SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Hiram E. Puig-Lugo
vs.	:	Next Event: Oral Argument TBD Courtroom 317
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTION TO DECLARE THE D.C. ANTI-SLAPP ACT VOID AND/OR UNCONSTITUTIONAL

THIS REPLY ADDRESSES THE OPPOSITIONS OF BOTH DEFENDANTS AND INTERVENOR DISTRICT OF COLUMBIA

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INTRODUCTION

Defendants' and Intervenor District of Columbia's Oppositions to Plaintiffs' Motion to Declare the D.C. Anti-SLAPP Act Void and/or Unconstitutional offer no valid reasons to avoid the conclusions that the D.C. Anti-SLAPP Act (1) violates the Home Rule Act, (2) violates the Congressionally enacted D.C. Code § 11-946, and (3) violates the First Amendment, both facially and as applied in this case. Plaintiffs do not raise their challenge to the validity of the D.C. Anti-SLAPP Act lightly—but under settled principles of law, the Act must be held invalid.

Violation of the Home Rule Act. Defendants and Intervenor ***concede***, as they must, that in passing the Home Rule Act,[1] Congress placed specific limitations on its delegation of legislative authority to the D.C. Council. And they ***further concede***, as they must, that among those limitations, the Home Rule Act provides "[t]he [D.C.] Council shall have no authority to ... [e]nact any act, resolution, or rule with respect to any provision of [D.C. Code] Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." D.C. Code § 1-206.02(a)(4). It is ***undisputed*** that D.C. Code Title 11 prescribes all aspects of the civil procedure of the D.C. Courts, and that D.C. Code § 11-946 prescribes the rules of procedure for the Superior Court. As a matter of law and logic, therefore, the D.C. Council "has no authority" to "enact any act, resolution, or rule with respect to" rules or procedures of the D.C. Courts. Because the Anti-SLAPP Act imposes such rules—including through provisions creating new "special motions" previously unrecognized by the D.C. Courts—it violates the Home Rule Act.

To argue the contrary, Defendants and Intervenor contend, ***first***, that the D.C. Anti-SLAPP Act creates "a *substantive* right" not to stand trial under certain circumstances.[2] Not only is that

[1] D.C. Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (codified at D.C. Code §§ 1-201.01 *et seq.*).

[2] All emphases added unless otherwise noted.

incorrect, but it is ***irrelevant***. Regardless of whether the Anti-SLAPP Act creates substantive rights, it indisputably *also* "establishes a new 'procedural mechanism'" for enforcing those rights—as both the D.C. Court of Appeals and D.C. Circuit have held. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1232 (D.C. 2016) (the Act "creates a burden-shifting *procedure*[.]"); *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1335 (D.C. Cir. 2015). It is therefore an act "with respect to any provision of Title 11," and violates the Home Rule Act regardless of whether it has substantive elements.

Second, Defendants and Intervenor contend that the parenthetical description of Title 11 in Section 1-206.02(a)(4) limits the operative language of the section. But as explained below, that parenthetical, which simply recites the statutory name of Title 11, is merely descriptive, not limiting. As courts have repeatedly explained, when a statutory section identifies others by number followed by a parenthetical description, the "parentheticals are only 'visual aids' designed to guide the reader through what would otherwise be a litany of numbers." *E.g.*, *United States v. Garner*, 837 F.2d 1404, 1419 (7th Cir. 1987). Moreover, as courts have repeatedly held when construing statutes, "a parenthetical is, after all, a parenthetical and it cannot be used to overcome the operative terms of the statute." *E.g.*, *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011).

Violation of Congressionally Enacted D.C. Code § 11-946. Defendants and Intervenor ***concede***, as they must, that D.C. Code § 11-946 (which was enacted by Congress) provides that (1) "the Superior Court shall conduct its business according to the Federal Rules of Civil Procedure ... unless it ... adopts rules which modify those rules," and (2) "[r]ules that modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court." And they ***further concede***, as they must, that

the D.C. Anti-SLAPP Act "created a [] rule" to protect defendants: the "special motion to dismiss"[3] (and a "special motion to quash"). It is ***undisputed*** that before the D.C. Anti-SLAPP Act, those motions did not exist, and there was no rule by which a party could file them. It is likewise ***undisputed*** that the D.C. Court of Appeals did not approve rules allowing for those special motions before they took effect—or engage in its prescribed rule-making process at all with regard to them.[4]

Accordingly, the Anti-SLAPP Act's provisions creating a "special motion to dismiss" and a "special motion to quash" are invalid. Defendants' and Intervenor's only argument to the contrary—that the "rule" providing for a special motion to dismiss does not *conflict* with the Court's existing rules or the Federal Rules of Civil Procedure—is a red herring. Under D.C. Code § 11-946, the relevant question is *not* whether a new rule *conflicts* with existing rules, but whether it *modifies*—adds to, supplements, alters, or amends—them. And it is undisputed that the Anti-SLAPP Act modifies the D.C. Courts' existing procedures and rules.

Violation of the First Amendment. The First Amendment right to petition the government includes "'[t]he right of access to courts for redress of wrongs.'" *Stuart v. Walker*, 143 A.3d 761, 767 (D.C. 2016). But, even where a plaintiff's suit is not a SLAPP—that is, a suit where a plaintiff's subjective "goal ... is not to win the lawsuit but to punish the opponent and intimidate them into silence," *Mann*, 150 A.3d at 1236—the D.C. Anti-SLAPP Act "impose[s] requirements and burdens on the [plaintiff] that significantly advantage the defendant." *Id.* at 1237. As such, the Act is facially unconstitutional. And because, as Defendants and Intervenor concede, Plaintiffs

[3] Defs. Opp. at 5.

[4] *See* District of Columbia Courts, *The Rulemaking Process*, https://www.dccourts.gov/superior-court/rules-committee/rule-making-process (last visited Dec. 12, 2019)

have not brought their claims in bad faith, it is unconstitutional as applied to Plaintiffs. *See* D.C. Opp. at 27 ("The District does *not* contend that the Complaint here is baseless or frivolous[.]").

RESPONSE TO DEFENDANTS' FACTUAL BACKGROUND CONTENTIONS

Although Plaintiffs' Motion to Declare the D.C. Anti-SLAPP Act Void and/or Unconstitutional raises purely legal questions, Defendants' "Background" section—in which they accuse Plaintiffs of forum-shopping—requires a brief response.

Defendants correctly note that this case is the second of three substantively similar lawsuits. But Defendants fail to disclose that it was *Defendants*, not Plaintiffs, who forced litigation in three forums as part of their effort to cherry-pick their favored anti-SLAPP statute. Plaintiffs first sued Defendants in February 2017 in state court in Ohio, where Plaintiff James resides. But Defendants (recognizing that Ohio did not have an anti-SLAPP statute) successfully contested the case on jurisdictional grounds and then refused to consent to personal jurisdiction over their corporate entities anywhere except in the District of Columbia—which has an anti-SLAPP statute more onerous for defamation-plaintiffs than statutes in other jurisdictions. Thus, Plaintiffs were forced to file here to avoid protracted litigation over jurisdiction.

Once in D.C., Defendants attempted to shoehorn the case into the ambit of the D.C. Anti-SLAPP Act by running away from their public statements that the Hoffman investigation was an effort "to ascertain the truth" about actions internal to the APA "wherever th[e] evidence leads."[5] Instead, they took the strategic litigation position that the Hoffman Report constitutes advocacy on public issues. Moreover, by moving to stay the case in D.C., Defendants forced Plaintiffs to file a third, "safety" lawsuit in Massachusetts (which also has connections to the facts and claims at issue

[5] APA, *Statement of APA Board of Directors: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture* (Nov. 12, 2014), *available at* https://www.apa.org/news/press/releases/2014/11/risen-allegations; APA, *APA Response to April 30 New York Times Article* (Apr. 30, 2015), *available at* https://www.apa.org/news/press/response/new-york-times.

here) to ensure they had a forum certain to hear their claims. (That suit includes additional claims and an additional defendant.) Ultimately, of course, Defendants have participated in *this* case, but only to invoke the Anti-SLAPP Act to avoid addressing its full merits.

As this history demonstrates, *Defendants*, not Plaintiffs, have forced litigation in multiple forums and have, ironically, weaponized a statute enacted to prevent the weaponization of litigation. As a California court noted about the abuse of that state's anti-SLAPP statute, it turns "the original intent … on its head." *Grewal v. Jammu*, 119 Cal. Rptr. 3d 835, 850 n.10 (2011). Defendants have done so here even though they do not even contend that Plaintiffs filed their lawsuit "as a 'weapon to chill or silence speech'"—i.e., a SLAPP. *Mann*, 150 A.3d at 1229.

ARGUMENT

The D.C. Anti-SLAPP Act is invalid for three separate and independent reasons: (1) it violates the Home Rule Act, (2) it conflicts with the Congressionally enacted Title 11 of the D.C. Code, and (3) it violates the First Amendment, both facially and as applied in this case.

I. The D.C. Anti-SLAPP Act Violates the Home Rule Act and Is Void.

The conclusion that the D.C. Anti-SLAPP Act violates the Home Rule Act—and is therefore void—follows from a simple, straightforward, and logical analysis of the plain text of the Home Rule Act and the D.C. Anti-SLAPP Act. Neither Defendants nor Intervenor District of Columbia has offered any reason to conclude otherwise.

A. Under the Plain Language of the Home Rule Act, the D.C. Council Exceeded Its Legislative Authority in Passing the D.C. Anti-SLAPP Act, and the Act Is Thus Void.

The analysis showing that the D.C. Council exceeded its legislative authority in enacting the D.C. Anti-SLAPP Act is straightforward:

(1) **U.S. Constitution.** Article I, Section 8 of the U.S. Constitution grants Congress exclusive power to enact legislation governing the District of Columbia. U.S. Const. art I, § 8.

(2) **Home Rule Act.** In 1973, Congress passed the D.C. Home Rule Act. *See* Pub. L. No. 93-198; 87 Stat. 774 (codified at D.C. Code §§ 1-201.01 *et seq.*).

(3) **Home Rule Act Delegates Certain Legislative Authority.** In the Home Rule Act, Congress, subject to its retention of the ultimate legislative authority over the District of Columbia, "delegated certain legislative powers to the government of the District of Columbia," and "vested [those powers] in ... the [D.C.] Council," subject to limitations specified in the Home Rule Act. D.C. Code §§ 1-201.02 (a), 1-204.04(a).

(4) **Home Rule Act Places Strict Limits on the D.C. Council's Authority to Legislate Regarding D.C. Courts.** As relevant here, the Home Rule Act, in D.C. Code § 1-206.02(a)(4), specifically provides the following limitation on the D.C. Council's authority to legislate with respect to the D.C. Courts:

> The Council shall have *no authority* to ... [e]nact any act, resolution, or rule *with respect to any provision of [D.C. Code] Title 11* (relating to organization and jurisdiction of the District of Columbia courts).

***Accordingly,* IF [A]** the D.C. Council enacts any "act, resolution, or rule with respect to any provision of [D.C. Code] Title 11 (relating to organization and jurisdiction of the District of Columbia courts)," **THEN [B]** it exceeds its Congressionally limited legislative authority, and that act, resolution, or rule is void. And because Title 11 (titled "Organization and Jurisdiction of the Courts"), in turn, contains the provisions of the D.C. Code that relate to the establishment, rules, and procedures of the D.C. Courts,[6] any legislation passed by the D.C. Council "with respect to" the rules or procedures of the D.C. Courts is void as violative of the Home Rule Act.

This analysis confirms that, in passing the D.C. Anti-SLAPP Act, the D.C. Council exceeded its legislative authority under the Home Rule Act. Although Defendants avoid acknowledging it, ***the Act unquestionably created new procedures*** and imposed them on the D.C. Courts. For example, the Anti-SLAPP Act created for the first time a procedure whereby defendants could file a "special motion to dismiss" at an early stage of a case that "shall be granted" unless the plaintiff makes a certain showing. D.C. Code § 16-5502. Similarly, the Anti-SLAPP

[6] *E.g.*, D.C. Code § 11-946 (prescribing rules of procedure for the D.C. Courts).

Act created for the first time a procedure whereby a subpoena-recipient could file a "special motion to quash" a subpoena, which "shall be granted" unless the party seeking discovery makes a certain showing. D.C. Code § 16-5502. Neither procedure existed before the Act was enacted.

Not surprisingly, the **D.C. Court of Appeals** has repeatedly recognized that, regardless of whether the D.C. Anti-SLAPP Act can be construed to create substantive rights, it unquestionably created and imposed various procedures on the D.C. Courts. For example, as the Court explained in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016)—on which Defendants rely heavily—"[t]he Anti-SLAPP Act's special motion to dismiss ***creates a burden-shifting procedure*** that is triggered by the party seeking to invoke the special protections afforded by the Act." *Id.* at 1232. Indeed, the *Mann* court noted that "[a] comparison of ***the procedures*** usually available in civil litigation makes clear that the complement of provisions of the Anti-SLAPP Act impose requirements and burdens ... that significantly advantage the defendant." *Id.* at 1237. Similarly, in *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014), the Court recognized that the Act ***"creates*** a 'special motion to dismiss,' ***a procedural mechanism*** that allows a named defendant to quickly and equitably end a meritless suit." *Id.* at 1036 (the Act creates ***"procedural protections."***).

The **D.C. Circuit** has likewise recognized that the D.C. Anti-SLAPP Act creates procedures for D.C. Courts to apply. Indeed, in its leading case interpreting the Act, *Abbas v. Foreign Policy Grp.*, 783 F.3d 1328 (D.C. Cir. 2015), the D.C. Circuit explained that "[t]he D.C. Anti-SLAPP Act, to use the words of the D.C. Court of Appeals, ***establishes a new 'procedural mechanism'*** for dismissing certain cases before trial." *Id.* at 1335 (quoting *Burke*, 91 A.3d at 1036)). **D.C. District courts** have, not surprisingly, held the same. *E.g.*, *Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149, 160 (D.D.C. 2018) ("There is no question that the special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit ***by altering***

the procedure otherwise set forth in Rule[] 12[.]"); *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 111 (D.D.C. 2012) ("The Act is a ***summary dismissal procedure***[.]"). These holdings are completely in accord with the construction of California's anti-SLAPP statute—on which D.C.'s Anti-SLAPP Act is based—by California courts. *E.g.*, *Flatley v. Mauro*, 46 Cal. Rptr. 3d 606, 615 (2006) (the statute "establishes a ***procedure***").[7] They likewise are in accord with the holdings of courts across the country recognizing that similar anti-SLAPP statutes create procedural mechanisms.[8]

In addition, the D.C. Anti-SLAPP Act is codified in the "Judiciary and Judicial ***Procedure***" Division of the D.C. Code. *See* D.C. Code Div. II; *see also Boulter*, 842 F. Supp. 2d at 110-11 (recognizing same). And although reference to the D.C. Anti-SLAPP Act's legislative history (which Defendants and Intervenor repeatedly invoke) is not necessary, that history confirms that the D.C. Council knew that the Act "adds new provisions in the D.C. Official Code to provide ***an expeditious process*** for dealing with [SLAPPs]."[9] Indeed, the preamble to the Act states that its purpose is "to provide a special motion for quick and efficient dismissal" and "to provide a motion to quash"—i.e., procedural mechanisms. 58 D.C. Reg. 741 (Jan. 28, 2011).

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[7] *See also* Br. of Amicus Curiae Dist. of Columbia, *Adelson v. Harris*, No. 12-cv-6052, 2013 WL 435912, at *4 (S.D.N.Y. Feb. 4, 2013) (D.C. Attorney General: "Guidance from the California courts ... is instructive because the District's Act was modeled in substantial part on California's Anti-SLAPP Act.").

[8] **D.C. Circuit:** *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015). **Second Circuit:** *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 154 (2d Cir. 2013); *In re Gawker Media L.L.C.*, 571 B.R. 612, 633 (Bankr. S.D.N.Y. 2017). **Third Circuit:** *Gilead Scis., Inc. v. Abbott Labs., Inc.*, No. 13-cv-2034, 2015 WL 1191129, at *6 (D. Del. Mar. 13, 2015). **Fourth Circuit:** *ABLV Bank, AS v. Ctr. for Advanced Def. Studies Inc.*, 14-cv-1118, 2015 WL 12517012, at *3 (E.D. Va. Apr. 21, 2015); *Platinum Press, Inc. v. Douros-Hawk*, No. 18-cv-458, 2018 WL 6435331, at *1-2 (W.D.N.C. Dec. 7, 2018). **Fifth Circuit:** *Klocke v. Watson*, 936 F.3d 240, 245-46 (5th Cir. 2019). **Sixth Circuit:** *Lampo Grp., LLC v. Paffrath*, No. 18-cv-1402, 2019 WL 3305143, at *3 (M.D. Tenn. July 23, 2019). **Seventh Circuit:** *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 732 (7th Cir. 2015). **Eighth Circuit:** *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 542 (D. Minn. 2015). **Ninth Circuit:** *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018); *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004); *United States ex rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 973 (9th Cir. 1999). **Tenth Circuit:** *Los Lobos Renewable Power, L.L.C. v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018). **Eleventh Circuit:** *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1355 (11th Cir. 2018). Even the **First Circuit**—the only circuit to apply an anti-SLAPP act wholesale in federal court—held that the Maine anti-SLAPP statute is both substantive ***and procedural***. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010).

[9] D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010).

In sum, because the provisions of the D.C. Anti-SLAPP Act unquestionably relate to (indeed, create) procedures for the D.C. Courts, it constitutes an "act, resolution, or rule with respect to any provision of [D.C. Code] Title 11 (relating to organization and jurisdiction of the District of Columbia courts)," and the D.C. Council exceeded its legislative authority under the Home Rule Act in enacting it. The Act is thus void.

B. Defendants' and Intervenor's Contentions Cannot Save the Anti-SLAPP Act.

Rather than dispute the above analysis, Defendants and Intervenor try to avoid it. But they cannot, and their contentions cannot save the Act.

First, Defendants and Intervenor contend that the D.C. Anti-SLAPP Act "creates substantive protections for parties who express views on matters of public interest."[10] To do so, they rely exclusively on one line in *Mann* in which the court stated that the "Act's purpose [is] to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures" under certain circumstances. *Mann*, 150 A.3d at 1231. They then contend that the Act created a substantive immunity from suit and further argue that because the Act "create[d] a burden-shifting framework" for evaluating its newly created "special motions to dismiss" it must be substantive.[11] ***Their contentions, however, are incorrect and, in any event, are irrelevant.***

Contrary to their claim, *Mann* did not "authoritatively" hold that the Act is substantive and not (also) procedural. Indeed, the court was not asked whether—and thus could not have held that—the D.C. Anti-SLAPP Act was substantive, procedural, or both. Nor was it asked to evaluate the Act's validity under the Home Rule Act—a question of first impression in this case. Rather, the court had to decide only whether it had jurisdiction to hear the interlocutory appeal of the grant

[10] Defs. Opp. at 3-4; *accord* D.C. Opp. at 7-12.

[11] Defs. Opp. at 3-4; *accord* D.C. Opp. at 7-12.

of an anti-SLAPP special motion and, if so, the standard applicable in considering the Act's "likelihood of success" burden. *Id.* at 1220.

Similarly, the D.C. Court of Appeals has never held that the Anti-SLAPP Act creates immunity from suit, as would be necessary to deem the Act substantive. Rather, it has explained that the Act ***"creates ... a procedural mechanism*** that allows a named defendant to quickly and equitably end a meritless suit." *Burke*, 91 A.3d at 1036. A right to end a meritless suit is not the same as immunity from suit. And Defendants' argument has already been rejected:

> The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure.... The Act is a summary dismissal procedure that the Defendants and the District seek to clothe in the costume of the substantive right of immunity—but this is largely a masquerade.

Boulter, 842 F. Supp. 2d at 110-11.[12]

Finally, contrary to Defendants' suggestion, the mere fact that the D.C. Anti-SLAPP Act contains provisions relating to the burden of proof or assessment of attorneys' fees does not render it substantive, much less substantive in its entirety. Courts have repeatedly held statutory provisions relating to burdens of proof and attorneys' fees to be procedural.[13]

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[12] The D.C. Circuit and courts around the country have held similarly in evaluating anti-SLAPP statutes. *E.g.*, *Abbas*, 783 F.3d at 1335 ("To over-simplify for present purposes, qualified immunity allows defendants to avoid liability even when they may have violated the law so long as they acted reasonably. Qualified immunity (on its own) does not tell a court what showing is necessary at the motion to dismiss or summary judgment stages in order to dismiss a case before trial."); *Ernst v. Carrigan*, 814 F.3d 116, 121 (2d Cir. 2016) ("The analogy [of the anti-SLAPP act] to qualified immunity does not hold together."); *Klocke v. Watson*, 936 F.3d 240, 245-46 (5th Cir. 2019) (anti-SLAPP statute creates procedural rules, not substantive immunity); *Jarrow Formulas, Inc. v. LaMarche*, 3 Cal. Rptr. 3d 636, 643 (2003) ("[T]he anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of immunity."); *Sandholm v. Kuecker*, 962 N.E.2d 418, 430 (Ill. 2012) (similar); *see also We, Inc. v. City of Phila.*, 174 F.3d 322, 324 (3d Cir. 1999) ("As the Supreme Court has explained, there is 'a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'").

[13] As to burdens of proof, *e.g.*, *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 511-12 (1915) ("So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law."); *see also* Fed. R. Evid. 302 adv. comm. n. to 1972 amend. (discussing burdens of proof as procedural). As to attorneys' fees, *e.g.*, *Leonardis v. Burns Int'l Sec. Servs., Inc.*, 808 F. Supp. 1165, 1184 (D.N.J. 1992) ("This jurisdiction views its counsel-fee rules as inextricably bound to the question of access to our

But even more fundamentally, it is simply <u>irrelevant</u> whether or not the D.C. Anti-SLAPP Act was intended to or did in fact create substantive rights. Defendants and Intervenor ignore the fact that a statute can relate to ***both*** substance and procedure. Regardless of whether the Act affects substantive rights, it unquestionably contains provisions that relate to and affect procedures. It is irrelevant whether those procedures were created as an end themselves or as a means to enforce new substantive rights. The only thing that matters is that the Anti-SLAPP Act created new procedures—period. That ends the inquiry and renders the Act violative of the Home Rule Act.

<u>Second</u>, Defendants and Intervenor argue that the Home Rule Act prohibits the D.C. Council only from enacting laws or rules that relate to unspecified parts of Title 11 "relating to the organization and jurisdiction of the District of Columbia courts"—but allows the Council to legislate with respect to other unspecified parts of that Title. To make this argument, they point to a parenthetical in Section 1-206.02 (a)(4) of the Home Rule Act:

> "The Council shall have no authority to ... [e]nact any act, resolution, or rule with respect to any provision of [D.C. Code] Title 11 (relating to organization and jurisdiction of the District of Columbia courts)."

According to Defendants and Intervenor, that parenthetical serves to modify—and limit—the operative text of Section 1-206.02(a)(4). They are incorrect. Although they fail to acknowledge it, their statutory construction argument has been repeatedly rejected.

As courts have repeatedly explained when interpreting congressionally-enacted statutes—like the Home Rule Act—"Congress' use of 'relating to' parentheticals is widely understood to have a descriptive import ... rather than to limit [a section's] application." *United States v. Harrell*,

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courts. They are thus ***procedural in a fundamental sense****[.]*"); *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414, 418 (3d Cir. 1995) ("Court rules regulating attorney fees are not only ***clearly procedural*** but have also expressly been so declared."); *Mazengo v. Mzengi*, No. 07-cv-756, 2007 WL 8026882, at *9 (D.D.C. Dec. 20, 2007) (similar); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (holding that an attorney-fee award against bad-faith conduct in the litigation does not derive in any way from state substantive law).

637 F.3d 1008, 1012 (9th Cir 2011) (collecting cases; quotation marks omitted); *see also, e.g.*, *United States v. Kassouf*, 144 F.3d 952, 959-60 (6th Cir. 1998) (parentheticals in statutory text are "descriptive rather than limiting"). Such "parentheticals are only 'visual aids' designed to guide the reader through what would otherwise be a litany of numbers." *United States v. Garner*, 837 F.2d 1404 (7th Cir. 1987). They are used because "[w]ithout any descriptions ... determining [what cross-referenced sections referred to] would be a long and arduous process. [P]arentheticals ... provide an aid to identification only." *United States v. Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999) (quotation marks omitted).[14] Indeed, this is especially true where, as here, the parenthetical in Section 1-206.02(a)(4) simply sets forth the name of Title 11.

Moreover, as courts have likewise repeatedly held when construing statutory language, "a parenthetical is, after all, a parenthetical and it cannot be used to overcome the operative terms of the statute" or to manufacture ambiguity. *Harrell*, 637 F.3d at 1012.[15] This makes sense: under basic rules of English construction and grammar, "[p]arenthetical expressions provide comments, explanations, digressions, or other supplementary information not essential to meaning." H. Ramsey Fowler & Jane E. Aaron, *The Little, Brown Book* 430 (2016).[16]

Finally, contrary to Intervenor's contention, recognizing the invalidity of the D.C. Anti-SLAPP Act as violative of the Home Rule Act would ***not*** require the invalidation of "whole swathes of District law."[17] Intervenor's case law is completely distinguishable and inapposite:

- *Dimond v. District of Columbia*, 792 F.2d 179, 190 (D.C. Cir. 1986). *Dimond* involved a

[14] *See also, e.g.*, *Harrell*, 637 F.3d at 1012 (parentheticals aid a section's identification rather than limit its application); *United States v. Persichilli*, 608 F.3d 34, 40 (1st Cir. 2010) (a parenthetical "merely provides a short-hand description of what ... the cited sections primarily cover"); *United States v. Galindo-Gallegos*, 244 F.3d 78, 733-34 (9th Cir. 2001).

[15] *See also, e.g.*, *Monjaras-Castaneda*, 190 F.3d at 330 (same); *Persichilli*, 608 F.3d at 40-41 ("A mere summary description of a cross-reference ... cannot alter the unambiguous language [of the statutory text].").

[16] *See also* Andrea Sutcliff, *The N.Y. Public Library Writer's Guide to Style and Usage* 248 (1994) ("Parenthetical words, phrases, or clauses are those that ... could be omitted without changing the meaning[.]").

[17] D.C. Opp. at 11, 14-20.

statute that eliminated a substantive cause of action; it did not involve judicial procedures.

- *District of Columbia v. Sullivan*, 436 A.2d 365, 366 (D.C. 1981). *Sullivan* involved a statute that decriminalized traffic offenses—a purely substantive statute.

- *Hessey v. Burden*, 584 A.2d 1, 6 (D.C. 1990). *Hessey* involved a statute that "merely enlarge[d] the class of those persons already allowed to contest the Mayor's [tax] assessments"—a substantive right with no procedural import.

- *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 (D.C. 1995). *Umana* involved the adoption of the D.C. Uniform Arbitration Act, which the court recognized did not alter the D.C. courts' jurisdiction or affect their procedures.

- *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019). *Price* involved a statute modifying the "contested case provision" of the D.C. Administrative Procedure Act. The court recognized the D.C. Council had not sought "to amend 'any provision of Title 11'" because "[t]here is no provision in Title 11 itself relating to the contested case requirement."

- *Bergman v. District of Columbia*, 986 A.2d 1208, 1225-26 (D.C. 2010). *Bergman* involved a substantive police power statute designed to ensure "protection of the residents of [D.C.] from intrusive conduct and harassment by [lawyers]" by regulating persons authorized to practice law, which the court recognized has long been an inherent *but not exclusive* power of the courts. The statute had no procedural components.

- *Woodroof v. Cunningham*, 147 A.3d 777, 787 (D.C. 2016). *Woodroof* involved the same Arbitration Act considered in *Umana*, which the court recognized did not alter the D.C. courts' jurisdiction or affect their procedures. *Woodroof* stands only for the proposition that the D.C. Council may change substantive law, a proposition irrelevant to this case.

The statutes cited by Intervenor to argue for the Council's authority to enact the Anti-SLAPP Act are similarly distinguishable: they create or modify substantive rights without dictating procedures and are not acts "with respect to Title 11."[18]

[18] D.C. Opp. at 10-11. For example, Intervenor cites D.C. Law No. 12-194 (Drug-Related Nuisance Abatement Act), which creates a cause of action for nuisance abatement and establishes the parameters of such claims; D.C. Law No. 13-172 (Drug-Related Evictions Re-enactment Act), which creates a cause of action for eviction of tenants charged with drug crimes and establishes the parameters of that cause of action; various statutes creating traditional, substantive immunities without creating new procedural mechanisms to assert them; and D.C. Code § 16-2310(e), which derives from Title 16 creating the juvenile justice system and does not impact Title 11.

II. The D.C. Anti-SLAPP Act Violates the Congressionally Enacted D.C. Code § 11-946 and Is Void.

The D.C. Anti-SLAPP Act is also void because it violates D.C. Code § 11-946, which was enacted by Congress.[19] Section 11-946 mandates that (1) the D.C. Courts must follow the Federal Rules of Civil Procedure unless they adopt rules that modify the Federal Rules, ***and*** (2) rules that modify the Federal Rules must be approved by the D.C. Court of Appeals before they take effect:

> [1] The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules.
>
> [2] Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court.[20]

Here, it is ***undisputed*** that the D.C. Anti-SLAPP Act created "special motions" and created rules for when those motions "shall be granted" or "shall be denied." Prior to the Act's passage, those motions did not exist, nor did any rules providing for when they could be brought, granted, or denied. It is likewise ***undisputed*** that the D.C. Court of Appeals did not engage in rulemaking for or approve the Anti-SLAPP Act's "special motion to dismiss" or "special motion to quash" rules before they took effect. As a result, the Anti-SLAPP Act violates the Supremacy Clause and is void. *E.g.*, *Barnes v. District of Columbia*, 611 F. Supp. 130, 133 (D.D.C. 1985) (state legislation is preempted by federal law if as here, it conflicts with a "clear and manifest purpose of Congress"). And because Section 11-946 provides that "[r]ules which modify the Federal Rules ... shall not

[19] *See* Pub Law. No. 91-358, 84 Stat. 473, 487-88 (codified at D.C. Code § 11-946).

[20] D.C. Code § 11-946; *see also, e.g.*, *Johnson v. United States*, 647 A.2d 1124, 1125 (D.C. 1994) ("[Section 11-946] makes clear that this court possesses the ultimate authority to approve or reject proposed Superior Court rules that modify existing federal rules of procedure."); *Adkins v. Morton*, 494 A.2d 652, 656 n.5 (D.C. 1985) (similar); *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) ("11-946 requires the Superior Court to conduct its business according to the Federal rules unless the court *affirmatively prescribes* modifications thereof. All modifications are to be approved before taking effect by the District of Columbia Court of Appeals." (emphasis in original)).

take effect until approved by [the D.C. Court of Appeals]," the Act's application cannot be retroactively approved by that Court.

Defendants' and Intervenor's only response is to contend that what they admit is a "rule" providing for a special motion to dismiss does not *conflict* with the Court's existing rules.[21] But that contention is a red herring. Under D.C. Code § 11-946, the relevant question is not whether a new rule conflicts with existing rules, but rather whether it ***modifies*** them. As the U.S. Supreme Court has explained, the definition of "to modify," unsurprisingly, includes "to ... enlarge; extend; amend." *MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (surveying dictionary definitions of "modify"). That is precisely what the Anti-SLAPP Act did to the Federal Rules by creating rules for filing and evaluating "special motions to dismiss" and "special motions to quash" that did not previously exist in D.C. Courts. Indeed, the D.C. Court of Appeals recognized the novelty of the Anti-SLAPP Act's rules—and their supplementation of the Federal Rules—in *Mann*, admonishing that the Anti-SLAPP Act "is not redundant relative to the rules of civil procedure." *Mann*, 150 A.3d at 1238. The Act thus violates Section 11-946 and is void.

III. The D.C. Anti-SLAPP Act Violates the First Amendment—Facially and As Applied.

The D.C. Anti-SLAPP Act is also invalid because it impermissibly infringes defamation-plaintiffs' First Amendment rights to petition by depriving them of access to the courts or substantially burdening that access. It is thus unconstitutional both facially and as applied here.

A. Defamation-Plaintiffs' First Amendment Rights to Seek Redress in Court Stand on Equal Footing with Defamation-Defendants' Free Speech Rights.

As an initial matter, courts have repeatedly recognized that the First Amendment right to petition the government includes "'[t]he right of access to courts for redress of wrongs.'" *Stuart*, 143 A.3d at 767 (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011)). And it is

[21] Defs. Opp. at 4-5; D.C. Opp. at 21-23.

"firmly established" that ***any*** "significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). "This type of scrutiny is necessary 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." *Id.* And as especially relevant here, a person's right of access to the courts to seek redress of grievances stands on equal footing with a defamation-defendant's: "a private citizen exercises a constitutionally protected First Amendment right ***anytime*** he or she petitions the government for redress; ... the First Amendment does not pick and choose its causes." *Van Deelen v. Johnson*, 497 F.3d 1151, 1156 (10th Cir. 2007).

Thus, just as any burden on a defamation-defendant's free speech rights "must survive exacting scrutiny," so too must any burden on a defamation-plaintiff's right to seek redress in the courts. *Elrod*, 427 U.S. at 362. That is especially true where, as here, an anti-SLAPP statute targets only a specific class of speakers—defamation-plaintiffs. Such "content-based regulations of speech" and "attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers" are "presumptively invalid" and subject to struct scrutiny. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). And contrary to Defendants' claim, the Anti-SLAPP Act need ***not*** be "unconstitutional in all of its applications" to be facially unconstitutional;[22] rather, "[i]n the First Amendment context ... [the Supreme] Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010).

[22] Defs. Opp. at 8.

B. The D.C. Anti-SLAPP Act Is Facially Unconstitutional.

As explained in Plaintiffs' Motion, the D.C. Anti-SLAPP Act is facially unconstitutional because, in addition to providing for the dismissal of SLAPPs—a legitimate purpose—its provisions *also* result in (or substantially risk) the dismissal of meritorious, non-SLAPP suits and substantially chill people from bringing legitimate and meritorious defamation claims.

Defendants' and Intervenor's contention to the contrary relies entirely on an erroneous definition of what constitutes a SLAPP. According to them, any case dismissed under the Anti-SLAPP Act is by definition a SLAPP. But that contention assumes its conclusion.

In reality, not every suit that could be dismissed under the D.C. Anti-SLAPP Act is necessarily a SLAPP—nor is every non-meritorious defamation suit a SLAPP. Rather, as the D.C. Court of Appeals recognizes, to be a SLAPP, a lawsuit must have two characteristics: (1) it "is an action filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view," and (2) its "goal ... is not to win the lawsuit but to punish the opponent and intimidate them into silence." *Mann*, 150 A.3d at 1226.[23] In other words, a SLAPP must not only target public speech, but *also* must be brought in subjective bad faith. *Id.* It is only those bad-faith lawsuits that the D.C. Anti-SLAPP Act was designed to prevent. *Id.*

Nevertheless, the D.C. Anti-SLAPP Act *also* provides for the dismissal of potentially meritorious lawsuits, not just SLAPPs. The Act does so by "***impos[ing] requirements and burdens on the [plaintiff]*** that significantly advantage the defendant." *Id.* at 1237. Among other things, the Act "stays the [plaintiff's] right to seek discovery ... with a limited exception that favors the defendant," and "places the initial ***burden*** on the [plaintiff] to present legally sufficient evidence

[23] Quoting D.C. Council, Committee on Public Safety & the Judiciary, Committee Report (Nov. 18, 2010), and George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 3, 9011 (1989). *See also Grewal*, 191 Cal.App.4th at 997 n.10, ("How ironic and sad, then, that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon.")

substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection." *Id.* In other words, it imposes substantial burdens on plaintiffs seeking redress of grievances. They may well have meritorious claims but need discovery to prove the truth of their well-pleaded allegations. Under the Act, however, even if that evidence existed, plaintiffs can be denied the discovery to obtain it and their claims would be dismissed. And because the Act provides that unsuccessful plaintiffs may be required to pay substantial attorneys' fees and costs, it chills plaintiffs from exercising their right to petition in the first instance.

Accordingly, recognizing that reality and the resultant "constitutional infirmity," and "to ensure that only 'SLAPP' suits are subject to dismissal," the courts in multiple states have construed those states' anti-SLAPP acts—which are materially similar to D.C.'s Act—to apply only if the claims lack merit as judged under the act's burden-shifting framework ***and*** the plaintiff brings the claims in subjective bad faith. *Blanchard v. Steward Carney Hosp.*, 75 N.E.3d 21, 38 (Mass. 2019); *see also, e.g., Sandholm v. Kuecker*, 962 N.E.2d 418, 429-30 (Ill. 2012). As these courts have recognized, "if the plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill defendant's rights of petition, speech, association, or participation in government, it is not a SLAPP and does not fall under the purview of the [Anti-SLAPP] Act." *Sandholm*, 962 N.E.2d at 429.[24]

[24] **Illinois:** *Sandholm*, 962 N.E.2d at 433 ("If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts," then it "does not constitute a SLAPP," and is "not … subject to dismissal …."). **Massachusetts:** *Blanchard,* 75 N.E.3d at 38 (Defendant must show that the putative SLAPP suit was "solely based on [the moving party's] own petitioning activities."); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (1998) ("[U]nless [a suit] can be shown to be sham petitioning, the [Anti-SLAPP] statute impinges on the adverse party's exercise of its right to petition[.]"). **Maine:** *Gaudette v. Davis*, 160 A.3d 1190, 1194 (Me. 2017) (Maine's Anti-SLAPP Act addresses "litigation instituted not to redress legitimate wrongs, but instead to 'dissuade or punish' the defendant's First Amendment exercise of rights through the delay, distraction, and financial burden of defending the suit."). **Vermont:** *Felis v. Downs Rachlin Martin PLLC*, 133 A.3d 836, 851 (Vt. 2015) (holding that "the anti-SLAPP statute should be construed as limited in scope and that great caution should be exercised in its interpretation" and that "unless [a suit] can be shown to be sham petitioning, the [Anti-SLAPP] statute impinges on the adverse party's exercise of its right to petition").

Notably, only the construction adopted by these courts—not the current construction of the D.C. Anti-SLAPP Act—ensures that the Act prevents *only* sham petitioning. As the U.S. Supreme Court expressly held in its seminal *Noerr* and *Pennington* line of cases (which provided the model for the burden of proof language in anti-SLAPP statutes), to render petitioning in the courts unprotected, a claim must be both "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," ***and*** a subjective "sham to cover what is actually nothing more than an attempt to interfere with [another person's rights]." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 50 (1993); *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Defendants' and Intervenor's only response is to assert that the D.C. Court of Appeals in *Mann* and Superior Court in *Gordon* already rejected facial challenges to the D.C. Anti-SLAPP Act. But they did not. ***In fact, Defendants grossly misquote* Gordon *and mischaracterize* Mann.** Contrary to Defendants' claim, *Mann* did ***not*** involve any First Amendment challenge to the D.C. Anti-SLAPP Act, and *Gordon* expressly recognized that "the *Mann* Court did not squarely address a First Amendment right to petition challenge." *Gordon v. Forrest Hills Neighb. All., Inc.*, No. 2016CA6397B, slip op. at 16 (D.C. Super. May 18, 2017). And Defendants omit words from their quotation of *Gordon* that make clear that it was "Plaintiffs' ***as-applied*** challenge to [the Act]" that that court rejected. *Id.* at 17 ("as-applied" omitted by Defendants). Neither *Mann* nor *Gordon* even purported to address the constitutional question here. Under settled law, the Act impermissibly burdens defamation-plaintiffs' First Amendment rights and must be invalidated—or construed in a manner consistent with those rights, as in *Sandholm*, *Blanchard*, and like cases.

C. The D.C. Anti-SLAPP Act Is Unconstitutional as Applied to Plaintiffs Here.

Finally, the D.C. Anti-SLAPP Act is unconstitutional as applied to Plaintiffs in this case. ***Defendants and Intervenor implicitly concede as much.***

Here, Defendants do not contend—and have never contended—that Plaintiffs brought their claims against them in bad faith or with the "goal ... not to win the lawsuit but to punish [Defendants] and intimidate them into silence." *See Mann*, 150 A.3d at 1226. And Intervenor expressly admits in its Opposition that "[t]he District does ***not*** contend that the Complaint here is baseless or frivolous."[25] As such, although Defendants contend that Plaintiffs' claims should ultimately fail, Defendants and Intervenor concede that Plaintiffs' lawsuit is not a SLAPP.

Nevertheless, the D.C. Anti-SLAPP Act has "impos[ed] requirements and burdens on [Plaintiff] that significantly advantage [Defendants]." *See Mann*, 150 A.3d at 1237. The Act has "stay[ed] [Plaintiffs'] right to seek discovery ... with a limited exception that favors [Defendants]." *Id.* And it has "place[d] the initial burden on [Plaintiffs] to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on [Defendants]." *Id.* In other words, it has substantially burdened Plaintiffs' First Amendment rights to bring a lawsuit that Defendants and Intervenor admit is not a SLAPP and not a sham.[26] And it has done so based on the content of Plaintiffs' speech (seeking redress for defamation) and because of who Plaintiffs are (defamation-plaintiffs). That is the very definition of a content-based restriction on speech that cannot survive strict-scrutiny—or any level of scrutiny. As such, the D.C. Anti-SLAPP Act is unconstitutional as applied to Plaintiffs here and cannot be enforced against them.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court declare the D.C. Anti-SLAPP Act void and/or unconstitutional.

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[25] D.C. Opp. at 27 (emphasis in original).

[26] *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 530-33 (2002) ("[E]ven though ... lawsuits ... [may be] unsuccessful, [that] class [of unsuccessful suits] nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds.").

Submitted this 13th day of December 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, a true and correct copy of the foregoing Plaintiffs' Consolidated Reply to Defendants' Opposition to Plaintiffs' Motion to Declare the D.C. Anti-SLAPP Act Void and/or Unconstitutional and the District of Columbia's Brief in Support of the D.C. Anti-SLAPP Act of 2010 was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record and the D.C. Attorney General that this filing is completed and available for download at their convenience.

/s/ *John B. Williams*
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