No. 20-cv-0318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Morgan Banks, et al.,

Appellants,

v.

David H. Hoffman, et al.,

Appellees.

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

EN BANC BRIEF OF APPELLEE AMERICAN PSYCHOLOGICAL ASSOCIATION

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D.C. CT. APP. R. 28(a)(2)(A) CERTIFICATE AS TO PARTIES

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

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

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

- Clare Locke LLP on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, plaintiffs
    - Thomas A. Clare
    - Joseph R. Oliveri

- Freeh Sporkin & Sullivan, LLP on behalf of Stephen Behnke, plaintiff
    - Louis J. Freeh

- Arent Fox LLP on behalf of American Psychological Association, defendant
    - Barbara S. Wahl
    - Karen E. Carr

- Williams & Connolly LLP on behalf of Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman, defendants
    - John K. Villa
    - Thomas G. Hentoff
    - Stephen J. Fuzesi
    - Eli S. Schlam
    - Krystal C. Durham
    - Alexander J. Kasner

- District of Columbia, intervenor
    - Karl A. Racine
    - Toni Michelle Jackson
    - Fernando Amarillas
    - Andrew J. Saindon

- Robert Rich

Counsel certifies that the following parties are appearing in this court in connection with the en banc proceedings:

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

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

- Kirk C. Jenkins on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants

- ArentFox Schiff LLP on behalf of American Psychological Association, appellee
  - Barbara S. Wahl
  - Randall A. Brater
  - Rebecca W. Foreman

- Williams & Connolly LLP on behalf of Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman, appellees
  - John K. Villa
  - Thomas G. Hentoff
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  - Carl J. Schifferle
  - James C. McKay, Jr.

DISCLOSURES PURSUANT TO D.C. CT. APP. R. 26.1

Pursuant to D.C. Ct. App. R. 26.1(a), Defendant-Appellee American Psychological Association discloses that it is a District of Columbia nonprofit organization and has no parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a final order and judgment of the Superior Court of the District of Columbia dated March 12, 2020, dismissing all claims brought by Plaintiffs-Appellants ("plaintiffs")[1] against Defendants-Appellees ("defendants")[2], under the Anti-Strategic Lawsuits Against Public Participation Act of 2010, D.C. Code § 16-5501-5505 ("ASA"). Plaintiffs filed a Notice of Appeal on April 6, 2020. This Court has jurisdiction over the appeal pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES[3]

1. Did the Superior Court correctly hold that the ASA does not violate the Home Rule Act of 1973 ("HRA"), D.C. Code §§ 1-201.01–1-207.71, where the ASA does not amend Title 11 of the D.C. Code and its procedural provisions do not contravene the Federal Rules of Civil Procedure ("FRCP"), and thus do not violate D.C. Code Section 11-946?

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[1] The original plaintiffs included Dr. Stephen Behnke and Dr. Russell Newman, whose claims are not part of this appeal. The reference to "plaintiffs" in this brief refers only to plaintiffs Banks, Dunivin and James, appellants herein.

[2] Unless otherwise indicated, "defendants" includes the District of Columbia, which intervened in the case below.

[3] Additional issues regarding the Superior Court's rulings that the plaintiffs are public officials and that the ASA does not violate the First Amendment are addressed in the briefs of defendant Sidley (defined herein) and the District of Columbia, respectively, which are adopted by APA and incorporated by reference. *See* D.C. Ct. App. R. 28(j).

2. Did the Superior Court correctly hold that plaintiffs failed to proffer clear and convincing evidence from which a properly instructed jury could find that defendant American Psychological Association ("APA") made allegedly false and defamatory statements about any plaintiff with actual malice when APA published a report ("Report") prepared after a thorough independent investigation by defendant Sidley Austin LLP and partner David Hoffman ("Hoffman," and collectively with Sidley Austin LLP and Sidley Austin (DC) LLP, "Sidley")?

3. Did the Superior Court correctly hold that plaintiffs failed to show that a properly instructed jury could find that APA republished the Report in August 2018 with actual malice, when APA (i) added to its website via links materials critical of the Report but did not amend the Report itself, or change the Report's URL or the website's link to the Report, which was publicly accessible at the same location at all times; and (ii) sent an email notifying APA's governing body, its Council of Representatives, of the APA website's additional content?

STATEMENT OF THE CASE

In November 2004, three years into the War on Terror after the September 11, 2001 attacks, the *New York Times* and other outlets published reports that U.S. military psychologists had participated in abusive interrogations of national security detainees. JA258 ¶ 70; JA2443–44. The reports roiled the psychologist community.

APA is the preeminent psychologist organization in the United States, with more than 157,000 members, whose mission is "to promote the advancement, communication, and application of psychological science and knowledge to benefit society and improve lives."[4] In response to the media reports, APA formed a Presidential Task Force on Psychological Ethics and National Security ("PENS Task Force"). JA258 ¶ 71. The PENS Task Force, comprised of military and civilian psychologists, was tasked with examining APA's ethical guidance to psychologists in national security settings. JA258 ¶¶ 71–72; JA259 ¶ 73; JA2474–75. In 2005, the PENS Task Force issued a report providing further ethical guidelines for psychologists in national security settings, which the APA Board adopted as official policy in July 2005, JA259 ¶¶ 75–77; JA2550, and which APA's Council of Representatives endorsed in August 2005. JA260 ¶ 78.

The policy divided psychologists. The debate came to a head in 2014, when *New York Times* investigative reporter James Risen published *Pay Any Price*, which alleged that APA had colluded with the United States Government to support enhanced interrogation techniques that amounted to torture. JA237 ¶ 3; JA2238.

APA responded by retaining Sidley Austin LLP, an elite law firm with broad investigations experience to conduct an independent review, with David Hoffman to

[4] *See* APA, *Our work*, https://www.apa.org/about/ (last updated Jan. 2022).

lead the investigation. JA237 ¶ 2; JA2238. Hoffman, a graduate of Yale University and University of Chicago Law School and a former Supreme Court clerk, had extensive experience conducting internal investigations, including as a former Inspector General and federal prosecutor. JA250–51 ¶ 46; JA1809. APA tasked Sidley with investigating whether APA colluded with the Bush administration, CIA, or U.S. military to support torture during the War on Terror. JA2238. Upon completion of the independent review, APA intended to make Sidley's report public, to promote free speech on the topic. JA241 ¶ 18. Over an eight-month period, a team of seven Sidley attorneys led by Hoffman conducted more than 200 interviews of 148 people, and reviewed more than 50,000 documents, JA2243–44, culminating in a 541-page Report, backed by 7,600 pages of exhibits. JA2223–778. APA initially published the Report by a link to the Report on its website on July 10, 2015, and then on September 4, 2015 published, again by a link to the Report on its website, a second version with minor corrections. JA303 ¶ 251; JA311 ¶ 286; JA2223.

Plaintiffs are retired military psychologists who were interviewed by Sidley and mentioned in the Report. They disagreed with some of the Report's conclusions and sued APA and Sidley in the District of Columbia Superior Court in August 2017, filing a twelve-count Complaint that the Report's findings and conclusions defamed

them and held them in a false light. JA39–228. Plaintiffs filed a Supplemental Complaint on February 4, 2019 that included a new count alleging that changes made to APA's website in August 2018 republished the Report. JA233–431.

In October 2017, APA and Sidley each timely filed special motions to dismiss the Complaint under the ASA. *See* D.C. Code § 16-5502. In response, on November 30, 2017, plaintiffs filed a motion to compel discovery under Superior Court Rules 26 and 56(d), and under the ASA's discovery provision, D.C. Code § 16-5502(c)(2). JA735–80. After oral argument, the Superior Court issued an order granting all of the discovery plaintiffs requested except limited the interview notes Sidley was to produce to those of eighteen individuals from whom plaintiffs alleged they had obtained affidavits. JA952–58. Thereafter, *sua sponte*, the Superior Court disallowed the depositions as being both burdensome and unnecessarily cumulative of other discovery provided. JA1138–39. Plaintiffs did not seek reconsideration of these discovery rulings, and did not request additional discovery at any time, nor did they bring any further motions for discovery. In discovery, plaintiffs received more than 54,000 documents, eighteen sets of interview notes, a copy of plaintiff Behnke's computer hard drive, and interrogatory responses from APA. JA1179–80.

In March 2019, APA and Sidley brought special motions to dismiss the Supplemental Complaint. Plaintiffs did not request any discovery.

In January 2019, plaintiffs moved to invalidate the ASA as violative of the HRA and the First Amendment. Following briefing by the parties and by intervenor the District of Columbia, in January 2020, the Superior Court correctly held that the ASA did not violate the HRA or the First Amendment. JA2043–56.

In a March 12, 2020 opinion, the Superior Court also correctly held that the ASA required dismissal as to both APA and Sidley. JA2193–221. The Superior Court found that APA and Sidley had made prima facie showings that plaintiffs' claims "arise[] from an act in furtherance of the right of advocacy on issues of public interest," which then shifted the burden to plaintiffs to demonstrate that their claims were "likely to succeed on the merits" to avoid dismissal. D.C. Code § 16-5502(b); *see* JA2204–07. Plaintiffs do not challenge that finding on appeal.

The Superior Court further correctly held that plaintiffs were public officials. Plaintiffs thus were required to, but did not, proffer clear and convincing evidence from which a properly instructed jury could find that APA and Sidley published with actual malice, meaning knowledge of falsity or reckless disregard of the truth. JA2213–20. As to plaintiffs' republication count in the Supplemental Complaint, the Superior Court concluded as a matter of law that APA and Sidley did not republish the Report when APA added links to additional materials to a timeline page on its website, but did not modify the Report itself. JA2211–13. The Superior Court also

found that an email to APA's Council of Representatives providing information regarding changes to the APA website also did not constitute republication. *Id*. The Superior Court therefore dismissed plaintiffs' claims with prejudice. JA2221.

This appeal followed. On September 7, 2023, a Division of this Court ruled, among other things, that certain sections of the ASA contravened the HRA, and that those provisions were invalid, and reversed the Superior Court's ASA rulings and remanded the case to the Superior Court. Defendants filed motions for rehearing and rehearing en banc, which were supported by nearly three dozen amici. On January 23, 2024, the Court vacated the Division's September 2023 ruling and granted the motions for rehearing en banc.

STATEMENT OF FACTS

APA adopts and incorporates by reference the Statements of Facts set forth in the Sidley and District of Columbia Briefs. *See* D.C. Ct. App. R. 28(j).

SUMMARY OF THE ARGUMENT

1. The Superior Court properly found that the ASA is within the authority of the District of Columbia Council ("D.C. Council"), that ASA provisions do not contravene the FRCP, that the ASA does not amend D.C. Code section 11-946, and that the ASA thus does not violate the HRA.

2. Plaintiffs do not challenge, and thus concede, that APA made a "prima facie showing" that the Report was an "[a]ct in furtherance of the right of advocacy

on issues of public interest" under the ASA. The Superior Court correctly held that plaintiffs were unable to satisfy their burden under the ASA that their claims were likely to succeed on the merits in order to avoid dismissal. D.C. Code § 16-5502(b); *see Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1237 (D.C. 2016).

3. The Superior Court properly held that plaintiffs are public officials, and therefore had to proffer clear and convincing evidence that APA published each allegedly false and defamatory statement concerning them with actual malice. The Superior Court correctly held that plaintiffs failed to proffer such clear and convincing evidence of actual malice by APA. It is undisputed that APA retained Sidley, a law firm with substantial investigations experience, to conduct an independent review. Over eight months, Sidley conducted an extensive review, and produced a 541-page Report backed by thousands of footnotes and public exhibits. Plaintiffs were unable to show that APA published statements concerning them with knowledge of falsity or reckless disregard of the truth. As the Superior Court found, plaintiffs' purported evidence did not satisfy their burden of proving APA's actual malice by clear and convincing evidence.

4. The Superior Court correctly held that plaintiffs failed to present evidence from which a properly instructed jury could find (i) that APA republished the Report when APA added to a timeline page on its website links to materials critical of the Report that did not change it in any respect or its location on the APA website;

and (ii) that an email to APA's Council of Representatives advising of the changes to the website and including a link to the timeline page constituted republication of the Report.

ARGUMENT

I. STANDARDS OF REVIEW

APA adopts and incorporates by reference the Standards of Review set forth in the Sidley and District of Columbia briefs, as they pertain to APA. *See* D.C. Ct. App. R. 28(j).

II. THE SUPERIOR COURT CORRECTLY HELD THAT THE ASA IS VALID AND THAT NO PROVISION VIOLATES THE HRA.[5]

A. The HRA, the ASA, and Challenges to D.C. Council-Enacted Legislation

Congress has legislative authority over the District of Columbia. Const., art. 1, § 8, cl. 17. Congress delegated substantial legislative authority over the District in the 1973 passage of the HRA, which was intended to grant the District broad rights of self-determination, vesting in the D.C. Council comprehensive legislative authority. D.C. Code § 1-201.02(a); *see also Cass v. District of Columbia*, 829 A.2d 480, 486 (D.C. 2003) (the best evidence of legislative purpose is "always the text of the statute itself"). In passing the HRA, Congress intended to, *inter alia*, "delegate

[5] APA incorporates by reference the arguments on this issue in the brief of the District of Columbia, Section I. *See* D.C. Ct. App. R. 28(j).

certain legislative powers to the government of the District of Columbia; grant … the District of Columbia powers of local self-government … and, to the greatest extent possible, consistent with the constitutional mandate [of article 1], relieve Congress of the burden of legislating upon essentially local District matters," and to vest the D.C. Council with legislative power to the greatest extent possible. D.C. Code § 1-201.02(a); *see also Washington D.C. Ass'n of Realtors, Inc. v. District of Columbia,* 44 A.3d 299, 302–3 (D.C. 2012).

Since the HRA's passage, this Court has developed fifty years of jurisprudence to analyze HRA-related challenges to D.C. Council-enacted legislation. The limitations on the D.C. Council's authority under the HRA are to be narrowly construed to preserve the goal of District self-determination. *Woodroof v. Cunningham*, 147 A.3d 777, 784–85 (D.C. 2016); *Bergman, v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010). D.C. Council-enacted legislation will be held to violate the HRA only if it actually amends or conflicts with an express provision of Title 11.[6] *Woodroof,* 147 A.3d at 784. An incidental impact on the courts' jurisdiction or organization is acceptable, and does not violate the HRA. *Id*. Where D.C. Council-enacted legislation can be harmonized with Title 11, there is no conflict and the D.C.

[6] The Superior Court is required to conduct business in accord with the FRCP, unless the court prescribes or adopts rules that modify the FRCP, which must first be submitted to the D.C. Court of Appeals for approval. D.C. Code § 11-946.

Council has the authority to act. *See, e.g., id.*; *Khan v. Orbis Bus. Intel.,* 292 A.3d 244, 261 (D.C. 2023). Courts construe the HRA's limitations on the D.C. Council's power "in a flexible, practical manner," giving deference to the D.C. Council's intent. *Woodroof*, 147 A.3d at 784.

With regard to the ASA, the D.C. Council enacted the statute to ensure that District residents would not be intimidated or prevented from engaging in political or public policy debates due to the filing of abusive lawsuits whose objective is to muzzle opposing points of view, referred to as SLAPPs (an abbreviation for the phrase "Strategic Lawsuits Against Public Participation").[7] No provision of the ASA amended the Superior Court's or the Court of Appeals' rules, including the discovery rules, leaving them entirely intact. The ASA accordingly does not violate the HRA.

B. The D.C. Council Did Not Exceed Its Authority in Enacting the ASA.

Plaintiffs argued below that the ASA should be struck down because it provided an entirely new procedural structure, which is forbidden by the HRA. JA2047. The Superior Court properly rejected this argument because the ASA does not alter the courts' jurisdiction or organization, or otherwise interfere with the courts' structure or core functions in any way contrary to the HRA, nor does it modify, amend, or create new procedures contrary to the directive of D.C. Code § 11-946. JA2047–

[7] *See* https://lims.dccouncil.gov/downloads/LIMS/23048/Committee_Report/B18-0893-CommitteeReport1.pdf?Id=59863 (Nov. 18, 2010).

50.[8]

Following the Division's September 2023 opinion, now vacated, plaintiffs changed their argument and argue for the first time before the Court en banc that the ASA must be invalidated because it runs afoul of the HRA in two ways: 1) it violates the HRA prohibition on the D.C. Council's enactment of legislation on any provision of Title 11 (Pl. Br. 20); and 2) specific provisions of the ASA contravene the FRCP in violation of D.C. Code section 11-946. Pl. Br. 28–29. Plaintiffs' first argument fails because plaintiffs' broad interpretation of the HRA is not supported by this Court's jurisprudence and the ASA neither modifies nor amends Title 11 and, therefore, is within the D.C. Council's authority. Plaintiffs' second argument also fails because the ASA and the FRCP are not in conflict, and plaintiffs, who received all the appropriate discovery they requested (which they have not contested on appeal),

[8] Plaintiffs' argument that the Superior Court erred in its analysis of whether the ASA violates the HRA, Pl. Br. 28–31, omits that the Superior Court did not have before it the arguments plaintiffs now make regarding the specific provisions of the ASA that they contend violate the HRA. With regard to the argument that plaintiffs *did* present to the Superior Court – that the ASA generally created a new procedure that was beyond the D.C. Council's authority under the HRA – the Superior Court's ruling was correct. JA2047–50. The Superior Court correctly rejected plaintiffs' reading of D.C. Code § 1-206.02(a)(4). JA2049. In addition, the Superior Court accurately noted that the D.C. Council had opined that the ASA addresses substantive rights, footnoting the ASA's legislative history. JA2049. Plaintiffs criticize the Superior Court as stating that this Court "approved this position" in *Mann*, Pl. Br. 29, but plaintiffs misquote the Superior Court decision. The Superior Court accurately quoted this Court's ruling in *Mann* that the D.C. Council intended the ASA to create substantive rights. *Id.*

cannot challenge the ASA discovery provision's validity.

1. The ASA Does Not Modify or Amend Title 11 and Therefore Does Not Violate the HRA.

Plaintiffs contend that the ASA violates the HRA because the ASA creates new procedures that impermissibly relate to a provision of Title 11. Pl. Br. 20-21. Plaintiffs apply the wrong standard by which this Court assesses whether legislation violates the HRA. The ASA neither amends nor modifies Title 11 and thus does not violate the HRA. *Woodroof*, 147 A.3d at 784.

This Court has held that where legislation does not usurp or amend specific provisions of Title 11, there is no conflict with the HRA. In *Khan*, this Court rejected a challenge to the ASA's prevailing party fee provision, finding that it does not conflict with the FRCP, and that D.C. Code section 16-5504 thus does not violate the HRA. 292 A.3d at 262. Similarly, in *Price v. D.C. Bd. of Ethics & Gov't*, 212 A.3d 841, 845 (D.C. 2019), this Court found that the D.C. Council's changes to the definition of a "contested case" under the District's Administrative Procedures Act did not violate the HRA because "contested case" was not defined in Title 11, even though the Administrative Procedures Act impacted the courts' review of agency decisions.

This Court also has consistently held that the D.C. Council has the authority to enact legislation involving court jurisdiction or organization where such impact is

an "incidental byproduct" of the legislation. *Woodroof*, 147 A.3d at 784, 787 (quotation omitted) (Revised Uniform Arbitration Act ("RUAA") provision allowing appeal of order denying or granting motion to compel is proper basis for jurisdiction of Court of Appeals that does not conflict with Title 11 and does not violate HRA); *see also BiotechPharma, LLC, v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 989–90 (D.C. 2014) (RUAA did not violate the HRA because the RUAA did not change the court's jurisdiction); *District of Columbia v. Sullivan*, 436 A.2d 364, 364–66 (D.C. 1981) (Traffic Adjudication Act that provided for decriminalization and administrative adjudication of traffic offenses did not violate the HRA because "the Superior Court's trial level jurisdiction over criminal cases remain[ed] intact, as [did] the appellate jurisdiction of this Court"); *Dimond v. District of Columbia*, 792 F.2d 179, 189–90 (D.C. Cir. 1986) (statute requiring a $5,000 threshold in medical expenses for jurisdiction did not contravene the HRA because the statute said "absolutely nothing" about jurisdiction of the courts, and its "inevitabl[e] affect" on jurisdiction was merely an "incidental byproduct" that did not contravene the HRA).

The common element in these cases is that although the D.C. Council's enacted legislation arguably has an impact on the jurisdiction and/or organization of the District's courts as a byproduct of legislation, this Court has interpreted these statutes to be within the D.C. Council's authority because they do not expressly amend Title 11 or contravene or amend the FRCP. The Court should reach the same

conclusion here, where the ASA neither amends Title 11 nor contravenes or amends the FRCP.

The interpretation of section 1-206.2(a)(4) that plaintiffs urge on this Court is not only flawed, but is also unsound policy. It is flatly inconsistent with this Court's jurisprudence under the HRA recognizing the D.C. Council's broad legislative authority and narrow limitations on that authority. *Woodroof*, 147 A.3d at 784 (quotations omitted); *Bergman*, 986 A.2d at 1226. If this Court applies plaintiffs' suggested approach to the HRA, whereby any legislation that incidentally touches on court jurisdiction or organization violates the HRA, many District statutes may be at risk of invalidation. *See, e.g.,* Proceedings to Discovery the Death of a Tenant for Life, §§ 16-1151-1158; Probate Court Proceedings, §§ 3101-3112; Quieting Title, § 3301; Medical Malpractice, §§ 16-2801-2804; Title 20 (probate and the administration of estates); Title 21 (fiduciary relations and persons with mental illness); and Title 25 (alcoholic beverage regulation).

2. The ASA's Discovery Provisions Do Not Violate the HRA.

Plaintiffs contend that the ASA violates the HRA because the ASA contains discovery limitations that "not only modify the FRCP but also conflict with it." Pl. Br. 24. There is no merit to this argument.

a. Plaintiffs' Discovery Argument Is Barred Because It Was Not Raised before the Superior Court.

Plaintiffs now argue on appeal for the first time that the ASA restricts discovery before the court considers a dispositive motion which conflicts with the FRCP – an argument they did not make before the Superior Court. Pl. Br. 30–31.[9] Having failed to make this argument below, plaintiffs have forfeited the right to do so here. *Khan*, 292 A.3d at 260.

b. The ASA's Discovery Provisions Are Not Contrary to the FRCP.

Plaintiffs contend that the ASA's discovery provisions violate D.C. Code section 11-946 by imposing procedures on the Superior Court that modify and contravene the FRCP, requiring that the ASA be struck down in its entirety (Pl. Br. 20, 31).[10] As the ASA's discovery provisions are in line with the FRCP, plaintiffs' argument is without merit.

Under the ASA, a court may allow discovery that "will enable the plaintiff to

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[9] Plaintiffs reference but do not brief that the ASA violates the HRA by the potential award of discovery costs and legal fees. Pl. Br. 18. As plaintiffs did not actually address these points in their brief, APA does not discuss them here. Moreover, this Court has found that an award of legal fees to the prevailing party under the ASA does not abrogate the HRA. *Khan*, 292 A.3d at 261.

[10] Plaintiffs' contention that the entire ASA must be struck down because its discovery and burden of proof provisions are central to its functionality, Pl. Br. 31, disregards the precedent that courts should defer to the D.C. Council's intent, *Cass*, 829 A.2d at 486, and that "[s]tatutes should generally be construed to avoid any doubt as to their validity." *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723–24 (D.C. 1995).

defeat the motion," provided that such discovery "will not be unduly burdensome." D.C. Code § 16-5502(c)(2). Nothing in the ASA limits the methods of discovery, its timeframe, or the parties or third parties from whom discovery may be sought, leaving such considerations to the sound discretion of the trial court. D.C. Code § 16-5502(c)(2). The ASA does not bar a plaintiff from requesting discovery on multiple occasions or moving for reconsideration to challenge the court's discovery rulings.

The scope of discovery under the ASA is substantially similar to that available under the FRCP. Under FRCP 26(b)(1), permissible discovery is limited to nonprivileged matters that are relevant to the claims and defenses and

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FRCP 26(b)(1). Both FRCP 26(b)(1) and the ASA expressly state that in evaluating requested discovery, the trial court must consider the burdensomeness of the request. *Id*. Also under both FRCP 26 and the ASA, the court has broad discretion in granting requested discovery, which is reviewed on an abuse of discretion standard. *See, e.g., Futrell v. Dep't of Lab. Fed. Credit Union*, 816 A.2d 793, 809 (D.C. 2003); *Jeffries v. Barr*, 965 F.3d 843, 855 (D.C. Cir. 2020).

A plaintiff under both the FRCP and the ASA may seek additional discovery from the trial court. A plaintiff can seek discovery at any time, including on multiple

occasions, which is not prohibited under the ASA or the FRCP. D.C. Code § 16-5502(c)(2); FRCP 26(b). Also, under both the FRCP and the APA, a plaintiff can move the trial court to reconsider any denial of requested discovery. *See, e.g., Moore v. Johnson*, 303 F.R.D. 105, 106 (D.D.C. 2014).

Courts have held there is no collision between anti-SLAPP statutes and the FRCP because discovery available under state anti-SLAPP statutes similar to the ASA is consistent with that available under the FRCP. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 90–91 (1st Cir. 2010); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1101–02 (C.D. Cal. 2004); *Henry v. Lake Charles Am. Press L.L.C.*, 566 F.3d 164, 182 (5th Cir. 2009).

Plaintiffs' recitation of case law from the federal courts of appeal that have purportedly found that the FRCP conflicts with state anti-SLAPP acts, Pl. Br. 24-28, is inapposite.[11] The sole issue in those cases was whether specific state anti-SLAPP

[11] Plaintiffs' claim that six federal circuits have held that state anti-SLAPP statutes as a whole conflict with the FRCP, Pl. Br. 24-28, is incorrect. The Second, Fifth, Seventh, Eleventh, and D.C. Circuits have held that FRCP 8, 12 and 56 applied rather than specific state anti-SLAPP act procedures, but none of those courts held that the anti-SLAPP statutes as a whole could not co-exist with the FRCP. *See La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 245–47 (5th Cir. 2019); *Intercon Sols., Inc. v. Basel Action Networks*, 791 F.3d 729, 732 (7th Cir. 2015); *Carbone v. Cable News Network, Inc*., 910 F.3d 1345, 1350–51 (11th Cir. 2018); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328,1333–34 (D.C. Cir. 2015). The Tenth Circuit did not determine whether the New Mexico anti-SLAPP act could co-exist with the FRCP. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.,* 885 F.3d 659, 673 n.8 (10th Cir. 2018). Plaintiffs omit other federal circuit courts that have found that state anti-SLAPP statutes and the FRCP are in harmony.

statutes had *the same* procedural rules as the FRCP such that the anti-SLAPP statute could be applied in federal court. That is not the question before this Court. Here the question is whether discovery procedures in the ASA are *compatible with* the FRCP. *Woodroof,* 147 A.3d at 784. This Court has already found that the ASA's attorneys' fees provision is in harmony with the FRCP. *Khan,* 292 A.3d at 261–62. The discovery provisions of the ASA are as well.

c. Having Received All the Appropriate Discovery Requested, and Not Contesting the Discovery Rulings, Plaintiffs Cannot Now Challenge the ASA Discovery Provisions.

It is well established that where a plaintiff has failed to request discovery in connection with a response to an anti-SLAPP motion to dismiss, or has obtained adequate discovery, courts have declined to entertain challenges to state anti-SLAPP act discovery limitations. *See, e.g*., *Henry*, 566 F.3d at 182 (rejecting argument that state anti-SLAPP statute deprived plaintiff of an opportunity to prove he would succeed on the merits of his claims where plaintiff did not request discovery); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1271 (C.D. Cal. 2001) (court properly denied requested discovery and granted anti-SLAPP act motion where discovery did not bear on the merits of motion); *Goldwine v. Better Bus. Bureau of Southland, Inc*., No. E032993, 2003 WL 22725702, at *1 (Cal. Ct. App. Nov. 20,

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Godin, 629 F.3d at 92; *Henry,* 566 F.3d at 182; *CoreCivic, Inc., v. Candide Grp., LLC*, 46 F.4th 1136, 1143 (9th Cir. 2022).

2003) (plaintiffs' failure to seek discovery as permitted by anti-SLAPP statute precluded argument that they were aggrieved by a lack of discovery); *Diamond Ranch Acad., Inc. v. Filer*, No. 14-cv-751, 2015 WL 5446824, at * 3 (D. Utah Sept. 15, 2015) (plaintiff's discovery request properly denied where plaintiff claimed it had already established a prima facie case of falsity through declarations).

After APA and Sidley filed special motions to dismiss plaintiffs' initial Complaint, plaintiffs moved under Superior Courts Rule 26 and 56(d) and under ASA section 16-5502(c)(2)[12] for discovery solely regarding actual malice.[13] The Superior Court granted all of the requested discovery except limited the production of Sidley's notes to the eighteen witnesses whom plaintiffs' counsel represented had provided affidavits.[14] The Superior Court subsequently *sua sponte* denied the depositions as

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[12]To the extent plaintiffs argue that discovery under Rule 56(d) and the ASA are different, they are wrong. The standards are similar and, importantly, made no difference in this case because plaintiffs (i) were granted extensive discovery; (ii) did not seek additional discovery at any time; (iii) did not seek reconsideration of the Superior Court's discovery rulings; and (iv) did not seek discovery after APA and Sidley filed special motions to dismiss the Supplemental Complaint.

[13] Plaintiffs requested: (i) APA responses to interrogatories; (ii) an electronic copy of then-plaintiff Behnke's computer hard drive; (iii) Sidley's notes for all individuals interviewed; and (iv) three depositions – of third party Stephen Soldz, APA employee Heather Kelly, and former APA employee Michael Honaker. JA758–60. Plaintiffs dropped their request to depose APA Board member Jennifer Kelly. JA858–59.

[14] The Superior Court denied the request for the Sidley notes of plaintiffs themselves as cumulative of information available to counsel in drafting the 104-page Complaint. JA899.

unduly burdensome and cumulative of evidence already in plaintiffs' possession and the thousands of documents being produced by APA and Sidley.[15] JA1138–39. As a result of the discovery rulings, plaintiffs and their counsel received more than 22,000 pages of documents from APA and nearly 32,000 pages of documents from Sidley, an electronic copy of the Behnke computer hard drive containing approximately 96 GB of data, JA1179–80, hard copy documents regarding each individual plaintiff from the Behnke hard drive, and interrogatory responses from APA. *Id.*

Plaintiffs do not contend that the Superior Court abused its discretion in denying some of the requested discovery.[16] They did not seek reconsideration of the Superior Court's denials of the discovery they requested. Nor did they seek any addi-

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[15] The Superior Court was well within its discretion in denying the three depositions. Plaintiffs sought to elicit testimony from Stephen Soldz to confirm their belief that he leaked the Report. JA760. In a deposition of Heather Kelly, plaintiffs intended to seek her opinion of her interviews with Sidley and confirm statements she allegedly made to others about those interviews. JA759–60. Finally, in a deposition of Michael Honaker plaintiffs intended to question him regarding his opinions about the Sidley investigation. JA760. None of these depositions would have elicited evidence of APA's or Sidley's actual malice or otherwise enabled plaintiffs to succeed on the merits of their claims and defeat the special motions to dismiss. D.C. Code § 16-5502(b).

[16] Plaintiffs' contention that they self-selected narrow discovery to be consistent with the ASA, Pl. Br. 38, is not a basis for a determination on appeal that the ASA is deficient in its discovery provisions. *See, e.g., Henry*, 566 F.3d at 182; *Global Telemedia*, 132 F. Supp. 2d at 1271; *Goldwine*, 2003 WL 22725702, at *1; *New.Net*, 356 F. Supp. 2d at 1102. Having chosen their litigation strategy, plaintiffs cannot now complain about their choice. *Henry*, 566 F.3d at 182.

tional discovery, including in connection with APA's and Sidley's subsequent special motion to dismiss the Supplemental Complaint. Plaintiffs did not seek discovery or other relief beyond their initial November 30, 2017 motion, and they did not object, complain, or make any record that they were unable adequately to respond to the special motions to dismiss due to lack of discovery.

Plaintiffs filed a ninety-nine page response to APA's and Sidley's special motions to dismiss and attached 387 pages of exhibits (including thirty-four affidavits) and material outside the pleadings accessible via hundreds of links contained in the materials they submitted, many found on a website they created for the issues in this case. JA1202–1767. Plaintiffs also filed a forty-page response to APA's and Sidley's special motions to dismiss the Supplemental Complaint, attaching eighteen additional exhibits and dozens of further links to sources outside the pleadings in support of their opposition. JA1768–1825.

Plaintiffs obtained extensive discovery, failed to utilize any of the mechanisms available to them to seek further discovery, and identified no discovery they requested that would have made a difference in the ruling on the special motions to dismiss. Plaintiffs' challenge to the ASA discovery provisions should be denied.

III. THE SUPERIOR COURT PROPERLY FOUND THAT THE ASA IS CONSTITUTIONAL.

The ASA does not violate the First Amendment. APA adopts and incorporates by reference the District of Columbia brief, Section II, and the Sidley brief, Section I, on this issue. *See* D.C. Ct. App. R. 28(j).

IV. PLAINTIFFS' CLAIMS WERE PROPERLY DISMISSED UNDER THE ASA.

Plaintiffs are public officials for the reasons stated in the Sidley brief, Section II.A., which APA adopts and incorporates by reference. *See* D.C. Ct. App. R. 28(j). Plaintiffs thus were required to proffer clear and convincing evidence from which a properly instructed jury could find that APA published with actual malice. The Superior Court correctly concluded that plaintiffs could not meet this standard. JA2213–20.

As a threshold matter, plaintiffs claim that the Superior Court erred by not conducting a claim-by-claim analysis of likelihood of success on the merits for each count. Pl. Br. 68–69. Plaintiffs are wrong. All of plaintiffs' defamation and false light claims require a showing of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 140 (D.C. 2021). The Superior Court assessed plaintiffs' alleged evidence of actual malice, which is a required element for all of plaintiffs' claims, and properly determined that the evidence was insufficient for plaintiffs to meet the clear

and convincing standard.[17] The Superior Court was not required to do more, as it addressed, and found lacking, the central element to each of plaintiffs' claims.

A. Plaintiffs Were Required to Proffer Clear and Convincing Evidence of Actual Malice.

As public officials, plaintiffs had to "proffer evidence capable of showing by the clear and convincing standard that [APA] acted with actual malice in publishing." *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 509 (D.C. 2020), *cert. denied*, 141 S. Ct., 1074 (2021); *see* Pl. Br. 39, 68 (admitting clear and convincing standard for actual malice).

Actual malice occurs when a defendant publishes "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968). Reckless disregard requires a "high degree of awareness of … probable falsity" such "that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. The actual malice

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[17] *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 743 (D.C. 2021), does not compel a different result. There, the plaintiff filed a twelve-count complaint alleging various breaches of fiduciary duty, breaches of contract, tortious interference with contract, corporate waste, and violations of the District's Nonprofit Corporation Act. The trial court denied an ASA special motion to dismiss, finding that "'a number' of the plaintiffs' claims were likely to succeed on the merits," without identifying which claims appeared to pass muster and which did not. *Id.* Unlike this case, in *Bronner* there was no common element to all counts, which required the court to separately analyze the different elements of each claim for likelihood of success. Here, where actual malice is an element applicable to all claims, a separate analysis of each count was not necessary.

standard is "subjective," requiring that a "plaintiff must prove that the defendant actually entertained a serious doubt" about the statement's veracity. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996).[18] It is insufficient for a plaintiff "to show that [the] defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt." *Jankovic v. Int'l Crisis Grp.* ("*Jankovic II"*), 822 F.3d 576, 589 (D.C. Cir. 2016).

The heightened standard also requires plaintiffs to "demonstrate actual malice *in conjunction* with a false defamatory statement," and not "in the abstract." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc). Thus, a plaintiff cannot show actual malice merely by proving that the defendant knew of "collateral falsehoods" that were "unrelated to [the] plaintiff." *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1512–13 (D. Minn. 1988) (citing *Tavoulareas*, 817 F.2d at 794), *aff'd,*

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[18] Plaintiffs quote dicta in a footnote from *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), that "proof of 'actual malice'… does not readily lend itself to summary disposition." *Id.* (citation omitted); *see* Pl. Br. 47. But the Supreme Court later clarified that it meant only to acknowledge its "general reluctance to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 n.7 (1986) (internal quotation marks omitted). This Court has stated that summary disposition in defamation cases may be appropriate given the First Amendment interests at stake. *See Nader v. de Toledano*, 408 A.2d 31, 44 (D.C. 1979) ("Because of the compelling First Amendment interest at stake, we regard summary judgment as a useful method of disposing of constitutional libel actions [w]here appropriate."); *see also Von Kahl v. BNA*, *Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017) ("[T]he Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits.").

881 F.2d 1426 (8th Cir. 1989). The plaintiff must also prove actual malice "at the time of publication." *Von Kahl*, 856 F.3d at 118. A plaintiff must present clear and convincing evidence of actual malice "separately with respect to each defendant," and actual malice "cannot be imputed from one defendant to another absent an employer-employee relationship." *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990); *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1303 (D.C. Cir. 1996).

The clear and convincing standard is even more difficult to meet where, as here, the plaintiff relies on circumstantial evidence. There are only three recognized scenarios "in which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice": when the statement was: (i) fabricated by the defendant, (ii) the product of the defendant's imagination,[19] or (iii) based wholly on an unverified anonymous source or some other source that a defendant had obvious reason to doubt. *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 50 (D.D.C. 2005). This high bar is meant "[t]o prevent the inquiry into the defendant's subjective state of mind from slipping

[19] This factor has also been described as "so inherently improbable that only a reckless person would have put [it] in circulation." *Jankovic II*, 822 F.3d at 589 (quoting *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003)).

into an open-ended review of the reasonableness of the … investigation or … compliance with professional standards." *Id.*[20]

The clear and convincing standard is "significantly more onerous" than the preponderance of the evidence standard. *Tavoulareas*, 817 F.2d at 776. This daunting standard "helps prevent persons from being discouraged in the full and free exercise of their First Amendment rights." *Von Kahl*, 856 F.3d at 116 (internal quotation marks omitted). Thus, "[f]ew public figures" have satisfied the actual malice standard. *Sheridan Square Press*, 91 F.3d at 1515. Plaintiffs failed to satisfy that standard here.

B. The Superior Court Correctly Held That Plaintiffs Failed to Present Clear and Convincing Evidence of Actual Malice as to APA.

The Superior Court properly held that plaintiffs failed to present clear and convincing evidence from which a properly instructed jury could find that APA published a false and defamatory statement with actual malice. JA2213–20.

In publishing the Report, APA was entitled to rely "on the professional reputation" of the Sidley law firm, and Sidley partner Hoffman. *Marcone v. Penthouse Int'l Mag. for Men*, 754 F.2d 1072, 1089 (3d Cir. 1985) ("[r]eliance on the professional reputation of an author may help to defeat an allegation of actual malice";

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[20] Plaintiffs quote *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979), in an effort to erode this standard by arguing actual malice can be shown in "many ways." Pl. Br. 48. But the Supreme Court was discussing actual malice at common law, not constitutional actual malice in *New York Times v. Sullivan*, and at issue here.

"even if [the defendant] had failed to investigate, its reasonable reliance on [the author] arguably would have been sufficient to defeat plaintiff's attempt to show actual malice"); *Esquire Mag.*, 74 F.3d at 1305 ("Reliance on a reporter's reputation can indeed show a lack of actual malice by a publisher.").

APA had no duty to conduct a second investigation to confirm that it agreed with the Report's findings before publishing. The Supreme Court has repeatedly emphasized that a defendant's failure to investigate another's statements before publishing them does *not* support a finding of actual malice. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 688 ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *St. Amant*, 390 U.S. at 731, 733 (Supreme Court case law is "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," and "[f]ailure to investigate does not in itself establish bad faith.").

This principle applies here where Sidley had expertise in the area of internal investigations and Hoffman, a graduate of Yale University and the University of Chicago Law School, and a former Supreme Court clerk, headed up the Sidley team, and personally had extensive experience conducting such investigations, including in his past employment as an Inspector General and a federal prosecutor. JA250–51

¶ 46; JA1809. Consistent with its reputation, Sidley conducted a thorough investigation before providing the Report to APA. Over a period of eight months, a team of seven attorneys conducted more than 200 interviews of roughly 150 people, and reviewed more than 50,000 documents. JA2243–44. Sidley's 541-page Report included 2,577 footnotes, and was supported by 7,600 pages of exhibits. JA2223–778. Thus, far from giving APA "obvious reasons to doubt the veracity of [Sidley] or the accuracy of [its] reports," *Harte-Hanks*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 732, APA had reason to be confident in the accuracy of the Report.[21]

Plaintiffs failed to point to any record evidence that demonstrates that APA actually knew a statement in the Report about plaintiffs was false, or that APA recklessly disregarded the truth of a statement in the Report when it published the Report.

C. The Superior Court Correctly Held That Plaintiffs Failed to Adduce "Direct Evidence" of Actual Malice.

Plaintiffs attempt to evade the stringent requirements for proving actual malice using circumstantial evidence, *see OAO Alfa Bank*, 387 F. Supp. 2d at 50, by mischaracterizing assertions as purported "direct evidence" of actual malice that the Superior Court missed. Pl. Br. 24–34, 50–57. But none actually constitutes direct evidence, principally consisting of complaints by the Report's detractors, provided

[21] Courts have declined to find fault where, as here, a law firm was hired to conduct an independent investigation and then the findings were published. *See, e.g.*, *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 94–95, 102–04 (2d Cir. 2000).

in affidavit form, criticizing the Report. None of this "evidence" proves actual malice as to APA, let alone clearly and convincingly.

"[D]irect evidence is evidence that, if believed by the fact finder, proves the particular fact in question without any need for inference." *Said v. Nat'l R.R. Passenger Corp.*, 317 F. Supp. 3d 304, 322 (D.D.C. 2018) (emphasis omitted), *aff'd*, 815 F. App'x 561 (D.C. Cir. 2020); *see also* Standardized Civil Jury Instructions for the District of Columbia § 2.03 (rev. ed. 2021) ("When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts from which reasonable conclusions may be drawn is circumstantial evidence."). Thus, direct evidence of actual malice could include a statement by the defendant himself admitting knowledge of falsity when a defamatory statement was published. *See, e.g.*, *OAO Alfa Bank*, 387 F. Supp. 2d at 49 (no actual malice absent witness testimony that defendants believed allegations were false). Plaintiffs failed to present any such "direct evidence" of actual malice.

1. Alleged Admissions

Plaintiffs' claim that APA made "admissions" demonstrating actual malice, Pl. Br. 51–52,[22] misstates the evidence and does not support an actual malice finding.

[22] Plaintiffs also allege that the Superior Court failed to consider evidence of admissions contained in their pleadings. Pl. Br. 69. Regardless, as explained herein, none of plaintiffs' purported evidence amounts to actual malice.

First, plaintiffs argue that the APA Board admitted during an August 2016 meeting that the Report contained "many inaccuracies" and that there appeared to be "no evidence of collusion." *Id.* at 51 (citing JA1658 ¶ 14; JA1719–25, ¶ 5, Ex. 1). In support, plaintiffs rely on a February 2019 affidavit from Robert Resnick, who recounted *his impressions* of the August 2016 meeting attended by some Board members (apparently not a quorum), at which *he* raised concerns about the Report. *See* JA1720 ¶¶ 4–5 (Resnick Affidavit); *see also* JA2672–77 (discussion of Resnick in Report). Resnick made a conclusory statement that "some Board members … acknowledged that the Report contain[s] many inaccuracies," without identifying the specific APA Board members, what they actually said, or whether the statements even related to the plaintiffs. JA1720 ¶ 5. These vague statements do not constitute admissions by APA and are not evidence of actual malice. *See Price*, 676 F. Supp. at 1512–13 (knowledge of "collateral falsehoods – false statements of fact unrelated to [the] plaintiff" do not establish actual malice); *Tavoulareas*, 817 F.2d at 794 (actual malice must be "*in conjunction* with a false defamatory statement"). Critically, the meeting in August 2016 occurred well *after* APA published the September 2015 version of the Report, and, even if Resnick's statement were credited in any regard, fails to show the APA Board's knowledge at the time of publication. *See Von Kahl*,

856 F.3d at 118. Thus, Resnick's statement falls far short of an APA Board admission of knowledge of inaccuracies in the Report at the time of publication. *See* Fed. R. Evid. 801(d)(2)(A).

Plaintiffs also cite to an affidavit of plaintiff James in which he stated that a single APA Board member emailed[23] and phoned him on an unidentified date "*after* the Report was published" to tell him that she knew that he had done nothing wrong. JA1658 ¶ 14 (emphasis added). Plaintiff James also claimed that the APA President serving in 2016 said during a February 2016 a meeting of the APA Council of Representatives – five months *after* the Report's publication – that "there was 'clear evidence' that Hoffman *may have* 'distorted' matters in the report," *id*. (emphasis added), without identifying whether the alleged matters pertained to any of the plaintiffs. This assertion by plaintiff James does not constitute an admission by APA or show that the APA Board[24] had knowledge at the time of the Report's publication

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[23] The alleged email was not provided, likely violating the best evidence rule. *See Abulqasim v. Mahmoud*, 49 A.3d 828, 837 (D.C. 2012).

[24] The James and Resnick affidavits do not describe the views of the APA Board, but rather impressions of plaintiff James (based on the alleged comments by two particular Board members), and the impressions of Resnick (based on the alleged comments by unidentified Board members). Plaintiffs fail to show that the particular APA Board member(s) were involved in the decision to publish the Report and had actual malice at such time. *See Dongguk Univ. v. Yale Univ.*, 873 F. Supp. 2d 460, 465 (D. Conn. 2012) ("when the defendant is an organization, a plaintiff must prove that a particular agent or employee of the defendant acted with actual malice at the time that agent or employee participated in the publication of the statement in question; an organizational defendant is not charged with the collective knowledge of all

that any statement concerning any plaintiff was false.[25] *See Tavoulareas*, 817 F.2d at 794.[26]

Further, plaintiffs rely on an affidavit from Barry Anton to claim that APA's outside counsel, David Ogden, "acknowledged that government documents contradicted the foundation of the Report's conclusion that APA and DoD officials, including Plaintiffs, colluded to ensure APA guidelines would not block psychologists' participation in abusive interrogations." Pl. Br. 51, citing JA1456 ¶ 6. Anton's assertion, once again hearsay, contains no indicia of reliability regarding Ogden's supposed statement, including to whom it was made, for what purpose, and whether he was acting as counsel for APA at the time. Even if Ogden made such a statement, it was allegedly *after* the Report was published. Nothing in the Anton affidavit demonstrates that APA admitted that it published the Report with knowledge that

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its agents and employees for purposes of the actual malice inquiry." (citations omitted)), *aff'd,* 734 F.3d 113 (2d Cir. 2013).

[25] Plaintiffs also contend, without record evidence, that an APA Associate General Counsel stated in February 2016 – six months after the Report's publication – that APA could not "do nothing" and "had a fiduciary obligation to fix things." Pl. Br. 51. No evidence supports this alleged statement, and it does not show any knowledge of falsity by APA's Board, and thus is deficient in proving actual malice.

[26] Plaintiffs also cite to the affidavit of former APA president Barry Anton, who was recused from the investigation and Report. JA1456 ¶¶ 6, 8. Anton stated that when "the Report was made public, [he] began to hear from people who believed there were inaccuracies in the Report" regarding "interrogation policies." JA1456 ¶ 6. Such hearsay regarding the unspecified "beliefs" of unidentified third parties that are not connected to any alleged defamatory statement concerning plaintiffs is not evidence of actual malice by APA.

the discussion of military interrogation polices was false, or that Ogden's alleged statement even pertained to a particular plaintiff. The evidence thus does not support an actual malice finding. *See Tavoulareas*, 817 F.2d at 794.

2. Alleged Documents and Testimony in "Defendants'" Possession

Plaintiffs contend that "defendants" possessed documents and testimony that contradicted the Report's primary conclusions, which constitutes direct evidence of APA's actual malice. Pl. Br. 52–55. This argument fails for multiple reasons.[27]

First, plaintiffs have not shown or even alleged that *APA* possessed documents that it ignored. Instead, plaintiffs' allegations pertain to Sidley only. *See*, *e.g.*, Pl. Br. 52 ("*Hoffman* omitted facts, mischaracterized them, and repeatedly drew unsupported inferences). As explained above, APA was entitled to rely on Hoffman and Sidley's work in conducting the investigation. *Marcone*, 754 F.2d at 1089. Plaintiffs also cannot impute Sidley's alleged state of mind to APA, *see, e.g.*, *Secord*, 747 F. Supp. at 787.

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[27] Plaintiffs argue that the Superior Court misconstrued emails marked "Eyes Only," or "please review and destroy," as evidence of collusive intent. Pl. Br. 73–74. But the Superior Court made no rulings regarding the emails, and merely noted that the investigators had the emails and thus the emails were considered by Sidley lawyers as part of their review. JA2220.

Second, plaintiffs rely on an "exhibit" attached to their opposition to APA's and Sidley's special motions to dismiss below that includes numerous factual assertions and numerous links to internet websites, Pl. Br. 52–53 (citing JA1302-62), but this too does not support an actual malice finding. Although plaintiffs contend that the Superior Court failed to consider such purported evidence, the Superior Court expressly stated that it had considered "the totality of the record." JA2219. Moreover, plaintiffs did not even develop an argument in their opposition below regarding the material included in Exhibit A. The Superior Court was not required to sift through the sixty-one pages of Exhibit A and the hundreds of links to internet sites included therein to pick out an argument for plaintiffs. *Garay v. Liriano*, 943 F. Supp. 2d 1, 20 (D.D.C. 2013). Further, the exhibit on its face is not pertinent to APA, and references only "Evidence in Hoffman's Possession." JA1302–62 (title of third column).

Third, plaintiffs fail to identify any evidence that was in APA's files "at the time of publication," *Von Kahl*, 856 F.3d at 118, which is necessary to show "actual malice *in conjunction* with a false defamatory statement." *Tavoulareas*, 817 F.2d at 794 (emphasis in original). This deficiency alone is fatal to plaintiffs' argument.

Finally, plaintiffs' argument misapprehends the actual malice standard. A defendant has no obligation to consult files, even its own, to determine whether a statement is false. *See, e.g.*, *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 126 (2d Cir.

2013) ("[e]ven the failure to review one's own files is inadequate to demonstrate malice" (citing *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 287–88 (1964))); *LaPointe v. Van Note*, No. Civ. A. 03-2128, 2006 WL 3734166, at *11–12 (D.D.C. Dec. 15, 2006) (no obligation to review a press release that allegedly would have shown falsity). Thus, even if plaintiffs could demonstrate that APA had documents or testimony in its possession that showed certain statements in the Report to be false – and they cannot – that would not prove actual malice as to such statements.

3. Alleged Omission of Exculpatory Reports

Plaintiffs contend that "Hoffman omit[ted] … exculpatory conclusions" from the Report that were in government agency reports.[28] Pl. Br. 55-56 (citing JA1241–42; JA1249–50; JA1374). Plaintiffs limit their argument to Hoffman, and have waived it as to APA. *See, e.g.*, *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008). Plaintiffs cannot impute Hoffman's alleged state of mind to APA. *Secord*, 747 F. Supp. at 787. Plaintiffs' argument also fails for the reasons stated in the Sidley brief, Section II.B.1.b, which APA adopts and incorporates by reference. *See* D.C. Ct. App. R. 28(j).

[28] Plaintiffs inconsistently argue that the Superior Court failed to consider certain government reports (Pl. Br. 69–70), but also argue that the Superior Court misconstrued that evidence. Pl. Br. 70. The Superior Court considered such evidence and properly found it did not constitute actual malice. JA2215.

4. Alleged Knowledge of Falsity by APA Board Members

Plaintiffs assert that APA Board members had knowledge that many of the Report's allegations were false. Pl. Br. 56-57. This argument is also meritless.

Plaintiffs' only support for this argument is the APA Ethics Committee's decision to close the ethics complaint file of Lt. John Leso. Plaintiffs assert that former APA President Nadine Kaslow commended the "thoroughness" of the Leso ethics investigation, and that APA Associate General Counsel Ann Springer allegedly "signed off on closing" the Leso ethics complaint file. *Id.* at 56. This, according to plaintiffs, shows that APA knew the Report's general conclusion that "APA purposely failed to conduct a thorough investigation" was false. *Id*. Not so.

The handling of the Leso file is unrelated to plaintiffs, who had no role in APA's ethics complaint process or the Leso ethics investigation. *See* JA2701–12, JA2730–58 (discussion of Leso file without mention of plaintiffs). Kaslow's statement and Springer's alleged action thus fail to show actual malice "*in conjunction* with a false defamatory statement" concerning plaintiffs. *Tavoulareas*, 817 F.2d at 794.

Plaintiffs also cite to Exhibit B attached to their ASA opposition brief below as "additional evidence relating to APA's knowledge" of the Report's falsity. Pl. Br. 57, 69 (citing JA1444–52). Plaintiffs failed to develop this argument at the Superior Court, or in their appellate brief, and it should not be considered. *Khan*, 292 A.3d at

260. The Superior Court was not required to sift through Exhibit B's nine pages, including more than sixty links to sources outside the record, to locate evidence that might support plaintiffs' claims. *Garay*, 943 F. Supp. 2d at 20.[29]

In sum, the so-called "direct evidence" is not, and in any regard fails to meet the clear and convincing standard for actual malice.

D. The Superior Court Correctly Held That Plaintiffs Failed to Adduce "Circumstantial Evidence" of Actual Malice.

Plaintiffs contend that "circumstantial evidence" demonstrates APA's actual malice. These arguments, not evidence, do not come close to satisfying any of the criteria for proving actual malice through circumstantial evidence.[30]

1. Alleged Adherence to a Preconceived Narrative, Purposeful Avoidance of the Truth, and Reliance on Unreliable and Biased Witnesses

Plaintiffs argue that Sidley "adhered to a preconceived narrative," Pl. Br. 57–59, 71–72, purposefully avoided the truth, Pl. Br. 59–60, 71–72, and "relied heavily"

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[29] Exhibit B purported to identify instances when certain Board members *may have been* involved in events in the Report, but did not establish the Board members' *actual* involvement or their *actual* knowledge that their past participation rendered false a statement in the Report. To the extent the Court considers these arguments further, APA adopts and incorporates by reference the arguments in its Reply brief below, which further explains why the exhibit is unpersuasive. *See* JA1979–2010.

[30] Plaintiffs highlight the D.C. Circuit's statement that courts can consider not just direct evidence but also "the cumulation of circumstantial evidence," Pl. Br. 48 (quoting *Tavoulareas*, 817 F.2d at 789), but this principle is of no help to them. The purported circumstantial evidence cited by plaintiffs here does not satisfy the criteria for proving actual malice, either individually or in the aggregate.

on a few unreliable witnesses. Pl. Br. 60–61, 72. Plaintiffs limit these arguments to Sidley and have thus waived them as to APA. *See, e.g.*, *Comford*, 947 A.2d at 1188. Plaintiffs also cannot impute the Sidley attorneys' alleged states of mind to APA. *Secord*, 747 F. Supp. at 787. Plaintiffs' arguments also fail for the reasons stated in the Sidley brief, Sections II.B.2.a., b., and c., which APA adopts and incorporates by reference. D.C. Ct. App. R. 28(j).

2. Alleged Evidence of Bias or Ill Will

Plaintiffs argue that the APA Board had a motive to "scapegoat" them to deflect blame from the Board. Pl. Br. 62–63. This argument fails to show actual malice.

Plaintiffs acknowledge that "evidence of motive to defame, bias, and ill will is not enough alone to find actual malice." Pl. Br. 62 (citing *Harte-Hanks*, 491 U.S. at 668).[31] Indeed, the "caselaw resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." *Parsi v. Daioleslam*, 890 F. Supp. 2d 77, 90 (D.D.C. 2012). Plaintiffs also point to no evidence that the APA Board had reason to "scapegoat" plaintiffs personally by publishing the Report, particularly because APA had announced prior to the start of the investigation that APA intended

[31] *Palin v. New York Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019), cited by plaintiffs, Pl. Br. 62, is inapposite. In *Palin*, the court reasoned that the author "had reason to be personally biased against [the plaintiff] and pro-gun positions," which was "more than sheer political bias," because the author's brother was plaintiff's political opponent and had himself been subjected to gun violence. *Id.* at 814–15. Also, unlike here, the defendant moved for Rule 12(b)(6) dismissal, not summary judgment, so the court took "no position on the merits" of the claim. *See id.* at 817.

to publish the results, no matter where the investigation led. JA1780 n.19. Plaintiffs contend that APA Board members were "involved in the events the Report described" and thus "stood to benefit from a report that protected them by blaming Plaintiffs" (Pl. Br. 45), but fail to support this statement with any record evidence. Their citation to their own Opposition brief below, JA1265–66, and Exhibit B thereto, JA1444–52, is not evidence of actual malice. *See supra* § IV.C.4. Plaintiffs note that the Sidley investigation and Report cost $4.3 million, JA1222, but fail to explain why the cost created a motive to "scapegoat" plaintiffs by publishing allegedly false and defamatory statements about them.[32] Plaintiffs also point to Kaslow's statement in a public interview that the Report "implicated only a 'small underbelly' of the APA, not Board members." Pl. Br. 62 (citing JA307). Plaintiffs omit that Kaslow plainly stated that her remarks were merely her own post-Report publication opinions ("*I think* that … there was … a small underbelly …."). JA306–07 (emphasis added). And the reference to an "underbelly" is non-actionable rhetorical hyperbole. *See*, *e.g.*, *Florio v. Gallaudet Univ.*, 619 F. Supp. 3d 36, 46–47 (D.D.C. 2022) (rhetorical hyperbole is not actionable), *appeal filed* No. 22-7117 (D.C. Cir. Aug. 22,

[32] Plaintiffs' other arguments regarding only Sidley fail for the reasons stated in Sidley's brief, Section II.B.2.d., which APA adopts and incorporates by reference. *See* D.C. Ct. App. R. 28(j).

2022). Finally, there is no record evidence that Kaslow was speaking of any of the plaintiffs when she made this comment.[33] *Price*, 676 F. Supp. at 1512–13.

3. Alleged Failure to Adhere to Proper Investigation Practices

Plaintiffs contend that Sidley's conduct of the independent review was negligent, and thus circumstantial evidence of actual malice, because it departed from proper investigation standards. *See* Pl. Br. § V(A). As Sidley, and not APA, conducted the investigation, and claims of deviations from proper investigative standards do not constitute actual malice, this argument also fails.

Plaintiffs point to a statement by former plaintiff Behnke that he was advised that it could "look bad" if he retained counsel in connection with the investigation.[34] JA1478 ¶ 9. But that does not show that APA knew any statement in the Report was false or had serious doubts as to its truth.[35]

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[33] Because the Superior Court found no actual malice by APA on any claim, there was no need to assess Count 8 separately. Nonetheless, the alleged statements in Count 8 are not evidence of actual malice because plaintiffs did not allege, nor offer proof, that any of the statements specifically related to plaintiffs. JA305–07 ¶¶ 262–269; *Price*, 676 F. Supp. at 1512–13.

[34] Plaintiffs other arguments are not asserted against APA. They are accordingly waived as to APA. *See Comford*, 947 A.2d at 1188.

[35] Plaintiffs' argument that APA allegedly invoked privilege in connection with the lawsuit to deny them access to documents (Pl. Br. 46) is a post-publication litigation position that does not provide proof of APA's state of mind at the time of publication. *Von Kahl*, 856 F.3d at 118.

Moreover, even if Sidley's "investigation departed from professional standards" (for which plaintiffs have adduced no such proof), such evidence is insufficient to prove actual malice. "[A] public figure plaintiff must prove *more than* an extreme departure from professional standards" to prove actual malice. *Harte-Hanks*, 491 U.S. at 665 (emphasis added). *See also* Sidley brief, Section II.B.2.e., which APA adopts and incorporates herein by reference. *See* D.C. Ct. App. R. 28(j).

4. Alleged Refusal to Retract or Correct Defamatory Statements

Plaintiffs' argument that APA's "refusal to correct or retract" the Report shows actual malice, Pl. Br. 64, disregards settled precedent. Plaintiffs never proffered evidence that any statements in the Report concerning the plaintiffs are actually false, nor that APA learned as much either before or after publication of the Report such that APA might have corrected or retracted the statements. Instead, plaintiffs argue without basis that the entire 541-page Report should have been retracted.

APA was not obligated to retract or correct the Report, even in the face of plaintiffs' protestations of false or incorrect statements in the Report. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 691 n.37 (noting that "denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error") (citation omitted); *Braden v. News World Commc'ns, Inc.*, No. CA-10689'89, 1991 WL 161497, at *11 (D.C. Super. Ct. Mar. 1, 1991) ("[A]ctual malice cannot be inferred as a matter of law from

printing the story in spite of such a general denial."). It is well settled that there is no duty to retract a statement, even if it is denied, or face liability. *See, e.g.*, *Sheridan Square Press*, 91 F.3d at 1515 (no authority "for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication"); *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 56 (D.D.C. 2002) ("[T]here is no duty to retract or correct a publication."), *aff'd,* 350 F.3d 1272 (D.C. Cir. 2003). The refusal to retract does not show actual malice because the "inquiry focuses on the defendant's state of mind at the time of publication," *Von Kahl*, 856 F.3d at 118, not subsequently. Plaintiffs cite *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007), to argue that a refusal to retract is a subsequent act that shows a previous state of mind. Pl. Br. 49, 64–65, 73. But *Weaver* is an outlier decision at odds with rulings interpreting D.C. law that address the issue.[36] *See, e.g, Sheridan Square Press*, 91 F.3d at 1508, 1515; *Lohrenz*, 223 F. Supp. 2d at 56. Thus, APA's purported failure to retract the Report does not evince actual malice.

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[36] Plaintiffs also cite to the Division's denial of the rehearing petition in *Tavouleras* (Pl. Br. 73), but on rehearing en banc the alleged failure to retract was found not to be evidence of actual malice. *Tavouleras*, 817 F.2d at 793–94. The Restatement (Second) of Torts § 580A cmt. d (1977) states only that no cases address "the effect of the defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory" and under certain circumstances that could show reckless disregard. Subsequent cases have found to the contrary. *See, e.g.*, *Lohrenz*, 223 F. Supp. 2d at 56 (no duty to retract).

In sum, plaintiffs cannot satisfy the criteria for clear and convincing proof of actual malice through circumstantial evidence. *See OAO Alfa Bank*, 387 F. Supp. 2d at 50. Accordingly, the Court should affirm dismissal of the Complaint.

V. APA DID NOT REPUBLISH THE REPORT AS A MATTER OF LAW.

Plaintiffs contend that APA republished the Report in two different ways, which plaintiffs claim constitutes actual malice. First, plaintiffs argue that APA's addition of three links to material critical of the Report, added to a page on its web-site titled Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security ("Time-line") as a result of the passage of a resolution by the APA Council of Representa-tives, JA1053 ¶ 6; JA1818, constitutes republication. Pl. Br. 66. Second, plaintiffs argue that an August 2018 email from APA's General Counsel to the APA Council of Representatives alerting them to the changes to the Timeline page also repub-lished the Report.[37] Plaintiffs' arguments are without merit. [38]

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[37] The Timeline is located on the APA website at https://www.apa.org/news/press/statements/interrogations (last accessed Apr. 7, 2024).

[38] Plaintiffs argued below that the August 2018 email was a republication because it referred or linked to the Report. JA1795–99. Plaintiffs have not preserved that argu-ment on appeal, and it is thus waived. *See, e.g.*, *Comford*, 947 A.2d at 1188. None-theless, it is well settled that merely referencing or hyperlinking to defamatory con-tent is not a republication. *See, e.g.*, *Lokhova v. Halper*, 995 F.3d 134,143–44 (4th Cir. 2021).

Under the single publication rule, publication gives rise to only one cause of action, regardless of how many times allegedly defamatory content is distributed or read. *Jankovic v. Int'l Crisis Grp.* ("*Jankovic I*"), 494 F.3d 1080, 1087 (D.C. Cir. 2007). The narrow exception is republication, which occurs when a defendant affirmatively intends to reiterate or amend the statement in a new version or affirmatively directs the content to a new audience. *Lokhova v. Halper*, 441 F. Supp. 3d 238, 254 (E.D. Va. 2020), *aff'd*, 995 F.3d 134 (4th Cir. 2021). Other publications' references or links to prior allegedly defamatory statements do not constitute republication. *Id*. Nor does republication occur if there is a change in the membership of a group to whom a statement has been published. *Perlman v. Vox Media, Inc.*, C.A. No. N19C-07-235, 2020 WL 3474143, at *8 (Del. Super. Ct. June 24, 2020), *aff'd*, 249 A.3d 375 (Del. 2021).[39]

Here, it is undisputed that the content of the Report never changed after September 2015, and that it remained at the same URL and accessible by a link on the Timeline page of the APA website. JA1052–53. APA's Director of Digital Strategies and Services added the three separate links to the 170 existing links on the Timeline

[39] The policy rationale for this principle is clear. If republication occurred every time a single person was added to or subtracted from a group to whom the same statement was already published, the statute of limitations for defamation would continue indefinitely, in contravention of the goal of the single publication rule. *See*, *e.g.*, *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 506–07 (6th Cir. 2015).

page. *Id.*[40] APA did not substantively alter, add to, or revise the content of the Report by adding to the Timeline page three separate and distinct links to materials critical of the Report. *See, e.g.*, *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 278 (S.D.N.Y. 2016). As the Superior Court correctly held, "there was no modification, or revision, to the Report," and the additional material APA added by separate links to the Timeline page "did not appear on the same webpage as the Report." JA2213; JA1053 ¶¶ 4–8. Adding the new links to the Timeline page did not constitute republication, as it is undisputed that there was no restatement or alteration of the content of the Report. *Yeager v. Bowlin*, 693 F.3d 1076, 1082–83 (9th Cir. 2012) ("[O]nce a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website.… [L]eaving a statement unchanged *while modifying other information on the URL* should not trigger republication." (emphasis added)).

Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862 (W.D. Va. 2016), cited by plaintiffs, does not help them. There, the defendant appended an "Editor's Note" to

[40] Plaintiffs' statement that the additional materials "accompanied" the Report on APA's website is a mischaracterization. Pl. Br. 65. It is undisputed that the additional materials were accessible only via links on the Timeline maintained by APA and were completely separate and distinct from the link to the Report. JA1053 ¶ 6, JA2213.

the online version of a defamatory article that substantively altered the article's content and repeated the original defamatory content. *Id.* at 868. The trial court there found that the substantive changes to the article thus created a triable issue of fact as to whether the new version restated and updated the article, thereby republishing it. *Id.* at 879. *Eramo* is materially distinct from this case, in which the content and location of the Report have never changed and the Report's link was distinct from and separated by multiple links away from the new material linked in the Timeline. JA1053 ¶¶ 4-8; JA2213.[41]

Nor did the August 2018 email to APA's Council of Representatives constitute republication. Plaintiffs contend that republication occurred because the email brought the Report to the attention of a new audience as the membership of the APA Council of Representatives changed from 2015 to 2018. Pl. Br. 66. But this argument fails because republication does not occur simply because new readers can access the same statement. *See, e.g.*, *Lokhova*, 995 F.3d at 142–43; *Clark*, 617 F. App'x at

[41] *Nunes v. Lizza*, 12 F.4th 890, 900–01 (8th Cir. 2021), cited by plaintiffs (Pl. Br. 65) is inapposite. There, the author tweeted a link to a story about plaintiff in which the author added commentary encouraging readers to review the article. Those facts are not present here – APA made no comments about the Report either in connection with the addition of links to the Timeline page or in the August 2018 email. *Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 571–73 (S.D.N.Y. 2019), also cited by plaintiffs, is even further from the instant case, as the defendant there continuously repeated the same allegedly defamatory statements to multiple media outlets in different interviews over the course of two years. Here, the Report remained in the same location on the APA website, without any change or modification. JA1053 ¶ 4.

506–07. The Report remained available to the public at the same location on the APA website since September 2015. JA1053-1054 ¶¶ 4, 10. The Report's readership before and after the August 2018 email thus is identical, and any alleged new members of the APA Council of Representatives in 2018 "cannot reasonably be seen as a new audience." *Perlman*, 2020 WL 3474143 at *8 ("directing one segment of the [website's] readership to an article on the site" is not directing to a new audience).[42]

Neither of plaintiffs' republication arguments passes muster as either actual malice[43] or as an independent claim and the Superior Court's ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment of the Superior Court.

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[42] The APA Council of Representatives is APA's governing body. Members of APA Council serve three-year elected terms. https://www.apa.org/about/governance/bylaws/article-5 (2008). The fact that elections may somewhat change the composition of the body from year-to-year cannot reasonably be construed to constitute a republication of the Report.

[43] Plaintiffs cite to no evidence that demonstrates that by adding materials to the Timeline page on the APA website or in emailing the APA Council of Representatives about that development APA had actual knowledge that any statement in the Report was false.

Date: April 8, 2024

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CERTIFICATE OF SERVICE

I hereby certify on this 8th day of April, 2024, that a true copy of the foregoing brief of Defendant-Appellee American Psychological Association was filed through the Court's e-filing system and served upon all registered participants.

/s/ Barbara S. Wahl
Barbara S. Wahl

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Barbara S. Wahl
Signature

20-cv-0318
Case Number(s)

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