Nos. 22-CV-0274 & 22-CV-0301

DISTRICT OF COLUMBIA COURT OF APPEALS

Felicia M. Sonmez,

Appellant/Cross-Appellee,

v.

WP Company LLC *et al*.,

Appellees/Cross-Appellants.

On Appeal from the Superior Court of the District of Columbia,
No. 2021 CA 002497 B (Anthony C. Epstein, J.)

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF CROSS-APPELLEE SONMEZ ON THE SLAPP ISSUE

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union
Foundation of the District of
Columbia
915 15th Street, NW – 2nd floor
Washington, D.C. 20005
(202) 457-0800
aspitzer@acludc.org

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1, amicus American Civil Liberties Union of the District of Columbia hereby certifies that it is a non-profit membership corporation, that it has no publicly held parent corporation, and that there is no publicly held corporation that owns 10% of more of its stock (as it has issued no stock).

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Auth orities chiefly relied upon are indicated with an asterisk.

Statutes and Regulations

Other Authorities

INTEREST OF AMICUS[1]

The American Civil Liberties Union of the District of Columbia (ACLU) is a nonprofit membership corporation that strives to defend and expand the civil rights and civil liberties of the people of Washington, D.C., through litigation, legislative advocacy, and public education. It is the local affiliate of the American Civil Liberties Union, a nationwide organization that pursues similar goals. The ACLU was the principal non-government entity involved in drafting and advocating for passage of the D.C. Anti-SLAPP statute and has filed amicus briefs in other cases involving that statute in this Court and in the Superior Court, *e.g., Snyder v. Creative Loafing, Inc*., No. 2011 CA 3168, 2011 WL 9699196 (D.C. Super. 2011); *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014); *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016); *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1219 (D.C. 2016).

As that history makes plain, the ACLU strongly supports the vigorous enforcement of the D.C. Anti-SLAPP Act. At the same time, the ACLU strongly supports the right of access to the courts, particularly for civil rights cases. Too broad a reading of the Anti-SLAPP Act could deter the filing of meritorious civil rights cases in situations that pose none of the dangers the Anti-SLAPP Act were intended to address. The ACLU submits this brief in the hope that it will assist the Court in striking the proper balance.

[1] Pursuant to Rule 29(a)(2), this brief is being filed with the consent of all parties.

ARGUMENT

Ms. Somnez's Claims Against the Washington Post are Not SLAPPs.

The language and legislative history of the D.C. Anti-SLAPP Act demonstrate that—contrary to the argument of the Washington Post and its amici—the Act's protection is not coextensive with that of the First Amendment; it is in some respects broader and in other respects narrower. While the Act provides important procedural protections to defendants sued regarding some speech that is not constitutionally protected (*e.g.,* defamation), it provides no protection to some categories of speech or activity that *are* constitutionally protected: speech that does not "communicat[e] views to members of the public"; speech that is not made "in connection with an issue of public interest"; conduct that may facilitate communication but that is not "expressive."

Construing the D.C. Anti-SLAPP Act in accordance with its careful drafting is essential to ensure that the Act applies where it is meant to apply but does not sweep in a broad range of lawsuits that are not SLAPPs, including many discrimination claims. The fact that the Superior Court declined to interpret the Act's scope as coextensive with the First Amendment's is not, as the Post and its amici would have it, proof that the court erred, but rather entirely consistent with the strong protection, but limited scope, of the Act.

A. The Anti-SLAPP Act's Text and Legislative History Contradict the Post's Theory.

In 1996, law and sociology professors at the University of Denver identified a widespread pattern of abusive lawsuits that they dubbed "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (1996). SLAPPS "are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right[s] or to punish them for doing so." *Blumenthal v. Drudge,* Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001). As legislatures around the nation became aware of this abusive practice, they began to enact anti-SLAPP statutes to deter the filing of SLAPPs, to enable such lawsuits to be quickly dismissed if they are filed, and to shift the costs of litigation onto the party that filed the SLAPP.

In June 2010, D.C. Councilmembers Mary Cheh and Phil Mendelson introduced Bill 18-893, titled the "Anti-SLAPP Act of 2010." *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010," Nov. 19, 2010 ("Committee Report"), at 4.[2] The bill was directly modeled on a bill pending in Congress, called the "Citizen

[2] The Committee Report is available at https://lims.dccouncil.gov/downloads/LIMS/23048/Committee_Report/B18-0893-CommitteeReport1.pdf.

Participation Act of 2009," H.R. 4364 (111th Cong., 1st Sess.). *See* Committee Report at 4 ("As introduced, this measure closely mirrored the federal legislation introduced the previous year.").[3] Like its congressional model, the bill defined a SLAPP; provided that a defendant could file a "special motion to dismiss" any claim that was asserted to be a SLAPP; required expedited consideration of such a motion; required dismissal of any claim that was found to be a SLAPP because the plaintiff could not demonstrate (in most cases prior to discovery) that the claim was likely to succeed on the merits; and authorized an award of fees to a prevailing defendant. *See* Committee Report at 10–13 (Bill 18-893 as introduced).

For obvious reasons, the definition of a SLAPP was the most critical portion of the bill, because it drew the line between lawsuits that would be subject to these special procedures—including prompt dismissal before discovery with the award of fees—and lawsuits that would not be subject to these special procedures.

In that regard, at the public hearing on the bill, the ACLU proposed several clarifying amendments to the definition of SLAPPs and the coverage of the statute. The Council's Judiciary Committee adopted several of those amendments, two of which are of particular importance here.

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[3] The text of the federal bill (which was not enacted) is available at https://www.govinfo.gov/content/pkg/BILLS-111hr4364ih/pdf/BILLS-111hr4364ih.pdf. (In a typographical error, the Committee Report incorrectly cites the congressional bill as H.R. 4363 rather than 4364.)

First, the introduced bill began by using the term "Act in furtherance of the right of free speech" to describe the conduct that would be protected by a special motion to dismiss. Bill 18-893 as introduced, § 2(1).[4] The ACLU suggested, however, that

> it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. . . . This specially-defined term deserves a special name that will not require a struggle to use correctly. We suggest "Act in furtherance of the right of advocacy on issues of public interest."

Testimony of the American Civil Liberties Union of the Nation's Capital by Arthur B. Spitzer, Legal Director, on Bill 18-893, the "Anti-SLAPP Act of 2010" (September 17, 2010) ("ACLU testimony"), at 4.[5] The Committee accepted that suggestion, and the revised language appears in the statute as enacted. D.C. Code § 16-5501(1). Thus, the Council very deliberately decided that it was protecting something different from the "right of free speech."

Second, the ACLU recommended amending another portion of the definition of what the bill would protect. As introduced, SLAPPs were defined to include

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[4] The bill as introduced is reproduced in the Committee Report as Attachment 1, beginning on p. 10 of the PDF document.

[5] The ACLU's written testimony is reproduced in the Committee Report as Attachment 2, beginning on p. 14 of the PDF document.

certain public "written or oral statement[s] . . . or . . .

> *Any other conduct* in furtherance of the exercise of the constitutional right to petition the government or the *constitutional right of free expression* in connection with an issue of public interest.

Bill 18-893 as introduced, § 2(1)(B) (emphasis added). The ACLU explained that this language had things

> backwards—it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. . . . [Y]et the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

ACLU Testimony at 5 (emphasis in original). It therefore recommended replacing that language with:

> 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.

(Emphasis added.) The Committee accepted that suggestion as well, and the revised language appears in the statute at D.C. Code § 16-5501(1)(B). This amendment also made clear that the Act was not intended to simply codify the First Amendment and provide for fee-shifting in First Amendment cases.

The Council adopted the Anti-SLAPP bill in the form recommended by the Judiciary Committee, and it became effective in 2011.

Thus, the Anti-SLAPP Act was carefully tailored to serve the specific purpose of "allowing defendants to quickly dispense with suits 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Fells v. Service Employees Int'l Union*, 281 A.3d 572, 579 (D.C. 2022) (quoting *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (in turn quoting the Committee Report, at 1). The Act was *not* designed to provide, on a categorical basis, a more aggressive screen-out mechanism for *any* lawsuit that would ultimately fail on First Amendment grounds. It is therefore not correct to say that the Act provides "broader" protection than the First Amendment, as the Post and its media amici say. *See* Post Opening Br. at 50 n.5; Media Br. at 10. Nor would it be correct to say that the Act provides narrower protection than the First Amendment. It provides *different* protection—broader in some respects and narrower in others—because it serves a different purpose.

An example of how the Act is broader than the First Amendment: defamation is not protected by the First Amendment, yet an allegedly defamatory statement made in the course of a public debate would be properly subject to a special motion to dismiss under the Act and a plaintiff seeking damages for alleged defamation would have to "put his evidentiary cards on the table" at an early stage and will be "liable for the defendant's costs and fees if the motion succeeds." *Competitive Enterprise Institute*, 150 A.3d at 1238.

An example of how the Act is narrower than the First Amendment: the right to read *Mein Kampf* in one's own backyard is clearly protected by the First Amendment, yet a lawsuit seeking damages for severe emotional distress caused by the plaintiff's peeking over the fence and seeing his next-door neighbor reading *Mein Kampf* would not be subject to an anti-SLAPP motion, because the First Amendment-protected activity of reading has nothing to do with communicating views to members of the public. Similarly, the First Amendment protects the right of a coffee shop to claim that its brew is the best in town. But a lawsuit seeking damages for false advertising, brought by a consumer who bought a cup and found it disgusting, would not be subject to an anti-SLAPP motion, because that First Amendment-protected activity was "directed primarily toward protecting the speaker's commercial interests." D.C. Code § 16-5501(3); *see Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 142 (D.C. 2021) (statement about legal dispute between property buyer and title company was not in connection with issue of public interest).

Consistently with the statute's language and drafting history, this Court has explained that the Act "provides a highly specific definition of the class of acts that the Anti-SLAPP Act shields. It carefully limits that class to *certain categories* of speech, with the identified aim of protecting 'the right of advocacy on issues of public interest.' . . . [T]he party filing a special motion to dismiss a claim must show that some form of speech within the Anti-SLAPP Act's protection is the basis of the

asserted cause of action." *American Studies Ass'n v. Bronner*, 259 A.3d 728, 746 (D.C. 2021) (emphases altered).

The arguments made by the Post and its amici in this case ignore this straightforward meaning of the statute, and rest on the unfounded, and incorrect, assumption that the D.C. Anti-SLAPP Act must protect whatever the First Amendment protects. Thus, for example, the Post cites several cases for the proposition that the behind-the-scenes work of editors and publishers is protected by the First Amendment. *E.g., Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (the exercise of "editorial discretion in the selection and presentation" of programming is protected); *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (a newspaper's choice of writers is protected). The Superior Court agreed with that proposition, *see* Mem. Op. at 26, JA 173 ("The Court does not doubt that a newspaper's decisions about assignment of reporters or about adoption and enforcement of a code of ethics for its reporters is protected by the First Amendment and that these actions are in furtherance of a newspaper's constitutionally protected freedom of the press."). Amici need not address that proposition here, though, because true or false, it does not answer the question whether claims arising from such behind-the-scenes work are covered by the D.C. Anti-SLAPP Act.

B. Ms. Sonmez's Claims Challenging the Post's Assignment Decisions Are Not SLAPPs.

The Act applies where there is "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." D.C. Code § 16-5501(1)(B) (emphasis added).

The Post and its amici make much of the distinction between "expression" and "expressive conduct," and urge that the presence of the latter term makes clear that the Act covers more than literal speech. That is correct. Under the Anti-SLAPP Act, as under the First Amendment, conduct that involves "an 'intent to convey a particularized message . . . [where] the likelihood [is] great that the message would be understood by those who viewed it'" is treated as speech. *See, e.g., Potts v. United States*, 919 A.2d 1127, 1130 (D.C. 2007) (demonstrators wearing prison garb on Supreme Court plaza to protest mistreatment of prisoners at Abu Ghraib and Guantanamo were engaged in expressive conduct) (quoting *Texas v. Johnson,* 491 U.S. 397, 404 (1989)). Such expressive conduct includes many of the activities involved in archetypical SLAPP suits—picketing, attending rallies, posting lawn signs, wearing message t-shirts, distributing handbills. The D.C. Anti-SLAPP statute's procedural protections certainly apply to lawsuits arising from such conduct

and other expressive conduct (*e.g.,* displaying a large inflatable "scab rat"[6])—"anything that is expressive and communicates views to members of the public." *Fells v. Service Employees Int'l Union*, 281 A.3d at 580.

But the Post and its amici ignore the rest of the Act's statutory definition, which requires the conduct at issue in the lawsuit to involve "communicating views to members of the public" (or, less relevant here, "petitioning the government"). D.C. Code § 16-5501(1)(B). A newspaper's behind-the-scenes work of choosing which reporter to assign to a story, to whatever extent it is protected by the First Amendment, is not covered by the Anti-SLAPP Act because the act of assigning a reporter does not itself "communicat[e] views to members of the public." Indeed, it may never be known to the public at all: the communication to the public—the byline of the reporter who writes an article—conveys to the reader only the name of the reporter who wrote the article, not that a different reporter was considered for the article and passed over for it, or that a reporter who had previously written on that subject had been pulled off the beat rather than, for instance, gone on vacation.

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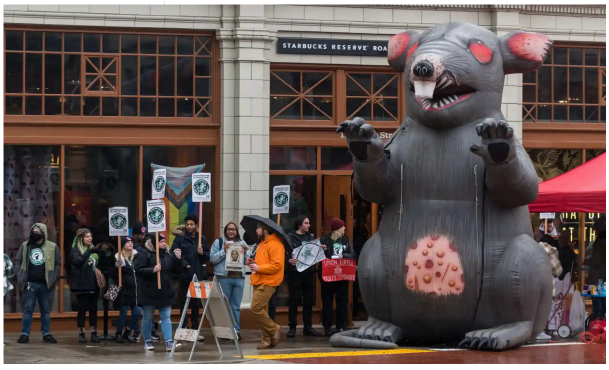

It is surely an issue of public interest whether a reporter who "had become an 'activist" and 'taken a side on the issue' by 'speaking out' on matters like 'the need for transparency' on accusations of sexual assault," would give "the appearance of a conflict" of interest were she assigned to cover the #MeToo movement. Post Opening Br. at 17-18. Thus, had the Post made public statements about its reassignments of Ms. Sonmez and its reasons therefor, and had Ms. Sonmez filed a lawsuit claiming that those statements defamed her or otherwise tortiously harmed her (*e.g.,* by conveying the message that she was an incompetent or unethical journalist), her claims would have been the proper subjects of a special motion to dismiss under the Anti-SLAPP Act because they would have arisen from the Post's "expression … communicating [its] views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

But Ms. Sonmez's claims arise from no such public expression. Therefore, Ms. Sonmez's suit is not about expression or expressive conduct that "involve[d] . . . communicating . . . to members of the public." Accordingly, her claims are not SLAPPs.[7]

[7] The Post did allegedly make a public statement that Ms. Sonmez's "tweets about the death of Kobe Bryant . . . displayed poor judgment that undermined the work of her colleagues." Complaint ¶ 84, JA 37. The Superior Court properly held that a claim based on that public statement was subject to the Anti-SLAPP Act's procedural protections. Mem. Op. 24-25 n.16, JA 171-72. But Ms. Sonmez is not pursuing any claim based on that public statement. *See* Sonmez Opening Brief at 17 n.3; Sonmez Reply/Response Brief at 5 n.2.

The First Amendment protects many private activities—watching a video, keeping a diary, hosting a book club in one's home, singing in the shower. Lawsuits arising from such private conduct (*e.g.*, a tort suit claiming that a book club's reading and discussion of *A Parent's Guide to Preventing Homosexuality* inflicted great emotional distress on the plaintiff) might be subject to dismissal on constitutional grounds, but they would not be SLAPPs within the meaning of the District of Columbia's Anti-SLAPP Act. Similarly, the First Amendment protects many activities that have an instrumental relationship to public expression—buying paper and ink; opening a Twitter account; hiring a public relations firm. Lawsuits arising from such conduct (*e.g.*, a tort suit claiming that the defendant's hiring of the plaintiff's ex-spouse's public relations firm inflicted great emotional distress on the plaintiff) might be subject to dismissal on constitutional grounds, but they would not be SLAPPs within the meaning of the D.C. statute.

The same is true of the Post's decisions about whom to hire, whom to fire, whom to assign to which beat, and which stories to cover. Those decisions may ultimately affect the Post's communication of its views to the public, but they are not themselves expressive acts that involve communicating views to the public. The same is true of a newspaper's decision to borrow money to buy a color printing press—the direct result of which will be the communication of more (literally) colorful news to the public (*see*, *e.g.*, n.6, *supra*). That decision involves editorial

judgment—is it better journalism to have color photographs in the newspaper or to have more reporters on staff?—but the act of borrowing money, or buying a printing press, even by a media company, is not expressive conduct, much less expressive conduct that "involve[s] . . . communicating . . . to members of the public." Such acts are therefore outside the protection of the D.C. Anti-SLAPP Act.

C. The California Anti-SLAPP Law Was Not the Model for the D.C. Law and the California Cases Are Not Persuasive Authority Here.

The Post and its amici rely heavily on cases applying the California anti-SLAPP law. *See* Post Opening Br. 16–18; Media Br. 12-14. The amici even assert that the D.C. Act is "is modeled on California's Anti-SLAPP Act," *id.* at 12 n.3 (internal quotation marks and citation omitted). But that is not true; as explained above, *supra* at 3-4, the D.C. bill as introduced "closely mirrored" a congressional bill that did not closely resemble the California law. Committee Report at 4. And the D.C. bill was then amended to make it even more different, *see supra* at 5-6. Thus, in *Saudi American Public Relations Affairs Comm. v. Institute for Gulf Affairs*, 242 A.3d 602 (D.C. 2020), this Court made clear that the D.C. statute was not modeled on any particular state's anti-SLAPP law, and that this Court would not "selectively follow other state court decisions," but would look to "basic principles of statutory interpretation" and "the plain language of the [D.C.] statute" to construe the D.C. law. *Id*. at 611.

The media amicus brief, at 12 n.3, cites three cases for the proposition that the D.C. statute was modeled on California's, but those cases provide little support. The first case, *Mann v. National Review, Inc*., No. 2012 CA 008263 B, 2013 WL 4494942 (D.C. Super. July 19, 2013), *aff'd in part, rev'd in part, and remanded sub nom. Competitive Enterprise Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018), states that the D.C. Act is modeled on "*case law from California*," not on the California statute. 2013 WL 4494942 at *5 (emphasis added). However, even that is incorrect; no California case is cited or referred to in the Committee Report. The second case, *American Studies Ass'n v. Bronner*, 259 A.3d 728, 746 (D.C. 2021), states only that California has a "similar anti-SLAPP statute," which is true in the sense that all anti-SLAPP statutes are generically similar. The third case, *Boley v. Atlantic Monthly Grp.*, 950 F. Supp. 2d 249 (D.D.C. 2013), notes only that California "has a well-developed body of anti-SLAPP jurisprudence," which is true but not relevant to the point.

Nevertheless, the Post relies in particular on *Wilson v. Cable News Network, Inc.*, 444 P.3d 706 (Cal. 2019). But the *Wilson* decision rested specifically on the language in the California statute that "protects 'any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest,'" *id.*, 444 P.3d at 713 (quoting Cal. Code Civ. P. § 425.16(e)(4)), which is almost precisely the

"constitutional right" terminology that was removed from the D.C. bill. It follows that *Wilson* and the other California cases are hardly relevant, as the Superior Court correctly concluded. *See* Mem. Op. 26, JA 173.

The Post assails the Superior Court's reliance on this legislative history, stating that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation." Post Opening Br. at 19. But the Post's premise is wrong: the legislative history here does not involve a "failed proposal." It involves a successful proposal: language that would support the Post's position was deliberately deleted and intentionally replaced with language that does not support the Post's position. Indeed, this Court has noted that "[t]he legislative history of the Anti-SLAPP Act is also informative" regarding the scope of the Anti-SLAPP Act's coverage. *American Studies Ass'n*, 259 A.3d at 747.

The Post also claims that the committee amendments to the D.C. bill were immaterial, "because the Council ultimately *did* extend protection to at least one category of conduct: 'expressive conduct.'" Post Opening Br. at 19. But the difference between the language in the original bill ("*Any other conduct* in *furtherance* of the exercise of the constitutional right") and the language in the Act as adopted ("*expressive* conduct that *involves* petitioning the government or *communicating* views to members of the public") is hardly immaterial. As we have explained, that amendment effectuated two important distinctions from the

California law: the distinction between *any* conduct and *expressive* conduct, and the distinction between *behind-the-scenes* conduct and conduct that *communicates views* to the public.

D. The Media Amici's Hypothetical Cases Illuminate the Flaws in the Post's Position.

Like the Post, the media amici want this Court to hold that the Anti-SLAPP Act is coterminous with the Constitution. *See* Media Br. at 15 (finding fault with the fact that that "The Superior Court's Narrow Interpretation of the D.C. Act Leaves a Substantial Amount of Constitutionally-Protected Activity Uncovered" (heading)). They present six hypothetical lawsuits, *id.* at 15-16, each of which they believe ought to be deemed a SLAPP. It is useful to analyze them to understand why they would or would not be:

- *a Logan Circle developer's lawsuit against a reporter claiming she "trespassed" on his property in the course of gathering news about him, if such newsgathering does not ultimately become a story.*

The act of trespassing does not generally involve "communicating views to members of the public," whether it is done by a reporter or by a peeping tom. One can imagine instances of trespassing that *could* constitute expressive conduct that communicates with the public—for example, a group of Native Americans marching across private property to communicate their view that it was stolen from their ancestors—but there is no reason to think the D.C. Council intended to immunize

trespassing by reporters when it was instrumentally connected to their reporting, and nothing in the statute so provides.

> • *a D.C. Council candidate's lawsuit against a news organization, in an attempt to thwart its reporting about him, for "intrusion" or "intentional infliction of emotional distress."*

This hypothetical is unilluminating because it is vague enough to describe both SLAPPs and non-SLAPPs. A candidate's lawsuit seeking damages for invasion of privacy or intentional infliction of emotional distress based on embarrassing information about him published in a news report or an editorial would of course be subject to a special motion to dismiss, and would survive such a motion only if the candidate could show that his claim was likely to succeed on the merits (because, for example, the information that was published was known to be false). On the other hand, a lawsuit seeking damages for invasion of privacy or intentional infliction of emotional distress based on the candidate's discovery of a hidden camera planted by the news organization in his bedroom, which had recorded his intimate moments with his spouse, would not be properly subject to a special motion to dismiss.

> • *a lawsuit against the 9:30 Club based on its decision not to book a particular heavy-metal band based on its view that the band's lyrics are too violent.*

Like the previous hypothetical, this one might or might not describe a SLAPP. If the 9:30 Club announces publicly that it is not booking the band because its lyrics are too violent, that is an expression of views to the public in connection with an

issue of public interest. A lawsuit arising out of that announcement (for, *e.g.,* interference with prospective business relationships) would be subject to an anti-SLAPP motion. The underlying decision not to book the band is also protected by the First Amendment. On the other hand, if the Club makes no public announcement and simply doesn't book the band, a lawsuit by the disappointed band members or a disappointed fan is not properly subject to an anti-SLAPP motion, because no message has been communicated to the public. Nor is it easy to see how it would survive a 12(b)(6) motion to dismiss, unless it involved a claim for breach of contract.

> • *a lawsuit against a news organization based on its passive receipt of opposition research against a political candidate that it decides not to publish.*

It is hard to imagine what claims this hypothetical lawsuit would include. Failure to close one's transom window is not a tort, nor is failure to publish. In any event, the news organization apparently engaged in no communication of any kind, so the lawsuit is not a SLAPP. If the imaginary lawsuit seeks injunctive relief ordering the news organization to publish a story based on the information it received, it is still not a SLAPP, but would nevertheless be dismissed for failure to state a claim on which relief could be granted; the First Amendment protects the news organization's freedom not to speak.

- *a male actor's discrimination lawsuit against a Kennedy Center production company's failure to be cast in a production of* The Women.

- *a discrimination lawsuit arising out of the* [sic] *a D.C. television producer's decision to write a particular character out of a new show.*

These two hypothetical cases present similar issues, so we discuss them together.

The Women is a comedy of manners that was written, in 1936, for an all-female cast. *See* https://en.wikipedia.org/wiki/TheWomen(play). Putting an all-female cast on stage in 2023 could reasonably be deemed "expressive conduct" that communicates to the public the producer's view that the play still ought to be presented with an all-female cast. (A similar communication in connection with an issue of public interest might be a production of *Othello* with an all-Black cast except for a white Othello.) A lawsuit by a male actor alleging that he was denied a role in *The Women* because of his sex would therefore properly be subject to a special motion to dismiss. Whether the lawsuit would be dismissed on such a motion would depend upon (1) whether the actor could make a "production or proffer of evidence that supports the claim," *Competitive Enterprise Institute v. Mann*, 150 A.3d at 1233, *i.e*., that he was objectively better qualified than the actor(s) who were hired; and (2) the applicable substantive law, *i.e.,* whether sex is a bona fide occupational

qualification for the role,[8] or if not, whether the producer's First Amendment right to communicate such a message supersedes the relevant antidiscrimination statute.

In the TV show hypothetical, assuming that it is (based on its content) the expression of views to the public about an issue of public interest, a claim challenging the content of the show *as broadcast* for the failure to include a particular character would be subject to a special motion to dismiss for the same reasons as the play example. That claim could also run up against the First Amendment for the same reasons.

The media amici complain that "[i]n all these examples, no matter how meritless the lawsuit may be, under the Superior Court's reasoning, the defendant content creator could be unable 'to quickly and equitably end' that meritless suit." Media Br. at 16 (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014)).[9] But that is not correct. First Amendment rights remain enforceable in D.C. courts, even in cases that are not SLAPPs. Where a non-SLAPP lawsuit is plainly meritless on

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[8] *See* EEOC regulations, 29 C.F.R. § 1604.2: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g.,* an actor or actress."

[9] The media amici's use of the phrase "content creator" to describe the defendants in their hypothetical cases is telling. The Anti-SLAPP Act was not enacted to protect "content creators." It was enacted to enhance "a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the *expression* of opposing points of view." Committee Report at 1 (emphasis added).

the face of the complaint (for example, the hypothetical lawsuit against a news organization based on its passive receipt of opposition research against a political candidate that it doesn't publish) it can be quickly and equitably dismissed on an ordinary motion to dismiss.

In this case, the Post declined to press its independent First Amendment defense in the Superior Court, *see* Mem. Op. at 12 n.4, JA 159 ("At the hearing on March 18, 2022, the Post stated that its First Amendment argument is subsumed in its special motion to dismiss."), perhaps because it did not wish to be seen arguing that it was free to discriminate based on sex in its assignment of reporters, and perhaps because it is not actually clear that a newspaper *is* free to discriminate based on sex in its assignment of reporters.[10] If the Post had pressed its First Amendment argument, and if its position on the law is correct, Ms. Sonmez's lawsuit would have been subject to dismissal on that ground without resort to the Anti-SLAPP statute; the only difference would have been the absence of a fee-shifting provision.

[10] *Cf. Associated Press v. NLRB*, 301 U.S. 103, 131 (1937) (rejecting as "an unsound generalization" the AP's argument that "it must have absolute and unrestricted freedom to employ and to discharge those who … edit the news"); *Mabee v. White Plains Pub. Co*., 327 U.S. 178, 184 (1946) (rejecting argument that application of Fair Labor Standards Act to newspaper violated First Amendment); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels*., 413 U.S. 376 (1973) (rejecting argument that First Amendment protected newspaper's editorial judgment to run "Male Help Wanted" and "Female Help Wanted" employment advertisements).

The Post has apparently waived its right to seek fees if it prevails on its special motion to dismiss in this case. *See* Mem. Op. 24 n.14, JA 171. To the extent that is a litigation tactic intended to encourage granting the motion, it should be disregarded. Once the news media have obtained a ruling from this Court that their instrumental activities (behind-the-scenes decisions about hiring, firing, assignments, what stories to cover, what kind of advertising to accept, etc.) are covered by the Anti-SLAPP law, they may not hesitate to seek fees in future cases. As a result of such a ruling, employees of media companies with weighty discrimination cases might be chilled from filing their cases at all for fear of being forced to pay their opponents' fees.

For example, consider a potential discrimination lawsuit by a Black reporter if the Post decided, behind the scenes, that it would not assign any Black reporter to cover the police killing of George Floyd on the ground that no Black reporter could maintain journalistic objectivity in such an assignment (although a white reporter could). Surely it was not the D.C. Council's intent—nor is it the design of the Anti-SLAPP law—to deter or punish the filing of such a claim.

* * *

The fundamental mischief addressed by anti-SLAPP statutes is the bullying conduct of wealthy business entities against local activists who cannot afford the expenses and risks of litigation. Of course the D.C. Anti-SLAPP statute is written in

generally applicable language, and in a proper case should be applied against any party who files a SLAPP. *See, e.g., Doe v. Burke*, 133 A.3d 569 (D.C. 2016) (awarding fees against individual who filed SLAPP claims). It is nevertheless ironic that the Washington Post seeks to use the Anti-SLAPP Act to protect itself from an employment discrimination suit brought by an individual ex-employee. The Post's gambit seeks to stretch the law that the Council enacted to help local activists into a law that will protect the institutional media for conduct far afield from the public expression of views on issues of public interest. The Superior Court properly rejected that gambit, and this Court should follow suit.

CONCLUSION

For the reasons given above, the judgment of the Superior Court denying the Post's special motion to dismiss filed pursuant to D.C. Code § 16-5502 should be affirmed.[11]

[11] Amicus expresses no views on the other issues in this appeal other than to observe, as Ms. Somnez has pointed out, *see* Somnez Opening Brief at 41-42, that the D.C. Circuit recently clarified that under federal law, an adverse employment action need not cause "objectively tangible harm." *Chambers v. District of Columbia,* 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc). This holding, which importantly returns federal employment discrimination law to its proper scope consistent with its text and purpose, is inconsistent with the Superior Court's statement that "[a]n adverse employment action 'must involve "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."'" Mem. Op. at 8, JA 155 (quoting *Kumar v. D.C. Water & Sewer Authority*, 25 A.3d 9, 17 (D.C. 2011)). While addressing this inconsistency may not be necessary to decide this case, the Court may wish to note it for the benefit of future litigants.

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Respectfully submitted,

Arthur B. Spitzer
Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman
American Civil Liberties Union
Foundation of the District of
Columbia
915 15th Street, NW – 2nd floor
Washington, D.C. 20005
(202) 457-0800
aspitzer@acludc.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2023, this brief was re-filed using the Court's e-filing system, and that all participants in this case are e-filers and were served with copies of this re-filed brief electronically via the Court's system.

Arthur B. Spitzer
Arthur B. Spitzer