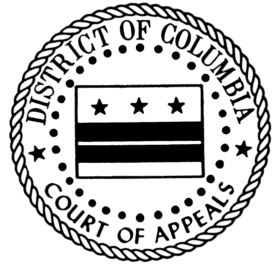

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318

MORGAN BANKS, et al.,
Plaintiffs–Appellant,

v.

DAVID D. HOFFMAN, et al.,
Defendant–Appellee.

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

BRIEF OF AMICI CURIAE PUBLIC INTEREST ADVOCACY ORGANIZATIONS IN SUPPORT OF APPELLEES' PETITIONS FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations, each of which certifies it has no parent corporation and has not issued any shares of stock to any publicly held corporation. No party's counsel authored the brief in whole or part or contributed money intended to fund preparing or submitting the brief, and none other than amici contributed money to fund preparing or submitting the brief.

INTEREST OF AMICUS CURIAE

Amici are public interest advocacy organizations for whom the protections of the First Amendment and anti-SLAPP statutes are critical to their missions. The decision in this case from a division of this court departs from prevailing case law and undermines the ability of amici to freely advocate on issues of national importance. Amici submit this brief to underscore that this case "involves … question[s] of exceptional importance," the division's resolution of which threatens core free speech rights far beyond those of the parties. D.C. Ct. App. R. 35(a)(2).

A more detailed description of amici is in the accompanying Motion for Leave and in Appendix A to this Brief.

SUMMARY OF ARGUMENT

The division's holdings in this appeal have an immediate and potentially devastating impact on the ability of public interest advocacy organizations and ordinary citizens to speak out on issues of vital public importance in the very jurisdiction where such speech can be most important and impactful: our nation's capital. Although the division's decision on the three specific issues in this appeal—the intersection between the D.C. Anti-SLAPP Act and the Home Rule Act, the "public figure" doctrine, and re-publication liability from linking—involve separate legal issues, they each have a similar practical impact of making it far more difficult to efficiently dispose of lawsuits aimed at silencing criticism and public advocacy.

The petitions for rehearing of the appellees and the District of Columbia amply set forth why the division's decision departs from precedent, including from this court. Amici submit this brief to further underscore the "exceptional importance" of the questions at issue in the case. D.C. Ct. App. R. 35(a)(2).

As public interest organizations that frequently speak out about and criticize powerful figures in society—including government officials and large corporations—amici are regularly faced with efforts to silence their advocacy, including through civil litigation that can take many years and millions of dollars to resolve. As both the District of Columbia Council and this court have recognized, even when such lawsuits are "without merit," they "achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights" by requiring the defendant to expend vast amounts of "money, time, and legal resources" to fight the lawsuit in court. *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 501–02 (D.C. 2020) (quoting Council of the District of Columbia, Report of Comm. on Public Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010) ("Council Report")).

Anti-SLAPP statutes and the case law on defamation that has developed in the wake of the Supreme Court's seminal *New York Times v. Sullivan* decision provide essential protections against the potentially devastating effects of such lawsuits. The division's decision strikes down the discovery limitations in the D.C.

anti-SLAPP Act, and suggests that "full discovery" is necessary to resolve threshold issues of whether a plaintiff is a "public official" and whether providing a link to allegedly defamatory material constitutes "publication" of that material. The result is to make potentially meritless SLAPPs significantly more difficult to dispose of at the early stages of a case, which, in turn, inevitably reinvigorates the ability of powerful figures to "use litigation as a weapon to chill or silence speech" in the District of Columbia. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014). Given the drastic impact of the division's decision on vast swathes of core First Amendment-protected speech, the full court should consider the issues raised on this appeal en banc and reverse the division's decision.

ARGUMENT

I. THE ANTI-SLAPP ACT'S PROTECTIONS AGAINST BURDENSOME DISCOVERY ARE ESSENTIAL FOR PROTECTING PUBLIC ADVOCACY

The Supreme Court's defamation jurisprudence is founded on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment's speech protections were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Public interest advocacy organizations play a vital role in organizing and developing the

speech that informs public debate and holds those in power to account.

In enacting the Anti-SLAPP Act more than a decade ago, the District of Columbia joined the growing majority of states that had passed legislation to minimize the cost and time required to defend against Strategic Lawsuits Against Public Participation ("SLAPPs"). As this court has explained, the Council of the District of Columbia was responding to the reality that SLAPPs had been "increasingly utilized over the past two decades as a means to muzzle speech … on issues of public interest." *Fridman*, 229 A.3d at 501–02 (quoting Council Report at 1). Accordingly, the Act grants defendants certain "substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP" (Council Report at 1), including "a special motion to dismiss which provides for the expeditious dismissal of a complaint, and the ability to stay discovery until that motion has been ruled upon." *Fridman*, 229 A.3d at 502 (internal citation omitted); *see also Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016) ("The D.C. Anti–SLAPP Act provides not only immunity from having to stand trial but also protection from 'expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish' by 'toll[ing] discovery while the special motion to dismiss is pending.'") (quoting Council Report at 4).

The Act's stay of discovery is consistent with anti-SLAPP statutes around the

country,[1] as well as the model "Public Expression Protection Act" developed by the Uniform Law Commission (finalized in 2020), which emphasized that a stay "furthers the purpose of the Act by protecting a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the [SLAPP] motion …."[2]

Courts and commentators have long recognized the "potentially enormous expense of discovery" in modern civil litigation—such that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial on the merits. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). When the source of potential liability is speech on matters of public concern, fear of such burdens inevitably causes some to stay silent—or at least to think twice before speaking. As Judge Wilkinson keenly observed about such cases:

> Even if liability is defeated down the road, the damage has been done. … The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well. To allow litigation to impose large costs will dull democracy at the local level, because the monetary impacts of litigation for all but the largest media organizations will prove unacceptably high.

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[1] *See, e.g.*, Cal. Civ. Proc. Code § 425.16(g); N.Y. C.P.L.R. § 3211(g).

[2] *See* Nat'l Conf. of Comm'rs of Uniform State Laws, Uniform Public Expression Protection Act, Section 4, cmt. 1 (2020), https://tinyurl.com/mr3v4atb.

Hatfill v. New York Times Co., 427 F.3d 253, 254–55 (4th Cir. 2005) (Wilkinson, J., dissenting from denial of rehearing en banc).

This threat is one that public advocacy organizations like amici know all too well. That is why a number of them have joined together with other organizations—including the American Civil Liberties Union, Amnesty International, Freedom of the Press Foundation, Human Rights Watch, Natural Resources Defense Council, Public Citizen, Rainforest Action Network, and the Sierra Club—to form the "Protect the Protest" Task Force to track SLAPPs and advocate to strengthen protections for speech on matters of public concern. *See* Protect the Protest, About, https://protecttheprotest.org/about/.[3] In September 2022, task force member Earth Rights International published a report cataloging and analyzing 152 different legal actions by the fossil fuel industry against critics and activists, including 93 SLAPPs.[4]

In two of the most prominent examples, for the past seven years, Greenpeace has been defending itself in two SLAPP cases in which large corporations sued the organization not only for defamation but also for fraud (and treble damages) under the federal Racketeering Influenced Corrupt Organization Act, 18 U.S.C. §§ 1962 et

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[3] Members of the task force have worked with activists across the country, including in Weed, California; Uniontown, Alabama; and New York City to help clients fight back against SLAPPs. *See* https://tinyurl.com/2s3s6dzw.

[4] *See* Earthrights Int'l, *The Fossil Fuel Industry's Use of SLAPPs and Judicial Harassment in the United States* (Sept. 2022), https://tinyurl.com/mr3wa5m8.

seq. (“RICO”)—the statute used to prosecute the mafia. In the first, one of Canada’s largest logging companies, Resolute Forest Products, sought $300 million in damages for statements criticizing the company’s forestry practices. In the second, oil company Energy Transfer Partners sued Greenpeace—along with other local organizations and activists—for $900 million for allegedly orchestrating the Standing Rock protests of the Dakota Access Pipeline in 2016.

The use of RICO conveyed the unmistakable message that political speech and activism was not only tortious—it was *criminal*. Energy Transfer’s CEO made no secret that the “primary objective” of his company’s lawsuit was not to obtain “monetary damages,” but to “send a message” to Greenpeace that “you can’t do this” and “it’s not going to be tolerated in the United States.”[5]

In both cases, Greenpeace successfully dismissed the RICO claims and, in the Resolute case, not only won summary judgment on the remaining defamation claims but was awarded nearly $600,000 in attorneys’ fees under the California anti-SLAPP statute.[6] But the Energy Transfer case was refiled in state court in North Dakota,

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[5] *See We were greatly harmed, lost millions of dollars: Energy Transfer Partners CEO*, CNBC (Aug. 15, 2017), https://tinyurl.com/2udwe7wf (video at 5:04); *see also Too Far Too Often: Energy Transfer Partners’ Corporate Behavior on Human Rights, Free Speech, and the Environment*, Greenpeace Reports (June 18, 2018), https://www.greenpeace.org/usa/reports/too-far-too-often/.

[6] *See Energy Transfer Equity, L.P. v. Greenpeace Int’l*, No. 17-cv-173, 2019 U.S. Dist. LEXIS 32264, at *11 (D.N.D. Feb. 14, 2019) (dismissing RICO claims and

which does not have an anti-SLAPP statute; the case has continued through years of massive discovery, with trial set for July 2024. As Greenpeace's Deputy General Counsel testified last year before Congress (in support of the passage of a federal anti-SLAPP statute), "here we are, more than six years from when the first SLAPP was filed against us, still forced to invest time and resources into these legal battles that otherwise would have been used to protect communities and the environment from toxic pollution and the existential threat of climate change."[7]

Protecting public advocacy within D.C. is a particularly urgent necessity. The capital is home to thousands of lobbying firms, think tanks, professional associations, non-governmental organizations, and, of course, the federal government itself. Speech on issues of serious public concern invariably involve D.C.-based entities—both as speakers and the subjects of criticism. And, indeed, organizations and individuals in this district frequently find themselves the target of

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declining jurisdiction over state law claims); *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-2824, 2019 WL 281370, at *18 (N.D. Cal. Jan. 22, 2019) (dismissing RICO claims and claims as to 292 out of 294 allegedly defamatory statements); *id.*, 2020 WL 8877818 (Apr. 22, 2020) (granting fees motion); *id.*, 2023 WL 3568077 (Apr. 21, 2023) (granting summary judgment on remaining claims). Resolute's appeal to the Ninth Circuit remains pending. *See* 23-15782 (9th Cir.).

[7] *Free Speech Under Attack (Part III): The Legal Assault on Environmental Activists and the First Amendment*: Hearing Before the Subcomm. On Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform, 117th Cong. 9 (2022), https://tinyurl.com/345wx5ym. The next day Rep. Raskin introduced a federal anti-SLAPP statute. *See* SLAPP Protection Act of 2022, H.R. 8864.

SLAPPs concerning public interest advocacy and political activism.[8] In testimony submitted to the D.C. Council in support of the initial passage of the Act, ACLU-DC described two cases in which it represented two such D.C. residents; in both cases, the defendants prevailed, but only after years of litigation that would have been prohibitively expensive without pro bono counsel from ACLU-DC.[9] The division's decision gutting one of the core protections of the Act leaves speech connected to our nation's capital uniquely vulnerable to the weaponized litigation the Council sought to prevent. The full court should grant the petition for rehearing on this exceptionally important issue and reverse the division's decision.

II. REQUIRING "FULL DISCOVERY" TO RESOLVE THRESHOLD ISSUES IN DEFAMATION CASES CHILLS SPEECH

The division's decision to remand the case for discovery on the "public official" and "republication" questions has a similarly adverse impact on the public's

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[8] *See, e.g.*, *Am. Studies Ass'n v. Bronner*, 259 A.3d 728 (D.C. 2021) (nonprofit research organization sued by former members over positions organization took on Israel-Palestine conflict); *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021) (international human rights organization sued by former Liberian government officials for publishing report about alleged corrupt oil leases involving major oil company); *Hindu Am. Found. v. Viswanath*, 646 F. Supp. 3d 78, 86 (D.D.C. 2022) (activists and academic sued by political organization over criticism of ties between organization and Hindu nationalist figures in Indian government).

[9] *See* Council Report, Attachment at 2-4 (discussing *Father Flanagan's Boys Home v. Dist. of Columbia, et al.*, No. 01-1735 (D.D.C.), *aff'd*, No. 02-7157, 2003 WL 1907987 (D.C. Cir. Apr. 17, 2003), and *Guam Greyhound, Inc. v. Dorothy Brizill*, 2008 Guam 13, 2008 WL 4206682 (Guam Sept. 11, 2008)).

ability to speak out about the powerful without fear of protracted litigation.

Public interest organizations frequently criticize government officials similar to the plaintiffs in this case. Government officials with the levels of responsibility held by the plaintiffs in this case are exactly the types of figures courts do not hesitate to hold must meet the heightened actual malice standard.[10] A defendant criticizing these individuals' performance of their official duties should not be required to wait until after the completion of costly, time-consuming "full discovery" before resolving the threshold question of what standard of fault will apply.

Lastly, public interest organizations frequently publish reports online that, for the convenience of readers, include hyperlinks to the sources the reports cite. The division's holding that inclusion of such links may effectively constitute *publication* of those sources for defamation purposes is contradicted by the overwhelming weight of authority and will only further serve to chill robust reporting and advocacy.

CONCLUSION

For the foregoing reasons, amici respectfully urge the court to grant appellees' petitions for rehearing en banc and reverse the division's decision.

Dated: October 27, 2023

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[10] *See generally Garrison v. Louisiana*, 379 U.S. 64, 76–77 (1964) ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.").

Respectfully submitted,

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APPENDIX A

Amazon Watch is a nonprofit organization focused on protecting the rights of Indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people and farmers living in and around the "Oriente" region of the Ecuadorian Amazon, where the operations of Chevron's predecessor, Texaco, caused one of the worst environmental disasters in history. For two decades, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities' efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

The American Civil Liberties Union of the District of Columbia (ACLU-DC) is the Washington, D.C., affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil liberties of all Americans, including their right to freedom of speech. The ACLU-DC played a leading role in supporting passage of the D.C. Anti-SLAPP Act, and, having represented defendants in several SLAPP suits, is familiar with the intimidating effect such lawsuits can have on free speech.

Breach Collective partners with communities on the front lines of the climate crisis to advance justice through locally-driven campaigns rooted in the power of grassroots organizing, legal advocacy, and human stories. Breach Collective has an

interest in ensuring that communities can draw attention to corporate malfeasance and hold polluters accountable without fear of being targeted by meritless litigation.

The Center for Biological Diversity (the "Center") is a non-profit organization that works through science, law, and creative media to ensure the preservation, protection, and restoration of biodiversity, native species, wild places, and public health. The Center has more than 1.7 million members and online activists, with staff and offices in the District of Columbia and other locations. The Center carries out a significant part of its advocacy and litigation work in the District of Columbia. In pursuit of its mission, the Center has a strong interest in ensuring that robust and effective anti-SLAPP laws are enforced, including in the District of Columbia.

The Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the "Protect the Protest" Task Force's litigation, advocacy, education and outreach work.

Direct Action Everywhere (DxE) is a grassroots network of animal activists working to achieve revolutionary social and political change for animals. DxE's work includes community organizing, public outreach, demonstrations, investigations, animal rescues, and legal advocacy.

Electronic Frontier Foundation (EFF) is a member-supported, nonprofit organization that has worked for more than 30 years at the intersection of civil liberties and technology. On behalf of its more than 34,000 dues-paying members, EFF's lawyers, activists, and technologists work to protect free expression, privacy, and innovation in the digital world. EFF has advocated against abusive SLAPP suits and for strong anti-SLAPP laws in the states and at the federal level, particularly through participation in Protect the Protest and the Public Participation Project. EFF, based in San Francisco, also regularly works in D.C. by meeting with members of Congress and federal agencies, speaking on panels in the District, filing comments on proposed federal agency regulations, and filing briefs in D.C. courts.

Greenpeace, Inc. (Greenpeace) is an independent campaigning organization, which uses non-violent, creative confrontation to expose global environmental problems, and to force the solutions which are essential to a green and peaceful future. Greenpeace, which maintains an office in Washington, D.C., campaigns to keep coal, oil, and gas in the ground and build a United States powered by 100 percent renewable energy. It is currently a defendant in two multi-year SLAPPs aimed at silencing its advocacy.

The International Corporate Accountability Roundtable (ICAR) is a nonprofit organization that fights to end corporate abuse of people and planet by

advocating for legal safeguards that hold big businesses accountable. ICAR currently acts as the secretariat organization for the Protect the Protest task force.

The Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

People for the Ethical Treatment of Animals, Inc. (PETA) is the largest animal rights organization in the world, together with its affiliates having more than 9 million members and supporters. It maintains an office in Washington, D.C., blocks away from the White House. PETA is guided by the principles that animals are not ours to experiment on, eat, wear, use for entertainment, or abuse in any other way. PETA's advocacy has made it a target of litigation, and it has used anti-SLAPP statutes to obtain dismissal or otherwise resolve multiple lawsuits, including one in Washington, D.C.

The Union of Concerned Scientists is a national non-profit organization that puts rigorous, independent science to work to solve our planet's most pressing problems. With offices in Washington, DC and three other cities, the organization combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, I caused the foregoing Brief of Amici Curiae Public Interest Advocacy Organizations to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated October 27, 2023

/s/ Laura R. Handman
Laura R. Handman

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

   - An individual's social-security number
   - 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/ Laura R. Handman
Signature

20-cv-0318
Case Number(s)

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10/27/2023
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