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

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

Counsel certifies that the following parties and intervenors and their counsel 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
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- District of Columbia, intervenor
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    - Toni Michelle Jackson
    - Fernando Amarillas
    - Andrew J. Saindon
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Counsel certifies that the following parties and intervenors, amici curiae, and their counsel are appearing or have appeared in this Court:

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

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

- Kirk C. Jenkins (with Arnold & Porter Kaye Scholer LLP on the original appellants' brief) 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
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    - Mark S. Wigley

- The Reporters Committee for Freedom of the Press on behalf of itself, The Atlantic Monthly Group LLC, Axios Media Inc., The Center for Investigative Reporting (d/b/a Reveal), Courthouse News Service, The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., The Media Institute, MediaNews Group Inc., The National Freedom of Information Coalition, The National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, News/Media Alliance, Informed California Foundation, d/b/a Open Vallejo, Pro Publica, Inc., Radio Television Digital News Association, The Society of Environmental Journalists, Society of Professional Journalists, Student Press Law Center, Time USA, LLC, Tribune Publishing Company, and The Tully Center for Free Speech, amici curiae
    - Katie Townsend
    - Mara Gassmann
    - Emily Hockett

- Davis Wright Tremaine LLP on behalf of Amazon Watch, The American Civil Liberties Union of the District of Columbia, Breach Collective, The Center for Biological Diversity, The Civil Liberties Defense Center, Direction Action Everywhere, Electronic Frontier Foundation, Greenpeace, Inc., The International Corporate Accountability Roundtable, The Mosquito Fleet, People for the Ethical Treatment of Animals, Inc., and The Union of Concerned Scientists, amici curiae
    - Laura R. Handman
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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 26.1(a), defendants-appellees Sidley Austin LLP and Sidley Austin (DC) LLP, which are limited liability partnerships, disclose that they do not have a parent corporation and no publicly held company owns more than ten percent (10%) of their stock. Defendant-appellee Sidley Austin LLP discloses that as of April 8, 2024, the following individuals were active partners:

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Advani, Suresh T.
Astle, Richard W.
Austin, Elizabeth Y.
Azizian, Alina A.
Basaria, Karim
Berg, Beth E.
Blackburn, Jonathan A.
Blocker, Mark B.
Braun, Bruce R.
Cardonick, Andrew R.
Carlson, Kathleen L.
Carney, Sean M.
Chan, Natalie C.
Chiarello, Elizabeth M.
Childs, Linton J.
Choi, Paul L.
Clemente, Matthew A.
Conrad, Neil H.
Cooper, Alexis A.
Craig, Daniel C.
Croke, James E.
Cunningham, Thomas D.
Datta, Meenakshi
Dickstein, Beth J.
Hoffman, David H.
Horowitz, Steven J.
Howard, Bradley D.
Howell, Nathan A.
Ibeling, Janelle
Jha, Pran
Johnson, Matthew E.
Jones, J. Simone
Jones, Jaime L.M.
Katz, Seth H.
Kaufmann, Mark L.
Kavanaugh, Brian P.
Kelsh, John P.
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Kirschner, Benjamin G.
Koh, Stephanie P.
Lazaroff, Kelly A.
Lee, Christopher Y.
Lewis, Robert J.
Lindt, Marketa
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Love, Nathaniel C.
Malhotra, Geeta
Marrs, Gregory A.
Mattson, Eric S.
Quintana, Beth M.
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Rein, Thomas D.
Reuter, Teresa L.
Ribaudo, Anthony J.
Roberts, Megan H.
Rubinstein, Daniel D.
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Schafer, Charles K.
Schaff, John T.
Schrank, Charles E.
Schubert, Elizabeth M.
Schwartz, Joseph
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Sheppard, Hille R.
Shwachman, Perry J.
Silverman, Richard M.
Skakun III, John M.
Smith, Jeffrey N.
Snyder, James A.
Solow, David K.
Stanton, Cameron S.
Starks, Catherine Y.

Dobecki, Stephanie H.
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Drake, R. Bradley
Ducayet, Jim
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Flint, Tacy F.
Fogel, Lawrence P.
Gallagher, Lauren A.
Gerstman, Gary D.
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Gordon, T.J.
Grothaus, John
Hale, Christopher R.
Harmon, Teresa Wilton
Helmuth, Ian
Hochman, Robert N.
McCall, Kara L.
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McCutcheon, Donielle
McGrory, Melissa K.
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Meyer, Chris K.
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Defendant-appellee Sidley Austin (DC) LLP discloses that as of April 8, 2024, the following individuals were active partners:

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Barros, Sonia Gupta
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Blake, Andrew P.
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Borden, Michael E.
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Broughan III, Thomas A.
Brown, Colleen Theresa
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Clukey, Nathan E.
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Koehler, Kristin Graham
Kushan, Jeffrey P.
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Langdon, Mark B.
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Crisham Pellegrini, Ellen
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Esmaili, Ranah
Fanelli, Christopher A.
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Fougere, Joshua J.
Fradette, Jacquelyn E.
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Lerner, Matthew D.
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Lewis, Michael D.
Loss-Eaton, Tobias S.
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Nuechterlein, Jonathan E.
Pai, Raj D.
Petron, David S.
Phelan, Noreen
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Sommers, Charles A.
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Teitelbaum, David E.
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Volpe, Frank R.
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Ward, Thomas G.
Warren, Matthew J.
Webster, Timothy K.
Weiner, Richard
West, Marisa S.
Whitfield, Peter
Wilan, Jonathan M.
Williams, Gregory M.
Wolk, Michael D.
Wood, Rebecca K.
Xenakis, Angela M.
Zidlicky, Paul J.
Zucker, Jon S.

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JURISDICTION

This appeal is from a final order dismissing plaintiffs-appellants' defamation and related claims under the D.C. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act, D.C. Code §§ 16-5501-5505. This Court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

1. Did the Superior Court correctly hold that the D.C. Anti-SLAPP Act does not violate the Home Rule Act, D.C. Code § 1-206.02, or the First Amendment?

2. Did the Superior Court correctly hold that plaintiffs, Col. (Ret.) L. Morgan Banks III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James, were public officials subject to the *New York Times v. Sullivan* actual malice standard?

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

4. (a) Did the Superior Court correctly hold that plaintiffs failed to show that a reasonable jury could find that APA's 2018 changes to a page on its website and an email hyperlinking to that page republished Sidley's 2015 Report?

(b) Can this Court affirm the decision as to Sidley on the alternative ground that an alleged 2018 republication by a third party of Sidley's 2015 Report as a matter of law cannot constitute evidence of actual malice as to Sidley?[1]

STATEMENT OF THE CASE

Nature of the Case

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

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

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[1] Plaintiffs also contend that if the actual malice standard does not apply they presented sufficient evidence on negligence to defeat Sidley's anti-SLAPP motion. Br. 1, 45-47. This argument is inapplicable. Sidley's anti-SLAPP motion was based on plaintiffs' public official status and inability to establish actual malice; it was not based on the negligence issue.

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

The Superior Court was correct: plaintiffs failed to make the required showing. As the court recognized, defamation plaintiffs cannot "show actual malice *in the abstract*; they must demonstrate actual malice in conjunction with *a false defamatory statement*." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc) (emphases added and omitted); JA2219. Plaintiffs largely ignore this requirement. Their appellate brief relies on generalized innuendo, misstatements of the law and the record, and documents and affidavits that have nothing to do with showing that Sidley made any false statement about any plaintiff with actual malice.

Plaintiffs' brief specifically discusses only three passages in the Report (and quotes four words or word pairs that it calls "loaded terms," *see infra* pp. 41-42 &

n.14). Br. 10, 13, 53, 63. The passages concern plaintiffs' work with key APA officials in 2005, when plaintiffs were Army colonels and military psychologists, to ensure that APA's new ethics guidance for psychologists supporting national security interrogations was consistent with DoD's guidance on the same topic. *See, e.g.*, JA 2246-47, 2249. Plaintiffs claim that Sidley acted with actual malice by calling that DoD guidance "high-level" and "non-specific" when, plaintiffs say, it in fact strictly prohibited specific interrogation techniques. Br. 10-11, 53, 63.

Plaintiffs misread the Report to find a conflict with DoD guidance that does not exist and cite Department of Defense ("DoD") policies and reports to highlight that nonexistent conflict. They fail to show that a reasonable jury could find by clear and convincing evidence that Sidley made these statements, or any statement in the Report about them, with knowledge of falsity or subjective doubts as to truth. That is no surprise given the scale and depth of Sidley's investigation. The judgment should be affirmed.

Course of Proceedings and Decision Below

Five plaintiffs filed a complaint for defamation and false light against Sidley and APA in D.C. Superior Court in August 2017 and a First Supplemental Complaint ("Complaint") in February 2019. The Superior Court in March 2019 ordered former plaintiffs Dr. Stephen Behnke and Dr. Russell Newman, former APA employees, to arbitrate their claims. Behnke's claims were resolved by agreement; the arbitrator

ruled against Newman on all his claims. *See* Plfs' Opp. to 12(b)(2) Mot. at 7, Apr. 7, 2023, CA No. 1884CV01968-D, Mass. Super. Ct. (Suffolk Cty.).

Retired Colonels Banks, Dunivin, and James are the remaining three plaintiffs. Their Complaint is 115 pages long and contains 586 numbered paragraphs and thirteen counts. JA233-348. It attaches a forty-five-page exhibit listing 219 allegedly false passages from Sidley's Report. JA349-93. All counts against Sidley arise from Sidley's submission of its Report to APA.[2] Defendants moved under the Anti-SLAPP Act to dismiss the original complaint in October 2017, JA432-734, and the supplemental complaint in March 2019, JA959-1081.

Plaintiffs moved in January 2019 to invalidate the Anti-SLAPP Act; defendants opposed. The District of Columbia intervened to also oppose the motion. The Superior Court denied the motion in January 2020. JA2043-56.

The court granted plaintiffs anti-SLAPP discovery in February 2019.[3] In February 2020, after the discovery and anti-SLAPP briefing were completed, the court held a hearing. In March 2020, it issued an order and then an amended order granting

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[2] The Complaint includes counts about publication of the Report at different points in time up to September 4, 2015, *e.g.*, JA325, 331, 335, and then an alleged August 2018 republication, JA340-43. Plaintiffs' inability to show actual malice applies to all the publications and all the claims they asserted.

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

the anti-SLAPP motions and dismissing plaintiffs' claims with prejudice.

The court held that D.C. law applied and that defendants were entitled to protection under the Anti-SLAPP Act because they were engaged in "advocacy on issues of public interest." JA2204-07. Plaintiffs do not challenge those conclusions on appeal. The court ruled that plaintiffs failed to show a likelihood of success. It first held that plaintiffs were "public officials" required to meet the actual malice standard under the First Amendment. *See* JA2207-11. It next held that plaintiffs failed "to proffer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, the Report were false or that they published the Report with reckless disregard of the falsity of these stated or implied facts." JA2214. The court finally held that "there was no republication of the Report as a matter of law." JA2213. Plaintiffs appealed.

On September 7, 2023, a division of this Court reversed and remanded, holding that the discovery-limiting provisions of the D.C. Anti-SLAPP Act violate the Home Rule Act. 301 A.3d 685. On January 23, 2024, the full Court vacated the opinion and ordered full briefing and argument. 308 A.3d 201(order).

STATEMENT OF FACTS

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

Following the 2004 disclosure of abuses of detainees at the Abu Ghraib prison and elsewhere, the use of "enhanced interrogation techniques" came under intense

public scrutiny. In November 2004, the New York Times reported a finding that "the American military has intentionally used psychological and sometimes physical coercion . . . on prisoners at Guantánamo Bay" and that military psychologists were "advis[ing] the interrogators" using these techniques. N. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, JA476-77. These disclosures created widespread controversy about the use of these techniques and psychologists' participation in interrogations. JA258, ¶ 70.

B. The PENS Task Force.

In response, APA established a task force to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." JA258, ¶ 71. It "became known as the PENS Task Force, 'PENS' standing for Psychological Ethics and National Security." *Id.* All three plaintiffs were involved in the Task Force's formation or deliberations. JA250, ¶ 45, JA259, ¶ 73. The press covered the meeting of the Task Force alongside new reporting about psychologists' involvement in abusive interrogations. *See* N. Lewis, *Interrogators Cite Doctors' Aid at Guantánamo*, N.Y. Times, June 24, 2005, JA484-87.

The Task Force met in Washington, D.C., from June 24 to 26, 2005. JA259, ¶ 75. It then proposed ethics guidelines for psychologists involved in national security interrogations, *id.*, concluding that psychologists could be involved to make sure interrogations were "safe, legal, ethical, and effective," JA499. The APA Board of

Directors adopted the PENS Guidelines on July 1, 2005. JA259-60, ¶ 77.

C. Post-PENS Task Force Debate.

In the years that followed, critics raised concerns about the Task Force and its guidelines, charging collusion between APA and the U.S. government to ensure continued psychologist involvement in national security interrogations despite the abuses. JA237, ¶ 2, JA285, ¶ 176. Public debate continued about psychologists' participation in such interrogations. "The issue was openly debated on [the APA] Council [of Representatives] floor and in numerous meetings, including a mini-convention on the topic." JA274, ¶ 131; A. Fifield, *Policy over Military Interrogations Divides Psychologists*, Phila. Inquirer, Aug. 9, 2006, JA504.

D. Plaintiffs' Involvement in These Events.

Plaintiffs Banks, Dunivin, and James were all psychologists and Army colonels who served in senior positions. *See* JA247-49, ¶¶ 39, 41-42. Dunivin and James served in senior roles at Guantanamo Bay, and James also did so at Abu Ghraib. *Id.* Banks served as the Director of Psychological Applications for the Army's Special Operations Command; in that role, he "provided ethical as well as technical oversight for all Army Special Operations Psychologists." JA247, ¶ 39.

The Complaint states that plaintiffs each played a "leading role" in "drafting policies and implementing training and oversight to prohibit and, as far as possible, prevent future abuses." JA239-40, ¶ 12, JA 272. Dunivin and Banks drafted policies

governing psychologists consulting on interrogations at Guantanamo Bay, JA258, ¶ 69, 270, ¶ 114, JA274, ¶ 129, and James and Banks investigated abuses at Abu Ghraib and "draft[ed] policies and institut[ed] procedures to prevent abusive interrogations," JA272-73, ¶¶ 123, 127. Banks authored "the Army Inspector General's report" on "detainee operations in Iraq and Afghanistan" and consulted on "a revision to the Army Field Manual" related to interrogation techniques. JA273, ¶ 125.

Banks and James were members of the PENS Task Force. JA259, ¶ 73. Banks introduced the Task Force to DoD guidance he was drafting for military psychologists supporting interrogations that included the "safe, legal, ethical, and effective" construct. He successfully urged APA to do the same with its Task Force Guidelines. JA491-93, 1883-93, 2466. James observed in his memoir that "[t]he results of this blue-ribbon panel were controversial." JA512-13. Dunivin, stationed at Guantanamo Bay at the time, made suggestions about the Task Force's membership. JA250, ¶ 45. Dunivin's husband, former plaintiff Newman, participated in the Task Force as an observer without disclosing the marriage to all participants, for which he received public criticism. JA297-98, ¶¶ 224-25.

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

In 2014, New York Times reporter James Risen published the book *Pay Any Price*. Among other topics, it discussed allegations that APA colluded with the government to support torture and that the outcome of the PENS Task Force in 2005

was a result of APA collusion with the government. JA237, ¶¶ 2-3, JA671-72.

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

David Hoffman, a Sidley partner, led a team of Sidley lawyers. JA2225. Over eight months, Sidley interviewed roughly 150 witnesses, conducted over fifty follow-up interviews, and reviewed over 50,000 documents. JA2243-44. In July 2015, Sidley submitted its Report, titled "Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture." It detailed Sidley's findings and the bases of its conclusions. APA made the Report and 7,600 pages of exhibits publicly available. In September 2015, Sidley provided a revised version containing a small number of corrections shown in a seven-page errata chart at the back of the Report, none about the three plaintiffs. JA2779-85.

Sidley reached a number of conclusions based on its review of the evidence.

Notwithstanding allegations from APA critics, the Report did not find that APA colluded with CIA, or that APA colluded with anyone to support torture. JA2238, 2282, 2304-05. The Report did find that "key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethics guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." JA2246. It did not find evidence that APA "knew about the existence of an interrogation program using 'enhanced interrogation techniques,'" only that certain APA officials had been indifferent to the possibility. JA2246. The Report also concluded that former plaintiff Behnke, the APA Ethics Director, engaged in a long-term secret collaboration with DoD officials, including plaintiffs, to defeat APA resolutions that would have restricted military psychologists' involvement in interrogations. JA2273. The Report also criticized the APA Ethics Committee and Ethics Department, whose members are not plaintiffs here, for their handling of ethics complaints against prominent national security psychologists. JA2295.

F. Post-Report Actions.

Controversy over APA's position regarding psychologists' involvement in national security interrogations continued, including changes to APA policies in response to the Report and criticism of the Report by some. This included efforts by some APA members to persuade APA to remove the Report from its website or

otherwise host criticisms of it, JA1078, which led to the APA Council of Representatives voting in August 2018 to make certain changes to a page on the APA website featuring a timeline of events, including adding hyperlinks to four documents critical of the Report, JA313. An email from APA's general counsel to the Council included a hyperlink to the timeline page. *Id.* Sidley was not involved in the website changes or the email. JA313-16, ¶¶ 295-305.

SUMMARY OF THE ARGUMENT

1. For the reasons stated in the District of Columbia's en banc brief, the Anti-SLAPP Act does not violate the Home Rule Act or the First Amendment. The D.C. Council has broad authority under the Home Rule Act to enact legislation, which it properly exercised here. By providing protections to defendants sued for their speech on public issues while permitting meritorious cases to proceed, the Act strikes an appropriate balance that does not violate litigants' First Amendment rights.

2. Sidley's Report to APA, on issues concerning psychologists' involvement in national security interrogations, is an "[a]ct in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5501(1). Sidley thus satisfied the "prima facie showing" under the Anti-SLAPP Act, and the burden shifted to plaintiffs to demonstrate that their claims are "likely to succeed on the merits," § 16-5502(b), which mirrors the standard for defeating a summary judgment motion.

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

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

5. Plaintiffs' claimed "circumstantial evidence" of actual malice also fails. The extensive scope of Sidley's investigation belies plaintiffs' accusations that it followed a "preconceived narrative," which "fail[ed] to adhere to proper investigatory practices," "purposeful[ly] avoid[ed] the truth," or relied only on "biased witnesses." Br. 57-62. Plaintiffs' other "circumstantial evidence" arguments misstate the law and the record. Their charges that the Superior Court failed to consider

evidence or usurped the role of the jury, *id.* 68-69, misstate the record as well.

6. For the reasons stated in APA's en banc brief, plaintiffs failed to present evidence for a reasonable jury to find either that APA's changes to a website page in August 2018 or an email it sent about those changes amounted to republication of Sidley's 2015 Report. In the alternative, an alleged 2018 republication of the Report by someone else is not evidence of Sidley's state of mind at the time of publication in 2015; it cannot support plaintiffs' actual malice allegations against Sidley.

STANDARD OF REVIEW

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

ARGUMENT

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

For the reasons set forth here and in the District of Columbia's en banc brief in Argument Sections I and II and incorporated here by reference, the Anti-SLAPP Act does not violate either the Home Rule Act or the First Amendment.

Home Rule Act: The D.C. Council did not exceed its broad authority when enacting the Anti-SLAPP Act, which created a "substantive right" for those who face lawsuits for speaking on issues of public interest "to avoid the burdens and costs of pre-trial procedures." *Mann*, 150 A.3d at 1231. The Act does not run directly contrary to D.C. Code § 11-946, the Title 11 provision concerning the rules of procedure. That a substantive law affects court procedure "in a sense" does not render it an amendment to Section 11-946 that would violate the Home Rule Act. *Woodroof v. Cunningham*, 147 A.3d 777, 782, 784 (D.C. 2016).

First Amendment: In erroneously contending that the Anti-SLAPP Act is subject to "exacting scrutiny" because it infringes the right to petition, Br. 17, 32, plaintiffs misapprehend how the Act works. It permits meritorious cases to proceed while requiring dismissal of only cases that lack merit as measured by the Rule 56 or Rule 12 standards. *See Mann*, 150 A.3d at 1232-33,1237, 1238 n.32; *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 750 (D.C. 2021). Because "baseless litigation is not immunized by the First Amendment," *In re Yelverton*, 105 A.3d 413, 421 n.8 (D.C. 2014) (quotation omitted), the Act is not subject to strict scrutiny.

Far from impairing "effective access to the courts," Br. 14, the Anti-SLAPP Act "take[s] due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment

protections can be satisfied at trial." *Mann*, 150 A.3d at 1239. The Act, therefore, "is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act"; it instead ensures that "the constitutional right of a plaintiff who has presented evidence that could persuade a jury to find in her favor is respected." *Id.*

Plaintiffs assert that the Act violates the First Amendment because it "does not require a showing that a suit intends to punish or prevent expression." Br. 31. They emphasize that the Illinois anti-SLAPP statute requires such a showing to preserve its constitutionality. *Id.* 35. But the D.C. Act has no need to import such a requirement. Unlike D.C., Illinois does *not* ask whether a plaintiff has brought a "suit[ ] with reasonable merit." *Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012). Illinois instead decides an anti-SLAPP motion based on whether a plaintiff's claims are "based on" a defendant's speech. *Id.* The D.C. Act, by contrast, requires a determination whether a plaintiff is "likely to succeed on the merits." D.C. Code § 16-5502(b). That difference in structure preserves its constitutionality.

Plaintiffs also challenge the Anti-SLAPP Act's limitations on discovery and burden-shifting provisions. Br. 37-38. Neither renders the Act unconstitutional. *See, e.g.*, *Mann*, 150 A.3d at 1239 (burden shifting appropriate to require plaintiff to establish case has merit); *City of Hampton v. Williamson*, 887 S.E.2d 555, 558-59 (Va. 2023) (no general constitutional right to discovery in a civil case). The Act's

discovery provisions prioritize discovery concerning issues raised in an anti-SLAPP motion, *see Mann*, 150 A.3d at 1233, and ensure that such discovery is not "unduly burdensome," § 16-5502(c)(2), a phrase this Court has held is similar to the general discovery limitation of Super. Ct. Civ. R. 26(g)(1)(C), *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 505, 513 (D.C. 2020). While plaintiffs did not receive all the discovery they sought, they received substantial discovery. JA1179-80, ¶¶ 4-5.

Plaintiffs' "as applied" challenge to the Act, Br. 37-39, fails for an additional reason. Despite complaining that the Superior Court "severely limit[ed] discovery" in this case, *id.* 37, plaintiffs never appealed the court's discovery order as an "abuse of discretion" under the Anti-SLAPP Act, *Fridman*, 229 A.3d at 513. They cannot show that the Act is unconstitutional as applied to them when they failed to allow this Court to consider whether the denial of some discovery ran afoul of the Act itself. *See Dubose v. United States*, 213 A.3d 599, 605 (D.C. 2019) (failure to follow requirements of statute was "fatal" to plaintiff's as-applied challenge to statute).[4]

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[4] Plaintiffs also assert that the Act violates the First Amendment because corporate or institutional defendants invoke its protection. Br. 34. But this case, in which plaintiffs sued entities and an individual, shows why the Act is needed: to protect against lawsuits "filed by one side of a . . . public policy debate aimed to . . . prevent the expression of opposing points of view." *Mann*, 150 A.3d at 1226 (quotation omitted). And even plaintiffs' incomplete list, Br., Ex. A (only 44 anti-SLAPP motions in 13 years), shows a number of anti-SLAPP motions filed by individuals.

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

There is no dispute that defendants made the prima facie showing that the Anti-SLAPP Act applies. The Report's subject matter—investigation of charges of APA and government collusion to permit psychologists' involvement in abusive interrogations of detainees—is plainly an "issue of public interest." D.C. Code §§ 16-5501(1)(A)(ii) to (3), 5502(b). The Act thus applies to protect against litigation that seeks to "chill or silence speech." *Mann*, 150 A.3d at 1229.[5]

Plaintiffs thus must show their claims are "likely to succeed on the merits." D.C. Code § 16-5502(b). This means establishing that "a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." *Mann*, 150 A.3d at 1236. The Act's test "mirror[s]" the Rule 56 summary judgment standard. *Id.* at 1237, 1238 n.32. Because plaintiffs are public officials, the requisite fault standard here is actual malice. In an actual malice case, the "heightened fault and proof requirements" include the "clear and convincing evidence" standard. *Id.* at 1236.

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[5] Plaintiffs complain that after they threatened a lawsuit in 2016 a planned supplemental report by Sidley to APA "never materialized." Br. 11. But one consequence of a defamation lawsuit like this is to inhibit further speech, a problem the Anti-SLAPP Act exists to remedy.

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

The Superior Court properly held that plaintiffs, military psychologists and colonels in the U.S. Army who exercised substantial policymaking responsibility relating to the War on Terror, are public officials for purposes of this lawsuit.[6]

Plaintiffs now seek to downplay their roles but cannot erase what their Complaint concedes about their important positions and substantial responsibilities regarding army psychologists and the treatment of detainees. The Complaint explains that each plaintiff held the rank of an Army colonel and each "took a leading role in creating policies and procedures" regarding national security interrogations "in the aftermath of the abuses at interrogation sites after 9/11." JA247-49, ¶¶ 39, 41-42, JA272. Banks was Director of Psychological Applications for the Army's Special Operations Command, where he provided "oversight for all Army Special Operations Psychologists." JA247, ¶ 39. "As the abuses at Abu Ghraib began to emerge, Col. Banks was ordered to work with the Army's Inspector General to investigate and decide how to prevent future abuses." *Id.* He also authored the Inspector General's report on detainee operations in Iraq and Afghanistan. JA273, ¶ 125.

Similarly, the Complaint alleges that Dunivin served as Chief of the

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[6] The actual malice standard is applied to two classes of defamation plaintiffs: public officials and public figures. The public-figure test is different, *see, e.g.*, *Salem Media Grp., Inc. v. Awan*, 301 A.3d 633, 647 (D.C. 2023), and not involved here.

Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center and also "w[as] called upon to help put in place policies to prohibit abuses." JA248, 258, JA272, ¶ 122. She created policies concerning interrogations, including authoring the protocol for military psychologists at Guantanamo, and "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command." JA248-49, ¶ 41, ¶¶ 114-15, 270, 273. James served as Director of Behavioral Science at Guantanamo and at Abu Ghraib in the wake of the infamous abuses. JA249, ¶ 42. He was charged with "drafting policies and instituting procedures to prevent abusive interrogations" and training personnel on how to interview detainees. JA272, ¶ 123. And plaintiffs cannot dispute that the statements in the Report that they challenge concerned their involvement in APA's efforts to address these and related issues.

Nothing more is needed to conclude that these high-ranking officers are "public officials" required to prove that defendants made statements about them with actual malice. "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," the public-official test is satisfied and actual malice applies. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). The Superior Court correctly held that plaintiffs' "positions comfortably fit within the hierarchy

of public officials as provided in *Rosenblatt*," noting the Complaint's "plethora of examples" demonstrating their substantial responsibilities, including those affecting the safety of detainees subject to military interrogation. JA2210.

1. The Superior Court Correctly Applied the Law.

The public-official determination is a "question of law to be resolved by the court," *Thompson*, 134 A.3d at 312 (quotation omitted), not a potential jury issue, as plaintiffs mistakenly suggest, Br. 1. It is thus for a court to determine if a plaintiff qualifies under the expansive public-official test. Here the admissions in plaintiffs' Complaint conclusively demonstrate their public-official status.

While the public-official "designation 'applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,'" *Thompson*, 134 A.3d at 312 (emphasis added) (quoting *Rosenblatt*, 383 U.S. at 85), it is also well settled that "[t]he public official category is by no means limited to upper echelons of government," 1 Robert D. Sack, *Sack on Defamation* § 5:2.1 (2019). In particular, one need not have ultimate decision-making authority to qualify as a public official. *See, e.g.*, *Harvey v. CNN Inc.*, 48 F.4th 257, 262, 273 (4th Cir. 2022) (aide to U.S. Congressman).

Consistent with these principles, this Court has held that far lower-ranking government officials than plaintiffs here with far less weighty responsibilities were

public officials. In *Thompson*, the plaintiff was a special agent within an office of the Treasury Inspector General who supervised "five to seven employees." 134 A.3d at 311-12. This Court emphasized that he had "access to sensitive databases and information." *Id.* at 312. In *Beeton v. District of Columbia*, the plaintiff was a correctional officer, who was known as "corporal." 779 A.2d 918, 922, 924 (D.C. 2001). Plaintiffs fail to cite either case.

Courts in D.C. and elsewhere consistently have held that military officers with duties like plaintiffs readily meet the standard. *See, e.g.*, *MacNeil v. CBS, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975) (Marine colonel who participated in public affairs lectures); *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 804-05 (9th Cir. 1978) (Navy captain commanding ship); *Davis v. Costa-Gavras*, 595 F. Supp. 982, 987 (1984) (U.S. military commander in Chile). And here the Complaint acknowledges not only "Plaintiffs' ranks," Br. 42, but also their significant leadership roles and substantial policy duties commensurate with that high rank. Indeed, a premise of the Complaint is that these plaintiffs "stepped up" into one of the most high-profile issues of national security policy in recent memory, becoming "directly and energetically involved in drafting policies and implementing training and oversight" relating to national security interrogations. JA239-40.

Plaintiffs cite affidavits, but nothing in them alters the admissions in the Com-

plaint. *See, e.g.*, JA1462 (affidavit reiterating that Banks had "oversight" responsibility for Special Operations Command psychologists). In fact, one affidavit plaintiffs highlight, Br. 6, explained that Banks shared responsibility for "detention center operations" at Bagram, Afghanistan and exercised authority there to "stop[] the abuse of at least one detainee," have "the offending individual permanently removed from the facility," and "to make sure no [further] abuse occurred while he was responsible for interrogations or for overall detainment." JA1754. Plaintiffs' affidavits underscore why they are public officials.

Strikingly, plaintiffs cite no case holding that any military officer of plaintiffs' rank and responsibilities was not a public official. But that is unsurprising. After all, "[t]he conduct of the military . . . during wartime is a matter of the highest public concern, and speech critical of those responsible for military operations is well within 'the constitutionally protected area of free discussion.'" *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008) (quoting *Rosenblatt*, 383 U.S. at 85). Indeed, the positions of "lieutenant colonel[] and colonel in the Regular Army" are of such importance that their appointments must be "made by the President, by and with the advice and consent of the Senate." 10 U.S.C. § 531(a)(2).

The very impetus for the actual malice rule established in *New York Times v. Sullivan* was to ensure that "debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 254, 270 (1964). For that reason, it has long been

emphasized that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt*, 383 U.S. at 85; *see also, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (recognizing "the paramount public interest in a free flow of information to the people concerning public officials, their servants"). Plaintiffs are prototypical public officials for purposes of applying the constitutional actual malice standard.

2. Plaintiffs Rely on a Misstatement of the Law.

Plaintiffs assert that the Superior Court erred by failing to use a "three-legged stool" public-official test found in a 1989 First Circuit case, *Kassel v. Gannett Co.*, 875 F.2d 935, 939-40 (1st Cir. 1989) (emphasis omitted); Br. 41. But *Kassel* does not represent "the U.S. Supreme Court's public official analysis," Br. 41; it has never been cited by the Supreme Court or any D.C. court. This Court applies the Supreme Court's *Rosenblatt* test. *See Thompson*, 134 A.3d at 312.

Specifically, plaintiffs argue that it is relevant that they purportedly lacked "access" to the media and did not "assum[e] the risk of media attention." Br. 43. Regardless of whether that assertion is even supported by plaintiffs' pleading, this Court has never before suggested that a factual inquiry into a plaintiff's access to the media is necessary before deeming any government official to be a public official. This Court has noted that "superior access to the media" was one *justification* for applying the actual malice standard to public officials. *Moss v. Stockard*, 580 A.2d

1011, 1029 (D.C. 1990). But even then, this Court also separately noted, as a first justification, "the public's strong interest in robust and unfettered debate concerning issues related to governmental affairs"—without mentioning access to the media. *See id.* In then analyzing whether government personnel were "public officials," this Court has never required *any* factual determination relating to access to the media. *See, e.g.*, *Beeton*, 779 A.2d at 924; *Thompson*, 134 A.3d at 312. Nor has the Supreme Court. *See Rosenblatt*, 383 U.S. at 85-86.[7]

3. Public-Official Status Should Be Decided Early.

The Superior Court was correct to rule at the anti-SLAPP stage of the case that plaintiffs are public officials. Delaying resolution of this question of law until later in a case "would prolong the litigation process and render the special motion to dismiss ineffective when it comes to public figures, who would be required to prove

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[7] Plaintiffs cite *Gertz v Robert Welch Inc*., 418 U.S. 323 (1974); Br. 41, which observed generally that "[p]ublic officials and public figures *usually* enjoy significantly greater access to the channels of effective communication," 418 U.S. at 343-44 (emphasis added), but it too nowhere establishes a test for public official status based on access to the media. One treatise suggests that "level of access to the media" may be a factor to be weighed in "close cases." 1 Rodney A. Smolla, Law of Defamation § 2:108 (2d ed.) (West 2023). But this is not a close case. Indeed, the same treatise elsewhere notes that "military personnel" are "*routinely* classified as public officials, particularly when they exercise some degree of policy-making authority," *id*. § 2:106 (emphasis added), and that "[t]he exercise of policy-making authority . . . may exist at the lowest echelons of a particular governmental agency, rendering even employees at the lowest rungs of authority public officials," *id*. § 2:108.

actual malice at trial, but could defeat the special motion with a lesser showing of fault." *Fridman*, 229 A.3d at 507. It would undermine the well-recognized interest in having public-official status decided "at the earliest opportunity that the state of the record will permit," Sack, *supra* § 5:4.2, at 5-84, and for claims subject to First Amendment protection to be adjudicated at the earliest opportunity.

"To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Kahl v. Bureau of Nat'l Affs., Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017); *Fridman*, 229 A.3d at 507 (Anti-SLAPP Act intended to "dispos[e] of a meritless lawsuit early in the litigation" (quotation omitted)).

The Superior Court correctly ruled that plaintiffs are public officials whose claims are subject to the actual malice standard.

B. Plaintiffs Cannot Demonstrate Actual Malice.

Establishing actual malice requires a showing, by clear and convincing evidence, that the defendant knew that the statements challenged by a plaintiff were false, had a "high degree of awareness of . . . probable falsity," or "in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731; *N.Y. Times Co.*, 376 U.S. at 279-80. This is a "subjective" standard requiring evidence of the speaker's state of mind, specifically whether "the defendant actually

entertained a serious doubt" about the truth of the statements. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996).

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

Actual malice is thus a "daunting" standard. *McFarlane*, 91 F.3d at 1515. "[V]ery few public [officials]" can satisfy it, *Fridman*, 229 A.3d at 509, and affirmance of summary dispositions for defendants in actual malice cases is common, *see, e.g.*, *id.* at 511; *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016); *Kahl*, 856 F.3d at 117.

The Superior Court, after properly considering "the totality of the record in this case," including "the various arguments that Plaintiffs advance," JA2219, rightly concluded that plaintiffs' evidence did not clear that very high bar.[8]

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[8] Plaintiffs quote dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), for the proposition that actual malice "'does not readily lend itself to summary disposition.'" Br. 47. But in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court clarified that *Hutchinson* simply "acknowledg[ed]" that the Court

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

What plaintiffs call "direct evidence" of actual malice, Br. 51, is no evidence at all. Plaintiffs feature non-specific allegations of falsity that are not tied to specific statements in the Report, *e.g.*, Br. 9, 51, and that say nothing about Sidley's state of mind when submitting the Report. In the few places where plaintiffs do address specific statements, they misstate what the Report said and otherwise fail to present evidence that Sidley published any statements about them with knowledge of falsity or actual subjective doubts as to falsity.

a. Plaintiffs' Generalized Allegations Are Insufficient.

Generalized complaints about an alleged false "overarching narrative," Br. 52, or broad complaints by others about unspecified aspects of the Report, *id.* 9, 51, fail to satisfy plaintiffs' burden. As the D.C. Circuit made clear in *Tavoulareas*, "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." 817 F.2d at 794.[9]

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was reluctant to endorse special protections for defamation defendants. *Id.* at 256 n.7. Since then, as noted above, courts have commonly affirmed summary judgment in public-figure defamation cases, and it is now firmly established that "the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Kahl*, 856 F.3d at 110 (directing summary judgment for lack of actual malice).

[9] Plaintiffs' contention that the Superior Court failed to conduct a "holistic examination" of evidence of actual malice, Br. 49, is refuted by the court's careful opinion,

As one court applying *Tavoulareas* emphasized, even if a plaintiff, unlike plaintiffs here, could establish actual malice as to "collateral falsehoods"—i.e., false statements about people other than the plaintiff—"this would not establish an inference of actual malice with respect to [defendant's] statements concerning plaintiff" because "[t]he doubt must be in conjunction with the alleged defamatory statement." *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1513 (D. Minn. 1988) (citing *Tavoulareas*, 817 F.2d at 794), *aff'd*, 881 F.2d 1426 (8th Cir. 1989).

Plaintiffs, however, rely on generalized second-hand characterizations or erroneous paraphrases of Sidley's Report. For example, they cite an editorial about the Report, Br. 2 (linked to at JA1217 n.8), which inaccurately said that APA "colluded with officials at . . . the C.I.A." even though the Report concluded the opposite, JA2247. Plaintiffs erroneously assert that the Report accused them of colluding to clear "obstacles to military psychologists' participation in abusive interrogations," Br. 2, without a quotation or even a page reference.[10]

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which expressly considered plaintiffs' arguments "[c]ombined," JA2218. And while "[p]laintiffs are entitled to an aggregate consideration of all their evidence," that evidence must still be "*in conjunction* with" specific statements challenged as false and defamatory. *Tavoulareas*, 817 F.2d at 794 & n.43.

[10] Without quoting the Report, plaintiffs suggest that interview notes could contradict the Report saying that "Banks . . . believed sleep deprivation was permitted." Br. 3 & n.11. But the actual passage that plaintiffs cite, JA2302-03, instead noted Banks' caution not to "automatically" conclude that all types of sleep deprivation were "torture," *not* that it was automatically permitted, as plaintiffs suggest.

What plaintiffs falsely characterize as "admissions," Br. 51, are not admissions at all. First, they are generalized after-the-fact statements by people associated with APA about Sidley's Report, not statements by Sidley. *Id.* 51-52. Second, the statements merely show that certain people affiliated with APA, in response to attacks by those opposed to the Report's conclusions, questioned or were open to questioning unspecified findings in the Report. *Id.* at 51. For example, plaintiffs rely on email notes of an August 2016 meeting, a year after the Report's release, in which an unidentified member of the APA Board allegedly said that "the report contains many inaccuracies," without further explanation or context. JA1460-61; Br. 51.[11]

And plaintiffs' argument fails as a matter of law because it conflates alleged evidence of *falsity* with *knowing falsity*. *See, e.g.*, Br. 8, 51. "[T]here is a significant difference between proof of actual malice[] and mere proof of falsity." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984); *Secord v. Cockburn*, 747 F. Supp. 779, 792 (D.D.C. 1990) ("To argue that evidence of actual malice exists by the mere fact that subsequent events determine the falsity of a source or statement would be tantamount to conflating the actual malice and falsity elements of a libel action.").

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[11] The email's author also observed tentatively that unspecified Board members at this 2016 meeting "*seemed to acknowledge* there was no evidence that APA officers colluded with the government." JA1460 (emphasis added). Plaintiffs' brief distorts that tentative second-hand observation into a firm declaration that "[m]embers of the APA Board admitted privately that there was 'no evidence' of collusion," Br. 8, something the email clearly did not say.

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

As to the only specific Report passages that plaintiffs' brief discusses, they claim that government policies and reports from the early 2000s contradicted what plaintiffs characterize as "the Report's primary false conclusion": that "existing DoD interrogation guidelines" and "'then-existing DoD guidance'" that APA was urged to adopt for its own ethical guidance for psychologists used "high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation." Br. 10, 53 (quoting JA2246-47, 2249). Plaintiffs are wrong.

1) The Report's Description of DoD Guidance for Psychologists Was Accurate.

The Report's observations were accurate; they were about "DoD interrogation guidelines" for *psychologists* supporting interrogations. JA2247-49, 2466, 2477. Plaintiffs misread the Report. Sidley never said that DoD policies governing *interrogators* "used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation." Br. 53 (quoting JA2249). As the Report said on the same page: the PENS Task Force was considering the issue of "where to draw the line *for psychologists* between unethical and ethical interrogation practices." JA2249 (emphasis added). After all, the PENS Task Force was part of the American *Psychological* Association; its mandate, as plaintiffs allege, was to "explore the ethical dimensions of *psychology's* involvement and the use of *psychology* in national

security-related investigations." JA258, ¶ 71 (emphases added).

The Report made clear in multiple places that it was referring to military policies specifically applicable to psychologists. For example, the reference to guidelines that "key DoD officials wanted to put in place," JA2247, was expressly about plaintiff Banks discussing at the PENS Task Force draft DoD guidance for psychologists supporting interrogations. *See, e.g.*, JA2466 (the draft policy "was distributed at the task force meeting and eventually became (almost verbatim) the interrogation policy of the Army Medical Command in 2006").

The Report also stated that the objective at PENS "was to, at a minimum, create APA ethics guidelines that went no farther than—and were in fact virtually identical to—the internal guidelines that were already in place at DoD or that the key DoD officials wanted to put in place." JA2247. The "virtually identical" language is key: a comparison of the draft DoD guidance for psychologists with the PENS Task Force Guidelines shows close similarities. This underscores that the Report was addressing DoD guidance for psychologists, *compare* JA1883-93 (draft DoD guidance), *with* JA491-502 (PENS Guidelines), not DoD policies for interrogators, which could not be described as "virtually identical" to the PENS guidelines.

These guidelines for military psychologists, JA2247-49, did in fact use "high-level concepts" and did not mention specific prohibited interrogation techniques, just as the Report said, JA2249, 2466, 2477 & n.1038. Thus, if and when DoD policies

governing *interrogators* changed—and plaintiffs admit that "these polices were changed a number of times," JA264, ¶ 92—the high-level nature of the DoD guidance for *psychologists* meant that it could not be an independent basis for psychologists to refrain from participating in interrogations. Thus, whatever the changing state of regional DoD policies for interrogators as to specific techniques such as sleep deprivation, Br. 7, 11, 55, it is indisputable that these techniques are not mentioned in either the DoD guidance for psychologists that Banks circulated at the PENS meeting or in the PENS Task Force Guidelines. JA1883-93, JA491-502.

It thus does not help plaintiffs' case that both the DoD guidance and the PENS guidelines advised psychologists to familiarize themselves with applicable military rules and policies governing interrogations. Br. 10 (citing JA1244). Rather than prohibiting psychologists' involvement in specific enumerated interrogation techniques, JA2502-03, both the DoD and PENS guidelines directed psychologists to look *elsewhere* for specifics. The advice for psychologists to familiarize themselves with the ever-changing local policies implemented by DOD or other government entities, JA264, ¶ 92, thus confirms the Report's description of the PENS guidelines as "high-level and non-specific," JA2249.

Plaintiffs' criticism that Sidley did not discuss a March 2005 standard operating procedure ("SOP") document for Guantanamo psychologists, Br. 54-55, is ill founded. That document was substantively the same as the draft DoD guidance

that Banks distributed at the June 2005 PENS Task Force meeting, JA2466, and that the Report addressed in detail: both used high-level concepts like "safe, legal, ethical and effective" interrogations; tasked psychologists with being familiar with applicable law and rules; required psychologists to report interrogation abuses; and did not mention specific prohibited interrogation techniques such as stress positions or sleep deprivation. *Compare* JA1895, 1900-01 (March 2005 SOP), *with* JA1883, 1886 (draft DoD guidance circulated at PENS meeting). Thus, the DoD guidance the Report discussed was not "outdated," Br. 54, at the time of PENS.[12]

2) Evidence of DoD Policies for Interrogators Did Not Contradict the Report's Description of DoD Guidance for Psychologists.

By contrast, the references in plaintiffs' brief to regional and other military policies governing the conduct of *interrogators*—which, plaintiffs allege, identified certain specific prohibited interrogation techniques, Br. 5-6, 55, 70—fail to show

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[12] Plaintiffs also allege that the Report was mistaken in observing that "at the time of the [PENS] report . . . the Bush Administration had defined 'torture' in a very narrow fashion." Br. 53; JA2240, 2249. The Report was correct. The PENS Task Force met in June 2005, JA259, ¶ 75, and the Report expressly identified Department of Justice ("DoJ") memos issued only a month earlier, in May 2005, by the Office of Legal Counsel that permitted waterboarding. The Report thus correctly referred to "narrower definitions of torture" that prevailed "at the time" of PENS. JA2541. In any event, plaintiffs ignore that the Report's reference to narrow DoJ definitions of torture related to what "APA officials" knew at the time, JA2249, not plaintiffs. And on that score, the Report plainly stated, "[w]e did *not* find evidence that this Justice-Department-memo rational[e] was part of the thinking or motive of APA officials." JA2532 n.1313 (emphasis added).

that the Report's description of DoD guidance for *psychologists* is wrong in any respect. *See, e.g.*, Br. 5-6, 70 (citing 2004 "testimony of Patrick Philbin, Associate Deputy Attorney General," which discussed what "the General Safeguards require [for] all interrogators," JA412); 5-6 (citing January 2005 Multi-National Force Iraq Policy, rules for "personnel . . . authorized to conduct interrogations," JA1406).

The same is true for the other reports or documents that plaintiffs cite in passing. *See, e.g.*, Br. 54 (citing legal opinion provided to APA in June 2014 that addressed different matters from those covered in Sidley Report, including development of international law regarding torture, JA1242-43 & n.69).

Plaintiffs' quotation of *Mann*'s actual malice holding, Br. 50, is therefore unavailing. The topics Sidley's Report discussed were different from and based on different evidence from the topics covered in the reports and other documents plaintiffs cite. In *Mann*, by contrast, the topic discussed in earlier reports and defendants' articles was the same: "appellants' statements that Dr. Mann engaged in 'dishonesty,' 'fraud,' and 'misconduct'" in his climate research." 150 A.3d at 1253.

The Superior Court thus properly found plaintiffs' evidence wanting: "Plaintiffs *fail to explain* whether the entities that issued those governmental reports had access to the same documents . . . and witnesses used as sources for the Report" and "it is unclear to what extent those reports were commissioned with mandates comparable" to Sidley's or "focused on the same issues." JA2215 (emphasis added).

3) Mere Evidence of Documents in a Defendant's Possession Does Not Support Actual Malice.

Even if Sidley had possessed documents that contradicted anything in the Report, the mere possession of such documents is insufficient to show Sidley was subjectively aware of information that rendered false or probably false, *see St. Amant*, 390 U.S. at 733, any statement it made about any plaintiff, *see Howard v. Antilla*, 294 F.3d 244, 255 (1st Cir. 2002) (defendant's missing key information among "1500 pages of notes and documents in her investigative file" was "at worst, a negligent failure to connect the dots in a voluminous paper trail," not actual malice). This is because "[a]n honest misinterpretation does not amount to actual malice even if the publisher was negligent in failing to read the document carefully." *Jankovic*, 822 F.3d at 576; *Time, Inc. v. Pape*, 401 U.S. 279, 290, 292 (1971) (same).

Plaintiffs' attempt to marshal what they call "direct" evidence of actual malice, Br. 50, fails.

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

Plaintiffs' purported "circumstantial" evidence of actual malice, Br. 57, also fails. It relies on the kinds of assertions courts routinely reject. Plaintiffs' incantation of "preconceived narrative" or "purposeful avoidance," *id.* 57, 59, cannot meet their burden to show that a reasonable jury could find by clear and convincing evidence that Sidley knowingly made false or probably false statements about them.

a. Alleged Preconceived Narrative.

Plaintiffs assert that Sidley "adhered to a preconceived narrative which assumed Plaintiffs' culpability." Br. 58. But such a bare allegation is insufficient as a threshold legal matter. A plaintiff's "argument that [the defendant] had concocted a pre-conceived storyline . . . fails to establish actual malice." *Jankovic*, 822 F.3d at 597; *see also Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 241 (D.C. Cir. 2021). This is so even where—unlike here—there is "evidence that the defendant was on a mission to advance a preconceived story line." *Jankovic v. Int'l Crisis Grp.*, 72 F. Supp. 3d 284, 316 (D.D.C. 2014) (quotation omitted), *aff'd*, 822 F.3d 576; *see also Lohrenz v. Donnelly*, 350 F.3d 1272, 1283-85 (D.C. Cir. 2003).

In any event, plaintiffs' purported "evidence" of any such "preconceived narrative," Br. 57-59, is without any factual support. Plaintiffs argue that (1) Sidley relied on and adopted the conclusions put forth by long-time critics and (2) witnesses submitted affidavits alleging that Sidley "distorted, omitted information from, or otherwise misrepresented their interviews," a subset of whom also alleged that Sidley appeared, during their interviews, to have a preconceived storyline that it was intent to prove. Br. 58-59. The Superior Court rightly determined that plaintiffs' evidence was insufficient to demonstrate actual malice. JA2217-18.

First, the record soundly refutes plaintiffs' assertion that Sidley simply adopted the critics' viewpoint. Sidley's investigation lasted more than eight months,

and involved review of over 50,000 documents, interviews of roughly 150 witnesses, including over fifty follow-up witness interviews. As the Superior Court found, APA's "critics" "were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed." JA2218.

Second, the affidavits plaintiffs cite merely repeat some interviewees' "impression" that Sidley had a "preconceived narrative," without providing any basis for that impression or tying it to any alleged false statement in the Report. Such speculation cannot establish actual malice. As the Superior Court pointed out, plaintiffs failed to show *when* in the course of the investigative process each affiant's interview came and what information Sidley had received *prior* to those interviews. JA2216-17. These failures render plaintiffs' "preconceived" charge meaningless. *See Wash. Post Co. v. Keogh*, 365 F.2d 965, 970 (D.C. Cir. 1966) (affidavit does not support actual malice without personal knowledge of conclusions in testimony).

Nor are allegations that the Report omitted certain views of witnesses, among the 150 interviewed, evidence of actual malice: "Courts have noted that [authors] . . . have to choose which facts to include and which to omit, because [i]t is impossible to print all the facts on which an opinion or belief is based, especially when an article comprises a critical analysis." *Talley v. Time, Inc.*, 923 F.3d 878, 905-06 (10th Cir. 2019) (quotations omitted).

As the Superior Court concluded, "at best" plaintiffs:

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

JA2218 (footnote omitted).

b. Alleged Purposeful Avoidance.

Plaintiffs' assertion that Sidley purposefully avoided the truth, Br. 59 (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989)), is meritless. The Superior Court rightly rejected this argument. JA2218. The facts of *Harte-Hanks* bear no resemblance to Sidley's investigation. There, a newspaper based on a single source an implausible story about a candidate for judicial office offering a bribe. *See* 491 U.S. at 692. The newspaper also declined to interview a key witness or listen to audio tapes of key conversations. *See id.* Courts reject the purposeful-avoidance argument where, as here, the situation is "precisely the opposite of [*Harte-Hanks*]," with a defendant interviewing "numerous sources." *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999).[13]

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[13] The assertion that Sidley did not give Dunivin follow-up questions for clearance with DoD, Br. 59, proves the point. Not following every lead in a thorough investigation is not purposeful avoidance. *Levan*, 190 F.3d at 1243.

c. Alleged Reliance on Unreliable and Biased Witnesses.

Plaintiffs' complaints about three purportedly "biased" witnesses do not demonstrate actual malice. Br. 60-62. First, plaintiffs again ignore the scope of Sidley's investigation. This case is thus not comparable to one involving a publisher who is alleged to have relied on a single "informant" whose credibility was known to be in doubt. *St. Amant*, 390 U.S. at 732; *Talley*, 923 F.3d at 884, 904 (no actual malice in investigation "involv[ing] dozens of interviews").

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

Third, plaintiffs also fail to identify a single allegedly false statement about them that they claim Sidley made in reliance on any of these individuals. *See* Br. 60-62; *see also Tavoulareas*, 817 F.2d at 794; *Biro v. Condé Nast*, 963 F. Supp. 2d

255, 286-87 (S.D.N.Y. 2013) (finding that "[one witness]'s reliability is irrelevant to [the defendant]'s alleged actual malice" when "there is no reason to believe—nor does the complaint allege—that [the witness] was a source for any of the four remaining defamatory passages"), *aff'd*, 807 F.3d 541 (2d Cir. 2015).

Fourth, plaintiffs ignore what the Report said about how these individuals factored into Sidley's investigation. The Report explained that "APA critics" Dr. Stephen Soldz and Nathanial Raymond were among those who made charges that Sidley thereafter investigated. JA2244. As for the third individual, Dr. Trudy Bond, Sidley simply reported that Bond—"a member of the Coalition for an Ethical Psychology and Psychologists for Social Responsibility"—sent ethics complaints to the APA Ethics Office. JA2733-34, 2755. There is no basis to claim that Sidley "over-relied," or relied at all, on Bond, Br. 61, and plaintiffs do not provide one.

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

Nor does plaintiffs' contention that Sidley had a "motive to defame" them or "ill will," Br. 63, support actual malice. First, "caselaw resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." *Nunes v. WP Co.*, 513 F. Supp. 3d 1, 8 (D.D.C. 2020) (quotation omitted), *aff'd per curiam*, 2022 WL 997826 (D.C. Cir. 2022).

Second, the allegation that Sidley used what plaintiffs call "loaded terms" like "collusion," "joint venture," "joint enterprise," and "deliberate avoidance," Br. 13,

63, does not show ill will or support actual malice. Inferring actual malice from the "'language' of the publication" is an "error of constitutional magnitude." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970). It is particularly inappropriate here: plaintiffs ignore that the Report used the term "collusion" because APA *charged* Sidley to examine allegations that APA "engaged in activity that would constitute collusion" with the government. JA1780.[14] And in any event the Report defined its use of the term collusion in a detailed passage. JA2301-02.[15]

Third, plaintiffs' claim that Sidley leaked the Report to the New York Times, Br. 8, 63-64, is baseless. It is undisputed that someone leaked a pre-release copy of the Report to the Times, which, starting on July 10, 2015, displayed a PDF copy of the Report via its website. But the affidavit of plaintiffs' computer forensics expert said only that metadata in that PDF copy indicates that the PDF file was originally

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[14] The Report did not accuse plaintiffs of criminal behavior. Its use of terms like "joint venture" or "joint enterprise," Br. 13, 63, as analogies for plaintiffs working with APA's Behnke to accomplish joint objectives, *e.g.*, JA2246-47, 2600, 2623, provides no evidence that Sidley doubted the truth of any of its conclusions. And the Report's reference to "deliberate avoidance," concerned APA officials, not any plaintiff, JA2304, and for that reason too is not evidence of ill will toward plaintiffs.

[15] Plaintiffs cite anonymous notes reflecting David Hoffman answering questions at an August 2015 APA Council meeting, alleging that he said that the term "behind-the-scenes communication" would have been more accurate than "collusion." Br. 63; JA1650. This allegation is beside the point. Even if the notes were not inadmissible out-of-context hearsay supplied by an anonymous person, "collusion" was a term that the Report defined precisely for readers.

converted from a Word document on July 2, 2015 by Sidley. JA1568, ¶ 10 (plaintiffs' expert); JA1924, ¶ 11 (Sidley expert). Of course, Sidley, as the Report's author, had earlier converted the Report into a PDF. That metadata does not show who sent the PDF to the Times. JA1923-25, ¶¶ 8-19.

Plaintiffs falsely assert that "a Word version" of the Report was leaked to the Times and that because APA never received a Word version of the Report, Sidley must have been the leaker. Br. 8. But plaintiffs' false assertion that a Word version of the Report was sent to the Times is based solely on their misreading of their own expert's affidavit. *Id.* (citing JA1568-69, ¶¶ 9-14). That affidavit says only that the PDF version of the Report, of which the Times possessed a copy, had *originally* been converted by Sidley from a Word document, *not* that anyone sent a Word version to the Times. JA1568, ¶ 9. Sidley's expert pointed out plaintiffs' error, JA1924-25, ¶ 14-16, but they irresponsibly persist in making it, Br. 8. Plaintiffs' misreading of their own expert's affidavit does not "creat[e] a material factual dispute." *Id.* 63.

Finally, plaintiffs fail to explain how publicizing a Report that was to be published anyway could show that Sidley harbored any "ill will," Br. 62, toward them.[16]

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[16] Plaintiffs allege that David Hoffman once said "I use the media to fan the flames," Br. 63, but rely on anonymous hearsay, JA1717 ¶ 13. And they cite no authority that publicizing information has any bearing on an author's awareness of falsity.

e. Alleged Negligence or Failure To Follow Proper Practices as Evidence of Actual Malice.

Plaintiffs separately argue that they submitted sufficient evidence of negligence if that is the fault standard rather than actual malice. Br. 1, 45-47. As noted *supra* p. 2 n.1, that argument is inapplicable. Sidley's anti-SLAPP motion was based on the actual malice standard, not the negligence standard. Plaintiffs also argue that their purported evidence of negligence should count toward evidence of actual malice. Br. 48. Plaintiffs are wrong on the law and the facts.

First, "[m]ere negligence does not suffice" for actual malice, *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991), which is "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731. Indeed, not even "an extreme departure from professional standards" constitutes actual malice. *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 45 (D.D.C. 2002) (quoting *Harte-Hanks*, 491 U.S. at 665), *aff'd*, 350 F.3d 1272. Here, nothing plaintiffs allege as to Sidley could establish that its professionals "*in fact harbored subjective doubt*," *Jankovic*, 822 F.3d at 589 (emphasis added), about any of the Report's findings.[17]

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[17] The only D.C. case plaintiffs cite for negligence helping prove actual malice is a district court case that predates the case law cited above. Br. 48, 74 (citing *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972)).

Second, plaintiffs cannot establish that an extreme departure from professional standards occurred here. They contend it was improper that the investigation was overseen by APA Special Committee members who, plaintiffs claim, were "involved in the events the Report described and stood to benefit from a report that protected them by blaming Plaintiffs." Br. 45. But plaintiffs cannot show that any APA board member did actually oversee the Report or had anything to do with any part of the Report that involved plaintiffs. Plaintiffs also allege that Sidley failed to inform interviewees that they were "potential targets" and that the APA General Counsel advised interviewees that they should not retain counsel. *Id.* 46. But they cannot deny that interviewees were fully aware Sidley was conducting an "independent review" in "a completely independent fashion with the sole objective of ascertaining the truth of the allegations," as Sidley told witnesses like Dunivin in emails requesting interviews. *E.g.*, JA1553.

f. Alleged Refusal To Retract or Correct.

Plaintiffs argue that Sidley's "refusal to correct or retract" its Report could support a finding of actual malice. The Superior Court correctly concluded that "Plaintiffs fail[ed] to establish any duty on behalf of Defendants to retract or correct

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It was criticized by a later case, which emphasized that "[a]s *St. Amant* makes clear, negligence . . . cannot support a finding of actual malice." *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 958, 960 (D.D.C. 1976).

the Report post publication." JA2219. "[T]here is no duty to retract or correct a publication, even where [unlike here] grave doubt is cast upon the veracity of the publication after it has been released," *Lohrenz*, 223 F. Supp. 2d at 56, and plaintiffs' brief here *still* fails to coherently identify any false statements about them.[18]

Plaintiffs also ignore that "[t]he actual malice inquiry focuses on the defendant's state of mind at the time of publication." *Kahl*, 856 F.3d at 118. Thus, "the inference of actual malice must necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication." *McFarlane*, 91 F.3d at 1508. Plaintiffs' bare statement that Sidley has not agreed to their retraction demands, Br. 64, is thus irrelevant.

g. The 2018 APA Website Changes and Email Do Not Support Actual Malice by Sidley in 2015.

For the reasons set forth in APA's en banc brief in Argument Section V and incorporated here by reference, no reasonable jury could find that there was a 2018 republication of Sidley's 2015 Report; thus, the August 2018 APA changes to the timeline page on it website and email hyperlinking to that page do not support plaintiffs' actual malice allegations. Br. 64. And even if plaintiffs' allegations were to

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[18] Plaintiffs cite a concurrence in the denial of a petition for rehearing for the proposition that refusal to retract is evidence of actual malice. Br. 73 (citing *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985)). The panel's opinion was vacated by the en banc D.C. Circuit. *Tavoulareas*, 817 F.2d 762. The en banc opinion does not support plaintiffs' cited proposition.

be credited, *id.* 11-12, 66-68, they still fail: "courts have consistently agreed that merely linking to an article should not amount to republication," *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021) (quotation omitted), because "though a link and reference may bring readers' attention to the existence of an article, they do not republish the article," *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012). Therefore, whether or not APA "circulated new instructions for accessing . . . the Report" or "included a link for [indirectly] accessing the Report," Br. 4, 65, an email that hyperlinked to a timeline page that itself hyperlinked to dozens of documents, including the Report, as a matter of law cannot establish republication.

This Court can affirm the judgment as to Sidley for an alternative reason supported by the record, *see Wilburn*, 957 A.2d at 924: plaintiffs do not even attempt to show that, three years after it submitted the Report to APA, Sidley had any involvement in the August 2018 APA timeline changes or email. Accordingly, plaintiffs' assertion that someone else's republication in 2018 of Sidley's 2015 Report is evidence of Sidley's alleged actual malice, Br. 64, fails as a matter of law.

This is because the inference of actual malice must be drawn "solely upon the basis of the information that was available to and considered by the defendant prior to publication." *McFarlane*, 91 F.3d at 1508. Tellingly, what plaintiffs call their "most damning[]" evidence of actual malice—their response complaining about the Report—was circulated by plaintiffs "in October 2015," Br. 9, a month *after* Sidley

submitted and APA published the revised version of the Report, JA245, ¶ 32. *See also Jankovic*, 494 F.3d at 1086, 1087 (even foreseeable republication does not amount to new cause of action against original publisher). Plaintiffs' republication claims fail to support actual malice.

* * *

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

C. The Court Appropriately Considered Plaintiffs' Proof.

Finally, plaintiffs attempt to reframe arguments already raised as charges that the Superior Court "failed to consider core evidence" and impermissibly "decid[ed] triable issues of fact and ma[de] inferences against plaintiffs." Br. 68-75 (discussing, *e.g.*, "government reports in Defendants' possession," "preconceived narrative," and "biased and unreliable witnesses"). The court properly applied the standard set forth in the Anti-SLAPP Act, considered the arguments presented, and concluded that plaintiffs' evidence could not support a jury finding of actual malice.[19]

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[19] Similarly, plaintiffs' contention that the Superior Court failed to consider their defamation by implication claim, Br. 68-69, is meritless. The "defamation by implication" count of the Complaint repeated a subset of allegations that were part of the "entire record," JA2195, the court considered. JA343-44, ¶¶ 554-561. Indeed,

Plaintiffs complain that the Superior Court's summary of plaintiffs' evidentiary "foundation" did not expressly mention two charts they attached only as exhibits to their briefs, including a chart listing purported actual malice support for 219 sets of statements in the Report. Br. 69; JA1301-62; *see also* Br. 53 (citing same chart as "direct" evidence of actual malice). Plaintiffs ignore, however, that the court made its decision after "consider[ing] the parties' pleadings, the relevant case and statutory law, and *the entire record*." JA2195 (emphasis added).

Any complaint that the court did not address arguments plaintiffs failed to include in their Superior Court opposition briefs is ill founded. In 119 pages of anti-SLAPP briefing in the Superior Court, plaintiffs allotted no space to the application of law to evidence included in these exhibits. The same is true here. Plaintiffs thus waived any argument that the court failed to consider their charts. *See Television Cap. Corp. of Mobile v. Paxson Commc'ns Corp.*, 894 A.2d 461, 470 (D.C. 2006) ("Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal.").[20]

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plaintiffs ignore that the court's rejection of their claims on actual malice grounds expressly included claims based on "implied facts." JA2214.

[20] Plaintiffs' assertion that their "briefs below presented voluminous evidence" regarding the "219 false statements," Br. 53, is wrong. They did not include those

CONCLUSION

The judgment of the Superior Court should be affirmed.

DATED: April 8, 2024

Respectfully submitted,

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arguments in their briefs; they relegated them to an exhibit; indeed, plaintiffs elsewhere concede that their counsel merely "directed the trial court's attention to this exhibit" at the hearing. *Id.* 52. That is an admission of waiver. *See Television Cap. Corp.*, 894 A.2d at 470.

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021, as amended July 29, 2022), 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
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - 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;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

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/ *Thomas G. Hentoff*
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Case Number: 20-cv-0318

Date: April 8, 2024

CERTIFICATE OF SERVICE

I hereby certify on this 8th day of April, 2024, that a true copy of the foregoing En Banc Brief of Appellees Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman was filed through the Court's e-filing system and served upon all registered participants.

/s/ *Thomas G. Hentoff*
Thomas G. Hentoff

STATUTORY ADDENDUM

D.C. Anti-SLAPP Act of 1970 Excerpts

D.C. Code § 16-5501. Definitions.

For the purposes of this chapter, the term:

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

(A) Any written or oral statement made:

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

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

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

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

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

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

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

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

(c)

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

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

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