No. 20-cv-0318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Morgan Banks, *et al.*,

Appellants,

v.

David H. Hoffman, *et al.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, 2017 CA 005989 B
Hon. Hiram E. Puig-Lugo, Associate Judge

BRIEF OF APPELLEES SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID H. HOFFMAN

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RULE 28(a)(2)(A) CERTIFICATE AS TO PARTIES

Counsel certifies that the following parties and intervenors appeared in the Superior Court of the District of Columbia:

- Bonny J. Forrest on behalf of L. Morgan Banks III, Debra L. Dunivin, Larry C. James, and Russell Newman, plaintiffs

- Williams Lopatto PLLC on behalf of L. Morgan Banks III, Stephen Behnke, Debra L. Dunivin, Larry C. James, and Russell Newman, plaintiffs
    - John B. Williams

- Clare Locke LLP on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, plaintiffs
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Counsel certifies that the following parties are appearing in this court:

- Bonny J. Forrest on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants

- Williams Lopatto PLLC on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants
    - John B. Williams

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1(a), defendants-appellees Sidley Austin LLP and Sidley Austin (DC) LLP, which are limited liability partnerships, disclose that they do not have a parent corporation and no publicly held company owns more than ten percent (10%) of their stock. Defendant-appellee Sidley Austin LLP discloses that as of April 26, 2021, the following individuals were active partners:

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Arazi, Jeannette K.
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Berg, Beth E.
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Blackburn, Jonathan A.
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Braun, Bruce R.
Cardonick, Andrew R.
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Carney, Sean M.
Cauley Jr., Thomas K.
Cederoth, Richard A.
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Johnson, Matthew E.
Jones, Jaime L.M.
Kansa, Kenneth P.
Kapshandy, Timothy E.
Katz, Seth H.
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Kavanaugh, Brian P.
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Pollock, Scott
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Qasim, Imad I.
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Ramirez, Michelle A.
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Cunningham, Thomas D.
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Fitzell, Stephen P.
Flint, Tacy F.
Fogel, Lawrence P.
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Giardina, David C.
Goldman, Michael P.
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Defendant-appellee Sidley Austin (DC) LLP discloses that as of April 26, 2021, the following individuals were active partners:

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Pai, Raj D.
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Cohen, Stephen L.
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Savage, Justin A.
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Senger, Jeffrey M.
Shenk, Christopher T.
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Shubert, Leslie A.
Singer, Joel
Solovy, Eric M.
Stanislawski, Howard J.
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Sullivan, Neal E.
Teitelbaum, David E.
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Van De Weert, John K.
Volpe, Frank R.
Wales, Samuel W.
Warden, Mike
Warren, Matthew J.
Webster, Timothy K.
Weiner, Richard
Whitfield, Peter
Wolk, Michael D.
Wood, Rebecca K.
Xenakis, Angela M.
Young, James P.
Zegger, Paul J.
Zidlicky, Paul J.

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JURISDICTION

This appeal is from a final order dismissing plaintiffs-appellants' claims under the D.C. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act of 2010, D.C. Code §§ 16-5501 to -5505 (2012 Repl.). This court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

1. Did the Superior Court correctly hold that plaintiffs, Col. (Ret.) L. Morgan Banks III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James – all military psychologists who admittedly led efforts to create and implement Department of Defense ("DoD") interrogation policies – were public officials to whom the *New York Times v. Sullivan* actual malice standard applies?

2. Did the Superior Court correctly hold that plaintiffs failed to show that a properly instructed jury could find, by clear and convincing evidence, that defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley partner David H. Hoffman ("Sidley") made any allegedly false statement about any plaintiff with actual malice in submitting an independent investigative report ("Report") to their client the American Psychological Association ("APA") in 2015?

3. (a) Did the Superior Court correctly hold that plaintiffs failed to show that a properly instructed jury could find that APA's changes to its website in 2018 amounted to a republication of Sidley's Report?

(b) In addition, as to Sidley, can this court affirm the decision on the alternative ground that plaintiffs failed to show that a properly instructed jury could find that Sidley had any involvement in website changes made by APA three years after Sidley submitted its Report?

4. Did the Superior Court correctly hold that the D.C. Anti-SLAPP Act violates neither the Home Rule Act of 1973, D.C. Code §§ 1-201.01, *et seq.*, nor the First Amendment?

STATEMENT OF THE CASE

Nature of the Case

The D.C. Anti-SLAPP Act was enacted to promote free speech by protecting defendants who express views on issues of public interest from SLAPP suits brought to "prevent" such speech. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016). This case exemplifies the need for such protection. In 2015 Sidley submitted the Report to its client APA concerning hotly debated issues over APA's and psychologists' roles in connection with national security interrogations of detainees during the government's War on Terror in the 2000s, and APA published the Report to its members and the public. Unhappy with the Report's conclusions, plaintiffs attacked the Report in multiple ways, including by filing this lawsuit.

Sidley attorneys worked for eight months on the investigation, interviewing roughly 150 witnesses, conducting over fifty follow-up interviews, and reviewing

more than 50,000 documents. They produced a 541-page Report including 2,577 supporting footnotes and accompanied by 7,600 pages of publicly available exhibits. Acknowledging this comprehensive, extensively disclosed investigative work, and the judgment calls required to synthesize and present the extensive information collected, the Superior Court dismissed plaintiffs' claims under the D.C. Anti-SLAPP Act. The court held that plaintiffs are public officials and rejected plaintiffs' claims that Sidley or APA had made false statements about them with "actual malice" – that is, with knowledge of falsity, or while subjectively entertaining serious doubts as to the truth, or with a high degree of awareness of probable falsity. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The Superior Court was correct: plaintiffs failed to make the required showing. As the court recognized, defamation plaintiffs cannot "show actual malice *in the abstract*; they must demonstrate actual malice in conjunction with *a false defamatory statement*." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc) (emphasis added and omitted); JA2219. Yet plaintiffs ignore this requirement; their seventy-page brief barely quotes the Report itself. And it fails to identify a single allegedly false statement about any plaintiff made with actual malice. That is not surprising given the scale and depth of Sidley's investigation and the ethical rules requiring lawyers to give clients candid advice. *See, e.g.*, D.C. Board Prof. Resp. R. 2.1. Plaintiffs instead rely on mischaracterizations of the

Report, generalized innuendo, and misstatements of the law and the record. But the brief never explains why any specific allegedly false statement about any plaintiff was purportedly published with actual malice. There are none; the judgment should be affirmed.

Course of Proceedings and Decision Below

Five plaintiffs filed a defamation and false-light invasion of privacy complaint against Sidley and APA in D.C. Superior Court on August 28, 2017 and a First Supplemental Complaint ("Complaint") on February 4, 2019. On March 26, 2019, the Superior Court ordered former plaintiffs Dr. Stephen Behnke and Dr. Russell Newman, both former APA employees, to arbitrate their claims.

Col. (Ret.) L. Morgan Banks III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James are the remaining three plaintiffs. Their Complaint is 112 pages and contains 586 numbered paragraphs and thirteen counts. JA233-48. It attaches a forty-five-page exhibit listing 219 allegedly false passages from Sidley's Report. JA349-93. All counts against Sidley arise from Sidley's submission of its Report to APA,[1] including the supplemental 2019 Count 11, which alleges that changes APA made to its website in 2018 amounted to republication of the Report for which all

[1] The Complaint includes counts about publication of the Report at different points in time up to September 4, 2015, *e.g.*, JA325, 331, 335; plaintiffs' inability to show actual malice applies to all the publications.

defendants are responsible. JA340-43. Defendants moved under the Anti-SLAPP Act to dismiss the original complaint on October 13, 2017, JA432-734, and the supplemental complaint on March 21, 2019, JA959-1081.

Plaintiffs moved to invalidate the Anti-SLAPP Act on January 8, 2019. The District of Columbia intervened; it and defendants opposed the motion. The Superior Court denied the motion in a January 23, 2020 order. JA2043-56.

The court granted plaintiffs anti-SLAPP discovery in a February 8, 2019 order and permitted full briefing on Sidley's and APA's anti-SLAPP motions directed to the original and supplemental complaints.[2] The court held a hearing on February 21, 2020. On March 11 and March 12, 2020, it issued an order and amended order granting the motions and dismissing plaintiffs' claims with prejudice.

The court held that D.C. law applied and that defendants were entitled to protection under the Anti-SLAPP Act because they were engaged in "advocacy on issues of public interest." JA2204-07. Plaintiffs do not challenge those conclusions on appeal. Turning to the merits, the court held that plaintiffs failed to show a likelihood of success. Relying on the Complaint and settled law, it held that plaintiffs – military officers with substantial responsibility – were "public officials" required to meet the actual malice standard under the First Amendment. *See* JA2207-11.

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[2] Sidley produced roughly 31,000 pages of documents and the former plaintiff Behnke's work hard drive, and APA answered four interrogatories and produced more than 22,000 pages of documents from the hard drive. JA1179-80 ¶¶ 4-5.

Examining plaintiffs' evidence, the court concluded that they failed to meet their heavy burden with respect to actual malice. The court held, "Plaintiffs fail to proffer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, the Report were false or that they published the Report with reckless disregard of the falsity of these stated or implied facts." JA2214. As for the supplemental count predicated on "re-publication" of the Report, the court held that "there was no republication of the Report as a matter of law." JA2213. Plaintiffs appealed.

STATEMENT OF FACTS

A. The Controversy Regarding Psychologists' Involvement in Abusive Interrogations of National Security Detainees.

Following the 2004 disclosure of abuses of detainees at the Abu Ghraib prison and elsewhere, the use of "enhanced interrogation techniques" and the role of psychologists in such interrogations came under intense public scrutiny. On November 30, 2004, the *New York Times* reported that the International Red Cross found "that the American military has intentionally used psychological and sometimes physical coercion . . . on prisoners at Guantánamo Bay" and that military psychologists were "advis[ing] the interrogators" using these techniques. N. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, JA476-77; *see also* JA258 ¶ 70. These disclosures created widespread controversy about the use of these techniques and psychologists' participation in interrogations. JA258 ¶ 70.

B. The PENS Task Force.

In response to this controversy, APA's Board of Directors voted in early 2005 to establish a task force to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." JA258 ¶ 71. "This task force became known as the PENS Task Force, 'PENS' standing for Psychological Ethics and National Security." JA258 ¶ 71. All three plaintiffs were involved in the formation or deliberations of the Task Force. See *infra* pages 9-10. The press covered the meeting of the Task Force alongside new reporting about psychologists' involvement in abusive interrogations. *See* N. Lewis, *Interrogators Cite Doctors' Aid at Guantánamo*, N.Y. Times, June 24, 2005, JA484-87.

The PENS Task Force met in Washington, D.C., from June 24 to 26, 2005. JA259 ¶ 75. After deliberating, it proposed ethical guidelines for psychologists involved in national security interrogations, JA259 ¶ 75, stating that psychologists could be involved to make sure interrogations were "safe, legal, ethical, and effective." JA499. The APA Board adopted the PENS Guidelines on July 1, 2005. JA259-60 ¶ 77.

C. Post-PENS Task Force Debate.

In the years after release of the PENS Task Force's report, critics raised concerns about the Task Force and its Guidelines. Critics saw the work of the Task Force as evidence of collusion between APA and the U.S. government and

advocated for a total ban on psychologists participating in national security interrogations. JA237 ¶ 2, JA285 ¶¶ 176, 178. Some critics filed ethics complaints against psychologists for allegedly facilitating torture. *See* JA285 ¶ 176. Over the next several years public debate continued about psychologists' participation in national security interrogations, including APA and its over 100,000 members. "The issue was openly debated on [the APA] Council [of Representatives] floor and in numerous meetings, including a mini-convention on the topic." JA274 ¶ 131. The controversy continued to garner media attention. *See, e.g.*, A. Fifield, *Policy Divides Psychologists*, Phila. Inquirer, Aug. 9, 2006, JA504; T. deLuzuriaga, *A Push to Ban Psychologists' Role in Torture*, Bos. Globe, Aug. 17, 2008, JA507.

D. Plaintiffs' Involvement in These Events.

Plaintiffs Morgan Banks, Debra Dunivin, and Larry James were all psychologists and Army colonels who served in senior positions in military hospitals or other military commands. *See* JA247-49 ¶¶ 39, 41-42. Dunivin and James each served as Chief of the Department of Psychology at Walter Reed Army Medical Center. JA248-49 ¶¶ 41-42. Dunivin and James also served in senior roles at Guantanamo Bay, and James was subsequently the Director of Behavioral Science at Abu Ghraib. JA248-49 ¶¶ 41-42. Banks served as the Director of Psychological Applications for the Army's Special Operations Command; in that role, he "provided ethical as well as technical oversight for all Army Special Operations Psychologists." JA247 ¶ 39.

The Complaint states that Banks, Dunivin, and James each played a "leading role" "in drafting policies and implementing training and oversight to prohibit and, as far as possible, prevent future abuses" related to interrogations. JA239-40 ¶ 12, JA272. Dunivin and Banks drafted policies governing psychologists consulting on military interrogations at Guantanamo Bay, JA258 ¶ 69, JA270 ¶ 114, JA274 ¶ 129, and James and Banks investigated abuses at Abu Ghraib and "draft[ed] policies and institut[ed] procedures to prevent abusive interrogations," JA272-73 ¶¶ 123, 127. Banks was "an author of the Army Inspector General's report . . . on detainee operations in Iraq and Afghanistan" and consulted with the Army "on a revision to the Army Field Manual" related to interrogation techniques. JA273 ¶ 125.

Banks and James were members of the PENS Task Force. JA259 ¶ 73. Banks introduced the Task Force to DoD guidance he was drafting for military psychologists supporting interrogations that included the "safe, legal, ethical, and effective" construct and successfully urged APA to do the same with its Task Force Guidelines. JA491-93, 1883, 2466. James observed in his published memoir that "[t]he results of this blue-ribbon panel were controversial." JA512-13. Dunivin, who was stationed at Guantanamo Bay supporting interrogations at the time, was not a member of the Task Force but made suggestions to APA about who should be selected as members. JA250 ¶ 45. Dunivin's husband, former plaintiff Russell Newman, participated in the Task Force as an observer without disclosing the

marriage to all participants, for which he received public criticism. JA297-98 ¶¶ 224-25.

E. APA Retains Sidley to Conduct an Independent Investigation In Response to Publication of *Pay Any Price*.

In 2014, *New York Times* reporter James Risen published the book *Pay Any Price*. Among other topics, it discussed the role of psychologists in national security interrogations and claims that APA colluded with the government to support torture and that the outcome of the PENS Task Force was a result of APA collusion with the government. JA237 ¶¶ 2-3; J. Risen, *Pay Any Price* 199-200 (2014), JA671-72.

In response to the controversy over Risen's book, APA engaged Sidley to conduct an independent review of allegations regarding APA's issuance of ethical guidance regarding interrogations and address whether "APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of 'enhanced' interrogation techniques." JA1780; *see also* JA237 ¶ 3. APA asked Sidley to investigate "all the evidence" and go "wherever the evidence leads." JA240 ¶ 15. It was understood that APA intended to make the final Report publicly available. JA241 ¶ 18.

David Hoffman, a Sidley partner, led a team of Sidley lawyers. JA2225. Over eight months, Sidley interviewed roughly 150 witnesses, conducted over fifty follow-up interviews of witnesses, and reviewed over 50,000 documents. JA2243-44. In July 2015, Sidley provided APA with its Report, titled Report to the Special

Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture. The Report detailed Sidley's findings and the bases of its conclusions and opinions. APA made the Report and 7,600 pages of exhibits publicly available. In September 2015, Sidley provided a revised version containing a small number of corrections shown in a seven-page errata chart at the back of the Report, none about any of the three plaintiffs. JA2779-85.

Sidley reached a number of conclusions based on its review of the evidence. Notwithstanding allegations from APA critics, the Report did not find that APA colluded with CIA, or that APA colluded with anyone to support torture. JA2238, 2282, 2304-05. The Report did find that "key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." JA2246. It did not find evidence that APA "knew about the existence of an interrogation program using 'enhanced interrogation techniques,'" only that certain APA officials had been indifferent to the possibility. JA2246. The Report also concluded that former plaintiff Behnke, the APA Ethics Director, engaged in a long-term secret collaboration with DoD officials, including plaintiffs, to defeat APA resolutions that would have restricted military psychologists' involvement in

interrogations. JA2273. The Report also criticized the APA Ethics Committee and Ethics Department, whose members are not plaintiffs here, for their handling of ethics complaints against prominent national security psychologists. JA2295.

F. Post-Report Actions.

Controversy over APA's position regarding psychologists' involvement in national security interrogations continued, including criticisms of and attacks on the Sidley Report by some and defenses of the Report by others. *See, e.g.*, JA245 ¶ 31, JA305 ¶ 263. This included public statements and efforts over the years to persuade APA to remove the Report from its website or otherwise promote criticisms of it. JA311-12 ¶ 289. Those efforts led to the APA Council of Representatives' voting in August 2018 to make certain changes to the APA website, including adding to an APA timeline page about the controversy four documents critical of the Report and deleting one of two ways to access the Report on the website. JA313. Sidley was not involved in the website changes. JA313-16 ¶¶ 295-305.

SUMMARY OF THE ARGUMENT

1. Plaintiffs do not dispute that Sidley's Report to APA, conveying the results of its independent investigation into allegations of collusion between the U.S. government and APA about government psychologists' involvement in national security interrogations during the War on Terror, is an "[a]ct in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5501(1). Sidley thus

satisfied the "prima facie showing" under the Anti-SLAPP Act, and the burden shifted to plaintiffs to demonstrate that their claims are "likely to succeed on the merits," § 16-5502(b), which this court has held mirrors the standard for defeating a summary judgment motion. Plaintiffs failed to meet that standard because they are public officials and cannot show, by the required clear and convincing evidence, that Sidley published any false statements about them with actual malice.

2. Plaintiffs are all psychologists who, per their Complaint, were U.S. Army colonels during the time covered by the Report. They all admittedly took a leading role in creating and implementing policies for psychologists' support of national security interrogations during the War on Terror. They were also admittedly involved in APA's efforts to address the appropriate role for government psychologists supporting interrogations amid emerging controversies over that subject. Under the standard uniformly applied by the U.S. Supreme Court and D.C. courts, all three plaintiffs easily qualify as public officials for actual malice purposes.

3. Plaintiffs' claimed "direct evidence" of actual malice fails. They rely principally on mischaracterizations and second-hand characterizations of the Report while largely avoiding addressing the Report's actual text. None of plaintiffs' purported evidence shows that Sidley doubted any statements about them, let alone possessed the serious, subjective doubts required to establish actual malice.

4. Plaintiffs' claimed "circumstantial evidence" of actual malice also fails.

The scope of Sidley's investigation belies plaintiffs' accusations that it followed a "preconceived narrative," which "fail[ed] to adhere to proper investigatory practices," "purposeful[ly] avoid[ed] the truth," and relied only on "biased witnesses." Br. 34-37. Sidley interviewed roughly 150 witnesses, conducted over fifty follow-up interviews, and reviewed over 50,000 documents. Plaintiffs' other "circumstantial evidence" arguments are untethered from the facts and wrong on the law. Their charge that the Superior Court "impermissibly usurped the role of the jury," Br. 42, is largely a rehashing of failed arguments that plaintiffs assert elsewhere.

5. Plaintiffs failed to present evidence on which a properly instructed jury could rely to find either that APA's changes to its website in August 2018 amounted to republication of Sidley's September 2015 revised Report or that Sidley had any involvement in those changes.

6. The Superior Court correctly rejected plaintiffs' attempt to void the Anti-SLAPP Act. This court has addressed the Act many times without suggesting it may violate the Home Rule Act. As this court has held, the Anti-SLAPP Act provides substantive protections and requires courts to apply the same standard as with Civil Procedure Rule 56. It was thus well within the D.C. Council's powers to enact. This court has also held that the Act strikes a balance between protecting defendants engaged in political and public policy debates while preserving plaintiffs' ability to vindicate meritorious claims. It does not violate the First Amendment.

STANDARD OF REVIEW

All issues before this court are questions of law subject to de novo review. *See Mann*, 150 A.3d at 1240 (whether a jury could find actual malice by clear and convincing evidence); *Thompson v. Armstrong*, 134 A.3d 305, 312 (D.C. 2016) (whether plaintiffs are public officials); *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1086 (D.C. Cir. 2007) (whether a jury can find republication); *Unum Life Ins. Co. v. District of Columbia*, 238 A.3d 222, 226 (D.C. 2020) (constitutional challenges). This court may also affirm on any basis supported by the record. *See Wilburn v. District of Columbia*, 957 A.2d 921, 924 (D.C. 2008).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS UNDER THE ANTI-SLAPP ACT.

Plaintiffs do not dispute that the Anti-SLAPP Act applies. The Report's subject matter – investigation of charges that APA and government officials colluded to permit psychologists' involvement in abusive interrogations of national security detainees – is plainly an "issue of public interest." *Fridman v. Orbis Bus. Intell.*, 229 A.3d 494, 502-04 (D.C. 2020), *cert. denied*, 141 S. Ct. 1074 (2021).

Plaintiffs thus bear the burden of showing their claims are "likely to succeed on the merits." D.C. Code § 16-5502(b). They must establish that "a jury properly instructed on the law, *including any applicable heightened fault and proof requirements*, could reasonably find for the claimant on the evidence presented." *Mann*,

150 A.3d at 1236 (emphasis added). The Anti-SLAPP Act's likelihood of success standard mirrors the Rule 56 summary judgment standard, *id.* at 1237, 1238 n.32, and in an actual malice case, the "heightened fault and proof requirements" include the "clear and convincing evidence" standard, *id.* at 1236, discussed below.

The fault element of a defamation claim is at issue in this appeal. To succeed on a claim for defamation, a plaintiff must prove, among a number of other things, that a defendant's fault in publishing an allegedly false and defamatory statement "met the requisite standard." *Fridman*, 229 A.3d at 504. Because plaintiffs are public officials, the requisite standard is "actual malice," a standard they cannot meet.

A. Plaintiffs Are Public Officials Who Must Prove Actual Malice.

The Superior Court properly held that plaintiffs, all military psychologists holding the rank of colonel in the U.S. Army who, per their Complaint, "took a leading role in creating policies and procedures" concerning national security interrogations, are public officials for purposes of this suit. JA272, 2210.

"The public official category is by no means limited to upper echelons of government." 1 Robert D. Sack, *Sack on Defamation* § 5:2.1 (2019). Rather, this court has held that the "designation 'applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.'" *Thompson*, 134 A.3d at 312 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

Such public officials include law enforcement, *id.* at 313 (Treasury Inspector General special agent), correctional officers, *Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001), and school administrators, *Paul v. News World Commc'ns*, 2003 WL 23899002, at *2 (D.C. Super. Ct. Sept. 15, 2003). A former public official "will ordinarily be treated as a public official with respect to comments about . . . her past performance in that role." Sack, *supra*; *Rosenblatt*, 383 U.S. at 87 n.14.

Military officers like plaintiffs – holding ranks above captain and major – readily meet that expansive standard. *See, e.g.*, *Secord v. Cockburn*, 747 F. Supp. 779, 784 (D.D.C. 1990) ("[A]ny individual who holds an advisory military . . . position, or otherwise attempts to shape the policy of the United States, is by definition a public figure.").[3] Plaintiffs served in positions with substantial responsibility. What they deride as "cherry-pick[ing]," Br. 18, is their own Complaint's descriptions of their roles: Banks served as the Director of Psychological Applications for the Army's Special Operations Command, where he provided "oversight for all Army Special Operations Psychologists." JA247. Dunivin served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed

[3] *See also MacNeil v. CBS*, 66 F.R.D. 22, 25 (D.D.C. 1975) (colonel who served as spokesman for DoD); *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 805 (9th Cir. 1978) (per curiam) (commander of naval ship); *Davis v. Costa-Gavras*, 595 F. Supp. 982, 987 (S.D.N.Y. 1984) (U.S. military commander in Chile).

National Military Medical Center. JA248, 272. James served as Director of Behavioral Science at Guantanamo and Abu Ghraib. JA249. They cite no case holding that an officer of their rank and responsibilities was not a public official.

Plaintiffs assert that the Superior Court erred by failing to use a three-pronged test for public official status in a 1989 First Circuit case, *Kassel v. Gannett Co.*, 875 F.2d 935, 935-40 (1st Cir. 1989). But neither this court nor any D.C. court has ever cited *Kassel*.[4] Instead, this court applies the Supreme Court's *Rosenblatt* test. *See Thompson*, 134 A.3d at 312. The Superior Court appropriately applied that test.

Plaintiffs downplay their roles now, but the court properly relied on their Complaint, JA2210-11, which touted their high-profile positions and involvement in "drafting and implementing policies to ensure humane treatment, prevent abuses, and report any abuses that occurred." JA258. The Complaint alleges that Dunivin and Banks were responsible for drafting policies governing psychologists consulting on military interrogations at Guantanamo Bay, JA258, 270, 272, 274, and James and Banks were responsible for investigating abuses at Abu Ghraib and "drafting policies and instituting procedures to prevent abusive interrogations," JA272.

The Superior Court thus correctly recognized that the Complaint "provides a plethora of examples demonstrating plaintiffs' 'substantial responsibility for or

[4] Unlike plaintiffs here, the plaintiff in *Kassel* had no policymaking or supervisory authority and his duties did not affect the general public. 875 F.2d at 940.

control over the conduct of governmental affairs.'" JA2210 (quoting *Rosenblatt*, 383 U.S. at 88). Plaintiffs are public officials.

B. Plaintiffs Cannot Demonstrate Actual Malice.

Establishing actual malice requires a showing, by clear and convincing evidence, that the defendant knew that the statements challenged by a plaintiff were false, had a "high degree of awareness of . . . probable falsity," or "in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This is a "subjective" standard requiring evidence of the speaker's state of mind, specifically whether "the defendant actually entertained a serious doubt" about the truth of the statements. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996).

The "clear and convincing" evidence standard, which courts apply at the summary judgment and anti-SLAPP stages, *see Mann*, 150 A.3d at 1253, is "significantly more onerous than the usual preponderance of the evidence standard," *Tavoulareas*, 817 F.2d at 776. It requires that "the ultimate factfinder [have] an abiding conviction that the truth of [the] factual contentions [is] 'highly probable,'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

Actual malice is thus a "daunting" standard. *McFarlane*, 91 F.3d at 1515. That is why "very few public figures" can satisfy it, *Fridman*, 229 A.3d at 509, and affirmance of summary judgment for defendants in actual malice cases is the norm,

see, e.g., *Kendrick v. Fox Television*, 659 A.2d 814, 822 (D.C. 1995); *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016); *Von Kahl v. BNA*, 856 F.3d 106, 117 (D.C. Cir. 2017) (reversing denial of summary judgment).[5]

The Superior Court, after properly considering "the totality of the record in this case," including "the various arguments that Plaintiffs advance," JA2219, rightly concluded that plaintiffs' evidence did not clear that very high bar.

1. Plaintiffs' Purported Direct Evidence Cannot Establish Actual Malice by Clear and Convincing Evidence.

What plaintiffs call "direct evidence" of actual malice, Br. 24, is no evidence at all. Plaintiffs rely mostly on non-specific allegations of falsity that are not tied to any specific statements in the Report, let alone any specific statements about any plaintiff. *E.g.*, Br. 24, 32. While the Report concerned Sidley's investigation of APA and leveled criticisms at its leadership, none of the plaintiffs worked for APA. If plaintiffs had a meritorious case to support their charges that Sidley – a law firm

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[5] Plaintiffs quote a footnote in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), for the proposition that actual malice "'does not readily lend itself to summary disposition.'" Br. 21. But in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court clarified that *Hutchinson* simply "acknowledge[ed]" that the Court was reluctant to endorse special protections for defamation defendants. *Id.* at 256 n.7. Plaintiffs also erroneously quote *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979), for examples of "the types of evidence" that can show actual malice. Br. 22. But that quotation describes evidence that could be used to show malice for certain *common-law* "qualified privileges" developed "long before *New York Times* was decided." *Von Kahl*, 856 F.3d at 163. The *Herbert* Court was expressly *not* listing the kinds of evidence that prove *constitutional* actual malice.

with ethical duties of candor to their client, *see, e.g.*, D.C. Board Prof. Resp. R. 2.1 – had actually made statements about any one of them with knowledge of falsity or serious doubts about falsity, they would have presented it. They did not.

a. Plaintiffs' Generalized Allegations Are Insufficient.

Generalized complaints about an alleged false "overarching narrative," Br. 27, or broad complaints by others about unspecified aspects of the Report, *id.* 24-25, fail to satisfy plaintiffs' burden. As the D.C. Circuit made clear in *Tavoulareas*, "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." 817 F.2d at 794.[6] As one court applying *Tavoulareas* emphasized, even if a plaintiff, unlike plaintiffs here, could establish actual malice as to "collateral falsehoods" – i.e., false statements about people other than the plaintiff – "this would not establish an inference of actual malice with respect to [defendant's] statements concerning plaintiff" because "[t]he doubt must be in conjunction with the alleged defamatory statement." *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1513 (D. Minn. 1988) (citing *Tavoulareas*, 817 F.2d at 794), *aff'd*, 881 F.2d 1426 (8th Cir. 1989).

[6] Plaintiffs' contention that the Superior Court failed to conduct a "holistic examination" of evidence of actual malice, Br. 23, is refuted by the court's careful opinion. And while "[p]laintiffs are entitled to an aggregate consideration of all their evidence," that evidence must still be "*in conjunction* with" specific statements challenged as false and defamatory. *Tavoulareas*, 817 F.2d at 794 & n.43.

Plaintiffs instead rely on inaccurate and generalized second-hand characterizations of Sidley's Report or their own erroneous paraphrases. For example, plaintiffs cite an editorial about the Report, Br. 2 (linked to at JA1217), that inaccurately says that APA "colluded with officials at . . . the C.I.A." even though the Report concluded the opposite, JA2247. Plaintiffs erroneously assert that the Report accused them of colluding to clear "obstacles to military psychologists' participation in abusive interrogations," Br. 2, without a quotation or even a page reference.

What plaintiffs falsely characterize as "admissions," Br. 24, are not admissions at all. First, they are generalized after-the-fact statements by people associated with APA, not Sidley, about Sidley's Report. Br. 24-26. Second, the statements merely show that certain people affiliated with APA, in response to attacks by those opposed to the Report's conclusions, questioned or were open to questioning unspecified findings in the Report. *Id.* For example, plaintiffs rely on email notes of an August 2016 meeting, a year after the Report's release, in which an unidentified member of a "subset" of the APA Board allegedly said that "the report contains many inaccuracies," without further explanation or context. JA1460-61; Br. 24.[7]

[7] The email's author also observed tentatively that unspecified Board members at this 2016 meeting "*seemed to acknowledge* there was no evidence that APA officers colluded with the government." JA1460 (emphasis added). Plaintiffs' brief distorts that tentative second-hand observation into a firm declaration that "[m]embers of the APA Board admitted privately that there was 'no evidence' of collusion," Br. 7, something the email clearly did not say.

And plaintiffs' argument fails as a matter of law because it conflates alleged evidence of falsity with the evidence plaintiffs had to marshal but did not: "[T]here is a significant difference between proof of actual malice and mere proof of falsity." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984); *Secord*, 747 F. Supp. at 792 ("To argue that evidence of actual malice exists by the mere fact that subsequent events determine the falsity of a source or statement would be tantamount to conflating the actual malice and falsity elements of a libel action.").

b. Plaintiffs' Evidence Regarding the Report's "First Primary Conclusion" Is Insufficient.

Plaintiffs claim that government policies and reports that their brief references contradicted what plaintiffs characterize as the Report's first of three "primary false conclusions": that "existing DoD interrogation guidelines" and "'then-existing DoD guidance'" used "'high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation.'" Br. 27-28 (quoting JA2249). Plaintiffs are wrong.

First, the Report's observations were accurate; they were about "DoD interrogation guidelines" for *psychologists* supporting interrogations. JA2247-49, 2466, 2477. Contrary to plaintiffs' assertion, Sidley never said that DoD policies governing *interrogators* "'used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation.'" Br. 28 (quoting JA2249). As the Report clearly said on the same page: the PENS Task Force was considering the issue of "where to draw the line *for psychologists* between unethical and ethical interrogation

practices." JA2249 (emphasis added).

Accordingly, the references in plaintiffs' brief to military policies governing the conduct of *interrogators* – which, plaintiffs allege, identified certain specific prohibited interrogation techniques, Br. 4-5, 29-31 – fail to show that the Report's description of DoD policies for *psychologists* is wrong in any respect.[8] The same is true for other reports or documents that plaintiffs cite in passing.[9]

That is why plaintiffs' citation of *Mann*'s actual malice holding, Br. 32-33, is unavailing. The topics Sidley discussed in its Report were different from and based on different evidence than the topics covered in the reports and other documents plaintiffs cite in passing, whereas in *Mann* the topic discussed in earlier investigative reports and defendants' articles (whether emails showed that the plaintiff climate scientist falsified research results) was exactly the same. 150 A.3d at 1246-47. And that is why the Superior Court properly found plaintiffs' reliance on these reports wanting: "Plaintiffs fail to explain whether the entities that issued those governmental reports had access to the same documents . . . and witnesses used as sources for the Report" and "it is unclear to what extent those reports were commissioned with mandates comparable" to Sidley's or "focused on the same issues." JA2215.

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[8] Plaintiffs' brief refers in passing to policies or reports and cites to the Joint Appendix. *See, e.g.*, Br. 4 ("military commanders['] . . . policies," citing JA403-13, 2107, 1363-1442); *id.* 29 ("DoD policies in place" at the time of PENS).

[9] *See, e.g.*, Br. 30 (citation of legal opinion provided to APA in early 2014).

The Report made clear in multiple places it was referring to military policies applicable to psychologists. For example, the reference to guidelines that "key DoD officials wanted to put in place," JA2247, was expressly about plaintiff Banks discussing at the PENS Task Force draft DoD guidance for psychologists supporting interrogations. *See, e.g.*, JA2466 (the draft policy "was distributed at the task force meeting and eventually became (almost verbatim) the interrogation policy of the Army Medical Command in 2006"). The Report also stated the joint objective of the APA and DoD officials at PENS "was to, at a minimum, create APA ethics guidelines that went no farther than – and were in fact virtually identical to – the internal guidelines that were already in place at DoD or that the key DoD officials wanted to put in place." JA2247. Indeed, a comparison of the draft DoD guidance for psychologists with the PENS Task Force Guidelines for psychologists shows just such similarities, further confirming that the Report was addressing military guidance for psychologists, not interrogators. *Compare* JA1883-93 (draft DoD guidance), *with* JA491-502 (PENS report).

These guidelines for military psychologists, JA2247-49, did in fact use "high-level concepts" and did not mention specific prohibited interrogation techniques, just as the Report said, JA2249, 2466, 2477 & n.1038. Thus, if and when DoD policies governing *interrogators* changed – and plaintiffs admit that "these polices were changed a number of times," JA264 ¶ 92 – the high-level nature of the DoD guidance

for *psychologists* meant that such guidance could not be an independent basis for psychologists to refrain from participating in interrogations.[10]

Plaintiffs' criticism that Sidley did not discuss a March 2005 standard operating procedure ("SOP") document for Guantanamo psychologists, Br. 30, is ill founded. That SOP was substantively the same as the draft DoD guidance that Sidley already addressed in detail. Both used high-level concepts like "safe, legal, ethical and effective" interrogations; tasked psychologists with being familiar with applicable law and rules; required psychologists to report interrogation abuses; and did not mention specific prohibited interrogation techniques such as stress positions or sleep deprivation. *Compare* JA1895, 1900-01, *with* JA1883, 1886.

Second, plaintiffs fail to show how any statement in any cited policy or report, Br. 29-31, contradicted any finding in the Report, let alone contradicted it so clearly as to constitute evidence of actual malice. Nor could they. Even if Sidley had possessed documents that contradicted anything in the Report, the mere possession of such documents is insufficient to show that Sidley was subjectively aware of infor-

[10] It does not help plaintiffs' case that both the DoD guidance and the PENS Task Force Guidelines advised psychologists to familiarize themselves with applicable military rules and policies governing interrogations. Br. 26. Rather than setting forth prohibitions on psychologists' involvement based on specific prohibited interrogation techniques, JA2502-03, both the DoD and PENS Guidelines directed psychologists to look elsewhere for specifics, thus confirming the Report's description of the PENS Guidelines as "high-level and non-specific." JA2249.

mation that rendered false or probably false any statement it made about any plaintiff. *See St. Amant*, 390 U.S. at 733; *Von Kahl*, 856 F.3d at 117 ("[A]n honest misinterpretation does not amount to actual malice even if the publisher was negligent in failing to read the document carefully." (quotation omitted)); *Howard v. Antilla*, 294 F.3d 244, 255 (1st Cir. 2002) (defendant's missing key information among "1500 pages of notes and documents in her investigative file" was "at worst, a negligent failure to connect the dots in a voluminous paper trail, not actual malice").[11]

c. Plaintiffs' Evidence Regarding the Report's "Second Primary Conclusion" Is Insufficient.

Plaintiffs' brief fleetingly addresses what it calls Sidley's "second primary conclusion" – that between 2006 and 2009 former plaintiff Behnke collaborated with plaintiffs and others, JA2246, 2273, "to keep the APA Council from banning psychologists' participation in national security interrogations," Br. 31.

Sidley's account of this period included reporting on the content of Behnke's email communications with plaintiffs. *See, e.g.*, JA2598-616, 2621-41. Plaintiffs'

[11] Plaintiffs also allege that the Report was mistaken in observing that "'at the time of the [PENS] report . . . the Bush Administration had defined "torture" in a very narrow fashion.'" Br. 28-29; JA2249. The Report was not mistaken. It expressly identified Department of Justice memos issued in May 2005 by the Office of Legal Counsel that permitted waterboarding, which the Report correctly called "narrower definitions of torture" that prevailed "at the time of PENS." JA2541. In any event, plaintiffs ignore that the Report plainly stated, "[w]e did *not* find evidence that this Justice-Department-memo rational[e] was part of the thinking or motive of APA officials." JA2532 n.1313 (emphasis added).

brief does not argue that Sidley published this account with knowledge of falsity or probable falsity. Instead, they address a different topic – they say that *later*-convened APA Council meetings "were open and transparent, making it impossible to dictate a result by collusion." Br. 31. But the Report never said anything different; its account instead was about how Behnke's earlier behind-the-scenes communications with plaintiffs attempted to affect the outcome of APA resolutions. Plaintiffs failed to present evidence that Sidley reported this with actual malice.

d. Plaintiffs' Evidence Regarding the Report's "Third Primary Conclusion" Is Insufficient.

What plaintiffs call the third "primary false conclusion[ ]," Br. 27, 31-32, is the Report's discussion of the APA Ethics Committee's and Ethics Office's handling of certain ethics complaints against prominent national security psychologists in connection with detainee interrogations. JA2295-300, 2700-58. But this section of the Report discussed the conduct – investigating ethics complaints – of members of the APA Ethics Committee and Ethics Office, not any of the remaining plaintiffs. JA2700-58. For this reason alone, the actual malice claim fails. *See Tavoulareas*, 817 F.2d at 794; *Price*, 676 F. Supp. at 1513. The only specific charge in the brief's short argument, Br. 31-32, is an interviewee's statement that she believed Sidley had a "preconceived narrative" while interviewing her, and purportedly failed to include a fact about a now-former plaintiff. *Id.* This is not evidence, let alone clear and convincing evidence, of actual malice. See also *infra* pages 29-31.

2. Plaintiffs' Purported Circumstantial Evidence Cannot Establish Actual Malice by Clear and Convincing Evidence.

Plaintiffs' purported "circumstantial" evidence of actual malice relies on assertions courts routinely reject. The incantation of "preconceived narrative" or "purposeful avoidance," JA2219, cannot meet their burden to show that a properly instructed jury could find by clear and convincing evidence that Sidley knowingly made false or probably false statements about plaintiffs.

a. Alleged Preconceived Narrative.

Plaintiffs assert that Sidley "adhered to a preconceived narrative which assumed Plaintiffs' culpability." Br. 35. But such an allegation is insufficient as a threshold legal matter. A plaintiff's "argument that [the defendant] had concocted a pre-conceived storyline . . . fails to establish actual malice." *Jankovic*, 822 F.3d at 597; *see also Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 241 (D.C. Cir. 2021). This is so even where – unlike here – there is "evidence that the defendant was on a mission to advance a preconceived story line." *Jankovic v. Int'l Crisis Grp.*, 72 F. Supp. 3d 284, 316 (D.D.C. 2014) (quotation omitted), *aff'd*, 822 F.3d 576; *see also Lohrenz v. Donnelly*, 350 F.3d 1272, 1283-85 (D.C. Cir. 2003).

In any event, plaintiffs' purported "evidence" of any such "preconceived narrative," Br. 35-36, is inadequate as a matter of law. Plaintiffs argue that (1) Sidley relied on and adopted the conclusions put forth by long-time critics and (2) witnesses submitted affidavits alleging that Sidley "distorted, omitted information from, or

otherwise misrepresented their interviews," a subset of whom also alleged that Sidley appeared, during their interviews, to have a preconceived story that it was intent to prove. Br. 35-36. The Superior Court rightly determined that plaintiffs' evidence was insufficient to demonstrate actual malice. JA2217-18.

First, the record soundly refutes plaintiffs' assertion that Sidley simply adopted the critics' viewpoint. Sidley's extensive investigation lasted more than eight months, and involved review of over 50,000 documents, interviews of roughly 150 witnesses, including over fifty follow-up witness interviews. As the Superior Court found, APA's "critics" "were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that these witnesses were biased does not suffice to establish actual malice." JA2218.

Second, as for Sidley's purported reliance on the views of APA's "long-time critics," investigation even of "charges . . . leveled by critics with axes to grind," does not demonstrate the defendant's *own* actual malice. *Montgomery v. Risen*, 197 F. Supp. 3d 219, 263 (D.D.C. 2016), *aff'd*, 875 F.3d 709 (D.C. Cir. 2017). And, as the Superior Court found, "[a]lthough the record shows that Defendants Sidley Austin interviewed a handful of Plaintiffs' critics, that fact does not establish that Defendants Sidley Austin had 'obvious reasons to doubt the veracity' of these sources." JA2218 (quoting *St. Amant*, 390 U.S. at 732); see also *infra* pages 33-35.

Third, the affidavits plaintiffs cite merely repeat witnesses' "impression" that

Sidley had a "preconceived narrative," without providing any basis for that impression or tying it to any alleged false statement in the Report. Such speculation cannot establish actual malice. *See McFarlane*, 91 F.3d at 1508. As the Superior Court pointed out, the cited affidavits "echo each other in tenor and vocabulary" and plaintiffs failed to show where in the investigative process the interviews came and what information investigators had received prior to those interviews, JA2216-17, which rendered the "preconceived" charge meaningless.

Fourth, allegations that the Report omitted certain views of witnesses, among the 150 interviewed, is not evidence of actual malice: "Courts have noted that [authors] have to choose which facts to include and which to omit, because [i]t is impossible to print all the facts on which an opinion or belief is based, especially when an article comprises a critical analysis." *Talley v. Time, Inc.*, 923 F.3d 878, 905-06 (10th Cir. 2019) (quotations omitted).

As the Superior Court ruled, "at best" plaintiffs

> have shown that Defendants Sidley Austin received contradictory and diverse statements, opinions, and recollections during the investigative process. . . . [I]nconsistencies and conflicting recollections are not uncommon in extensive investigations involving large numbers of witnesses. Combined with other arguments that Plaintiffs have raised, these factors do not support claims that Defendants had subjective knowledge of the Report's falsity or acted with reckless disregard for whether or not the statements in the Report were false.

JA2218 (footnote omitted).

b. Alleged Purposeful Avoidance.

Plaintiffs' assertion that Sidley "purposeful[ly] avoid[ed] the truth," Br. 36 (quoting *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 692 (1989)), is meritless. The Superior Court rightly rejected this argument as inapplicable to an investigation of the scale and depth here. JA2218. Where the record reflects that defendants "conducted a long and thorough investigation," as Sidley indisputably did here, courts do not find "purposeful avoidance." *See Talley*, 923 F.3d at 898-99.

Sidley's investigation bears no resemblance to the circumstances presented in *Harte-Hanks*, plaintiffs' lone cited authority. There, a newspaper based an implausible story about a candidate for judicial office offering a bribe on a single source. *See* 491 U.S. at 692. The newspaper also declined to interview a key witness or listen to audio tapes of key conversations. *See id.* Courts of course reject this argument where, as here, the situation is "precisely the opposite of [*Harte-Hanks*]," with a defendant interviewing "numerous sources." *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999); *see also Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Harte-Hanks* because the article at issue was supported by an "overwhelming number of sources").[12]

[12] The assertion by Dunivin that Sidley did not give her follow-up questions for clearance with DoD, Br. 36-37, merely proves the point. As the cases cited above demonstrate, "purposeful avoidance" does not mean not following every possible lead in the course of a thorough investigation. Indeed, even "a publisher's failure to

c. Alleged Reliance on Unreliable and Biased Witnesses.

Plaintiffs' complaints about three purportedly "biased" witnesses and one set of notes do not demonstrate actual malice. Br. 37-38. First, plaintiffs again ignore the depth of Sidley's investigation. This case is thus not comparable to one involving a publisher who is alleged to have relied on a single "informant" whose credibility was known to be in doubt. *St. Amant*, 390 U.S. at 732; *Talley*, 923 F.3d at 884, 904 (finding no actual malice in investigation "involv[ing] dozens of interviews").

Second, even if the record had reflected only a few witness interviews instead of more than 200, plaintiffs could not satisfy the actual malice standard. *See, e.g.*, *St. Amant*, 390 U.S. at 733; *Lohrenz*, 350 F.3d at 1284 ("That [defendants] acted on the basis of a biased source and incomplete information does not demonstrate [actual malice] . . . ." (quotation omitted)). Instead, "the plaintiff must establish that *even in relying upon an otherwise questionable source the defendant actually possessed subjective doubt*" as to the truth of the source's information. *McFarlane*, 91 F.3d at 1508 (emphasis added) (quoting *Secord*, 747 F. Supp. at 794). Plaintiffs point to no evidence that Sidley "actually possessed subjective doubt" about what it reported. *Jankovic*, 822 F.3d at 597 (quoting *McFarlane*, 91 F.3d at 1508).

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engage in dialogue with the allegedly defamed party does not support a finding of willful blindness that would lead to an inference of actual malice," *Foretich v. Am. Broad. Cos.*, 1997 WL 669644, at *7 (D.D.C. Oct. 17, 1997), and here plaintiffs admit that Sidley interviewed them all. JA273 ¶ 124.

Third, plaintiffs also fail to identify a single allegedly false statement about them that they claim Sidley made in reliance on any of these individuals. *See* Br. 37-38; *see also Tavoulareas*, 817 F.2d at 794; *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 286-87 (S.D.N.Y. 2013) (finding that "[one witness]'s reliability is irrelevant to [the defendant]'s alleged actual malice" when "there is no reason to believe – nor does the complaint allege – that [the witness] was a source for any of the four remaining defamatory passages"), *aff'd*, 807 F.3d 541 (2d Cir. 2015).

Fourth, plaintiffs ignore what the Report explained to readers about how these individuals actually factored into Sidley's investigation. Sidley's Report expressly disclosed that two of them (Dr. Stephen Soldz and Nathanial Raymond) were "APA critics." JA2244. Soldz and Raymond were among those who made charges that Sidley thereafter investigated. As for the third individual, Dr. Trudy Bond, Sidley simply reported that Bond – "a member of the Coalition for an Ethical Psychology and Psychologists for Social Responsibility" – sent ethics complaints to the APA Ethics Office. JA2733-34, 2755. There is no basis to claim that Sidley "relied heavily" on Dr. Bond, Br. 38, and plaintiffs' brief does not provide one.

Fifth, plaintiffs' attempt to take issue with the set of "notes of PENS meetings taken by one of its members, Jean Maria Arrigo," Br. 38, only highlights the care and good faith with which Sidley approached its work. Sidley's Report informed readers that "[t]he veracity of Arrigo's set of notes have been questioned by some,"

and described how Sidley also reviewed multiple sets of additional "contemporaneous notes from Behnke, Susan Brandon, and an assortment of other task force members from the PENS meetings." JA2501. As for Arrigo's notes, Sidley reviewed not only her typed notes, but also her "contemporaneous, handwritten notes." *Id.* Sidley compared the witnesses' sets of notes and found "consistency and accuracy across all sets of notes." *Id.* Sidley asked witnesses about Arrigo's notes. *Id.* And Sidley then appended sets of notes from Arrigo, Behnke, and Brandon to the Report, so that readers could review them. *Id.* This is the opposite of actual malice.

d. Alleged Motive to Defame and Bias and Ill Will.

Plaintiffs' contention that Sidley had a "motive to defame" them or had "bias and ill will against them," Br. 39-40, likewise does not demonstrate actual malice. First, "caselaw resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." *Nunes v. WP Co.*, 2020 WL 7668900, at *5 (D.D.C. Dec. 24, 2020) (quotation omitted); *Arpaio v. Zucker*, 414 F. Supp. 3d 84, 92 (D.D.C. 2019) ("[T]he motivations behind defendants' communications . . . do not impact whether defendants acted with actual malice as a matter of law.").[13]

[13] Plaintiffs cite *Harte-Hanks*, Br. 39, but there the Supreme Court specifically distinguished "actual malice" from "a showing of ill will or 'malice' in the ordinary sense of the term." 491 U.S. at 666. Plaintiffs' citation to *Palin v. New York Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019), Br. 39, is likewise inapposite. There, the writer not only "had reason to be personally biased against [plaintiff] and pro-gun positions [like plaintiff's] in general," but also because the writer's brother was a

Second, the allegation that Sidley used "loaded terms" like "collusion," Br. 39-40, does not show bias, ill will, or actual malice. Inferring actual malice from the "'language' of the publication" is an "error of constitutional magnitude." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970); *Wash. Post Co. v. Keogh*, 365 F.2d 965, 969 (D.C. Cir. 1966). It is particularly inappropriate here: plaintiffs ignore that the Report used the term "collusion" because APA *charged* Sidley to examine allegations that APA "engaged in activity that would constitute collusion" with the government. JA1780.[14] And in any event the Report defined its use of collusion in a detailed passage that the Complaint failed to identify as false and defamatory. JA2301-02 (Report); JA362 (Complaint not listing definition as false).[15]

Third, plaintiffs cannot show actual malice by accusing Sidley of "t[aking] on

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senator – and political opponent of plaintiff – who had been threatened by gun violence. *Palin*, 940 F.3d at 814-15. Plaintiffs failed to identify any similar personal animosity from Sidley.

[14] Plaintiffs cannot contend the Report accused them of criminal behavior. Its use of terms like "joint venture" or "joint enterprise," Br. 8, as analogies for plaintiffs working with Behnke to accomplish joint objectives, *e.g.*, JA2246-47, 2600, 2623, provides no evidence that Sidley doubted the truth of any of its conclusions.

[15] For this reason, plaintiffs' citation of anonymous notes reflecting David Hoffman answering questions at an August 2015 APA Council meeting, alleging that he said that the term "behind-the-scenes communication" would have been more accurate than "collusion," Br. 39-40; JA1650, is beside the point. Even if the notes were not inadmissible out-of-context hearsay supplied by an anonymous person, "collusion" was a term that the Report defined precisely for readers.

the role of a prosecutor making a case." Br. 40. Even if the charge were true (it is not), "[t]he fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false." *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1307 (D.C. Cir. 1996) (quotation omitted).[16]

Fourth, plaintiffs' irresponsible allegation that Sidley leaked the Report to the *New York Times*, Br. 40, fails for two reasons. First, it is factually frivolous. The affidavit of plaintiffs' computer forensics expert Arman Gungor says only that metadata in the version of the Report on the *Times* website indicates that the PDF file was created from a Word document created and edited by Sidley. JA1568-69. Of course, Sidley, as its author, created and edited the Report. The metadata would look exactly the same, therefore, no matter who later sent the file to the *Times*. JA1923-25 ¶¶ 8-19 (Christopher Racich Aff. (Sidley expert)). Yet that is the sole basis of plaintiffs' argument. Br. 40. Second, plaintiffs fail to explain how publicizing the Report would establish Sidley's belief that anything in it was false. *See Harte-Hanks*, 491 U.S. at 665.

[16] Plaintiffs allege David Hoffman once said that "I use the media to fan the flames," Br. 40, but failed to produce a witness to make the allegation. Former plaintiff Newman's affidavit admits that he was relying on information relayed to him by his counsel. JA1717 ¶ 13. In any event, publicizing a publication has no bearing on an author's awareness of any falsity; plaintiffs cite no authority suggesting it does.

e. Alleged Failure to Follow Proper Practices.

Plaintiffs' naked assertion that Sidley's investigation somehow departed from "proper investigation practices" is wrong on the facts and the law. First, actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731. In fact, the standard for actual malice is specifically *not* "an extreme departure from professional standards." *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 45 (D.D.C. 2002) (quoting *Harte-Hanks*, 491 U.S. at 665). But even if "an extreme departure from professional standards," *id.*, has any relevance to actual malice, plaintiffs cannot establish that such a departure occurred here. By any measure, Sidley's thorough investigation satisfies whatever plaintiffs assert to be "professional standards."

Second, plaintiffs make only two factual allegations with respect to this argument, both of which fail. They contend it was improper that the investigation – commissioned by APA – was overseen by APA Special Committee members who, plaintiffs claim, were "intimately involved in the events the Report described." Br. 41. Plaintiffs also allege that Sidley failed to inform interviewees that they were "potential targets" and that the APA General Counsel advised interviewees that they should not retain counsel. *Id.* Both allegations fail for what the Superior Court correctly termed the lack of the "necessary connection" between the investigation practices and any false defamatory statement about any plaintiff here: any showing

of actual malice must be "in conjunction with a false defamatory statement." JA2219. The allegations also fail because they do not establish that anything alleged caused Sidley to subjectively doubt the truth of any of the Report's findings. And plaintiffs cannot deny interviewees were fully aware Sidley was conducting an "independent review" in "a completely independent fashion with the sole objective of ascertaining the truth of the allegations," as Sidley told witnesses like Dunivin in emails requesting interviews. *E.g.*, JA1553.

f. Alleged Refusal to Retract or Correct.

Plaintiffs argue that Sidley's "refusal to correct or retract" its Report could support a finding of actual malice. The Superior Court correctly concluded, "Plaintiffs fail[ed] to establish any duty on behalf of Defendants to retract or correct the Report post publication." JA2219. "[T]here is no duty to retract or correct a publication, even where [unlike here] grave doubt is cast upon the veracity of the publication after it has been released," *Lohrenz*, 223 F. Supp. 2d at 56, and plaintiffs' brief here *still* fails to coherently identify any false statements about them.[17]

Plaintiffs also ignore that "[t]he actual malice inquiry focuses on the defendant's state of mind *at the time of publication*." *Von Kahl*, 856 F.3d at 118 (emphasis

[17] Plaintiffs cite a judge's individual opinion concurring in the denial of a petition for rehearing for the proposition that refusal to retract is evidence of actual malice. Br. 46 (citing *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985)). The panel's opinion was vacated by the en banc D.C. Circuit. *Tavoulareas*, 817 F.2d 762. The en banc opinion does not support plaintiffs' cited proposition.

added). Thus, "the inference of actual malice must necessarily be drawn solely upon the basis of the information that was available and considered by the defendant *prior to publication*." *McFarlane*, 91 F.3d at 1508 (emphasis added). Actual malice thus "cannot be inferred from a publisher's failure to retract a statement." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013). Plaintiffs' bare statement that "Defendants have taken no effective steps to correct the Report," Br. 42, is therefore irrelevant here, even had there been any basis for retraction.

* * *

Plaintiffs' evidence, taken all together, fell far short of enabling a properly instructed jury to find clear and convincing evidence that Sidley made a false statement about any plaintiff with actual malice.

C. The Court Appropriately Considered Plaintiffs' Proof.

Finally, plaintiffs attempt to reframe arguments already raised as charges that the Superior Court impermissibly "decid[ed] triable issues of fact and ma[de] inferences against plaintiffs." Br. 42-48 (discussing, e.g., "government reports in Defendants' possession," "preconceived narrative," and "biased and unreliable witnesses"). For the reasons already discussed, the court properly applied the standard set forth in the Anti-SLAPP Act, considered the arguments presented, and concluded that plaintiffs' "evidence" did not demonstrate a likelihood of success in establishing actual malice. *Supra* pages 20-40; *Fridman*, 229 A.3d at 506 ("[T]he plaintiff must

shoulder the burden of showing that his claim is likely to succeed on the merits," which "mandates the production or proffer of evidence that supports the claim.").

Plaintiffs raise three additional meritless arguments:

1. Plaintiffs complain that the Superior Court's summary of plaintiffs' evidentiary "foundation" did not mention two charts they attached only as exhibits to their briefs. Br. 42-43 (citing JA2214-15). They ignore, however, that the court expressly made its decision after "consider[ing] the parties' pleadings, the relevant case and statutory law, and *the entire record*." JA2195 (emphasis added).

Any complaint that the court did not address arguments plaintiffs failed to include in their opposition briefs is ill founded. In 119 pages of briefing, plaintiffs allotted no space to the application of law to evidence included in these exhibits. Plaintiffs thus waived any argument that the court failed to consider their charts. *See Television Cap. Corp. of Mobile v. Paxson Commc'ns Corp.*, 894 A.2d 461, 470 (D.C. 2006) ("Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal." (quotation omitted)).

2. Plaintiffs claim the Superior Court "neglected to undertake the required analysis of plaintiffs' evidence for negligence." Br. 47. But there is no such required

analysis in an actual malice case.[18] The Superior Court appropriately rejected plaintiffs' argument that purported failures to adhere to "proper investigation practices" could show actual malice on Sidley's part. *Supra* pages 38-39; JA2219-20. Plaintiffs identify no evidence of "negligence" beyond those assertions. *See* Br. 47-48.

3. Plaintiffs point to certain emails between Behnke and plaintiff Banks, asserting that the Superior Court made the same negative inferences about those emails that the Report did. Br. 48. But Sidley reasonably concluded, from undisputed emails reflecting agreements between Behnke and Banks to delete emails, that other emails between them may not exist because they were deleted. JA2631-32; *see also Nader v. de Toledano*, 408 A.2d 31, 51 (D.C. 1979) ("Adoption of a rational explication of an ambiguous document, even if erroneous, does not constitute clear and convincing evidence sufficient to support a judgment of publication with actual malice."). The court agreed, recognizing the high burden imposed by actual malice. That of course does not turn the court into "Defendants' advocate." Br. 48.

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[18] The only D.C. case plaintiffs cite is a district court case that predates relevant D.C. Circuit case law by decades. Br. 22, 35, 47 (citing *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972)). It was criticized by a later case, which emphasized that "[a]s *St. Amant* makes clear, negligence . . . cannot support a finding of actual malice." *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 958, 960 (D.D.C. 1976). In any event, after considering the entire record, the Superior Court concluded that plaintiffs had failed to proffer evidence that could demonstrate that Sidley failed to observe an ordinary degree of care in ascertaining the truth of the challenged statements. JA2220 n.10.

D. The 2018 APA Website Changes Were Not a Republication.

For the reasons set forth in APA's appellee brief at Section II.C and incorporated herein by reference, the Superior Court's ruling on the supplemental count should be affirmed because a properly instructed jury could not find that the changes APA made to its website in August 2018 amounted to a republication of the Report. Under D.C.'s single-publication rule, a communication placed on a publicly accessible website is published only when first posted. *Jin v. Ministry of State Sec.*, 254 F. Supp. 2d 61, 64, 68-69 (D.D.C. 2003). Plaintiffs failed to show that APA republished the Report. APA Br. § II.C.2. And even crediting plaintiffs' allegations, Br. 49-52, as a matter of law sending a link to a communication does not amount to a republication, *see In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012).

This court can affirm the judgment as to Sidley for an additional reason: plaintiffs failed to show that, three years after Sidley submitted the Report to APA, it had any involvement in an August 2018 vote by the APA Council of Representatives to make the APA website changes at issue. Defamation requires proof that a defendant "published or knowingly participated in publishing the defamation." *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985) (emphasis omitted), *vacated in part on other grounds on reh'g*, 763 F.2d 1472, *and on reh'g*, 817 F.2d 762. Put another way, "some responsible participation is clearly a prerequisite to any potential liability." *Tavoulareas v. Piro*, 93 F.R.D. 11, 15 (D.D.C. 1981).

Plaintiffs failed to show any "responsible participation" by Sidley in the August 2018 website changes. Plaintiffs now say "Defendants" gave instructions for accessing the APA website in 2018, Br. 3, but this is false as to Sidley and supported by no evidence. The Complaint itself alleged only that plaintiffs made two court filings in 2018 that alluded to possible forthcoming APA website changes (that did not in fact occur), so it should have been reasonably foreseeable to Sidley in 2018 that a different set of website changes might be made by APA. JA315 ¶ 301. Besides failing to show the website changes were reasonably foreseeable to Sidley, plaintiffs failed to support the assertion that, after gaining such information in 2018, Sidley took any step that could count as "responsible participation" in the changes.

II. THE ANTI-SLAPP ACT SHOULD NOT BE VOIDED.

A. The Anti-SLAPP Act Does Not Violate the Home Rule Act.

The D.C. Council enacted the Anti-SLAPP Act in 2010, and this court has interpreted it many times. *See, e.g.*, *Mann*, 150 A.3d 1213; *Fridman*, 229 A.3d 494; *Saudi Am. Pub. Rels. Affairs Comm. v. Inst. for Gulf Affairs*, 242 A.3d 602 (D.C. 2020). The Superior Court correctly rejected plaintiffs' request to void the Act because it violates the Home Rule Act, D.C. Code §§ 1-201.01 to -201.03; JA2043.

The Council has broad authority under the Home Rule Act to enact local legislation, D.C. Code § 1-201.02(a), which it properly exercised here. The Council's "interpretation of its responsibilities under the Home Rule Act is entitled to great

deference," *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988), and "[s]tatutes should generally be construed to avoid any doubt as to their validity" under the Home Rule Act. *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723-24 (D.C. 1995).

The Council's authority to enact legislation is subject to only a "narrow" exception. *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016). It cannot enact any act "with respect to any provision of Title 11 (relating to organization and jurisdiction of the [D.C.] courts)." D.C. Code § 1-206.02(a)(4). That exception "does not . . . in any way limit the Council's authority to enact or to alter the substantive law to be *applied by* the courts." *Umana*, 669 A.2d at 724 n.15 (emphasis added).

Plaintiffs argue the Act should be void for two reasons: (1) it is an act "with respect to any provision of Title 11," therefore violating § 1-206.02(a)(4), and (2) it impermissibly "modif[ies]" the rules of the Superior Court in a way that this court has not approved, thereby violating the portion of Title 11 that directs the Superior Court to "conduct its business according to the Federal Rules of Civil Procedure," D.C. Code § 11-946. Br. 53. These arguments both fail.

The Anti-SLAPP Act is a substantive law that does not outstrip the § 1-206.02(a)(4) exception. Contrary to plaintiffs' suggestion, Br. 53, that the Act creates a "procedural mechanism," this court has held that the Act "creat[es] substantive rights with regard to a defendant's ability to fend off" a SLAPP suit. *Mann*, 150

A.3d at 1226 (quotation omitted). The legislative history confirms that the Anti-SLAPP Act was intended to create new "substantive rights." JA2049. Plaintiffs claim not to understand what the substantive rights are. Br. 58. But this court has been clear: the Act "create[s] a *substantive* right not to stand trial and to avoid the burdens and costs of pre-trial procedures." *Mann*, 150 A.3d at 1231. The Act "explicitly protects the right not to stand trial in a SLAPP, which is intended as a weapon to chill or silence speech." *Id.* at 1229 (quotation omitted). Plaintiffs ignore those clear statements and attempt to shoehorn the Act into the § 1-206.02(a)(4) exception.

First, as plaintiffs would have it, any D.C. law that even "relates to" D.C. courts – including which rights may be asserted in those courts – is invalid under the Home Rule Act. Br. 53-54, 58. Such an argument is unsustainable in light of the "paramount purpose" of the Home Rule Act: "to grant the inhabitants of the District of Columbia powers of local self-government." *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010). The Superior Court correctly rejected plaintiffs' argument, construing the "narrow" § 1-206.02(a)(4) exception "in a flexible, practical manner" as this court has instructed. *Woodroof*, 147 A.3d at 784; JA2049. The exception fundamentally concerns D.C. courts' jurisdiction or core functions. *See* JA2049; *see also Dimond v. District of Columbia*, 792 F.2d 179, 190 (D.C. Cir. 1986) (upholding 1982 No-Fault Insurance Act). The Anti-SLAPP Act simply has nothing to do with the basic operations of the courts.

Second, plaintiffs contend the Home Rule Act impermissibly modifies the rules of the Superior Court in ways that this court has not approved. Br. 53. They are again wrong on the law. The Anti-SLAPP Act is perfectly consistent with Title 11, D.C. Code § 11-946. Section 11-946 simply provides that the Superior Court must follow the Federal Rules of Civil Procedure unless the D.C. courts, not the Council, adopt new rules. The Anti-SLAPP Act applies the same substantive standard as Federal Rule of Civil Procedure 56, so courts applying the Anti-SLAPP Act are following the federal rules. *See Mann*, 150 A.3d at 1238 n.32.

Citing *Abbas v. Foreign Policy Group*, 783 F.3d 1328 (D.C. Cir. 2015), plaintiffs argue that the Anti-SLAPP Act "conflicts" with the Superior Court's Rules because its "likelihood of success" standard is different from that of the rules and that standard is not found in those rules. Br. 55. But this court made clear after *Abbas* that the substantive standards of Rule 56 and the Anti-SLAPP Act are "substantively the same." *Mann*, 150 A.3d at 1238 n.32. And whether the Anti-SLAPP Act applies in federal court under *Erie* is different from whether it gives D.C. defendants substantive protections or conflicts with Title 11.[19] Citations to *other* courts interpreting *different* anti-SLAPP statutes, Br. 55, are irrelevant. *See Mann*, 150 A.3d at 1239.

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[19] For this reason, although the D.C. Circuit recently reaffirmed *Abbas*'s ruling, *see Tah*, 991 F.3d at 238-39, *Mann* remains this court's definitive pronouncement on the compatibility of the Anti-SLAPP Act with the D.C. Rules of Civil Procedure.

B. The Anti-SLAPP Act Does Not Violate the First Amendment.

In erroneously contending that the Act is subject to "exacting scrutiny" because it is overbroad and infringes the right to petition, Br. 61-63, plaintiffs reflect a fundamental misunderstanding of how the statute works.[20]

Far from impairing "effective access to the courts," Br. 60, the Anti-SLAPP Act "takes due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." *Mann*, 150 A.3d at 1239. The Act, therefore, "is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Id.*

Plaintiffs assert that the Anti-SLAPP Act violates the First Amendment because it "does not require a showing that a suit intends to punish or prevent expression." Br. 60. Plaintiffs note that the Illinois anti-SLAPP statute requires such a limited scope to preserve its constitutionality. But the D.C. Act includes no such limitation. Indeed, this court has concluded that the D.C. Act's "early judicial evaluation of the legal sufficiency of the plaintiff's evidence strikes the right balance between the interests of the parties," both "deter[ring] meritless claims filed to harass

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[20] The Act is not subject to "exacting scrutiny." Br. 61. It permits meritorious suits, see *infra* page 49, and the First Amendment does not immunize "baseless litigation." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (quotation omitted).

the defendant for exercising First Amendment rights," while preserving issues of fact for the jury. *Mann*, 150 A.3d at 1239. Contrary to the statutes plaintiffs cite, Br. 65 & n.12, the D.C. Act ensures "the constitutional right of a plaintiff who has presented evidence that could persuade a jury to find in her favor is respected" without needing to establish improper motivation behind a plaintiff's claims. *Mann*, 150 A.3d at 1239.

Unlike the D.C. Anti-SLAPP Act, the Illinois statute did not ask whether the plaintiff was bringing a "suit[ ] with reasonable merit." *Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012). Rather, Illinois premised the success of a motion not on the merits of the plaintiff's claims, but on whether the claims were "based on" the defendant's allegedly defamatory speech. *Id.* The D.C. Act, of course, requires a court to determine whether a plaintiff is "likely to succeed on the merits." D.C. Code § 16-5502(b). That structure preserves its constitutionality.

Plaintiffs also challenge the Anti-SLAPP Act's discovery mechanisms and fee-shifting provisions. Br. 66-70. Neither renders the Act unconstitutional. Plaintiffs say that the Act is unconstitutional on its face because plaintiffs may only get "targeted" discovery. *Id.* 66. And plaintiffs argue that the discovery they were granted under the Anti-SLAPP Act was insufficient for them to make their case. *Id.* 68-69. Those complaints do not raise constitutional issues, and besides, § 16-5502(c)(2)'s discovery mechanisms merely prioritize discovery concerning issues

raised in an anti-SLAPP motion. *See Mann*, 150 A.3d at 1233. That allows plaintiffs to demonstrate the merits of their claims in the face of whatever issues defendants have raised. *Id.* Plaintiffs sought to do so here, but came up short.

Plaintiffs cannot carry their "heavy burden" to show that a law is facially unconstitutional, *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009), or unconstitutional as applied in this case. The Act appropriately protects defendants engaged in public debate while preserving plaintiffs' ability to bring meritorious claims.

CONCLUSION

The judgment of the Superior Court should be affirmed.

DATED: April 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 26th day of April, 2021, that a true copy of the foregoing Appellees' Brief was filed through the court's e-filing system and served upon all registered participants.

/s/ Thomas G. Hentoff
Thomas G. Hentoff

STATUTORY ADDENDUM

D.C. Anti-SLAPP Act of 2010 Excerpts

D.C. Code § 16-5501. Definitions.

For the purposes of this chapter, the term:

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

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

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

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

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

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

D.C. Code § 16-5502. Special motion to dismiss.

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

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

(c)

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

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

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