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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| STEPHEN BEHNKE, *et al.*,<br>Plaintiffs,<br>v.<br>DAVID H. HOFFMAN, *et al.*,<br>Defendants.<br><br>THE DISTRICT OF COLUMBIA,<br>Intervenor. | Case No. 2017 CA 005989 B<br><br>Judge Hiram E. Puig-Lugo |

# INTERVENOR THE DISTRICT OF COLUMBIA'S BRIEF IN SUPPORT OF THE ANTI-SLAPP ACT OF 2010

## INTRODUCTION

The District of Columbia (the District) intervenes for the limited purpose of defending the constitutionality of the Anti-SLAPP Act of 2010 (the Act), D.C. Law 18-351, *codified at* D.C. Code §§ 16-5501, *et seq.*[1]

The District's Anti-SLAPP Act is constitutional; it was enacted to protect the rights of citizens to provide their views or petition the government on matters of public debate. Plaintiffs argue that the Act violates the Home Rule Act (HRA) because it exceeds the grant of legislative authority provided to the D.C. Council by Congress

[1] The District takes no position on the merits of the Parties' claims or defenses in the underlying lawsuit.

and intrudes on the powers of the judiciary. They are incorrect. Ignoring the decades of cases interpreting the contours of the HRA and the Council's authority, plaintiffs argue only broad, undisputed generalities. Regardless of the reasons for plaintiffs' avoidance of controlling case law, the Act is well within the broad legislative powers of the Council and does not constitute an impermissible infringement on the jurisdiction or organization of the courts.

Plaintiffs also argue that the Act violates the First Amendment, but the statute's legislative objective is clear—to grant substantive rights and protect citizens facing strategic lawsuits against public participation (SLAPPs), providing them an ability to quickly and efficiently seek dismissal of meritless lawsuits arising from the exercise of their First Amendment rights. The Act does not violate the First Amendment—it does not prevent or discourage anyone from accessing the courts, nor is it unconstitutionally overbroad or likely to "chill" the exercise of rights by other persons. Instead, the Act—like similar laws in the majority of states—seeks to protect citizens against expensive lawsuits designed to punish or prevent the expression of opposing points of view.

## STATUTORY OVERVIEW

### I. The Purpose of the Anti-SLAPP Act

After a legislative process that began with the introduction of the proposed bill in June 2010, followed by a public hearing, a mark-up hearing, and a detailed report from the Council's Committee on Public Safety and the Judiciary, the Anti-SLAPP Act of 2010 was passed by the Council on second reading by a vote of 12–0, and on

January 19, 2011 was signed by then-Mayor Vincent C. Gray.[2] Following the completion of the thirty-day period of congressional review required under the HRA, and without a single public expression of disapproval of the Act by any member of Congress, the legislation became effective on March 31, 2011. 58 D.C. Reg. 3699 (Apr. 29, 2011).

The legislation, D.C. Law 18-351, *codified at* D.C. Official Code §§ 16-5501, *et seq.*, was designed by the Council to "extend[] substantive rights to defendants in a SLAPP." Comm. Rep. at 4. The Council found that the prevailing tort litigation regime was insufficient to protect citizens from "litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." *Id.* The Committee on Public Safety and the Judiciary summarized the "background and need" for the bill by explaining that it was developed to enhance:

> [A] defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or effort to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial[] amount of money, time, and legal resources. The impact is not limited to named defendants['] willingness to speak out, but prevents others from voicing concerns as well.

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[2] *See* 58 D.C. Reg. 743 (Jan. 28, 2011). *See also* http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (search for "A18-701") (as of Oct. 22, 2019); Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010," November 18, 2010 ("Comm. Rep."). The Committee Report is available online at http://lims.dccouncil.us/Download/23048/B18-0893-CommitteeReport1.pdf (Oct. 22, 2019).

Comm. Rep. at 1.

## II. The Protections Afforded Under the Anti-SLAPP Act

At the core of the Act's protections is D.C. Code § 16-5502, which provides that 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"—as that term is defined in the Act—within 45 days after service of the claim. *Id.* at § 16-5502(a). It also provides a burden-of-persuasion rule for such special motions to dismiss:

> 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.

*Id.* at § 16-5502(b). In addition, the Act provides for a stay of discovery upon the filing of a special motion to dismiss, until the motion is disposed of, except that "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 specialized discovery be conducted," and provides "that [s]uch an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." *Id.* at § 16-5502(c).[3]

[3] The other four sections of the Act set forth definitions (D.C. Code § 16-5501), provide for unnamed SLAPP defendants to move to quash a subpoena to protect their identity (*id.* at §16-5503), provide for fees and costs to the prevailing party (*id.* at §16-5504), and prescribe the scope of certain exemptions (*id.* at §16-5505).

As explained in the Committee Report, the Council thus sought to implement First Amendment-promoting protections: to "ensure[ ] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates[,] … [t]o prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act." Comm. Rep. at 4. With the passage of the Act, the District joined the majority of the States, which provide qualified immunity and other protections against lawsuits "aimed to punish or prevent the expression of opposing points of view," by "allow[ing] a defendant to more expeditiously, and more equitably, dispense of a SLAPP." *Id.* at 1, 3.[4]

## ARGUMENT

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

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4 According to the Public Participation Project, 32 States have some form of anti-SLAPP law, *https://anti-slapp.org/your-states-free-speech-protection/* (Oct. 22, 2019). For other jurisdictions' anti-SLAPP statutes: *see* Ariz. Rev. Stat. §§ 12-751, 752; Ark. Code Ann. §§ 16-63-501 to 508; Cal. Civ. Proc. Code § 425.16; Del. Code Ann. §§ 10.8136 to 8138; Fla. Stat. §§ 768.295 & 720.304; Ga. Code Ann. § 9-11-11.1; Haw. Rev. Stat. §§ 634F-1 to 634F-4; 735 Ill. Comp. Stat. §§ 110/1 to 110/99; Ind. Code §§ 34-7-7-1 to 34-7-7-10; Kan. Stat. § 60-5320; La. Code Civ. Proc. Ann. § 971; Me. Rev. Stat. Ann. tit. 14, § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. §§ 554.01 to 554.05; Mo. Rev. Stat. § 537.528; Neb. Rev. Stat. §§ 25-21,242 to 25-21,246; Nev. Rev. Stat. §§ 41.635 to 41.670; N.M. Stat. Ann. §§ 38-2-9.1 to 38-2-9.2; N.Y. C.P.L.R. 70-a, 76-a, & 3211; Okla. Stat. tit. 12 § 1443.1; Or. Rev. Stat. §§ 31.150 to 31.155; 27 Penn. Cons. Stat. §§ 7707, 8301 to 8303; R.I. Gen. Laws §§ 9-33-1 to 9-33-4; Tenn. Code Ann. §§ 4-21-1001 to 1004; Tex. Civ. Prac. & Rem. Code §§ 27.001 to .011; Utah Code Ann. §§ 76B-6-1401 to 1405; Vt. Stat. Ann. tit. 12, § 1041; Va. Code § 8.01 to 223.2; and Wash. Rev. Code §§ 4.24.500 to 525.

Plaintiffs argue that the Act violates the HRA because it exceeds the grant of legislative authority provided to the D.C. Council. Pl. Mem. at 4–5. In addition, plaintiffs argue that the Act improperly creates "new procedures to govern the work of the courts[,]" *Id.* at 3 (citing D.C. Code § 16-5502), and that these procedures conflict with court rules. *Id.* at 3–4. These arguments fail for the reasons discussed below.

### A. <u>Congress Granted the D.C. Council Broad Legislative Power Under the Home Rule Act.</u>

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise exclusive legislative authority over the District of Columbia. *See generally Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). In 1973, Congress delegated most of this authority to the District by passing the HRA, Pub. L. No. 93-198, 87 Stat. 774, *codified at* D.C. Code §§ 1-201.01, *et seq.* (2017 Supp.). The HRA allows Congress a period to review legislation enacted by the Council. If Congress fails to pass a joint resolution of disapproval within that period, the legislation becomes law. *Id.* § 1-206.02(c). Congress therefore maintains final control over all legislation adopted for the District of Columbia. *District of Columbia Ass'n of Chartered Public Schools v. District of Columbia*, 134 F. Supp. 3d 525, 529 (D.D.C. 2015).

By enacting the HRA, Congress broadly delegated legislative authority to the District government. Among the stated purposes of the HRA were to "grant the inhabitants of the District of Columbia powers of local self-government … and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-

201.02(a). *See also United States v. Alston*, 580 A.2d 587, 589 (D.C. 1990); *Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 889, 903 (D.C. 1981) (*en banc*); *McIntosh v. Washington*, 395 A.2d 744, 752 (D.C. 1978).

Consistent with these purposes, the HRA provides that, "[e]xcept as provided in title VI of this Act [D.C. Code §§ 1-206.01 to 1-206.03], the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States." D.C. Code § 1-203.02. *See Sprint Commc's Co. v. Kelly*, 642 A.2d 106, 110 (D.C. 1994). The Supreme Court had previously interpreted the phrase "rightful subjects of legislation" in the District of Columbia Organic Act of 1871, Act of Feb. 21, 1871, 16 Stat. 419, to delegate to the District power "as broad as the police power of a state." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953). Thus, Congress's use of the same language in the HRA indicated that it was delegating all of its powers over local matters except those specifically reserved.

### B. The Anti-SLAPP Act is a Valid Exercise of the Council's Broad Legislative Authority that Protects Substantive Rights Without Altering the Jurisdiction, Structure, or Core Functions of the Courts.

The Council acted deliberately, in full recognition of the limits of its authority, when it enacted the Act. The "D.C. 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). Plaintiffs have presented nothing to rebut—or even question—this basic presumption of District law.

Similar to other legislation upheld by the District of Columbia Court of Appeals (DCCA), the Act is simply substantive law to be applied by the courts and does nothing to change the core operation of Title 11 of the D.C. Code or the jurisdiction of the local courts in administering that title.

As introduced, the Act contained a provision which provided that "[t]he defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part." Comm. Rep. at 12. The Council, however, noting the then-recent panel decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), removed that provision, acknowledging the panel's finding that "the Council exceeds its authority in making such orders reviewable on appeal." Comm. Rep. at 7.[5]

This concern by the Council of its own limitations is a key factor in determining whether the legislation violates the HRA. "In view of the care with which the Council acted in the area of the courts' jurisdiction, we should not construe [the challenged provision] more expansively than is necessary to achieve the policies underlying the [new law]." *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 723 (D.C. 1995).

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[5] *Stuart* was subsequently vacated pending rehearing *en banc*. 30 A.3d 783 (D.C. 2011). *Cf. NcNair Builders, Inc. v. Taylor*, 3 A.2d 1132, 1138 (D.C. 2010) (interlocutory appeals were proper in cases involving a "substantial public interest," for example, "that of enforcing a statute that 'aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights ….'") (quoting *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 180 (5th Cir. 2009) (considering Louisiana's anti-SLAPP statute)).

Plaintiffs contend that the Act "impermissibly encroaches on the power of the judiciary," Pl. Mem. at 5, in violation of Section 602(a)(4) of the HRA, which provides: "The Council shall have no authority to pass any act contrary to the provisions of this chapter … or to [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts) …." *Codified as amended at* D.C. Code § 1-206.02(a)(4).

Plaintiffs are incorrect. Their cursory arguments do little to advance the Court's understanding of the history and scope of the HRA. On its face, the Anti-SLAPP Act withstands HRA scrutiny. The Act grants important substantive rights and has no effect on the organization or jurisdiction of the local courts. *See Jackson v. District of Columbia Bd. of Elections & Ethics*, 999 A.2d 89, 101 (D.C. 2010) (*en banc*) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used ….") (quoting *Brizill v. District of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1216 n.8 (D.C. 2006)).

Plaintiffs dwell on the fact that the former Attorney General for the District of Columbia noted that the legislation that became the Anti-SLAPP Act "may run afoul of section 602(a)(4)" of the HRA. Pl. Mem. at 5. Plaintiffs fail to note, however, that the one-page letter was, by its terms, only preliminary, *see* Pl. Ex. A at 23, without an in-depth analysis of the legislation, and simply raised questions without reaching any conclusions. Moreover, the legislation was subsequently amended, and the Mayor ultimately signed it. *Cf. Jackson*, 999 A.2d at 107–108 (although Corporation Counsel and General Counsel to the Council advised that the Council was not authorized to

enact the provision, "the elected representatives of the people—the Council and the Mayor—thought otherwise").

The Council has broad authority to enact legislation that has far greater effect on the courts' procedures than the Anti-SLAPP Act, imposing specific procedural requirements on judicial actions.[6] Moreover, it is long-recognized that it is within the power of a legislature, as the Council did in the Act, to grant substantive defenses and immunity from legal burdens and liability. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("[T]he State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether ...."). Indeed, there are dozens of statutory immunities codified in the District, many enacted as exercises of the Council's broad police powers.[7]

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[6] For example, D.C. Law 12-194, the Drug-Related Nuisance Abatement Act of 1998, eff. Mar. 16, 1999, *codified as amended at* D.C. Code §§ 42-3101, *et seq.*, appeared to create a presumption that, in a proceeding for a preliminary injunction, irreparable harm to the plaintiff outweighs any harm to the defendant. *See* D.C. Code § 42-3104(a). Thus, it arguably changed the common law requirements for a preliminary injunction. *Cf.* Super. Ct. Civ. R. 65. Similarly, D.C. Law 13-172, the Residential Drug-Related Evictions Re-enactment Act of 2000, eff. Oct. 19, 2000, *codified as amended at* D.C. Code §§ 42-3601, *et seq.*, provides, in pertinent part, that "[t]he Court shall not enter a default judgment to evict a tenant or occupant who has failed to plead or otherwise defend unless, based upon evidence presented by the plaintiff, the Court determines that the rental unit is a drug haven or nuisance." D.C. Code § 42-3605. *Cf.* Super. Ct. Civ. R. 55. *See also* D.C. Code § 42-3604(a)(1) (within 10 days of issuance of preliminary injunction, "the Court shall hold a full hearing on the merits of the eviction action").

[7] *See, e.g.*, D.C. Code §§ 3-1251.08 (immunity for members of Committee on Impaired Nurses); 4-1451.06 (immunity for authorized facilities and personnel under "newborn safe haven" law); 5-404.01(e)(2) (immunity for Medical Director of Fire and Emergency Medical Services Department); 7-1305.06b(b) (immunity for members of review panel for administration of psychotropic medications to citizens with intellectual disabilities); 7-1531.25(d) (immunity for persons "taking the medically

If plaintiffs' arguments were taken to their logical extreme, the Council could not enact any law that would affect the "procedures" of the local courts. But this is not the law. "[R]estrictions on the Council's legislative authority are to be narrowly construed." *Bergman v. District of Columbia*, 986 A.2d 1208, n.24 (D.C. 2010). Under plaintiffs' theory, whole swathes of District law would have to be invalidated, as impermissibly intruding on the prerogatives of the courts. *See, e.g.*, D.C. Code § 16-2310(e) (criteria for placing children in detention).[8]

Longstanding case law mandates that the language in Section 602(a)(4) of the HRA be read practically, especially where the subject matter of Council legislation is far removed from the "core" of Title 11 and any intrusion on the courts' authority over

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necessary steps to reserve a decedent's organs"); 7-1908 (qualified immunity for persons reporting alleged abuse, neglect, or exploitation of vulnerable adults); 16-1045 (immunity for District employees and officials for registration or enforcement of foreign protection orders); 16-1057 (immunity for persons providing information to the Domestic Violence Fatality Review Board); 16-4414 (immunity for arbitrators); 21-1203 (immunity for trained employees administering medication to persons with intellectual or other disabilities); 22-4013 (immunity for District and employees for sex offender registration process); 38-104 (immunity for members of Board of Education); 38-1802.04(c)(17) (immunity for public charter schools, boards of trustees, and employees); 42-815.02(g) (immunity for administrator and mediators of foreclosure-mediation program); 44-803 (immunity for medical peer review bodies and members).

[8] *See also* D.C. Code §§ 16-924 (requiring expedited judicial hearing for child support); 4-1303.33(b) (suit filed to compel disclosure of findings in cases of child fatality "shall be set for a hearing by the Superior Court at the earliest practicable time and shall be given all possible expedited treatment"); 16-804(b)(2) ("If the Court determines that the motion [to seal criminal records] does not comply with [these requirements] then the movant shall have 30 days … to amend[.] If the movant fails to amend his original motion within 30 days, then the motion shall be dismissed with prejudice.").

procedural rules is minimal and necessary to effectuate a substantive policy. Indeed, plaintiffs' argument is directly contrary to the structure and purpose of the HRA.

The legislative history of Section 602(a)(4) of the HRA—codified at D.C. Code § 1-206.02(a)(4)—indicates that Congress intended that the Council not have the legislative power to alter the "structure" of the courts, because Congress had recently and comprehensively legislated on this subject. *See* Remarks of Rep. Adams, in House Committee on the District of Columbia, *Home Rule for the District of Columbia 1973–1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule for the District of Columbia)* at 1081 (1973). *See also District of Columbia v. Sullivan*, 436 A.2d 364, 366 (D.C. 1981) (Section 602(a)(4) was enacted "to give the newly enacted District of Columbia Court Reorganization Act of 1970 an opportunity to prove its effectiveness"). *Cf. In re Crawley*, 978 A.2d 608, 619 (D.C. 2009) ("[C]ongress wished to allow the local courts to prove their mettle with respect to work previously handled by certain federal courts.").[9]

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[9] In *Crawley*, the Court of Appeals held invalid legislation that attempted to assign prosecutions under the false claims statute to the Office of the Attorney General, as violating Section 602(a)(8) of the HRA, which prohibits the Council from enacting legislation "relating to the duties or powers" of the United States Attorney for the District of Columbia. *Id.* at 619. Despite similar language in the provisions, "[b]ecause of the different purposes served by [§ 602(a)(4) and (a)(8)]," the Court rejected the suggestion that it apply the *same* standards used to analyze legislation alleged to violate Section 602(a)(4), *i.e.*, whether the legislation "impermissibly intruded" upon the courts' role or affected the "structure" of the courts. *Id.* at 619.

### C. Section 602(a)(4) Creates a Narrow Exception to the Council's Broad Legislative Authority.

Section 602(a)(4) of the HRA provides a narrow exception to Congress's delegation in the HRA. That provision states that the "Council shall have no authority to … [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)[.]" D.C. Code § 1-206.02(a)(4). The statutory text's parenthetical statement following the reference to Title 11 is instructive, making clear that Congress's focus in this prohibition was on changes to the organization and jurisdiction of the courts. That focus is further reinforced by the legislative history of Section 602(a)(4) and subsequent judicial interpretations that similarly indicate that the exception was only meant to prevent the Council from passing laws that alter the core powers of the District of Columbia Courts.

The HRA's legislative history also supports the conclusion that the courts' jurisdiction, and not other aspects of the courts' practice, was Congress's primary concern in enacting Section 602(a)(4)'s exception to the grant of delegated authority. Congress was not concerned with setting beyond the reach of the local legislature *other* aspects of the courts' practice, such as whether particular rules of civil procedure must remain effective in every context. At the House Committee on the District of Columbia mark-up on a bill preceding the HRA, Representative Charles Diggs, the committee's chair, stated: "We believe that we've cleared up the problem of who shall have authority to modify the jurisdiction of the court system; namely, giving that to the Congress." *Home Rule for the District of Columbia* at 1076.

Representative Diggs proposed statutory language describing the courts' jurisdiction, and later proposed a conforming amendment that included the current language of Section 602(a)(4). *Id.* at 1077, 1097. The Conference Report adopted the House amendments, including that "the Council could not change … the organization and jurisdiction of the D.C. Courts." *Id.* at 3013. It also noted that the conferees adopted "retention in Congress of authority over the composition, structure and jurisdiction of the D.C. courts." *Id.* at 3015. Representative Diggs reiterated this on the floor of the House. *Id.* at 3034. In light of this, application of Section 602(a)(4) as plaintiffs suggest, where the composition, structure, and jurisdiction of the courts are not at issue, would take the provision beyond what Congress intended.

Interpretations of this exception by the D.C. Circuit and DCCA have similarly reflected an understanding that the exception only covers laws that alter the jurisdiction of the courts, otherwise interfere significantly with the courts' structure or core functions, or directly conflict with the provisions of Title 11. In *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986), the D.C. Circuit confronted a challenge to legislation that raised the minimum limit for suing for damages for an automobile accident in Superior Court to $5,000. *Id.* at 182. The Court rejected the argument that the law changed the jurisdiction of the Superior Court (or the federal district court in diversity actions) by mandating that a certain group of tort claimants—those with damages claims totaling under $5,000—could no longer sue in those courts. *Id.* at 182, 190. The Court explained that the law "says absolutely nothing about the jurisdiction of the … Superior Court or the diversity jurisdiction of

the District of Columbia District Court"; rather, it merely abolished part of a cause of action. *Id.* at 190. "Although the partial abolition of a cause of action inevitably affects the cases a court adjudicates, this incidental byproduct does not amount to an alteration of the jurisdiction of the local and federal courts in violation of the [HRA]." *Id.* The D.C. Circuit held that the challenged legislation was a legitimate policy determination by the Council, and that limiting the number of tort suits—and generating savings from the avoided "transaction costs of litigation to establish fault"—was a permissible method to accomplish the legislation's goals. *Id.* at 187.

Consistent with the D.C. Circuit's approach, the DCCA has emphasized in its interpretation of Section 602(a)(4) that "the Council of the District of Columbia may not enlarge the congressionally prescribed limitations on our jurisdiction." *Jones & Artis Constr. Co. v. D.C. Contract Appeals Bd.*, 549 A.2d 315, 318 (D.C. 1988). A recent case, *Price v. District of Columbia Bd. of Ethics and Gov't Accountability*, 212 A.3d 841 (D.C. 2019), reiterates the analysis the DCCA has performed, repeatedly, over many years. At issue in *Price* was a provision within the statute that created the Board of Ethics and Government Accountability, that directed judicial review of the Board's ethics rulings to the Superior Court of the District of Columbia, despite the fact that those rulings would clearly arise from "contested cases" and therefore be directly reviewable only by the Court of Appeals, as required under the D.C. Administrative Procedure Act (DCAPA). 212 A.3d at 843–44. The *Price* plaintiffs argued that the provision was invalid because the Court's jurisdiction to review administrative decisions is set forth in Title 11 of the D.C. Code and the HRA

prohibits the Council from amending Title 11. *See* D.C. Code § 11-722; Home Rule Act § 602(a)(4).

The *Price* Court upheld the provision because the Council had the authority to amend the DCAPA, and it found that the Council had implicitly—but directly—done so by virtue of the judicial review provision it enacted for ethics rulings. *Price*, 212 A.3d at 845–47. Moreover, the DCCA explained that it construes the HRA "narrowly to mean that the Council is precluded from amending Title 11 itself" but that the Council otherwise has "broad legislative power" to fulfill the Home Rule Act's paramount purpose. *Id.* at 845 (citing *Woodroof v. Cunningham*, 147 A.3d 777, 782, 784 (2016) and *Andrew v. American Imp. Ctr.*, 110 A.3d 626, 629 (D.C. 2015)). Because the Council did not seek to amend Title 11, "but instead amended the contested case provision of the DCAPA codified in D.C. Code § 2-501(a)"—a provision absent from Title 11 itself—the Council did not violate Section 602(a)(4) of the HRA. *Id.*

The DCCA had reached a similar conclusion almost 40 years ago. In *Sullivan*, motorists argued that enactment of the Traffic Adjudication Act violated Section 602(a)(4) because the statute substituted administrative adjudication for trials by the Superior Court and provided for appeals to the Superior Court rather than the DCCA. 436 A.2d at 365. The DCCA rejected the motorists' arguments that the Council was impermissibly changing the responsibility of each court; though "certain violations no longer constitute criminal offenses," and the legislation thus undoubtedly had an effect on the type of cases the Superior Court would hear and how it would hear them,

it did not relate to the "structure of the courts" and thus did not violate Section 602(a)(4)'s limitation on Congress's delegation of legislative authority to the Council. *Id.* at 366. The DCCA reiterated that the "core and primary purpose of the Home Rule Act" was to transfer legislative authority on local matters to the Council, and, accordingly, the DCCA's role was to interpret legislation so as to effectuate that purpose. *Id.* The DCCA also noted that Section 602(a)(4)'s legislative history indicates that Congress intended that the Council not have the legislative power to alter the "structure" of the courts, because Congress had recently legislated on this subject.[10]

Plaintiffs' arguments run headlong into four decades of court decisions interpreting the HRA. The DCCA has repeatedly rejected challenges brought under Section 602(a)(4) of the HRA; as explained, courts must look to the powers, duties, and jurisdiction of the allegedly affected institution, and determine whether the legislation changes the powers granted to that institution. That is, the Court should look not to the individual, incidental effect of any legislative change, but to whether the change directly affects the basic structure of the local courts. If it does not, the legislation is within the broad legislative authority that the HRA confers. *Cf. Apartment & Office Bldg. Ass'n of Metropolitan Washington v. Public Serv. Comm'n of the District of Columbia*, 203 A.3d 772, 779 (D.C. 2019) (HRA's limitations on the Council's authority "must be construed narrowly so as not to thwart the paramount purpose of the Home Rule Act, namely, to grant the inhabitants of the District powers of local self-government.") (internal quotations and citations omitted).

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10 *See id.* at 366.

This approach of expansively reading the Council's legislative powers while narrowly interpreting limitations in the HRA was exemplified in *Hessey v. Burden*, 584 A.2d 1 (D.C. 1990). *Hessey* involved an initiative—subject to the same limitations as legislation passed by the Council—that would create an Office of the Public Advocate for Assessment and Taxation with authority to appeal and advocate on behalf of taxpayers. *Id.* at 8. The DCCA held that the initiative would *not* expand the jurisdiction of the Tax Division of the Superior Court and the DCCA in violation of Section 602(a)(4), because those appeals would fall within the existing jurisdiction of the Tax Division. *Id.* ("In our judgment, an enlargement of the class of persons who may bring such appeals does not affect the 'structure of the courts' or the jurisdictional arrangement Congress had decided upon in the [Home Rule] Act.") (internal citations omitted). The limitation in Section 602(a)(4) of the HRA, D.C. Code § 1-206.02(a)(4), means simply that "the Council of the District of Columbia may not enlarge the congressionally prescribed limitations on [the courts'] jurisdiction." *Jones & Artis*, 549 A.2d at 318; *accord District of Columbia v. Group Ins. Adm.*, 633 A.2d 2, 14 (D.C. 1993).

More recently, in *Woodroof*, the DCCA concluded that the Council's enactment of the Revised Uniform Arbitration Act did not violate Section 602(a)(4) of the HRA, affirming that "the Council may make substantive changes to the law, even when those changes affect the kinds of cases the courts adjudicate." 147 A.3d at 781.[11] The

[11] Although *Woodroof* is one of the few on-point cases cited by plaintiffs, *see* Pl. Mem. at 5 n.8, they make no attempt to address its holding or distinguish it.

DCCA delved into the legislative history of the HRA and reviewed the case law construing Section 602(a)(4), which directs courts not to interpret the terms of that provision "rigidly, but … to construe this limitation on the Council's power in a flexible, practical manner." 147 A.3d at 784.

As the case law makes clear, to show that challenged legislation exceeds the scope of the Council's legislative authority under the HRA, a legislative act must significantly affect the fundamental organization or power of the courts. A litigant must demonstrate an actual *conflict* with the terms of Title 11 governing the courts' jurisdiction and organization. *Umana*, 669 A.2d at 723 n.15 (citing *Hessey*, 584 A.2d at 7 (the "test is whether local legislation attempts to confer *jurisdiction* that would conflict with the terms of title 11") (emphasis added)).

Here, plaintiffs have failed to demonstrate any such conflict and fail entirely to mention *Bergman*. In that case, the Court considered a challenge by a member of the D.C. Bar to the White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, which prohibited "practitioners" from personally soliciting "a client, patient, or customer within 21 days of a motor vehicle accident[.]" 986 A.2d at 1211. Mr. Bergman, an attorney, alleged that the law infringed upon his First Amendment rights and violated Section 602(a)(4) of the HRA, because it "impermissibly intrudes upon this court's exclusive authority to regulate the practice of law[.]" *Id.* at 1225.

The DCCA rejected Mr. Bergman's claims, noting that there is no distinct boundary between the powers of the different branches of District government. Some

overlap of those powers is to be expected: "D.C. Code § 1-206.02(a)(4) precludes the Council from amending the fundamental organization and jurisdiction of the District of Columbia courts, which were established by Congress in 1970." *Id.* at 1226.[12] Consequently, legislation will violate Section 602(a)(4) of the HRA *only* if it interferes with the "fundamental organization and jurisdiction" of the courts. The Anti-SLAPP Act simply does not meet this threshold:

> [T]he Council's passage of the Act, in the exercise of its power to enact legislation of general applicability, does not impermissibly burden or unduly interfere with this court's authority to exercise its core functions. [T]o the contrary, it does not appear that the Act limits the authority or ability of the Court of Appeals to carry out its functions ... in any significant way.

*Bergman*, 986 A.2d at 1230.

Plaintiffs have not demonstrated any such burden or interference, to say nothing of the "conflict" they allege.[13] If the cases discussed above, which involved much more extensive intrusions on the courts' jurisdiction were held not to violate the HRA, the Anti-SLAPP Act's minimal effects are entitled to the same treatment.

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[12] "[T]his court has repeatedly held that § 602(a)(4) must be construed as a narrow exception to the Council's otherwise broad legislative power ...." *Andrew v. American Import Ctr.*, 110 A.3d 626, 629 (D.C. 2015) (quoting *Bergman*, 986 A.2d at 1226).

[13] For example, the Victims of Violent Crime Compensation Act of 1996, eff. Apr. 9, 1997, D.C. Law 11-243, D.C. Code §§ 4-501, *et seq.* (2017 Supp.), required the Superior Court to establish and operate a crime victims compensation program, which clearly affects the Court's functions more than the legislation at issue here. Indeed, there are even instances where the Council has defined what constitutes service of process, *see* D.C. Code § 50-2421.07, without running afoul of the HRA.

D. The Act's Procedures Do Not Conflict With Any Rules of the Local Courts.

Plaintiffs similarly contend that the Act's procedures are invalid because they have not been approved by the DCCA, as required under D.C. Code § 11-946. Pl. Mem. at 4–5. But the provisions in the Act are not "rules" as contemplated by § 11-946, nor are they in conflict with any rule of the local courts.

There is no Superior Court rule that conflicts with any provision of the Act. *Cf. Competitive Enterprise Inst. v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016) (Anti-SLAPP Act procedures are "not redundant relative to the rules of civil procedure"). Even if there were such a conflict, "a Superior Court rule … cannot curtail substantive rights." *Ford v. ChartOne, Inc.*, 834 A.2d 875, 879 (D.C. 2003). Contrary to plaintiffs' implications, the Act takes precedence here, even if they had shown any "conflict." *See id.* at 880 (Superior Court rule may not "supersede an inconsistent provision of the District of Columbia Code").

Here, plaintiffs imply that there is a conflict between Superior Court Rule 56 and the Act's procedures. *See* Pl. Mem. at 6, 11–12. There is no conflict. *See Mann*, 150 A.3d at n.32 ("the special motion to dismiss is different from summary judgment").[14] *Cf., e.g., Santa Barbara Beach Club, LLC v. Freeman*, 2010 WL 1744950 (Cal. App. 2d Dist. 2010), *review denied* (July 21, 2010) (anti-SLAPP statute merely established procedure requiring a plaintiff to make an evidentiary showing at the outset of the litigation that the claims have substantive merit; plaintiff would

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[14] *Cf. id.* (The standard to be employed by a court in determining whether to grant a special motion to dismiss is the same as that for a motion under Rule 56: "whether the evidence suffices to permit a jury to find for the plaintiff").

have substantially similar burden if defendant moved to dismiss or for summary judgment, as either of those procedures would require plaintiff to establish the merits of his or her complaint before trial).

Plaintiffs also argue that the Act "eviscerates normal discovery procedures." Pl. Mem. at 11. But the Anti-SLAPP Act, just like the statute in Maine, allows a court to order that specific discovery be conducted. *Cf.* D.C. Code § 16-5502(c)(2) and Me. Rev. Stat. tit. 14, § 556. The Act is not the extreme departure from the "normal" rules of civil procedure suggested by plaintiffs, but simply a garden-variety exercise of the Council's legislative powers; the Act is analogous to a heightened standard of proof in that it provides additional protection to certain parties depending on the nature of the claim.

The Council—like legislatures elsewhere—imposes standards of proof governing a variety of substantive claims, without violating the HRA or "separation of powers" concerns.[15] The courts would not have the power to adopt the Act's

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[15] *See, e.g.*, D.C. Code §§ 5-116.03 ("clear and convincing evidence" required to overcome presumption that improperly recorded interrogation statement is involuntary); 7-131 ("clear and convincing evidence" required to allow disclosure of information identifying communicable disease sufferers); 16-831.03(b) ("An individual who establishes that he or she is a de facto parent by clear and convincing evidence shall be deemed a parent for the purposes of … this chapter."); 16-4703 (court may compel disclosure of information otherwise protected from disclosure if party seeking disclosure establishes "clear and convincing evidence" that such disclosure is required); 19-1304.07 ("clear and convincing evidence" required to demonstrate existence of oral trust); 21-2003 ("clear and convincing evidence" required to appoint or enlarge powers of guardian or conservator); 22-3225.05(b) (in cases of insurance fraud, "[e]xcept where punitive damages are sought, the court shall award treble damages where the offense is proven by clear and convincing evidence to be in accordance with an established pattern or practice"); 44-1004.03(b)

provisions as rules of procedure; plaintiffs have presented no authority otherwise. And all the other state anti-SLAPP provisions were adopted through legislation, not as court rules. These simple facts confirm that anti-SLAPP provisions are substantive, not procedural, in nature. Plaintiffs' arguments that the Act undermines the ordinary procedural rules of civil litigation should be rejected.

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

Plaintiffs also assert that the Act is overbroad on its face in violation of the First Amendment, because the Act's definition of the speech it regulates is "grossly overbroad" and thus "chill[s]" the rights of other speakers to petition the courts. Pl. Mem. at 6, 7.[16] Plaintiffs' conception of the right of access to petition the government

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(rebuttable presumption that adverse action against resident of nursing home is retaliatory unless shown otherwise by "clear and convincing evidence").

[16] Plaintiffs contend that the Act's "restrictions" on speech are content-based and thus subject to strict scrutiny. Pl. Mem. at 8–9. Not so. "The [Supreme] Court has not said, … and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011). Indeed, there is a major difference between restrictions on speech in a public forum (like the ordinance struck down in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)) and the detailed standards and procedures for the disposition of civil lawsuits. Courts apply numerous content-based distinctions depending on the nature of the claim. For example, fee-shifting provisions apply only to certain claims—like civil rights—and not others. *See also* below at 31–34. And there are procedural rules that also depend on the "content" of speech, *i.e.*, the nature of the claim—such as the *McDonnell-Douglas* burden-shifting framework under Title VII and the requirement that fraud be pleaded with particularity under Rule 9 of the federal and Superior Court rules of civil procedure. Surely, these types of standards and procedures are not subject to strict scrutiny as "content based," and plaintiffs have presented no cases suggesting otherwise. *See United States v. Ferek*, 1985 WL 2851, *2 (N.D. Ill. July 25, 1985) (rejecting "strict scrutiny" in challenge to local court rule authorizing imposition of costs on a party or attorney "responsible for an unused jury panel").

is itself too broad. The Act comports with the First Amendment and protects free speech and political advocacy.

### A. <u>The Anti-SLAPP Act Is Not Constitutionally Overbroad, As It Only Requires Dismissal of Meritless Claims.</u>

Plaintiffs argue that the Anti-SLAPP Act is unconstitutionally overbroad on its face, because it fails to "provide a mechanism" to determine if a suit is a SLAPP "before applying [the Act's] sanctions." Pl. Mem. at 6. Plaintiffs also claim that the Act is "grossly overbroad" because its definition of the speech it is intended to protect fails to distinguish between "speech exercising the right to advocacy and the kind of speech at issue in this case[.]" *Id.* at 7. Plaintiffs are wrong.

To prevail on a facial attack, plaintiffs must demonstrate "that the law is unconstitutional in all of its applications." *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). Plaintiffs cannot meet this burden. Even in the First Amendment context, "the overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Id.* at 339 (quoting *Virginia v. Hicks*, 539 U.S. 113, 12 (2003)).

For a law to be struck as unconstitutionally overbroad, "there must be a realistic danger that the statute itself will significantly compromise recognized protections of parties not before the Court[.]" *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). A statute will be found overbroad on its face only if "a substantial number of applications are unconstitutional, judged in relation

to the statute's plainly legitimate sweep." *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 28 (D.D.C. 2018) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Plaintiffs fail to allege any specific, potentially unconstitutional application of the Act, claiming only that the Act could be applied against "legitimate" suits to redress "real" harms, and not solely to the SLAPP suits described in the legislative history. Pl. Mem. at 6. Only recently has the DCCA opined on "the proper interpretation and application of the Act's special motion to dismiss." *Mann*, 150 A.3d at 1227. The *Mann* decision establishes the constitutionality of the Anti-SLAPP Act:

> The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. Thus, the special motion to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant … *and* of the constitutional interests of the plaintiff[.]

*Id.* at 1239 (emphasis in original).

As the DCCA recognized in *Mann*, the Act requires dismissal of only "meritless" claims—that is, claims for which the plaintiff cannot show "an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann*, 150 A.3d at 1239, 1261–62. It is not a violation of the First Amendment right of petition for a court to dismiss a meritless claim. *See Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685, 691 (Cal. 2002) (upholding California anti-SLAPP Act against First Amendment challenge).

Plaintiffs fundamentally mischaracterize the Act. It does not "proscribe" any speech, Pl. Mem. at 7, or bar a plaintiff from litigating any claim that arises from "an

act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b). A plaintiff may lawfully file such a claim and have the court consider it. The Act simply directs that the court determine, at an early stage, whether the plaintiff has legally substantiated a claim. Also contrary to plaintiffs' contentions, the Act does not impose any "sanctions," such as civil penalties or other punitive measures, if a claim is dismissed under the Act. Pl. Mem. at 6; *cf. BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 529–30, 536 (2002) (holding that the NLRB could not declare "illegal" or otherwise "penalize" an unsuccessful, retaliatory lawsuit that was nevertheless reasonably based). Although the Act permits an award of reasonable attorney's fees against a losing party, that is not a "sanction" or an award that the First Amendment prohibits. *See id.* at 537 ("nothing in our holding today should be read to question … the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff"); *see also* below at 31–34.

Plaintiffs' overbreadth argument further mistakes the Act's scope. Plaintiffs complain that the Act might cover claims where an improper motivation for bringing the claims has not been established. *See* Pl. Mem. at 7, 9. They rely on other state anti-SLAPP statutes that were interpreted to require proof of such motivation, but only "to distinguish meritless claims from meritorious claims, as was intended by the Legislature." *Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012) (quoting *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 943 (Mass. 1998)). The Act, however, already makes that distinction between meritless and meritorious claims, by allowing the plaintiff to overcome a prima facie showing of protected

advocacy by demonstrating that his claim is "likely to succeed on the merits"—in other words, that he has "an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann*, 150 A.3d at 1261–62; *accord* D.C. Code § 16-5502(b). By requiring dismissal only of meritless claims, the District's statute raises no constitutional concerns.

B. <u>The Anti-SLAPP Act Does Not Infringe on the Right to Access the Courts.</u>

Plaintiffs also argue that the Anti-SLAPP Act, as applied to them, unconstitutionally infringes on their First Amendment right to petition the courts. Pl. Mem. at 10. But the Petition Clause of the First Amendment does not provide an absolute right to petition. *McDonald v. Smith*, 472 U.S. 479 (1985). "[B]aseless litigation is not immunized by the First Amendment Right to Petition." *In re Yelverton*, 105 A.3d 413, n.8 (D.C. 2014) (quoting *McDonald*, 472 U.S. at 484) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)). *Cf. Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016) ("[A]n individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation.") (citations omitted).

The District does *not* contend that the Complaint here is baseless or frivolous, only that case law recognizes that "[t]he right to petition is not absolute," *Equilon Enters.*, 52 P.3d at 692 (citation omitted) (rejecting First Amendment challenge to California's anti-SLAPP statute), and the Act is a permissible regulation of that right. The Supreme Court held long ago—specifically in the context of defamation—that "there is no constitutional value in false statements of fact. Neither the intentional

lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Further, the Supreme Court has held that "First Amendment rights may not be used as the means or pretext for achieving 'substantive evils' which the legislature has the power to control." *Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1133 (D.C. 2012) (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972)). The holding of *Companhia Brasileira* has many parallels to the question facing this Court.

There, the DCCA held—in response to a certified question from the D.C. Circuit—that a petition sent to a federal agency in the District will suffice to establish personal jurisdiction over the petitioner, so long as the plaintiff sufficiently alleges that the petition "fraudulently induced unwarranted government action against the plaintiff[.]" 35 A.3d at 1130. The DCCA was careful to note the concerns that its newfound fraud exception to the "government contacts" principle could unleash a torrent of new litigation, but nevertheless held that "unsupported allegations" would *not* be enough to invoke it—"a plaintiff will have to come forward with evidence supporting his well-pled allegations[.]" *Id.* at 1135. The DCCA found that "strict adherence to standards of pleading" and "the trial court's ability to 'inquire … into the facts as they exist'" would provide sufficient protection to defendants. *Id.* at 1134, 1135 (quoting *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)). So too here: The Anti-SLAPP Act simply requires that plaintiffs bringing suits "arising from an act in

furtherance of the right of advocacy on issues of public interest" provide some evidence to support their well-pled allegations, D.C. Code §§ 16-5502(a), (b), and the Act relies on the trial court's inherent powers to look into the existing facts to determine if such suits should proceed. *See id.*, § 16-5502(b) (special motion to dismiss will be denied where plaintiff "demonstrates that the claim is likely to succeed on the merits").

The Act, on its face, "does not address or restrict the ability" of a plaintiff to file a petition. *Nat'l Ass'n for the Advancement of Multijurisdictional Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015). Thus, it has no effect on plaintiffs' (or anyone else's) ability to file any petition on any subject. *Cf. Ryan, LLC v. Lew*, 934 F. Supp. 2d 159, 173 (D.D.C. 2013) (regulation imposing "discrete, limited restrictions on a party's ability to petition the government" does not violate the First Amendment). *Cf. Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008) ("Conditions and restrictions on each person's access are necessary to preserve the judicial resource for all other persons.").

The Act only changes the *standards* under which certain petitions are reviewed for legal sufficiency. And considering that there is no "right to receive a government response to or official consideration of a petition" under the First Amendment, *We the People Found., Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007), plaintiffs' First Amendment challenge should be rejected.

In sum, the Act was enacted to protect citizens from "meritless litigation." *Mann*, 150 A.3d at 1231. Suits that lack a "reasonable basis" are "not within the scope

of First Amendment protection." *Bill Johnson's*, 461 U.S. at 743. If a plaintiff's claims have any merit, they will proceed. If not, they will be dismissed early, pursuant to the Act. This process does not violate the First Amendment. *Cf. Bernardo v. Planned Parenthood Fed'n of Am.*, 9 Cal. Rptr. 3d 197, 228 (Cal. Ct. App. 2004) ("The anti-SLAPP statute did not prevent [plaintiff] from bringing a meritorious claim; it properly prevented her from continuing to prosecute her meritless SLAPP suit. The application of [the provision] in this matter did not violate [plaintiff's] First Amendment rights."); *Lee v. Pennington*, 830 So.2d 1037, 1043 (La. Ct. App. 2002) (purpose of anti-SLAPP provision "is to act as a procedural screen for meritless suits, which is a question of law for a court to determine at every stage of a legal proceeding. * * * This [provision] does not bar anyone with a valid claim from pursuing his case through the judicial process.").

### C. Plaintiffs' As-Applied Challenge Fails Because Shifting of Costs, Including Fees, and Limitations Upon Discovery Do Not Implicate The First Amendment Right to Petition.

Plaintiffs also contend that the Anti-SLAPP Act violates the First Amendment because of "its threatened imposition of costs for unsuccessful plaintiffs." Pl. Mem. at 13. But the Act's fee-shifting provisions do not impose any cognizable burden on plaintiffs' First Amendment rights. "[T]he proposition that the [F]irst [A]mendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987). Such statutes—like the Act—do not bar the filing of any claim or defense or

prevent a jury from hearing it. "Fee-shifting simply requires the party that creates the costs to bear them." *Equilon Enters.*, 52 P.3d at 691. "This is no more a violation of the [F]irst [A]mendment than is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press." *Premier Elec.*, 814 F.2d at 373. "The exercise of rights may be costly, and the [F]irst [A]mendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." *Id.*

Indeed, countless statutes have long authorized an award of reasonable attorney's fees to prevailing parties. *See, e.g.*, 42 U.S.C. § 1988. To be sure, these fee-shifting statutes often favor prevailing plaintiffs, *see Hughes v. Rowe*, 449 U.S. 5, 14–15 (1980), while the Act favors prevailing defendants, D.C. Code § 16-5504. But that does not matter for purposes of the First Amendment; there is no reason to deny a defendant the same right as a plaintiff to petition a court. Plaintiffs' argument would essentially render all fee-shifting statutes unconstitutional.

Moreover, fee-shifting provisions are typically *more* expansive than the provision at issue here. They allow fee-shifting if a party prevails at any stage of the litigation, whether on dispositive motion or at trial. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016). The Act, however, permits fee-shifting only if the party prevails on a special motion to dismiss (or if the court so conditions "targeted discovery"). D.C. Code §§ 16-5502(c)(2), 16-5504. If the party prevails later on summary judgment, or at trial, the Act's fee-shifting provisions are inapplicable.

Plaintiffs' challenge would not only call into question the constitutionality of fee-shifting statutes generally, but other well-accepted provisions requiring the payment of the costs of litigation.[17] These costs often become significant, especially in more complex cases with the added expenses of expert witnesses and broad discovery. And such expenses, like other costs, may be shifted to the other party in certain circumstances. *See Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978) (noting the court's discretion under Fed. R. Civ. P. 26(c) to condition discovery on the requesting party's payment of the costs of discovery); Super. Ct. Civ. R. 26(b)(4)(C) (expert discovery). As there is no serious constitutional question about these provisions, there can be none about the Act's fee-shifting provisions.

Even assuming the First Amendment has "anything to say" about the Act's fee-shifting provisions, *Premier Elec. Constr. Co.*, 814 F.2d at 373, the Act easily survives either strict or intermediate scrutiny. *See also* n.15, above. The Act serves a strong and compelling interest. As discussed above, "[t]he purpose of the special motion to dismiss is to protect a particular value of a high order—the right to free speech guaranteed by the First Amendment—by shielding defendants from meritless litigation that might chill advocacy on issues of public interest." *Mann*, 150 A.3d at 1231 (internal quotation marks omitted); *accord*, Comm. Rep. at 1–4. And the prospect of incurring attorney's fees to defend against such suits stifles protected

[17] Such costs include transcript fees, Super. Ct. Civ. R. 201; filing fees, Super. Ct. Civ. R. 202; and witness fees, D.C. Code § 15-714. Losing parties would not only have to pay their own costs but also those of the other side. 28 U.S.C. § 1920; Super. Ct. Civ. R. 54(d).

speech. *See Doe v. Burke*, 133 A.3d 569, 575–76 (D.C. 2016); Comm. Rep. at 1 (noting that SLAPP defendants "must dedicate a substantial[] amount of money, time, and legal resources" to their defense), 3 (discussing one example of a SLAPP that "would have resulted in outlandish legal costs to defend" but for pro bono assistance). The Act's fee-shifting provision is precisely tailored to address this problem, by requiring that the plaintiff who creates those fees bear them when the lawsuit is shown to lack merit. D.C. Code § 15-5504(a).

Plaintiffs also contend the Act "eviscerates normal discovery procedures." Pl. Mem. at 11. Not so. The Act's provision regarding discovery is constitutional. Under the Act, a special motion to dismiss stays discovery on the claim until the motion is decided. D.C. Code § 16-5502(c)(1). However, the court may order "targeted discovery" that "will enable plaintiff to defeat the motion" if the discovery will not be "unduly burdensome." *Id.* § 16-5502(c)(2). The court may also shift the cost of such targeted discovery to the plaintiff. *Id.*

Plaintiffs imply a constitutional entitlement that does not exist. "There is no constitutional right to discovery even in criminal prosecutions." *Batagiannis v. W. Lafayette Cmty. Sch. Corp.*, 454 F.3d 738, 742 (7th Cir. 2006) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)). If a criminal defendant, facing loss of life or liberty, has no general constitutional entitlement to discovery, then a civil plaintiff, merely seeking money damages, has none either. *Gunter v. Va. State Bar ex rel. Seventh Dist. Comm.*, 399 S.E.2d 820, 823 (Va. 1991). Discovery is simply a procedural mechanism authorized by legislation or court rule, and its prevalence is a relatively

recent development. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691, 694 (1998) ("Historically, discovery had been severely limited in both England and the United States."). In federal courts, discovery was virtually non-existent until the adoption of the modern federal rules. *Id.* at 698–701. The denial of requested discovery does not implicate the Constitution.

Even if the right to petition encompassed a right to discovery, plaintiffs' constitutional challenge would still fail. As noted above, the Act's discovery provision directly advances the important purpose of the special motion to dismiss. Discovery is tolled during the motion's pendency to "ensure a defendant is not subject to extensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish" protected speech. Comm. Rep. at 4. If lengthy discovery were allowed as a matter of course, it would defeat the goal of an expedited hearing on the motion and prompt ruling, D.C. Code § 16-5502(d), so that meritless litigation can be "expeditiously" resolved, Comm. Rep. at 4.

The Act's discovery provision nonetheless is carefully tailored to accommodate the interests of defendants and plaintiffs. Under that provision, the court may still allow "targeted discovery" that would enable the plaintiff to defeat the special motion to dismiss. D.C. Code § 16-5502(c)(2). The Act is "not a sledgehammer meant to get rid of any claim against a defendant" able to make a prima facie showing of a protected activity. *Mann*, 150 A.3d at 1239. At the same time, the Act's discovery provision is not merely "redundant" of Civil Rules 12(b) and 56. *Id.* at 1238. Those

rules do not address the problem of "extensive and time consuming discovery that is often used in a SLAPP case as a means to prevent and punish." Comm. Rep. at 4. A meritless lawsuit can still survive a motion to dismiss under Rule 12(b). *Satkar Hosp., Inc. v. Fox TV Holdings*, 767 F.3d 701, 704 (7th Cir. 2014). And the granting of summary judgment under Rule 56, after full discovery, would come far too late, after the harms that the Act is designed to prevent have already occurred. Thus, to the extent the First Amendment is relevant in this context, the Act's discovery provision passes constitutional muster.

## CONCLUSION

For the foregoing reasons, the Court should find that the District's Anti-SLAPP Act is constitutional and does not violate the Home Rule Act or First Amendment.

Dated: November 15, 2019. Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on this 15th day of November, 2019, a copy of the foregoing Brief was served electronically through CaseFileXpress, on all counsel of record.

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