No. 20-

IN THE

Supreme Court of the United States

MIKHAIL FRIDMAN, PETR AVEN,
AND GERMAN KHAN,

Petitioners,

v.

ORBIS BUSINESS INTELLIGENCE LIMITED
AND CHRISTOPHER STEELE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the District of Columbia Anti-SLAPP Act is applied to a lawsuit, the plaintiff is required to produce legally sufficient *evidence* for his claim, prior to the conduct of any discovery. In a defamation lawsuit, does the application of the Act to dismiss the claim of a public figure plaintiff—not afforded any discovery into the mental state of the defendant—violate the Due Process Clause and the principles laid down by the Court in *Herbert v. Lando*, when the dismissal is based on the plaintiff's failure to produce evidence of the defendant's subjective mental state of "actual malice"?

2. Whether, in the absence of any guidance from this Court on the scope of a "particular public controversy" giving rise to the defamation, the District of Columbia Court of Appeals' application of *Gertz v. Robert Welch, Inc.* was erroneously and unconstitutionally overbroad?

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STATEMENT OF RELATED CASES

- *Fridman v. Orbis Business Intelligence Limited*, No. 18-CV-919, District of Columbia Court of Appeals. Judgment entered June 18, 2020.

- *Khan v. Orbis Business Intelligence Limited*, Case No. 2018 CA 002667, Superior Court of the District of Columbia, Civil Division. Order filed August 20, 2018.

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PETITION FOR WRIT OF CERTIORARI

Mikhail Fridman, Petr Aven, and German Khan respectfully petition for a writ of *certiorari* to review the decision of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (1a-35a) is available at 229 A.3d 494. The opinion of the Superior Court for the District of Columbia (36a-66a) is unreported.

JURISDICTION

The final judgment of the District of Columbia Court of Appeals was entered on June 18, 2020. This Court's March 19, 2020 Order extended the deadline to file a petition for a writ of *certiorari* to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and (b). The notification required by Rule 29.4(c) has been made.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> [n]o person shall be . . . deprived of . . . liberty, or property, without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides, as relevant here:

> [N]or shall any State deprive any person of . . . liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

District of Columbia Code §16-5502(b) provides:

> 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.

District of Columbia Code §16-5502(c) provides:

> (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 is 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.

STATEMENT OF THE CASE

Introduction

Christopher Steele and his company, Orbis Business Intelligence Limited ("Respondents"), are the authors and publishers of the now infamous "Steele Dossier," a collection of seventeen memos created as part of a political opposition research project for the Hillary Clinton Campaign in 2016. All *but one* of those seventeen memos made allegations about then presidential candidate Donald Trump and his purported illicit connections to Russia. The one memo that did not mention Trump or his campaign became the subject of this lawsuit. Labeled "Company Intelligence Report 112" ("CIR 112")[1], that memo had a different theme. It alleged that three individuals, Mikhail Fridman, Petr Aven, and German Khan (the Plaintiffs below and Petitioners here), have a corrupt relationship with Vladimir Putin involving bribery and other misconduct.[2]

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1. Defendants' Memorandum of Points and Authority in Support of Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 at Ex. B, *Aven v. Orbis Business Intelligence Limited*, Case No. 2018 CA 002667 (D.C. Super. Ct. May 30, 2018).

2. CIR 112 is headlined "RUSSIA/US PRESIDENTIAL ELECTION: KREMLIN ALPHA GROUP CO-OPERATION." The body of CIR 112 does not attempt to support or otherwise address the notion that the "Alpha Group" or Petitioners cooperated with the Kremlin regarding the 2016 presidential

Respondents published the defamatory statements in the fall of 2016 by providing, directly and through agents, orally and in writing, the content of those defamatory statements to members of the media and others. 5a-6a, 39a, 49a-50a. The defamatory statements, as well as the sixteen other memos that came to be defined by the media singularly as the "Dossier," were first published in the media on January 10, 2017. 39a. On that date, the website of BuzzFeed, Inc. published a story titled "These Reports Allege Trump Has Deep Ties To Russia" (the "BuzzFeed Article"). *See id.* All seventeen Dossier Reports authored by Steele were attached to the online BuzzFeed Article, including CIR 112 and its statements defaming Petitioners. *Id.*

On April 16, 2018, Petitioners filed a Complaint against Respondents in the Superior Court for the District of Columbia asserting a claim for defamation. 6a.

The State Court Proceedings – D.C. Superior Court

Respondents moved to dismiss Petitioners' defamation Complaint (the "Special Motion to Dismiss") under the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.* (the "D.C. Anti-SLAPP Act"). *See* 3a, 36a. Under the D.C. Anti-SLAPP Act, if the Respondents made "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 was to be granted "unless the responding party demonstrates that the

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election. But its heading, even though completely unsupported by anything in the body of CIR 112, defamed Petitioners by implying that they and their company "Alpha" were cooperating with the Kremlin regarding the 2016 election.

claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Simultaneously, Respondents' motion triggered an automatic discovery stay:

> (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.C. Code § 16-5502.

Respondents argued in their Special Motion to Dismiss that Petitioners were "public figures at least for the limited purpose of this case."[3, 4] As limited purpose public figures, Petitioners would be required to prove "by clear and convincing evidence—that defendants acted with actual malice." 42a. Thus, according to Respondents,

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3. Defendants' Memorandum of Points and Authority in Support of Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 at 9, *Aven v. Orbis Business Intelligence Limited*, Case No. 2018 CA 18-2667 (D.C. Super. Ct. May 30, 2018); *see also* 56a.

4. Petitioners dispute that they are limited purpose public figures.

Petitioners were required to prove in their briefing that Respondents "either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." 43a.

In opposing the Special Motion, Petitioners requested leave to conduct discovery, asserting that the evidence required to show that Respondents "drafted and/or disseminated [CIR 112] with actual knowledge of or subjective doubts about its falsity" was "exclusively" within Respondents' control.[5] Citing this Court's precedents, Petitioners contended that they were entitled to discovery on the issue of actual malice in order to show a likelihood of success on the merits:

> In [*Herbert v. Lando,* 441 U.S. 153 (1979)], the Supreme Court held that defamation plaintiffs burdened with proof of actual malice are entitled to discovery on a media defendant's editorial process as a constitutional matter. 441 U.S. at 169-70, 175. Lando's claim of editorial privilege was rejected because it would impermissibly increase the burden on libel plaintiffs to demonstrate actual malice, and likely inhibit their ability to do so.[6]

Petitioners also sought discovery to explore the reason that Respondents were engaged to produce and publish

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5. Memorandum of Points and Authorities in Opposition to Defendants' Special Motion to Dismiss the Complaint Based on the D.C. Anti-SLAPP Statute at 24, *Aven v. Orbis Business Intelligence Limited*, Case No. 2018 CA 18-2667 (D.C. Super. Ct. July 6, 2018).

6. *Id.* at 25.

CIR 112 in the first place. That is, under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974), what controversy was it that gave rise to the defamation? Petitioners contended that the controversy giving rise to CIR 112 (and all of Steele's other reports) was a controversy related to the 2016 election—Donald Trump and his purported collusion with Russia—and Petitioners further argued that discovery was likely to supply evidence for this definition of the controversy.[7] There is no evidence in the record that Petitioners attempted to influence the outcome of any controversy involving the 2016 election.

On August 20, 2018, the Superior Court for the District of Columbia granted Respondents' Special Motion to Dismiss, concluding that the D.C. Anti-SLAPP Act required dismissal of the case because Respondents had made a *prima facie* case that the Act applied to the lawsuit and Petitioners, as limited purpose public figures, had failed to submit evidence that Respondents "knew any of this information was false or acted with reckless disregard of its falsity." 37a.[8] Concerning Petitioners' request for discovery, the Court rejected Petitioners' argument that Respondents were in exclusive control of evidence necessary to prove actual malice:

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7. *Id.* at 13-14.

8. In *Fridman v. Bean LLC,* 2019 U.S. Dist. LEXIS 7874, *13-14 (D.D.C. Jan. 15, 2019), in which Petitioners assert a defamation claim against the political opposition research firm which commissioned CIR 112, and against the firm's founder, the court declined to resolve the issue of whether Petitioners were public figures in denying the defendants' motion to dismiss under the D.C. Anti-SLAPP Act and FED. R. CIV. P. 12(b)(6), concluding that Petitioners' public figure status should be assessed with the benefit of discovery.

> Plaintiffs have not shown a likelihood that Defendants have information that will establish actual malice by clear and convincing evidence. If targeted discovery were justified solely by the fact that a defendant in a defamation case is the best, if not only, source of information about his subjective knowledge of the truth or falsity of the challenged statement, discovery would be justified in every Anti-SLAPP Act case.

64a. The Court also rejected Petitioners' reliance on *Herbert v. Lando*:

> Plaintiffs contend that "defamation plaintiffs burdened with proof of actual malice *are entitled to discovery of a media defendant's editorial process as a constitutional matter*." *See* Opp. at 24-25 (emphasis in original). However, the Constitution does not entitle plaintiffs in defamation cases to conduct fishing expeditions.
>
> * * *
>
> *Herbert* holds only that in a case where discovery is warranted, the First Amendment does not allow a media entity to claim absolute privilege over its editorial processes. *See Herbert*, 441 U.S. at 158, 175. *Herbert* does not hold that the Constitution gives an absolute right to discovery by any plaintiff who has the burden to show actual malice by clear and convincing evidence and who can only speculate that discovery will enable him to prove his case. 64a-65a.

The State Court Proceedings – D.C. Court of Appeals

On appeal, Petitioners raised the *Herbert v. Lando* issue concerning their request for targeted discovery:

> In light of the Supreme Court's holding in *Herbert v. Lando*, as well as the Act's allowance of targeted discovery when it "appears likely" that such discovery will "enable the plaintiff to defeat the motion," whether the Superior Court erred in holding that Plaintiffs were not entitled to targeted discovery focused on identifying the controversy giving rise to the publication of CIR 112 and Defendants' state of mind in connection with its publication.[9]

Petitioners argued that denial of targeted discovery was a violation of the D.C. Anti-SLAPP Act and due process rights in view of their constitutional burden, as alleged limited purpose public figures, to prove actual malice:

> Given that Plaintiffs have been subjected to such a burden, the Superior Court's denial of discovery even in light of the very real potential for discovery to produce helpful evidence for Plaintiffs was in substance the erection of the "impenetrable barrier" foreclosing inquiry into Defendants' state of mind of the kind that *Herbert v. Lando* disapproves.[10]

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9. Brief of Appellants at 3, *Fridman v. Orbis Business Intelligence Limited*, 18-CV-919 (D.C. Ct. App. Dec. 10, 2018).

10. *Id.* at 49-50.

The D.C. Court of Appeals rejected Petitioners' due process argument, finding no error in the denial of targeted discovery. It held that the standard for targeted discovery under the D.C. Anti-SLAPP Act is "difficult to meet," and the party seeking targeted discovery "must be able to articulate how targeted discovery will enable him to defeat the special motion to dismiss" and show "that it is 'likely' the discovery will produce that result." 33a.

Without addressing either Petitioners' *Herbert v. Lando* analysis or the constitutional dimensions of the "actual malice" standard, the Court of Appeals expressly agreed with the trial judge "that if courts relied solely on the premise that the defendants would have better access to what was in their minds at the time of publication, 'discovery would be justified in every Anti-SLAPP Act case.'" 34a. Nor did the Court of Appeals address whether discovery would have shed light on the scope of "the controversy giving rise to the defamation." While the Court of Appeals found that "[t]he key issue in this case is whether appellants can prove that CIR 112 was published with actual malice," it held that Petitioners had failed to show from the evidence available to them "that it 'appears likely' that information gained from deposing appellees will enable them to defeat the special motion to dismiss." *Id.*

Petitioners also argued on appeal that in applying the second prong of the Supreme Court's decision in *Gertz v. Robert Welch*, the Superior Court erred by failing properly to focus its analysis on the controversy "giving rise" to the defamatory statements, that is, "why CIR 112 was published." 22a. The Court of Appeals affirmed the trial court's ruling that Petitioners were limited purpose public figures after broadly defining the controversy:

> While gathering information about Mr. Trump and his connections to Russia may have been the motivation behind creating the dossier, CIR 112 focuses on the preexisting controversy surrounding Russian oligarchs and their influence upon the Russian government. . . . [T]he motivation leading to the creation of the Steele Dossier does not compel us to define the controversy differently than the Superior Court did. 23a.

Significantly, the Court of Appeals justified its analysis—as did the trial court—on the public's interest in matters Russian: ". . . we agree with the trial court that the 'U.S. public today continues to have a strong interest in Russia's relations with the United States and in the political and commercial relationships between Russian oligarchs and the Russian government.'" 21a.

REASONS FOR GRANTING THE WRIT

POINT I

Certiorari Is Warranted to Resolve the Conflict Between the D.C. Anti-SLAPP Statute's Foreclosure of Discovery and the Limitation Established by *Herbert v. Lando* on the *New York Times* "Fault" Doctrine

Certiorari should be granted because the Court has never addressed the important constitutional balancing issues posed by state anti-SLAPP statutes. These statutes, like District of Columbia Code §16-5502(c), severely restrict discovery in defamation cases when so applied, as they often are. This kind of restriction

on discovery is particularly harmful to the defamation claims of public figures for whom it presents an apparently insoluble conundrum. The claims of such plaintiffs, when subjected to an anti-SLAPP standard, are dismissed if the plaintiff does not produce *evidence* of the defendant's actual malice. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016) (holding that the D.C. Anti-SLAPP Act "mandates the production or proffer of evidence that supports the claim"). Yet many anti-SLAPP statues, like the District of Columbia's, automatically deny plaintiffs (with limited exceptions) the discovery needed to obtain evidence about the defendant's actual malice (or other subjective mental state). In this way, anti-SLAPP statutes erect an impenetrable barrier for a public figure who maintains he was defamed—requiring him to prove the subjective mental state of the defendant whilst simultaneously prohibiting such public figure plaintiffs from obtaining any discovery from the defendant about his subjective mental state.[11]

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11. Subsequent to the Superior Court's dismissal of Petitioners' claim, substantial evidence has been publicly released demonstrating that Steele's process of creating the Dossier reports was a function of bias and such a departure from information-gathering norms as to support the permissive inference that his act of publication was reckless. That evidence includes notes from the Federal Bureau of Investigation's interview of Steele's primary subsource, which reflect that Steele vastly overstated the connections and knowledge of his main source and demonstrate that, contrary to what is written in CIR 112, its allegations did not originate with a "[t]op level Russian government official" but were no more than the subsource's "hypothes[es]." Federal Bureau of Investigation Electronic Communication, February 9, 2017, at 50, *available at* https://www.judiciary.senate.gov/imo/media/doc/February%209,%202017%20Electronic%20Communication.pdf. Additional evidence is described in a decision from the English

The Court, in *Herbert v. Lando*, 441 U.S. 153 (1979), rejected a similar ban on discovery of a defendant's mental state that arose from a different policy choice—the "editorial privilege"—but *Lando's* reasoning applies equally as well here. "It is . . . untenable to conclude from our cases that, . . . plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error." *Id*. at 160.

Since the adoption by the State of Washington of

High Court resolving claims against Steele relating specifically to CIR 112, in which the court concluded that allegations about Petitioners in CIR 112, such as that Fridman and Aven used an intermediary "to deliver large amounts of illicit cash" to Vladimir Putin, and that Fridman "met directly with Putin," were inaccurate. *Aven v. Orbis Business Intelligence Ltd.*, [2020] EWHC 1812 (QB). Still more evidence was unearthed in a report prepared by the U.S. Department of Justice Office of Inspector General released in December 2019, which found that Steele's methods of gathering information were unreliable. *See* Appellants' Motion for Leave to Supplement the Record with the December 9, 2019 Report of the Department of Justice's Office of the Inspector General at Ex. B, *Fridman v. Orbis Business Intelligence Limited*, 18-CV-919 (D.C. Ct. App. Jan. 15, 2020). The Inspector General's Report shows that Steele's publication of CIR 112 arose from and related entirely to the 2016 presidential election, which contradicts the Superior Court's identification of the applicable controversy for which the Petitioners were held to be limited purpose public figures and thus subject to the burden to show Respondents' actual malice in publishing the defamatory statements. The targeted discovery Petitioners requested in the Superior Court could have enabled them to marshal evidence in support of that contention and the evidence of Steele's actual malice, later revealed publicly—illustrating why making discovery purely discretionary is constitutionally suspect.

the first anti-SLAPP statute in 1989, these procedural mechanisms for the early dismissal of defamation and related claims have proliferated. As of 2016, thirty-six states had enacted anti-SLAPP statutes.[12] Colorado joined the group in 2019 and just a few days ago, on November 10, 2020, New York enacted an enhanced anti-SLAPP statute.[13] A federal anti-SLAPP bill was introduced in Congress in 2015 and 2020.[14]

Understandably, the anti-SLAPP motion has become a popular arrow in the quiver of counsel for defendants in defamation cases. Over the last decade, in California alone, between 200 and 300 anti-SLAPP motions have been filed every year.[15]

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12. Andrew Rome, *Green Mountain Balancing Act: Exploring the Constitutionality of Vermont's Anti-SLAPP Statute*, 41 Vt. L Rev. 429, 430, ft. 12 (2016). It should be noted that in some states without anti-SLAPP statutes, the courts have fashioned some common law protection for the target of a SLAPP.

13. *See* 2019-2020 N.Y. Senate-Assembly Bill S52A, A5991A (Nov. 10, 2020).

14. *See* Speak Free Act of 2015, H.R. 2304, 114th Cong. (2015-216); Citizen Participation Act of 2020, H.R. 7771, 116th Cong. (2019-2020).

15. After an initial period of relative quiescence following the enactment of the statute in 1993, the use of anti-SLAPP rapidly gained popularity, rising approximately 30% in the period 2001-2002, and 50% between 2002 and 2003. The number of cases continued to climb, then roughly stabilized between 2007 and 2019. During this latter period, the number of cases ranged between 211 and 284 per year. Juan Chavarria, Javier Flores, Salman Mostafa, and Marian Riedy, Who is 'SLAPPing' Whom? (March 5, 2020) (unpublished article) (on file with Marian K. Riedy).

Granting this Petition would afford the Court an opportunity to right the disequilibrium that the anti-SLAPP statutes create. On one side of the scales is the policy goal of protecting persons who engage in some form of public participation from meritless claims that target them based on their public speech. But on the other side of the scales sits a public value no less weighty: the First Amendment right of public figures to petition the courts for redress of reputational harm through procedures that afford them due process. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government").

This Court has explained why a meaningful ability to seek redress in the courts for reputational harm is basic to our constitutional system:

> The individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Gertz, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Another factor making the issue presented even more consequential is the rise of the Internet as a forum for public discourse. An untrue, harmful post easily "goes viral," re-victimizing the target thousands or even millions of times. Thus, the Internet "amplifies the harm caused by libelous publications."[16] It is, therefore, more important than ever that a plaintiff (even one who is a public figure) who has been the subject of defamatory speech have the right to seek *meaningful* redress in a court of law. If her claim can be dismissed based on her inability to prove the private operation of the mind of the publisher of the defamatory statement, in circumstances where she is prevented from conducting any discovery into the publisher's state of mind, the historically sacred right to seek meaningful redress for defamation would almost be extinguished, at exactly the point in time when technological innovation makes the sting of the defamatory harm potentially permanent and its publication almost unlimited.

Despite the intervention of these significant developments over the years—the emergence and global adoption of the Internet and the enactment by a majority of states of anti-SLAPP statutes—this Court has not visited the important issues presented in this Petition. Specifically, guidance is needed by this Court as to how its line of cases beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), fits into today's radically changed social, statutory, and media landscape.

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16. Andrew L. Roth, *Upping the Ante:—Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. Rev. 741, 751 (2016).

The Constitution sets a high bar for a limited purpose public figure by requiring him to prove actual malice. *New York Times Co. v. Sullivan*, altered defamation law in the United States by requiring that a public official prove "actual malice" in a defamation suit against a media defendant. *Id.* at 279-80, 283. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), extended the actual malice requirement to actions by "public figures," and *Gertz*, 418 U.S. at 351-52, to a "limited purpose public figure."[17] By definition, the issue of whether a publisher acted with "'actual malice' calls a defendant's state of mind into question." *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n.9 (1979).

This Court's decision in *Herbert v. Lando*, however, cautions that the "high bar" of actual malice cannot be insurmountable. Specifically, the Court in *Lando* refused to erect "an impenetrable barrier" to a public figure defamation plaintiff's ability to prove "actual malice" in the form of an "editorial process" claim of privilege that would have precluded discovery of the news media defendant's state of mind. 441 U.S. at 170. Justice White's opinion traced both the need and inexorable logic of the rule:

> *New* York *Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. . . . Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would

17. *Gertz* and how properly to define a "limited purpose public figure" are more fully addressed in Point II below.

> be open to examination. *It is also untenable to conclude from our cases that, . . . plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error.*

Id. at 160 (emphasis added). The Court has emphasized that the actual malice standard "does not readily lend itself to summary disposition." *Hutchinson*, 443 U.S. at 120, n.9. Thus, this Court has recognized since at least 1979 that because proof of actual malice is required of a public figure, or limited purpose public figure as defined by *Gertz,* that enquiry into the defamation defendant's state of mind is essential "unless liability is to be completely foreclosed." *Lando*, 441 U.S. at 160. But that is exactly what happened to Petitioners when the trial court denied any limited discovery into Respondents' state of mind. Petitioners' path to liability was completely foreclosed.

Anti-SLAPP statutes like D.C. Code § 16-5502(c)(2) effectively preclude discovery into the very issue—defendants' state of mind—libel plaintiffs must prove to establish liability. The anti-SLAPP statute forecloses any opportunity for a defamation plaintiff, in the words of the D.C. statute, to demonstrate "the claim is likely to succeed on the merits." The D.C. Act thus precludes discovery unless it is "likely that the targeted discovery will enable the plaintiff to defeat the motion." D.C. Code § 16-5502(c)(2).

This is a Catch-22—and fatal to limited purpose public figures who can almost never satisfy these mutually conflicting dependent conditions. While *Herbert v. Lando* acknowledges that it would be "untenable" to erect a process under which "plaintiffs may not inquire directly from the defendants" with respect to their state of mind

to satisfy the "actual malice" standard of *New York Times* and *Butts*, the trial court and D.C. Court of Appeals forbade that very inquiry. 441 U.S. at 160. That dissonance is tantamount to a denial of due process; it is, in short, "untenable."[18] This Court should grant *certiorari* to harmonize the interplay of the First Amendment, *Herbert v. Lando*, due process, and the individual's right to his good name, all in the new context of new and proliferating anti-SLAPP statutes and the almost infinite dissemination capacity of the Internet.

The D.C. Court of Appeals ignored that interplay altogether, limiting its discovery analysis to the questions of statutory interpretation and abuse of discretion. The Court of Appeals attempted to explain that the D.C. statute "creates a standard that is difficult to meet" by engaging in an exegesis of the legislative history. 32a-33a. But that analysis was nothing more than a tautology that ended up where it began—the "likely that targeted discovery will enable the plaintiff to defeat the motion" standard: "He must be able to articulate how targeted discovery will enable him to defeat the special motion to dismiss. He must also show that it is 'likely' the discovery will produce that result." 33a.[19] But while the Court of Appeals

18. *Cf.* Lee Levine, *Judge And Jury In The Law Of Defamation: Putting The Horse Behind The Cart*, 35 Am. U. L. Rev. 3, 21 (1985) ("The Supreme Court in *Herbert* . . . held that such a testimonial privilege would substantially increase the burden of proving actual malice, a result contrary to the intent of *New York Times*, *Butts*, and similar cases.").

19. The Court of Appeals also expressed concern that if it allowed targeted discovery into the issue of malice for a limited purpose public figure "discovery would be justified in every Anti-SLAPP Act case." 34a. That is a red herring. Only in those anti-SLAPP cases involving a public figure where alternative

accurately described the difficult statutory standard for obtaining discovery to oppose an anti-SLAPP motion, the court's sole reliance on the statute ignored that *Herbert v. Lando* did not endorse a purely discretionary standard for a plaintiff seeking discovery to satisfy his actual malice burden, and instead, its holding disdains the erection of impenetrable barriers to such discovery. In any event, actual malice involves a state of mind. As construed by the Court of Appeals, the D.C. statute apparently embodies a duty of clairvoyance by imposing on the plaintiff a burden to show what that "state of mind" is, without being allowed discovery into that state of mind.

Despite the fact that the Court of Appeals concluded that "the key issue in this case is whether appellants can prove that CIR 112 was published with actual malice," 34a, given the Court of Appeals' analytical test, Petitioners' failure was preordained. The court gave no consideration to the burden the "actual malice" standard imposed on a limited purpose public figure defamation plaintiff. That analytical black hole conflicts with this Court's long-established standards.

This strain between the anti-SLAPP statutes' constraints on discovery and the actual malice standard derives, of course, from First Amendment jurisprudence. That is, but for the First Amendment's imposition of the higher standard of proof, such discovery limits would pose a far lower bar to prosecuting the claim. The other constitutional provision implicated is due process. Courts have expressed due process concerns regarding the anti-SLAPP statute's limitations on discovery when the plaintiff is required to prove actual malice.

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sources for proof of malice are unavailable would such discovery be justified.

Accordingly, lower courts have acknowledged the inherent tension between protection of legitimate speech and a plaintiff's right to seek redress for defamatory speech. That tension is particularly taut when the plaintiff is a public figure or limited purpose public figure required to prove actual malice. In Georgia, the state legislature took action specifically to reduce that strain, replacing a "discretionary discovery" provision in its anti-SLAPP act, O.C.G.A. § 9-11-11.1(d), by giving public figure defamation plaintiffs the right to discovery of actual malice, O.C.G.A §9-11-11.1(b)(2). *Cf. Rosser v. Clyatt*, 348 Ga. App. 40, 43 (2018) ("[the statute] provides for 'discovery on the sole issue of actual malice,' should there be a claim that the plaintiff is a public figure").

Even California courts applying the more permissive "good cause" standard for discovery acknowledge these due process implications. Thus, in *The Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156 (2004), the California Court of Appeal recognized that "[s]urely the fact [that] evidence necessary to establish the plaintiff's prima facie case is in the hands of the defendant or a third party goes a long way toward showing good cause for discovery." 117 Cal. App. 4th at 1162. The *Garment Workers* court cited with approval the due process concern articulated in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855, 867-68 (1995): "We acknowledge, however, that the discovery stay . . . of section 425.16 literally applied in all cases might well adversely implicate a plaintiff's due process right, particularly in a libel suit against a media defendant."[20]

20. Despite the fact that both courts identified the legal tension in the statute, the *Garment Workers* court reversed the grant of discovery because the trial court did not first foreclose other legal infirmities justifying dismissal, including even failure

Even before anti-SLAPP statutes became prevalent, courts sought to balance due process's competing objectives of protection of persons engaged in advocacy from frivolous lawsuits with the need for discovery directed to the individual's right to protect his good name: "Only through discovery of these materials, which directly relate to The Post journalists' states of mind . . . will the plaintiffs have a fair opportunity to satisfy the actual malice standard. . . ." *Tavoulareas v. Piro*, 93 F.R.D. 35, 43 (D.D.C. 1981). The New Mexico Supreme Court has commented on the analytical strains in finding the proper balance between these competing rights. *Marchiondo v. Brown*, 649 P.2d 462, 467 (N.M. 1982) ("It was error for the trial court to enter summary judgment for defendants on the question of malice, in light of the fact that Marchiondo had been denied the opportunity to discover the . . . state of mind of the person who made the decision. . . ."). The Pennsylvania Supreme Court has echoed those concerns in the context of that Commonwealth's shield law. *See Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346, 351 (Pa. 1987) (expansive interpretation of state shield law would not adequately protect defamation plaintiff's "fundamental right of reputation" in view of actual malice requirement). A Kentucky Supreme Court dissent recently voiced similar due process concerns in an anonymous speech defamation case. *See Doe v. Coleman*, 497 S.W.3d 740, 757 (Ky. 2016) (Cunningham, J., dissenting) ("a plaintiff cannot be required to establish evidence of constitutional actual malice without first engaging in discovery").

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to state a cause of action for libel. 117 Cal. App. 4th at 1162-63. In *Lafayette*, the plaintiff had not even sought discovery. 37 Cal. App. 4th at 867. *Lafayette* was superseded by statute on other grounds as stated in *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 478 (2000).

In the modern era of anti-SLAPP statutes, this Court should grant *certiorari* to re-examine the proper equilibrium between First Amendment rights and the law of defamation. It is a time-honored struggle addressing rights of a constitutional dimension: "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, 418 U.S. at 325. Not having visited that struggle in over forty years, and never having assessed that "proper accommodation" in the anti-SLAPP context, this Court should grant *certiorari* to revisit the proper balance between those competing mutual objectives. "Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse." *Butts*, 388 U.S. at 161.

POINT II

The Petition Should Be Granted to Provide Lower Courts Modern Guidance on Answering an Important Question of Federal Law: How to Determine the Scope of the "Particular Controversy Giving Rise to the Defamation" Under *Gertz*

The writ should be granted because this Court has not provided recent or clarifying guidance on how to define "the defamation giving rise to the controversy" standard established in *Gertz* and discussed in *Time, Inc. v. Firestone,* 424 U.S. 448, 453-54 (1976). Lower courts have foundered for almost fifty years to implement the standard,

resulting in disparate tests employed throughout the circuits and states. Further, the guidance issued by this Court could not have contemplated the unique aspects of defamation actions which have blossomed in the Internet age. As the D.C. Circuit lamented over forty years ago, "Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. The very purpose of the rule announced in *New York Times*, however, requires courts to articulate clear standards that can guide both the press and the public." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). This is a critically important issue, for it is in the context of that "particular public controversy" that the defamation plaintiff's notoriety mandates that he meet the actual malice burden. *Gertz*, 418 U.S. at 351, 352. Beyond the scope of such controversy, the plaintiff is not deemed to be a "limited purpose public figure." *See id.* Because First Amendment media rights and the defamation plaintiff's individual right to her reputation constitute an important balancing of conflicting interests, this Court should grant the writ to provide modern guidance in the Internet age to elucidate the appropriate standard on this compelling public issue.

Since *New York Times* and *Butts* introduced the public official and public figure defamation plaintiff's requirement to prove actual malice, and this Court's decision in *Gertz* defining the standard for evaluating who is a "limited purpose public figure," federal and state courts have "struggled" to apply that definition. *See, e.g., Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd,* 580 F.2d 859 (5th Cir. 1978) ("Defining public figures is much like trying to nail a jellyfish to the wall."); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758,

766 (Ky. 1990) (reciting differing tests employed by the Sixth, D.C., and Second Circuits); William P. Robinson III, *et. al.*, *The Tie Goes to the Runner: The Need for Clearer and More Precise Criteria Regarding the Public Figure in Defamation Law*, 42 U. Haw. L. Rev. 72, 102 (2019) ("A cursory review of the case law reveals far less consistency of reasoning and result than one might hope for in the crucial arena of determining who is a public figure.").

In the absence of guidance from this Court since *Gertz* and *Firestone*, the Courts of Appeal and state courts have adopted differing tests, often conflicting and creating an analytical quagmire, relating to the definition of a limited purpose public figure. The D.C. Circuit was among the first, establishing the three-part test in *Waldbaum.* Other Circuits have adopted their own tests, differing in emphasis and application. The Sixth Circuit applies its own three-part test. *Clark v. Am. Broad. Cos., Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982); *see also Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 334 (Ala. 2007) (adopting three-part test announced by the Eleventh Circuit) (citing *Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996)); *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 557-58 (W. Va. 1996) (adopting three-part test); *Warford*, 789 S.W.2d 758, 766 (Ky. 1990) (adopting three-part test). In contrast, the Fourth Circuit adopted a five-part test in *Fitzgerald v. Penthouse Int'l Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982); *see also Waicker v. Scranton Times Ltd. P'ship*, 688 A.2d 535, 540 (Md. Ct. Spec. App. 1997) (applying *Fitzgerald*'s five-part test). The Second Circuit has adopted a four-part test. *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136 (2d Cir. 1984). This proliferation of tests has led to a proliferation in results, compelling one court to observe that "[w]hile such tests may constitute useful analytic frameworks, they sometimes take on a

life of their own and become unmoored from the original intent of the Supreme Court cases that they attempt to represent." *Anaya v. CBS Broad., Inc.*, 626 F. Supp. 2d 1158, 1204 (D.N.M. 2009).

The courts' struggle to define a limited purpose public figure is especially acute in terms of establishing the "scope" of the controversy. *See, e.g., Harris v. Tomczak*, 94 F.R.D. 687, 704 (E.D. Cal. 1982) (explaining that the *Waldbaum* test "leaves at large the scope of the controversy and . . . leads to unpredictable and [unacceptable] ad hoc results"); Carl Willner, *Defining A Public Controversy in the Constitutional Law of Defamation*, 69 Va. L. Rev. 931, 931 (1983) ("The Court's failure to define 'public controversy' has . . . forced the lower courts to fashion their own understandings of the term. A few have tried, with limited success, to devise coherent tests; most have sunk into a morass of ad hoc rulings."). Ironically, such "ad hoc" results were the very problems the *Gertz* court sought to avoid since these "would lead to unpredictable results and uncertain expectations." 418 U.S. at 343; *see also Waldbaum*, 627 F.2d at 1292.

Such "ad hoc" decision-making directly signals the need for guidance from this Court. These imprecise definitions of "the public controversy giving rise to the defamation" lack a principled means of application. The *Waldbaum* definition, for example—a "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way"—raises but fails to answer so many questions as to be meaningless. 627 F.2d at 1296. What is a "real dispute" that has some "outcome"? What types of "affects" are "appreciable" and what constitutes a "segment" of the public? All those ill-defined terms comprise questions of fact, yet they

are often answered before discovery has even begun. It is no surprise that, given these standards, courts simply struggle to apply a working definition of public controversy: "this [*Waldbaum*] definition is still inherently vague." *Araya v. Deep Dive Media, LLC*, 966 F. Supp. 2d 582, 591 (W.D.N.C. 2013). *See also* RODNEY SMOLLA, LAW OF DEFAMATION § 2:21 (2020) (noting the confusion exhibited by lower courts on how to define the "public controversy").

The definitions used by the various Circuit and state courts differ, but all too frequently, in practice, result in finding a public controversy that is meaninglessly overbroad. As the Second Circuit concluded, a "public controversy" exists if "various groups . . . have vastly divergent views. . . ." *Lerman*, 745 F.2d at 138. On what topic today are there not divergent views clashing on Twitter or Facebook? The logical result of the Second Circuit's expansive view of "public controversy" is that if the media shows up at any peaceable assembly with a camera or smart phone, any person whose image is captured may become a limited purpose public figure required to prove "actual malice." This cannot be what this Court intended in *New York Times, Firestone,* or *Gertz*. This Court should embrace this opportunity to define a meaningful and useful standard.

The confusion surrounding the standards for determining the "public controversy giving rise to the defamation" is particularly pernicious in the context of an anti-SLAPP motion. As in this case, the defamation plaintiff captured within the expansive umbrella of "a real dispute" must prove actual malice but is precluded from obtaining evidence of actual malice because of the limitations on discovery in these statutes.

Another problem with the broad reach of the "public controversy" definition, adopted by the D.C. Circuit is that it obscures questions about what constitutes a sufficient "segment" of the population and a "real dispute." For example, in the case at bar, the courts below ignored Petitioners' argument that discovery was also warranted to discern the purpose of the Respondents' engagement and why they were hired in the first place. Yet the Respondents did not dispute the fact that they were hired first by Republican opponents of Trump, and then Democratic opponents of Trump during the 2016 election cycle, suggesting that the controversy giving rise to CIR 112 was centered in the 2016 presidential election, and specifically on the controversy of whether the Trump campaign and Russia colluded to influence the election result.[21] Thus, the anti-SLAPP limitation on discovery precluded the Petitioners from even exploring

21. Petitioners' request for discovery regarding why Respondents were retained was fully warranted and supported by Respondents' own statements, suggesting that limited discovery into the issue would identify information critical to the resolution of the definition of the controversy. The public was told this by the person who engaged Respondents to create CIR 112 and the other memos that became the "Dossier": "It was late August 2015 and the 2016 presidential campaign could not have been younger, nor the candidacy of Donald Trump more farfetched. . . . As absurd as Trump seemed, Simpson sensed a rich research and business opportunity. 'Trump' was the subject heading in the email he sent that Sunday morning to a longtime Republican politico. 'Couple of interesting threads that might be worth a look if you know anyone who might be interested in funding.' 'Yes,' came the reply. 'Let's discuss. Can I call you this eve?'" Glenn Simpson and Peter Fritsch, Crime In Progress, Inside the Steele Dossier and the Fusion GPS Investigation of Donald Trump 14 (Random House 2020).

the nature of the "particular controversy giving rise to the defamation."

That judicial struggle with the ill-defined "public controversy" was manifest in the decisions below. The Court of Appeals acknowledged—forty-six years after *Gertz*—that "[w]hile *Gertz* furnishes the language 'giving rise to the defamation' it does not supply a framework for how to define the controversy." 22a.[22] Applying *Waldbaum,* and its own definition in *Moss v. Stockard,* 580 A.2d 1011 (D.C. 1990), the Court of Appeals affirmed that Petitioners were "limited purpose public figures" for virtually any issue regarding Russian foreign policy, or any controversy concerning "Russian oligarchs' involvement with the Russian government and its activities and relations around the world. . . ." 58a. The Court of Appeals seemed to justify this wide-ranging, virtually boundless, definition of the controversy by noting that "*Waldbaum* itself recognizes that multiple relevant controversies may exist at the same time, and that 'a narrow controversy may be a phase of another broader one.'" *Id.* (citing *Waldbaum*,

22. If *Gertz* were to be read as supplying a framework for defining the pertinent controversy, fidelity to that framework is absent from the Court of Appeals' analysis. Ultimately, *Gertz* points to the need to define the controversy by looking to the issue or concern that gave rise to the making of the defamatory statement, as opposed to looking at the issue that is the subject of the defamatory statement. The defamatory statements in *Gertz* accused the plaintiff of being a communist, but the events that gave rise to the making of those defamatory statements involved a dispute about a different subject—the shooting by the Chicago police of a civilian. *See, e.g.*, *Gertz*, 418 U.S. at 325-26, 352. The Supreme Court treated the controversy in *Gertz* as a dispute regarding the police shooting, not about the essence of the defamatory statement (communists in general or whether Gertz was a communist). *See id.*

627 F.2d at 1297 n.27). The Court of Appeals thus landed on a definition of "the particular controversy giving rise to the defamation" that was not "particular," not even a "controversy," and certainly did not give rise to the defamation that emanated from Respondents' 2016 United States presidential election related engagement.

Lacking guidance from this Court, the Court of Appeals "agreed" with the trial court, reasoning that the "U.S. public today continues to have a strong interest in Russia's relations with the United States and in the political and commercial relationships between Russian oligarchs and the Russian government." 58a. *That finding illustrates how far afield the definition can stray.* The scope of the controversy is determined by the "particular controversy giving rise to the defamation," not the court's unsupported view of what the U.S. public may or may not have an interest in. By so finding, the Court of Appeals modified this Court's focus of analysis in *Gertz* into its own view—unsupported by any evidence of record—into what the U.S. public finds interesting. In so doing, it in effect embraced the public interest methodology briefly adopted by this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and then rejected in *Gertz*. *See also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Firestone*, 424 U.S. at 453-54 ("cause celebre" divorce proceeding involving adult adventures sufficient to "make Dr. Freud's hair curl" did not render divorcee a "public figure").

This Court has repeatedly rejected the principle that merely being newsworthy is sufficient to render one a public figure. In *Wolston,* the Court rejected the concept that simply because the press found events newsworthy and that "these events attracted media attention," such factors rendered the individual involved a "public figure:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public concern or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify the demanding burden of *New York Times*.

Wolston, 443 U.S. at 167-68.[23] The methodology invoked by the Court of Appeals is (i) inconsistent with this Court's limited teaching in *Gertz*, (ii) illustrates how wildly overbroad well-intentioned courts may wander in

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23. In *Wolston*, this Court reversed the United States Court of Appeals for the District of Columbia's affirmance of the District Court's finding that the plaintiff was a limited purpose public figure for his failure to appear in response to a grand jury subpoena. Justice Rehnquist rejected the finding that plaintiff had "voluntarily thrust" or "injected" himself into a public controversy: "It would be more accurate to say that petitioner was dragged unwillingly into the controversy." *Id.* at 166. Like the current case, *Wolston* also involved hyper-sensationalized "interests" in Russian (albeit in the Soviet era) activities in the United States. In that case, the two D.C. courts involved deemed Petitioner a "public figure" under *Gertz* because he failed to appear for a grand jury investigation after his aunt and uncle pled guilty to espionage charges. Petitioner had already submitted to multiple interviews by U.S. authorities. *See id.* at 161.

defining the "controversy giving rise to the defamation," and (iii) calls out for more rigorous analytical oversight from this Court.

The record is uncontroverted that Respondents were retained by Fusion GPS and Glenn Simpson to conduct opposition political research about Donald Trump specifically for the 2016 election. *See* 3a, 37a. Indeed, the engagement was originally on behalf of Republican clients during the primary season, and once Trump secured the Republican nomination, on behalf of the Hillary Clinton campaign. 3a. *The entire engagement was for purposes of the 2016 presidential election. Id.* It was that 2016 engagement, ultimately focused on an investigation of purported illicit ties between Russia and the Trump campaign that "gave rise to the defamation." Yet the Court of Appeals relied on a fifteen-year-old federal district court holding from 2005, involving entirely different issues, in defining the "public controversy." Both the trial court and Court of Appeals cited *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20 (D.D.C. 2005), with approval. The events giving rise to the defamatory statements made in 2000 that were the subject of the *OAO* lawsuit could not possibly have been the same events giving rise to defamatory statements made in 2016—especially because the issue that gave rise to the making of those statements in 2016 was Donald Trump's presidential campaign in general and his purported ties to Russia in particular.[24] The other case

24. The *Wolston* court confronted a similar issue insofar as both lower courts there found that petitioner had become a public figure in 1958 at the time of his contempt citation. Petitioner argued that the passage of time had restored him to the status of a private person for purposes of First Amendment jurisprudence. Because this Court concluded Wolston was not a public figure in 1958, Justice

the Court of Appeals apparently relied on, *Deripaska v. Associated Press*, 282 F. Supp. 3d 133 (D.D.C. 2017), did not even involve Petitioners. Apparently, the Court of Appeals viewed the label "Russian oligarch" a sufficient epithet to deem all such "oligarchs" "newsworthy" public figures, whenever accused of misconduct purportedly related to their status as oligarchs and how they portrayed themselves in the media.[25] Yet, even the quote from *Waldbaum* that both courts below relied on regarding broad public controversies acknowledged that one involved in the sub-controversy would "remain a private person for the [broader] overall controversy." *Waldbaum*, 627 F.2d at 1297 n.27.

This Court should grant the writ of *certiorari* to clarify the appropriate standard for defining the proper scope of the "particular controversy giving rise to the defamation" for purposes of identifying "limited purpose public figures" and their rights under the established precedent of *Gertz*. The writ should also issue in order for this Court to provide appropriate guidance on the constitutional balance between the mutually competing objectives of the First Amendment and a limited purpose public figure's right to protect his reputation as confirmed in *Herbert v. Lando*.

Rehnquist held "we need not and do not decide whether or when an individual who was once a public figure may lose that status by the passage of time." 443 U.S. at 166 n.7.

25. The court in *Deripaska* noted that the plaintiff did not dispute any of the material facts as it related to his biography and role in "advancing Russian interests internationally." In further contrast to the Petitioners, the court noted that Deripaska "boasted" to reporters about his close association with the Russian state. 282 F. Supp. 3d at 142-43.

CONCLUSION

For all of the foregoing reasons, the writ of *certiorari* should issue.

Respectfully submitted,

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November 16, 2020

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, DATED JUNE 18, 2020

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CV-919

MIKHAIL FRIDMAN, PETR AVEN,
AND GERMAN KHAN,

Appellants,

v.

ORBIS BUSINESS INTELLIGENCE LIMITED
AND CHRISTOPHER STEELE,

Appellees.

November 21, 2019, Argued
June 18, 2020, Decided

On Appeal from the Superior Court of the
District of Columbia Civil Division. (CAB-2667-18).
(Hon. Anthony C. Epstein, Trial Judge).

Before BLACKBURNE-RIGSBY, Chief Judge, and FISHER and BECKWITH, Associate Judges.[1].

1. Associate Judge McLeese was a member of the panel at the time of oral argument. He later recused himself and was replaced by Chief Judge Blackburne-Rigsby.

Appendix A

JUDGMENT

This case came to be heard on the transcript of record, the briefs filed, and was argued by counsel. On consideration whereof, and as set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the judgment of the Superior court which granted appellees' special motion to dismiss is affirmed.

For the Court:

/s/

Julio A. Castillo
Clerk of the Court

Dated: June 18, 2020.

Opinion by Associate Judge Fisher.

Appendix A

FISHER, *Associate Judge*: Appellants challenge an order of the Superior Court which granted appellees' special motion to dismiss, brought under the District of Columbia Anti-SLAPP Act. D.C. Code §§ 16-5501-5505 (2012 Repl. & 2019 Supp.). Appellants present three primary arguments: (1) the Anti-SLAPP Act does not apply to the facts of this case; (2) assuming that the Anti-SLAPP Act does apply, appellants have demonstrated that their claim is likely to succeed on the merits; and (3), in any event, the court erred by granting the special motion to dismiss without allowing appellants to conduct targeted discovery. Finding appellants' arguments unpersuasive, we affirm the trial court's judgment dismissing the case.

I. Factual and Procedural Background

According to appellants' complaint, in advance of the 2016 presidential election, Washington, D.C.-based Fusion GPS hired appellees Christopher Steele and his company Orbis Business Intelligence Limited ("Orbis") to conduct opposition research about then-candidate Donald J. Trump. While appellees were initially hired by Mr. Trump's Republican opponents, once it became clear that he would be that party's nominee, appellees began working for the Democratic National Committee and Hillary Clinton's campaign. Beginning that summer, appellees investigated what if any connections Mr. Trump and his campaign might have to Russia and Russian President Vladimir Putin, and compiled the results of their investigation into Company Intelligence Reports ("CIRs"). The complaint states that by the end of October 2016 appellees had created seventeen CIRs, which collectively became known as the Steele Dossier.

Appendix A

Appellants Mikhail Fridman, Petr Aven, and German Khan are "ultimate beneficial owners" of Alfa Group ("Alfa"), a "Russian business conglomerate." They claim that one of the reports in the Steele Dossier, CIR 112, defamed them. CIR 112 is a two-page report entitled "RUSSIA/US PRESIDENTIAL ELECTION: KREMLIN-ALPHA GROUP CO-OPERATION."[2] The report mentions each appellant by name and refers to an alleged relationship among appellants, their company Alfa Group, and President Putin. The report begins with a three-bullet summary which states:

- Top level Russian official confirms current closeness of Alpha Group-PUTIN relationship. Significant favours continue to be done in both directions and FRIDMAN and AVEN still giving informal advice to PUTIN, especially on the US

- Key intermediary in PUTIN-Alpha relationship identified as Oleg GOVORUN, currently Head of a Presidential Administration department but throughout the 1990s, the Alpha executive who delivered illicit cash directly to PUTIN

- PUTIN personally unbothered about Alpha's current lack of investment in Russia but under pressure from colleagues over this and able to exploit it as lever over Alpha interlocutors

2. CIR 112 consistently refers to appellants' company as Alpha Group, but appellants represent that the proper spelling is Alfa Group.

Following the summary, the report contains three numbered paragraphs marked "[d]etail." In relevant part, this section states that, "[s]peaking to a trusted compatriot in mid-September 2016, a top level Russian government official" discussed the relationship between Putin and "the Alpha Group of businesses led by oligarchs Mikhail FRIDMAN, Petr AVEN and German KHAN." These "leading figures in Alpha" are on "very good terms with PUTIN," and "[s]ignificant favours continue[] to be done in both directions, primarily political ones for PUTIN and business/legal ones for Alpha." According to the report, in the 1990s Fridman and Aven relied upon Govorun, who at the time was "Head of Government Relations at Alpha Group," to act as "the 'driver' and 'bag carrier' used by FRIDMAN and AVEN to deliver large amounts of illicit cash to the Russian president, at the time deputy Mayor of St. Petersburg." The report concludes by stating that "Alpha held 'kompromat' on PUTIN and his corrupt business activities from the 1990s," but at the same time, "the Russian president was able to use pressure . . . from senior Kremlin colleagues as a lever on FRIDMAN and AVEN to make them do his political bidding."

According to appellants' complaint, Steele personally briefed members of the media about the dossier. After these alleged briefings, news articles began circulating which described some of the contents of the dossier. A writer for *Mother Jones* magazine interviewed Steele and wrote an article entitled "A Veteran Spy Has Given the FBI Information Alleging a Russian Operation to Cultivate Donald Trump," which was published on October 31, 2016. The author stated that he had "reviewed" the early reports in the dossier, from which the article quoted.

Appellants also allege that, in addition to contacting the media, Steele met with various politicians to discuss the dossier. On separate occasions in September 2016, appellants claim, Steele briefed an official from the State Department and another from the Department of Justice. He also met with an individual affiliated with Senator John McCain and, in November 2016, delivered a copy of the dossier "for redelivery and further publication to Senator McCain in D.C."

On January 10, 2017, after Mr. Trump won the presidential election, BuzzFeed, Inc. ("BuzzFeed"), published the Steele Dossier in its entirety on the internet. Along with the dossier, BuzzFeed published an article entitled "These Reports Allege Trump Has Deep Ties to Russia."

Appellants initiated this lawsuit in the Superior Court on April 16, 2018, alleging that CIR 112 included "facially defamatory statements." The lawsuit claimed that appellees "did not know the unverified, anonymous, inherently harmful accusations in CIR 112 about [appellants] to be true" when they "intentionally" published that information to the individuals and entities discussed above. In response, appellees filed a special motion to dismiss pursuant to § 16-5502 of the District of Columbia Anti-SLAPP Act and a motion to dismiss under Super. Ct. Civ. R. 12(b)(6).

The Honorable Anthony C. Epstein granted appellees' special motion to dismiss and denied the Rule 12(b)(6) motion as moot. Judge Epstein determined that appellees

had made a prima facie showing that the Anti-SLAPP Act applied to the conduct at issue because it involved a right of advocacy on an issue of public interest. Regarding the right of advocacy, Judge Epstein held that, "[e]ven if Mr. Steele did not meet with the media in a public place or forum, he engaged in expression involving communicating information to members of the U.S. public through the media." Indeed, the court explained, "Plaintiffs challenge Mr. Steele's provision of his dossier to the media precisely because he expected and intended the media to communicate the information to the public in the United States and around the world."

The court commented that the fact that the dossier contained so-called "raw intelligence" did not make the Act inapplicable because "the public is interested in facts as well as opinions," and "[t]he First Amendment protects not only statements of pure opinion but also statements of fact and of opinions that imply or rely on provably false facts, unless the plaintiff proves that the statements are false and that the defendant's fault in publishing the statements met the requisite standard." On the question of whether the expressive conduct concerned an issue of public interest, Judge Epstein found that CIR 112 addressed not just the possibility of Russian interference in the 2016 presidential election but also "relations between the United States and Russia more generally." He determined that the "involvement of Russian international businessmen in Russian foreign policy, specifically including Russian foreign policy toward the United States, involves an issue of public interest in the United States, regardless of whether it relates to a particular election."

Next, the judge concluded that appellants had not offered evidence from which a reasonable jury could return a verdict in appellants' favor. In reaching that determination, Judge Epstein found that appellants were limited-purpose public figures who had failed to meet the constitutionally required standard of showing that appellees acted with actual malice. Finally, Judge Epstein denied appellants' request for targeted discovery, holding that appellants had failed to show that discovery would be "likely to uncover clear and convincing evidence that, for example, Mr. Steele fabricated any information provided in CIR 112 or had solid intelligence that his source(s) fabricated it." This appeal followed.

II. Discussion

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (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) ("November Report")). In enacting the Anti-SLAPP Act, the Council of the District of Columbia took into consideration research showing that SLAPPs:

> [H]ave been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of

> punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

November Report at 1. To mitigate "the amount of money, time, and legal resources" that defendants named in such lawsuits must expend, the Anti-SLAPP Act created substantive rights which accelerate the often lengthy processes of civil litigation. *Id.* These rights include a special motion to dismiss which provides for the expeditious dismissal of a complaint, *see* D.C. Code § 16-5502(a), and the ability to stay discovery until that motion has been ruled upon, *id.* § 16-5502(c).

The party filing a special motion to dismiss must first show that the Act applies. *Id.* § 16-5502(b); *see Mann*, 150 A.3d at 1232. Once applicability has been established, the burden then shifts to the non-moving party to show "that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b). If the non-moving party fails to meet that standard, then the motion must be granted and the case will be dismissed with prejudice. *Id.* § 16-5502 (b), (d).

A. Prima Facie Showing That the Anti-SLAPP Act Applies

We first address whether appellees have made a prima facie showing that the claims at issue fall under the protection of the Anti-SLAPP Act — do the claims "aris[e] from an act in furtherance of the right of advocacy on issues of public interest"? *Id.* § 16-5502(a). Appellants do not challenge that the "content of CIR 112 includes

'an issue of public interest.'" However, the parties do dispute whether the publication of CIR 112 met the "act in furtherance of the right of advocacy" requirement of the Act. *Id.* Although our opinion in *Doe No. 1 v. Burke*, 91 A.3d 1031, 1041-44 (D.C. 2014), addressed the definition of an "issue of public interest," none of our published opinions to date has construed "in furtherance of the right of advocacy."

The Anti-SLAPP Act defines an "act in furtherance of the right of advocacy on issues of public interest" as:

> (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.

D.C. Code § 16-5501(1). The parties agree that § 16-5501(1)(A)(i) does not apply to the facts at hand. This leaves us to determine whether appellees' actions should be considered

a written or oral statement made "in a place open to the public or a public forum in connection with an issue of public interest," *id.* § 16-5501(1)(A)(ii), or expression "that involves . . . communicating views to members of the public in connection with an issue of public interest," *id.* § 16-5501(1)(B). As discussed in detail below, we conclude that appellants' conduct falls within § 16-5501(1)(B). We therefore do not discuss the meaning or application of § 16-5501(1)(A)(ii).

In order for Subsection B to apply, there must be evidence that appellees "communicat[ed] views to members of the public." *Id.* at § 16-5501(1)(B). Although the complaint alleges that Steele met with members of the media in private, it is reasonable to infer that Steele expected and intended that the media in turn would communicate this information to the public. However, appellants challenge the application of Subsection B by asserting that CIR 112 "expresse[d] no views." According to appellants, the phrase "communicating views" applies only to beliefs or opinions and cannot be "stretched to encompass the compiling and conveyance of 'raw intelligence.'" They argue that "views mean views — not facts," and that any other reading of the word "views" is contrary to its "well understood meaning." Relying upon language from the trial court's order, appellees, on the other hand, contend that the statutory language encompasses not "only pure opinion speech" but also factual statements and "raw intelligence."

To determine whether a particular statement meets this definition of advocacy, we think it helpful to look

to defamation law for guidance. Our law recognizes that speech is capable of conveying different meanings depending upon the context in which it occurs. *See Klayman v. Segal*, 783 A.2d 607, 614 (D.C. 2001) (requiring the court to look at the publication "as a whole, in the sense it would be understood by the readers to whom it was addressed" to determine whether speech is capable of defamatory meaning) (quoting *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984)). Indeed, it is quite possible that speech may have a defamatory meaning in some circumstances, but not in others. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 878 (D.C. 1998) (holding that statements that "an attorney is often out of the office during normal working hours, . . . could reasonably be construed, in context, as a reflection on her professional performance"); *see also Southern Air Transp., Inc. v. American Broadcasting Companies, Inc.*, 877 F.2d 1010, 1015, 278 U.S. App. D.C. 222 (D.C. Cir. 1989) (considering statements that a company "engaged in dealings with the government of South Africa" capable of defamatory meaning because at the time, there was "intense antipathy felt by a great number of Americans towards South Africa"). Thus, courts must look to the context of the challenged speech to determine whether it was "capable or susceptible of a defamatory meaning." *Klayman*, 783 A.2d at 614.

Similarly, whether expressive conduct communicates a view depends not solely on the words spoken, but also upon the circumstances surrounding the speech, including when, where, why, and how the words were uttered, as well as the characteristics of the speaker and the audience. It

is certainly possible that statements of fact not overtly couched as an opinion can communicate a view when considered in context and as a whole.

According to appellants' complaint, Steele and his company were hired by Mr. Trump's political opponents to conduct "opposition research" into possible dealings Mr. Trump and his campaign had with Russia. The complaint itself alleges that the Steele Dossier in general, and CIR 112 in particular, were created "to publicly discredit its target," an action that was "[c]onsistent with the intended purpose of 'oppo research.'" Given the background detailed in the complaint, CIR 112 communicates the view that Fridman, Aven, and Khan have had a longstanding close and influential relationship with President Putin — a relationship which includes illicit acts. In discussing appellants' ability to influence Putin (or to do his bidding) "on foreign policy, and especially about the U.S.," CIR 112 further communicates the view that appellants are powerful figures who can affect relations between Russia and the United States. By publishing CIR 112 to the media, appellees communicated this view to members of the public. Appellees have therefore made a prima facie showing that the publication of CIR 112 falls within the protection of the Anti-SLAPP Act.

B. "Likely To Succeed on the Merits"

Since appellees' conduct qualifies for the protections of the Anti-SLAPP Act, the burden shifts to appellants to show "that the[ir] claim [of defamation] is likely to succeed on the merits." D.C. Code § 16-5502(b). Our role

is "to test the legal sufficiency of the evidence to support the claims." *Mann*, 150 A.3d at 1240. We must affirm a ruling granting a special motion to dismiss if the "claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Id.* at 1236 (emphasis omitted).

1. Public Figure Determination

a. Legal Framework

"To succeed on a claim for defamation, a plaintiff must prove: '(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.'" *Id.* at 1240 (quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)) (footnotes omitted). On appeal, the parties focus on the third element (the standard of fault).[3]

The standard against which we measure the defendant's fault in publishing turns upon whether the plaintiff is a public or a private figure. *See Moss v.*

3. For purposes of this analysis, we assume without deciding that the nearly identical affidavits each appellant submitted, which assert that the statements in CIR 112 regarding illicit activities and a "quid pro quo" relationship with President Putin were false, are enough to make the first element of a defamation claim a question for the jury to decide.

Stockard, 580 A.2d 1011, 1022 (D.C. 1990). Given their "ready access . . . to mass media of communication, both to influence policy and to counter criticism of their views and activities," *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (Warren, C.J., concurring), public figures are required "to prove greater fault by a greater degree of factual certainty than private plaintiffs," *Moss*, 580 A.2d at 1029.

The term "public figure" can be broken down into two categories: general purpose public figures and limited-purpose public figures. *See Gertz v. Welch, Inc.*, 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Because of their "positions of such persuasive power and influence," general purpose public figures "are deemed public figures for all purposes." *Id.* at 345. "[L]imited-purpose public figures, who assume roles 'in the forefront of particular public controversies in order to influence the resolution of the issues involved,'" are only considered public figures in relation to the particular controversy (or controversies) in which they have involved themselves. *Moss*, 580 A.2d at 1030 (quoting *Gertz*, 418 U.S. at 345).

"The task of determining whether a defamation plaintiff is a limited-purpose public figure is a difficult one, requiring a highly fact-intensive inquiry." *Doe No. 1*, 91 A.3d at 1041. The ultimate determination is a question of law, however. *See Moss*, 580 A.2d at 1030-31. To aid in this process, the D.C. Circuit devised a three-part test in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-97, 201 U.S. App. D.C. 301 (D.C. Cir. 1980). We adopted the *Waldbaum* test in *Moss*. 580 A.2d at 1030-32.

Under this framework, the trial court first must "decide whether there is a public controversy, and determine its scope." *Id.* at 1030. This inquiry is backward-looking and requires us to decide "whether the controversy to which the defamation relates was the subject of public discussion *prior* to the defamation." *Id.* Next, the court asks "whether 'a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.'" *Id.* (quoting *Waldbaum*, 627 F.2d at 1297).

After the controversy is defined, we look at "the plaintiff's role in it." *Moss*, 580 A.2d at 1031. To be a limited-purpose public figure, "[t]he plaintiff must have achieved a special prominence in the debate, and either 'must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.'" *Id.* (quoting *Waldbaum*, 627 F.2d at 1297). "Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome." *Waldbaum*, 627 F.2d at 1298; *see Moss*, 580 A.2d at 1033. In those instances, "[u]nless he rejects any role in the debate, he too has 'invited comment' relating to the issue at hand." *Waldbaum*, 627 F.2d at 1298.

Finally, if both of the previous elements are satisfied — "there is a preexisting public controversy which the plaintiff undertakes to influence" — we consider "whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Moss*, 580 A.2d at 1031.

b. When Do We Conduct the Public Figure Analysis?

As a preliminary matter, appellants assert that the Superior Court erred in conducting a public figure analysis at the special motion to dismiss stage of this litigation. They argue that unless a plaintiff concedes his status as a public figure, he need only present a prima facie case of negligence in publishing to defeat a special motion to dismiss, rather than meet the heightened "actual malice" standard that applies to both general and limited-purpose public figures. Appellants complain that "a plaintiff cannot be required to prove something that he is not required to plead," and urge us to recognize that "whether a plaintiff is a public figure is an affirmative defense." Therefore, according to appellants, a plaintiff's status as a public figure should have no bearing upon the Anti-SLAPP Act's requirement that he "demonstrate[] that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b).

To support their argument, appellants point to two unpublished district court opinions: *Fridman v. Bean LLC*, No. 17-2041, 2019 U.S. Dist. LEXIS 7874, 2019 WL 231751 (D.D.C. Jan. 15, 2019), and *MiMedx Grp, Inc. v. DBW Partners, LLC*, No. 17-1925, 2018 U.S. Dist. LEXIS 166970, 2018 WL 4681005 (D.D.C. Sept. 28, 2018). Both cases were decided after the Superior Court issued its opinion in this matter and therefore were not addressed below. In *Fridman*, which is a companion case to the current litigation and involves a similar challenge to CIR 112, the district court denied the defendants' Rule 12(b)(6) motion, concluding that it was premature to resolve

the question of whether plaintiffs were public figures. 2019 U.S. Dist. LEXIS 7874, 2019 WL 231751, at *4. The court reasoned that the plaintiffs were not required to plead sufficient facts to show that the defendants published CIR 112 with actual malice because the heightened fault standard would only be raised "as an affirmative defense to defeat plaintiffs' defamation claim." *Id.* The court further stated that the plaintiffs had no obligation to overcome that affirmative defense because "resolution of an affirmative defense is proper on a motion to dismiss only if the facts required to establish the defense are apparent on the face of the complaint (or if the plaintiff concedes public figure status or the facts that establish it)." *Id.*

Likewise, the district court denied the defendants' Rule 12(b)(6) motion in *MiMedx* because it determined that the defamation plaintiff had no "obligation to anticipate in its complaint the need to plead facts to defend against defendants' assertion that it is a public figure." 2018 U.S. Dist. LEXIS 166970, 2018 WL 4681005, at *6. Although the court opined that the plaintiff "may later be deemed a public figure or limited-purpose public figure, . . . its failure to allege actual malice" did not require dismissal on Rule 12(b)(6) grounds. *Id.*

We are not bound by these unpublished opinions from the federal district court. More importantly, we emphasize, the judges in both *Fridman* and *MiMedx* were not purporting to apply the Anti-SLAPP Act. The Anti-SLAPP Act was not at issue in *MiMedx*, and the trial judge in *Fridman* declined to apply the Act in federal

court. *See Fridman*, 2019 U.S. Dist. LEXIS 7874, 2019 WL 231751, at *2.[4]

The standards for adjudicating a special motion to dismiss and a Rule 12(b)(6) motion are materially distinct. In ruling on a Rule 12(b)(6) motion, a court looks at whether the *complaint* "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Comer v. Wells Fargo Bank, N.A.*, 108 A.3d 364, 371 (D.C. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). There is no requirement that a plaintiff offer any evidence to defeat the motion. *In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006).

However, in opposing a special motion to dismiss, the plaintiff must shoulder the burden of showing that his claim is likely to succeed on the merits. In *Mann*, we explained that this requirement "mandates the production or proffer of evidence that supports the claim." 150 A.3d at 1233. Because the "standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying claim and related defenses and privileges," plaintiffs are required to present more than the mere

4. Citing the D.C. Circuit's decision in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334-37, 414 U.S. App. D.C. 465 (D.C. Cir. 2015), the judge denied the defendant's special motion to dismiss, concluding that "a federal court sitting in diversity must apply Federal Rules of Civil Procedure 12 and 56 rather than D.C.'s Anti-SLAPP law." *Fridman*, 2019 U.S. Dist. LEXIS 7874, 2019 WL 231751, at *2.

allegations in the complaint. *Id.* at 1236. The process in essence accelerates the consideration of available defenses. Thus, "[t]he precise question the court must ask [in ruling on a special motion to dismiss] is whether 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." *Id.* (emphasis added). *See Doe No. 1*, 91 A.3d at 1045 (concluding that a special motion to quash subpoena should have been granted; appellee, a public figure, had failed to show a likelihood of success on the merits because she could not show actual malice). This fundamental difference in procedure makes the reasoning in *Fridman* and *MiMedx* inapplicable to a special motion to dismiss.

Rather than disposing of a meritless lawsuit "early in the litigation," as the Act intends, *see Mann*, 150 A.3d at 1238, appellants' reading of the statute 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 actual malice at trial, but could defeat the special motion with a lesser showing of fault. *Id.* at 1238. The trial court properly conducted a public figure analysis prior to ruling on the special motion to dismiss.

c. Application to the Facts at Hand

The Superior Court identified a real, public controversy, which it defined as "Russian oligarchs' involvement with the Russian government and its activities and relations around the world, including the United States." This definition of a preexisting public controversy was

supported by the record. Moreover, we agree with the trial court that the "U.S. public today continues to have a strong interest in Russia's relations with the United States and in the political and commercial relationships between Russian oligarchs and the Russian government." Notably, when faced with a similar issue, our sister courts in the District of Columbia have concluded that "there can be no doubt [that] a public controversy exists relating to Russian oligarchs acting on behalf of the Russian government." *Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 142 (D.D.C. 2017). *See also OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 43 (D.D.C. 2005) (holding that "[t]he rise of the oligarchs and the decline of the Russian economy into what one observer described as a 'criminal-syndicalist state'" was a public controversy because it was the topic of "intense discussion" throughout the United States and the world).[5]

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5. In determining that appellants were limited-purpose public figures, Judge Epstein referred to *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20 (D.D.C. 2005), a prior defamation case. That case was brought by appellants Fridman and Aven and their companies and involved a challenge to statements from a public interest organization alleging that the plaintiffs had connections to organized crime in Russia. *Id.* at 23. The trial court in *OAO Alfa Bank* held that appellants were limited-purpose public figures. *Id.* at 47. On appeal in the current case, appellants maintain that Judge Epstein improperly "import[ed] the *OAO* limited public figure finding into this case." They assert that Judge Epstein's mention of *OAO Alfa Bank* was "an invalid shortcut"—an improper use of issue preclusion. We disagree. Although Judge Epstein relied upon quotes from *OAO Alfa Bank*, we do not read his opinion as impermissibly applying issue preclusion to determine appellants' public figure

Appellants argue that the trial court misidentified the controversy and assert that it should be defined instead as "Donald J. Trump's ties to Russia and Vladimir Putin." In advancing that conclusion, appellants contend that the Supreme Court's decision in *Gertz* stands for the proposition that "[c]ourts should not base their decision on how to define the controversy on *the content* of the defamatory statement . . . but rather, on the issue or dispute that triggered the making of the defamatory statements." Following that reasoning, appellants maintain that because the Steele Dossier was created in order to investigate "Donald J. Trump's ties to Russia and Vladimir Putin," the controversy "giving rise" to the allegedly defamatory statements was "the controversy surrounding Donald Trump's presidential campaign." At its core, appellants' argument urges us to focus on why CIR 112 was published.

This argument is unconvincing. While *Gertz* furnishes the language "giving rise to the defamation," it does not supply a framework for analyzing how to define the controversy. 418 U.S. at 352. In the nearly fifty years since

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status. Rather, the quotations serve as evidence that appellants have been the subject of international discussion for years, and correspondingly have "enjoy[ed] access to the channels of effective communication that enable them to respond to any defamatory statements and influence the course of public debate." *Id.* at 45 (internal quotation marks omitted). Judge Epstein explained why, based upon the documents submitted by appellees in this case, the "findings in *OAO Alfa Bank* are valid today." The opinion does not, as appellants suggest, simply adopt the finding of *OAO Alfa Bank* without conducting an independent analysis.

Gertz was decided, cases such as *Waldbaum* and *Moss* have done so. *Waldbaum* itself recognizes that multiple relevant controversies may exist at the same time, and that "a narrow controversy may be a phase of another, broader one." 627 F.2d at 1297 n.27.

In light of *Waldbaum*, appellants' assertion that the Steele Dossier was created to investigate candidate Trump's ties to Russia is not incompatible with the Superior Court's definition of the controversy. While gathering information about Mr. Trump and his connections to Russia may have been the motivation behind creating the dossier, CIR 112 focuses on the preexisting controversy surrounding Russian oligarchs and their influence upon the Russian government. This discussion might well have provided important background information related to the election. Nevertheless, the motivation leading to the creation of the Steele Dossier does not compel us to define the controversy differently than the Superior Court did.

Our next step is to analyze appellants' role in the controversy. *See Waldbaum*, 627 F.2d at 1297. "The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Id.* Amassed in the record before us are hundreds of pages of news articles discussing appellants' status as Russian oligarchs and their ties to Vladimir Putin. Furthermore, as the record shows, in the years prior to the publication of CIR 112, there were thousands of internet search hits for each appellant, showing appellants' involvement in

the controversy prior to September 2016. Included in these search hits are news articles detailing meetings each appellant has had with President Putin as well as personal interviews the appellants have willingly given to the media. These interviews have spanned a wide range of subjects, from discussions of appellants' hobbies and interests to statements regarding their businesses and connections to the Kremlin.

The involvement appellants and their businesses had in litigation over a decade before the election shows that they have been participating in a debate on the world's stage for quite some time. *See OAO Alfa Bank*, 387 F. Supp. 2d at 23. In the interim appellants have not been shy about giving interviews and putting forth their own views about their role with respect to the Russian government. Even if their celebrity in this matter was a vestige of a previous era, it is evident that appellants still "remain[] able to reply to attacks through the press, which is continuing to cover [them]." *Waldbaum*, 627 F.2d at 1295 n.18. Based on this record, we have no trouble upholding Judge Epstein's conclusion that appellants "have assumed special prominence in [the] controvers[y]."

Finally, we conclude that the challenged speech contained in CIR 112 was germane to appellants' participation in the controversy. *See Waldbaum*, 627 F.2d at 1298. At its core, CIR 112 discusses appellants' relationship with President Putin and the influence appellants have over the Russian government and its "foreign policy . . . especially about the US." These statements are directly related to the public controversy

identified by Judge Epstein. Since all three prongs of the *Waldbaum* test are satisfied, we agree with the trial court that appellants are limited-purpose public figures with respect to the speech at issue.

2. Did Appellees Publish with Actual Malice?

As limited-purpose public figures claiming they were defamed, appellants are held to heightened proof requirements. Even at the special motion to dismiss stage, appellants must proffer evidence capable of showing by the clear and convincing standard that appellees acted with actual malice in publishing CIR 112. *See Mann*, 150 A.3d at 1236. This constitutional standard "is a daunting one" which very few public figures can meet. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515, 320 U.S. App. D.C. 40 (D.C. Cir. 1996) (quoting *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308, 316 U.S. App. D.C. 35 (D.C. Cir. 1996)). To succeed in establishing actual malice, appellants must show "that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). Merely "show[ing] that [the] defendant should have known better" than to believe the truth of his publication does not suffice. *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589, 422 U.S. App. D.C. 259 (D.C. Cir. 2016); *see also St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Rather, the plaintiff must offer evidence showing that "the defendant in fact entertained serious doubts as to the truth of his

publication," *St. Amant*, 390 U.S. at 731, or acted "with a 'high degree of awareness of . . . probable falsity,'" *id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)).

Appellants have not done so. They argue that the truth of the challenged speech can be doubted if the information was learned from an "unverified and anonymous" source and if bias was shown in its publication. They proffer three pieces of evidence which they claim adequately support "an inference" of actual malice.

Appellants first contend that the source of the statements "contained in CIR 112 was not merely unknown to readers, but more importantly, unknown to Steele." For this proposition, they rely upon language in CIR 112 which states: "[s]peaking to a trusted compatriot in mid-September 2016, a top level Russian government official commented on the history and current state of relations between President [Putin, appellants, and Alfa Bank]." Based solely on that statement and the fact that CIR 112 did not identify a source, appellants assume that Steele learned the information in the document from an "unverified and anonymous" source. Building on this assumption, appellants assert that the "evidence" supports an inference of actual malice under *St. Amant*, 390 U.S. at 731.

Appellants are mistaken. In *St. Amant*, the Supreme Court stated that a defamation plaintiff is likely to meet the actual malice standard when the defendant's "story . . . is based wholly on an unverified anonymous telephone

call." *Id.* But, although CIR 112 does not name a source, there is no reason to expect that it would.[6] Appellants have identified nothing in the record to suggest that Steele learned the information he published through an anonymous tipster. Nor have appellants identified anything showing that Steele did not test the veracity of the intelligence he gained, assuming that it did derive from a source unknown to him. Instead, appellants simply assert that appellees have failed to rebut the contention that the source was unverified and anonymous because "[t]here is no indication in CIR 112 or elsewhere that Steele knew the identity of the anonymous Russian official who spoke to the unidentified 'trusted compatriot.'"

That argument misplaces the burden, which lies with the appellants to set forth facts that would allow a jury to find actual malice. *See Mann*, 150 A.3d at 1236. Furthermore, under the reasoning in *St. Amant* and subsequent cases, reliance upon a single source, even an unverified and anonymous one, will amount to actual

6. Intelligence reports, like the Steele Dossier, and even newspaper articles, are often designed to conceal the identity of their source or sources. Nothing in *St. Amant* or subsequent cases makes a defendant's decision not to publicly name a source the equivalent of actual malice. Moreover, without more, actual malice would not be a reasonable inference even if Steele himself did not know the identity of the speaker. The Supreme Court has recognized "that a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's [biased] motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

malice only if the defendant "had obvious reason to doubt" the statement's veracity. *Jankovic*, 822 F.3d at 590 (quotation omitted). Appellants cannot point to anything establishing that it was reasonable to infer that there were obvious reasons for Steele to doubt the credibility of his source. *See Mann*, 150 A.3d at 1236.[7]

Appellants' second proffer fares no better. Appellants claim that an inference of bias must apply because Steele was hired to provide opposition research on Donald Trump. While we have held that "bias providing a motive to defame . . . may be a relevant consideration" in evaluating whether the defendant acted with actual malice, *id.* at 1259, appellants' reliance upon this statement is misplaced. According to the allegations in the complaint, Steele and his company were hired to conduct opposition research about candidate Trump and his presidential campaign. Perhaps it is fair to infer that Steele was biased against Mr. Trump, whom Steele had been hired by political opponents to investigate and "publicly discredit." However, this motivation would not necessarily extend to appellants, who were not the "target" of Steele's research and investigation.

Finally, citing a news article, appellants claim that Steele admitted after the dossier was published that up

7. Appellees assert in a footnote that appellants are not entitled to permissible inferences in their favor. However, in *Mann*, we held that, before granting a special motion to dismiss, a trial court must "allow[] for the weighing of evidence and permissible inferences by the jury." 150 A.3d at 1236.

to 30% of it might prove to be inaccurate.[8] This article, which was published over a year after the dossier was created, states that although "Steele was adamant that his reporting was credible," he "recogni[z]ed that no piece of intelligence was 100% right." Relying solely upon statements allegedly made by Steele's anonymous "friends," the article reports that Steele "assessed that his work on the Trump dossier was 70-90% accurate."

Appellant's reliance on this single statement ignores the context of the entire twelve-page article, which quotes an associate as stating that Steele is "sober, cautious, highly regarded, professional and conservative." Even assuming that their assertion about the dossier's overall accuracy, which ironically is supported only by anonymous sources, proved true, a jury properly instructed on the law could not reasonably infer that this evidence amounted to proof of actual malice. *See Mann*, 150 A.3d at 1232 ("[W]e conclude that in considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion."). As the Superior Court rightfully noted, appellants have not maintained that Steele "subjectively believed that the 10-30% of the Steele Dossier that would ultimately turn out to be inaccurate included CIR 112." Nor do appellants

8. Luke Harding, *How Trump walked into Putin's web*, The Guardian, (Nov. 15, 2017), https://www.theguardian.com/news/2017/nov/15/how-trump-walked-into-putins-web-luke https://perma.cc/7Z7Y-N8UF.

point to any evidence showing that Steele was aware at the time he published the dossier that he was relying upon inaccurate information. Indeed, according to the same article on which appellants rely, Steele told friends that the dossier "was a thoroughly professional job, based on sources who had proven themselves in other areas."

For these reasons, even drawing reasonable inferences in appellants' favor, they have failed to proffer evidence capable of showing by the clear and convincing standard that appellees acted with actual malice. *Mann*, 150 A.3d at 1236.

C. Denial of Targeted Discovery

Finally, appellants challenge the trial court's denial of their request for targeted discovery. The Act provides, as a substantive protection for defendants, that once a special motion to dismiss has been filed, all discovery proceedings "shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). Nevertheless, "[w]hen 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." *Id.* § 16-5502(c)(2).

As a general rule, "the intent of the lawmaker is to be found in the language that he [or she] has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) (quoting *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) (en banc)). Therefore, our first step in interpreting

§ 16-5502(c) is to "look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning." *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). While Subsection (c)(1) clearly and unambiguously requires that discovery proceedings be stayed once a special motion to dismiss is filed, the language of Subsection (c)(2) requires further analysis.

In order for discovery to be allowed, two things must "appear[] likely": (1) "that targeted discovery will enable the plaintiff to defeat the motion," and (2) "that the discovery will not be unduly burdensome." D.C Code § 16-5502(c)(2). The limiting language found in the second clause is well known to us. The "unduly burdensome" phrase mimics the requirement set forth in Super. Ct. Civ. R. 26(g)(1)(C) that a party seeking discovery must attest that it is "neither unreasonable nor unduly burdensome." Both our court and the Superior Court have adjudicated discovery disputes under the unduly burdensome standard. We need not analyze this clause further, as it is evident the legislature chose to use a "well-known term of art." *See Mann*, 150 A.3d at 1234.

The first clause of Subsection (c)(2) requires further examination, however. We recognize that "[t]he meaning — or ambiguity — of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). Therefore, "we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them." *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 652 (D.C. 2005) (en banc).

In *Mann* we addressed the role of discovery in the statutory scheme:

> In short, the special motion to dismiss provision authorizes final disposition of a claim in a truncated proceeding, usually without the benefit of discovery, *id.* § 16-5502(c), to avoid the toll that meritless litigation imposes on a defendant who has made a prima facie showing that the claim arises from advocacy on issues of public interest.

150 A.3d at 1235. Having recognized that special motions to dismiss usually will be decided without discovery, we characterized § 16-5502(c) as providing "a limited exception that favors the defendant." *Id.* at 1237. Thus, the language of § 16-5502(c) indicates that discovery normally will not be allowed.

This view is supported by the Act's legislative history. While the vast majority of jurisdictions with Anti-SLAPP Acts permit a court to order specified discovery on a showing of "good cause," *see, e.g.*, Cal. Civ. Proc. Code § 425.16(g) (2019), the District of Columbia Council abandoned this language. As introduced, the bill would have stayed discovery proceedings until the special motion to dismiss had been disposed of, "except that the court, for good cause shown, may order that specified discovery be conducted." D.C. Council, Comm. On Public Safety and the Judiciary, Report on Bill 18-893 at 2 (July 7, 2010). During its testimony before the Committee on Public Safety and the Judiciary, the American Civil Liberties

Union of the Nation's Capital ("ACLU") cautioned that the "good cause" standard in the proposed bill "has the disadvantage of being completely subjective so that a judge . . . can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way." *Anti-SLAPP Act of 2010*: Hearing on Bill No. 18-893 before the Committee on Public Safety and the Judiciary, Council of the District of Columbia, Statement of Arthur Spitzer, Legal Director, ACLU at 6 (Sep. 17, 2010). After hearing this testimony, the Committee added the requirement that the proposed discovery not be unduly burdensome and replaced the "for good cause shown" test with the requirement that it must appear "likely that targeted discovery will enable the plaintiff to defeat the motion." November Report at 7.

Given the statutory language and this background, we conclude that the clause "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion" creates a standard that is difficult to meet. Discovery must be "targeted" instead of wide-ranging. A plaintiff seeking discovery must show more than "good cause," and he cannot merely argue that the evidence he seeks would be relevant or helpful. He must be able to articulate how targeted discovery will enable him to defeat the special motion to dismiss. He also must show that it is "likely" the discovery will produce that result.

Moreover, given the use of the word "may," which is "quintessentially permissive," the decision to grant or deny targeted discovery rests within the trial court's broad discretion. *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991). "Discretion signifies choice." *Johnson v. United States*, 398

A.2d 354, 361 (D.C. 1979). Under the abuse of discretion standard, the trial judge "has the ability to choose from a range of permissible conclusions." *Id.* "The appellate court role in reviewing 'the exercise of discretion' is supervisory in nature and deferential in attitude." *Id.* at 362.

In the trial court, appellants requested targeted discovery to reveal what appellees "were thinking and doing when they compiled CIR 112 and published it, and what communications they had with their sources, their contractees and others regarding the reliability of the information they had gathered." Judge Epstein denied this request, reasoning that appellants had not "shown a likelihood that [appellees] have information that will establish actual malice by clear and convincing evidence." He cautioned, and we agree, that if courts relied solely on the premise that the defendants would have better access to what was in their minds at the time of publication, "discovery would be justified in every Anti-SLAPP Act case." However, as we have shown, it was the legislature's intent that discovery ordinarily would not be permitted.

Appellants' request for discovery does not necessarily raise concerns of undue burden. However, they have not shown that it "appears likely" that information gained from deposing appellees will enable them to defeat the special motion to dismiss. The key issue in this case is whether appellants can prove that CIR 112 was published with actual malice.[9] As we have discussed at some length,

9. Appellants also assert that targeted discovery would allow them to establish that the controversy "giving rise to" the publication of CIR 112 "was not the controversy identified by the

the fact that Steele did not name his confidential source in CIR 112, the claim that he was biased because of the nature of his engagement, and the selective quotations from the news article do not support an inference of actual malice. Appellants have not shown why discovery will likely produce evidence more persuasive than what we have rejected. It was not an abuse of discretion to deny targeted discovery.

III. Conclusion

For the reasons discussed above, we affirm the judgment of the Superior Court which granted appellees' special motion to dismiss.

Superior Court." They claim that if appellees were deposed, they may "acknowledge that an interest in the 'Trump-Russia' question gave rise to the creation and publication of CIR 112." However, as we have discussed above, the controversy must have existed prior to the defamation, and identifying the motivation for publishing is not the same as defining the controversy. Appellants have not shown that discovery targeted in this manner likely would enable them to defeat the special motion to dismiss.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION, DATED AUGUST 20, 2018

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

Case No. 2018 CA 002667 B

GERMAN KHAN, *et al.*

v.

ORBIS BUSINESS INTELLIGENCE
LIMITED, *et al.*

ORDER

The Court grants the special motion to dismiss filed by defendants Orbis Business Intelligence Limited ("Orbis") and Christopher Steele under the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 to -5505. The Court therefore denies as moot Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

This case involves what has become known as the "Steele Dossier." The relatively small portion of the Steele Dossier at issue in this case discusses the relationship between plaintiffs German Khan, Mikhal Fridman, and Petr Aven and the Russian government, but it does not discuss specific information linking them to any Russian

interference in the 2016 U.S. presidential election or to any specific American candidate. Defendants' special motion to dismiss does not require the Court to determine whether any information in the Steele Dossier is accurate or inaccurate. The purpose of such a motion is not to determine whether the defendant actually committed the tort of defamation. *See Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016). The Court concludes only that the Anti-SLAPP Act requires dismissal of this case because Defendants have made a prima facie case that the Act applies to their provision of this portion of the Steele Dossier to the media, and Plaintiffs have not submitted evidence that Defendants knew any of this information was false or acted with reckless disregard of its falsity.

I. BACKGROUND

On April 16, 2018, Plaintiffs filed a complaint against Defendants for defamation. Plaintiffs make the following allegations in their complaint. Plaintiffs are international businessmen who are the beneficial owners of Alfa-Bank (a.k.a. Alfa Group), which is based in Russia; Mr. Fridman and Mr. Khan are each citizens of both Russia and Israel, and Mr. Aven is a citizen of Russia.[1] Complaint ¶¶ 1, 15. Mr. Steele is a U.K. citizen and a principal of Orbis, a U.K.-based company. *See id.* ¶¶ 16-17. Defendants were hired in June 2016 by Fusion GPS ("Fusion"), a Washington, D.C.-based firm that conducts political opposition research,

1. Alfa-Bank is spelled as "Alpha" throughout the Steele Dossier. The Court uses Plaintiffs' spelling.

to compile information about then-candidate Donald J. Trump's ties to Russia and Vladimir Putin. *Id.* ¶ 5. Fusion was originally hired during the primary phase of the 2016 election cycle by Republicans. *Id.* After the Republican convention, Fusion was hired by the Democratic National Committee and the campaign of Hillary Clinton. *Id.*

Mr. Steele compiled the Steele Dossier between June 2016 and October 2016. *See* Complaint ¶¶ 5-8. The Steele Dossier consists of seventeen Company Intelligence Reports ("CIR"). *Id.* This case focuses on CIR 112, a one-and-a-half page document entitled "RUSSIA/US PRESIDENTIAL ELECTION: KREMLIN-ALPHA GROUP CO-OPERATION." CIR 112 (Special Motion to Dismiss Ex. B). CIR 112 identifies Mr. Fridman, Mr. Aven, and Mr. Khan as "oligarchs" who lead the Alfa Group. The summary makes three points:

- Alfa Group has a close relationship with President Vladimir Putin of Russia: "Significant favours continue to be done in both directions and FRIDMAN and AVEN still giving informal advice to PUTIN, especially on the US."

- The "[k]ey intermediary" in the relationship is Oleg Govorun, who "delivered illicit cash directly to PUTIN" throughout the 1990s when President Putin was the deputy mayor of St. Petersburg.

- President Putin is not personally bothered about Alfa's current lack of investment in Russia, but he is "able to exploit it as lever over Alpha interlocutors."

Appendix B

The body of CIR 112 does not refer the 2016 U.S. presidential election. CIR 112 also does not contain a specific allegation that any Plaintiff gave advice to President Putin relating to the election or attempted to influence the election in any way, or that Alfa Group's "cooperation" with the Russian government extended to the election. CIR 112 states that "FRIDMAN and AVEN continued to give informal advice to PUTIN on foreign policy, and especially about the US where he distrusted advice being given to him by officials." CIR 112 states that Mr. Fridman and Mr. Aven used Mr. Govorun in the 1990s to "deliver large amounts of illicit cash to the Russian president, at the time deputy Mayor of St. Petersburg."

In the summer of 2016, Mr. Steele briefed members of the print and online media about the contents of the Steele Dossier. Complaint ¶ 9. On January 10, 2017, BuzzFeed, Inc. published the full Steele Dossier, including CIR 112. *See id.* ¶ 12.

On May 30, 2018, Defendants filed a special motion to dismiss ("Motion") and a motion to dismiss under Rule 12(b)(6). On July 6, Plaintiffs filed an opposition to both the special motion to dismiss ("Opp.") and the Rule 12(b)(6) motion. On July 24, Defendants filed a reply in support of their special motion to dismiss ("Reply") and a reply in support of their Rule 12(b)(6) motion.

II. LEGAL STANDARD

A. The Anti-SLAPP Act

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann*, 150 A.3d at 1226 (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.'" *Id.* at 1235 (quoting legislative history). "Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id.* at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] 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.'" *Mann*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)).

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Mann*, 150 A.3d at 1227 (quoting § 16-

5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id.* at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id.* at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Mann*, 150 A.3d at 1227. Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice." Section 16-5502(d) also requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing."

Under D.C. Code § 16-5502(c)(1), the filing of a motion to dismiss generally results in an automatic stay of discovery "until the motion has been disposed of." Section 16-5502(c)(2) provides for an exception: "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."

B. Defamation

"To succeed on a claim for defamation, a plaintiff must prove (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Mann*, 150 A.3d at 1240 (quotation and brackets omitted).

"A statement is defamatory if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Mann*, 150 A.3d at 1241 (quotation and brackets omitted). "To evaluate whether a statement is capable of defamatory meaning, courts employ a two-part framework that asks: (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory." *Zimmerman v. Al Jazeera America, LLC*, 246 F. Supp. 3d 257, 273 (D.D.C. 2017) (quotations and citation omitted).

In defamation cases that rely on statements made about public figures concerning matters of public concern, plaintiffs must prove – by clear and convincing evidence – that defendants acted with actual malice. *Mann*, 150

A.3d at 1251-52. "A plaintiff may prove actual malice by showing that the defendant either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." *Id.* at 1252 (quotation omitted); *see New York Times v. Sullivan*, 376 U.S. 254, 280-81 (1964). "The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Mann*, 150 A.3d at 1252 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

The "actual malice" standard applies to statements about public figures. A public figure can be either a limited-purpose public figure or a general-purpose public figure:

> General purpose public figures because of their position of such pervasive power and influence are deemed public figures for all purposes. Limited-purpose public figures, that is, individuals who assume roles in the forefront of particular public controversies in order to influence the resolution of the issues involved, are deemed public figures only for purposes of the controversy in which they are influential.

Doe No. 1 v. Burke, 91 A.3d 1031, 1041 (D.C. 2014) (citations and quotations omitted). The Court of Appeals has adopted a three-part test as a roadmap to determine whether an individual is a limited-purpose public figure. *Moss v. Stockard*, 580 A.2d 1011, 1030 (D.C. 1990) (following

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980)). The Court "should first decide whether there is a public controversy, and determine its scope." *Moss*, 580 A.2d at 1030. "[T]his inquiry has two components: (1) whether the controversy to which the defamation relates was the subject of public discussion prior to the defamation, … and (2) whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id.* (quotation omitted). Second, the Court must determine the plaintiff's role in the controversy: "The plaintiff must have achieved a special prominence in the debate, and either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Id.* (quotation from *Waldbaum* omitted). "In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements." *Waldbaum*, 627 F.2d at 1297. The third and last "question is whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Moss*, 580 A.2d at 1031.

III. DISCUSSION

Plaintiffs make four arguments: (a) Defendants cannot seek protection under the Anti-SLAPP Act because they are not entitled to any protections under the First Amendment; (b) Defendants do not make a prima facie case under the Anti-SLAPP Act that Plaintiffs' claims arise from an act in furtherance of the right of advocacy

on issues of public interest; (c) Plaintiffs have shown they are likely to succeed on the merits; and (d) Plaintiffs are at least entitled to targeted discovery to enable them to defeat the motion. The Court addresses each argument in turn.

A. Applicability of First Amendment protections

Plaintiffs contend that the Anti-SLAPP Act does not apply unless the First Amendment applies and that Defendants do not have First Amendment rights because Mr. Steele is a non resident alien with British citizenship and Orbis is a U.K.-based company. *See* Opp. at 1. The Court does not agree.

The Court assumes without deciding that the Anti-SLAPP Act applies only to conduct that is protected by the First Amendment. "To establish the grounds for either of the two procedural protections the Anti-SLAPP statute affords – dismissal of the suit or quashing of a subpoena – the moving party must show that his speech is of the sort that the *statute* is designed to protect." *See Doe No. 1*, 91 A.3d at 1036 (emphasis added). The Act does not explicitly limit its protection to activity that is also protected by the First Amendment, and indeed the Act's legislative history indicates that the Council intended the Act to apply more broadly.[2] In addition, by its terms, the Anti-SLAPP Act

2. Section 2(1)(B) of the initial version of the Anti-SLAPP Act introduced in June 2010 defined protected activity to include "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." *See* Bill

does not limit its protections to U.S. citizens or entities. Although Plaintiffs argue otherwise (Opp. at 1), the plain language of D.C. Code § 16-5502(a) indicates that any party can file a special motion to dismiss. Reading an implied limitation to District residents into the Act would be contrary to the purposes of the Act and the First Amendment to provide broad protection for speech on issues of public interest (as the Court discusses in the next paragraph). In addition, Plaintiffs have not cited, and the Court is not aware of, any case holding that the defenses that a defendant in a defamation case may assert under D.C. law or the First Amendment depend on whether the defendant is a U.S. citizen or entity.[3]

18-893: "Anti-SLAPP Act of 2010" (Motion Ex. A). In September 2010, the American Civil Liberties Union of the Nation's Capital ("ACLU") proposed changing this definition because the "purpose of an anti-SLAPP law is to provide broader protection than existing law already provides," and courts should not have to determine whether conduct is covered by the Constitution before they can determine whether it is protected by the Act. *See* Testimony of the American Civil Liberties Union of the Nation's Capital at 5 (Motion Ex. A). Section 16-5501(1)(B) codifies the ACLU's proposed alternative by making the Act applicable to "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issues of public interest." *See id*. at 5.

3. It is ironic that Plaintiffs, who are non-resident aliens with Russian and/or Israeli citizenship (Complaint ¶ 15), argue that non-resident aliens do not have rights that the First Amendment requires a U.S. court to respect – while petitioning a U.S. court for a redress of their grievances and invoking a constitutional right to conduct discovery (Opp. at 25). *See Stuart v. Walker,* 143 A.3d 761, 767 (D.C. 2016) ("[T]he right of access to courts for redress

Plaintiffs contend that even if Defendants' speech involves issues of public interest in the United States, it is unprotected by the First Amendment because Mr. Steele is not a U.S. citizen or resident and Orbis is not a U.S. company. However, advocacy on issues of public interest has the capacity to inform public debate, and thereby furthers the purposes of the First Amendment, regardless of the citizenship or residency of the speaker. The First Amendment protects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. at 270. Constitutional standards for defamation cases have been developed to safeguard the "important societal interest in vigorous debate over matters of public concern protected by the First Amendment." *See Mann*, 150 A.3d at 1241. Moreover, the First Amendment "guarantees are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374. 389 (1967). "It is now well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*,

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of wrongs is an aspect of the First Amendment right to petition the government.") (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011)); *Douglas v. Kriegsfeld Corp.*, 849 A.2d 951, 994 (D.C. 2004) ("The right of access to the courts is but one aspect of the broader right, protected by the First Amendment, to petition the government for redress of grievances," and "[m] eaningful access to the courts is a fundamental right of citizenship in this country.") (quotations omitted). Plaintiffs do not explain why non-resident aliens have the same rights as U.S. citizens to bring defamation actions, but non-resident aliens do not have the same rights as U.S. citizens to defend themselves.

408 U.S. 753, 762-63 (1972) (citations and quotations omitted). As a result, the interest of U.S. citizens in receiving information that the First Amendment protects does not depend on whether the speaker is a U.S. citizen or resident.

It is in this context that the Court evaluates Plaintiffs' argument that the First Amendment does not apply to Defendants' speech. It is well established that non-citizens "enjoy certain constitutional rights." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing *Plyler* v. *Doe*, 457 U.S. 202, 211-212 (1982) (illegal aliens are protected by Equal Protection Clause); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges* v. *Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens)). *Verdugo-Urquidez*, 494 U.S. at 259, indicates that a non-citizen must have "substantial connections with the country" before he can "receive constitutional protections." *See Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

Appendix B

To paraphrase *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 202 (D.C. Cir. 2001), the Court need not undertake to determine, as a general matter, how "substantial" a non-resident alien's connections with this country must be to merit the protections of the First Amendment for speech in the United States. The Court need not define the precise line because Mr. Steele and Orbis and their speech have ample connections with the United States that are clearly substantial enough to merit First Amendment protection.

According to Plaintiffs' own complaint, U.S. clients hired Mr. Steele and Orbis, and a U.S. presidential candidate was the subject of the investigation that they were hired to conduct. *See* Complaint ¶ 5. Furthermore, Mr. Steele was in the United States when he briefed U.S.-based media organizations about the results of his investigation, and Plaintiffs do not dispute that Mr. Steele was lawfully present in the United States when he provided his briefings.[4] These U.S.-based media organizations reported on allegations in the Steele Dossier in the United States. *See id.* ¶¶ 9, 11. Plaintiffs themselves allege that the Court has jurisdiction because "Orbis and Steele transacted business in the District of Columbia." Complaint ¶ 20. Plaintiffs' summary of their jurisdictional allegations is apt: "In sum, Steele, acting for himself and Orbis, has engaged in a persistent course of conduct, often with Fusion and Simpson, intended to have and which did have effects in the District, by meeting with District based

4. The Court does not suggest that aliens who are not legally present in the United States automatically lack First Amendment rights. This case does not present that issue.

media and government employees to bring his reports on 'Russia matters' to their attention." Complaint ¶ 20; *see id.* ¶ 1 (Fusion is based in Washington, and Glenn Simpson is Fusion's principal).

Moreover, Plaintiffs recognize that Mr. Steele had substantial ongoing connections with the United States even before U.S. clients hired him to gather information relating to the 2016 presidential election:

> Steele, on behalf of himself and Orbis, has engaged in other ongoing business relationships with entities located in the District. Steele and Orbis have been retained repeatedly by the District-based F.B.I. to assist in various investigations between 2009 and 2016, and, as alleged above, Steele and Orbis have had an ongoing professional relationship with Fusion for years. And as also noted above, according to Winer, during his 2013-2016 employment at the State Department in the District, Steele/Orbis provided over 100 intelligence reports, many of which Winer shared with other State Department officials.

Complaint ¶ 21.

Plaintiffs argue that "Defendants must show that they have, in some form, assumed the obligations of the people," Opp. at 5 (quotation and citation omitted), and Defendants assumed at least one important "obligation" of "the people" – by accepting the Court's jurisdiction,

Defendants assumed the obligation to pay any judgment that might ultimately be entered against them in a U.S. court. By assuming this obligation, Defendants also assumed the concomitant right to raise the same defenses available to U.S. citizens and resident aliens who are sued for defamation.

Plaintiffs rely on *Hoffman v. Bailey*, 996 F. Supp. 2d 477 (E.D. La. 2014), which held that a British national could not invoke the Louisiana Anti-SLAPP Act because he did not have First Amendment protection. *See* Opp. at 4-5. However, in *Hoffman*, the defendant's only contact with the United States was that he sent the email that formed the basis of the defamation claim to a Louisiana resident. *See Hoffman*, 996 F. Supp. at 488-89. Here, Defendants and their speech have far more substantial contacts with the United States.

Because Defendants have substantial and ongoing connections with the United States and their speech in the United States concerns matters of public concern in the United States, Defendants' speech is protected by the First Amendment. Therefore, even if the Anti-SLAPP Act protects only speech also protected by the First Amendment their speech is covered by the Act.

B. Prima facie showing

Defendants have made a prima facie showing that Plaintiffs' claims arise from "an act in furtherance of the right of advocacy on issues of public interest" within the meaning of § 16-5501(1). Section 16-5501(1) defines an

"act in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made … [i]n a place open to the public or a public forum in connection with an issue of public interest; … or [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." Section 16-5501(3) defines an "issue of public interest" to include an issue related to "community well-being" or "a public figure."

1. The right of advocacy

Plaintiffs themselves allege that Defendants "intended, anticipated or foresaw" that providing a copy of the Steele Dossier, including CIR 112, to third parties would likely result in the Steele Dossier being published by the media, and that "[b]y their direct and intentional publication to third parties … the Defendants published to a worldwide public false and defamatory statements concerning Plaintiffs and Alfa." *See* Comp. ¶¶ 13, 43. The Court disagrees with both of Plaintiffs' two arguments that Defendants' provision of the Steele Dossier to the media with this intent and expectation was not "an act in furtherance of the right of advocacy."

First, Plaintiffs contend that Defendants' statements to the media were outside the scope of the Anti-SLAPP Act because "the Complaint [does not] allege or suggest that Defendants' defamatory statements were made 'in a place open to the public or a public forum.'" Opp. at 7 (quoting § 16-5501(1)(A)(ii)); *id* at 8 ("it is dubious

that Defendants' private discussions with members of the media and others constitute 'public' statements or expressions"). However, § 16-5501(1) applies in the disjunctive either to statements "[i]n a place open to the public or a public forum in connection with an issue of public interest; … *or* [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." (Emphasis added.) Even if Mr. Steele did not meet with the media in a public place or forum, he engaged in expression involving communicating information to members of the U.S. public through the media. As the Court explains above, Plaintiffs challenge Mr. Steele's provision of his dossier to the media precisely because he expected and intended the media to communicate the information to the public in the United States and around the world.

Second, Plaintiffs argue that "the Complaint's allegations in no way suggest that Steele was hired to express '*views,*' or that he did so," and they suggest that the Anti-SLAPP Act does not protect the provision of "raw intelligence" to the media. *See* Opp. at 7-8 (emphasis in original). However, the public is interested in facts as well as opinions, and whether Defendants were originally hired to express views or collect facts, they provided factual information to the U.S. public through U.S. media relating to issues of public interest in the United States. The First Amendment protects not only statements of pure opinion but also statements of fact and of opinions that imply or rely on provably false facts, unless the plaintiff proves that the statements are false and that the defendant's fault in publishing the statements met the

requisite standard. *See Mann*, 150 A.3d at 1240-41; Opp. at 12. Protection under the Anti-SLAPP Act is at least as broad as protection under the First Amendment, so the Act applies to statements that consist of "raw intelligence."

2. Issues of public interest

Defendants have made, at a minimum, a prima facie case that the information in the Steele Dossier generally, and the information in CIR 112 in particular, involves "issues of public interest."

It is appropriate to interpret the term "issues of public interest" in § 16-5501(3) in light of defamation cases defining whether the controversy in which the plaintiff is involved is public. In these defamation cases, "courts often define the public controversy in expansive terms," and "a court may find that there are multiple potential controversies, and it is often true that 'a narrow controversy may be a phase of another, broader one.'" *Jankovic v. International Crisis Group*, 822 F.3d 576, 586 (D.C. Cir. 2016) (quoting *Waldbaum*, 627 F.2d at 1297 n.27). Defendants argue that CIR 112 involves two issues of public interest: (1) relationships between Russian oligarchs and the Russian government and (2) Russian interference in the 2016 U.S. presidential election. Reply at 10. The Court adds that relations between the United States and Russia more generally (and not just related to alleged Russian interference with the 2016 U.S. presidential election) is an issue of public interest in the United States. Plaintiffs contend that they are not public figures with respect to these issues of public interest.

The Steele Dossier *as a whole* plainly concerns an "issue of public interest" within the meaning of § 16-5501(3) because it relates to possible Russian interference with the 2016 presidential election. The Steele Dossier generated so much attention and interest in the United States precisely because its contents relate to active public debates here. *See Waldbaum*, 627 F.2d at 1296-97 (courts "may not question the legitimacy of the public's concern" to avoid becoming "censors of what information is relevant to self-government") (quoting Supreme Court cases). Plaintiffs themselves "readily agree that the 2016 U.S. Presidential election was of public interest." Opp. at 9. A key part of Plaintiffs' case is that CIR 112 implicitly alleged that Plaintiffs aided "the Kremlin's interference in the 2016 U.S. Presidential election," Opp. at 1, and Plaintiffs cannot contend both that Defendants in CIR 112 accused them of cooperation with Russian interference in the election and that these statements did not involve an issue of public interest in the United States. Plaintiffs own contentions therefore establish at least a prima facie case that Defendants' allegedly defamatory statements involve a matter of public interest.

Moreover, CIR 112 expressly discusses Russian foreign policy toward the United States and President Putin's advisors on Russia-U.S. policy, and these too are issues of public interest within the meaning of § 16-5501(3). Contrary to their argument that Defendants defamed them by accusing them of complicity in Russian interference with the 2016 U.S. presidential election, Plaintiffs argue that CIR 112 does not relate to an issue of public interest because it does not mention any presidential candidate by

name or explicitly address the 2016 presidential election. *See* Opp. at 8-9, 20-21. However, involvement of Russian international businessmen in Russian foreign policy, specifically including Russian foreign policy toward the United States, involves an issue of public interest in the United States, regardless of whether it relates to a particular election.

For these reasons, Defendants have made a prima facie case that the expressive conduct that forms the basis of Plaintiffs' defamation claim involves an "issue of public interest," even if they do not also make a prima facie case that Plaintiffs are public figures. Speech may involve an issue of public interest within the meaning of the Act even if the speech does not involve a public figure, so Defendants are entitled to the protection of the Anti-SLAPP Act on this basis alone.

In fact, Defendants have made a prima facie case that the Steele Dossier in general, and CIR 112 in particular, involve public figures. It would appear to be beyond dispute that President Putin, who is discussed in CIR 112, is a general-purpose public figure. *See Doe No. 1*, 91 A.3d at 1041 ("General purpose public figures because of their position of such pervasive power and influence are deemed public figures for all purposes.").

Furthermore, Plaintiffs are public figures for at least a limited purpose related to the information in CIR 112. In some cases "[t]he task of determining whether a defamation plaintiff is a limited-purpose public figure is a difficult one, requiring a highly fact-intensive inquiry

that some have described as trying to nail a jellyfish to the wall." *Id.* at 1041-42. The task is easier in this case. *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20 (D.D.C. 2005), was a defamation case brought by Mr. Fridman, Mr. Aven, and their companies, and the court held as a matter of law that the evidence in that case eliminated any genuine dispute that they "are limited public figures": the plaintiffs made choices that placed them "squarely in the public light;" they "have been the subject of widespread news coverage;" they "enjoy access to the channels of effective communication that enable them to respond to any defamatory statements and influence the course of public debate;" and "Aven and Fridman have used their positions to influence the events of their country and the world, and have assumed a prominent role in the civic life of Russia, associating closely and openly with the Russian business elite and politicians at the highest positions of government." *See id.* at 44-46 (quotation omitted); *see id.* at 25-28. "Simply put, Aven and Fridman are players on the world stage; hence, they are limited public figures not only in Russia, but in the United States as well." *See id.* at 47. The same is true of Mr. Khan: like Mr. Fridman and Mr. Aven, Mr. Khan is a beneficial owner of Alfa, Complaint ¶ 15; and he has had similar prominence and media coverage. *See* Motion at 8 (an Internet search yielded 5,311 articles mentioning Mr. Khan, slightly more than those mentioning Mr. Aven).

These findings in *OAO Alfa Bank* are valid today. *See* Motion at 8, 11-13 (including recent articles in examples of extensive media coverage of all three Plaintiffs going back to the 1990s). Plaintiffs dismiss them as "findings

of another court in another decade in connection with unrelated defamatory statements." *See* Opp. at 21 n.26. *OAO Alfa Bank* is not a relic from a bygone era, and Plaintiffs do not contend that they have become recluses in the last decade. Nothing suggests in the intervening decade a significant decrease in the fortunes of Alfa Group or the role of Russian oligarchs.

Plaintiffs therefore are limited-purpose public figures for the broad controversy relating to Russian oligarchs' involvement with the Russian government and its activities and relations around the world, including the United States. The U.S. public today continues to have a strong interest in Russia's relations with the United States and in the political and commercial relationships between Russian oligarchs and the Russian government. *Deripaska v. AP*, 282 F. Supp. 3d 133, 142 (D.D.C. 2017) ("there can be no doubt a public controversy exists relating to Russian oligarchs acting on behalf of the Russian government."). Plaintiffs have assumed special prominence in these controversies, and the statements in CIR 112 are germane to these controversies. *See OAO Alfa Bank*, 387 F. Supp. 2d at 43-44.

For all of these reasons, Defendants have made a prima facie case that their speech involved issues of public interest and that Plaintiffs are limited-purpose public figures.

C. Likelihood of success on the merits

Because Defendants have made this prima facie case, the burden shifts to Plaintiffs to offer evidence that

would permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find that Defendants are liable for defamation. *See Mann*, 150 A.3d at 1232. "The precise question the court must ask, therefore, is whether 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." *Id*. at 1236. Because Defendants' speech concerned a matter of public concern and Plaintiffs are limited-purpose public figures, Plaintiffs would have the burden at trial to prove by clear and convincing evidence that Defendants acted with actual malice – that is, "'that the statement was made … with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times Co.*, 376 U.S. at 279-80). Plaintiffs have not carried their burden because they do not offer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, CIR 112 were false or that they published CIR 112 with reckless disregard of the falsity of these stated or implied facts.

Plaintiffs contend that they have shown actual malice because "a careful reading of the text of CIR 112 reveals that it contains no support for the implication in CIR 112's headline that Plaintiffs 'cooperated' in Russian interference in the U.S. Presidential election of 2016. In doing so, Defendants essentially admit that they have no facts to support that defamatory statement." *See* Opp. at 22. If it is plain from a reading of CIR 112 that Defendants do not have any evidence that Plaintiffs cooperated in Russian interference with this election beyond information

that Plaintiffs have had a long and close relationship with the Russian government and gave advice to President Putin about Russia's relations with the United States, it would be plain that Defendants were engaging in speculation to the extent CIR 112 suggests that the Plaintiffs cooperated in Russian interference with the U.S. presidential election. However, under the First Amendment, a statement is not actionable "if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise." *See Mann*, 150 A.3d at 1241 (quotation omitted); *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) ("When the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals the reader that what is said is opinion, and not fact.").

A reader could reasonably infer that inclusion of CIR 112 in a collection of reports relating to Russian interference in the 2016 U.S. presidential election was not gratuitous, and CIR 112 is capable of bearing the meaning that that the nature of the overall relationship between Plaintiffs and the Russian government creates a reasonable possibility that they were involved, as advisors or participants, in any Russian interference with the U.S. election. *See Zimmerman,* 246 F. Supp. 3d at 273.[5] However, Plaintiffs do not offer any evidence that Defendants knew, or recklessly disregarded substantial information, that no conceivable possibility existed that Plaintiffs were involved in any such Russian interference.

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5. The Court need not and does not decide whether this meaning is defamatory.

The failure to include supporting facts does not support a reasonable inference by clear and convincing evidence that Defendants knew the statements were false or acted in reckless disregard to their falsity: lacking supporting information is different from having opposing information; and although lack of evidence may establish negligence, negligence "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *See New York Times Co.*, 376 U.S. at 288.

Plaintiffs argue that only a reckless person would publish CIR 112 to third parties. *See* Opp. at 22. "But it is not enough to show that defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt." *Jankovic*, 822 F.3d at 589-90. "The plaintiff can make this showing, for example, by offering evidence that it was highly probable that the story was (1) fabricated; (2) so inherently improbable that only a reckless person would have put it in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that defendant had obvious reason to doubt." *Id.* Plaintiffs do not offer evidence that Mr. Steele in fact had subjective doubts or recklessly disregarded information about its falsity, or that Defendants had obvious reason to doubt the source described in CIR 112 as a "trusted compatriot" of a "top level Russian government official." *See OAO Alfa Bank*, 387 F. Supp. 2d at 1253-54 (a publisher does not have a duty to corroborate even when a single source of potentially libelous material is a person of questionable credibility); *St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith."); *see Gertz v. Robert*

Welch, 418 U.S. 323, 332 (1974) ("mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."). Moreover, the information in the Steele Dossier about corrupt payments to Russian public officials was consistent with other information in the public domain: "Although Alfa Bank has developed a reputation in the international community as one of the most respected Russian financial institutions, Aven and Fridman have been dogged by allegations of corruption and illegal conduct." *OAO Alfa Bank*, 387 F. Supp. 2d at 28 (footnote omitted). Mr. Fridman himself acknowledged that the "rules of business" in Russia "are quite different to western standards" and to "be completely clean and transparent is not realistic." *Id*. at 29.

Plaintiffs argue that Mr. Steele doubted the truthfulness of some of the Steele Dossier based on a publication stating that Mr. Steele "estimated that between 10 and 30 percent of his 'raw intelligence' would ultimately prove inaccurate." Opp. at 23. However, even putting aside whether this publication falls within any exception to the hearsay rule, a belief that most, if not almost all, of the information would ultimately prove to be accurate is hard to square with actual malice. In any event, "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) (emphasis in original). Plaintiffs do not allege that Mr. Steele subjectively believed that the 10-30% of the Steele Dossier that would ultimately turn out to be inaccurate included CIR 112 or that Mr. Steele knew any

fact stated or implied in CIR 112 was false or acted with reckless disregard to its falsity.

Plaintiffs argue that Defendants have not demonstrated that the statements are true. *See* Opp. at 22. However, the burden is on Plaintiffs to show that the statements were false, not on Defendants to demonstrate their truth. *See New York Times Co.*, 376 U.S. at 271; *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (the plaintiff in a defamation action must show "that the defendant made a false and defamatory statement concerning the plaintiff") (quotations and citations omitted).

Because Plaintiffs have not offered evidence supporting a clear and convincing inference that Defendants made any defamatory statement in CIR 112 with knowledge that it was false or with reckless disregard of its falsity, they have not offered evidence that their claims are likely to succeed on the merits.

D. Targeted discovery

Section 16-5502(c)(2) provides, "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." Plaintiffs have not shown that it is likely that any discovery that is targeted and not unduly burdensome will enable them to defeat the special motion to dismiss. More specifically, Plaintiffs do not show that any such discovery is likely to uncover clear and convincing evidence that, for example, Mr. Steele

fabricated any information provided in CIR 112 or had solid intelligence that his source(s) fabricated it.

Plaintiffs suggest that they should be allowed to conduct discovery because Defendants have exclusive control over evidence about their subjective state of mind. *See* Opp. at 24. However, Plaintiffs have not shown a likelihood that Defendants have information that will establish actual malice by clear and convincing evidence. If targeted discovery were justified solely by the fact that a defendant in a defamation case is the best, if not only, source of information about his subjective knowledge of the truth or falsity of the challenged statement, discovery would be justified in every Anti-SLAPP Act case.

Citing *Herbert v. Lando*, 441 U.S. 453 (1979), Plaintiffs contend that "defamation plaintiffs burdened with proof of actual malice *are entitled to discovery of a media defendant's editorial process as a constitutional matter*." *See* Opp. at 24-25 (emphasis in original). However, the Constitution does not entitle plaintiffs in defamation cases to conduct fishing expeditions. The provision of the Anti-SLAPP Act permitting targeted discovery only if the plaintiff shows a likelihood that discovery will produce clear and convincing evidence of actual malice is consistent with plaintiffs' constitutional rights, including their right to trial by jury. *Cf. Mann*, 150 A.3d at 1232-33. It is also consistent with more general direction from the Supreme Court "to expeditiously weed out unmeritorious defamation suits" in order to "preserve First Amendment freedoms." *See Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 108 (D.C. Cir. 2017). *Herbert* holds only

that in a case where discovery is warranted, the First Amendment does not allow a media entity to claim absolute privilege over its editorial processes. *See Herbert*, 441 U.S. at 158, 175. *Herbert* does not hold that the Constitution gives an absolute right to discovery by any plaintiff who has the burden to show actual malice by clear and convincing evidence and who can only speculate that discovery will enable him to prove his case.

IV. CONCLUSION

Plaintiffs are correct that the Anti-SLAPP Act was "not enacted to immunize surreptitious for-hire intelligence operatives who defame private persons." Opp. at 9. However, the Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest, and it does not exempt advocates if they can be described as "surreptitious for-hire intelligence operatives." Nor does the Anti-SLAPP Act immunize any defamatory statement – whether the information was obtained surreptitiously or openly, or for hire or for other reasons. The Act allows defamation suits involving statements about issues of public interest to proceed, provided that the subjects of the alleged defamatory statement offers evidence that they are likely to succeed. Plaintiffs have failed to provide such evidence. Accordingly, the Court orders that:

1. Defendants' special motion to dismiss is granted.

2. Defendants' Rule 12(b)(6) motion to dismiss is denied as moot.

3. This case is dismissed with prejudice.

Date: August 20, 2018

/s/
Anthony C. Epstein
Judge