defend against appellants' challenges to the Anti-SLAPP Act. Appellants brazenly attempt to deny the District this right, however, by straining to manufacture some inconsistency between the statements of District officials in a separate legislative context and the statements of the District in this litigation. No such inconsistency exists, and in any event, appellants offer no authority or even legal theory that could conceivably justify barring the District from being heard to the defend the validity and constitutionality of its own statute.

Appellants have not shown that the legislative statements that they cite are "squarely contrary to the two key arguments the District makes in its Appellee's Brief." Mot. 1. Chairman Mendelson's statement in his testimony on D.C. statehood is fully consistent with the District's argument in its brief that "the Anti-SLAPP Act is a valid exercise of the Council's broad authority to enact local legislation" and that "[t]he Council enjoys a wide degree of authority under the Home Rule Act," which this Court has interpreted "to impede only the Council's ability to pass laws that directly alter the jurisdiction and organization of the District's courts." Mot. 2 (quoting District Br. 10-11). Indeed, the Chairman's

statement that the Council cannot "strengthen" the Anti-SLAPP Act, enacted in 2010, assumes that the Council's enactment of the existing Act *was* within the Council's authority. To be sure, the Council would be unable to strengthen the Act in a way that would directly alter the organization and jurisdiction of the District of Columbia Courts. *See* District Br. 11. Appellants, though, are obviously not challenging any such hypothetically strengthened act but the one that is actually in existence. In any case, statements of the Chairman or members of the Council are not binding on the Attorney General, who has charge of all of the legal business of the District. D.C. Code § 1-301.81.

Similarly, the Attorney General's statement in his letter to the Chairman of the Council that generally characterized SLAPP lawsuits as those "designed solely to punish speech" on matters of public interest, Mot. Ex. B at 1, is not at all inconsistent with the District's position here. Appellants suggest such an inconsistency based on the following passage from the District's brief:

> 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* [*v. Holmes Prods. Corp.*], 691 N.E.2d [935 (1998)] at 942-43. But statutes may instead allow plaintiffs an opportunity to demonstrate their claims' merits. *See Equilon* [*Enters. v. Consumer Cause, Inc.*, 52 P.3d 685, 689 (Cal. 2002)] at 691. The right to petition does not require both.

Mot. 4 (quoting District Br. 25) (emphasis in original). Appellants argue that the Attorney General "made it plain that he now believes the Act should protect only against lawsuits designed solely to punish speech," i.e., only those suits where an improper motive has been shown. Mot. 4. Appellants misread the Attorney General's statement.

The Attorney General's description in his letter of anti-SLAPP acts in general does not purport to speak to their constitutional requirements. Nor did the Attorney General question the settled decisions of this Court holding that the District's Anti-SLAPP law does not require proof of an improper motive on the part of the plaintiff. As the District's brief noted, "this Court had no difficulty interpreting the District's Anti-SLAPP Act to reject an improper motive requirement." District Br. 25 (citing *Doe v. Burke*, 133 A.3d 569, 574-76 (D.C. 2016)). The Act requires that, if a defendant shows that plaintiff's claim arises from protected speech, then plaintiff must establish that it is likely to succeed on the merits, D.C. Code § 16-5502(b), which this Court has interpreted as requiring an evidentiary basis for a jury to find in plaintiff's favor, *see Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1261-62 (D.C. 2016). The Attorney General's letter does not in any way state that requiring proof of an improper motive is essential to the Act's constitutionality or proper interpretation.

Even if appellants' arguments had persuasive value (which they do not), they go to the merits and are not grounds for a motion to strike. Appellants could have raised these arguments in their reply brief or a citation of supplemental authority. They offer no legal authority or analysis whatsoever for their extraordinary request, instead, to strike the District's brief and prevent its participation in oral argument. Their request is without basis or legal foundation.

CONCLUSION

This Court should deny appellants' motion.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

/s/ James C. McKay, Jr.
JAMES C. McKAY, JR.
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March 2022

CERTIFICATE OF SERVICE

I certify that on March 15, 2022, this opposition was served through this Court's electronic filing system:

John B. Williams
Bonny J. Forrest
Kirk C. Jenkins
John K. Villa
Thomas G. Hentoff
Karen E. Carr
Barbara S. Wahl

/s/ James C. McKay, Jr.
JAMES C. McKAY, JR.

ORAL ARGUMENT APRIL 20, 2022
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 OF APPELLANTS COLS. (RET.) L. MORGAN BANKS III, DEBRA L. DUNIVIN, AND LARRY C. JAMES TO THE DISTRICT OF COLUMBIA'S OPPOSITION TO APPELLANTS' MOTION TO STRIKE THE DISTRICT'S BRIEF

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RULE 26.1 CERTIFICATE

All appellants are individuals.

RULE 28(A)(2) CERTIFICATE

Plaintiffs-Appellants: L. Morgan Banks III, Debra L. Dunivin, Larry C. James
Counsel: Bonny J. Forrest; Kirk Jenkins, Arnold & Porter; John Williams, Williams Lopatto PLLC

Defendants-Appellees: David Hoffman, Sidley Austin LLP, and Sidley Austin (DC) LLP
Counsel: Thomas G. Hentoff, John K. Villa, Stephen J. Fuzesi, Krystal C. Durham, Matthew J. Greer, Williams & Connolly LLP

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

Intervenor-Appellee: D.C. Attorney General
Counsel: Karl A. Racine, Loren L. AliKhan, Caroline S. Van Zile, Carl J. Schifferle, James C. McKay

Table of Authorities

Cases

Statutes

Other

This case raises two questions about the D.C. Anti-SLAPP Act. First, did it violate the Congressional mandate that the D.C. Council may not legislate with respect to "any provision" of Title 11 of the D.C. Code and, in particular, that D.C. courts must follow the Federal Rules of Civil Procedure unless this Court approves modifications to them? D.C. Code § 1-206.2; § 11–946.[1] Second, does the Anti-SLAPP Act violate the First Amendment by improperly obstructing the rights of citizens with legitimate grievances to petition the courts for redress? On these issues, the D.C. Attorney General and Council Chair have made public statements that contradict positions taken in the District's Brief to this Court. In fact, their statements align with the Appellants' positions. Instead of confronting these facts, the District's Opposition attempts to interpret away the plain meaning of the statements' language, while ignoring some of it, as well as the reasons for which it conflicts with the positions taken in the District's Brief.

I. The District Fails to Show that the Council Chair's Statement Does Not Conflict with Its Arguments to This Court.

The portion of the Home Rule Act that renders the Anti-SLAPP Act invalid is found at D.C. Code § 1-206.2 Limitations on the Council:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter,

[1] District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code §§ 11-101 to 11-2504, 23-101 to 23-1705 (1973 & Supp. 1977).

or to—

* * *

> (4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)[.]

The District's Opposition repeats its contention that the Council is prohibited from legislating only with respect to the "organization and jurisdiction" of the courts, because the ending parenthetical limits the scope of the preceding unequivocal language. District Opp. at 5; Intervenor's Br. at 8-9. As Appellants' briefs have demonstrated, that contention collapses in the face of the accepted rules of statutory interpretation and the relevant precedent. Appellants' Opening Br. at 53-54; Reply at 45-53. The parenthetical, which simply repeats the Title's heading as it was enacted ("Title 11. Organization and Jurisdiction of the Courts"), is properly read as intended to assist the reader in understanding what Title 11 generally concerns, not to broaden Congress' grant of authority to the D.C. Council.

Before Congress, Council Chair Mendelson testified that the Council is prohibited from amending the Anti-SLAPP Act *not* because it is prohibited from legislating as to the courts' jurisdiction and organization, but "because we cannot legislate judicial process." His phrasing cannot be considered a one-time misstatement: he gave identical testimony, using the same words, before Congress in 2014 and 2019. Appellants' Motion to Strike at 3, fn 3. Yet the District attempts to distance itself from his statements. District Opp. at 5.

This testimony contradicts the District's argument to this court about the limited scope of the prohibitions on the D.C. Council. Moreover, the testimony makes clear that the Anti-SLAPP Act addresses not (or not solely) substantive legal rights, as the District has argued, but the "judicial process." "Process" and "procedure" are considered synonyms by such authorities as Merriam-Webster,[2] and the "process" of the D.C. courts is governed by the courts' Rules of Procedure.

D.C. Code § 11–946 mandates that the Superior Court must follow the Federal Rules of Civil Procedure, and any "modifications" to those rules must be first approved by this Court. There is no question, as Appellants have demonstrated, that the Anti-SLAPP Act establishes new procedures for the D.C. Superior Court which modify—in fact, conflict with—the Federal Rules. The District has attempted to escape D.C. Code § 11–946 by arguing that the Act establishes substantive rights, not procedures. In the face of overwhelming authority to the contrary, *and now of the Council Chair's view that the Act addresses judicial process,* that argument is unavailing. Appellants' Opening Br. at 54-55; Reply at 45-53.[3]

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[2] "Process" in *Merriam-Webster.com*. Retrieved March 17, 2022, from https://www.merriam-webster.com/thesaurus/process)

[3] *See also* James C. McKay Jr., *Separation of Powers in the District of Columbia under Home Rule*, 27 Cath. U. L. Rev. 515, 538 (1978). "In sum, it appears that the District of Columbia courts possess the exclusive power to promulgate rules of procedure governing the business of the courts, while only the Council possesses the authority to enact rules that affect substantive rights." Attached as Exhibit B to

II. The District Fails to Rebut Appellants' Showing that the Attorney General Has Publicly Taken the Position that the Anti-SLAPP Act Blocks Legitimate Suits.

The First Amendment guarantees the right, among others, to access the courts for the redress of wrongs. *See, e.g., Stuart v. Walker,* 143 A.3d 761, 767 (D.C. 2016). Laws significantly infringing on First Amendment rights must survive exacting scrutiny "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . ." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (citation omitted). As a result, when anti-SLAPP statutes, initially intended to protect defendants against sham lawsuits, also implicate plaintiffs' First-Amendment rights, they must be at a minimum reasonably designed to achieve their intent if they are to pass constitutional muster.

Attorney General Racine's comments support the view that the Act is not so designed, but instead imposes undue burdens on suits that are not SLAPPs. The Opposition summary of his comments omits their key point: the D.C. Anti-SLAPP Act has enabled defendants to turn its protections "on their heads," as Appellants have consistently argued. District Opp. at 3.

Plaintiffs' Motion to Declare the Anti-SLAPP Act Void and Unconstitutional; *article available at* https://scholarship.law.edu/cgi/viewcontent.cgi?article=2404&context=lawreview

> As you know, anti-SLAPP . . . laws are statutes that insulate people and entities that speak out on matters of public interest from baseless SLAPP lawsuits, *designed solely to punish speech and drain financial resources* . . . Anti-SLAPP protections work by cutting off a SLAPP suit in its tracks, halting all proceedings until *both the trial and appellate courts determine whether the suit is in fact retaliatory*. Recently, however, corporations have turned these protections on their heads to stop legitimate government enforcement actions by claiming that government suits are in fact SLAPP suits. Consequently, important government cases have been halted while courts resolve specious SLAPP claims.

Letter to Council Chair Phil Mendelson, October 28, 2021 (emphasis added); attached to Appellants' Motion to Strike as Ex. B.

The Attorney General's letter is entirely consistent with Appellants' position in their briefs, not the District's. First, the letter assumes, if it does not explicitly state, that an anti-SLAPP law must protect only against actual retaliatory SLAPPs designed to punish speech protected by the First Amendment. Second, the Attorney General believes the D.C. Anti-SLAPP Act is not serving its announced purpose and, in fact, has become harmful and is being misused.

His analysis is that D.C. courts are bogging down legitimate actions by testing whether they are SLAPPs. In fact, the harm results primarily because the Act's application is triggered *not* by a showing that a suit is a SLAPP, designed as a weapon to silence speech or drain resources, but merely by "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 . . . ." D.C. Code § 16-5502. Once the showing is made, the

burden shifts to the plaintiffs to demonstrate that they have a likelihood of success on the merits—even if their suit is not a retaliatory SLAPP.

Although the Attorney General's diagnosis and the Appellants' differ, the bottom line is the same: the Act is not reasonably designed to achieve its announced aim of disposing efficiently of suits designed "not to win the lawsuit but punish the opponent and intimidate them into silence." D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010) at 4. Instead, it imposes impermissible burdens on plaintiffs with legitimate claims by sweeping them up in its reach.

These statements of the District Attorney General and Council Chair cannot be reconciled with the District's positions in this case. This conflict, compounded by the District's refusal to acknowledge any discrepancy at all, is grounds for this Court to strike the District's brief and bar it from oral argument.

The District's suggestion that Appellants should have made this argument in a reply filed last July, even though the Attorney General's letter is dated October 28, 2021, is irrelevant to the issue: should the District be permitted to take one position before this Court and another, irreconcilable position when that suits its immediate purposes? Its suggestion that Appellants simply should have provided the conflicting statements as supplemental authority is similarly unfounded, given that the District

of Columbia Court of Appeals Rule 28(k) provides that the citation of supplemental authority shall be made without argument.

Respectfully submitted this 18th day of March 2022.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Reply to the District's Opposition to the Motion to Strike 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 18th day of March 2022.

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