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DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed: Nov. 13, 2025]

No. 20-CV-0318
2017-CA-005989-B

MORGAN BANKS, *et al.,*

Appellants,

v.

DAVID H. HOFFMAN, *et al.,*

Appellees.

Appeal from the
Superior Court of the District of Columbia
Civil Division

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, Deahl, Howard, and Shanker, Associate Judges.

JUDGMENT

This case came to be heard on the record, *see* D.C. App. R. 10(a), the briefs filed, and the oral arguments presented by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the Superior Court's ruling that the District's Anti-SLAPP Act comports with the Home Rule Act is upheld. The case is returned to the division to address appellants' remaining arguments.

For the Court:

/s/ Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

Dated: November 13, 2025.

Opinion for unanimous en banc court by Associate Judge Deahl.

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DISTRICT OF COLUMBIA COURT OF APPEALS

[FILED: 1/29/2026]

No. 20-CV-0318

MORGAN BANKS, *et al.*,
Appellants,

v.

DAVID H. HOFFMAN, *et al.*,
Appellees.

Appeal from the Superior Court
of the District of Columbia
(2017-CA-005989-B)

(Hon. Hiram E. Puig-Lugo, Trial Judge)

(Argued En Banc February 25, 2025 Decided
November 13, 2025)
(Amended January 29, 2026[*])

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[*] After the initial issuance of this opinion on November 13, 2025, the en banc court amended the opinion by revising some of the language in the two sentences that lead into footnote eight. The minor revisions to those sentences are meant to make clear that not all of the statutory citations in footnote eight concern

Bonny J. Forrest, with whom *Kirk Jenkins* and *John B. Williams* were on the briefs, for appellants.

Thomas G. Hentoff, with whom *John K. Villa*, *Stephen J. Fuzesi*, *Krystal C. Durham*, and *Renee M. Griffin*, were on the brief, for appellees Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman.

Barbara S. Wahl, with whom *Randall A. Brater* and *Rebecca W. Foreman* were on the brief, for appellee American Psychological Association.

Carl J. Schifferle, Deputy Solicitor General, with whom *Brian L. Schwalb*, Attorney General for the District of Columbia, *Caroline S. Van Zile*, Solicitor General for the District of Columbia, *Ashwin P. Phatak*, Principal Deputy Solicitor General, and *James C. McKay, Jr.*, Senior Assistant Attorney General, were on the brief, for appellee District of Columbia.

Bilal K. Sayyed and *Ari Cohn* filed a brief on behalf of TechFreedom as *amicus curiae* in support of appellees.

Landis Cox Best, *Britney R. Foerter*, *Lisa J. Cole*, *Elizabeth Tang*, *Elizabeth Vogel*, *Rachel Smith*, *Jennifer Mondino*, *Micaela C. Deming*, and *Alexandra S. Drobnick* filed a brief on behalf of National Women's Law Center, D.C. Coalition Against Domestic Violence, DV Leap, & Ten Other Individual & Organizational Survivor Advocates in D.C. as *amici curiae* in support of appellees.

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immunity from suit, but some concern immunity from liability instead.

Laura R. Handman and *Eric J. Feder* filed a brief on behalf of Amazon Watch, The American Civil Liberties Union of the District of Columbia, The Center for Biological Diversity, The Civil Liberties Defense Center, Direct Action Everywhere, Electronic Frontier Foundation, Greenpeace, Inc., The Mosquito Fleet, People for the Ethical Treatment of Animals, Inc., and The Union of Concerned Scientists, as *amici curiae* in support of appellees.

Daniel P. Golden, *Nicole L. Streeter*, *Lauren R.S. Mendonsa*, and *Wei Guo* filed a brief on behalf of Council of the District of Columbia as *amicus curiae* in support of appellees.

Katie Townsend, *Mara Gassmann*, and *Zachary Babo* filed a brief on behalf of the Reporters Committee for Freedom of the Press and 32 Media Organizations as *amici curiae* in support of appellees.

Before BLACKBURNE-RIGSBY, *Chief Judge*, and BECKWITH, EASTERLY, DEAHL, HOWARD, and SHANKER, *Associate Judges*.

Opinion for the unanimous court by *Associate Judge* DEAHL.

DEAHL, *Associate Judge*: This case concerns whether the D.C. Council exceeded its authority under the Home Rule Act when it passed the District's Anti-SLAPP Act. The Home Rule Act precludes the Council from passing any law "with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." *See* D.C. Code § 1-206.02(a)(4). Title 11 of the D.C. Code, in turn, provides that the District's Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure . . .

unless it . . . adopts," and this court approves, "rules which modify those Rules." D.C. Code § 11-946.

Appellants argue that the Anti-SLAPP Act violates the Home Rule Act because it truncates discovery in certain Superior Court proceedings—namely, those deemed to be "strategic lawsuits against public participation," or SLAPPs, which are basically suits filed to silence someone from exercising their free speech or petition rights by burdening them with costly litigation so that they abandon their criticisms. In appellants' view, that truncated discovery process alters the Superior Court's procedural rules in a manner that only the District's courts and Congress have the authority to do, per Section 11-946. A division of this court agreed with appellants that the Anti-SLAPP Act's discovery limiting provisions intruded into Title 11 and thus violated the Home Rule Act, and this court granted en banc review. *See Banks v. Hoffman*, 301 A.3d 685 (D.C. 2023), *vacated by* 308 A.3d 201 (Mem.) (Order granting en banc review).

We disagree with appellants and now hold that the D.C. Council did not exceed its authority by passing the Anti-SLAPP Act. While we acknowledge this case presents a close question about which reasonable minds can differ, we conclude that the Anti-SLAPP Act does not run afoul of Section 1-206.02(a)(4) because it does not modify Title 11 itself, it does not run directly contrary to Title 11, nor does it otherwise alter the fundamental organization or jurisdiction of the District's courts. The Act instead creates supplementary procedures for a small subset of cases in a manner that remains consistent with Title 11. This court has consistently read the Home Rule Act's restrictions on the Council's authority narrowly, in

recognition of the Council's "broad authority" to legislate on local matters. *Andrew v. Am. Import Ctr.*, 110 A.3d 626, 628-29 (D.C. 2015). Most states have passed legislation comparable to our Anti-SLAPP Act, complete with similar procedural aspects, and yet no court in this country has deprived its local legislature of the authority to pass anti-SLAPP legislation. The Home Rule Act does not require us to more tightly constrict our local legislature, as Congress showed no interest in doing that when passing the Act.

We explain ourselves in three parts: First, we detail the relevant history and foundations of the Home Rule Act, as well as its limitation on the Council's power to enact legislation with respect to Title 11. Second, we explain why the AntiSLAPP Act does not run afoul of that limitation. Third, we explain why the appellants' contrary view suffers from a number of critical flaws. Chief among them is that they would have us strictly police the "substantive law" versus "procedural rule" divide, a creature of federalism concerns not pertinent here, and they would further thrust the District's courts into a policymaking role that we are fundamentally ill-suited for. We now address those three points in turn.

I. The Home Rule Act grants the Council broad authority to legislate, so long as it does not directly alter Title 11 or fundamentally alter our court system

The Home Rule Act is akin to a Constitution for the District, providing the basic groundwork and structure for our local government. *See Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299,

303 (D.C. 2012) ("The Home Rule Act operates much like a state constitution.").

Congress passed the Home Rule Act in 1973 to "grant to the inhabitants of the District of Columbia powers of local self-government," allowing residents to vote for a mayor and city councilpersons and providing the District with the power to control the agencies and organizations that affect residents' daily lives. D.C. Code § 1-201.02(a). Although Congress retained "the right, at any time, to exercise its constitutional authority as legislature for the District," *id.* § 1-206.01; U.S. Const. art. I, § 8, cl. 17, the Home Rule Act "relieve[d] Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a); *see also* S. Rep. No. 93-219, at 4 (1973) (The Act granted the District lawmaking authority over "those matters municipal as distinguished from those national in scope."), *reprinted in* Staff of H. Comm. on D.C., 93d Cong., Home Rule for the District of Columbia: Background and Legislative History at 2724 (Comm. Print 1974) [hereinafter House Comm. Print].

The Act granted the "D.C. Council broad authority to legislate upon 'all rightful subjects of legislation within the District,'" *Andrew*, 110 A.3d at 628 (quoting D.C. Code § 1-203.02), while carving out certain exceptions from the District's legislative power. One exception, at issue in this case, is that "[t]he Council shall have no authority to . . . [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." D.C. Code § 1-206.02(a)(4).

To explain that provision, let us rewind to three years before the Home Rule Act's passage, when

Congress enacted the Court Reorganization Act of 1970. The Court Reorganization Act, codified in Title 11 of the D.C. Code, details the "organization, administration[,] and jurisdiction" of the District's courts. *See* House Comm. Print at 1450. The purpose of that act was similar to what animated the Home Rule Act itself: It was meant to shift federal jurisdiction over essentially local matters to a newly created D.C. court system, featuring the Superior Court of the District of Columbia and this court. *See generally Woodroof v. Cunningham*, 147 A.3d 777, 782-84 (D.C. 2016). This new court system needed procedural rules to operate, and Congress provided those in the Court Reorganization Act as follows:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it . . . adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules.

D.C. Code § 11-946.

To paraphrase that provision, Congress set the federal rules of procedure as the default in the Superior Court. At the same time, Congress made its disinterest in micromanaging those procedural rules clear, providing that the Superior Court was free to modify or supplant those rules whenever and for whatever reason we wanted, so long as this court

approved. And the Superior Court could unilaterally promulgate any "other rules," without this court's approval, that did not modify the federal rules. Congress said nothing about whether the Council could modify or supplement the court's procedural rules, of course, because the Council in its modern form had not yet been created.[1] The only relevant legislature at the time was Congress, which was just as free as the District's courts to amend or supplement those rules.

Now, back to the Home Rule Act. An early draft of that Act would have allowed the Council to "pass acts affecting all aspects of [the District's] courts," permitting the Council to shift various matters back to the federal courts, to change our judicial selection processes, to eliminate judgeships, and to eliminate our newly forged courts entirely. House Comm. Print at 942 (proposing to grant such authority eighteen months after the date of enactment); *Woodroof*, 147 A.3d at 783. That led to some understandable backlash—our courts were just finding their legs, and allowing the Council to upend our organization and structure would threaten their core functions. The Chief Judge of this court at the time, Gerard D. Reilly, voiced those institutional concerns in a letter to Congress, arguing that "the new judicial system should be allowed to mature and gain experience before subjecting it to further major modifications."

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[1] There was a nine-member presidentially appointed D.C. Council with rather limited powers established in 1967, several years prior to both the Court Reorganization and the Home Rule Acts. *See* Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11669 (Aug. 12, 1967), *reprinted in* 81 Stat. 948 (1967). The modern D.C. Council that we are concerned with was established by the Home Rule Act.

House Comm. Print at 1417. Chief Judge Reilly's concerns were with avoiding a big-picture structural upheaval of our newly minted court system—"drastic changes," as he put it—like with how judges are selected and reappointed, or with how jurisdiction is divided with our federal counterparts across the street. *Id.* at 1416-18. He voiced no concern with the Council possibly altering the minutiae of the finer procedural rules governing the District's court proceedings.

Another member of our newly minted courts, Superior Court Chief Judge Harold H. Greene, voiced the same broad institutional concerns. In his view, allowing the D.C. Council to "completely alter" and "obliterate the structure, organization and jurisdiction" of the District's courts would "negate all the vested rights of the judicial and nonjudicial personnel of the court system." *Id.* at 1421-22. Chief Judge Greene suggested two changes to the draft Home Rule Act to prevent that: (1) eliminate the section that allowed the Council to pass acts affecting "all aspects" of the courts; and (2) add a provision stating that "the organization and jurisdiction of the District of Columbia courts shall be governed by title 11." *Id.* at 1423-24. Congress took note of Chief Judge Greene's requests and acceded to them. The conference committee, to accommodate those requests, agreed that the Home Rule Act should make clear that only Congress, and not the Council, had "authority over the composition, structure[,] and jurisdiction of the D.C. Courts." H.R. Rep. No. 93-703, at 77 (1973), *reprinted in* House Comm. Print at 3015.

To that end, when Congress passed the Home Rule Act, it modified its earlier draft to preclude the Council from "[e]nact[ing] any act, resolution, or rule

with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." D.C. Code § 1-206.02(a)(4). As the legislative history makes clear, Congress added this provision to (1) keep the Court Reorganization Act intact and (2) enshrine the separation of powers between the legislature and the judiciary. *Woodroof*, 147 A.3d at 784 (Section 1-206.02(a)(4) "was primarily concerned with preserving the organization and structure of the newly created court system (established in Title 11) and the independence of the judiciary."). This section served as a preventive measure to ensure that the Council could not pass legislation to "change the method by which judges are appointed and removed, to change the number of judges on either court, or to create an intermediate court of appeals," *id.*, and to prevent comparable structural or jurisdictional changes.

As a textual matter, the parenthetical phrase in Section 1-206.02(a)(4)—"relating to organization and jurisdiction of the District of Columbia courts"—was no throwaway, contrary to appellants' argument. As the above statutory history makes evident, that clause is the sine qua non of Section 1-206.02(a)(4) and captures its essence. *See Bergman v. District of Columbia*, 986 A.2d 1208, 1225-26 (D.C. 2010) (holding that Section 1-206.02(a)(4) was not violated where an act, on its face, "does not affect the organization or jurisdiction either of this court or the Superior Court"). That language signifies precisely the types of structural changes that Congress sought to preclude the Council from making. Congress deliberately chose the words "organization and jurisdiction," rather than, say, "rules and procedures," because it was those big-picture issues that it wanted to prevent the D.C. Council from interfering with. In

other words, Congress was telling the Council that it was reserving the power to make fundamental or structural changes to the District's courts for itself. Outside of those big-picture alterations, the Home Rule Act empowered the elected Council to legislate on behalf of District residents.

The appellants argue to the contrary, positing that Section 1-206.02(a)(4)'s "relating to" parenthetical was just a duplicative reference to Title 11's caption—"Organization and Jurisdiction of the Courts"—so as to render the parenthetical meaningless. That is not the best interpretation of that provision. First, it is undercut by the legislative history recounted above,[2] demonstrating that Congress was specifically implementing Chief Judge Greene's suggestion and depriving the Council of "authority over the composition, structure[,] and jurisdiction of the D.C. Courts." H.R. Rep. No. 93-703, at 77. Consistent with that history, we read that parenthetical as critical to understanding 1-206.02(a)(4)'s command. [3] Second, the

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[2] The only specific reference to our courts' rulemaking authority in the Chief Judges' letters came in Chief Judge Greene's letter where he expressed concerns that the Home Rule Act's initial draft could leave the courts' "authority to adopt court rules" in doubt. House Comm. Print at 1422. It would indeed be a massive change to our court system if the Council attempted to divest our courts of their rulemaking powers—as it was empowered to do under the Home Rule Act's initial draft—and we would have little difficulty concluding that would be an impermissible intrusion into Title 11 because it would run directly contrary to it. But Chief Judge Greene did not in that sentence suggest that he was concerned with whether the Council's enactments might affect court processes in more discrete ways while leaving our general rulemaking authority in place, as the Anti-SLAPP Act does.

[3] There are certainly times where such parentheticals are best read as appellants suggest, as merely "alert[ing] readers to

reference to Title 11 was not otherwise opaque or in need of any clarification. The D.C. Code is replete with express references to Title 11, and nowhere else does it seek to aid the reader in finding that Title by imprecisely restating its caption. *See, e.g.*, D.C. Code §§ 1-821.01, 16-3901, 21-502(a), 22-3571.02(c).

Our cases have long aligned with our holding today that Section 1-206.02(a)(4) must be read "narrowly" to mean only "that the Council is precluded from amending Title 11 itself." *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019). That is consistent with this court's repeated proclamations that this provision should not be construed to defeat the Home Rule Act's more overarching purpose of promoting self-governance. *Bergman*, 986 A.2d at 1226 ("[T]his court and the United States Court of Appeals for the District of Columbia Circuit have consistently held . . . that

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the nature of the otherwise anonymous section numbers." *See Oppedisano v. Holder*, 769 F.3d 147, 150 (2d Cir. 2014); *see also Fid. & Deposit Co. of Md. v. Stromberg Sheet Metal Works, Inc.*, 532 A.2d 676, 678 (D.C. 1987) (reading parenthetical phrase as merely indicating the nature of, rather than delimiting, prior reference to sections of the U.S. Code); *but see Voss v. Comm'r of Internal Revenue,* 796 F.3d 1051, 1059-60 (9th Cir. 2015) (explaining that statutes should not be interpreted in a way that "parentheticals would be superfluous"). But that is neither a hard-and-fast rule nor even a reliable presumption. We have applied that line of thinking only after "consider[ing] . . . the background" of the relevant Act "as a whole," and providing a "detailed examination of the structure of" the Act and why it supported that conclusion. *Fid. & Deposit Co. of Md.*, 532 A.2d at 678. Here, the background and structure of the Home Rule Act indicate that Section 1-206.02's parenthetical reference to the "organization and jurisdiction" of the District's courts was not merely clarifying, but essential to understanding the section's core purpose.

restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed.").

For example, in *Bergman*, 986 A.2d at 1225-26, we considered an issue very similar to the one we confront today. Title 11 dictates that this court "shall" make rules regulating bar admission and membership, D.C. Code § 11-2501(a), and the question in *Bergman* was whether Section 1-206.02(a)(4) precluded the Council from intruding into that sphere of this court's authority. We answered that firmly in the negative, explaining that nothing in the Home Rule Act made the powers conferred on this court in Title 11 exclusive to us, with a parting shot that "it would be an inappropriate exercise of judicial power to restrict the legislative authority of our elected representatives" by precluding the Council from passing its own laws about bar admission and membership. *Bergman*, 986 A.2d at 1230. Put another way, in words equally applicable to the Anti-SLAPP Act, "the Council's passage of the Act, in the exercise of its power to enact legislation of general applicability, does not impermissibly burden or unduly interfere with this court's authority to exercise its core functions." *Id.* This court has similarly emphasized that the Home Rule Act does not preclude the Council from passing laws that "affect the kinds of cases that the courts adjudicate" altogether, *Woodroof*, 147 A.3d at 781, so the Council can eliminate certain claims from being adjudicated in our courts or prevent certain classes of litigants from bringing or being subjected to certain claims entirely. *See Coleman v. District of Columbia*, 80 A.3d 1028, 1035 n.9 (D.C. 2013) (rejecting Home Rule Act challenge to statute that eliminated causes of action).

That has been the consistent thrust of our precedents interpreting the intersection of the Home Rule Act and the Court Reorganization Act, congruent with their text and legislative history. The Council cannot directly amend Title 11 or otherwise alter the District's courts' structure, jurisdiction, or fundamental powers, but it is not precluded from legislating in areas that the courts likewise have some domain over under Title 11.

II. The Anti-SLAPP Act does not amend Title 11 or alter the organization, structure, jurisdiction, or rulemaking authority of the District's courts

That brings us to the District's Anti-SLAPP Act and whether its discovery-limiting provisions impermissibly intrude into the District's courts' powers under Title 11. That is, is the Anti-SLAPP Act an Act "with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)," D.C. Code § 1-206.02(a)(4), which the Council lacks authority to pass? Appellants contend that it is, because the Anti-SLAPP Act's discovery-limiting provisions alter the procedural ground rules in a subset of Superior Court cases by truncating the discovery rights that plaintiffs typically have, contrary to Title 11's mandate that the Federal Rules of Civil Procedure govern Superior Court procedures except to the extent those rules are modified by the courts.[4] To assess that argument, we first take a deeper dive into the Anti-SLAPP Act itself.

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[4] We note at the outset that Title 11 does not quite say that: recall that Section 11-946 provides that the Superior Court can unilaterally promulgate "other rules," without even this court's approval, so that Title 11 plainly does not direct that the court conduct itself *exclusively* according to the federal rules as

A The Anti-SLAPP Act and how it works

Strategic lawsuits against public participation, or SLAPPs, in their most classic form are lawsuits brought against individuals to chill the exercise of their First Amendment rights. *See generally* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Env't. L. Rev. 3 (1989). Think of an animal rights activist who, in a public broadcast, complains about a meat producer's inhumane slaughter of animals. The meat producer might sue that activist for defamation, knowing full well that it has no legitimate grounds for suit, for the sole purpose of miring the activist in protracted and costly litigation—that might shut them, and others like them, up. That's a SLAPP, and the Anti-SLAPP Act is meant to root out and mitigate the damaging effects of such suits.[5] The Act attempts to accomplish that goal by providing District residents "substantive rights to expeditiously and economically dispense of

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modified by our courts. Instead, Section 11-946 contemplates that some "other rules" can be promulgated that will not qualify as modifications of the federal rules at all. The parties do not explore this statutory caveat, nor do our precedents, and it raises a fairly elusive distinction of when a new rule constitutes a modification of the federal rules versus an "other rule[]." We note this caveat only as some indication that when Congress passed Title 11 it did not contemplate the federal rules being the only rules that could govern Superior Court proceedings—they could be otherwise supplemented.

[5] There are potent criticisms that anti-SLAPP acts do a lousy job of serving that purpose and instead give corporations just one more tool for stifling their detractors. *See Navellier v. Sletten*, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting) ("The cure has become the disease—SLAPP motions are now just the latest form of abusive litigation."). But those are critiques of a policy judgment that we are bound to leave to the Council.

litigation aimed to prevent their engag[ement] in constitutionally protected actions on matters of public interest." Anti-SLAPP Act of 2010, Report on Bill No. 18-893 before the Committee on Public Safety and the Judiciary, Council of the District of Columbia, at 4 (Nov. 18, 2010) [hereinafter D.C. Council Committee Report]. The Act, in other words, "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Id.* at 1.

More concretely, the Anti-SLAPP Act allows defendants, within forty-five days of being served with a complaint, to "file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). The defendant must "make[] 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." *Id.* § 16-5502(b). If they can do that, their motion to dismiss "shall be granted unless the [plaintiff] demonstrates that the claim is likely to succeed on the merits." *Id.*; *see generally Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226-27, 1232-33 (D.C. 2016) (describing the special motion to dismiss).

The key feature of the Anti-SLAPP Act is that it saves litigants from the potentially years-long and prohibitively expensive discovery that often accompanies even baseless litigation, thereby reducing the chilling effects that abusive lawsuits have on First Amendment activity. Once a special motion to dismiss is filed, "discovery proceedings on the claim [are] stayed until the motion has been disposed of."

D.C. Code § 16-5502(c)(1). There is a narrow exception to this in recognition of the plaintiff's interests, whereby a plaintiff may request and receive some "specified" discovery if it "appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." *Id.* § 16-5502(c)(2). The provisions, together, reflect a careful balancing of the interests in protecting public advocates from "expensive and time consuming" discovery—one of the more draining components of litigation, *see* D.C. Council Committee Report at 4—and the interests that plaintiffs have in receiving their day in court. The Act is directly targeted at the litigation process because "*[l]itigation itself* is the plaintiff's weapon of choice" to "intimidate" people "into silence." D.C. Council Committee Report at 4.

B. The Anti-SLAPP Act is within the Council's broad authority to legislate

We are faced with two competing views about how to best interpret Section 1-206.02(a)(4)'s restriction on the Council's authority. On one view, as the appellants argue, the Anti-SLAPP Act is an Act "with respect to Title 11" because it affects court procedures for a suit once the defendant makes a prima facie showing that it is a SLAPP. It therefore contravenes Title 11's command that the federal rules as modified by the District's courts govern Superior Court procedures, or so the argument goes. On the other view, advanced by the District and its amici in defense of the Act, only laws that directly amend Title 11 or upset the organization and jurisdiction of the District's courts run afoul of Section 1-206.02(a)(4). Laws that have mere incidental or supplementary effects on court procedures

to advance policy goals, like the Anti-SLAPP Act, remain within the Council's purview.

The District's interpretation is the better one. It aligns with the purpose of Section 1-206.02(a)(4), and it is more faithful to the overall purpose of the Home Rule Act, which was to ensure the Council had "broad authority to legislate upon 'all rightful subjects of legislation within the District.'" *Andrew*, 110 A.3d at 628 (quoting D.C. Code § 1-203.02). It is also the interpretation that far better comports with this court's long held view that Section 1-206.02(a)(4) "must be construed as a narrow exception to the Council's otherwise broad legislative power 'so as not to thwart the paramount purpose of the Home Rule Act, namely, to grant the inhabitants of the District of Columbia powers of local self-government.'" *Woodroof*, 147 A.3d at 784 (quoting *Andrew*, 110 A.3d at 629).

We hold today that the Council does not run afoul of Section 1-206.02(a)(4) so long as (1) it does not affect the "organization and jurisdiction" of the District's courts, which is what Section 1-206.02(a)(4) was principally meant to stave off; (2) it does not divest our courts of rulemaking authority, though we think this second point fairly fits within the first;[6] (3) it does not alter or "run directly contrary to" Title 11

[6] We flag one topic that we do not resolve today: In the unlikely event that the District's courts promulgated a rule that directly abrogated the Anti-SLAPP Act's discovery provisions (or any of the Council's other policy judgments that affect court rules), we do not opine on who would prevail in that power struggle, i.e., whether the statute or the court rule would control proceedings. The fact is that there is no power struggle here, as the District's courts have never taken any action indicating their disapproval of and seeking to displace the Anti-SLAPP Act's procedural aspects.

itself, *see Woodroof*, 147 A.3d at 784; and (4) it does not otherwise fundamentally alter our courts or seek to micromanage the day-to-day procedures that govern court proceedings. The Anti-SLAPP Act does none of those things, so it does not run afoul of Section 1-206.02(a)(4)'s restriction on the Council.

The Anti-SLAPP Act—crafted according to the policy judgments of our local legislature—is a routine example of the Council "legislating upon essentially local District matters." D.C. Code § 1-201.02(a). Presuming that Congress "acted rationally and reasonably, with an awareness of the goals of the statutory scheme as a whole," and keeping in mind "the policies intended to be furthered by the legislation," *Expedia, Inc. v. District of Columbia*, 120 A.3d 623, 631 (D.C. 2015) (quoting *In re C.L.M.*, 766 A.2d 992, 996-97 (D.C. 2001)), the Home Rule Act permitted the Council to enact the Anti-SLAPP Act to protect District residents from lawsuits that stifle free debate on matters of public interest.

As support, we note that various state constitutions preclude the legislature from micromanaging or fundamentally restructuring their judiciaries, similar to how the Home Rule Act restricts the Council from altering our court system's organization and structure. *E.g.*, *Mellowitz v. Ball State Univ.*, 221 N.E.3d 1214, 1221 (Ind. 2023) (citing Ind. Const. art. 1, § 1); *People v. Warren*, 671 N.E.2d 700, 710-11 (Ill. 1996); *Berkson v. LePome*, 245 P.3d 560, 564-65 (Nev. 2010); *Massey v. David*, 979 So.2d 931, 936 (Fla. 2008). And yet no state court has ever held that their state's anti-SLAPP act intrudes upon that division of power, despite the fact that a substantial majority of states

have anti-SLAPP acts of their own.[7] *See Anti-SLAPP Legal Guide*, Reps. Comm. for Freedom of the Press, www.rcfp.org/anti-slapp-legal-guide (last visited Oct. 29, 2025) ("As of June 2025, 38 states and the District of Columbia have anti-SLAPP laws.").

For example, in Indiana, the state constitution establishes the separation of powers between the legislative and judicial branches: "Enacting laws" is a "legislative function," whereas "promulgating procedural rules for litigating disputes about those laws is part of the judicial function." *Mellowitz*, 221 N.E.3d at 1221. Yet the Indiana Supreme Court has found that the state's anti-SLAPP act—which has a discovery-limiting provision like ours, *see* Ind. Code Ann. § 34-7-7-6—did not conflict with the state's constitution because the Act did not "micromanage

[7] Two states—Washington and Minnesota—struck down their anti-SLAPP statutes because they required plaintiffs to show "by clear and convincing evidence" that their suits were likely to succeed in order to defeat a special motion to dismiss. That heightened evidentiary standard violated each state's constitutional rights to a jury trial. *See Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015) (en banc) (holding that the heightened evidentiary standard "violates the right of trial by jury" under the state's constitution); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 637 (Minn. 2017) (same). Both states have since revised their anti-SLAPP statutes to comply with those rulings, and notably, both statutes still limit discovery. *See* Wash. Rev. Code Ann. § 4.105.030(1)(a); Minn. Stat. Ann. § 554.10(a)(1). Our own Anti-SLAPP Act does not impermissibly intrude on the jury trial right because we have interpreted it, after invoking the doctrine of constitutional avoidance, to set a much lower bar for a suit to proceed. *See Mann*, 150 A.3d at 1236 (The constitutional avoidance canon "leads us to interpret the phrase 'likely to succeed on the merits,' undefined in the D.C. Anti-SLAPP statute, in a manner that does not supplant the role of the fact-finder, lest the statute be rendered unconstitutional.").

the courts" and "address[ed] a substantive concern: a chill on citizens' free speech rights." *Mellowitz*, 221 N.E.3d at 1222.

Our interpretation is further bolstered by the fact that the Council can undoubtedly pass legislation that more directly and severely upends the normal procedural rules and available remedies for certain subsets of claims. For instance, it is undisputed that the Council can insulate certain individuals and entities from legal exposure, by making them immune from suit or liability, without exceeding its powers under the Home Rule Act.[8] We have similarly held

[8] *See, e.g.*, D.C. Code § 1-301.42 ("For any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place."); *id.* § 7-531.09 ("With respect to their participation in the [Volunteer Service Credit Program] or a demonstration project, the District government and its agencies, officials, and employees and sponsors and their advisory committees, officials, and employees shall be immune from civil or criminal liability if they have acted in good faith."); *id.* § 7-1908 ("Any person who reports an alleged case of abuse, neglect, self-neglect, or exploitation pursuant to § 7-1903 shall be immune from civil or criminal liability for so reporting if he, she, or it has acted in good faith."); *id.* § 49-1101.11(e) ("The Interstate Commission's executive director and its employees shall be immune from suit and liability, either personally or in their official capacity, for a claim for damage to or loss of property or personal injury or other civil liability caused or arising out of or relating to an actual or alleged act, error, or omission that occurred, or that such person had a reasonable basis for believing occurred, within the scope of Interstate Commission employment, duties, or responsibilities; provided, that such person shall not be protected from suit or liability for damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of such person."); *id.* § 31-5414(a) ("There shall be no liability on the part of . . . any member insurer or its agents or employees, the [Life and Health Insurance Guaranty] Association or its agents or employees, members of the Board of

that the Council can shift certain categories of cases outside of the court system and into administrative adjudication, thereby rendering our court rules wholly inapplicable to those cases; and, even more broadly, the Council can extinguish entire categories of claims altogether, as it sees fit. *See, e.g.*, *District of Columbia v. Sullivan*, 436 A.2d 364, 365-66 (D.C. 1981) (rejecting Home Rule Act challenge to statute that decriminalized minor traffic offenses and substituted administrative adjudication); *Coleman*, 80 A.3d at 1035 n.9 (rejecting Home Rule Act challenge to statute foreclosing certain causes of action).

The power to do those considerably more drastic things, by any logic, must encompass the more modest power to limit the discovery that a certain subset of plaintiffs are entitled to unless and until they can clear some threshold hurdles. *See Mann*, 150 A.3d at 1229-30 (The Anti-SLAPP Act is "analogous to qualified immunity for official conduct in that its application depends on the court's resolution of whether the acts complained of entitle the defendant not to stand trial 'under certain circumstances.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985))); D.C. Council Committee Report at 4 ("Following the lead of other jurisdictions, which have

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Directors, or the Mayor or the Mayor's representatives, for any action or omission by them in performance of their powers and duties under this chapter, except in the case of willful misconduct, gross negligence, or criminal activity on the part of these persons."); *id.* § 3-1251.08 ("The members of the [Committee on Impaired Nurses] shall be immune from liability in the exercise of their duties."); *id.* § 4-1321.04 ("Any person, hospital, or institution participating in good faith in the making of a report pursuant to this subchapter shall have immunity from liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making of the report.").

similarly extended absolute or qualified immunity to individuals engaging in protected actions, [the Act] extends substantive rights to defendants in a SLAPP."). As the Council aptly describes in its amicus brief, the Anti-SLAPP Act's special motion to dismiss provides certain individuals with "qualified immunity against discovery," much like the many immunity statutes enacted by the Council on countless other occasions. So just like those immunity statutes, the Anti-SLAPP Act does not exceed the Council's authority.

III. Responses to the appellants' remaining arguments

The appellants' contrary view is that the Anti-SLAPP Act's discovery-limiting provisions' "procedural nature" means the Act necessarily infringes on our rulemaking authority, thereby violating Title 11. Under that view, the Council is restricted to enacting purely "substantive" laws that do not affect court procedures. We disagree, for three principal reasons.

A. The Superior Court's rules are unmodified and still apply in every case

The appellants' interpretation, while a plausible enough reading of Section 1-206.02(a)(4) in isolation, is by no means compelled by its text.[9] Recall that this

[9] This court has held that we "may refuse to adhere strictly to the plain wording of a statute in order 'to effectuate the legislative purpose,' *Mulky v. United States*, 451 A.2d 855, 857 (D.C. 1982), as determined by a reading of the legislative history or by an examination of the statute as a whole." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) (en banc). While we do not think Section 1-206.02(a)(4)'s text plainly favors the appellants' interpretation, even if we concluded otherwise, that interpretation would nonetheless be so clearly contrary to both the legislative purpose behind that

provision precludes the Council from "[e]nact[ing] any act, resolution, or rule with respect to any provision of Title 11," which in turn dictates that "[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure," though the District's courts are free to modify those rules (as we frequently do) and the Superior Court can unilaterally promulgate "other rules" governing its procedures. D.C. Code §§ 1-206.02(a)(4), 11-946. Title 11 does not say the Superior Court shall be governed *only* by the federal rules as amended by our courts, so on its face it leaves room for the Council to supplement those rules, at least where its enactments do not directly conflict with them. *See Woodroof*, 147 A.3d at 784 ("[T]he Council's actions [can]not run directly contrary to the terms of Title 11.").

The appellants never explained how the Anti-SLAPP Act prevents the Superior Court from "conduct[ing] its business according to the Federal Rules of Civil Procedure." D.C. Code § 11-946. The Superior Court still conducts its business according to the federal rules as modified by our courts in all cases, despite the Anti-SLAPP Act's existence. As the Council puts it in its amicus brief, the Act "does not amend a single word of section 11-946," it does not amend any court rule, nor does it "repeal or otherwise alter the establishment of the Federal Rules . . . as the default rules for the conduct of Superior Court business." *See also Price*, 212 A.3d at 845 (Section 1-206.02(a)(4) should be read "narrowly to mean" only "that the Council is precluded from amending Title 11 itself.").

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provision in particular and the overall purposes animating the Home Rule Act that we would likely reject it in any event.

Our local procedural rules still apply in every single anti-SLAPP case, and our courts retain the authority to modify each of those rules, the Anti-SLAPP Act notwithstanding. Many procedural rules come into play before any special motion to dismiss can be filed. *See, e.g.*, Super. Ct. Civ. R. 4 (requirements for the contents, issuance, and service of a summons); Super. Ct. Civ. R. 8 (pleading requirements). While a special motion to dismiss might end litigation before it gets to the Rule 56 summary judgment stage, that is no novelty—the rules themselves contemplate that. *See* Super. Ct. Civ. R. 12 (motions to dismiss for lack of personal jurisdiction, lack of subject-matter jurisdiction, failure to state a claim, etc.). And in those cases where an anti-SLAPP defendant does not seek or unsuccessfully moves for early dismissal, the full panoply of Rule 56's requirements awaits. *See* Super. Ct. Civ. R. 56. In all cases, therefore, the Superior Court is "conduct[ing] its business" according to the local rules, and the Anti-SLAPP Act is not a law "with respect to" that in any meaningful sense. D.C. Code §§ 1-206.02(a)(4), 11-946.[10]

The appellants counter that the Anti-SLAPP Act conflicts with our local Rule 56's summary judgment standard, under which full discovery is the norm, while the Anti-SLAPP Act "blocks most if not all discovery" in some cases. This argument starts from the mistaken premise that the Council can in no way alter or affect the procedures in our courts, a premise that misreads the Home Rule Act by evincing far too siloed an approach to the permitted interplay

[10] Even in cases where a special motion to dismiss is granted, plaintiffs have the full benefit of the procedural rules governing post-judgment relief. *See, e.g.*, Super. Ct. Civ. R. 60.

between the Council and our courts. The Home Rule Act does not expressly or implicitly bar the Council from enacting procedural rules that affect court proceedings, and the fact that it protects our own rulemaking authority does not make that authority exclusive—it only precludes the Council from displacing it. *See generally Bergman*, 986 A.2d at 1224-26. It is not as if the Anti-SLAPP Act upends Rule 56 in any way that could be fairly described as preempting it wholesale. The Anti-SLAPP Act and Rule 56 can coexist in perfect harmony. *See Mann*, 150 A.3d at 1238 ("Our interpretation of the requirements and standard applicable to special motions to dismiss ensures that the Anti–SLAPP Act provision is not redundant relative to the rules of civil procedure."); *cf. Asylum Co. v. D.C. Dep't of Emp. Servs*., 10 A.3d 619, 631 (D.C. 2010) ("Courts assume . . . that 'the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress.'" (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992))).

The appellants' response is premised on the mistaken assumption that the Home Rule Act enshrined the substantive/procedural divide policed by federal courts hearing state law claims. That divide not only lacks any textual grounding in the Home Rule Act, its relevance here is minimal, as we now explain.

B. The Home Rule Act did not enshrine the substantive/procedural divide that governs federal court proceedings

The appellants' position starts with the premise that the Home Rule Act requires this court to police the "substantive law" versus "procedural rule" divide

that guides federal courts, per the Supreme Court's seminal decision *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), when adjudicating state law claims. From that mistaken premise, appellants highlight several federal appellate courts—though they are not uniform on the point—that have concluded that the federal rules of procedure prevail over the procedures dictated by state anti-SLAPP laws when federal courts adjudicate state anti-SLAPP suits. *See, e.g.*, *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333-34 (D.C. Cir. 2015); *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021); *La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020).[11] These federal cases are inapposite for two important reasons.

First, these cases are rooted in federalism and uniformity concerns that have no bearing here; they seek to ensure "a uniform and consistent system of rules" in the federal courts, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987), rather than miring federal courts in the niceties of each states' varied procedural rules. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) ("[D]ivergence from state law . . . is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure."). Those concerns are absent here. The Anti-SLAPP Act applies uniformly in the District's courts, and there is

[11] One federal circuit has concluded that a state's anti-SLAPP law "has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010). We pay that case no more mind than those that reach a different conclusion—they are all addressed to federalism concerns not present here.

no vertical power struggle with the federal government at play, only the horizontal separation of powers concern of whether the Council needs this court's approval to enact its limited discovery provisions. So, unlike the federal courts, we have no cause to strictly police the substantive law/procedural rule divide that steers federal court procedures under *Erie*. That doctrine is inapposite here, and nothing in the Home Rule Act suggests we should import it into our local courts tasked with adjudicating local law.

Second, these federal cases involve a crucially different question from the one presented here. The federal cases, which jealously guard the interests described in the previous paragraph under *Erie*, ask whether a state's anti-SLAPP law "answers the same question" as a provision of the federal rules. *La Liberte*, 966 F.3d at 87 (citing *Shady Grove*, 559 U.S. at 398-99). If so, federal procedure generally governs the federal court proceedings. We confront a fundamentally different question here, which is whether the Anti-SLAPP Act impermissibly interferes with the Superior Court's ability to "conduct its business" according to the federal rules as amended by this court. D.C. Code §§ 1-206.02(a)(4), 11-946. That inquiry is far less concerned with the Anti-SLAPP Act's relationship with one or two discrete procedural rules and instead focuses on whether the Anti-SLAPP Act has affected the Superior Court's operations as a whole. These federal cases are accordingly of little relevance, and appellants' reliance on them was misplaced.[12]

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[12] There is also the distinction that, even if the procedural provisions of a given state's anti-SLAPP law do not bind federal courts, those laws remain applicable in state court proceedings. Here, appellants ask us to strike down the District's AntiSLAPP

C. Appellants' position would thrust the District's courts into a policymaking role that they are fundamentally ill-suited for

Perhaps most troublingly, the appellants' view boils down to the startling proposition that it is up to *the courts* or Congress to decide whether to enact the Anti-SLAPP Act's discovery-limiting provisions. That would be unwelcome news.

The District's courts generally are not entrusted with, or particularly adept at, making such policy decisions. Because our judges are appointed rather than elected, we are in a poor position to "balanc[e]" the many "costs and benefits" that underlie big-picture decisions about access to the litigation process. *See Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2239 (2025). Those decisions are better made by elected Councilmembers; they are in more direct communication with District residents, who likely experience those costs and benefits in a variety of ways. What do we, an unelected group of judges, think about the substance of the Anti-SLAPP Act's discovery-limiting provisions? We think that raises a policy question outside our bailiwick, so that we ought to get out of the Council's way to do what it does and make such policy judgments. *See supra* n.5.

Several state appellate courts have cogently explained, similarly, that their own anti-SLAPP laws "predominantly further public policy objectives" and thus do not interfere with the judiciary's procedural rules or functions. *Mellowitz*, 221 N.E.3d at 1221; *see also, e.g.*, *Robinson v. V.D.*, 328 A.3d 198, 223-24

Act provisions even in the District's courts, rendering them a nullity everywhere. That is a more sweeping result that none of the federal authorities had to grapple with.

(Conn. App. Ct. 2024); *Davis v. Parks*, No. 61150, 2014 WL 1677659, at *2 (Nev. Apr. 23, 2014) (unpublished). As we have already explained, no state court has ruled otherwise and deprived its own legislature of the power to pass similar anti-SLAPP legislation, which by itself is a pretty devastating blow to appellants' interpretation of the Home Rule Act. *See Sullivan*, 436 A.2d at 366 (rejecting Home Rule Act challenge out of hand where "[a]cceptance of this argument would be to hold the Council powerless to act in many areas which have traditionally fallen within the local regulatory domain" (quoting *McIntosh v. Washington*, 395 A.2d 744, 751 (D.C. 1978))).

While Congress itself could still pass the Anti-SLAPP Act under the appellants' reasoning, Congress is demonstrably unconcerned with our courts' local procedural rules. That is no swipe at Congress; it has better things to do. And Congress made its indifference to our local procedural rules readily apparent in the Court Reorganization Act, when it said—to paraphrase—"take these federal rules of procedure as a starting point, but feel free to supplement or modify them as you wish." *See* D.C. Code § 11-946. For appellants to read that law to preclude the Council from so much as affecting our courts' procedures, despite the fact that the Council did not exist at the time of the Court Reorganization Act so Congress had not contemplated any limitation on it, turns that indifference on its head.

Moving beyond the Anti-SLAPP Act itself, there are many District statutes that affect discovery just as much as the Anti-SLAPP Act does, and appellants' reasoning would leave it to our courts to decide whether to give force to those laws by way of rules amendments. Aside from the numerous immunity

statutes already discussed, a handful of statutes allow for stays of discovery that are unquestionably procedural, despite the fact that the District's courts have never affirmatively adopted them. *See, e.g.*, Medical Malpractice Amendment Act of 2006, D.C. Code § 16-2821 ("After an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery."); False Claims Act, *id.* § 2-381.03(g)(1) ("[U]pon a showing by the District that certain actions of discovery by the qui tam plaintiff would interfere with the investigation or prosecution of a criminal or civil matter by the District or a criminal matter in the District of Columbia arising out of the same facts, the court may stay such discovery"); Uniform Business Organization Code, *id.* § 29-709.06 (where a limited partnership is named as party in a derivative proceeding, "[i]f the partnership appoints a special litigation committee [to investigate], on motion by the committee made in the name of the partnership, except for good cause shown, the Superior Court shall stay discovery for the time reasonably necessary to permit the committee to complete its investigation."). By appellants' reasoning, it would be up to our courts to decide which of those statutes to approve and reject, guided by what would surely be policy considerations.

Other statutes control the scope of discovery in more limited ways, similar to how the Anti-SLAPP Act asks courts to determine if targeted discovery is necessary at the special motion to dismiss stage. *See, e.g.*, *id.* § 22-4135(e)(4) (where a person convicted of a crime moves to vacate their conviction for actual innocence, they "shall be entitled to invoke the processes of discovery available under Superior Court Rules of Criminal Procedure or Civil Procedure . . . if,

and to the extent that, the judge, in the exercise of the judge's discretion and for good cause shown, grants leave to do so, but not otherwise"). And yet another category of statutes limits what types of information can be discovered, with no grounding in our procedural rules. *See, e.g.*, *id.* § 44-805(a)(1) (certain records of peer review bodies "shall be neither discoverable nor admissible into evidence in any civil, criminal, legislative, or administrative proceeding"); *id.* § 16-4203(a) (mediation communications are privileged and "not subject to discovery or admissible in evidence"); D.C. Code § 14-306(a) (codifying the spousal privilege and directing that one cannot be "compell[ed] to testify for or against their spouse or domestic partner"); D.C. Code § 14-309 (codifying the clergy-penitent privilege and explaining that clergy members "may not be examined in any civil or criminal proceedings" on a variety of topics). If the Anti-SLAPP Act's discovery-limiting provision exceeds the Council's authority, so too must all of these, unless the courts step in to authorize them.

Then there are the practical concerns with the District's courts having to greenlight any legislation that incidentally affects our courts' procedures. This court has many exemplary qualities, but our "wheels of justice sometimes grind very slowly indeed." *Belcon Inc. v. D.C. Water & Sewer Auth.*, 826 A.2d 380, 383 (D.C. 2003). That careful deliberateness is often a feature of the judiciary. *See Remarks of Justice Alito*, 58 Cath. U. L. Rev. 1, 6 (2008) (describing how "[t]urtles figure prominently in the ornamentation of the Supreme Court building" and are often interpreted to "represent[] the slow and steady pace of justice"). But if we inject ourselves into the policymaking process, it would become a significant flaw.

* * *

The Home Rule Act is vital legislation that granted self-governance to the District. The Anti-SLAPP Act, passed by the D.C. Council per its lawmaking authority under the Home Rule Act, ensures that the District's residents can speak their minds about public issues without being dragged into protracted and baseless retaliatory litigation. The Anti-SLAPP Act does not run afoul of the Home Rule Act by impermissibly intruding into Title 11 because it does not alter the structure or jurisdiction of the District's courts; it does not divest us of our rulemaking authority; it does not run directly contrary to Title 11; and it does not bring about any other drastic alterations to our judiciary, or seek to micromanage our courts' procedures, in any way that Congress sought to preclude the Council from doing when it passed the Home Rule Act. The Anti-SLAPP Act does not unduly infringe on the District's courts' power or assume our area of expertise, nor does it change the fact that the Superior Court conducts its business pursuant to the Federal Rules of Civil Procedure except as modified by our courts. We thus conclude that the Anti-SLAPP Act comports with the Home Rule Act.

Appellants raise several other challenges to the trial court's ruling, and we return the case to the division for it to address those matters in light of this opinion.

So ordered.

APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed: Sept. 07, 2023]

No. 20-CV-0318
2017-CA-005989-B

MORGAN BANKS, *et al.,*

Appellants,

v.

DAVID H. HOFFMAN, *et al.,*

Appellees.

On Appeal from the
Superior Court of the District of Columbia
Civil Division

BEFORE: Blackburne-Rigsby, Chief Judge, Howard, Associate Judge, and Thompson, Senior Judge.

JUDGMENT

This case came to be heard on the transcript of record and the briefs filed, and it 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 dismissing appellants' complaint is reversed and the case is remanded for further proceedings consistent with this opinion.

For the Court:

Julio A. Castillo
Julio A. Castillo
Clerk of the Court

Dated: September 7, 2023.
Opinion by Senior Judge Thompson.

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed: 09/07/2023]

No. 20-CV-0318

MORGAN BANKS, *et al*.,

Appellants,

v.

DAVID H. HOFFMAN, *et al.*,

Appellees.

Appeal from the Superior Court
of the District of Columbia
(2017-CA-005989-B)

(Hon. Hiram E. Puig-Lugo, Motions Judge)

(Argued April 20, 2022 Decided September 7, 2023)

Bonny J. Forrest, of the bars of the States of New York and California, *pro hac vice*, by special leave of the court, with whom *Kirk Jenkins* and *John B. Williams* were on the brief, for appellants L. Morgan Banks, III, Debra L. Dunivin, and Larry C. James.

James C. McKay, *Jr.*, Senior Assistant Attorney General, for appellee District of Columbia. *Karl A. Racine*, Attorney General for the District of Columbia at the time, *Loren L. AliKhan*, Solicitor General at the time, *Caroline S. Van Zile*, Principal Deputy Solicitor General at the time, *Carl J. Schifferle*, Deputy Solicitor General, and *Mark S. Wigley*, Assistant Attorney General, were on the brief for appellee District of Columbia.

Barbara S. Wahl, with whom *Randall A. Brater* and *Michael F. Dearington* were on the brief, for appellee American Psychological Association.

Thomas G. Hentoff, with whom *John K. Villa, Stephen J. Fuzesi, Krystal C. Durham* and *Matthew J. Greer* were on the brief, for appellees David H. Hoffman, Sidley Austin, LLP, and Sidley Austin (DC), LLP.

Before BLACKBURNE-RIGSBY, *Chief Judge*, HOWARD, *Associate Judge*, and THOMPSON, *Senior Judge*.

THOMPSON, *Senior Judge*: This matter is an appeal from the Superior Court's dismissal of a defamation action pursuant to the special-motion-to-dismiss provisions of the District of Columbia Anti-SLAPP Act.[1] In challenging the dismissal, plaintiffs/appellants argue inter alia that the D.C. Anti-SLAPP Act is invalid because its enactment violated the District of Columbia Home Rule Act (the "Home

[1] Formally, the District of Columbia Anti-Strategic Lawsuits Against Public Participation Act (hereafter referred to as the "D.C. Anti-SLAPP Act," the "Anti-SLAPP Act," or the "Act"), D.C. Code §§ 16-5501–16-5505.

Rule Act").[2] For the reasons set out below, we agree that the Home Rule Act, and in particular its preservation of Title 11 of the D.C. Code, precluded the Superior Court from giving effect to the discovery-limiting aspects of the D.C. Anti-SLAPP Act's special-motion-to-dismiss provisions. Accordingly, we reverse the judgment of dismissal and remand for further proceedings consistent with this opinion. In light of the discovery limitations the Superior Court implemented, we also vacate the court's rulings on the "public official" and "republication" issues discussed below and remand as to those issues as well.

I. Introduction

A. Procedural Background

Plaintiffs/appellants are Col. (Ret.) L. Morgan Banks, III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James. All three are retired military psychologists who were mentioned prominently in a report ("the Report"), published in 2015 on the American Psychological Association ("APA") website, concluding that certain APA officials colluded with the U.S. Department of Defense ("DoD") "to support the implementation by DoD of the interrogation techniques [directed at persons detained following the events of September 11, 2001] that DoD wanted to implement without substantial constraints from APA" ethical guidelines. The Report identifies each of the appellants by name as a key participant in the alleged collusion. Appellants filed the underlying action for defamation *per se*, defamation by imply-

[2] District of Columbia Self Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), codified at D.C. Code §§ 1-201.01-1 207.71.

cation, and false light invasion of privacy in 2017, naming as defendants the APA, which authorized and financed the Report; David H. Hoffman, the lead of a team of lawyers who conducted the underlying investigation and prepared the Report; and the law firm in which Hoffman is a partner, Sidley Austin LLP, and its affiliated entity Sidley Austin (DC) LLP (together, "Sidley").[3]

The APA, Hoffman, and Sidley filed special motions to dismiss the lawsuit pursuant to the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5502(a). In response, appellants moved to declare the Anti-SLAPP Act void as in contravention of the Home Rule Act, and as unconstitutional under the First Amendment right to petition for redress of grievances. The District of Columbia intervened to defend the Anti-SLAPP Act legislation. In two separate orders, the Superior Court first denied appellants' motion to declare the Anti-SLAPP Act violative of the Home Rule Act and unconstitutional, and then granted appellees' special motions to dismiss, finding that appellants had failed to show that they were likely to succeed on the merits of their defamation and related claims.

Appellants now seek reversal of the Superior Court's orders on five grounds: (1) enactment of the D.C. Anti-SLAPP Act violated the Home Rule Act because it is a legislative enactment with respect to Title 11 of the D.C. Code, which is beyond the authority the Home Rule Act conferred on the Council of the District of Columbia (the "Council"),

[3] Originally, five plaintiffs filed suit, but two of them were referred to arbitration pursuant to their employment contracts with the APA. Those former plaintiffs are Dr. Stephen Behnke and Dr. Russell Newman.

and because the Act's special-motion-to-dismiss procedure squarely conflicts with the mandate Congress set out in section 946 of Title 11 (D.C. Code § 11-946); (2) the D.C. Anti-SLAPP Act is unconstitutional because it impairs exercise of the First Amendment right to petition for redress of grievances; (3) the Superior Court reached its determination that appellants were not likely to succeed on the merits of their claims by erroneously treating appellants as "public officials," who can prevail on a claim of defamation only by showing that the defendants acted with actual malice; (4) even if the actual-malice standard applies, appellants came forward with evidence sufficient to permit a reasonable jury to find, by clear and convincing evidence, that appellees acted with actual malice in publishing the statements in issue; and (5) the Superior Court erred in ruling that the APA did not "republish" the Report in August 2018.

B. The D.C. Anti-SLAPP Act

The legislative history of the D.C. Anti-SLAPP Act describes a SLAPP — a strategic lawsuit against public participation — as 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 Pub. Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010) (hereinafter, the "Report on Bill 18-893")). In enacting the D.C. Anti-SLAPP Act in 2010, the Council joined nearly 40 other jurisdictions that had already adopted or were considering the adoption of anti-SLAPP legislation. Report on Bill 18-893 at 3. In the words of the Committee on Public Safety, the Act

"incorporates substantive rights with regard to a defendant's ability to fend off" SLAPPs, so as to "allow a defendant to more expeditiously, and more equitably, disp[ose] of a SLAPP." *Id.* at 1, 3.

The Anti-SLAPP Act's provisions at issue in this case are codified at D.C. Code §§ 16-5502 and 16-5504(a). Section 16-5502 provides that:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.
>
> (c)
>
> (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the

> plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

D.C. Code § 16-5502(a)-(d).

Construing the "likely to succeed on the merits" standard of § 16-5502(b), this court has held that it is "substantively the same" as the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure. *Mann*, 150 A.3d at 1238 n.32 (stating that the "likelihood of success standard . . . simply mirror[s] the standards imposed by Federal Rule 56" (internal quotation marks and citation omitted)).[4] At the same time, "the special motion to dismiss is different from [Rule 56] summary judgment in that it imposes the burden on plaintiffs and requires the court to consider the legal sufficiency of the evidence presented before discovery is completed," *id.*, and because, under § 16-5502(c), "the decision to grant or deny targeted discovery rests within the trial court's broad discretion," *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 513 (D.C. 2020). In addition, the Anti-SLAPP Act's "reversal of the allocation of burdens for dismissal" relieves the special-motion-to-dismiss

[4] "[T]he standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that 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." *Mann*, 150 A.3d at 1236 (emphasis in the original).

movant from "shoulder[ing] the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts." *Mann*, 150 A.3d at 1237.

D.C. Code § 16-5504(a) provides in relevant part that "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 . . . the costs of litigation, including reasonable attorney fees." Interpreting this provision, this court has recognized that "the Act imposes no requirement on a successful movant under § 16-5504(a) to show either . . . improper motive (bad faith) or total lack of merit in the underlying suit . . . before reasonable attorney's fees may be awarded." *Doe v. Burke*, 133 A.3d 569, 575 (D.C. 2016).

C. Factual Background

In late 2004, the *New York Times* and other media outlets published articles about the abuse of detainees captured by the United States as part of its global war on terror. These articles, and the reports underlying them, directly implicated psychologists as assisting in the carrying out of abusive interrogations of detainees. Amidst growing public scrutiny, the APA — a professional organization of over 117,500 members across the United States — convened a task force, known as the Psychological Ethics and National Security Task Force (the "PENS Task Force" or the "Task Force") to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." Appellants Banks and James were among the ten individuals selected to be on the Task Force, and they were two of the Task Force's three members who were military officers at the time. Appellant

Dunivin, who was also a military officer at the time, was not a member of the Task Force, but she proposed members for it (and, according to the Report, influenced its composition).

The PENS Task Force met for three days in June 2005 and, at the conclusion of the meetings, issued a set of guidelines with commentary, known as the PENS Guidelines, "about the ethical obligations of the APA members" involved in national-security-related work. The PENS Guidelines stated that psychologists "may serve in various national security-related roles, such as a consultant to an interrogation," but that psychologists should "strive to ensure that they rely on methods that are effective, in addition to being safe, legal, and ethical." The APA Board adopted the PENS Guidelines as official policy in July 2005.

In the years that followed issuance of the PENS guidelines, the APA was publicly criticized for allowing psychologists to consult on national security interrogations. In 2014, nine years after the issuance of the PENS Guidelines, *New York Times* Reporter James Risen published a book entitled *Pay Any Price: Greed, Power and Endless War*, which charged that the APA had colluded with the U.S. government to support torture. In response, the APA commissioned Sidley to conduct "an independent review" to determine "whether APA officials [had] colluded with DoD, CIA, or other government officials to 'support torture.'" The review culminated in the 541-page Report, entitled "Independent Review Relating to APA Ethics Guidelines, National Security Inter-

rogations, and Torture."[5] The APA published the Report on its website in July 2015.

Under a section of the Report entitled "Summary of the Investigation's Conclusions," the Report notes that its "principal findings relate to the 2005 [PENS] [T]ask [F]orce." The first of the "principal findings" is that "key APA officials . . . colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines."[6] The Report identified appellant Banks as "the key DoD official" with whom the APA partnered and appellant Dunivin as "the other DoD official who was significantly involved in the confidential coordination effort." The Report states as its next "principal finding" that "in the three years following the adoption of the 2005 PENS Task Force report as APA policy, appellants and APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad." In an additional "principal finding," the Report states that "ethics complaints against prominent national

[5] A link to the report is contained on the APA website at https://www.apa.org/news/press/statements/interrogations; https://perma.cc/HRN5-PEN8. According to Sidley's brief, the Report was based on the law firm's having "interviewed roughly 150 witnesses, conducted over fifty follow-up interviews of witnesses, and reviewed over 50,000 documents" over an eight-month period.

[6] The Complaint asserts that this statement is the Report's "most prominent false conclusion."

security psychologists w[ere] handled in an improper fashion, in an attempt to protect these psychologists from censure." Appellant James is one of the psychologists who allegedly was "shielded" from censure.

D. The Particulars of the Complaint and the Superior Court's Rulings

Appellants' August 2017 Complaint and February 2019 Supplemental Complaint allege that the Report had "an overarching false and defamatory narrative: [that] from 2005 to 2014, [p]laintiffs and others 'colluded' to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations."[7] The complaint alleges that each of the Report's "three primary conclusions . . . is false" and that the Report damaged appellants' reputations and careers. As to Mr. Hoffman and Sidley, appellants assert that these appellees made defamatory statements in the Report that they knew were false or with reckless disregard for their truth or falsity; purposely avoided information that they knew would contradict their preconceived narrative; relied on sources they knew were biased or unreliable; failed to adhere to proper investigative practices; and refused to correct or retract defamatory statements despite receiving additional evidence of their falsity. As to the APA, appellants assert that the APA Board hastily reviewed the Report and published it despite knowledge of its errors. The complaint alleges in addition that an APA email referencing the Report and changes made to the APA's website in August 2018 constituted a republication of the Report. An

[7] Hereafter, references to the "complaint" are to the Supplemental Complaint unless otherwise indicated.

Exhibit to the complaint identifies 219 (allegedly) defamatory statements made in the Report.[8]

In a January 23, 2020, order, the Superior Court rejected appellants' argument that the Anti-SLAPP Act is invalid, and the court granted appellees' special motions to dismiss in a March 12, 2020, order. In the latter order, the Superior Court determined that appellees had made a prima facie showing that appellants' claims "ar[ose] from an act in furtherance of the right of advocacy on issues of public interest" within the meaning of the Anti-SLAPP Act (a determination that appellants do not challenge in this appeal) and thus that, under § 16-5502(b), the burden shifted to appellants to show that they were likely to succeed on the merits. The court determined that each appellant is a "public official" for purposes of defamation law and therefore could prevail only by presenting evidence that would permit a jury to find by clear and convincing evidence that appellees acted with actual malice, i.e., with knowledge that the

[8] Appellees argued in their special motions to dismiss that appellants' allegations did not "come close to establishing" that the Report contained statements that appellees knew were false or about whose truth they entertained doubts, and further that the allegations of the complaint were insufficient to establish actual malice. Mr. Hoffman and Sidley asserted in addition that they believe the Report's interpretation of the events it discusses is correct. The APA asserted that it was entitled to rely on the statements in the Report and had no obligation to investigate the Report before releasing it to the public. In their briefs in this appeal, appellees argue that appellants cannot show, by clear and convincing evidence, that appellees published false statements about them with actual malice. The Sidley brief argues in addition that appellants "rely on inaccurate and generalized second-hand characterizations of [the] Report or their own paraphrasing," thereby complaining about alleged statements that the Report "never said."

statements in dispute were false or with reckless disregard of whether they were false. The court then found that appellants had failed to make the requisite showing despite having had the opportunity to conduct some targeted discovery pursuant to § 16-5502(c)(2).[9] The court also determined as a matter of law that APA did not republish the Report in August 2018. This appeal followed. Appellants seek a remand for full discovery and trial.

II. Analysis

A. The Validity of the Anti-SLAPP Act's Provisions

1. Whether the Anti-SLAPP Act's Special-Motion-to-Dismiss Procedure Contravenes the Home Rule Act

We turn first to appellants' contention that the D.C. Anti-SLAPP Act is void under the Home Rule Act. We note that the issue of the validity of the D.C. Anti-SLAPP Act in light of D.C. Code § 11-946 was before this court earlier in *Khan v. Orbis Business Intelligence Ltd.*, 292 A.3d 244 (D.C. 2023), but the issue had not been raised in the trial court, and we therefore declined to address it on appeal. *See id.* at 260. In the instant case, the issue of whether the Act's special-motion-to-dismiss procedure contra-

[9] The court reasoned, for example, that affidavits appellants submitted in support of their opposition to the special motions to dismiss did not support a finding of actual malice because, notwithstanding the affiants' impression that Sidley had a "preconceived narrative" at the time Sidley investigators interviewed the affiants, the affiants' statements shed no light on "where along the investigative process . . . [the] interviews [of the affiants] took place, and what information investigators had received prior to the interviews leading them to focus their inquiry."

venes the Home Rule Act has been preserved and timely raised, and so we address it as a matter of first impression.

Appellants' claim is based on the Home Rule Act provision that states, in relevant part, that "[t]he Council shall have no authority to . . . [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia Courts)." D.C. Code § 1-206.02(a)(4).[10] Title 11 was enacted by Congress in 1970 as part of the so-called Court Reorganization Act.[11] It "address[es] a wide range of topics,"[12] and

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[10] Section 1-206.02(a)(4) (formerly codified as § 1-147(a)(4), *see Coleman v. District of Columbia*, 80 A.3d 1028, 1035 n.9 (D.C. 2013)) is one of several provisions of Title VI of the Home Rule Act ("Reservation of Congressional Authority") through which Congress explicitly reserved legislative authority in certain areas. Section 602 of the Home Rule Act, codified as D.C. Code § 1-206.02, is titled "Limitations on the Council." 87 Stat. at 813.

[11] This is a shorthand reference to the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. In enacting the Home Rule Act, Congress mandated that the District of Columbia court system "shall continue as provided under the . . . Court Reorganization Act," "subject to . . . [D.C. Code] § 1-206.02(a)(4)." D.C. Code § 1-207.18(a); *see also Parker v. K&L Gates, LLP*, 76 A.3d 859, 880 (D.C. 2013) (McLeese, J., concurring) (noting that in enacting the Court Reorganization Act, Congress "likely intended" to "maintain[] uniformity between the law of this jurisdiction and federal law"). As one commentator has observed, "there was no question that the Court Reorganization Act was not promoted by its sponsors as a home rule measure . . . ." Steven M. Schneebaum, *The Legal and Constitutional Foundations for the District of Columbia Judicial Branch*, 11 UDC/DCSL L. REV. 13, 17 (2008) (quoted in *Johnson v. District of Columbia*, 584 F. Supp. 2d 83, 88 (D.D.C. 2008)).

[12] *Woodroof v. Cunningham*, 147 A.3d 777, 783 (D.C. 2016).

specifies, among other things, that "[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it prescribes or adopts rules which modify those Rules." D.C. Code § 11-946. It instructs that any such Superior-Court-adopted rules "shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court." *Id.*

Appellants argue that the Anti-SLAPP Act violates the Home Rule Act because it is legislation "with respect to [a] provision of Title 11," which in particular "intrudes . . . on [Title 11, § 946] by imposing rules on the Superior Court that modify the Federal Rules but have not been approved by the D.C. Court of Appeals." Appellants assert that the intrusion entails "erecting an entirely separate procedural mechanism" that "blocks most if not all discovery," that "requires a court to consider the legal sufficiency of the evidence presented before discovery," and that "permits a quick dismissal unavailable under the [Federal Rules of Civil Procedure ("FRCP")]."[13]

The District of Columbia argues that the Home Rule Act limitation on the Council's authority set out in § 1-206.02(a)(4) — again, the proscription against the Council's enacting "any act, resolution, or rule with respect to any provision of Title 11 (relating to

[13] Appellants also assert that the Act potentially and impermissibly "shifts the burden of defendants' attorneys' fees to plaintiffs." However, this court has already ruled that the D.C. Anti-SLAPP Act provision authorizing that attorney-fee-shifting does not violate the Home Rule Act because neither the Federal Rules of Civil Procedure nor any provision of Title 11 dictates that parties are to bear their own attorney's fees. *See Khan*, 292 A.3d at 260-61.

organization and jurisdiction of the District of Columbia Courts)" — pertains only to the Council's ability to pass laws "that run directly contrary to the 'organization' or 'jurisdiction' of [District of Columbia] courts" and does not pertain to "rules of procedure."[14] And, the District asserts, even if the limitation on the Council's authority does apply to court rules of procedure, the limitation does not render the D.C. Anti-SLAPP Act void because the Act creates "substantive" rights, and its special-motion-to-dismiss provisions are "substantive law" that "does not impermissibly conflict with Title 11 or the Superior Court's procedural rules [that are analogues of the FRCP]." The District emphasizes this court's statements that the Act was intended by the Council to extend "substantive rights" to SLAPP defendants, *Doe*, 133 A.3d at 575-76, and that the "Act's purpose [was] to create a *substantive* right not to stand trial and to avoid the burdens and costs of pre-trial procedures" when defendants face legally insufficient claims that arise from protected activity, *Mann*, 150 A.3d at 1231 (emphasis added); *see also Fridman,* 229 A.3d at 502 (citing the explanation in the Report on Bill 18-893 that the Act's purpose was "[t]o mitigate 'the amount of money, time, and legal resources' that defendants named in [SLAPP] lawsuits must expend" by "creat[ing] substantive rights which accelerate the often lengthy processes of civil litigation").

The foregoing statements about the Council's intent notwithstanding, our case law forecloses the notion that the Act's special-motion-to-dismiss provisions are not rules of procedure. We have observed that the Act's special motion to dismiss is in essence

[14] Appellants' March 8, 2022, motion to strike the District's brief is denied.

an expedited summary judgment motion, "albeit with procedural differences." *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 740-41 (D.C. 2021).[15] We have further acknowledged that the Act "creates a distinct *procedural* tool to be used to combat certain lawsuits," *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 609 (D.C. 2020) (emphasis added), and provides SLAPP defendants "with procedural tools to protect themselves from 'meritless' litigation," *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 142 (D.C. 2021). Of particular note is the Act's provision (in § 16-5502(c)(1)) that "discovery proceedings . . . shall be stayed" upon the filing of a special motion to dismiss.

That discovery-limiting provision, like other "rules governing pretrial discovery," is a rule "'addressed to procedure.'" *Passmore v. Baylor Health Care Sys.,* 823 F.3d 292, 299 (5th Cir. 2016) (quoting *Shady Grove*, 559 U.S. at 404 (making that observation about both "rules governing summary judgment" and rules governing "pretrial discovery")). That the D.C. Anti-SLAPP Act's discovery-limiting provisions were intended to provide substantive protections does not diminish their procedural nature because "most procedural rules do" "affect[] a litigant's substantive rights." *Shady Grove*, 559 U.S. at 407.

As to the District's argument that the parenthetical in § 1-206.02(a)(4) signifies that this Home Rule Act limitation on the Council's authority precludes only Council action affecting the *organi-*

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[15] *See also Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (observing that "rules governing motions for summary judgment are procedural" (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 404 (2010))).

zation or *jurisdiction* of the D.C. Courts, we reject the argument for a number of reasons. First, the phrase in the parenthetical — "organization and jurisdiction of the District of Columbia Courts" — merely repeats the title of Title 11, which is "Organization and Jurisdiction of the Courts," and is not reasonably read as specifying that only a subset of the "wide range of topics"[16] covered by Title 11 is off-the-table for Council action.[17]

In addition, § 1-206.02(a)(4) states that "[t]he Council shall have no authority to . . . [e]nact any act, resolution, or rule with respect to *any provision* of Title 11" (italics added), denoting that the limitation on the Council's authority reaches beyond provisions that establish the organization and jurisdiction of the D.C. Courts.[18] By its plain meaning, this language

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[16] *Woodroof*, 147 A.3d at 783.

[17] *See, e.g.*, *Oppedisano v. Holder*, 769 F.3d 147, 150 (2d Cir. 2014) (explaining that "relating to" parentheticals are an "aid to identification only" and "alert readers to the nature of the otherwise anonymous section numbers"); *United States v. Abdur-Rahman*, 708 F.3d 98, 100 (2d Cir. 2013) (reasoning that the parenthetical "(relating to mail, bank, and wire fraud)" "serves only an explanatory or descriptive purpose and does not expressly limit the definition of felony violation to only those offenses identified in the parenthetical"); *United States v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011) (parentheticals aid a section's identification rather than limiting its application); *Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 n.1 (5th Cir. 2007) ("[P]arenthetical 'related to alien smuggling' . . . is descriptive and not limiting."); *Mapp v. District of Columbia*, 993 F. Supp. 2d 26, 29 (D.D.C. 2014) ("'[R]elating to' parentheticals are 'descriptive and not limiting.'" (quoting *Garrido-Morato*, 485 F.3d at 322 n.1)).

[18] In looking to the plain meaning of § 1-206.02(a)(4), we are adhering to the principle that "[i]n endeavoring to discern the meaning of any particular statute, '[t]he primary and general

precludes Council action that contravenes the Title 11 procedural provision designated as § 11-946, which, again, mandates that the Superior Court is to conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure unless the Superior Court "prescribes or adopts rules which modify those Rules." D.C. Code § 11-946.[19]

Further, it cannot reasonably be thought inadvertent that the limitation on the Council's authority extends to every provision of Title 11. As we described in *Woodroof*, "a draft version of the [Home Rule] statute permitted the Council to 'pass acts affecting *all aspects* of [the District of Columbia]

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rule of statutory construction is that the intent of the lawmaker is to be found in the language that he or she used.'" *Thomas v. United States*, 171 A.3d 151, 153 (D.C. 2017) (quoting *Clark Constr. Grp., Inc. v. D.C. Dep't of Emp. Servs.*, 123 A.3d 199, 202-03 (D.C. 2015)).

The District implies that the Anti-SLAPP Act does not contravene the Home Rule Act because it does not amend Title 11 itself, but the Act's discovery-limiting provisions do just that: they effectively amend and modify § 11-946 to mandate that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure . . . *except upon the filing of an Anti-SLAPP Act special motion to dismiss or* unless it prescribes or adopts rules which modify those Rules . . . ."

[19] This was the concern registered preliminarily by then Attorney-General for the District of Columbia Peter J. Nickles in his September 17, 2010, letter to the then-Chair of the Council Committee on Public Safety & the Judiciary. Attorney General Nickles warned that the proposed Anti-SLAPP Act's special-motion-to-dismiss procedure "may run afoul of section 602(a)(4) of the Home Rule Act [§ 1-206.02(a)(4)]," which, he observed, "preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council." Report on Bill 18-893 at 23.

courts' after an 'eighteen-month period following . . . the date of enactment of [the Home Rule] Act.'" *Woodroof*, 147 A.3d at 783 (emphasis and second alteration supplied in *Woodroof*) (quoting H. Comm. on the District of Columbia, 93d Cong., 2d Sess., Home Rule for the District of Columbia 942 (Comm. Print 1974) ("Home Rule Print")). But the proposal raised concerns among the bench and bar that the legislation could "completely alter" the District's new court system, which had only recently been established through the 1970 Court Reorganization Act, before it had time to mature and gain experience and also could threaten the independence of the judiciary. *See id.*; *Hessey v. Burden*, 584 A.2d 1, 7 (D.C. 1990). And of particular note, the judiciary expressed the concern that it was "unclear whether and the extent to which provisions [of the Court Reorganization Act] relating to . . . [the courts'] authority to adopt court rules . . . would survive the enactment of [the draft Home Rule legislation, H.R. 9056]." Home Rule Print at 1422.

Congress went on to reject H.R. 9056 as well as a "proposed amendment," *id.*, that would have provided that "[*e*]*xcept as otherwise provided in this Act*, the organization and jurisdiction of the District of Columbia courts shall be governed by [T]itle 11." *Id.* at 1423-24 (italics added). Congress determined to "*freez*[*e*] . . . *current law*," *id.* at 1425, mandating that the District of Columbia court system "shall continue as provided under the . . . Court Reorganization Act," "subject to . . . [D.C. Code] § 1-206.02(a)(4)." D.C. Code § 1-207.18(a). Thus, the language of § 1-206.02(a)(4) was specifically intended to continue in effect all of the provisions adopted through the Court Reorganization Act. *See id.*; *Woodroof*, 147 A.3d at 783; *see also Varela v. Hi-Lo Powered Stirrups, Inc.*,

424 A.2d 61, 64 (D.C. 1980) ("The legislative history of § 11-946 reflects the congressional intent that the local courts were to be governed by the *federal* rules . . . ."); Home Rule Print at 1098 (transcript of Markup by Full Committee of H.R. 9056 (July 24, 1973)) (explaining that amendments to the proposed Home Rule legislation provided that "Title 11 of the District of Columbia Code shall remain in effect, that it shall be, not subject to change by the Council, and it shall not be a Charter change; and in effect, leaves the jurisdiction to this [congressional] Committee of how Title 11 may be changed in the future").

It is true, as the District reminds us, that this court has repeatedly said that our interpretation of § 1-206.02(a)(4) must not "thwart the paramount purpose of the [Home Rule Act], namely, to grant the inhabitants of the District of Columbia powers of local self-government." *Woodroof*, 147 A.3d at 784 (quoting *Andrew v. Am. Import Ctr.*, 110 A.3d 626, 629 (D.C. 2015)); *see also Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (noting that this court has "consistently held . . . that restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed, so as not to thwart th[at] paramount purpose" of the Home Rule Act).[20] We have emphasized that "[t]he literal wording of the statute is a primary index but not the sole index to legislative intent" and "cannot prevail over strong

[20] *See also id.* at 1225-26 (rejecting the argument that the Title 11 provision stating that this court "shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and exclusion" conferred upon this court "the *exclusive* authority to take any action which would restrict in any way the conduct of attorneys in the practice of law") (emphasis in the original).

contrary indications in the legislative history or so as to command an absurd result." *Citizens Ass'n of Georgetown v. Zoning Comm'n of D.C.*, 392 A.2d 1027, 1033 (D.C. 1978) (quoting *Lange v. United States*, 443 F.2d 720, 722-23 (D.C. Cir. 1971)). We therefore "have not construed D.C. Code § 1-206.02(a)(4) as rigidly as its language might permit." *Woodroof*, 147 A.3d at 785. Instead, "[w]hen the Council's actions do not *run directly contrary* to the terms of Title 11, . . . our past decisions have chosen not to interpret [the language of § 1-206.02(a)(4)] rigidly, but rather to construe this limitation on the Council's power in a flexible, practical manner." *Id.* at 784 (brackets and emphasis added).

The District argues that in employing that flexibility, this court has "construed [s]ection 1-206.02(a)(4) to prohibit the Council only from passing laws that directly conflict with or amend the jurisdiction or structure of the District's courts." What the District's argument reflects is that the vast majority of this court's previous decisions involving § 1-206.02(a)(4) have considered challenges to Council actions that arguably expanded or contracted this court's appellate jurisdiction as described in § 721 or § 722 of Title 11 (D.C. Code §§ 11-721, 11-722). We have not previously had occasion to consider a challenge premised on a claim that Council legislation is violative of the Home Rule Act because what the legislation requires conflicts with the mandate of § 946 of Title 11 (D.C. Code § 11-946). Our previous decisions neither compel nor persuade us to reject appellants' Home Rule Act claim.

Moreover, we are not presented here with a possibility, similar to ones we have been presented with in some of our earlier cases, of adopting a broad

or fluid interpretation of a term or phrase used in Title 11 or in the Home Rule Act in a way that enables us to give deference to the Council's intent. *Cf. Woodroof*, 147 A.3d at 780, 785, 787 (holding that a provision of the Revised Uniform Arbitration Act allowing immediate appeal to this court of an order granting a motion to compel arbitration did not violate § 1-206.02(a)(4)'s restriction on the Council's authority to enact legislation "with respect to" the jurisdiction of the courts; reasoning that § 11-721(a), which gives this court jurisdiction over "appeals from . . . all final orders and judgments," contains "no statutory definition of a 'final order,'" and that "categorizing orders as 'final' or 'interlocutory' can be a fluid concept"); *see also, e.g.*, *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019) (upholding Council-enacted law that vested the Superior Court rather than this court with initial-review jurisdiction over Board of Ethics decisions on the ground that the Home Rule Act established this court's primary jurisdiction as extending to review of agency orders and decisions, "but only 'to the extent provided by law,'" D.C. Code § 1-204.31(a) (quoting *District of Columbia v. Sullivan*, 436 A.2d 364, 368 (D.C. 1981))). Neither the parties nor we have identified any "fluid" language in § 11-946 or in the Home Rule Act, or any narrow construction of the § 1-206.02(a)(4) restriction on the Council's legislative authority, that enables us to harmonize the conflict (described more fully in the paragraphs that follow) between the discovery-limiting aspects of the Anti-SLAPP Act's special-motion-to-dismiss procedure and Title 11 § 946 (which mandates adherence to the Federal Rules of Civil Procedure, absent modifications adopted through Superior Court rulemaking).

To be sure, we have said that Council legislation that has a mere "incidental" impact on the Superior Court's exercise of its jurisdiction under Title 11 does not contravene the Home Rule Act § 1-206.02(a)(4) limitation on the Council's authority to enact legislation with respect to any provision of Title 11. For example, we agreed in *Coleman* that "[a]lthough the foreclosure of a cause of action can certainly be said to affect the jurisdiction of the courts in a sense," such "incidental byproduct[s]" of changes in the substantive law "do[] not amount to an alteration of . . . jurisdiction" in violation of the Home Rule Act." 80 A.3d at 1035 n.9 (internal quotation marks and brackets omitted) (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 189-90 (D.C. Cir. 1986); *see also Umana v. Swidler & Berlin, Chartered,* 669 A.2d 717, 724 n.15 (D.C. 1995) (explaining that the provision now codified as § 1-206.02 (a)(4) "does not . . . limit the Council's authority to enact or to alter the substantive law to be applied by the courts"). We have also upheld Council legislation that had an impact on the Superior Court's exercise of its jurisdiction under Title 11 where a separate provision of the Home Rule Act specifically gave the Council authority to "classify an act as a crime, or to decriminalize certain behavior." *Sullivan*, 436 A.2d at 366 (pertaining to legislation that decriminalized certain traffic offenses, thereby eliminating the Superior Court's original jurisdiction over those offenses). In the instant case, by contrast, we discern no such bases for a narrow construction of 1-206.02(a)(4)'s limitation on the Council's legislative authority. The Anti-SLAPP Act's discovery-limiting provisions are not a mere incidental byproduct of changes in the substantive tort law to be applied by the courts, and they do not have a mere "incidental"

impact on the Superior Court's application of its counterparts to the federal rules of procedure governing pre-trial disposition of cases. Rather, the discovery-limiting provisions are a frontal and intentional feature of the Act and the main procedural tool to achieve the expedited and less costly disposition the Council had in mind. And while the District is correct that the Council has "broad authority to legislate," *Andrew*, 110 A.3d at 628 (citing D.C. Code § 1-203.02), the Council cannot curtail the pre-trial civil discovery provided for in the Federal Rules of Civil Procedure "without running headlong into [one of the] limitation[s]" of § 1-206.02(a). *In re Crawley*, 978 A.2d 608, 618 (D.C. 2009).

We think it important to note that recognizing the § 11-946 limitation on the Council's authority to legislate with respect to Superior Court procedure does not thwart the Home Rule Act's purpose of granting powers of local self-government, because § 11-946 already specifically prescribes how the *local* judiciary is empowered to modify court rules in a manner that departs from the Federal Rules of Civil and Criminal Procedure. To repeat, § 11-946 states that the Superior Court is to conduct its business according to the FRCP "unless it prescribes or adopts rules which modify those Rules" by submitting them for approval of this court, and further that the Superior Court "may adopt and enforce other rules as it may deem necessary without the approval of [this court] if such rules do not modify the Federal Rules."[21] D.C. Code § 11-946. This distinguishes § 11-

[21] Unlike Council legislation, the Superior Court's modification to the Federal Rules for use in Superior Court and this

946 from other provisions of Title 11 wherein Congress made no allowance for how the requirements could be modified without congressional action.[22]

In any event, as we said in *Woodroof*, it is only "[w]hen the Council's actions do not run directly contrary to the terms of Title 11" that we have construed section Title 11 in a flexible manner. 147 A.3d at 784. That is not the situation here. As we

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court's approval of such modifications are not subject to a congressional-review waiting period or congressional veto.

[22] Also noteworthy is that the D.C. Courts have utilized their authority under § 11-946 to amend the rules to accommodate or accomplish the intent of Council legislation. In 2021 and 2022, the Council enacted amendments to the debt collection statute, D.C. Code § 28-3814, to provide inter alia that "[i]n a cause of action initiated by a debt collector to collect a consumer debt, the debt collector shall attach to the complaint or statement of claim a copy of the signed contract, signed application, or other documents that provide evidence of the consumer's liability and the terms thereof, and shall allege or state [specified] information in the complaint or statement of claim." In April 2022, the Superior Court adopted, after this court's approval, an amendment to Rule 56, entitled "Consumer Debt Collection Actions," providing that "[i]n an action initiated by a debt collector to collect a consumer debt as defined in D.C. Code § 28-3814, the plaintiff must provide all documentation and information required by D.C. Code § 28-3814 prior to entry of summary judgment." Super. Ct. Civ. R. 56(a)(2); *see* Promulgation Order 22-06 (D.C. Super. Ct. 2022). At least arguably, this rule amendment averted a conflict between § 28-3814 and Super. Ct. Civ. R. 8(a), which "mirrors" FRCP 8(a) in requiring a pleading to contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011). The courts have made no such rule amendment to accommodate the discovery-limiting aspects of the Anti-SLAPP Act's special-motion-to-dismiss procedure.

elaborate below, the Act's discovery-limiting special-motion-to-dismiss procedure *is* directly contrary to § 11-946's prescription that the Superior Court is to conduct its business according to the FRCP "unless it prescribes or adopts rules which modify those Rules" by submitting them for approval of this court. The Act thus runs up against "a limitation expressed by title 11 itself." *Hessey*, 584 A.2d at 7.[23]

Federal Rule of Civil Procedure 56 (like its Superior Court analogue) provides that

> [i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d); *see also* Super. Ct. Civ. R. 56(d)(2). As the United States Court of Appeals for the Ninth Circuit has observed, while Rule 56 "facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the

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[23] This conflict with a limitation expressed in Title 11 makes the issue in this case analogous to the one we considered in *Capitol Hill Restoration Society, Inc. v. Moore*, 410 A.2d 184, 186-88 (D.C. 1979) (explaining that Title 11 would preclude the Council from expanding this court's jurisdiction to include direct review of a determination by the District's State Historic Preservation Officer, because D.C. Code § 11-722 limits this court's authority to conduct direct reviews of agency action to review "in accordance with the . . . Administrative Procedure Act," which "in turn limits our review to 'contested cases'").

Supreme Court has restated the rule as *requiring*, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

As noted above, this court recognized in *Mann* that the D.C. Anti-SLAPP Act special-motion-to-dismiss provision effectively functions as a Rule 56 motion for summary judgment. *Mann*, 150 A.3d at 1238 n.32. But unlike FRCP 56, the Act's special-motion-to-dismiss provision mandates generally that "upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). That general rule is subject to the exception that "[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). Under this provision, "discovery normally will not be allowed," as a plaintiff must show "more than 'good cause'" for discovery, such that it is "difficult" for a plaintiff to meet the § 16-5502 discovery standard. *Fridman*, 229 A.3d at 512. And, to refer again to our observation in *Mann*, "the special motion to dismiss is different from [Rule 56] summary judgment in that it imposes the burden on plaintiffs and requires the court to consider the legal sufficiency of the evidence presented *before discovery is completed*." 150 A.3d at 1238 n.32 (emphasis added).

In short, because of the discovery-limiting aspects of § 16-5502(c), the Act does not simply mirror

Federal Rule of Civil Procedure 56. For that reason, the D.C. Circuit "stated [in its 2015 decision in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328,] that the special motion to dismiss created by D.C. Code § 16-5502 does not apply in federal court because it answers the same question as the Federal Rules of Civil Procedure — when a court must dismiss a case before trial — in a different way." *Id.* (citing *Abbas*, 783 F.3d at 1336); *see also Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021) (continuing to apply *Abbas* after this court's decision in *Mann*, explaining that under Federal Rule 56, "full discovery is the norm, not the exception," such that "summary judgment is typically premature unless all parties have had a full opportunity to conduct discovery," while under the D.C. Anti-SLAPP Act, "discovery normally will not be allowed" (internal quotation marks omitted)); *id.* ("Although *Mann* may undermine some of *Abbas*'s reasoning, the bottom line remains: the federal rules and the anti-SLAPP law answer the same question about the circumstances under which a court must dismiss a case before trial . . . differently, and the anti-SLAPP law still conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." (internal quotation marks omitted)); *Abbas*, 783 F.3d at 1334, 1335, 1336 (noting that the D.C. Anti-SLAPP Act establishes a procedural mechanism that "differs from" the Federal Rules and "disrupt[s] the comprehensive scheme embodied in the Federal Rules" (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring))).

Most of the other federal courts of appeals that have ruled on the issue have similarly held that State anti-SLAPP statutes will not be applied fully (if at

all) in the federal courts in their circuits because of the conflict between those anti-SLAPP statutes' procedural mechanisms and the Federal Rules of Civil Procedure.[24] *Godin v. Schencks*, 629 F.3d 79 (1st

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[24] *See, e.g.*, *La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020) (rejecting the argument that the California anti-SLAPP statute "supplements rather than conflicts with the Federal Rules" and holding that "federal courts must apply Rules 12 and 56 instead of California's special motion to strike") (internal quotation marks omitted); *Klocke v. Watson*, 936 F.3d 240, 246 (5th Cir. 2019) (holding that the Texas anti-SLAPP statute conflicts with the federal rules because it "operates largely without pre-decisional discovery"); *Carbone v. CNN, Inc*., 910 F.3d 1345, 1353-54 (11th Cir. 2018) (holding that the Georgia anti-SLAPP statute "abrogates the entitlements conferred" by the federal rules by requiring the plaintiff to rely exclusively on evidence he was able to obtain without discovery); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018) (reviewing California's anti-SLAPP statute and reasoning that "[r]equiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without providing any of the procedural safeguards that have been firmly established by the Federal Rules of Civil Procedure," a result the court "could not properly allow" because it "would effectively allow the state anti-SLAPP rules to usurp the federal rules."); *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 661 (10th Cir. 2018) (affirming district court holding that the New Mexico anti-SLAPP statute's procedural mechanisms are inapplicable in federal court); *Metabolife*, 264 F.3d at 845, 846 (holding that the "discovery-limiting aspects" of California's anti-SLAPP statute "directly collide" with the "discovery-allowing aspects" of FRCP 56); *Z.F. v. Ripon Unified Sch. Dist.*, 482 F. App'x 239, 240 (9th Cir. 2012) (holding that if an anti-SLAPP motion to dismiss is based on a factual challenge rather than a purely legal challenge, it must be treated as a motion for summary judgment and "discovery must be permitted"); *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1042, 1048 (N.D. Ill. 2013) (observing that "it is clear from the Advisory Committee

Cir. 2010), is a notable exception, but in that case the First Circuit applied the Maine anti-SLAPP statute in a diversity action on the rationale that "[i]f a federal court would allow discovery under Fed. R. Civ. P. 56(d) then, in our view, that would constitute good cause [to allow discovery] under the Maine statute," *id.* at 91,[25] and on the additional rationale that the Maine anti-SLAPP statute "provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail," neither of which is the "province of . . . Rule 56," *id.* at 89 (noting that the Maine anti-SLAPP statute "substantively alters the type of harm actionable" by requiring the plaintiff to "show the defendant's conduct resulted in actual

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Notes . . . that Rules 12 and 56 *were* intended to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint," and concluding that the Washington anti-SLAPP statute could not be applied by a federal court sitting in diversity because it "plac[ed] a higher procedural burden on the plaintiff than is required to survive a motion for summary judgment under [federal] Rule 56), *aff'd*, 791 F.3d 729 (7th Cir. 2015). *But see*, *e.g.*, *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 182 (5th Cir. 2009) (applying Louisiana's anti-SLAPP statute in case where the plaintiff "fail[ed] to request" discovery). The Fifth Circuit panel in *Klocke* concluded that *Henry*'s conclusion about the applicability of the Louisiana anti-SLAPP statute was not binding because the opinion there gave "no indication . . . that the court considered the potential overlap or conflict between the Louisiana anti-SLAPP provision and the Federal Rules" and because "the *Henry* panel did not have the benefit of the Supreme Court's compelling decision in *Shady Grove*." *Klocke*, 936 F.3d at 248-49.

[25] *But see Gaudette v. Davis*, 160 A.3d 1190, 1199 (Me. 2017) (explaining that under the Maine anti-SLAPP statute, "the trial court must strictly limit the scope of . . . discovery"), *overruled in part on other grounds*, *Thurlow v. Nelson*, 263 A.3d 494, 502 (Me. 2021)).

injury to the plaintiff" and further requires the plaintiff "to demonstrate that the defendant's activity (1) was without reasonable factual support, and (2) was without an arguable basis in law" (quoting Me. Rev. Stat. tit. 14, § 556 (internal quotation marks omitted))). The D.C. Anti-SLAPP Act is quite different from the Maine statute as that statute has been interpreted by the First Circuit: as discussed above, under the D.C. Anti-SLAPP Act's special-motion-to-dismiss provision, "discovery normally will not be allowed," *Fridman*, 229 A.3d at 512. Moreover, nothing in the Act provides substantive legal defenses to defendants or alters the elements plaintiffs must prove to prevail on their claims.

In sum, the discovery-limiting aspects of the D.C. Anti-SLAPP Act's special-motion-to-dismiss procedure conflict with FRCP 56.[26] That means that the Anti-SLAPP Act's mandate that the Superior Court apply those discovery-limiting aspects of the Council-created procedure when a party invokes the protection of the Act — instead of applying the rules prescribed by (or adopted by the court pursuant to) Title 11 § 946 — violates the Home Rule Act.[27]

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[26] By contrast, the Anti-SLAPP Act's attorney fee-shifting provision (§ 16-5504) addresses a matter not addressed by the Federal Rules, and thus does not conflict with the Federal Rules, with § 11-946, or with the Home Rule Act. *See Khan*, 292 A.3d at 260-61 ("[T]he fee-shifting provision of the Anti-SLAPP Act plainly does nothing to modify the procedure set forth in the Federal Rules of Civil Procedure for requesting and obtaining a statutorily authorized award of litigation costs.").

[27] To be clear, our analysis in this opinion governs when, as occurred in the instant case, the Superior Court considers materials outside the complaint when deciding an Anti-SLAPP Act special motion to dismiss (i.e., when in essence the court considers whether to grant summary judgment). We do not

Here, in seeking to persuade the Superior Court to allow them an opportunity for discovery, appellants filed declarations detailing the targeted discovery they sought. The Superior Court granted them answers to four interrogatories and a physical copy of a computer hard drive. But of the 148 witness-interview notes appellants requested, they were granted interview notes for only 18 individuals (excluding their own interview statements). In addition, while the Superior Court initially said it would allow appellants to take three depositions, the court

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address in this opinion application of the Anti-SLAPP Act when the Superior Court resolves an Anti-SLAPP Act special motion to dismiss on the ground that the complaint failed to state a claim (i.e., when discovery is not an issue). *But see Am. Stud. Ass'n*, 259 A.3d at 750 ("A determination by the court pursuant to Rule 12(b)(6) that the responding party has failed to state a claim on which relief can be granted suffices to establish that the claim is not 'likely to succeed on the merits.' The court should rule on the special motion to dismiss with respect to each claim, even if it grants a 12(b)(6) motion to dismiss that claim."). We note that the Ninth Circuit, though declining to apply the discovery-limiting provisions of the California anti-SLAPP statute, has given effect to the California statute's attorney-fee-shifting provision where a defendant invoking the anti-SLAPP special-motion procedure contends that the complaint is deficient. *See Planned Parenthood*, 890 F.3d at 834 (agreeing that "[i]f a defendant makes a special motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of [the California anti-SLAPP statute] applies"); *see also* Sydney Buckley, Comment, *Getting SLAPP Happy: Why the U.S. District Court for the District of Kansas Should Adopt the Ninth Circuit's Approach when Applying the Kansas Anti-SLAPP Law*, 68 U. KAN. L. REV. 791, 821 (2020) (advocating application of the Ninth Circuit approach, such that the fee-shifting provisions of anti-SLAPP statutes would be applicable in federal courts in such circumstances).

subsequently sua sponte denied appellants an opportunity to take any depositions. Thus, while the Superior Court observed that appellants "received voluminous discovery under the limited discovery provision" of the Act, they received considerably less discovery than they sought.[28]

Appellants seek a remand "for full discovery," arguing that "[d]efamation plaintiffs inevitably need substantial discovery from third parties about what defendants should have known, as well as from defendants themselves about [what] they knew," what they avoided learning, "and what documents they had when they published the challenged statements." Appellants emphasize that, in giving effect to the Act's special-motion-to-dismiss provision, the Superior Court "severely limit[ed] discovery in a case where evidence in [d]efendants' possession was critical to address issues of malice" and "a crucial step in demonstrating actual malice."[29] Appellants assert that they "cannot adequately rebut [the Report's] claims without access to" witness statements, interview notes, and other documents that appellees have withheld.

As we noted in the introductory pages of this opinion and as we discuss further *infra*, appellants

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[28] Sidley states that it produced roughly 31,000 pages of documents and former plaintiff Behnke's work hard drive. The APA answered four interrogatories, produced more than 22,000 pages of documents from the hard drive, and made 7,600 pages of Report exhibits publicly available. Appellants state that they received "very limited discovery."

[29] *See Standridge v. Ramey*, 733 A.2d 1197, 1203 (N.J. Super. Ct. App. Div. 1999) ("[T]here is an especially strong need for full discovery in a defamation action brought by a plaintiff who is classified as a 'public official.'").

dispute that they are public officials whose defamation claims are entirely subject to the actual-malice fault standard. It appears, however, that since appellants seek an award of punitive damages, the parties and their discovery efforts must focus on the question of actual malice even if appellants are not public officials.[30] See *infra* note 38. We are persuaded that regardless of which standard applies — actual malice or negligence[31] — appellants were entitled to discovery under the Superior Court counterparts to the Federal Rules of Civil Procedure before the Superior Court ruled on what was in effect appellees' motion for summary judgment. But, giving effect to the Act's limited-discovery provision, the Superior Court denied appellants the opportunity for full discovery. We therefore reverse the judgment of dismissal and remand for further proceedings.

2. Appellants' Constitutional Claims

Appellants contend that the D.C. Anti-SLAPP Act is invalid on the additional ground that it unconstitutionally burdens their First Amendment right to petition the government to seek redress for harm to their reputations and livelihoods. In the context of this claim, too, appellants emphasize the Act's impairment of their right to discovery, an impedement they particularly decry since it applies even without proof that they filed suit with an

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[30] Appellants acknowledged as much in their briefs filed in the Superior Court.

[31] For plaintiffs who are not public officials or public figures, establishing defamation requires proof of at least negligence on the defendant's part. *See Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990) (explaining that this is so regardless of whether the source of the alleged defamatory statements is a media or non-media source).

abusive purpose. They complain that the possibility that they may be "saddled with the defendants' attorneys' fees" likewise burdens their right to petition.

We need not pause long over these claims. Because we have agreed that imposition of the discovery-limiting aspects of the Act's special-motion-to-dismiss procedure exceeded the Council's authority under the Home Rule Act and directly conflicts with § 946 of Title 11, and in light of our remand on that basis for full discovery, we need not address appellants' constitutional claim as it relates to the Act's severe limits on the opportunity for discovery to avoid pre-trial dismissal. In addition, our recent decision in *Khan* has already resolved any claim that the Act's attorney-fee-shifting provision, § 16-5504(a), unconstitutionally burdens the constitutional right to petition for redress of grievances. *See Khan*, 292 A.3d at 259 ("[W]e readily conclude that § 16-5504(a) imposes no undue burden on the First Amendment right to petition for redress of grievances.").[32]

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[32] *See also id.* at 257-58 ("But even if a fee-shifting provision can be said to 'burden' the exercise of the right to petition by discouraging plaintiffs from asserting claims of questionable merit, that does not mean the burden is undue or so interferes with exercise of the right as to be unconstitutional. . . . [S]ome encroachment on the right to petition – particularly when regulations do not directly impair the right to *access* the court – is permissible if it effectuates important interests of the government. . . . The Council unquestionably had significant reasons for enacting the Anti-SLAPP Act's fee-shifting provision . . . [including] [d]iscouraging the filing of meritless lawsuits, and . . . protecting the right to free speech guaranteed by the First Amendment . . . by shielding defendants from meritless litigation that might chill advocacy on issues of public interest." (internal quotation marks and citations omitted)); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 373

Appellants also deride the Act's "reverse burden on the non-moving party." This is a reference to what we have called the Act's "reversal of the allocation of burdens . . . for summary judgment[.]" *Mann*, 150 A.3d at 1237. We cannot agree that the Act's burden-shifting provision infringes on appellants' constitutional right to petition. The Supreme Court has explained that "the right [of access to the courts] is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002); *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("'[B]aseless litigation is not immunized by the First Amendment right to petition.'" (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)). The burden-shifting provision imposes on SLAPP plaintiffs the burden of showing that the complaint rests on more than "unsupported claims that do not meet established legal standards," *Mann*, 150 A.3d at 1239, and of successfully rebutting any argument that the plaintiff "could not prevail as a matter of law, . . . after allowing for the weighing of evidence and permissible inferences by the jury," *id.* at 1236 (emphasis omitted). A plaintiff who is shut out of court because it cannot meet that burden has not been denied its constitutional right to petition the courts.

What remains of appellants' constitutional argument is the claim that the Act impermissibly burdens the First Amendment right to petition for redress by deterring plaintiffs whose lawsuits are not grounded

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(7th Cir. 1987) ("[T]he proposition that the first amendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." (footnote omitted)).

on the types of abusive motives — the intent to punish or prevent expression — the Act was intended to stem. Appellants rely on cases from other jurisdictions in which courts have held that there must be a required showing of such an abusive motive if application of an anti-SLAPP statute is to pass constitutional muster. They contend that the Act's application to "well-founded suits to redress real harm . . . filed by individuals with limited resources against well-funded defendants [such as appellees here]" demonstrates its overbreadth. But here, as was the case in *Equilon Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002), appellants have "failed to identify any support for the proposition that the constitutionality of [the anti-SLAPP law] provisions depends upon their requiring proof of subjective intent." *Id.* at 692.

For the foregoing reasons, we reject appellants' constitutional claims.

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Appellants ask us to strike down the Act in its entirety. But in light of all the foregoing discussion, we see no basis for doing so in the absence of any argument by appellants that the discovery-limiting provisions of the Act are not severable. *See Hooks v. United States,* 191 A.3d 1141, 1145 (D.C. 2018) ("Even without a severability provision, there is always a presumption of severability whenever the remaining provisions, standing alone, are fully operative as a law." (internal quotation marks and citation omitted)). Our decision today precludes the Superior Court from giving effect to D.C. Code § 16-5502(c) (as well as the expedited-hearing sentence of § 16-5502(d) to the extent it would curtail discovery) unless and until the Superior Court rules are

amended to authorize the discovery-limiting departure from the Federal Rules that the Act purported to mandate.[33] But, giving deference to the Council's legislative intent[34] (and authority) to create substantive rights for SLAPP defendants, including "financial levies to deter a SLAPP plaintiff," *Mann*, 150 A.3d at 1238, we decline to strike the Act's attorney-fee-shifting provision (§ 16-5504(a)), and we likewise decline to strike § 16-5502(a) or § 16-5502(b) (including its burden-shifting provision).[35]

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[33] To state the point differently, § 16-5502(c) (as well as the expedited-hearing sentence of § 16-5502(d) to the extent it would curtail discovery) is to be disregarded unless and until there are such rule amendments. *Cf. Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2350 (2020) ("[I]f any part of an Act is unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States." (internal quotation marks omitted)). Our holding is that § 16-5502(c) (as well as § 16-5502(d) to the extent it would curtail discovery) is "inoperative or unenforceable" until such time as any that the Superior Court rules are amended to adopt the provisions' discovery limitations, "but not void in the sense [of being] repealed or abolished." *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952).

[34] *See Woodroof*, 147 A.3d at 787.

[35] As the First Circuit has observed, "[n]either Fed. R. Civ. P. 12(b)(6) nor Fed. R. Civ. P. 56 determines which party bears the burden of proof on a state-law created cause of action." *Godin*, 629 F.3d at 89. Moreover, "the burden of proof [is] a 'substantive' aspect of a claim[,]" *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000), and we thus regard the Council's allocation of the burden of proof to SLAPP plaintiffs as a substantive enactment that does not implicate the Federal Rules. *See also Godin*, 629 F.3d at 89 (["[I]t is long settled that the allocation of burden of proof is substantive in nature and controlled by state law.") (citing *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943)).

B. The "Public Official" Issue

"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 (brackets and footnote omitted) (quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)). As to the third element, the requisite showing of fault depends on whether the plaintiff is a public official[36] or public figure,[37] both of whom are subject to the heightened proof requirement of actual malice, or is instead a private individual, who need prove only negligence.[38] *Id.* at 1240

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[36] We note, with reference to appellants' status as now-retired military officers, that "[e]ven though a person is no longer publicly employed, . . . he or she will ordinarily be treated as a public official with respect to comments about his or her past performance in that role." 1 ROBERT D. SACK, SACK ON DEFAMATION § 5:2.1, at 5-9 (5th ed. 2017) (hereafter, "SACK") (citing cases); *see Rosenblatt v. Baer*, 383 U.S. 75, 87 n.14 (1966) (acknowledging that "there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the [rule in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)]").

[37] See *supra* note 31. Appellees do not contend (or no longer contend) in this case that appellants are limited-purpose public figures.

[38] However, a private plaintiff seeking punitive damages for alleged defamation must prove actual malice to recover such damages, at least when the defamatory statements involve matters of public concern. *See Gertz v. Robert Welch, Inc.*, 418

n.33. To establish actual malice, a plaintiff must show "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 (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014)); *see N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).[39]

U.S. 323, 348-50 (1974) (acknowledging that there is a "strong and legitimate state interest in compensating private individuals for injury to reputation," but holding "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"; "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) ("We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 90 (D.C. 1980) (affirming grant of summary judgment against plaintiff on a claim for presumed or punitive damages because plaintiff had failed to produce evidence of defendant's "knowing or reckless false publication" under the "constitutionally mandated *Times* malice standard); *Davis v. Schuchat*, 510 F.2d 731, 737 n.5 (D.C. Cir. 1975) (applying the foregoing statement in *Gertz* in the case of a non-media defendant).

[39] The *New York Times* actual malice standard is sometimes called "constitutional actual malice" to distinguish it from "actual malice in the common-law sense of spite or ill will." *See* SACK, § 1:3.1 at 1-34; *Moss*, 580 A.2d at 1026 n.29. *But see Harte-Hanks Commnc'ns v. Connaughton*, 491 U.S. 657, 668 (1989) (noting that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" and explaining that evidence of motive can be "supportive" of a conclusion about reckless disregard as to truth or falsity of allegations).

"[W]here the plaintiff rests both his defamation and false light claims on the same allegations . . . the claims will be analyzed in the same manner." *Close It! Title Servs.*, 248 A.3d at 140 (quoting *Blodgett v. Univ. Club*, 930 A.2d 210, 222-23 (D.C. 2007)). "[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001) (quoting *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994)).

Appellants argue that the Superior Court erred in determining that they were public officials and in scrutinizing their evidence and likelihood of prevailing with an actual-malice lens. In their complaint and accompanying affidavits, appellants characterize themselves as "mid-level employee[s]" who were not in a position to formulate DoD or military policy. They contend that their role was to execute the policy directives of their superiors and emphasize that they did not have authority to speak on behalf of DoD. The Superior Court reasoned that the Report "clearly addresses [appellants'] performance of their official duties," but appellants assert that they did their work on the PENS Task Force during their free time as volunteers and private individuals who were members of the APA's military psychologists division, not in their capacity as military officers. In asserting in their special motions to dismiss that appellants are public officials, appellees relied in large part on appellants' ranks and titles[40] as well as on excerpts

[40] Appellant Banks was Director of Psychological Applications for the United States Army's Special Operations Command. Appellant James was the Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and Director of Behavioral Science at Guantanamo and Iraq. Appellant Dunivin was Chief of the Departments of

from appellants' descriptions (in the complaint) of their positions and responsibilities.

The Supreme Court has not precisely defined the term "public official," and the case law reflects difficult-to-reconcile determinations about particular public employees who have been determined to be, or not to be, public officials. *See generally* SACK, § 5:2.1 at 5-7 and 5-10 to 5-20 (collecting cases). The term "eludes precise definition." *Mandel v. Bos. Phoenix, Inc.*, 456 F.3d 198, 202 (1st Cir. 2006). The Supreme Court has instructed, however, that not every public employee is a public official for libel-law purposes. *See Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979). The term "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85. But "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 86 n.13.[41] A public-official position is one with "such apparent importance that the public has an independent interest in the qualifications and performance of the person who

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Psychology at Walter Reed Medical Center and Walter Reed National Military Medical Center.

[41] *See also Moss*, 580 A.2d at 1029 ("[T]he *position* occupied by the official must be distinguished from the controversy in which he has become embroiled, for it is the former that must inherently invite public scrutiny."); *O'Connor v. Burningham*, 165 P.3d 1214, 1220 (Utah 2007) ("Public officials owe their status to the duties demanded by their official positions, not to the vagaries of events that may occur while they occupy these positions.").

holds it, beyond the general public interest in the qualifications and performance of all government employees[.]" *Id.* at 86.[42]

This court's case law establishes that a government employee's position may be of "apparent importance" by virtue of, for example, control over policy, direct interaction with the public, or supervisory authority over other employees. *Beeton v. District of Columbia*, 779 A.2d 918, 921, 924 (D.C. 2001) (corrections officer was public official); *Thompson v. Armstrong*, 134 A.3d 305, 308, 312 (D.C. 2016) (special agent with Treasury Inspector General was public official). In considering a plaintiff's public-official status, we have echoed the Supreme Court's reasoning that "public officials, with superior access to the media, usually are better able than ordinary individuals to affect the outcome of those issues and to counteract the effects of negative publicity." *Moss*, 580 A.2d at 1029 (citing *Rosenblatt*, 383 U.S. at 85-86); *see also Gertz*, 418 U.S. at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."). *See generally* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:108 (2d ed. 2023) ("[C]ourts have begun to

[42] "Law enforcement officers at virtually every level have been held to be public officials," SACK, § 5:2.1 at 5-12 (footnote omitted), a result that seems to follow from their wielding substantial and direct authority in enforcing the law against the public. The Sack treatise suggests that all elected officials are public because "they place their character and behavior before the public for consideration" by running for office, while "[o]nly some nonelected officials are subject to the [actual-malice] standard." *Id.* at 5-8 (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

emphasize the degree of policy-making authority wielded by the plaintiff in his or her official position, as well as the plaintiff's level of access to the media, as factors to be weighed in making the public official determination.").

In determining that appellants are public officials, the Superior Court relied in part on appellants' positions, which it found "comfortably fit within the hierarchy of public officials as provided in *Rosenblatt*." The court also relied on appellants' allegations in the complaint that they drafted, created, implemented, and helped put in place policies, procedures, and training relating to interrogations and interview techniques; investigated interrogation abuses; and, in the case of appellant Banks, provided technical oversight of Army Special Operations psychologists and became an author of an Army Inspector General Report on detainee operations. The court did not give explicit consideration to appellants' access *vel non* to the media. Appellants contend that this was error and argue that appellees failed to present evidence that would have supported a legal determination that each of the appellants is a public official.

Appellants argue in particular that the issue of their status as public officials is one that appellees raised as an affirmative defense and for which appellees accordingly bore — but failed to meet — the burden of proof. They cite the precedent of courts in California,[43] which have held that when an anti-

[43] The California anti-SLAPP statute was on the Council's radar when it enacted the D.C. Anti-SLAPP Act, *see* Report on Bill 18-893 at 3, and California "has a well-developed body of anti-SLAPP jurisprudence." *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013). However, this court does not

SLAPP defendant asserts, in an anti-SLAPP special motion to dismiss, the affirmative defense of conditional privilege — which includes the defense that an alleged defamatory statement concerned a public official and thus is protected unless made with actual malice[44] — the *defendant* bears the initial burden of proof of establishing the facts necessary to support that affirmative defense.[45] However, this court explained in *Mann* that "[t]he standards against which the court must assess the legal sufficiency of the [plaintiff's] evidence [in addressing a D.C. Anti-SLAPP Act special motion to dismiss] are the substantive evidentiary standards that apply to the underlying claim *and related defenses and privileges*." 150 A.3d at 1236 (emphasis added). That statement

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invariably hew to the precedent of other jurisdictions, including California, in interpreting their anti-SLAPP statutes. *See Saudi Am. Pub. Rels. Affs. Comm.*, 242 A.3d at 611 (declining to "selectively follow other state court decisions" in interpreting the D.C. Anti-SLAPP Act).

[44] *See N.Y. Times*, 376 U.S. at 298 (Goldberg, J., concurring) (stating that the Constitution affords "a 'conditional privilege' immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer").

[45] *See, e.g.*, *Davis v. Elec. Arts, Inc.,* 775 F.3d 1172, 1177 (9th Cir. 2015) (citing *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 35 Cal. Rptr. 3d 31, 44 676 (Ct. App. 2005) (explaining that although the California anti-SLAPP statute "places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense")); *see also Bently Reserve LP v. Papaliolios*, 160 Cal. Rptr. 3d 423, 435 (Ct. App. 2013) ("When evaluating an affirmative defense in connection with . . . an anti-SLAPP motion, the court . . . should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense.").

seems to envision that under the D.C. Anti-SLAPP Act, it was appellants who bore the burden of coming forward with evidence to support a determination that they are not public officials. We think an interpretation that assigns this burden to defamation plaintiffs, like appellants, even as to defendants' asserted affirmative defense is necessary to give meaning to the Act's burden-shifting provision; after all, in the summary judgment context even outside the context of an Anti-SLAPP Act motion, a non-moving party (here, appellants) *always* has the burden of "mak[ing] a sufficient showing on an essential element of [its own] case with respect to which [it will bear the burden of proof at trial]."[46] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also id.* at 325 (rejecting the notion "that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof"). But even if the quoted language from *Mann* means no more than that the burden is on appellants to demonstrate that appellees cannot shoulder *their* burden of proving their claims that appellants are public officials, appellants still must bear some of the burden on this issue.

And, in any event, as regards questions of law such as whether a defamation plaintiff is a public official, *see Thompson*, 134 A.3d at 312, "burdens of proof have no place," *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 983 & n.5 (C.D. Cal. 1999) (explaining that "[b]urdens are relevant when evi-

[46] In a defamation case such as this one, the essential elements to be proven include that the allegedly defamatory statement was made "without privilege." *Mann*, 150 A.3d at 1240.

dence is ambiguous or evenly balanced," but that "the issue of who bears the 'burden of proof' . . . cannot affect the legal question"). *See Marinelarena v. Barr*, 930 F.3d 1039, 1049 (9th Cir. 2019) ("[A] pure question of law . . . is unaffected by statutory burdens of proof.").

We conclude that we should remand the issue of appellants' public-official status for the Superior Court to make the determination in the first instance, based on applying all of the relevant considerations and on a more fully developed record. Appellants emphasized at oral argument that some facts bearing on their status as public officials *vel non* is not in the record. They also suggest that the truth or falsity of some of the Report's content (such as insinuations that appellants' "private deliberations about APA policies . . . had [an] effect on governmental policies") is relevant to resolution of the public-official issue.

Further, the present record affords us no insight into matters such as whether appellants' policy-drafting efforts were types of tasks inherent in their roles as military officers, or whether they were assigned or undertook their efforts, alleged in the complaint or discussed in the Report, based on their "particular proclivities." *Mandel*, 456 F.3d at 205-06 (explaining how "the factual record, at the summary judgment stage, was too uncertain to warrant a legal conclusion either way" about the public-official status of the plaintiff assistant state's attorney). No discovery was conducted to assist in resolution of whether any or all of the appellants had "substantial responsibility for or control over the conduct of governmental affairs" by virtue of their positions (or whether, as they assert, they merely "executed the

policy decisions of their superiors"); or whether appellants had access to the media to defend their reputations.[47] We have not overlooked that appellants' request for discovery does not appear to have been directed at obtaining information relevant to the public-official issue, but we are also mindful that appellants were describing the *targeted* discovery they wanted the court to permit, and they understandably focused on materials they thought would enable them to prove actual malice.

We acknowledge that an early resolution of the public-official issue is preferable so that the parties "will know what case they are preparing and may be expected to try" and to enable them to avoid "unnecessary time, effort, and expense of preparing two cases." SACK, § 5:4.2 at 5-84 (advocating for resolution of the public-figure issue "at the earliest opportunity that the state of the record will permit"); *see also Miller v. Transam. Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980) (advising that the question of public-figure status should "be answered as soon as possible"). "It does not follow, however, that the issue should always be decided as a preliminary matter," because "[t]here are cases in which the pretrial record is simply inadequate for proper determination of the issue." SACK, § 5:4.2 at 5-84; *see also Mandel*, 456 F.3d at 204 ("[T]here are cases in which it may not be possible to resolve the [public-official or public-

[47] To be sure, the record does contain some relevant evidence on this point. It discloses that in 2008, appellant James published a memoir (*Fixing Hell: An Army Psychologist Confronts Abu Ghraib*) that discussed the work of the PENS Task Force. This may have some bearing on the access-to-the-media issue, at least as to appellant James. This underscores, too, that the conclusion as to public-official status may not be the same for each of the appellants.

figure] issue until trial." (internal quotation marks and citation omitted)). We think this is such a case.

In sum, as to the public-official issue, we conclude, again, that appellants were entitled to discovery in an effort to meet their evidentiary burden to show a likelihood of prevailing against appellees' asserted defenses and privileges. We therefore decline to resolve the issue of their public-official status in this appeal. Instead, "we authorize the . . . [p]arties, if they wish, to seek further consideration of [the public-official] issue on remand." *Saudi Am. Pub. Rels. Affairs Comm.*, 242 A.3d at 612 n.13.

C. Republication

Appellants' republication claim (Count 11 of the Supplemental Complaint) alleges that on August 21, 2018, the APA's General Counsel sent an email to the APA Council of Representatives listserv, which includes persons who are not APA Council members, containing a link to an online APA Timeline page that in turn contains a link to the Report (as well as over 170 links to other documents, including some documents critical of the Report). Appellants assert that the email "constituted a separate communication of the defamatory Report to both the same persons and new persons"[48] and, along with some changes the

[48] Appellants point to statements in two affidavits averring that as a result of the email, the Report reached some "new and different readers." See Affidavit of Sally Harvey in Support of Plaintiffs' Memorandum in Opposition to Defendants' Second Set of Special Motion to Dismiss Under D.C. Anti-SLAPP Act, ¶ 6 ("Because the email announcement of the republished Report was posted to the Council listserv, which included recipients who are not Council members as well as Council members who were different from those Council members receiving the Report in 2015, the Report reached new and

APA made to its website, constituted a republication by all of the appellees (including Sidley and Hoffman, based on the claimed "foreseeab[ility]" of the putative republication).

The Superior Court concluded as a matter of law that there was no republication on August 21, 2018.[49] The court relied on the record evidence that the APA General Counsel's email did not contain a direct link to the Report[50] Further, the court reasoned that

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different readers."); Affidavit of Russell Newman in Support of Plaintiffs' Memorandum in Opposition to Defendant's Second Set of Special Motion to Dismiss Under D.C. Anti-SLAPP Act (same averment).

[49] The Superior Court summarized the relevant law as follows:

> Whether the publisher of a defamatory statement may be liable for republication depends on whether the publisher "edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience." *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 880 (W.D. Va. 2016) (internal citations omitted). "In the context of internet articles . . . courts have held that 'a statement on a website is not republished unless the statement itself is *substantively altered or added to*, or the website is directed to a new audience.'" *Id*. (internal citations omitted) (emphasis added). Thus, the relevant inquiry focuses on whether there has been a change in the content of the defamatory statement or whether the publisher actively sought a new audience.

March 12, 2020, Order at 11.

[50] The court's emphasis on the use of a hyperlink was consistent with the holdings of other courts regarding the posting of hyperlinks. *See, e.g.*, *Lokhova v. Halper*, 995 F.3d 134, 142 (4th Cir. 2021) (quoting the district court's observation that "although creating hypertext links to previously published statements may technically direct audiences' attention to the prior dissemination of those statements, such links do not

"there is no evidence that Defendant APA intended to, or actually did, reach a new audience" and remarked that appellants' contention that the APA sought a new audience by sending the email "exaggerates the available evidence."

This court — which, at least for statute-of-limitations purposes, has adopted the so-called "'single publication' rule," i.e., the rule that "a book, magazine, or newspaper has one publication date, the date on which it is first generally available to the public," *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 n.2 (D.C. 2001) — has not previously decided whether defamatory material is republished when a hyperlink directing the reader to it is posted on a website. We decline to decide the issue on the present record. We conclude that, just as with respect to the actual-malice and public-official issues, the republication issue is one as to which appellants should be given an opportunity for discovery. The Superior Court's remarks — about there being "no evidence that [d]efendant APA intended to, or actually did, reach a new audience" and about appellants' "exaggerat[ion of] the available evidence" — raise the question whether the available evidence on these points might be expanded through discovery.[51] We also think it

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constitute republication." (internal quotation marks and citation omitted)); *id.* at 143 (noting that "courts have consistently agreed that '[m]erely linking to an article should not amount to republication'"); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) ("[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article").

[51] Regarding whether the General Counsel's email actually might have reached new readers, it does seem clear that appellants' affiants were not themselves part of any new audience because the record indicates that they were well aware

possible that a more fully developed record could illuminate factors that conceivably would affect our decision whether to recognize republication, for example, whether a website is managed statically or dynamically, the context of a particular hyperlink, and the degree of removal (if any) of the hyperlink from the defamatory content (i.e., whether and how many additional steps are necessary to reach the defamatory content from the hyperlink in question).

III. Conclusion

For the reasons discussed above, we reverse the judgment of the Superior Court dismissing appellants' complaint and remand for further proceedings consistent with this opinion.

So ordered.

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of the 2015 publication before 2018: the record shows that affiant Harvey (see *supra* note 48) led a "careful examination" of the Report and "provided a detailed response" in November 2015, and affiant Newman was a plaintiff in the case when it was filed in 2017.

APPENDIX C

SUPERIOR COURT FOR THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

[Filed: D.C. Superior Court
01/23/2020 09:56AM
Clerk of the Court]

2017 CA 005989 B
Judge Hiram E. Puig-Lugo

STEPHEN BEHNKE, *et al.*,

Plaintiffs,

v.

DAVID D. HOFFMAN, *et al.*,

Defendants.

ORDER

The Plaintiffs have moved this Court to declare void and unconstitutional the D.C. Anti-SLAPP Act of 2010. Specifically, they contend that the Anti-SLAPP Act (1) violates the Home Rule Act, (2) contravenes the First Amendment because it is "grossly overbroad," and (3) creates impermissible barriers to finding recourse in the Courts. For the reasons discussed below this motion is denied.

Background

On August 28, 2017, the Plaintiffs filed claims of defamation *per se*, defamation by implication and

false light against the Defendants.[1] At that time, the Plaintiffs included former Army Colonels L. Morgan Banks, III, Debra L. Dunivin, Larry C. James, and Drs. Russell Newman and Stephen Behnke.[2] The Defendants are attorney David Hoffman, his law firm Sidley Austin LLP, its District office Sidley Austin (DC) LLP, and the American Psychological Association ("APA") (collectively, the "Defendants").

The dispute between the parties is based on the contents of an independent review and report that APA commissioned from Hoffman and Sidley Austin. The review and report resulted from an investigation into concerns that, in the aftermath of September 11, 2001, the APA colluded with the Bush Administration, the Central Intelligence Agency ("CIA") and the U.S. military to support participation of mental health professionals in the torture of military detainees. The Plaintiffs contend that the investigation did not find evidence to support the allegations described in the Defendants' report and resulted in the publication of a series of demonstrably false and defamatory allegations against them.

In response to the Plaintiffs' Complaint, the Defendants filed separate special motions to dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 ("Anti-SLAPP Act"), which are currently pending before the Court. For their part, the Plaintiffs opposed the separate requests for dismissal and

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[1] On February 4, 2019, Plaintiffs filed a supplemental complaint adding an additional count of defamation *per se*.

[2] Dr. Newman and Dr. Behnke have been ordered to arbitrate their claims as provided in their contractual relationships with the American Psychological Association.

countered with a motion to declare the D.C. Anti-SLAPP Act void and unconstitutional.

The Court notes that this lawsuit is the second of three substantively similar lawsuits against the Defendants filed in Ohio, the District of Columbia, and Massachusetts, arising from the aforementioned publication of Sidley Austin's independent investigative report to the APA. The Ohio case was dismissed for lack of personal jurisdiction and the Massachusetts case is currently stayed in favor of the D.C. action under the first-filed rule.

DISCUSSION

The D.C. Anti-SLAPP Act of 2010 culminated a legislative process which began with a proposed bill introduced in June that year. After a public hearing, a mark-up hearing and a detailed report from the Council's Committee on Public Safety and the Judiciary, the Council unanimously approved the bill. *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report, Report on Bill 18-893, "Anti-SLAPP Act of 2010," November 18, 2010 (Comm. Rep.)[3]. After the period of congressional review required under the Home Rule Act ("HRA"), the legislation became effective on March 31, 2011. 58 D.C. Reg. 3699 (Apr. 29, 2011).

The Anti-SLAPP Act, D.C. Law 18-351, *codified at* D.C. Code §§ 16-5501, *et seq.*, "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Comm. Rep.

[3] The Committee Report is available online at http://lims.dccouncil.us/Download/23048/B18-0893-Committee-Report1.pdf (Jan. 10, 2020).

at 1. More specifically, the Council described the "background and need" for the legislation as follows:

> Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation – or SLAPPs – have 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. Further, defendants of a SLAPP must dedicate a substantially (sic) amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Id.

The law provides that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of

public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). "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." D.C. Code § 16-5502(b). "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(c)(2). If it does not appear likely that targeted discovery will enable the plaintiff to defeat the motion and/or that discovery will be unduly burdensome, discovery proceedings on the claim shall be stayed until the motion is resolved. D.C. Code § 16-5502(c)(1). Moreover, the Act mandates that the "Court hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing." D.C. Code § 16-5502(d). "If the special motion to dismiss is granted, dismissal shall be with prejudice." *Id*.

The goal of the Anti-SLAPP provisions cited above is to ensure that "District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Comm. Rep. at 4. Similarly, the Act seeks to prevent "the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by [the] act." *Id*.

It is notable that the Committee Report prepared for the Anti-SLAPP Act emphasizes that the law was designed to follow the model set forth in a number of other jurisdictions, Committee Report at 1, and that the D.C. Court of Appeals often accords significant weight to such reports. *Boley v. Atl. Monthly Group*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (citations and internal quotations omitted). "Where appropriate, then, the Court will look to decisions from other jurisdictions (particularly those from California, which has a well-developed body of anti -SLAPP jurisprudence) for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law." *Id*.

I. The Anti-SLAPP Act and the Home Rule Act.

The Plaintiffs argue that the Anti-SLAPP Act exceeds the authority granted to the D.C. Council under the Home Rule Act and creates new procedures applicable to D.C. Courts without having followed appropriate procedures. Both issues are discussed sequentially below.

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise exclusive Legislation over the District of Columbia. *Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). In 1973, Congress delegated the bulk of this authority to the District through enactment of the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201 *et seq.*). The Home Rule Act reserves for Congress a layover period of thirty statutory days to review legislation enacted in the D.C. Council, and the legislation will become law if Congress does not pass a joint resolution disapproving the legislation within that time frame. *Bliley*, 23 F.3d at 508.

When it enacted the Home Rule Act, Congress intended, in relevant part, "to delegate certain legislative powers to the government of the District of Columbia; . . . grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). In addition, Congress directed that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1-203.02. However, that delegation of legislative authority is not without limitation.

The Home Rule Act specifies that the D.C. Council shall have no authority to enact any act, resolution, or rule related to the organization and jurisdiction of the District of Columbia courts as required under Title 11. D.C. Code § 1-206.02(a)(4). The legislative history of the HRA indicates that "the purpose of this [provision] was the very strong argument made by the court and supported by members of the bar . . . that the Reorganization Act had just gone into effect. Therefore, the *structure* of the courts should have an opportunity for that Reorganization Act to be completely carried out." Staff of House Committee on the District of Columbia, 93d Cong., 2d Sess., Home Rule for the District of Columbia, 1973-1974, 1081 (Comm. Print 1974) (emphasis added).

The D.C. Court of Appeals has construed D.C. Code § 1-206.02(a)(4) narrowly to mean that "the Council is precluded from amending Title 11 itself" but that the Council retains "broad legislative power" to implement the purpose of the Home Rule Act. *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019). Where a litigant challenges the validity of legislation under this provision, that party must demonstrate an actual conflict between the law and the terms of Title 11 governing the courts' jurisdiction and organization. *See Hessey v. Burden,* 584 A.2d 1, 7 (D.C. 1990) (the "test is whether local legislation attempts to confer jurisdiction that would conflict with the terms of title 11"). Otherwise, the limitation found in D.C. Code § 1-206.02(a)(4) does not restrict the authority of the D.C. Council to enact or to alter the substantive law applied in D.C. courts.

Moreover, the D.C. Court of Appeals has held that "the D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 (D.C. 1988). Thus, statutes should be construed to avoid any doubt as to their validity "when it is not compelled by the language or the purpose of the statute." *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723-24 (D.C. 1995). The language or the purpose of the Anti-SLAPP provision does not compel a finding a violation of the Home Rule Act here.

The Anti-SLAPP Act does not alter the jurisdiction of the courts, or otherwise interfere with the court's structure or core functions contrary to the Home Rule Act. The legislative history of the Act explains that it was intended to create new "substantive rights." The

D.C. Court of Appeals approved this position when it concluded that the Act created ***substantive rights*** designed to protect the targets of meritless lawsuits intended to restrict participation in issues of public concern. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (citations and internal quotations omitted) (emphasis added). Although the Plaintiffs focus on a letter from a former Attorney General for the District of Columbia opining that the legislation which became the Anti-SLAPP Act "may run afoul of section 602(a)(4)" of the Home Rule Act, that opinion preceded enactment of the final version of the statute, was based on a preliminary review of the initial bill and thus carries limited precedential weight in this conversation. Subsequently, the legislation was amended, the Mayor signed it, and Congress did not pass a joint resolution stating its disapproval prior to the legislation becoming law. Applying section 602(a)(4) of the Home Rule Act as Plaintiffs suggest, where the composition, structure and jurisdiction of the courts are not at issue, would take that provision beyond what Congress intended when it limited the legislative authority of the D.C. Council.[4] Therefore, the D.C. Anti-SLAPP Act does not contradict the terms of Title 11 in violation of the Home Rule Act.

Plaintiff also invokes D.C. Code § 11-946 to challenge the legality of the Anti-SLAPP Act. This provision requires that "[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal

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[4] The D.C. Courts have routinely and consistently concluded that the HRA does not prevent the Council from changing the District's substantive law. *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016).

Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules." *Id*. [5]

However, aside from creating substantive rights in circumstances where the right of advocacy on issues of public interest is involved, the Anti-SLAPP Act does not amend or modify the Federal Rules of Civil Procedure. What it does is establish a framework to balance the competing interests of adversarial parties in a particular set of circumstances which is "not a redundant relative to the rules of civil procedure." *Competitive Enterprise Inst. v. Mann,* 150 A.3d 1213, 1238 (D.C. 2016). Even if there were a conflict between the Act and Superior Court rules, the Act would prevail since a rule "may not supercede an inconsistent provision of the District of Columbia Code." *Ford v. ChartOne, Inc.,* 834 A.2d 875, 879 (D.C. 2003). Thus, the Anti-SLAPP Act does not modify federal rules and does not create new procedures contrary to the directive found in D.C. Code § 11-946.

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[5] *See,* General Rules of the Family Division, Rules Governing Parentage and Support Proceedings, Rules Governing Domestic Relations Proceedings, Rules Governing Proceedings in the Domestic Violence Division, and Rules Governing Abuse and Neglect Proceedings for examples of rules where D.C. Court of Appeals approval is not required.

II. The Constitutionality of the Anti-SLAPP Act:

Plaintiffs contend that the Anti-SLAPP Act limits the content of speech and therefore is subject to strict scrutiny. However, the Supreme Court has not said "that strict scrutiny is called for whenever a fundamental right is at stake." *Heller v. District of Columbia,* 670 F.3d 1244, 1256 (D.C. Cir. 2011). In reality, the Anti-SLAPP Act does not on its face address or restrict the ability of a plaintiff to file a lawsuit. *Nat'l Ass'n for the Advancement of Multi-jurisdictional Practice v. Roberts,* 180 F. Supp. 3d 46, 53, (D.D.C. 2015). Thus, absent any precedential authority to the contrary, strict scrutiny does not apply to the Anti-SLAPP Act.

a. The Anti-SLAPP Act is not Unconstitutionally Overbroad

A statute will be found overbroad on its face only if "a substantial number of applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Sandvig v. Sessions,* 315 F. Supp. 3d 1, 28 (D.D.C. 2018) (quoting *United States v. Stevens,* 559 U.S. 460, 473 (2010)). In such circumstances, there must be a realistic danger that the statute itself will significantly compromise First Amendment protections for parties not before the Court for the statute to be facially challenged on over breadth grounds. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). "Broad, facial challenges to the constitutionality of a statute impose a heavy burden on the parties and rarely succeed. This is so because "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [a]ct would be valid,' *i.e.*, that the law is unconstitutional

in all of its applications." *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009) (citations omitted).

Here, the Plaintiffs claim that the Anti-SLAPP Act "impinges unconstitutionally on the rights of the plaintiffs to bring legitimate suits to redress wrongs to their reputations," but fail to identify any specific and potential applications of the Act that would render it unconstitutional. Pl. Mem. at 6. Yet, the D.C. Court of Appeals has determined that the Anti-SLAPP satisfies constitutional guidelines:

> The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. Thus, the special motion to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial; it is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act.

Competitive Enter. Inst. v. Mann, 150 A.3d at 1213, 1239 (D.C. 2016).

Similarly, the California Supreme Court has found that a motion filed under that state's Anti-SLAPP law is not "a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances." *Equilon Enters. v. Consumer Cause, Inc.,* 52

P.2d 685, 693 (Cal. 2002). It emphasized that the remedy identified in California law "is not available where a probability exists that the plaintiff will prevail on the merits." *Id.* This position coincides with the D.C. Court of Appeals conclusion that dismissal under the D.C. Anti-SLAPP Act is only appropriate where a plaintiff cannot show "an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann,* 150 A.3d 1239, 1261-62. In essence, both the California Supreme Court and the D.C. Court of Appeals concur in the conclusion that dismissing a meritless claim does not violate the First Amendment.[6]

The Plaintiffs misconstrue the legislation in their argument that the Anti-SLAPP Act does not satisfy constitutional requirements. The Act specifically directs a court to determine, at an early stage, whether the plaintiff has legally valid claim. The Act distinguishes between meritless and meritorious claims, by allowing the plaintiff to overcome a prima facie showing of protected advocacy through showing that his or her claim is likely to succeed on the merits. As noted in *Mann*, 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 claim-

[6] The Plaintiffs cite jurisprudence from Massachusetts and Illinois in their challenge to the D.C. Anti-SLAPP Act. Contrary to local legislation, the pertinent laws in those states did not provide plaintiffs with an opportunity to show the likelihood of success on the merits. *See, e.g., Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 165, (1998); *Sandholm v. Kuecker,* 962 N.E.2d 418, 431 (Ill. 2012).

ant's constitutional right to a jury trial." *Mann*, 150 A.3d at 1232-33.

The Plaintiffs have not met their burden of showing that the Anti-SLAPP Act is unconstitutionally overbroad on its face. The claim that the Anti-SLAPP Act impinges unconstitutionally on the rights of plaintiffs to bring legitimate lawsuits to redress real wrongs to their reputations, because it does not provide a mechanism for determining whether a suit is a strategic lawsuit against public participation (SLAPP) before applying its sanctions is without merit. The Act explicitly gives all plaintiffs the opportunity to demonstrate that their grievance is legitimate by making a preliminary showing regarding the merits of their defamation claims after providing for targeted, non-burdensome discovery where appropriate. In this litigation, the Plaintiffs received voluminous discovery under the limited discovery provision of the statute and will have an ample opportunity to advance the merit of their claims within the framework established under the Anti-SLAPP Act.

b. The Anti-SLAPP Act does not Infringe on the First Amendment's Right to Petition

The First Amendment's Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I. The right to petition extends to all departments of the Government and the right of access to the courts is but one aspect of the right of petition. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). "[T]he First Amendment does not provide plaintiffs with the right to receive a government response to or official consideration of their petitions." *We the People Found, Inc. v.*

United States, 485 F.3d 140, 142 (D.C. Cir. 2007). Additionally, the First Amendment Right to Petition does not immunize litigants from pursuing baseless litigation. *In re Yelverton*, 105 A.3d 413, 421 (D.C. 2014). In fact, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1133 (D.C. 2012).

When "a person petitions the government" in good faith, "the First Amendment prohibits any sanction on that action." *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 89 (D.C. Cir. 2015). To clarify, the U.S. Supreme Court has differentiated "sanctions" imposed for First Amendment purposes from common litigation sanctions imposed by courts themselves – such as those authorized under Rule 11 of the Federal Rules of Civil Procedure – or provisions that merely authorize the imposition of attorney's fees on a losing plaintiff. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002) ("nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves – such as those authorized under Rule 11 of the Federal Rules of Civil Procedure – or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.").

The Anti-SLAPP Act does not bar plaintiffs from bringing legal actions. It only requires that plaintiffs demonstrate that a claim is "likely to succeed on the merits" only after defendants make a prima facie showing that the claim "arises from an act in furtherance of the right of advocacy on issues of

public interest." D.C. Code § 16-5502(b). This burden-shifting scheme is designed to protect free speech only in situations where a court finds that a party is using litigation as a weapon to chill or silence expression. *See Doe v. Burke,* 133 A.3d 569, 571 (D.C. 2016) (citation omitted). Otherwise, the party seeking redress is free to proceed.

Federal courts have found that requiring plaintiffs to prove their cases early in the litigation process is not only *appropriate* to protect free speech but also that summary proceedings are *essential* in the First Amendment area. *See Farah v. Esquire Magazine,* 736 F.3d 528, 534 (D.D.C. 2013) (quoting *Wash. Post. Co. v. Keough,* 365 F.2d 965, 968 (D.C. Cir. 1966)) (summary proceedings are essential in First Amendment cases "because if a suit entails `long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails"); *see also Coles v. Washington Free Weekly,* 881 F. Supp. 26, 30 (D.D.C. 1995) (appropriate to scrutinize defamation lawsuits and determine whether dismissal is warranted at an early stage to avoid the threat of non-meritorious actions infringing on First Amendment rights).

The Anti-SLAPP Act does not limit the First Amendment right to petition the courts. The law does not, on its face, bar plaintiffs from bringing suit. As previously stated, the Anti-SLAPP Act was interpreted as a "tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to the First Amendment protections and of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." *Mann*, 150 A.3d at 1239. *See also, Nat'l Ass'n for the Advancement of Multijurisdiction Practice v.*

Roberts, 180 F. Supp. 3d 46, 63 (D.D.C. 2015) (law that does not restrict ability to file a petition does not violate First Amendment right to petition). Therefore, Plaintiffs' facial and/or as-applied challenge to the Anti-SLAPP Act fails on these grounds as well. Indeed, Plaintiffs are not barred from bringing their claims and the burden-shifting requirements under the Anti-SLAPP Act do not violate their First Amendment Right to Petition.

Finally, the allowance for reimbursement of reasonable attorneys fees incurred when prosecuting a motion to dismiss under the Anti-SLAPP act does not produce an opposite result. As quoted above in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002), the award of reasonable attorney's fees against a losing party is neither a "sanction" nor an impermissible award under the First Amendment.

CONCLUSION

Based on the pleadings, the entire record herein, relevant law, and for the above reasons, it is this 23rd date of January, 2020, hereby:

ORDERED, that Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Act Void and Unconstitutional is **DENIED**; it is further

ORDERED, that Plaintiffs and Defendants appear on February 21, 2020 at 2:00 p.m. for a hearing on the pending motions to dismiss under the D.C. Anti-SLAPP Act. Counsel for Intervenor, District of Columbia, is excused from further proceedings.

IT IS SO ORDERED.

/s/ Hiram Puig-Lugo
Judge Hiram Puig-Lugo
Signed in Chambers

Copies via Casefile Xpress to all counsel of record.

APPENDIX D

U.S. Constitution art. I, § 8, cl. 17

* * *

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

APPENDIX E

73d CONGRESS. SESS. II. CHS. 651, 652. JUNE 19, 1934.

[CHAPTER 651.]

AN ACT

June 19, 1934.
[S. 3010.]
[Public, No. 415.]

To give the Supreme Court of the United States authority to make and publish rules in actions at law.

Supreme Court of United States.

Power to prescribe rules in civil actions at law.

Be it enacted by the Senate and House of Representatives of the United States *of America in Congress assembled,* That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Rights of litigant.

Effective date.

Rules in equity and law may be united.

SEC. 2. The court may at any time unite the general rules prescribed by it for cases in equity

with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. Approved, June 19, 1934.

Proviso.
Right of trial by jury.

Effective date of united rules.

[CHAPTER 652.]

AN ACT

June 19, 1934.
[S. 3285.]
[Public, No. 416:]

To provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in. Congress assembled,

Communications Act of 1934.

TITLE I—GENERAL

PROVISIONS

Purposes of Act.

PURPOSES OF ACID; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the Federal Communications Commission ", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Federal Communications Commission created.

Application of Act.

APPLICATION OF ACT

SEC. 2. (a) The provisions of this

To interstate and foreign communications; transmission of energy by radio.

Persons to whom applicable.

Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all

Code of the District of Columbia

Title 11. Organization and Jurisdiction of the Courts. [Enacted title]

Chapter 1. General Provisions.

§§ 11-101 – 11-102

Chapter 3. United States Court of Appeals for the District of Columbia Circuit.

§§ 11-301 – 11-301

Chapter 5. United States District Court for the District of Columbia.

§§ 11-501 – 11-521

Chapter 7. District of Columbia Court of Appeals.

§§ 11-701 – 11-745

Chapter 9. Superior Court of the District of Columbia.

§§ 11-901 – 11-947

Chapter 11. Family Court of the Superior Court.

§§ 11-1101 – 11-1106

Chapter 12. Tax Division of the Superior Court.

§§ 11-1201 – 11-1203

Chapter 13. Small Claims and Conciliation Branch of the Superior Court.

§§ 11-1301 – 11-1323

Chapter 15. Judges of the District of Columbia Courts.

§§ 11-1501 – 11-1572

Chapter 17. Administration of District of Columbia Courts.

§§ 11-1701 – 11-1748

Chapter 19. Juries and Jurors.

§§ 11-1901 – 11-1918

Chapter 21. Register of Wills.

§§ 11-2101 – 11-2106

Chapter 23. Medical Examiner.

§§ 11-2301 – 11-2312

Chapter 25. Attorneys.

§§ 11-2501 – 11-2504

Chapter 26. Representation of Indigents in Criminal Cases.

§§ 11-2601 – 11-2609

D.C. Code § 11–946. Rules of court.

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

D.C. Code § 1-206.02(a)(4). Limitations on the Council.

(a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter, or to:

* * *

(4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts);

* * *

D.C. Code § 1–207.18. Continuation of District of Columbia court system.

(a) The District of Columbia Court of Appeals, the Superior Court of the District of Columbia, and the District of Columbia Commission on Judicial Disabilities and Tenure shall continue as provided under the District of Columbia Court Reorganization Act of 1970 subject to the provisions of part C of subchapter IV of this chapter and § 1-206.02(a)(4).

* * *

D.C. Code § 16–5501. Definitions.

For the purposes of this chapter, the term:

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

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

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

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

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

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

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

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

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

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

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

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

D.C. Code § 16–5503. Special motion to quash.

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues

of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16–5504. Fees and costs.

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

D.C. Code § 16–5505. Exemptions.

(a) This chapter shall not apply to:

(1) Any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(A) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(B) The intended audience is an actual or potential buyer or customer; and

(2) Any claim brought by the District government, including District public charter schools.

(b) Subsection (a)(2) of this section shall apply:

(1) As of March 31, 2011; and

(2) To any claims pending as of [November 8, 2021].

APPENDIX F

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General*. Unless another time is specified by this rule or an applicable statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer within 21 days after being served with the summons and complaint.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *The United States or the District of Columbia and the Agencies, Officers, or Employees of Either Sued in an Official Capacity*. The United States or the District of Columbia or an agency, officer, or employee of either sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia).

(3) *United States or District of Columbia Officers or Employees Sued in an Individual Capacity*. A United States or District of Columbia officer or employee sued in an individual capacity for an act or omission

occurring in connection with the duties performed on the United States' or the District of Columbia's behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia), whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(5) *Entry of Default*. Unless the time to respond to the complaint has been extended as provided in Rule 55(a)(3) or the court orders otherwise, failure to comply with the requirements of this rule will result in the entry of a default by the clerk or the court sua sponte.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) [Omitted];

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULTS OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement

and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitations on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–

(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 12*, as amended in 2007 and 2009, except for: 1) the substitution of "applicable statute" for "federal statute" in subsection (a)(1); 2) the deletion of inapplicable federal limitation periods in subsection (a)(1)(A); 3) the addition of references to "the District of Columbia" in subsections (a)(2) and (a)(3); 4) the retention of subsection (a)(5) regarding the automatic entry of default against a defendant who does not timely respond to the complaint; and 5) the omission

of subsection (b)(3), which deals with improper venue and is not applicable in the District of Columbia.

COMMENT

SCR-Civil 12(a) is rearranged to reflect the format established by the federal rule revisions of December 1993. Federal limitation periods are altered to comport with those in the existing Superior Court rule. Additionally, a paragraph (5) has been added to preserve the existing Superior Court rule of automatic entry of default against a defendant who does not timely respond to the complaint.

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION; FORMAT.

(1) *Time to File.* Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(2) *Format: Parties' Statements of Fact*.

(A) *Movant's Statement*. In addition to the points and authorities required by Rule 12-I(d)(2), the movant must file a statement of the material facts that the movant contends are not genuinely disputed. Each material fact must be stated in a separate numbered paragraph.

(B) *Opponent's Statement*. A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the

affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 56*, as amended in 2010, except that 1) a reference to local district court rules is omitted from the language in subsection (b)(1) and 2) subsection (b)(2), which is unique to the Superior Court rule, requires parties to submit statements of material facts with each material fact stated in a separate, numbered paragraph (a requirement previously found in Rule 12-I(k)). In 2010, the federal rule underwent substantial revisions in order to improve the procedures for presenting and deciding summary judgment motions, but the standard for granting summary judgment remained unchanged. Parties and counsel should refer to the Federal Rules of Civil Procedure Advisory

Committee Notes for a detailed explanation of these amendments.

COMMENT

Identical to *Federal Rule of Civil Procedure 56* except for the provision in paragraphs (a) and (b) of Rule 56 that the time period for filing the motion shall be set by Court order. For further requirements with respect to summary judgment procedure, see Rule 12-I(k).

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

RULE PROMULGATION ORDER 25-01

(Amending Super. Ct. Civ. R. 12 and 28-I)

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the Board of Judges of the Superior Court approved amendments to Superior Court Rules of Civil Procedure 12 and 28-I; and

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the amendments to these rules, to the extent that they modify the federal rules, have been approved by the District of Columbia Court of Appeals; it is

ORDERED, that Superior Court Rules of Civil Procedure 12 and 28-I are hereby amended as set forth below; and it is further

ORDERED, that the amendments to Superior Court Rule of Civil Procedure 12 shall take effect immediately and shall govern all proceedings hereafter commenced and, insofar is just and practicable, all pending proceedings; and it is further

ORDERED, that the amendments to Superior Court Rule of Civil Procedure 28-I shall take effect sixty days from the date of this order and shall govern all proceedings thereafter commenced and, insofar is just and practicable, all proceedings then pending.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

~~(1) *In General*.~~ Unless another time is specified by ~~this rule or~~ an applicable statute, the time for serving a responsive pleading is as follows:

(1) *In General.*

(A) A defendant must serve an answer within 21 days after being served with the summons and complaint.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *The United States or the District of Columbia and the Agencies, Officers, or Employees of Either Sued in an Official Capacity*. The United States or the District of Columbia or an agency, officer, or employee of either sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia).

(3) *United States or District of Columbia Officers or Employees Sued in an Individual Capacity*. A United States or District of Columbia officer or

employee sued in an individual capacity for an act or omission occurring in connection with the duties performed on the United States' or the District of Columbia's behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia), whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(5) *Entry of Default*. Unless the time to respond to the complaint has been extended as provided in Rule 55(a)(3) or the court orders otherwise, failure to comply with the requirements of this rule will result in the entry of a default by the clerk or the court sua sponte.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) [Omitted];

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed— but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULTS OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must

point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitations on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)– (7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMENT TO 2025 AMENDMENTS

Section (a) of this rule has been amended consistent with the 2024 amendments to *Federal Rule of Civil Procedure 12*, which was amended to make clear that a statute that specifies another time supersedes the times to serve a responsive pleading set by subsections (a)(2) and (3).

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 12*, as amended in 2007 and 2009, except for: 1) the substitution of "applicable statute" for "federal

statute" in subsection (a)(1); 2) the deletion of inapplicable federal limitation periods in subsection (a)(1)(A); 3) the addition of references to "the District of Columbia" in subsections (a)(2) and (a)(3); 4) the retention of subsection (a)(5) regarding the automatic entry of default against a defendant who does not timely respond to the complaint; and 5) the omission of subsection (b)(3), which deals with improper venue and is not applicable in the District of Columbia.

COMMENT

SCR-Civil 12(a) is rearranged to reflect the format established by the federal rule revisions of December 1993. Federal limitation periods are altered to comport with those in the existing Superior Court rule. Additionally, a paragraph (5) has been added to preserve the existing Superior Court rule of automatic entry of default against a defendant who does not timely respond to the complaint.

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(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *The United States or the District of Columbia and the Agencies, Officers, or Employees of Either Sued in an Official Capacity*. The United States or the District of Columbia or an agency, officer, or employee of either sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia).

(3) *United States or District of Columbia Officers or Employees Sued in an Individual Capacity*. A United States or District of Columbia officer or

employee sued in an individual capacity for an act or omission occurring in connection with the duties performed on the United States' or the District of Columbia's behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia), whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(5) *Entry of Default*. Unless the time to respond to the complaint has been extended as provided in Rule 55(a)(3) or the court orders otherwise, failure to comply with the requirements of this rule will result in the entry of a default by the clerk or the court sua sponte.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

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point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

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(1) on its own; or

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(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitations on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

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(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)– (7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMENT TO 2025 AMENDMENTS

Section (a) of this rule has been amended consistent with the 2024 amendments to *Federal Rule of Civil Procedure 12*, which was amended to make clear that a statute that specifies another time supersedes the times to serve a responsive pleading set by subsections (a)(2) and (3).

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 12*, as amended in 2007 and 2009, except for: 1) the substitution of "applicable statute" for "federal

statute" in subsection (a)(1); 2) the deletion of inapplicable federal limitation periods in subsection (a)(1)(A); 3) the addition of references to "the District of Columbia" in subsections (a)(2) and (a)(3); 4) the retention of subsection (a)(5) regarding the automatic entry of default against a defendant who does not timely respond to the complaint; and 5) the omission of subsection (b)(3), which deals with improper venue and is not applicable in the District of Columbia.

COMMENT

SCR-Civil 12(a) is rearranged to reflect the format established by the federal rule revisions of December 1993. Federal limitation periods are altered to comport with those in the existing Superior Court rule. Additionally, a paragraph (5) has been added to preserve the existing Superior Court rule of automatic entry of default against a defendant who does not timely respond to the complaint.

Rule 28-I. Interstate Depositions and Discovery Procedures

(a) IN GENERAL. In seeking to conduct interstate depositions and discovery, parties may proceed under any of the following provisions.

(b) INTERSTATE DEPOSITIONS AND DISCOVERY PROCEDURES UNDER THE UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT, D.C. CODE §§ 13-441 to -449~~8~~.

(1) *Issuance of Subpoena*.

(A) To request a subpoena under D.C. Code § 13-443 ~~(2012 Repl.)~~, a party must submit a foreign subpoena to the clerk and the written affirmation required by Rule 28-I(b)(2)(A). A request for the issuance of a subpoena under the Uniform Interstate Depositions and Discovery Act does not constitute an appearance in the courts of the District of Columbia.

(B) When a party submits a foreign subpoena to the clerk, the clerk, in accordance with these rules, must promptly issue a subpoena for service on the person to whom the foreign subpoena is directed.

(C) A subpoena under Rule 28-I(b)(1)(B) must:

(i) incorporate the terms used in the foreign subpoena; and

(ii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(2) *Affirmation of Noninterference with Bodily Autonomy*.

(A) A party or the party's counsel requesting issuance of a subpoena under Rule 28-I(b)(1) must submit a written statement, signed by the party seeking enforcement or the party's counsel, swearing or affirming under penalty of perjury that no portion of the foreign subpoena is intended or anticipated to further any investigation or proceeding of a type described in D.C. Code § 2-1461.01(a).

(B) A foreign subpoena not conforming to the requirements of Rule 28-I(b)(2)(A) will not be accepted for filing.

(C) If a party or the party's counsel refuses to provide the Affirmation of Noninterference with Bodily Autonomy, the clerk must send to the person to whom the foreign subpoena is directed, by first class mail at the address shown in the subpoena, a copy of the foreign subpoena and a notice that it is not recognized as a valid foreign subpoena because it does not include the affirmation required by Rule 28-I(b)(2)(A).

(3) *Service of Subpoena*. A subpoena issued by a clerk under Rule 28-I(b)(1) must be served in compliance with D.C. Code § 11-942 (2012 Repl.) and Rule 45.

(~~3~~4) *Deposition, Production, and Inspection*. The rules applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises apply to subpoenas issued under Rule 28-I(b)(1).

(~~4~~5) *Motions Regarding Subpoena.* A motion for a protective order or to enforce, quash, or modify a

subpoena issued by a clerk under Rule 28-I(b)(1) must comply with these rules and the laws of the District of Columbia and must be submitted to the Superior Court.

(c) ASSISTANCE TO TRIBUNALS AND LITIGANTS OUTSIDE THE DISTRICT OF COLUMBIA UNDER D.C. CODE § 13-434.

(1) *By Court Order*. Upon application by any interested person or in response to letters rogatory issued by a tribunal outside the District of Columbia, the Superior Court may order service on any person who is domiciled or can be found within the District of Columbia of any document issued in connection with a proceeding in a tribunal outside the District of Columbia. The order must direct the manner of service.

(2) *Without Court Order*. Service in connection with a proceeding in a tribunal outside the District of Columbia may be made inside the District of Columbia without an order of the court.

(3) *Effect*. Service under Rule 28-I(c) does not, of itself, require the recognition or enforcement of an order, judgment, or decree rendered outside the District of Columbia.

(d) COMMISSIONS OR NOTICES FOR TESTIMONY UNDER D.C. CODE § 14-103. When a commission is issued or notice given to take the testimony of a witness found within the District of Columbia, to be used in an action pending in a court of a state, territory, commonwealth, possession, or a place under the jurisdiction of the United States, the party seeking that testimony may file with this court a certified copy of the commission or notice. Upon approval by the judge in chambers of the commission or notice and the

proposed subpoena, the clerk must issue a subpoena compelling the designated witness to appear for deposition at a specified time and place. Testimony taken under Rule 28-I(d) must be taken in the manner prescribed by these rules, and the court may entertain any motion, including motions for quashing service of a subpoena and for issuance of protective orders, in the same manner as if the action were pending in this court.

COMMENT TO 2025 AMENDMENTS

Section (b) of the rule has been amended to implement the Human Rights Sanctuary Amendment Act of 2022, D.C. Law L24-0257, § 201, 70 D.C. Reg. 2929 (2023), D.C. Code §§ 13-443, -449, which amended the Uniform Interstate Depositions and Discovery Act to restrict enforcement of foreign subpoenas in interstate investigations and proceedings that interfere with the right of bodily autonomy under section 101(a) of the Act, D.C. Code § 2-1461.01(a). New subsection (b)(2) implements the Act's affirmation requirement, D.C. Code §13-449. Former subsections (b)(2), b(3), and b(4) have been redesignated (b)(3), (b)(4), and (b)(5), respectively. Section (b) has also been amended to conform with the general restyling of the Superior Court rules.

To the extent the Human Rights Sanctuary Amendment Act of 2022 includes procedural rules, the Court has adopted them pursuant to its exclusive rulemaking authority under D.C. Code § 11-946. *See Woodroof v. Cunningham*, 147 A.3d 777 (D.C. 2016).

COMMENT TO 2017 AMENDMENTS

This rule was amended to include the procedures for filing under the Uniform Interstate Depositions and Discovery Act (D.C. Code §§ 13-441 to -448 (2012

Repl.)) and D.C. Code § 13-434 (2012 Repl.). The process for obtaining a commission or notice under D.C. Code § 14-103 (2012 Repl.) has been retained from the prior version of the rule, but the provisions related to appointment of an examiner to take testimony of a witness outside the District of Columbia have been moved to new Rule 28-II. Stylistic changes were also made to this rule to conform with the 2007 amendments to the Federal Rules of Civil Procedure.

COMMENT

Paragraphs (c) and (b) of Rule 28-I implement the authority conferred on the Superior Court by § 14-103 and § 14-104, respectively.

Rule 28-I. Interstate Depositions and Discovery Procedures

(a) IN GENERAL. In seeking to conduct interstate depositions and discovery, parties may proceed under any of the following provisions.

(b) INTERSTATE DEPOSITIONS AND DISCOVERY PROCEDURES UNDER THE UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT, D.C. CODE §§ 13 441 to -449.

(1) *Issuance of Subpoena*.

(A) To request a subpoena under D.C. Code § 13-443, a party must submit a foreign subpoena to the clerk and the written affirmation required by Rule 28-I(b)(2)(A). A request for the issuance of a subpoena under the Uniform Interstate Depositions and Discovery Act does not constitute an appearance in the courts of the District of Columbia.

(B) When a party submits a foreign subpoena to the clerk, the clerk, in accordance with these rules, must promptly issue a subpoena for service on the person to whom the foreign subpoena is directed.

(C) A subpoena under Rule 28-I(b)(1)(B) must:

(i) incorporate the terms used in the foreign subpoena; and

(ii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(2) *Affirmation of Noninterference with Bodily Autonomy*.

(A) A party or the party's counsel requesting issuance of a subpoena under Rule 28-I(b)(1) must submit a written statement, signed by the party seeking enforcement or the party's counsel, swearing or affirming under penalty of perjury that no portion of the foreign subpoena is intended or anticipated to further any investigation or proceeding of a type described in D.C. Code § 2-1461.01(a).

(B) A foreign subpoena not conforming to the requirements of Rule 28-I(b)(2)(A) will not be accepted for filing.

(C) If a party or the party's counsel refuses to provide the Affirmation of Noninterference with Bodily Autonomy, the clerk must send to the person to whom the foreign subpoena is directed, by first class mail at the address shown in the subpoena, a copy of the foreign subpoena and a notice that it is not recognized as a valid foreign subpoena because it does not include the affirmation required by Rule 28-I(b)(2)(A).

(3) *Service of Subpoena*. A subpoena issued by a clerk under Rule 28-I(b)(1) must be served in compliance with D.C. Code § 11-942 and Rule 45.

(4) *Deposition, Production, and Inspection*. The rules applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises apply to subpoenas issued under Rule 28-I(b)(1).

(5) *Motions Regarding Subpoena.* A motion for a protective order or to enforce, quash, or modify a subpoena issued by a clerk under Rule 28-I(b)(1)

must comply with these rules and the laws of the District of Columbia and must be submitted to the Superior Court.

(c) ASSISTANCE TO TRIBUNALS AND LITIGANTS OUTSIDE THE DISTRICT OF COLUMBIA UNDER D.C. CODE § 13-434.

(1) *By Court Order*. Upon application by any interested person or in response to letters rogatory issued by a tribunal outside the District of Columbia, the Superior Court may order service on any person who is domiciled or can be found within the District of Columbia of any document issued in connection with a proceeding in a tribunal outside the District of Columbia. The order must direct the manner of service.

(2) *Without Court Order.* Service in connection with a proceeding in a tribunal outside the District of Columbia may be made inside the District of Columbia without an order of the court.

(3) *Effect*. Service under Rule 28-I(c) does not, of itself, require the recognition or enforcement of an order, judgment, or decree rendered outside the District of Columbia.

(d) COMMISSIONS OR NOTICES FOR TESTIMONY UNDER D.C. CODE § 14-103. When a commission is issued or notice given to take the testimony of a witness found within the District of Columbia, to be used in an action pending in a court of a state, territory, commonwealth, possession, or a place under the jurisdiction of the United States, the party seeking that testimony may file with this court a certified copy of the commission or notice. Upon approval by the judge in chambers of the commission or notice and the proposed subpoena, the clerk must issue a subpoena

compelling the designated witness to appear for deposition at a specified time and place. Testimony taken under Rule 28-I(d) must be taken in the manner prescribed by these rules, and the court may entertain any motion, including motions for quashing service of a subpoena and for issuance of protective orders, in the same manner as if the action were pending in this court.

COMMENT TO 2025 AMENDMENTS

Section (b) of the rule has been amended to implement the Human Rights Sanctuary Amendment Act of 2022, D.C. Law L24-0257, § 201, 70 D.C. Reg. 2929 (2023), D.C. Code §§ 13-443, -449, which amended the Uniform Interstate Depositions and Discovery Act to restrict enforcement of foreign subpoenas in interstate investigations and proceedings that interfere with the right of bodily autonomy under section 101(a) of the Act, D.C. Code § 2-1461.01(a). New subsection (b)(2) implements the Act's affirmation requirement, D.C. Code §13-449. Former subsections (b)(2), b(3), and b(4) have been redesignated (b)(3), (b)(4), and (b)(5), respectively. Section (b) has also been amended to conform with the general restyling of the Superior Court rules.

To the extent the Human Rights Sanctuary Amendment Act of 2022 includes procedural rules, the Court has adopted them pursuant to its exclusive rulemaking authority under D.C. Code § 11-946. *See Woodroof v. Cunningham*, 147 A.3d 777 (D.C. 2016).

COMMENT TO 2017 AMENDMENTS

This rule was amended to include the procedures for filing under the Uniform Interstate Depositions and Discovery Act (D.C. Code §§ 13-441 to -448 (2012 Repl.)) and D.C. Code § 13-434 (2012 Repl.). The

process for obtaining a commission or notice under D.C. Code § 14-103 (2012 Repl.) has been retained from the prior version of the rule, but the provisions related to appointment of an examiner to take testimony of a witness outside the District of Columbia have been moved to new Rule 28-II. Stylistic changes were also made to this rule to conform with the 2007 amendments to the Federal Rules of Civil Procedure.

COMMENT

Paragraphs (c) and (b) of Rule 28-I implement the authority conferred on the Superior Court by § 14-103 and § 14-104, respectively.

APPENDIX G

NORTON INTRODUCES BILL TO GIVE D.C. CONTROL OVER OPERATIONS OF LOCAL D.C. COURTS

July 21, 2025 | Press Release

WASHINGTON, D.C. — Congresswoman Eleanor Holmes Norton (D-DC) introduced her District of Columbia Courts Home Rule Act today, which would give the D.C. Council authority over the jurisdiction and organization of the local D.C. courts. The D.C. Home Rule Act expressly prohibits D.C. from enacting any law with respect to any provision of the D.C. Code that relates to the jurisdiction and organization of the local D.C. courts. Congress can give D.C. this authority even before the District becomes the 51st state.

"The District has never had authority over its local courts, even before 1997 when it was responsible for paying for the courts' operations," Norton said. "As the duly elected and accountable local legislature for the District, it is irresponsible for the D.C. Council to be left on the sidelines while Congress, which could not care less about the local D.C. courts, remains in charge of improving their operations. My bill would correct this wrong and increase democratic autonomy and self-government for the District."

Under the Home Rule Act, the D.C. Council has no authority to "enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)."

In 1997, under the National Capital Revitalization and Self-Government Improvement Act, the federal government assumed the costs for several state-level

functions from D.C., including the local D.C. courts. This bill would not affect the authority of the President to nominate, or the Senate to confirm, local D.C. judges, which has been within their purview since the creation of the District's modern local court system in 1970.

Norton's introductory statement follows.

Statement of Congresswoman Eleanor Holmes Norton on the Introduction of the District of Columbia Courts Home Rule Act

July 21, 2025

Today, I introduce the District of Columbia Courts Home Rule Act. This bill would give the Council of the District of Columbia authority over the jurisdiction and organization of the local D.C. courts. The D.C. Home Rule Act (HRA) prohibits the Council from enacting any law with respect to title11 of the D.C. Code, which relates to the jurisdiction and organization of the local D.C. courts.

More than 50 years after passage of the HRA and notwithstanding the importance of the local D.C. courts to D.C., the Council, which is the legislative body accountable to D.C. residents, is left on the sidelines while Congress, which could not care less about the local D.C. courts, remains the only legislative body that can amend title 11 of the D.C. Code.

Under the HRA, the Council has no authority to "enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)." Title 11 of the D.C. Code primarily relates to the rules of criminal and civil

procedure, court administration, the branches of the courts, jury service and admission to the bar.

D.C. has never had authority over its local courts, even when it was responsible for paying for them. Under the National Capital Revitalization and Self-Government Improvement Act of 1997, the federal government assumed from D.C. the costs for several state-level functions, including the courts. This bill would not change the federal government's responsibility for funding the local D.C. courts or the authority of the President to nominate, and the Senate to confirm, local D.C. judges.

This bill is an important step to increase self-government for D.C. I urge my colleagues to support it.

INTRODUCTION OF THE DISTRICT OF COLUMBIA COURTS HOME RULE ACT

HON. ELEANOR HOLMES NORTON
OF THE DISTRICT OF COLUMBIA
IN THE HOUSE OF REPRESENTATIVES

Monday, July 21, 2025

Ms. NORTON. Mr. Speaker, today I introduce the District of Columbia Courts Home Rule Act. This bill would give the Council of the District of Columbia authority over the jurisdiction and organization of the local D.C. courts. The D.C. Home Rule Act (HRA) prohibits the Council from enacting any law with respect to title 11 of the D.C. Code, which relates to the jurisdiction and organization of the local D.C. courts.

More than 50 years after passage of the HRA and notwithstanding the importance of the local D.C. courts to D.C., the Council, which is the legislative body accountable to D.C. residents, is left on the sidelines while Congress, which could not care less about the local D.C. courts, remains the only legislative body that can amend title 11 of the D.C. Code.

Under the HRA, the Council has no authority to "enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)." Title 11 of the D.C. Code primarily relates to the rules of criminal and civil procedure, court administration, the branches of the courts, jury service and admission to the bar.

D.C. has never had authority over its local courts, even when it was responsible for paying for them. Under the National Capital Revitalization and Self-Government Improvement Act of 1997, the federal government

assumed from D.C. the costs for several state-level functions, including the courts. This bill would not change the federal government's responsibility for funding the local D.C. courts or the authority of the President to nominate, and the Senate to confirm, local D.C. judges.

This bill is an important step to increase self-government for D.C. I urge my colleagues to support it.

119TH CONGRESS
1ST SESSION

H. R. 4574

To amend the District of Columbia Home Rule Act to permit the Council of the District of Columbia to enact laws with respect to the organization and jurisdiction of the District of Columbia courts.

IN THE HOUSE OF REPRESENTATIVES

JULY 21, 2025

Ms. NORTON introduced the following bill; which was referred to the Committee on Oversight and Government Reform

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A BILL

To amend the District of Columbia Home Rule Act to permit the Council of the District of Columbia to enact laws with respect to the organization and jurisdiction of the District of Columbia courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Courts Home Rule Act".

SEC. 2. AUTHORITY OF COUNCIL OF DISTRICT OF COLUMBIA TO ENACT LAWS WITH RESPECT TO DISTRICT OF COLUMBIA COURTS.

Section 602(a) of the District of Columbia Home Rule Act (sec. 1–206.02(a), D.C. Official Code) is amended by striking paragraph (4).

INTRODUCTION OF THE DISTRICT OF COLUMBIA COURTS HOME RULE ACT

HON. ELEANOR HOLMES NORTON
OF THE DISTRICT OF COLUMBIA
IN THE HOUSE OF REPRESENTATIVES

Monday, October 2, 2023

Ms. NORTON. Mr. Speaker, today, I introduce the District of Columbia Courts Home Rule Act. This bill would give the Council of the District of Columbia authority over the jurisdiction and organization of the local D.C. courts. The D.C. Home Rule Act (HRA) expressly prohibits the Council from enacting any law with respect to any title 11 of the D.C. Code, which relates to the jurisdiction and organization of the local D.C. courts. Congress can correct this injustice to D.C. residents, who pay all federal taxes, by amending the HRA, even before D.C. becomes the 51st state.

Fifty years after passage of the HRA, mat-ters involving the local D.C. courts almost never come to Congress, so Congress knows virtually nothing about D.C.'s local courts—and could not care less. Notwithstanding the importance of D.C.'s local courts to D.C. residents, the Council, which is the repository of knowledge and experience for D.C.'s criminal and civil justice systems and the body accountable to D.C. residents, is irresponsibly left on the sidelines while Congress remains the sole entity that may correct flaws in D.C.'s local courts.

Under the HRA, the Council has no authority to "enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)." Matters in title 11 primarily relate to the rules of criminal and civil

procedure, court administration, the branches of the courts, the rules of jury service and admission to the bar. This bill would strike this limitation on the Council's authority.

D.C. has never had authority over its local courts, even when it was responsible for paying for their operations. Under the National Capital Revitalization and Self-Government Improvement Act of 1997, the federal government assumed the costs for several state-level functions, including the courts. This bill would not change the courts' funding. This bill also would not change the authority of the President to nominate, or the Senate to confirm, local D.C. judges, which has been within their purview since the creation of the modern local court system in 1970.

This bill is an important step to increase democratic self-government for D.C. I urge my colleagues to support this bill.

118TH CONGRESS
1ST SESSION

H. R. 5868

To amend the District of Columbia Home Rule Act to permit the Council of the District of Columbia to enact laws with respect to the organization and jurisdiction of the District of Columbia courts.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 2, 2023

Ms. NORTON introduced the following bill; which was referred to the Committee on Oversight and Accountability

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A BILL

To amend the District of Columbia Home Rule Act to permit the Council of the District of Columbia to enact laws with respect to the organization and jurisdiction of the District of Columbia courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Courts Home Rule Act".

SEC. 2. AUTHORITY OF COUNCIL OF DISTRICT OF COLUMBIA TO ENACT LAWS WITH RESPECT TO DISTRICT OF COLUMBIA COURTS.

Section 602(a) of the District of Columbia Home Rule Act (sec. 1–206.02(a), D.C. Official Code) is amended by striking paragraph (4).

APPENDIX H

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY COMMITTEE REPORT

1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

/s/ Phil Mendelson

FROM: Councilmember Phil Mendelson, Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893; the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation – or SLAPPs – have 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. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many

> on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation,* Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=112284context=envlaw (last visited Nov. 17, 2010).

[2] *Id* at 7-8.

defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as, of January 2010 there are approximately 28 jurisdictions in the United States

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[3] *Id* at 8-9.

[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the

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[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.govicgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&l/home/LegislativeData.phpl

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary,* Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony *"[l]itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent

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[8] *Id* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.,* Civil Action No. 01-1732 (D.D.C)).

[9] *Id.* at 3.

their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends 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. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants – in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out – the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010 Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored

by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

July 9, 2010 — Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register*.

August 13, 2010 — Notice of a Public Hearing is published in the *District of Columbia Register*.

September 17, 2010 — The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.

November 18, 2010 — The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The. Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. OpperWeiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is

pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1 — States the short title of Bill 18-893.

Section 2 — Incorporates definitions to be used throughout the act.

Section 3 — Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) — Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders

reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 Provides for the awarding of fees and costs for prevailing on a special motion to

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Members of the Council

/s/Cynthia Brock-Smith
From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)

Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, June 29, 2010. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Anti-SLAPP Act of 2010", B18-0893

INTRODUCED BY: Councilmembers Cheh and Mendelson CO-SPONSORED BY: Councilmember M. Brown

The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

Attachment

cc: General Counsel
Budget Director
Legislative Services

/s/ Phil Mendelson
Councilmember Phil Mendelson

/s/ Mary M. Cheh
Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmembers Mary M. Cheh and Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation (SLAPPs), to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA,

That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

(1) "Act in furtherance of the right of free speech" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) 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.

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

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

(4) "Government entity" means the Government of the District of Columbia and its branches, subdivisions, and departments.

Sec. 3. Special Motion to Dismiss.

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

(b) A party filing a special motion to dismiss under this section must make a prima facie showing that the claim at issue arises from an act in furtherance of the right of free speech. If the moving party makes such a

showing, the responding party may demonstrate that the claim is likely to succeed on the merits.

(c) Upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until notice of entry of an order disposing of the motion, except that the court, for good cause shown, may order that specified discovery be conducted.

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

(e) The defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with an action arising from an act in furtherance of the right of free speech may make a special motion to quash the discovery order, request, or subpoena.

(b) The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the right of free speech. If the person makes such a showing, the claimant in the underlying action may demonstrate that the underlying claim is likely to succeed on the merits.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

(a) This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7: Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1- 206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1- 206.02(c)(1)), and publication in the District of Columbia Register.

Testimony of the

American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

Committee on Public Safety and the Judiciary of the
Council of the District of Columbia

on

Bill 18-893, the
"Anti-SLAP? Act of 2010"

September 17, 2010

The ACLU of the Nation's Capital appreciates this opportunity to testify on Bill 18-893. We support the purpose and the general approach of this bill, but we believe it requires some significant polishing in order to achieve its commendable goals.

Background

In a seminal study about twenty years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits filed by one side of a political or public policy dispute—usually the side with deeper pockets and ready access to counsel—to punish or prevent the expression of opposing points of view. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They pinpointed several criteria that identify a SLAPP:

— The actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id.* at 150.

— The defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— The legal claims filed against the speakers tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy, and conspiracy: *Id.* at 150-51.

— The lawsuit often names "John or Jane Doe defendants." *Id.* at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id.*

The authors "conservatively estimate[d] that ... tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *Id.* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id.,* they proposed the adoption of anti-SLAPP statutes to address the problem. *Id.* at 201.

Responding to the continuing use of SLAPPs by those seeking to silence opposition to their activities, twenty-six states and the Territory of Guam have now enacted anti-SLAPP statutes.[1]

The ACLU of the Nation's Capital has been directly involved, as counsel for defendants, in two SLAPPs involving District of Columbia residents.

In the first case, a developer that had been frustrated by its inability promptly to obtain a

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[1] Links to these statutes can be found at http://www.casp.net/inenstate.html.

building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media," and when they created a web site that urged people to "call, write or e-mail the mayor" to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal.[2] But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia.

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[2] *Father Flanagan's Boys Home v. District of Columbia, et al.,* Civil Action No. 01-1732 (D.D.C.), *aff'd,* 2003 WL 1907987 (No. 02-7157, D.C. Cir. 2003).

This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

As professors Pring and Canan demonstrated, a SLAPP plaintiffs real goal is not to win the lawsuit but to punish his opponents and intimidate them and others into silence. *Litigation itself* is the plaintiff's weapon of choice; a long and costly lawsuit is a victory for the plaintiff even if it ends in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically.

Bill 18-893

Bill 18-893 would help end SLAPPs quickly and economically by making available to the defendant a "special motion to dismiss" that has four noteworthy features:

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.

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[3] *Guam Greyhound, Inc. v. Brizill,* 2008 Guam 13, 2008 WL 4206682.

- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

Speaking generally, this is sensible path to the desired goal, and speaking generally, the ACLU endorses it. If a lawsuit looks like a SLAPP, swims like a SLAPP, and quacks like a SLAPP, then it probably is a SLAPP, and it is fair and reasonable to put the burden on the plaintiff to show that it isn't a SLAPP.

We do, nevertheless, have a number of suggestions for improvement, including a substantive change in the definition of the conduct that is to be protected by the proposed law.

Section 2(1). The bill begins by defining the term "Act in furtherance of the right of free speech," which is used to signify the conduct that can be protected by a special motion to dismiss. In our view, it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. It would be akin to defining the term "fruit" to mean "a curved yellow edible food with a thick, easily-peeled skin." This specially defined term deserves a special name that will not require a struggle to use correctly. We

suggest "Act in furtherance of the right of advocacy on issues of public interest."

Section 2(1)(A). Because there is no conjunction at the end of section 2(1)(A)(i), the bill is ambiguous as to whether sections 2(1)(A)(i) and (ii) are conjunctive or disjunctive. That is, in order to be covered, must a statement be made "In connection with an ... official proceeding" *and* "In a place open to the public or a public forum in connection with an issue of public interest," or is a statement covered if it is made *either* "In connection with an ... official proceeding," *or* "In a place open to the public or a public forum in connection with an issue of public interest"?

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement made "In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves antiSLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding

regarding the construction of 'a slaughterhouse has yet begun.[4]

Section 2(1)(B). Section 2(1)(B) expands the definition of 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." We fully agree with the intent of this provision, but we think it fails as a definition because it is backwards—it requires a courtfirst to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was

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[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H:R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee *(available at* http://thomas.loc.govicgi-biniquery/z?cill: H.R.4364.1H:). In that bill it is clear that speech or activity that falls wider any one of these definitions is covered.

not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "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."

Section 2(4). Section 2(4) defines the term "government entity." But that term is never used in the bill. It should therefore be deleted.[6]

Section 3(b). We agree with what we understand to be the intent of this provision, setting out the standards for a special motion to dismiss. But the text of this section fails to accomplish its purpose because it never actually spells out what a court is supposed to do. We suggest revising Section 3(b) as follows:

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance

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[5] The Supreme Court of Guam ultimately rejected the argument that "Constitutional rights" meant "constitutionally protected rights," *see id.* at ¶ 32, but that was hardly a foregone conclusion, and the D.C. Court of Appeals might not reach the same conclusion under Section 2(1)(B).

[6] The same term is defined in H.R. 4364, but it is then used in a section providing that "A government entity may not recover fees pursuant to this section."

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.

Section 3(c). We agree that discovery should be stayed on a claim as to which a special motion to dismiss has been filed. This is an important protection, for discovery is often burdensome and expensive. Because expression on issues of public interest deserves special protection, a plaintiff who brings a claim based on a defendant's expression on an issue of public interest ought to be required to show a likelihood of success on that claim without the need for discovery.

A case may exist in which a plaintiff could prevail on such a claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPs.

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute

spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery.be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

Finally, we note that this section provides that discovery shall be stayed "until notice of entry of an order disposing of the motion." That language tracks H.R. 4364, but "notice of entry" of court orders is not part of D.C. Superior Court procedure. We suggest that the bill be amended to provide that "... discovery proceedings on the claim shall be stayed until the motion has been disposed of, including any appeal taken under section 3(e), ..."

Sections 3(d) and (e). We agree that a special motion to dismiss should be expedited and that its denial should be subject to an interlocutory appeal. The Committee may wish to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal. The D.C. Court of Appeals often takes years to rule on appeals.

Section 4. Section 4 is focused on the fact that SLAPPs frequently include unspecified individuals (John and Jane Does) as defendants. As observed by professors Pring and Canan, this is one of the tactics employed by SLAPP plaintiffs to intimidate large numbers of people, who fear that they may become named defendants if they continue to speak out on the relevant public issue.

There can be very legitimate purposes for naming John and Jane Does as defendants in civil litigation. The ACLU sometimes names John and Jane Does as defendants when it does not yet know their true identities—for example, when unknown police officers are alleged to have acted unlawfully.[7] It is therefore necessary to balance the right of a plaintiff to proceed against an as-yet-unidentified person who has violated his rights, and to use the court system to discover that person's identity, against the right of an individual not to be made a defendant in an abusive SLAPP that was filed for the purpose of retaliating against, or chilling, legitimate civic activity.

We believe that Section 4 strikes an appropriate balance by making available to a John or Jane Doe a "special motion to quash," protecting his or her identity from disclosure if he or she was acting in a manner that is protected by the Anti-SLAPP Act, and if the plaintiff cannot make the same showing of likely success on the merits that is required to defeat a special motion to dismiss.

Like Section 3(b), however, Section 4(b) never actually spells out what a court is supposed to do. We therefore suggest revising Section 4(b) in the same manner we suggested revising Section 3(b):

> (b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the

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[7] *See, e.g., YoungBey v. District of Columbia, et al.,* No. 09-cv-596 (D.D.C.) (suing the District of Columbia, five named MPD officers, and 27 "John Doe" officers in connection with an unlawful pre-dawn SWAT raid of a District resident's home).

party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 6(a). Section 6(a) provides that "This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest." This language is vague and tremendously broad. Almost any plaintiff can and will assert that he is bringing his claims "to enforce an important right affecting the public interest," and neither this bill nor any other source we know gives a court any guidance regarding what "an important right affecting the public interest" might be. The plaintiffs in the two SLAPP suits described above, in which the ACLU of the Nation's Capital represented the defendants, vigorously argued that they were seeking to enforce an important right affecting the public interest: the developer argued that it was seeking to provide housing for disadvantaged youth; the gambling entrepreneur argued that he was seeking to prevent vicious lies from affecting the result of an. election.

Thus, this provision will almost certainly add an entire additional phase to the litigation of every SLAPP suit, with the plaintiff arguing that the anti-SLAPP statute does not even apply to his case because he is acting in the public interest. To the extent that courts accept such arguments, this provision is a poison pill with the potential to turn the anti-SLAPP statute into a virtually dead letter. At a minimum, it will subject the rights of SLAPP defendants to the subjective opinions of more than 75 different Superior Court judges regarding what is or is not "an important right affecting the public interest."

Moreover, we think the exclusion created by Section 6(a) is constitutionally problematic because it incorporates a viewpoint-based judgment about what is or is not in the public interest—after all, what is in the public interest necessarily depends upon one's viewpoint.

—Assume, for example, that D.C. Right To Life (RTL) makes public statements that having an abortion causes breast cancer. Assume Planned Parenthood sues RTL, alleging that those statements impede its work and cause psychological harm to its members. RTL files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But Planned Parenthood responds that its lawsuit is not subject to the Anti-SLAP? Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

—Now assume that Planned Parenthood makes public statements that having an abortion under medical supervision is virtually risk-free. RTL sues Planned Parenthood, alleging that those statements impede its work and cause psychological harm to its members. Planned Parenthood files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But RTL responds that its lawsuit is not subject to the Anti-SLAPP Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to life.

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right

affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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[8] Section 10 of H.R. 4364, on which Section 6(a) of Bill 18-893 is modeled, begins with the catchline "Public Enforcement." It therefore appears that Section 10 was intended to exempt only enforcement actions brought by the government.

Even if that is true, we see no good reason to exempt the government, as a litigant, from a statute intended to protect the rights of citizens to speak freely on issues of public interest. To the contrary, the government should be held to the strictest standards when it comes to respecting those rights. *See, e.g., White v. Lee,* 227 F.3d 1214 (9th Cir. 2000) (holding that the advocacy activities of neighbors who opposed the conversion of a motel into a multi-family housing unit for homeless persons were protected by the First Amendment, and that an intrusive eight-month investigation into their activities and beliefs by the regional Fair Housing and Equal Opportunity Office violated their First Amendment rights).

We therefore urge the complete deletion of Section 6(a), as noted above. However, if the Committee does not delete Section 6(a) entirely, its coverage should be limited to lawsuits brought by the government.

GOVERNMENT OF THE
DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL

September 17, 2010

The Honorable Phil Mendelson
Chairperson
Committee on Public Safety & the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Ste. 402
Washington, D.C. 20004

Re: Bill 18-893, the "Anti-SLAPP Act of 2010"

Dear Chairperson Mendelson:

I have not yet had the opportunity to study in depth Bill 18-893, the "Anti-SLAPP Act of 2010" ("bill"), which will be the subject of a hearing before your committee today, but I do want to register a preliminary concern about the legislation.

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]:" As you know, the

Superior Court subsequently adopted rules of procedure for civil actions, including Rules I2(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that — if you have not already done so — you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

/s/ Peter J. Nickles
Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi

Chief Financial Officer

MEMORANDUM

TO:	The Honorable Vincent C. Gray Chairman, Council of the District of Columbia
FROM:	Natwar M. Gandhi Chief Financial Office
DATE:	November 16, 2010
SUBJECT:	Fiscal Impact Statement - "Anti-SLAPP Act of 2010"
REFERENCE:	Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as

[1] Defined in the proposed legislation 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; (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

strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a'special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

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involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE
DISTRICT OF COLUMBIA

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

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

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest.

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

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

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

Sec. 3. Special Motion to Dismiss.

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

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

(c)(1) Except as provided in paragraph (2), 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 specialized discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

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

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of

this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

APPENDIX I

COUNCIL OF THE DISTRICT OF COLUMBIA
THE JOHN A. WILSON BUILDING
1350 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

TESTIMONY OF CHAIRMAN PHIL MENDELSON
COUNCIL OF THE DISTRICT OF COLUMBIA

EQUALITY FOR THE DISTRICT OF COLUMBIA:
DISCUSSING THE IMPLICATONS OF S. 132, THE
NEW COLUMBIA ADMISSIONS ACT OF 2013

UNITED STATES SENATE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS COMMITTEE

SEPTEMBER 15, 2014

Thank you Chairman Carper, Ranking Member Coburn, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia. I am pleased to testify today in support of S. 132, the New Columbia Admissions Act of 2013. Full and fair representation for the over 646,000 citizens residing in the District of Columbia is only possible through achieving statehood, and so I urge this Committee, and this Congress, to move expeditiously on this measure.

I want to thank this Committee for its ongoing support for the District of Columbia. In particular, I want to thank Chairman Carper for introducing statehood legislation, and I want to thank Subcommittee Chairman Begich for introducing important legislative and budget autonomy legislation, S. 2245, the District of Columbia Paperwork Reduction Act of 2014, and S. 2246, the District of Columbia Budget Accountability Act of 2014. While our ultimate goal of

statehood would accomplish the autonomy provided in these measures, until that happens, these bills would empower the District to more effectively and efficiently manage our government operations. The Senate Financial Services and General Government Appropriations Subcommittee has included provisions similar to these bills in its recommendations for fiscal year 2015, and I urge support by all Members as this legislation comes before the full Senate.

I also want to thank this Committee for working with the District and our Congresswoman Eleanor Holmes Norton to update our Chief Financial Officer's compensation and make improvements to the Height Act.

While these measures are important to achieving the overarching goal of full rights of citizenship, each is an incremental approach. So that District residents can achieve full participation in our democracy, Congress must adopt the New Columbia Admissions Act.

THE DISTRICT OF COLUMBIA IS THRIVING

Despite the many limitations imposed on the District due to our unique status, and despite the economic downturn caused by the Great Recession and the resulting reduction in federal funds available to local jurisdictions, the District of Columbia is thriving. We are strong financially. We are growing by over 1,000 new residents a month and businesses are flocking to the District. This is a far cry from the image of the District that lingers in many people's minds from decades past. I believe that other jurisdictions can learn from our many successes over the last decades.

Since Congress granted the District of Columbia limited home rule in 1973,[1] the District has had many successes, but also many challenges. Perhaps our greatest challenge was the imposition of a Control Board in 1995, essentially stripping our local government of full control over our budget and management. The Control Board era forced the District to confront its finances head-on, and to realign the relationship between the District and the federal government. By 2001, the District was back on solid financial footing and the Control Board was dissolved. Since that period the District has had a strong economic record.

For 17 consecutive years, the District has ended its fiscal year with a budgetary surplus. We have grown our fund balance even in the wake of the Great Recession and massive cuts in federal spending. Our balanced budgets have relied not on steep tax increases or deep spending cuts, but on responsible policies that have grown our economy while providing a broad safety net for District residents. As of last September 30th, the District had a General Fund balance of over $1.75 billion dollars.[2] Compared to the states, this would put us only behind Alaska and Texas in terms of real dollars.[3] Included within this General Fund balance are four reserve funds which, as of the beginning of the current fiscal year, totaled $791 million – close to the Government Finance Officers

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[1] District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774, D.C. OFFICIAL CODE § 1-201.01 *et seq.* (1973) [hereinafter Home Rule Act].

[2] District of Columbia Chief Financial Officer, 2013 Comprehensive Annual Financial Report 31 (Jan. 30, 2014).

[3] National Association of State Budget Officers, The Fiscal Survey of States 13 (Fall 2013).

Association (GFOA) recommended amount of two-months' operating cash.

These factors have helped the District maintain the third highest possible bond rating with both Moody's and Fitch, and the fourth highest with S&P.[4] Our strong fiscal position allowed us to recently adopt a far-reaching income and business tax cut which will phase in over the next three to five years, beginning with fiscal year 2015. We continue to make capital investments in our infrastructure, while remaining below our locally-mandated 12% debt cap.[5] I am also pleased to say that our Fiscal Year 2015 budget[6] lays out a path for future capital investments relying less on financing and more on pay-as-you-go capital.

Other indicators of financial strength include funding for retirement accounts. Our Police, Fire, and Teachers retirement fund – a defined benefit plan – is second best in the nation, fully funded at over 100 percent. Our Other Post-Employment Benefits Fund is also second best in the nation, funded at over 80 percent and with a closed amortization period for the remaining unfunded liability.

Our city is growing, our tax base is growing, our financial reserves are healthy, our capital spending is disciplined, and our retirement funds are among the best. Few local governments, and even fewer states,

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[4] District of Columbia Chief Financial Officer, 2013 Comprehensive Annual Financial Report 10 (Jan. 30, 2014).

[5] D.C. OFFICIAL CODE § 47-335.02(a) (2014). The congressionally adopted Home Rule Act allows for an 18% cap.

[6] *See* Government of the District of Columba, Fiscal Year 2015 Proposed Budget and Financial Plan (Aug. 7, 2014).

can boast of such achievements, especially in the last decade.

How does this relate to statehood for the District? Residents of the District have long held that denying almost 650,000 citizens the right to full congressional representation and control over their local government is fundamentally unfair and not in keeping with the values and ideals of the United States of America. Instead, as you know, we cannot spend without congressional appropriation, and we cannot enact local laws without congressional review. We cannot fix inequities in criminal sentencing without the approval of the United States Attorney General, and we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process.

The District's success, even in the face of administrative hurdles that no other jurisdiction must endure, demonstrates that, in addition to our being entitled to full and fair representation, the District government is fully capable of managing our affairs just like any state. To that end, we stand on our record of responsible government management.

THE CASE FOR STATEHOOD

In the 200 years since Congress rescinded voting rights from the last group of Washington residents who had previously voted in Maryland and Virginia, citizens residing in the District of Columbia have been denied the right of a vote in Congress. To add insult to injury, it is Congress that has plenary authority over

all matters in the District, although no members of Congress are elected by District residents.[7]

In recent decades, numerous efforts have been made to correct this historical injustice. Some of these efforts were successful, and some were not. In 1960, the 23rd Amendment was adopted, granting the District the same number of presidential electors as the smallest state.[8] In 1970, the District of Columbia Delegate Act[9] was enacted to give the District a representative in the House of Representatives. But, as you know, that position is non-voting – the same status as U.S. territories. In 1973, Congress adopted the Home Rule Act, a major reform for District governance, but that act is silent as to congressional representation.[10] In 1978, the District's non-voting delegate in the House of Representatives, Walter Fauntroy, introduced a constitutional amendment that would have given the District two senators, a representative, and an unrestricted vote for President.[11] While Congress approved the amendment, three-quarters of the states did not ratify it.

More recently, this Committee, under the previous leadership of Senators Lieberman and Collins, reported bipartisan legislation[12] to add two additional seats in the House of Representatives, including a full

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[7] District of Columbia Organic Act, 6th Congress, 2nd Sess., ch. 15, 2 Stat. 103.

[8] U.S. CONST. amend. XIII § 1.

[9] District of Columbia Delegate Act, Pub. L. No. 91-405, § 201, 84 Stat. 848 (1970).

[10] Home Rule Act *supra* note 1.

[11] H.R.J. Res 554, 95th Cong. (1978).

[12] District of Columbia House Voting Rights Act, S.1257, 110th Cong. (2007).

voting Member for the District and one for Utah. This approach relied on Congress's authority to legislate on matters for the District, as well as the creation of congressional seats and adjustment in the number of representatives in the House of Representatives.[13] Unfortunately, a Senate vote to simply proceed to full debate on the measure fell short by three votes. That bill eventually passed the Senate in 2009, but with a poison pill amendment limiting the ability of the District to regulate guns within its own borders, so it was never considered in the House.

There have been other efforts aimed at restoring voting rights for District residents by retroceding all populated areas of the city back to the State of Maryland. The most recent iteration of this idea was introduced last year in the House.[14] Advocates of this method have argued that retroceding the District to Maryland is the most practical and constitutionally sound way to give District residents a vote in the Senate, and that it makes historical sense when compared to the previous retrocession of Arlington to Virginia.[15] This may be logical, but the proposal is unpopular with the residents of the District and Maryland – they don't want it. And so Congress can't force this on Maryland. Further, this approach would ignore the unique character of the District and its residents as a distinct jurisdiction.

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[13] S. REP. NO. 110-123, at 3 (2007).

[14] District of Columbia-Maryland Reunion Act, H.R. 2681, 113th Cong. (2013).

[15] *See Legislative Hearing on H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (testimony for the record of Lawrence H. Mirel for the Committee for the Capital City) (Sept. 20, 2006).

There is another important element to statehood besides congressional representation, and most of these past attempts to secure voting rights for District residents would have left us deprived of that fundamental right: the right to self-governance. Independent governance reflecting the will of the people is fundamental to our system of democracy. Self-governance reflects community values and priorities. Self-governance is more sensitive to constituents. Self-governance is the essence of every town hall, city council, county board, and state legislature in the United States of America.

The only option to gain full voting representation and full self-governance, as enjoyed by residents of the other 50 states, is statehood for the District.

The idea behind the New Columbia Admissions Act of 2013 was first proposed in 1971.[16] It would carve out the geographic federal core of the city to remain a federal enclave, while establishing the remainder of the city as the state of New Columbia. Full statehood is the most practical way to fully restore the rights of those who now live in the Nation's capital.

This approach is a well-tested method of gaining representation, having already been employed 37 times. Congress granted statehood to several territories that were in existence for less than ten years. On the other hand, the last three states admitted to the Union – Hawaii, Alaska, and Arizona – were territories for 61, 47, and 49 years, respectively, before being granted statehood. However, the District has been

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[16] *City and State: D.C. State Bill*, Washington Post, July 7, 1971, at C4.

around for 214 years. We had these rights way back then. It's time we had them again.

While I staunchly advocate for District statehood, I recognize that there are hurdles standing in the way. Unfortunately, many of these hurdles are simply a matter of national politics and efforts by political parties jockeying for majorities in Congress. The hurdles are not confined to Capitol Hill. Many state legislatures don't see the advantage of a constitutional amendment that might affect their states' influence in the House or Senate, and many of their state legislatures also don't understand that the United States citizens of the District of Columbia raise their own taxes and pay for their own services but are not equal to the United States citizens in any of the 50 states.

Even during the 2007 effort to gain seats in the House of Representatives for the District and for Utah, then-Chairman Lieberman acknowledged that "frankly and directly [the legislation] overcome[s] concerns of the partisan impact of giving a House seat to the District because it tends to vote Democratic..."[17] Fundamental fairness and voting rights should trump politics – at least in this country.

It is also important that we acknowledge that education of the public is another hurdle standing in our way. According to a January 2005 poll paid for by D.C. Vote and conducted by an independent research firm, over 80 percent of American adults were not aware that the District does not have equal constitutional rights or representation in Congress. However, over 80 percent of respondents supported

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[17] 153 Cong. Rec. S11626 (daily ed. Sept. 18, 2007) (statement of Senator Lieberman).

voting rights for the District.[18] The idea of tax-paying citizens without full representation in the United States Congress is a concept so foreign and against everything we are taught in school about the basic democratic values of our country, that many don't believe it, or are forced to square this injustice using misconceptions about the District.

The District of Columbia is unique in many ways, but no unique qualities should support disenfranchisement of its citizens.

While decidedly small, population is not, and should not, be a requirement for full participation in the Union. In any event, the District's population is greater than two existing states: Vermont and Wyoming. Furthermore, at the growth rate we have seen in recent years – 7.4 percent – I would expect the District to continue to move up the list.

Some have argued that large, current federal payments to the District are another disqualification for statehood. In truth, however, the vast majority of the federal dollars that the District receives consists of Medicaid and other federal program subsidies received by all the states. We used to receive a federal payment in addition to the standard federal program allocations, but that was eliminated over 15 years ago.

Some say that the vast amount of land owned or controlled by the federal government within the District is another disqualification for statehood. There is, to be sure, a substantial amount of federal land in the monumental core of the District – much of which the New Columbia Admissions Act would leave

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[18] DC Vote, U.S. Public Opinion on DC Voting Rights (Jan. 2005).

as a federal area. However, the sixty-plus other square miles of the District are not unlike other states. Currently, compared against the states, the District has the second lowest total actual number of acres under federal control and has the 13th lowest federal acres as a percentage of total land, ranking behind a few notable states including Alaska, Montana, Arizona, and Wyoming.[19] Under the provisions of the New Columbia Admissions Act, much of the federal acreage in our borders would be retained as a federal enclave, leaving New Columbia with even less land under federal control.

To address state revenue forgone due to non-taxable federal lands, the Department of the Interior administers a Payments in Lieu of Taxes (PILT) program to compensate for state services that may be provided on federal lands under the control of the Department of the Interior, such as fire protection. This program is applicable to all of the states. In Fiscal Year 2014, under the PILT formula, the District received only $18,159 of the $436,904,919 paid out nationally.[20] Compare this to $28 million for Alaska, $34 million for Arizona, $28 million to Montana, or $27 million for Wyoming. Many of our other non-taxable areas fall under the General Services Administration, other federal agencies, or are subject to State Department diplomatic tax exclusions.[21]

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[19] Congressional Research Service, Federal Land Ownership: Overview and Data, 4-5 (Feb. 8, 2012).

[20] Department of the Interior, Payments in Lieu of Taxes by State, Fiscal Year 2014 (Sept. 2, 2014, 2:45 PM), http://www.doi.gov/pilt/state-payments.cfm?fiscal_yr=2014.

[21] Department of State, Diplomatic Note 06-01, 12-18 (Apr. 12, 2006).

The federal government also makes non-PILT payments to states in which it owns substantial land. In 2013, 34 states received federal mineral royalties totaling $1.9 billion, with Wyoming receiving the most at $932 million, followed by New Mexico at $478 million.[22] While the federal government owns the land on which the minerals are produced, it disburses revenues to fulfill a variety of state needs including infrastructure improvements and schools that support state residents.

The federal government is generous to the states. The fact that the District receives federal dollars – including for Medicaid, federal highway, homeland security, etc. – is not unusual and should not be used against us in our quest for statehood.

CONCLUSION

Full statehood is the only practical way that our citizens can participate in a fully democratic government. It is the only way to ensure that our local government will never be subject to a shutdown because of quibbling over purely federal matters, and our local services not suspended because of partisan disagreements. It is the only way to give our residents locally elected representatives to enact purely local laws that would not be subject to national debates over divisive social issues. It is the only way to create a justice system that is representative of, and sensitive to, our community values. Statehood is the only way to give residents a full, guaranteed, and irrevocable voice

[22] Office of Natural Resources Revenue, Statistical Information, Disbursements for Fiscal Year 2013 (Sept. 2, 2014, 2:45 PM), http://statistics.onrr.gov/ReportTool.aspx.

in the Congress of the United States – the same voice enjoyed by our peers across the country.

Statehood is the most practical solution to right the historical wrong of denying voting rights to citizens of the District and to guarantee the right to local self-governance. The District of Columbia has a proven track record of prudent fiscal management spanning two decades. The State of New Columbia would enter the Union as a 51st state with an economy envied by other jurisdictions. Politics must be set aside and all of the excuses used to justify denial of our inalienable rights must be shelved. Our limited home-rule power delegated by Congress is appreciated, but too tenuous and too often a bargaining chip in political battles. Limited home-rule cannot make up for all of the other rights withheld by Congress that we could have only through statehood.

Statehood legislation was last seriously considered by Congress after the House Committee on the District of Columbia reported the bill to the full House for consideration. The accompanying committee report[23] contained dissenting views as to why statehood should not move forward, and included some of the same arguments opponents use today. In addition to the constitutional concerns raised then and now – which I believe can be overcome – the report stated the following with regard to the conditions necessary to grant statehood:

> "By precedent and tradition, three main requirements have been considered by the Congress in evaluating statehood admission petitions. The requirements, as restated by the Senate Interior Committee Report

[23] H.R. REP. NO. 102-99 (1992).

accompanying the Alaska admission act, are as follows:

> "(1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government.
>
> "(2) That a majority of the electorate wish statehood.
>
> "(3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government.
>
> "The third of these requirements is particularly important to our form of federalism as it demands that new States demonstrate that they can provide for their own self-government, independent of any other State as well as the federal government, and that the new State will provide its equitable share of the cost of the federal government at the time of admission and in the future."[24]

At the time, those who opposed statehood for the District argued that the large federal payment, federal pension contributions, declining population, and lack of economic diversity stood in the path to our satisfying the third criteria. However, the District has turned around on all of these fronts. For the reasons I outlined earlier in this testimony, we have satisfied the

[24] *Id* at Minority Views.

traditional three main requirements, and it is time for Congress to reconsider our demand for statehood.

One final point: throughout the world, there are very few national capitals – and none in the free world – where the citizens do not enjoy a vote in the national legislature. We, the District of Columbia, are unique in this regard. It is a distinction we do not want, and a stain on our federal system.

The Council appreciates the Committee's consideration of the New Columbia Admissions Act of 2013, and urges that it be brought before the Committee for markup and before the Senate and House for a vote. I also appreciate the Committee's past support for the District and look forward to continuing to work together in the future, I hope with a newly-elected Senator of our own on the Committee from the State of New Columbia.

COUNCIL OF THE DISTRICT OF COLUMBIA
THE JOHN A. WILSON BUILDING
1350 PENNSLYVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

TESTIMONY OF CHAIRMAN PHIL MENDELSON
COUNCIL OF THE DISTRICT OF COLUMBIA

H.R. 51, THE WASHINGTON, D.C.
ADMISSION ACT

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND REFORM

SEPTEMBER 19, 2019

Thank you Chairman Cummings, Ranking Member Jordan, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia (Council). I am pleased to testify today in support of H.R. 51, the Washington, D.C. Admission Act. Full and fair representation for the over 700,000 citizens residing in the District of Columbia is only possible through achieving statehood, and so I urge this Committee, and this Congress, to move favorably and expeditiously on this measure.

I want to thank this Committee for its ongoing support for the District of Columbia. In particular, I would like to thank the Delegate for the District of Columbia, Congresswoman Eleanor Holmes Norton, for her staunch representation of the District and for introducing H.R. 51. I also want to thank Chairman Cummings for cosponsoring this legislation, and for agreeing to hold this hearing today and for committing to markup H.R. 51.

For over 200 years, citizens residing in the District of Columbia have been denied the same right of citizenship that is enjoyed by U.S. Citizens everywhere

else: full self-governance, and representation in the national legislature. Denying this to the District of Columbia deprives these citizens of the fundamental rights of our democracy. This is inconsistent with the principles of our American revolution. And like other anomalies of the Founding Era (like the disenfranchisement of women and blacks) this civil rights injustice must be corrected. Statehood would do that.

Self-governance is the essence of democracy and freedom. It is more sensitive to constituents. It reflects community values and priorities. Self-governance is the lifeblood of every town hall, city council, county board, and state legislature in the United States of America. The only option to gain both full voting representation and full self-governance is to pass H.R. 51 and grant statehood to the District of Columbia.

THE CASE FOR STATEHOOD FOR THE DISTRICT OF COLUMBIA

When the District of Columbia was established in the 1790s, its citizens had voting rights and self-governance. This was not immediately taken away. I find it instructive that nowhere in the Federalist Papers or James Madison's notes will you find a discussion that it was a goal of the Founding Fathers to take our citizenship away. They wanted control of the seat of the federal government. That was their only focus. It has been over 200 years since Congress rescinded voting rights from the last group of Washington residents who had previously voted in Maryland and Virginia. To add to this injury, it is Congress that has plenary authority over all matters

in the District.[1] It is, to borrow a phrase, taxation without representation.

Numerous efforts have been made to correct this injustice, some of which were successful. In 1960, the 23rd Amendment was adopted, granting the District the same number of presidential electors as the smallest state.[2] In 1970, the District of Columbia Delegate Act[3] was enacted to give the District a representative in the House of Representatives. But, as you know, that position is non-voting — the same status as that of members from U.S. territories. In 1973, Congress adopted the Home Rule Act, a major reform for District governance, but that act is silent as to congressional representation.[4] In 1978, the District's non-voting delegate in the House of Representatives, Walter Fauntroy, introduced a constitutional amendment that would have given the District — two senators, a representative, and an unrestricted vote for President.[5] While Congress approved the amendment, three-quarters of the states failed to ratify.

In 2007, Senators Liberman and Collins reported bipartisan legislation to add two additional seats in the House of Representatives: a full voting member for

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[1] District of Columbia Organic Act, 6th Congress, 2nd Sess., ch. 15, 2 Stat. 103.

[2] U.S. Const. amend. X111 § 1.

[3] District of Columbia Delegate Act, Pub. L. No. 91-405, § 201, 84 Stat. 848 (1970).

[4] District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774, D.C. OFFICIAL CODE § 1-201.01 *et seq,* (1973) [hereinafter Home Rule Act].

[5] H.R.J. Res. 554, 95th Cong. (1978).

the District and one for Utah.[6] This approach relied on Congress's authority to legislate on matters for the District as well as to create and adjust the number of congressional seats in the House of Representatives.[7] Unfortunately, a Senate cloture vote to simply proceed on the measure fell short by three votes.

There have been other efforts at restoring voting rights for District residents by retroceding all populated areas of the city back to the State of Maryland. The most recent iteration of this idea was introduced in the House in 2013.[8] Advocates of retrocession have argued that it is the most practical and constitutionally sound way to give District residents votes in both the House and the Senate, and that it makes historical sense when compared to the previous retrocession of Arlington to Virginia.[9] This may be logical, but the proposal is unpopular with the citizens in both the District and Maryland. More importantly, Congress can't force this on Maryland. So it is impractical. Full statehood is the most practical way to fully restore the rights of those who now live in the nation's capital.

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[6] *See* District of Columbia House Voting Rights Act, S. 1257, 110th Cong. (2007).

[7] S. Rep. No. 110-12, at 3 (2007).

[8] District of Columbia-Maryland Reunion Act, H.R. 2681, 113th Cong. (2013).

[9] *See Legislative Hearing on HR. 5388, the District of Columbia Fair and Equal Housing Voting Rights Act of 2006* (testimony for the record of Lawrence H. Mirel for the Committee for the Capital City) (Sept. 20. 2006).

The idea of the Washington D.C. Admission Act was first proposed in 1971.[10] It would carve out the geographic core of the city to remain a federal enclave, while establishing the remainder of the city as the state of Washington, D.C. This approach is consistent with long standing practice, having already been employed 37 times. Congress granted statehood to several territories that were in existence for less than

10 years. On the other hand, the last three states admitted to the Union — Hawaii, Alaska, and Arizona — were territories for 61, 47, and 49 years, respectively, before being granted statehood. The District has been around for 214 years. We had these rights way back then. It's time we had them again.

While I staunchly advocate for District statehood, I recognize that there are hurdles. Unfortunately, many of these hurdles are simply a matter of national politics and efforts by parties jockeying for majorities in Congress. Many state legislatures see the disadvantage to admitting a new state that might affect their state's influence in the House or Senate, and many state legislatures do not understand that the United States citizens of the District of Columbia raise their own taxes and pay for their own schools but are not equal to the United States citizens in any of the 50 states.

It is also important for the District to acknowledge that education of the nation of the District's half-status is also an important hurdle that we must clear. But most people will agree that the idea of tax-paying citizens without full representation in the United States Congress is a concept so foreign and against

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[10] *City and State: D.C. State Bill,* Washington Post, July 7, 1971. at C4.

everything we are taught in school about the basic democratic values of our country. Many do not believe it, or are forced to square this injustice using misconceptions about the District. The District of Columbia is unique in many ways, but no unique qualities should support disenfranchisement of its citizens.

THE DISTRICT ECONOMY: A *MODEL FOR OTHER JURISDICTIONS*

Since Congress granted the District of Columbia home rule in 1973.[11] the District has had both successes and challenges. Perhaps our greatest challenge was the imposition of a Control Board in 1995,[12] which essentially stripped our local government of its limited autonomy. The Control Board era forced the District to confront its finances head on and to realign the relationship between'the District and the federal government. In less than six years, the District was back on solid financial footing and the Control Board was dissolved. Today, the District is thriving, and we are financially strong. This is a far cry from the image many still harbor about the District.

The Council recently approved the fiscal year 2020 budget.[13] The fiscal year 2020 budget is the District's

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[11] Home Rule Act *supra* note 4.

[12] The Control Board was established pursuant to the District of Columbia Financial Responsibility Management Assistance Act of 1995, approved April 17, 1995 (Public Law 104-8, 109 Stat. 142), to oversee the finances of the District.

[13] *See* the Fiscal Year 2020 Local Budget Act of 2019, effective August 31, 2019 (D.C. Law 23-11; 66 DCR 8242); *See* Fiscal Year 2020 Federal Portion Budget Request Act of 2019 (D.C. Act 23-69; 66 DCR 7612).

twenty-fourth consecutive balanced budget and the fourth to be adopted under local budget autonomy.[14] The District's budget prioritizes principles of responsible budgeting, fiscal responsibility, and efficient use of public resources. Indeed, our fiscal position has become the envy of other states, counties, and cities. Both our pension and Other Post-Employment Benefits funds are fully funded, using conservative actuarial assumptions. At the conclusion of fiscal year 2019, our reserves will be equal to 60 days operating costs — a Government Finance Officers Association best practice.

We have established a system for multi-year capital planning to bring all capital assets to a state of good repair by fiscal year 2028; no other jurisdiction has this.[15] Our independent Chief Financial Officer is developing resiliency strategies that include recession planning and cybersecurity analysis. The District continues to grow in population and jobs, and is diversifying its economy. As a result, revenues to support the budget are growing on average more than 3 percent annually. This fiscal strength has resulted in ratings for our general obligation bonds being upgraded by all three rating agencies, including AAA by Moody's.

The District is growing, our tax base is growing, our financial reserves are healthy, our capital spending is disciplined, and our retirement funds are, combined, best in the nation. Few localities, and even fewer

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[14] *See* the Local Budget Autonomy Act of 2012, effective July 25, 2013 (D.C. Law 19-321; 60 DCR 12135).

[15] The District continues to make these capital investments while still remaining below our locally-mandated 12 percent debt cap. *See* D.C. OFFICIAL CODE § 47-335.02(a). Incidentally, Congress mandated an 18 percent limit.

states, can boast of such achievements. These successes have a direct correlation to statehood for the District.

Opponents of statehood have long argued that the District is not capable of governing itself in a fiscally responsible manner. In 1992, the last time Congress seriously considered statehood for the District, the committee report that accompanied H.R. 4718, the New Columbia Admission Act, laid out three main requirements to evaluate statehood petitions.[16] The dissenting views raised doubts as to whether the District had the economic viability — meaning both population and resources — to support a state government that was independent of other states and the federal government, and whether the District had the resources to bear its equitable share of the cost of the federal government.[17] Well, the District's financial status is the envy of the jurisdictions around the country. Our fundamentals are solid, with 16.7 percent population since 2010 — highest compared to the 50 states. Revenues are growing steadily and at a rate greater than most states. And we don't have unfunded liabilities unlike most states. Further, we are a donor state, contributing far more to the federal government in taxes than we receive in federal grants and federal payments. It seems to me that the District by

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[16] *See* H. Rep. No. 102-909 (1992). The three requirements are as follows: (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government; (2) That a majority of the electorate wish statehood; and (3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government. *Id.*

[17] *Id.*

operating under budget autonomy has more than answered the doubts raised almost 30 years ago about its economic viability. The District is flourishing and is more than capable of meeting the financial cost of becoming the 51st state.

CONGRESSIONAL INTERFERENCE

Moreover, the District has been able to prosper even with unnecessary congressional interference in our local affairs. Every year we watch as members of Congress, who have no connection with the District, introduce legislation or insert appropriation riders that detrimentally impact the functions of government. The policies of the District government are at many times at the mercy of whichever party is in control of Congress. As a District policymaker, I can tell you that this hurts our ability to manage the affairs of our government.

One case in point is the restriction of the District's ability to tax and regulate marijuana. When District residents overwhelmingly approved Initiative 71[18] in 2014 to provide for the legalization of possession of minimal amounts of marijuana for personal use, we were reflecting a trend among the 50 states. But Congress has stepped in to prohibit the District from passing laws to regulate this industry. The Council was challenged on whether having a public hearing on the taxation and regulation of marijuana was a violation of the Anti-Deficiency Act.[19] One has to think that Congress surely has more important things to worry about than about this *uniquely local issue.*

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[18] *See* the Legalization of Possession of Minimal Amounts of Marijuana Personal Use Initiative of 2014, effective February 26, 2015 (D.C. Law 20-153; 62 DCR 880).

[19] *See* 31 U.S.C. § 1341.

Worse, we are in an untenable situation: residents may possess and use marijuana (just like many other states) but government (the District government) is unable to regulate the sale. However, I would like to thank the House for removing that rider this year and I hope the Senate will follow suit.

Another case in point is the appropriation rider that prohibited needle exchange — a government program to reduce the spread of HIV and other diseases. The program exists in many cities. It is proven to reduce infection, the spread of disease, and fatalities. Yet the District was precluded from it, while Congress provided no alternative help. After many years the rider was finally lifted. But the damage to the public health remains to this day. The essential point here is that the District requires full self-governance if it is to improve further. The nation's capital should be a model for the country. The current governance situation holds us back.

As you know, the Home Rule Act also places limitations on what laws the Council can approve. As a result, we cannot fix inequities in criminal sentencing without the approval of the United State Attorney General, and we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process. Further, the Home Rule Act requires Congressional review of all permanent and temporary bills passed by the Council. But that review has not resulted in a single congressional disapproval in almost three decades.

Congressional review of legislation is not only unnecessary it has a significant impact on the operations of the Council. In 2009, the Council's General Counsel estimated that between 50 and 60 percent of the legislative measures the Council adopts

could be eliminated if there were no congressional review requirement.[20] He added that the congressional review requirement from time to time has resulted in gaps in critical pieces of criminal legislation that cannot be cured with a retroactive applicability date because of the *ex post facto* clause of the Constitution.[21] Under section 602 of the Home Rule Act, the Council has passed thousands of laws and transmitted thousands of pages to Congress, which requires significant staff time and effort, and only three acts have been disapproved and none since March 21, 1991. Our General Counsel correctly noted at the time "Congress may not legislate with the District in mind very often, but we always legislate with Congress in mind."[22] Congressional review of District legislation has proven to be inefficient, ineffective, and unnecessary.

These are a few examples of how denying the right of full congressional representation, and control of local government to 703,000 residents is counter-productive and bad governing, while also fundamentally unfair and contrary to the values and ideals of the United States of America.

The District's success, even in the face of these hurdles that no other jurisdiction must endure, demonstrates that, in addition to our being entitled to full and fair representation, the District is capable of

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[20] *Pathways to Statehood, From Voting Rights to Full Self:Determination: Political and Constitutional Considerations: Public Hearing before the Council of the District of Columbia Special Committee on Statehood and Self-Determination,* June 1, 2009 (written testimony of Brian Flowers, General Counsel of the Council of District of Columbia, at *5).*

[21] *Id at* 6.

[22] *Id.*

managing its affairs just like any state. To that end, we stand on our record of responsible governing.

An example of the District's sound governing practice is the District's management of its budget after the Council approved and the voters by referendum ratified, the Local Budget Autonomy Act of 2012.[23] Removing the uncertainty over the District's budget authority has ensured that its budget is not being inefficiently spent on unnecessary borrowing costs or paying a premium for services. Under budget autonomy, the District has met the immediate needs of a thriving city. The flexibility of budget autonomy has allowed the District to address the urgent service and programmatic needs of the city, from trash collection to public safety response, and it has ensured that these services are delivered efficiently in terms of both time and resources.

Another advantage to budget autonomy: it has ensured that the delivery of services — to residents, to visitors, and even to the federal government — is not disrupted due to federal budget battles which have no relation to the District or its budget. As U.S. Representative Tom Davis noted in 2003, while Congress's involvement in the District's budget stems from a desire to ensure the financial wellbeing of nation's capital, "the unfortunate reality is that the city's local budget can get tied up in political stalemates over congressional appropriations that rarely have anything to do with the District's budget."[24] The District has proven that it can manage

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[23] *Supra* note 14.

[24] *Budget Autonomy for the District of Columbia: Restoring Trust in Our Nation's Capital, Hearing Before the H. Comm. On*

its business similar to a state and can function without congressional oversight.

As for oversight, the Council conducts rigorous oversight over all of the District agencies that report directly to the Mayor of the District of Columbia, as well as numerous independent and regional agencies and bodies, e.g., DC Water, the Metropolitan Washington Council of Governments, and the Washington Metropolitan Airports Authority, and over District-related issues.

The Council, through its twelve committees, holds performance and budget oversight hearings on every District agency. During these hearings the committees can scrutinize the past and present performance and the budgetary needs of each agency. The Council also holds numerous public oversight hearings and roundtables over agencies and specific subject-matter areas. Further, the Council holds hearings and roundtables on legislation and resolutions throughout the year since the Council is a full-time legislature.

During Council Period 22 (January 2, 2017 to January 1, 2019) the Council and its various committees held over 600 meetings, hearings, and roundtables. In 2018, the Council recorded almost 900 hours of meetings, hearings, and roundtables. The Council held 36 Legislative Meetings in Council Period 22. The Committee of the Whole held 18 regular meetings and 21 additional meetings to consider legislation and reports in the Committee and process reports from other committees. This is further proof that congressional interference of the actions of the

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Government Reform, 108th Cong., Serial No. 108-36, at 2 (statement of U.S. Representative Tom Davis).

District government are unnecessary and are unwarranted.

RESPECTING THE WILL OF DISTRICT RESIDENTS: END TAXATION WITHOUT REPRESENTATION

In April of 2016, the New Columbia Statehood Commission (Commission) announced that the District of Columbia would pursue statehood through an approach modelled on the Tennessee Plan. This would entail the creation of a contemporary constitution and boundaries for the state of Washington, Douglass Commonwealth. The Commission set out to convene a series of town hall meetings, culminating with a three-day District-wide constitutional convention. The Commission then adopted a draft Constitution and state boundaries.

The draft Constitution and boundaries were then sent to District residents for ratification. Over 85 percent of District residents who voted in our 2016 general election approved a referendum to grant authority to the Council to petition Congress to enact a statehood admission act and to approve the District's Constitution.[25] Passage of the referendum established that the citizens of the District: (1) agree that the District should be admitted to the union as a State; (2) approve a Constitution of the state of Washington, Douglass Commonwealth, as adopted by the Commission; (3) approve the boundaries for the state; and (4) agree that the state of Washington, Douglass Commonwealth shall guarantee an elected representative form of government.

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[25] *See* Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016, effective July 12, 2016 (Res. 21-570; 63 DCR 9627).

In light of this action, Congress needs to respect the will of the District residents. District residents want and deserve fair and equal representation. Continuing to ignore the voice of District residents' request for statehood is to ignore democratic values. Until this is done the residents of the District will continue to feel left out of the democratic process which is not what was envisioned when this country was founded.

Our founding fathers could have never envisioned disadvantaging the rights of citizens of the federal district. In fact, James Madison in Federalist #43 contemplated that the residents of the District would not be disenfranchised when he wrote "[citizens of the federal district] will have had their voice in the election of the government which is to exercise authority over them[.]"[26] The mandate *"No Taxation Without Representation" is* deeply engrained in the founding principles of this nation. I believe the Founding Fathers would disagree that 703,000 taxpaying citizens of the United States should lack voting representation in the national government, as well as lack local control over their lives.

FURTHER ARGUMENTS IN OPPOSITION TO STATEHOOD

Some have argued that the population of the District should be a disqualification for full participation in the Union. While decidedly small, population is not, and should not be a requirement to become a state. Moreover, the District's population is greater than that of two existing states, Vermont and Wyoming. Further, at the growth rate we have seen in recent years it is reasonable to that additional states will become smaller in population.

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[26] The Federalist No. 43 (James Madison).

Some say that the vast amount of land owned or controlled by the federal government within the District is another disqualification for statehood. There is, to be sure, a substantial amount of federal land in District. However, the sixty-plus other square miles of the District are not unlike other states. Compared against the states, the District has the third lowest total actual number of acres under federal control and has the 13th lowest number of federal acres as a percentage of total land, ranking behind a few notable states including Alaska, Montana, Arizona, and Wyoming.[27] Under the provisions of the Washington, D.C. Admission Act, much of the federal acreage in our borders would be retained as a federal enclave, leaving the state of Washington, Douglass Commonwealth with even less land under federal control.

Additionally, some have argued that large, current federal grants and payments to the District are another disqualification for statehood. In truth, however, the vast majority of the federal dollars that the District receives consists of Medicaid and other federal program subsidies received by all the states. We used to receive a substantial federal payment in addition to the federal program allocations, but that was eliminated over two decades ago.

Another way to look at the issue of federal grants is to compare it to how much in taxes a state remits to the federal government. The District of Columbia paid $28.4 billion in taxes in 2018.[28] The amount paid is

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[27] CAROL HARDY VINCENT, LAURA A. HANSON, CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, at 7-9 (2017).

[28] Internal Revenue Service SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5, https://

more than 21 other states.[29] This fact is astonishing when considering the size of the District compared to other states.

Attached to my testimony is a chart that compares the federal funding received and taxes paid by the District to ten states with populations comparable to that of the District. First, it shows that the difference between what the District pays in taxes and what it receives in federal grants is more than $24 billion.[30] Second, it shows the District's total payment to the federal government minus the funding it receives is about 10 times that of Vermont, Wyoming, Alaska, and North Dakota – states with populations almost identical to the District.[31] Finally, the facts show that, in the end, the District is a *significant* contributor to the federal government, more so than many other states in the country.

CONCLUSION

Full statehood is the only practical way that our citizens can participate in a fully democratic government. It is the only way to ensure that our local government will never be subject to a shutdown because of quibbling over purely federal matters, and our local services not suspended because of partisan disagreements. It is the only way to give our residents locally elected representatives to enact purely local laws that would not be subject to national debates over divisive social issues. It is the only way to ensure a

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www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last visited Sept. 16, 2019).

[29] *Id.*

[30] *See* Exhibit 1.

[31] *Id.*

judicial system that is representative of our community values. Statehood is the only way to give residents a full, guaranteed, and irrevocable voice in the Congress of the United States. The same voice enjoyed by our peers across the country.

Statehood is the most practical solution to right the historical wrong of denying voting rights to citizens of the District and to guarantee the right to local self-governance. The District of Columbia has a proven track record of prudent fiscal management spanning over two and a half decades. The State of Washington, D.C. would enter the Union as a 51st state with an economy envied by other jurisdictions. Politics must be set aside, and all of the excuses used to justify denial of our inalienable rights must be shelved. Our limited home-rule power delegated by Congress is appreciated, but too tenuous and too often a bargaining chip in political battles. Limited home-rule cannot make up for all of the other rights withheld by Congress that we could have only with statehood.

One of the most important points that is never mentioned by the opponents of District statehood is that we are the only national capital in the free world where the citizens do not enjoy a vote in the national legislature. Indeed, Mexico which had modeled its federal system — including a federal city as its national capital — recently granted statehood to Mexico City. It is now our time. We, the District of Columbia, are unique in the world. The United States is the greatest democracy in world and the fact that the citizens of its nation's capital do not have voting representation is no longer warranted and is a station on our democracy. We implore Congress to treat us as equals and no longer as second-class citizens.

The Council appreciates the Committee's consideration of the Washington, D.C. Admission Act, and urges that it be brought before the Committee for a favorable markup and before the House and Senate for a vote. The Council and I look forward to working with the Committee to move this bill forward to ensure that the next time I am called to testify it will be as Speaker of the Legislative Assembly of the state of Washington, D.C.

TEN STATE RECIPIENTS OF FEDERAL FUNDS COMPARED TO TAXES PAID WITH A POPULATION COMPARABLE TO THE DISTRICT OF COLUMBIA (Dollars in Thousands)

Jurisdiction	Population	Total Federal Grants – FY2018[1]	Total Internal Revenue Service Collections FY2018[2]	Total Contribution to Federal Government minus Federal Grants
District of Columbia	702,455	$3,920,973[3]	$28,443,717	$24,522,744
Vermont	577,737	$2,014,977	$4,417,527	$2,402,550
Wyoming	626,299	$1,872,033	$4,930,650	$3,058,617
Alaska	737,438	$3,703,011	$5,287,377	$1,584,366
North Dakota	760,077	$2,020,693	$6,578,855	$4,558,162
South Dakota	882,835	$1,753,165	$8,200,403	$6,447,238
Delaware	967,171	$2,595,853	$19,038,671	$16,442,818
Rhode Island	1,057,315	$3,240,462	$14,725,607	$11,485,145
Montana	1,062,305	$3,204,721	$6,229,347	$3,024,626
Maine	1,338,404	$3,218,918	$7,925,462	$4,706,544
New Hampshire	1,356,458	$2,404,006	$12,291,272	$9,887,266

[1] Federal Funds Information for States Grants Database, https://www.ffis.org/database (last visited Sept. 16, 2019). Data on federal grants to states for Fiscal Year 2018

[2] Internal Revenue Service SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5, https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last visited Sept. 16, 2019).

[3] Does not include federal payments to the District government which totaled $118,650,000 in FY 2019.

EXHIBIT 1

COUNCIL OF THE DISTRICT OF COLUMBIA

THE JOHN A. WILSON BUILDING
1350 PENNSLYVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

TESTI MONY OF CHAIRMAN PHIL MENDELSON
COUNCIL OF THE DISTRICT OF COLUMBIA

H.R. 51, THE WASHINGTON, D.C.
ADMISSION ACT

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND REFORM

MARCH 22, 2021

Thank you Chairwoman Maloney, Ranking Member Comer, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia. I am pleased to testify today in support of H.R. 51, the Washington, D.C. Admission Act. Full and fair representation for the over 700,000 citizens residing in the District of Columbia is only possible through achieving statehood, and so I urge this Committee, and this Congress, to move favorably and expeditiously on this measure.

I want to thank this Committee for its ongoing support for the District of Columbia. In particular, I would like to thank the Delegate for the District of Columbia, Congresswoman Eleanor Holmes Norton, for her staunch representation of the District and for introducing H.R. 51. I also want to thank Chairwoman Maloney for cosponsoring this legislation, for agreeing to hold this hearing today, and for the House's historic adoption of H.R. 51 last year.

THE CASE FOR STATEHOOD FOR THE DISTRICT OF COLUMBIA

For over 200 years, the United States citizens residing in the District of Columbia have been denied the same rights of citizenship that are enjoyed by United States citizens everywhere else: full self-governance and representation in the national legislature. Denying this to the District of Columbia deprives these citizens of the fundamental rights of our democracy. This is inconsistent with the principles of our American revolution and I do not think this was intended by our Founding Fathers. Regardless, this civil rights injustice must be corrected, just like other anomalies of the Founding Era, like the disenfranchisement of women and Blacks. Statehood would do that.

Self-governance is the essence of democracy and freedom. It is more sensitive to constituents. It reflects community values and priorities. Self-governance is the lifeblood of every town hall, city council, county board, and state legislature in the United States of America. The only option to gain both full voting representation and full self-governance is to pass H.R. 51 and grant statehood to the District of Columbia.

Our Founding Fathers did not envision eliminating the rights of the citizens of the federal district. In fact, James Madison, in Federalist No. 43, contemplated that the residents of the District would not be disenfranchised when he wrote: "they [the citizens of the federal district] will have had their voice in the election of the government which is to exercise authority over them[.]" And when the District of Columbia was established in the 1790s, its citizens had voting rights and self-governance. This was not immediately taken away. Nowhere in the Federalist

Papers or James Madison's notes will you find a discussion that it was a goal of the Founding Fathers to take our citizenship rights away.

Actually, what was of concern to the Founding Fathers was to protect the government from riots. Like Shays' Rebellion literally months before the Constitutional Convention. "The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. ... Without it, ...the public authority might be insulted and its proceedings interrupted with impunity..."[1] Like what happened here at the Capitol on January 6, 2021.

Ironically, January 6th helps make our case for statehood. Rather than "insult" and interrupt Congressional proceedings, the District came to the rescue – sending our Metropolitan Police and DC National Guard to quell the riot. Yet because we are not a state we were unable to send the Guard directly and immediately; we had to ask the President of the United States. And, as you know, sending the Guard to help was then delayed for hours.

It has been over 200 years since Congress rescinded voting rights from the last group of Washington residents who had previously voted in Maryland and Virginia. To add to this injury, it is Congress that has plenary authority over all matters in the District.[2] It is taxation without representation.

Numerous efforts have been made to correct this injustice, and some incremental changes have been made. In 1960, the 23rd Amendment was adopted,

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[1] The Federalist No. 43 (James Madison)

[2] District of Columbia Organic Act, 6th Congress, 2nd Sess., ch. 15, 2 Stat. 103.

granting District residents the ability to vote for the President.[3] In 1970, the District of Columbia Delegate Act[4] was enacted to give the District a representative in the House of Representatives. But, as you know, that position is non-voting – the same status as that of members from U.S. territories. In these measures Congress has recognized that the structure put in place by the Founding Fathers must adapt.

In 1973, Congress adopted the Home Rule Act, a major reform for District governance, but that act is silent as to Congressional representation.[5] And this limited home rule, as I will later explain, is inadequate and problematic.

In 1978, the District's non-voting delegate in the House of Representatives, Walter Fauntroy, introduced a constitutional amendment that would have given the District two senators, a representative, and an unrestricted vote for President.[6] Congress approved the amendment, but it was not ratified by the necessary three-quarters of the states within the seven-year time limit.

In 2007, Senators Liberman and Collins reported bipartisan legislation to add two full-voting seats in the House of Representatives: one for the District and

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[3] U.S. Const. amend. XIII § 1, granting the District the same number of presidential electors as the smallest state.

[4] District of Columbia Delegate Act, Pub. L. No. 91-405, § 201, 84 Stat. 848 (1970).

[5] District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774, D.C. OFFICIAL CODE § 1-201.01 et seq. (1973) [hereinafter Home Rule Act].

[6] H.R.J. Res. 554, 95th Cong. (1978).

one for Utah.[7] This approach relied on Congress's authority to legislate on matters for the District as well as to create and adjust the number of Congressional seats in the House of Representatives.[8] Unfortunately, a Senate cloture vote on the measure fell short by three votes.

The idea of the Washington D.C. Admission Act was first proposed in 1971.[9] This approach is consistent with long standing practice, having already been employed 37 times. Congress has granted statehood to several territories that were in existence for less than 10 years. On the other hand, the last three states admitted to the Union – Hawaii, Alaska, and Arizona – were territories for 61, 47, and 49 years, respectively, before being granted statehood. The District has been around for 214 years. Long enough.

In 1992, the Congressional report that accompanied H.R. 4718, the New Columbia Admission Act, laid out three main requirements to evaluate statehood petitions.[10] First, that the residents support the principles of democracy. Second, that a majority of the electorate support statehood. Third, that the proposed

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[7] *See* District of Columbia House Voting Rights Act, S. 1257, 110th Cong. (2007).

[8] S. Rep. No. 110-12, at 3 (2007).

[9] City and State: D.C. State Bill, Washington Post, July 7, 1971, at C4.

[10] *See* H. Rep. No. 102-909 (1992). The three requirements are as follows: (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government; (2) That a majority of the electorate wish statehood; and (3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government.

new State has sufficient population and resources to support itself as well as provide its share to the Federal government.

Regarding the first two requirements: over 85 percent of District residents who voted in our 2016 general election approved a referendum to grant authority to the Council to petition Congress to enact a statehood admission act and to approve the District's Constitution.[11] Passage of the referendum established that the citizens of the District: (1) agree that the new state shall guarantee an elected representative form of government; (2) agree that the District should be admitted to the union as a state; (3) approve a Constitution of the state of Washington, Douglass Commonwealth; and (4) approve the boundaries for the state.

As to the third requirement:

Yes, the District has sufficient population. It is currently larger than two states – Wyoming and Vermont. It is only slightly smaller than North Dakota and Alaska.

Yes, the District has sufficient resources. Our Fiscal Year 2021 budget[12] totals $16.9 billion and is the District's twenty-fifth consecutive balanced budget and the fifth to be adopted under local budget

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[11] See Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016, effective July 12, 2016 (Res. 21-570; 63 DCR 9627).

[12] *See* the Fiscal Year 2021 Local Budget Act of 2020, effective October 20, 2020 (D.C. Law 23-136; 67 DCR 13201); *See* Fiscal Year 2021 Federal Portion Budget Request Act of 2020 (D.C. Act 23-409; 67 DCR 10652).

autonomy.[13] The District's budget prioritizes principles of responsible budgeting, fiscal responsibility, and efficient use of public resources. Indeed, our fiscal position has become the envy of other states, counties, and cities. Both our pension and Other Post-Employment Benefits funds are fully funded, using conservative actuarial assumptions. At the conclusion of fiscal year 2020, our reserves continue to equal to 60 days operating costs – a Government Finance Officers Association best practice.

Yes, the District is able to provide its share of the cost to fund the Federal government. In this regard I wish to make three points. First, on a per capita basis District residents currently pay more in federal taxes than residents in any of the 50 states. Second, the District is a so-called "donor state," contributing more in taxes to the federal government than it receives in grants, subsidies, and other payments. Third, while decades ago the District relied on a substantialannual payment from the United States (approximately $660 million annually in the mid-1990s, about 16% of the District's budget) in Fiscal Year 2020, the approved federal payments budget amounted to only $136.7 million or 0.9 percent of the District's gross funds budget.

Hurdles

While I staunchly advocate for District statehood, I recognize that there are hurdles. Many of these hurdles are simply a matter of national politics and efforts by parties jockeying for majorities in Congress. Many state legislatures see a disadvantage to admitting a new state that might affect their state's

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[13] *See* the Local Budget Autonomy Act of 2012, effective July 25, 2013 (D.C. Law 19-321; 60 DCR 12135).

influence in the House or Senate, and many state legislatures do not understand that the United States citizens of the District of Columbia raise their own taxes and pay for their own governance but are not equal to the United States citizens in any of the 50 states.

It is also important to recognize that educating the nation of the District's half-status is another important hurdle to clear. But most people will agree that the idea of tax-paying citizens without full representation in the United States Congress is a concept against everything we are taught in school about the basic democratic values of our country. Many do not believe it, or are forced to square this injustice using misconceptions about the District. The District of Columbia is unique in many ways, but no unique qualities should support disenfranchisement of its citizens.

REBUTTING ARGUMENTS AGAINST STATEHOOD

Finances. Opponents of statehood have long argued that the District is not capable of governing itself in a fiscally responsible manner. Dissenting views in the committee report on H.R. 4718 raised doubts as to whether the District had the economic viability – meaning both population and resources – to support a state government that was independent of other states and the federal government, and whether the District had the resources to bear its equitable share of the cost of the federal government.[14] Well, the District's financial status is the envy of jurisdictions around the country. Our fundamentals are solid, with 16.7 percent population growth since 2010 – highest compared to

[14] H. Rep. No. 102-909 on the New Columbia Admission Act (1992).

the 50 states. Revenues are growing steadily and at a rate greater than most states. And we don't have unfunded liabilities – unlike most states.

We have established a system for multi-year capital planning to bring all capital assets to a state of good repair by fiscal year 2028; no other jurisdiction has this.[15] Our independent Chief Financial Officer has developed resiliency strategies that include recession planning and cybersecurity analysis. The District continues to grow in population, is diversifying its economy, and was growing in jobs before the pandemic. As a result, revenues to support the budget were growing on average more than 3 percent annually prior to the pandemic. This fiscal strength has resulted in ratings for our general obligation bonds being upgraded by all three rating agencies, including AAA by Moody's. The District has more than answered the doubts raised almost 30 years ago about its economic viability. The District is flourishing and is capable of meeting the financial cost of becoming the 51st state.

Retrocession. There have been efforts at restoring voting rights for District residents by retroceding all populated areas of the city back to the State of Maryland. The most recent iteration of this idea was introduced in the House in 2013.[16] Advocates of retrocession have argued that it is the most practical and constitutionally sound way to give District residents votes in both the House and the Senate, and

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[15] The District continues to make these capital investments while still remaining below our locally-mandated 12 percent debt cap. *See* D.C. OFFICIAL CODE § 47-335.02(a). Incidentally, Congress mandated an 18 percent limit.

[16] District of Columbia-Maryland Reunion Act, H.R. 2681, 113th Cong. (2013).

that it makes historical sense when compared to the previous retrocession of Arlington to Virginia.[17] This may be theoretically logical. But the citizens of both the District and Maryland do not support it, so it is unpopular. More importantly, Congress can't force this on Maryland. So it is impractical. Full statehood is the most practical way to fully restore the rights of those who now live in the nation's capital.

Small Population. Some have argued that the population of the District should be a disqualification for full participation in the Union. While decidedly small, population is not, and should not be a requirement to become a state. Historically, most states had less population when admitted than the District does now. Currently, the District's population is greater than that of two existing states, Vermont and Wyoming, and only slightly smaller than North Dakota and Alaska. At the growth rate we have seen over the past decade, it is possible that the District will out rank these other states.

Federal land. Some say that the vast amount of land owned or controlled by the federal government within the District is another disqualification for statehood. There is, to be sure, a substantial amount of federal land in the District. However, there are over 700,000 disenfranchised U.S. citizens on the non-federal land. Moreover, as a percentage of total land, the District has the third lowest total number of acres under federal control and has the 13th lowest number of federal acres when compared against the 50 states.

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[17] *See Legislative Hearing on H.R. 5388, the District of Columbia Fair and Equal Housing Voting Rights Act of 2006* (testimony for the record of Lawrence H. Mirel for the Committee for the Capital City) (Sept. 20, 2006).

This ranks behind a few notable states including Alaska, Montana, Arizona, and Wyoming.[18] Under the provisions of the Washington, D.C. Admission Act, much of the federal acreage in our borders would be retained as a federal enclave, leaving the state of Washington, Douglass Commonwealth with even less land under federal control.

Federal payment. Some argue that large, current federal grants and payments to the District are a disqualification for statehood. In truth, however, the vast majority of the federal dollars that the District receives consists of Medicaid and other federal program subsidies received by all the states. As explained earlier, we used to receive a substantial federal payment in addition to the federal program allocations, but that was eliminated over two decades ago.

Another way to look at the issue of federal grants is to compare it to how much in taxes a state remits to the federal government. The District of Columbia paid $27.5 billion in taxes in 2019.[19] The amount paid is more than 22 other states.[20] This fact is astonishing when considering the size of the District compared to other states.

Attached to my testimony is a chart that compares the federal funding received and taxes paid by the District to ten states with populations comparable to

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[18] CAROL HARDY VINCENT, LAURA A. HANSON, CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, at 7-9 (2017).

[19] Internal Revenue Service SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5, https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last visited March 10, 2021).

[20] *Id.*

that of the District. First, it shows that the difference between what the District pays in taxes and what it receives in federal grants is more than $23 billion.[21] Second, it shows that the District's total payment to the federal government minus the funding it receives is significantly higher than that of Vermont, Wyoming, Alaska, and North Dakota – states with populations similar to the District.[22] Finally, the facts show that, in the end, the District is a significant contributor to the federal government, more so than many other states in the country.

Governance. In spite of evidence to the contrary, some argue that the District is incapable of governing itself. Look no further than the state of our finances to rebut this. But I want to say more about governance. Even in the face of the hurdles that no other jurisdiction must endure, the District is capable of managing its affairs just like any state. We stand on our record of responsible governing.

An example of the District's sound governing practice is the management of our budget after the Council initiated, and the voters by referendum ratified, the Local Budget Autonomy Act of 2012.[23] Removing uncertainty over the District's bud-get authority has ensured that its budget is not being inefficiently spent on unnecessary borrowing costs or paying a premium for services. The flexibility of budget autonomy has allowed the District to address the urgent service and programmatic needs of the city, from trash collection to public safety response, and

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[21] *See* Exhibit 1.

[22] *Id.*

[23] *Supra* note 14.

ensured that these services are delivered efficiently in terms of both time and resources.

Another advantage to budget autonomy: it has ensured that the delivery of services – even to the federal government – is not disrupted due to federal budget battles that have no relation to the District or its budget. As U.S. Representative Tom Davis noted in 2003: while Congress' involvement in the District's budget stems from a desire to ensure the financial well-being of the nation's capital, "the unfortunate reality is that the city's local budget can get tied up in political stalemates over Congressional appropriations that rarely have anything to do with the District's budget."[24]

As for oversight, the Council conducts rigorous oversight over all of the District agencies that report directly to the Mayor of the District of Columbia, as well as numerous independent and regional agencies and bodies, e.g., DC Water, the Metropolitan Washington Council of Governments, and the Washington Metropolitan Airports Authority. The Council, through its tencommittees, holds performance and budget oversight hearings on every District agency. During these hearings the committees scrutinize the past and present performance and budgetary needs of each agency. The Council also holds numerous public oversight hearings throughout the year over agencies and specific subject-matter areas. Further, the Council holds hearings on legislation and resolutions throughout the year since the Council is a full-time legislature.

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[24] *Budget Autonomy for the District of Columbia: Restoring Trust in Our Nation's Capital, Hearing Before the H. Comm. On Government Reform*, 108th Cong., Serial No. 108-36, at 2 (statement of U.S. Representative Tom Davis).

During Council Period 23 (January 2, 2019 to January 1, 2020) the Council and its various committees held hundreds of meetings, hearings, and roundtables. The Council itself held 41 Legislative Meetings in Council Period 23. The Committee of the Whole held 19 regular meetings and 18 additional meetings to consider legislation in the Committee and process reports from other committees.

This is further evidence that the District government is more than capable of governing itself and that Congressional interference is unnecessary.

CONGRESSIONAL INTERFERENCE

For the citizens of the District of Columbia, a compelling argument for statehood is to end Congressional interference in our affairs. Every year we watch as members of Congress, who have no connection with the District, introduce legislation or insert appropriation riders that detrimentally impact the functions of government. The policies of the District government are many times at the mercy of whichever party is in control of Congress. As a District policymaker, I can tell you that this hurts our ability to manage the affairs of our government.

One case in point is the restriction of the District's ability to tax and regulate marijuana. When District residents overwhelmingly approved Initiative 71[25] in 2014 to provide for the legalization of possession of minimal amounts of marijuana for personal use, we were reflecting a trend among the 50 states. But Congress stepped in to prohibit the District from

[25] *See* the Legalization of Possession of Minimal Amounts of Marijuana Personal Use Initiative of 2014, effective February 26, 2015 (D.C. Law 20-153; 62 DCR 880).

passing laws to regulate this industry; that rider remains on the books. The Council was challenged on whether the mere act of having a public hearing on the regulation of marijuana was a violation of the Anti-Deficiency Act.[26] One has to think that Congress surely has more important things to worry about than about this uniquely local issue. Worse, we are in an untenable situation: residents may possess and use marijuana (just like many other states) but government (the District government) is unable to regulate the sale. Perhaps this rider will be rescinded in the next Appropriations bill.

Another case in point is the appropriation rider that prohibited needle exchange – a government program to reduce the spread of HIV and other diseases. The program exists in many cities. It is proven to reduce infection, the spread of disease, and fatalities. Yet the District was precluded from implementing the program while Congress provided no alternative help. After many years the rider was finally lifted, but the damage to the public health remains to this day. The essential point here is that the District requires full self-governance. The nation's capital should be a model for the country. The current governance situation holds us back.

As you know, the Home Rule Act also places limitations on what laws the Council can approve. As a result, we cannot fix inequities in criminal sentencing without the approval of the United State Attorney General, and we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process. We can't even regulate the filing fee for evictions – which at $15

[26] *See* 31 U.S.C. § 1341.

is by far the lowest in the country. Further, the Home Rule Act requires Congressional review of all permanent and temporary bills passed by the Council. But that review has not resulted in a single Congressional disapproval in almost three decades.

Congressional review of legislation is not only unnecessary it has a significant impact on the operations of the Council. In 2009, the Council's General Counsel estimated that between 50 and 60 percent of the legislative measures the Council adopts could be eliminated if there were no Congressional review requirement.[27] He added that the Congressional review requirement from time to time has resulted in gaps in critical pieces of criminal legislation that cannot be cured with a retroactive applicability date because of the ex post facto clause of the Constitution.[28] Under section 602 of the Home Rule Act, the Council has passed thousands of laws and transmitted thousands of pages to Congress, which requires significant staff time and effort, and only three acts have been disapproved and none since March 21, 1991.Our General Counsel correctly noted at the time "Congress may not legislate with the District in mind very often, but we always legislate with Congress in mind."[29] Congressional review of

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[27] *Pathways to Statehood, From Voting Rights to Full Self-Determination: Political and Constitutional Considerations: Public Hearing before the Council of the District of Columbia Special Committee on Statehood and Self-Determination*, June 1, 2009 (written testimony of Brian Flowers, General Counsel of the Council of District of Columbia, at 5).

[28] *Id.*at 6.

[29] *Id.*

District legislation has proven to be inefficient, ineffective, and unnecessary.

Congressional review is not only burdensome, but it has a deleterious effect on the District government's finances. Our ability to go to the bond markets to finance capital improvements costs more or less depending upon our bond ratings. And while the District has a triple-A rating from Moody's, the other agencies have held back. Why? A primary reason cited by the rating agencies is Congressional review and interference. This costs us money because it means higher interest rates.

These are a few examples of how the current Home Rule structure is sometimes harmful to the District and is a poor governance structure that would be rectified by statehood.

RESPECTING THE WILL OF DISTRICT RESIDENTS

In April of 2016, the New Columbia Statehood Commission announced that the District of Columbia would pursue statehood through an approach modelled on the Tennessee Plan. This would entail the creation of a contemporary constitution and boundaries for the state of Washington, Douglass Commonwealth. The Commission convened a series of town hall meetings, culminating with a three-day District-wide constitutional convention. The Commission then adopted a draft Constitution and state boundaries.

The draft Constitution and boundaries were then sent to District residents for ratification. Over 85 percent of District residents who voted in our 2016 general election approved the referendum to grant authority to the Council to petition Congress to enact

a statehood admission act and to approve the District's Constitution.[30]

In light of this action, Congress needs to respect the will of District citizens. They want and deserve fair and equal representation. Continuing to ignore their request for statehood is to ignore democratic values. Until it is granted our citizens will continue to feel left out of the democratic process – because they are -- which is inconsistent with the principles upon which our country was founded.

CONCLUSION

One of the most important arguments that is never addressed by the opponents of District statehood is that we are the only national capital in the free world where the citizens do not enjoy a vote in the national legislature. Indeed, Mexico, which had modeled its federal system after ours– including a federal district as its national capital – recently granted statehood to Mexico City. It is now our time. The United States is the greatest democracy in world, and the fact that the citizens of its capital city do not have voting representation is indefensible and a stain on our democracy. We implore Congress to treat us as equals and no longer as second-class citizens.

Statehood is the only practical way that our citizens can participate in a fully democratic government. It is the only way to ensure that our local government will never be subject to a shutdown because of quibbling over purely federal matters, and our local services not suspended because of partisan disagreements. It is the

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[30] *See* Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016, effective July 12, 2016 (Res. 21-570; 63 DCR 9627).

only way to ensure that our local laws will no longer be victims to national debates over divisive social issues. It is the only way to ensure a judicial system that is sensitive to our community values. Statehood is the only way to give residents a full, guaranteed, and irrevocable voice in the Congress of the United States. The same voice enjoyed by our fellow citizens across the country.

Statehood is the most practical solution to right the historical wrong of denying voting rights to citizens of the District and to guarantee the right to local self-governance. The District of Columbia has a proven track record of prudent fiscal management and good governance. The State of Washington, D.C. would enter the Union as a 51st state with an economy envied by other jurisdictions. Politics must be set aside, and all of the excuses used to justify denial of our inalienable rights must be shelved. Our limited home-rule power delegated by Congress is appreciated, but too tenuous and too often a bargaining chip in political battles. Limited home-rule cannot make up for all of the rights withheld by Congress that we could have only with statehood.

The Council appreciates the Committee's consideration of the Washington, D.C. Admission Act, and urges that it be brought before the Committee for a favorable markup and before the House and Senate for a vote. The Council and I look forward to working with the Committee to move this bill forward to ensure that the next time I am called to testify it will be as Speaker of the Legislative Assembly of the state of Washington, D.C.

APPENDIX J

Historical Executive Branch and
Department of Justice Materials
(1975–1976 Shop-Book Rule Act Episode)

1. Unpublished Opinion of the Corp. Counsel re Bill 1-137, the D.C. Shop-Book Rule Act (Dec. 19, 1975); Memorandum to Judith W. Rogers, Special Assistant for Legislation, from C. Francis Murphy, Corporation Counsel. D.C. Re: Bill No. 1-137, the proposed "District of Columbia Shop-Book Act", December 19, 1975. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

2. Veto Message of the Mayor, District of Columbia (Jan. 7, 1976) re: the D.C. Shop-Book Rule Act (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

3. Memorandum to Walter E. Washington, Mayor, D.C. from Louis P. Robbins, Acting Corporation Counsel, D.C., concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act," February 10, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

4. Correspondence to Hon. James T. Lynn, Director, Office of Management and Budget, from Michael M. Uhlman Assistant Attorney General, Dept. of Justice, concerning District of Columbia enrolled bill B-1-137, District of Columbia Shop-Book Rule Act, February 20, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

5. Memorandum to President Gerald R. Ford from James M. Frey, Assistant Director for Legislative Reference, Re: District of Columbia Enrolled Act 1-88—District of Columbia Shop-Book Rule Act, February 20, 1976. (Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

6. Correspondence to Hon. Phillip W. Buchen, Counsel to the President from Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", Feb. 24, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

7. Correspondence to Hon. Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, from Phillip W. Buchen, Counsel to the President, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", Feb. 25, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

8. Memorandum to Jim Cavanaugh, Special Assistant to President Ford, from Max L. Friedersdorf, Office of Legislative Affairs, Subject: D.C. Enrolled Act 1-88 – District of Columbia Shop-Book Rule Act, February 25, 1976 (Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

9. Memorandum to the President from Jim Cannon, Assistant to President Ford, Subject: Presidential Policy on Home Rule, February 27, 1976 (Box 10, folder

"District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

10. The President's Message to the Chairman of the Council on his Disapproval of the D.C. Shop-Book Rule Act, 12 Weekly Comp. of Pres. Doc 301, February 28, 1976 (Box 22 of the White House Press Releases at the Gerald R. Ford Presidential Library.)

11. White House Notice to the Press on President's Disapproval of the D.C. Shop- Book Rule Act, February 28, 1976 (Box 22 of the White House Press Releases at the Gerald R. Ford Presidential Library.)

12. Correspondence to Hon. Phillip W. Buchen, Counsel to the President, from Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", March 1, 1976. (Box 36, folder "Office of Management and Budget- General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.

DOCUMENT 1

Memorandum

Government of the District of Columbia

Department, Corporation Counsel, D.C.
Agency, Office: L&O:JCM:kC

TO: Judith N. Rogers
Special Assistant for Legislation

FROM: C. Francis Murphy
Corporation Counsel, D.C.

Date: December 19, 1975

SUBJECT: Bill No. 1-137, the proposed "District of Columbia Shop-Book Act".

This is in response to your request for my comments on Bill No. 1-137, the proposed "District of Columbia Shop-Book Act" introduced by Councilmember Clarke and referred to the Committee on the Judiciary. It passed on second reading December 16, 1975.

I do not believe that this bill should be approved, as if clearly exceeds the authority of the Council under the District of Columbia Self-Government and Governmental Reorganization Act.

The bill would legislatively prescribe rules of evidence governing the admissibility of business records in proceedings before the Superior Court of the District of Columbia. However, under the allocation of powers between the branches of the District Government established by the Self-Government Act, it is clear that the authority to prescribe rules of court was vested exclusively in the judiciary.

The District of Columbia Court of Appeals and the Superior Court were created by the District of

Columbia Court Reorganization Act of 1970, P.L. 91-358, title I, 84 Stat. 473, which vested these courts with the judicial power of the District of Columbia except with respect to matters of national concern. The Self-Government Act reaffirmed this power. Section 718(a) of the Act provides that "[t]he District of Columbia Court of Appeals, the Superior Court of the District of Columbia and the District of Columbia Commission on Judicial Disability and Tenure shall continue as provided under the District of Columbia Court Reorganization Act of 1970 subject to the provisions of Part C of title IV of the Act and section 602(a)(4)."

These two references in section 718(a) did not limit the power of the courts, but enhanced it. Section 431(a) of part C of title IV of the Act provides that "[t]he judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia." Section 602(a)(4) of the

Act assures the immunity of these courts from legislative interference by prohibiting the Council from "enact[ing] any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to the organization and jurisdiction of the District of Columbia Courts)."

The authority to prescribe rules governing trial proceedings for the proper administration of justice, including rules of evidence, has been long recognized as an essential element of the judicial power of the courts of the District of Columbia; The present District of Columbia Courts can trace this inherent power, recognized by various statutes, at least as far back as the Supreme Court of the District of Columbia. See *Cropley v. Volger*, 2 App. D.C. 34 (1893). In *Griffen v. United States*, 336 U.S. 704, 716-17 (1949). the Supreme Court of the United States held that "[i]t has

become the settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to be determined—in the absence of specific Congressional legislation—by the highest appellate court. of the District of Columbia." Although the highest appellate court at that time was the United States Court of Appeals for the District of Columbia Circuit, this language is equally applicable to the District of Columbia Court of Appeals, which inherited this mantle throng the Court Reorganization Act. D. C. Code, sec. 11-102. *Accord, Fisher v. United States*, 328 U.S. 463, 476-77 (1946).

Section 946 of title 11 of the D. C. Code, which was enacted by the Court Reorganization Act, recognized this rule-making authority of the District of Columbia Courts as follows:

> "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section."

This section qualifies the courts' authority by making the Federal Rules initially applicable in the Superior Court, chiefly to fill the vacuum with rules familiar to the local bar. But as is made clear by the provisions authorizing the courts, acting in conjunction, "to prescribe or adopt rules which modify those Rules" and authorizing the Superior Court to "adopt and enforce other rules" supplementing the Federal Rules, there was no Congressional intent to diminish otherwise the inherent authority of the District of Columbia Courts to prescribe rules governing their proceedings. Essentially, this section placed the burden on the courts to take affirmative action to modify the Federal Rules and subsequent amendments thereto.

Other provisions enacted by the Court Reorganization Act dealing with the courts' rulemaking power in various divisions of the Superior Court, D.C. Code, secs. 11-1203 (tax), 18-513 (probate), and 16-701 (criminal), are governed by. section 11-946.

With respect to rules of evidence, the mechanism provided by section 11-946 has functioned as follows: When the Court Reorganization Act was enacted, the Federal Rules relating to evidence were chiefly contained in Fed. Civ. Pro. 43(a), which provided:

"EVIDENCE

> "(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under applicable statutes, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules

> of evidence appliedin the District of Columbia. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in arty of the. statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

and Fed.R. Crim, Pro. 26, which provided:

"EVIDENCE

> "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided-by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts in the light of reason and experience."

Pursuant to D.C. Code, section 11-946, these rules automatically applied to proceedings in the Superior Court.

However, the very broad provisions relating evidence in these two rules were superseded when the Supreme Court, pursuant to the rules enabling acts (18 U.S.C. secs. 3402, 3771, 3772; 28 U.S.C. secs. 2072, 2075), promulgated the Federal Rules of Evidence, which were expressly approved by Congress to take effect July 1, 1975. P.L. 93-595, 85 Stat. 1926. Section 3 of that Act approved various amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure which were prescribed by the

Supreme Court so that these rules would accord with the Federal Rules of Evidence. Pursuant to D.C. Code, section 11-946 these. amendments automatically applied in the Superior Court as of July 1, 1975.

The amendments were as follows: Fed. R. Civ. Pro. 43 was redesignated "Taking of Testimony". The provisions in section (a) thereof, quoted above, relating to evidence were abrogated, because, according to the Advisory Committee's Notes, "[the provisions] dealing with admissibility of evidence and competency of witnesses . . . are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence.' The remainder of subsection (a), relating to testimony, was revised to read as follows:

> "(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

Fed. R. Crim. Pro. 26 was similarly revised.

Fed. R. Civ. Pro. 43 (b), relating to the scope of examination and cross-examination, was abrogated because, according to the Advisory Committee's Notes, "[t]he subdivision is no longer needed or appropriate because the matters with which it deals are treated in the Rules of Evidence." Fed. R. Civ. Pro. 43(c), relating to the record. of excluded evidence, was also abrogated since the matters within its scope were covered by Rule 103 of the Federal Rules of Evidence.

Likewise, the first sentence of Fed. R. Civ. Pro. 30(c), relating to examination and cross-examination, was revised to read as follows: "Examination and cross-examination of witnesses may proceed as permitted at

the trial under the provisions of the Federal Rules of Evidence." Fed. R. Civ. Pro. 32(c), relating to depositions, was abrogated because, to quote the Advisory Committee, "it appears to be no longer necessary in light of the Rules of Evidence." Fed. R. Civ. Pro. 44.1 and Fed. R. Crim. Pro. 44.1, relating to the determination of foreign law, were both revised to include references to the Federal Rules of Evidence.

As the foregoing analysis demonstrates, the Federal Rules of Evidence are part and parcel of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. They are essentially an outgrowth of Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26. They were promulgated pursuant to the same statutes, and their scope as stated in Rule 101 encompasses the scope of those Federal Rules. See Fed. R. Civ. Pro. 1, Fed. R. Crim. Pro. 1. The deletion of provisions in those Rules inconsistent with the Rules of Evidence and their incorporation of the Rules of Evidence by reference emphasizes this interdependence.

The inescapable conclusion is that the Federal Rules of Evidence applied to the Superior Court as of July 1, 1975 pursuant to D.C. Code, section 11-946, along with the amendments to the existing Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure. The codification of the Rules of Evidence under a separate title for purposes of convenience should not be the basis for according them different treatment. The omission of any specific reference to the Superior Court in Rule 1101(a) of the Rules of Evidence is perfectly consistent with this conclusion. For if the Rules of Evidence were made applicable to the Superior Court by their own force, the District of Columbia Courts would lose their power under D.C.

Code, section 11-946, to prescribe rules of evidence modifying the Federal Rules.

Exercising this power to modify the Federal Rules, the District of Columbia Courts prescribed a modification to Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26, by rein-stating the so-called Federal Shop-Book Rule, 28 U.S.C. section 1732 (1970). Subsection (a) of that statute contained general provisions relating to the admissibility of business records and contained a provision making the entire statute applicable in any courts established by Act of Congress"‘ including the Superior Court. Subsection (a) was repealed by P.L. 93-595, section 2, to coincide with the approval of the Federal Rules of Evidence, because the provision was superseded by Rule 803(6) of the Federal Rules of Evidence. Subsection (b) of the statute remained, but was no longer applicable in the Superior Court as a result of the repeal of subsection (a).

Pursuant to their authority under D.C. Code, sec. 11-946, the District of Columbia Courts reinstated both subsections of this statute, incorporating them in Superior Court Civ. R. 43-I and analogous rules in other divisions of the Court: Super. Ct. Sm. Cl. R. 2; Super. Ct. Dom. Rel. R. 43-I; Super. Ct. Crim. R. 57(a); Super. Ct. Tax Div. R. 11(a); Super. Ct. Juv. R. 114; Super Ct. Intrafam. R. 1; Super. Ct. Neglect R. 1; Super..Ct. Ment. H.R. 4(a)(1); Super. Ct. Ment. Retard. R. 12(a).

Recently, the Board of Judges of the Superior Court prescribed modifications to the above mentioned amendments to the Federal Rules by reinstating the old versions of those rules and submitted them to the District of Columbia Court of Appeals. The reinstatement of the former Fed. R. Civ. Pre. 43 (a) and Fed. R.

Crim. Pro. 26 would, of course, end the applicability of the Federal Rules of Evidence in the Superior Court.

Under the scheme provided by the Court Reorganization Act and continued by the Self-Government Act, the power to modify Federal Rules prescribed by the Supreme Court pursuant to the rules enabling acts is vested exclusively in the Superior Court and the District of Columbia Court of Appeals. The power of the Superior Court, with the approval of the Court of Appeals, to prescribe rules governing trial proceedings which modify the Federal Rules of Civil Procedure and Federal Rules of Criminal Proce-dure pursuant to D.C. Code, sec. 11-946 is complemented by the power of the District of Columbia Court of Appeals to prescribe rules governing appeals which modify the Federal Rules of Appellate Procedure pursuant to D.C. Code, sec. 11-743. The power of these courts to prescribe rules of court is similar to the power of other courts created by Congress under Article I of the Constitution, such as the United States Military Court of Appeals, 10 U.S.C. sec. 866(f), and the United States Tax Court, 26, U.S.C. sec. 7453. In each case the rulemaking authority of these courts is shared only with Congress.

The Self-Government Act gave the Council no authority whatever to modify these Federal Rules. The absence of specific language in the Act prohibiting the Council from enacting amendments to title 14 of the D.C. Code, which this bill purports to do, is no justification whatever for the Council's attempt to assume judicial powers clearly vested in the courts.

The authority of the Council with respect to the District of Columbia courts under the Self-Government Act is miniscule in comparison with the authority of Congress with respect to the Federal judiciary under the Constitution. The Council's authority over rules of

court is more akin to the authority of the legislature of the State of New Jersey defined in *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950), where the court held that the state constitution providing that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" ousted the power of the State legislature over rules of court. *Accord, Burton.v. Mayer*, 274 Ky. 263, 118 S.W. 2d 547 (1938); *Lee v. Baird*, 146 N.C. 361, 59 S.E. 876 (1907).

Practical considerations mentioned in these opinions apply to the instant case. The courts, unlike the legislatures, are uniquely equipped by training and experience to formulate efficient and effective rules of court. The trial judges are daily involved with the operation of these rules. The District of Columbia Courts possess similar expertise. Congress' complete reliance on the District of Columbia judiciary to promulgate rules of court within the District government is made apparent by the provision in D.C. Code, sec. 11-946 authorizing the Superior Court to appoint a committee of lawyers to advise it in the performance of its duties under that section. The task was left to lawyers, not legislators.

In conclusion, this bill exceeds the authority Of the Council granted by the Self-Government Act. It infringes upon the judicial powers vested in the District of Columbia Courts pursuant to section 431 of the Act and clearly constitutes "an act .. . . with respect to [section 946] of title 11 of the District of Columbia Code in violation. of section 602(a)(4) of the Act. Therefore, I strongly recommend that this bill not be approved.

DOCUMENT 2

January 7, 1976

TO THE COUNCIL OF THE DISTRICT OF COLUMBIA:

I am returning without my approval Bill 1-137, a bill "To enact a law of evidence to be applied in the District of Columbia Courts."

I fully support the object of this bill, which is to make the so-called "Federal Shop-Book Rule" applicable once more to proceedings in the Superior Court of the District of Columbia. This was necessary as the provision of the statute making the rule applicable in the Superior Court was repealed by Congress with the enactment of the Federal Rules of Evidence. However, the Corporation Counsel has advised me that the object of this bill has already been accomplished by the District of Columbia Courts themselves, pursuant to their rule making powers under the District of Columbia Court Reorganization Act of 1970.

More importantly it is the opinion of the Corporation Counsel that the Council does not have the authority to enact this bill for the following reasons. The Court Reorganization Act created the Superior Court and, pursuant to D.C. Code, § 11-946, made the Federal Rules of Civil and Criminal Procedure, including rules relating to the admissibility of evidence, applicable in that court in the first instance. However, this same section gave the Superior Court, with the approval of the D. C. Court of Appeals, the authority to prescribe rules modifying the Federal Rules. Foreseeing the void that would result from the partial repeal of the "Federal Shop-Book Rule", the Superior Court Board of Judges adopted a rule virtually identical to this rule as a modification of the Federal Rules of Civil and Criminal Procedure relating to the admissibility of evidence, and the D. C. Court of Appeals approved this

modification. This rule became, effective July 1, 1975 to coincide with the partial repeal of the "Federal Shop-Book Rule". As a result, this rule became a permanent addition to the rules governing proceedings in the Superior Court.

The Council's enactment of a rule identical to the rule prescribed by the District of Columbia Courts would not only be unnecessary, but would exceed the legislative authority of the Council under the Self-Government Act. Under the Court Reorganization Act, the power to prescribe rules of court modifying the Federal Rules was vested exclusively in the District of Columbia Courts, subject only to Acts of Congress. The Self-Government Act did not transfer this authority to the Council, but pre-served it in the courts. Section 710(a) of the Act provides that the District of Columbia Courts shal 1 continue as provided under the Court Reorganization Act. Section 431 vests the judicial power of the District exclusively in these courts. Finally, section 602(a) (4) prohibits the Council from enacting any act with respect to the provisions in title 11 of the District of Columbia Code, including section 946 of that title, which is the source of the courts' rulemaking authority.

In summary, the Corporation Counsel is of the opinion that the enactment of this bill is unnecessary in view of the prior action of the District of Columbia Courts and is beyond the authority of the Council, beinc an infringement on the powers vested in the District of, Columbia Courts under the Court Reorganization Act an the Self–Government Act. Accordingly, I am unable to give my approval to this bill.

/s/ Walter E. Washington
WALTER E. WASHINGTON
Mayor

DOCUMENT 3

Memorandum

Government of the District of Columbia

Department, Corporation Counsel , D.C.

Agency, Office: L&O:JCM:kc

TO: Mayor Walter E. Washington

FROM: Louis P. Robbins
Acting Corporation Counsel, D.C.

Date: February 10, 1976

SUBJECT: Memorandum by General Counsel to the Council of January 13, 1976, concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act."

This memorandum is addressed to the arguments set forth by Edward B. Webb, the General Counsel to the D.C. Council, in his memorandum to the Council dated January 13, 1976, concerning Bill. No. 1-137, the proposed "District of Columbia Shop-Book Act." The bill was vetoed by the Mayor on January 7, 1976 and was overridden by the Council on January 27, 1976. It was transmitted to the. President pursuant to section 404(e) of the Self-Government Act on January 29, 1976. Under this provision, the President has 30 calendar days from the date of transmission to sustain the Mayor's veto.

This memorandum supplements our memorandum of December 19, 1975 to Judith Rogers, special Assistant for Legislation, in which we recommended that this bill be returned without approval. A copy of this memorandum is attached.

The General Counsel contends that the Council alone is empowered to enact a "shop-book" rule of evidence. He argues (1) that "Congress has consistently considered the shop-book rule a substantive law of evidence to be promulgated by legislation"; (2) that the Federal Rules of Civil Procedure recognize statutory enactments as a means to establish rules relating to the admissibility of evidence; and (3) that Congress in enacting title 11 of the D.C. Code, recognized that substantive rules of evidence should be codified separately from provisions relating to the jurisdiction of the courts.

The General Counsel's first argument is a misstatement of a fact. Despite the opinion of the House Judiciary Committee concerning the authority of the Supreme Court to promulgate rules of evidence under the rules enabling acts, 18 U.S.C. §§ 3771, 3772, 3402; 28 U.S.C. §§ 2072, 2075 – an opinion that was not shared by the Senate Judiciary Committee, Sen. Rep. No. 93-1277, 93d Cong., 1st Sess. (1974) – Congress did not divest the Supreme Court of its authority over this area. The rules enabling acts, under which the Court has previously enacted rules governing the admissibility of evidence – Fed. R. Civ. Pro. 43(a), Fed. R. Crim. Pro. 26 – remained intact. . Moreover, section 2(a) of P.L. 93-595, by which Congress enacted the Federal Rules of Evidence, gave the Supreme Court "the power to prescribe amendments to the Federal Rules of Evidence", subject, of course, to Congressional oversight. 28 U.S.C. § 2076. The only substantive diminution of the Supreme Court's rulemaking authority was the requirement that rules "creating, abolishing, or modifying a privilege" be ratified by Congress before taking effect.

Under the scheme provided by Congress, subsequent amendments to the successor of the Federal Shop-Book Rule, Fed. R. Evid. 803(6), which do not affect privilege, will be made by the judicial branch of the government, not the legislature.

The wisdom of this approach was articulated by Dean 7 Roscoe Pound during the controversy over the civil rules, of procedure:

> "Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about; they will not, as has happened more than once when committees of the American Bar Association have gone before Congressional Committees– they will not have to be taught the existing practice and the mischief as well as the proposed remedy."

R. Pound, *The Rule-Making Power of the Courts*, Amer. Bar Ass'n J. 602 (1930).

The General Counsel's second argument begs the question. I have no quarrel with the statement that

"the Federal Rules of Procedure recognize statutory enactment as a means to establish rules relating to the admissibility of evidence." The power of the Congress, which enacted the rules enabling acts, to promulgate rules of evidence for the Federal judiciary is well settled. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1940). Likewise, the power of Congress to enact rules of evidence for the Superior Court of the District of Columbia, which it created under the District of Columbia Court Reorganization Act of 1970, P.L. 91-358, title 1, 84 Stat. 473, is beyond dispute. However, the crucial question, which the General Counsel does not address, is whether Congress delegated its ultimate legislative authority over rule-making in the District of Columbia Courts to the D. C. Council.

An examination of the Court Reorganization Act and the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774, demonstrate that the power to prescribe rules of court, including rules of evidence, was vested exclusively in the District of Columbia. Courts.

The Court Reorganization Act created the D. C. Court of Appeals and the Superior Court of the District of Columbia, and vested them with the judicial power of the District with respect to matters of local law. D.C. Code, § 11-101a For the convenience of the local bar, the Act made the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, promulgated by the Supreme Court, applicable in the Superior Court in the first instance. However, the Superior Court was empowered, subject to the approval of the D.C. Court of Appeals, to prescribe or adopt rules which modify the Federal Rules", and was authorized to "adopt and enforce other rules . . . [which] do not modify the Federal Rules." D.C. Code, § 11-946. No

limitation was placed upon the power of the District of Columbia Courts to modify the Federal Rules.

The "judicial power" of the District, of course, includes the long recognized authority of the District courts to prescribe rules of evidence. As the Supreme Court stated in *Griffin v. United States*, 336 U.S. 704, 716-717 (1949), 'Tilt has become the settled practice for. this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to the determined – in the absence of specific Congressional legislation – by the highest appellate court of the District of Columbia." *Accord, Fisher v. United States*, 328 U.S. 463, 476-77 (1946).

The enactment of the Self-Government Act did not diminish the rulemaking authority of the District of Columbia Courts, but solidified it. Section 718(a) of this Act provides that these courts "shall continue as provided under the District of Columbia Court Reorganization Act of 1970 . . .". Section 431(a) unqualifiedly vests the "judicial power of the District" in these courts, recognizing the continuation of the full authority of the courts granted under the Court Reorganization Act. Section 602(a)(4) supplements these provisions by expressly, precluding Council action with respect to any provision of title 11 of the D.C. Code, which includes D.C. Code § 11-946, the source of the rulemaking authority of the courts.

The General Counsel assumes that the Council, merely because it is a legislature, has the authority to promulgate rules of evidence. However, the power of the Council over the District of Columbia Courts under the Self-Government Act is not analogous to the power of Congress over the Federal judiciary under the Constitution or even to the power of most State

legislatures over their respective State courts. The Council's authority over rules of court is more akin to the authority of the legislature of the State of New Jersey defined in *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), where the court held that the State constitution providing that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" ousted the power of the State legislature over rules of court.

In his third argument, the General Counsel urges a dichotomy between 'rules of procedure, over which he grants the courts authority, and "substantive" rules of evidence, which he maintains are matters strictly for the legislature. He points to the separate codification of the courts' rulemaking authority – title 11, D.C. Code – and various enactments of Congress relating to evidence – title 14, D.C. Code. He contends that the absence in the Self-Government Act of a specific prohibition of Council action with respect to the provisions in title 14 leads to the conclusion that Congress intended to vest the Council with the authority to promulgate rules of evidence.

In the first place, rules of evidence have been generally considered to be predominantly procedural and not affecting substantive rights. See *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1940); *Prliminary Study of the Advisability and Feasibility of Developing Uniform Rule of Evidence for the Federal Courts*, 30 F.R.D. 73, 100 et. seq.

In the second place, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain rules governing the admissibility of evidence. When the Court Reorganization Act was

enacted, the principal rules of evidence were Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26. Pursuant to D.C. Code, § 11-946, these rules applied in the Superior Court in the first instance, but were made subject to modification by the District of Columbia Courts.

These two rules of evidence were superseded by the Federal Rules of Evidence, enacted by P.L. 93-595, 88 Stat. 1926. In section 3 of that Act, 88 Stat. 1949, Congress expressly approved the orders of the Supreme Court, issued pursuant to the rules enabling acts, amending these rules and other rules relating to evidence. The attached memorandum of December 19, 1975 to the Special Assistant for Legislation explains in detail the interdependency of the Federal Rules of Evidence and the Federal Rules of Civil and Criminal Procedure. The Rules of Evidence are an outgrowth of these two sets of rules and are incorporated by reference in both. Though codified separately for convenience, the Rules of Evidence remain inextricably bound to the Rules of Civil Procedure and the Rules of "Criminal Procedure.

As a result, the Federal Rules of Evidence, together with the amendments to the Rules of Civil. Procedure and the Rules of Criminal Procedure, became applicable in the Superior Court as of July 1, 1975 (the effective date of the Rules and the amendments) under the terms of D.C. Code, § 11-946. Thus, Fed. R. Evid. 803(6), the successor to the Federal Shop-Book Rule , repealed by P. L. 93-595, § 2(b), 88 Stat. 1949, became applicable in the Superior Court in the first instance.

The District of Columbia Courts, exercising their authority under D.C. Code, § 11-946, prescribed modifications to the amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure and thereby to the Federal Rules of

Evidence, which was incorporated into these rules. Fed. R. Civ. Pro. 43 was modified by the addition of Super. Ct. Civ. R. 43-I, which reinstated the Federal Shop-Book Rule in the District of Columbia. Similar changes were made to analogous rules in the other divisions of the Superior Court.

By order dated December 23, 1975, the Superior Court Board of Judges deleted the amendments to the Federal Rules promulgated by the Supreme Court – Fed. R. Civ. Pro. 30, 32, 43, 44.1; Fed. R. Crim. Pro. 26, 26.1, 28 – which incorporated the Federal Rules of Evidence. The Board replaced them with the former versions of these rules. This action was approved by the D.C. Court of Appeals on December 28, 1975. The deletion of the references to the Federal Rules of Evidence in these rules ended their applicability in the Superior. Court.

Thus, the District of Columbia Courts acting pursuant to D.C. Code, § 11-946, modified the successor to the Federal Shop-Book Rule , Fed. R. Evid. 803(6) by reinstating the old rule. Only the Courts were authorized by Congress to modify this Federal Rule. The Council was given no such authority. The power of the District of Columbia Courts in this respect is similar to the power of other courts created by Congress under Article I of the Constitution, such as the United States Military Court of Appeals, 10 U.S.C. § 866(f), and the United States Tax Court, 26 U.S.C. § 7453. In each case, the rulemaking authority of these courts is shared only with Congress and the Supreme Court.

In the third place, the codification of certain specific rules of evidence in title 14 of the D.C. Code is not inconsistent with the grant to the Courts of general authority over rules of evidence not inconsistent with

these laws. The provisions of title 14 – enacted by P.L. 88-241, 77 Stat. 517, and based upon the Act of March 3, 1903, 31 Stat. 1354 – apply to the United States District Court for the District of Columbia as well as to the local courts. This statutory enactment of rules of evidence based on laws that predated the enabling acts, clearly cannot be considered to diminish the basic authority of the Supreme Court or of the District of Columbia Courts over the promulgation of rules of evidence.

The absence of a specific prohibition of Council action with respect to the provisions of title 14 can scarcely support a wholesale reallocation to the Council of powers clearly vested in the District of Columbia Courts by the Court Reorganization Act and continued under the Self-Government Act. A specific prohibition is unnecessary, as the enactment of this rule of evidence by the Council would constitute an "act . . . with respect to [section 946] of title 11 of the District of Columbia Code . . ." in violation of section 602(a)(4). Moreover, it would constitute a clear encroachment on the judicial powers of the District of Columbia Courts recognized by section 431(a).

In conclusion, the authority to promulgate rules of evidence was not granted to the D.C. Council or shared with the Council, but vested exclusively in the District of Columbia Courts. Although the subject matter of this bill is not controversial since the Courts have already promulgated every word of it pursuant to their rulemaking authority, the precedent it would set would fundamentally change the balance of power between the judicial and legislative branches of the District government as envisioned by the Self-Government Act.

A number of other bills of the Council enacting rules of evidence in the Superior Court have been introduced, such as Bill No. 1-149, the "Medical Record Act of 1975", 21 D.C. Reg. 4397; Bill No. 1-172, the "District of Columbia Psychiatric Confidentiality Act", 22. D.C. Rag, 771; and Bill No. 1-214,. the "Prior Sexual Conduct Evidence Act of 1975", 22 D.C. Reg. 3011. Action on these bills has been suspended pending the resolution of the question of the allocation of powers between the judicial and legislative branches of the District government under the Self-Government Act.

The instant bill, as well as these others, represents a serious encroachment by the D. C. Council on the powers clearly granted to the District of Columbia Courts, in violation of the Self-Government Act.

DOCUMENT 4

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

February 20, 1976

Honorable James T. Lynn
Director, Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the District of Columbia enrolled bill B-1-137, the District of Columbia Shop-Book Rule Act, which was submitted to the President for approval on January 29, 1976. Under section 404(e) of the District of Columbia Self-Government and Governmental Reorganization Act (P.L. 93-198), a bill passed by a two-thirds majority of the District of Columbia City Council over a mayoral veto becomes law at the end of the thirty-day period beginning on the date of transmission to the President, unless disapproved by the President within that period.

Bill 1-137 is substantially identical with Rule 43-I adopted by the D.C. Superior Court on June 30, 1975, which, in turn, is substantially identical with the relevant provisions of the U.S. Code since repealed. Those provisions essentially allow the introduction into evidence of records regularly made in the normal course of any recurring business, to include accurate photographic copies. They are also consistent with Rule 803 (6) of the Federal Rules of Evidence to the same effect, although different in form. Thus, there is no dispute over the substance of the enrolled bill; Mayor Washington, the D.C. Superior Court, and the D.C. City Council all agree on its desirability.

The issue between the Mayor and Council is a more fundamental one. In the Mayor's view, the Council lacks statutory authority to legislate rules of evidence, and any action by the Council to that effect must be without force. Mayor Washington's veto of the Council enactment was correct in this instance although the reasons stated in his message of January 7, 1976, sweep too broadly. The Justice Department recommends that the President disapprove the enrolled bill, enacted by the Council over the Mayor's veto.

The City Council is the sole legislative body of the District of Columbia government, and all legislative power granted to the District is vested in and may be exercised by the Council, Home Rule Act, Sec. 404(a). However, that power is subject to careful reservations by the Congress of its own constitutional powers and to specific limitations included in title VI of the Home Rule Act. Indeed, the very grant of power in section 404(a) begins with the words, "[s]ubject to the limitations specified in title VI of this Act, . . ." Thus, there are real limits on the Council's authority to act.

The most specific of those title VI limitations are set forth in Section 602 of the Home Rule Act. That section, headed "Limitations on the Council," reads in pertinent part as follows:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to –
>
> *
>
> *
>
> *

> (4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts); . . .

Therefore any action by the City Council with respect to matters controlled by any provision of title 11 of the District of Columbia Code is beyond the authority of the Council and should properly be disapproved by the Mayor and by the President. The question then becomes one of whether enactment of the Shop-Book Rule is such an action.

The courts of the District of Columbia are created by Act of Congress. The Court Reorganization Act (P.L. 91-358, 84 Stat. 473) forms title 11 of the present D.C. Code, a title over which the D.C. City Council has no legislative authority. Section 718(a) of the Home Rule Act continues the Superior Court and Court of Appeals for the District in existence even after Home Rule, and section 431(a) of the same Act vests the whole judicial power of the District in those two courts. That authority is to be exercised under the terms of title 11 of the D.C. Code.

Pursuant to Section 11-946 of title 11, the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. With the approval of the District of Columbia Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. The Superior Court has adopted, with the approval of the Court of Appeals, its new Rule 43-I, which is identical in substance with the enrolled bill under discussion. Rule 43-I became effective in the Superior Court June 30, 1975.

Rule 43-I is technically a rule of evidence but it is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Prior to enactment of the Federal Rules of Evidence, several provisions of the Federal Rules of Civil Procedure contained evidentiary provisions of a similar nature. See, e.g., Rule 26(b)(2), Rule 32(a)(1), Rule 33(c), Rule 43, Rule 44, Fed. Rules of Civ. Proc. (1970). Title 11 of the District of Columbia Code clearly empowers the District of Columbia Courts to adopt rules of procedure of this nature and the Home Rule Act just as clearly restricts the power of the Council to affect such rules.

It is not necessary in this instance to determine whether title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts have, in fact, done so). Nor is it necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. Promulgation of the Shop-Book Rule by the District of Columbia courts is well within the courts' express power to adopt rules of civil procedure and, as such, is beyond the power of the City Council. Because of the ramifications of a veto with respect to the separate issue of the power of the Council to modify statutory rules of evidence, such as those contained in Title 14, the Department of Justice recommends that veto of the Council's action be premised on the narrow ground that the Shop-Book Rule was adopted by the courts as an exercise of its undisputed power to adopt rules of civil and criminal procedure.

Sincerely,

/s/ Michael M. Uhlmann
Michael M. Uhlmann
Assistant Attorney General

Attachments

Home Rule Act Pub. L. 93-198, 87 Stat. 774 Sec. 404 Powers of the Council

(a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. . . .

Sec. 602 Limitations on the Council

(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to–

. . .(4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts);

D.C. Code

11-946 Rules of Court

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such

rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

July 29, 1970, Pub. L. 91-358, §111, title I, 84 Stat. 487. (emphasis added)

DOCUMENT 5

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON , D.C. 20503

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-88 – District of Columbia Shop-Book Rule Act

Last Day for Action

February 27, 1976 – Friday

Purpose

To make documentary records of business transactions admissible as evidence in judicial proceedings in the courts of the District of Columbia.

Agency Recommendations

Office of Management and Budget.	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the

President declines to act, thereby approving the legislation, the Congress would then have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the second Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on the other bill.

Summary of Act 1-88

This legislation would amend Title 14 of the D.C. Code, which contains rules of evidence, to exempt business records from the hearsay rule. Act 1-88, cited as the "District of Columbia Shop-Book Rule Act," provides that any documentary record (either the original written version or a photographic copy) of any business transaction, event, or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. The introduction of a reproduced record does not preclude admission of the original as evidence.

Background

Although, under the Home Rule Act, all legislative power granted to the District is vested in the Council, that power is subject to reservations by the Congress of its own constitutional powers and to specific limitations included in Title VI of the Home Rule Act. Specifically, Section 602 of that Act, headed "Limitations on the Council" prohibits the Council from enacting any act, resolution, or rule relating to the organization and jurisdiction of the District of Columbia courts, as set forth in Title 11 of the D.C. Code.

In addition, Section 602 similarly prohibits the Council from enacting any rule, resolution, or law with respect to the rules of criminal procedure for a period of two years from the date on which the first elected members of the Council take office.

The District of Columbia Court Reorganization Act of 1970, P.L. 91-358, which established the D.C. Superior Court and the D.C. Court of Appeals as local courts, forms Title 11 of the D.C. Code and provides, in part that the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. It also provides that, with the approval of the D.C. Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. This rulemaking authority was not modified under the Home Rule Act.

Enactment of P.L. 93-595 (approved January 2, 1975), establishing new Federal Rules of Evidence, repealed certain rules of judicial procedure relating to the admissibility of evidence, including a 1936 Federal Shop-Book Rule, which was in force in the D.C. courts. P.L. 93-595, which took effect on July 1, 1975, and which includes a new shop-book rule as a rule of evidence, did not reference the D.C. courts as courts within the purview of the Act. Apparently believing that these new rules of evidence could not be applied in the D.C. Superior Court, and that the absence of a shop-book rule would have had a disruptive effect on litigation, the Board of Judges of that court reenacted a shop-book rule, which is substantially identical to this bill and the repealed 1936 Federal rule. The rule was approved by the D.C. Court of Appeals and became effective on July 1, 1975, thus coinciding with the effective date of the new Federal Rules of Evidence.

On December 16, 1975, the D.C. Council passed this legislation, because it viewed the Board of Judges' action in passing the rule as an emergency measure to be consummated by legislative enactment of substantive law. The Mayor, however, vetoed the bill on the grounds that (1) its passage was unnecessary in view of the legitimacy of the Superior Court's action, and (2) the Council exceeded its legislative authority under the Home Rule Act in passing a law affecting the judicial procedures of the D.C. courts. The Mayor's veto was overridden on January 27, 1976, by a unanimous vote of the eleven Council Members present.

Issue

The Federal interest in this matter is whether the intent of Congress in delegating legislative authority to the D.C. Council under the Home Rule Act has been appropriately carried out in this instance. The specific issue to be decided is whether or not the Council was within its authority under the Home Rule Act in enacting this bill. If not, it has exceeded its powers under the Home Rule Act and encroached upon the powers of the D.C. courts. However, neither the continued effect nor the content of the D.C. court's rule was contested by the Council; only the legitimacy of the Council's action is disputed.

Summary of Arguments

The arguments of the D.C. Corporation Counsel and the General Counsel of the D.C. Council which, respectively, formed the basis of the Mayor's veto and the Council's override are summarized below for your consideration. Briefly, the arguments presented by the Corporation Counsel are:

– Under the D.C. Court Reorganization Act, which was not modified by the Home Rule Act, the

power to prescribe rules of judicial procedure, including rules of evidence, was vested exclusively in the D.C. courts, subject only to acts of Congress.

– The Home Rule Act prohibits the Council from enacting any act with respect to the provisions of Title 11 of the D.C. Code, which contains the courts' rulemaking authority.

– Rules of evidence are an integral part of rules of judicial procedure, and, therefore, the D.C. courts' -action in this regard was within the scope of their rulemaking authority under the 1970 D.C. Court Reorganization Act, i.e., Title 11 of the D.C. Code. For example, the Superior Court has replaced other Federal rules of procedure, including the new Federal Rules of Evidence, with the former versions of these rules.

Conversely, the General Counsel of the D.C. Council argues:

– The shop-book-rule is a substantive law of evidence, which is quite distinct from rules of judicial procedure, and which, therefore, must be promulgated by legislation.

– Codification of the D.C. rules of evidence in Title 14 of the D.C. Code instead of under Title 11 (dealing with the organization, jurisdiction, and authority of the D.C. courts) reflects Congressional intent that rules of evidence are not exclusively a function of the judiciary. P.L. 93-595, which established the new Federal Rules of Evidence and affirmed the right of Congress to supersede rules of evidence promulgated by the

Supreme Court, is referenced as analgous precedent.

– The Home Rule Act limits the authority of the Council with respect to Title 11, not to Title 14.

View of the Department of Justice

The Department of Justice advises that the Shop-Book Rule, though technically a rule of evidence, is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Therefore, promulgation of the Shop-Book Rule by the D.C. courts was well within the courts' express power to adopt rules of civil procedure, and, as such, is beyond the power of the Council under the Home Rule Act. The Department further advises that it is not necessary in this instance to determine whether Title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts did in fact do so on December 22, 1975). Similarly, it is not necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. In this connection, the D.C. Corporation Counsel has noted that the Council has suspended action on a number of bills to enact rules of evidence for the Superior Court, pending your decision.

Conclusion

We concur with the views of the Mayor and the Department of Justice that this bill be disapproved on the ground that the D.C. Council has exceeded its authority in this instance and encroached upon the authority of the courts to enact rules of procedure. Your decision on this matter would, therefore, be based on a technical legal interpretation of the distinctions

between rules of procedure and evidence, judgments generally reserved to the courts or the Congress. You may wish to consider the alternative of not taking any action on this bill. As noted earlier in this memorandum, the bill would then go to the Congress which would have 30 days to make its judgment. It might be more appropriate to have the Congress settle the jurisdictional question of the relative authority of the D.C. courts and the City Council rather than draw the Presidency into narrow legal questions.

A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

/s/ [Illegible]
Assistant Director for
Legislative Reference

Enclosures

DOCUMENT 6

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON. D. C.

CHAMBERS OF
CHIEF JUDGE GERARD D. REILLY

February 24, 1976

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop Book Act".

Dear Mr. Buchen:

Inasmuch as the statutory authority of the District of Columbia courts to promulgate their own rules without interference by the City Council would be severely impaired unless the President sustains the Mayor's veto of Council Bill No. 1-137, I am writing to draw your attention to this controversy.

The Council's action in overriding the Mayor's veto was transmitted to the President on January 29, 1976, under Section 404(e) of the Self-Government Act. This provision gives the President 30 calendar days from the date of transmission to sustain the veto. As I understand it, this would mean that the President has only until February 27th to act on the matter.

In this instance, the Mayor vetoed the bill on, the advice of the Corporation Counsel, who pointed out to him that enactment of the so-called Shop Book rule by the Council was beyond its powers, as D.C. Code 11-946 (a provision in the D.C. Judicial Reorganization Act of 1970) prescribes that the federal rules of procedure shall be applicable to the Superior Court,

unless such court adopts rules which modify them with the approval of the District of Columbia Court of Appeals. A copy of the Mayor's veto message is enclosed as Appendix A.

The proposed local Shop Book rule itself is harmless enough as the Superior Court, with the consent of our court has already adopted it as a local exception to the recently enacted Federal Rules of Evidence Act of 1975. But the significance of the Council action, if permitted to stand, is vastly more ominous. Backed up behind it are Council bills which would virtually prevent the local courts from effectively trying criminal cases involving rape and other serious sexual offenses, e.g., Bill No. 214, "The Prior Sexual Conduct Evidence Act of 1975", Bill No. 1-172, "The Psychiatric Confidentiality Act", etc. Council action on these bills has been temporarily deferred, presumably because of the transmission of the shop-book controversy to The White House, but their ultimate passage is regarded as almost certain unless the President upholds the Mayor's effort to stop the Council from encroaching upon matters reserved by statute to the courts.

While I recognize that The White House is ordinarily reluctant to get into District matters, I hope that because of the importance of this matter to the future of our courts that you will have time to review both the Mayor's veto and the opinion of the Corporation Counsel, also enclosed as Appendix B, and to advise the President.

Faithfully yours,

/s/ Gerard D. Reilly
Gerard D. Reilly
Chief Judge

Enclosures

DOCUMENT 7

THE WHITE HOUSE

WASHINGTON

February 25, 1976

Dear Judge Reilly:

Many thanks for your letter of February 22nd on the subject of the Mayor's Veto of D. C. Council Bill No. 1-137.

I did find, after you called, that we were aware of the problem which you had raised in your letter, and of course are giving it the serious weight which it deserves.

Your interest and concern are appreciated.

Sincerely,

/s/ Philip W. Buchen
Philip W. Buchen
Counsel to the President

The Honorable Gerard D. Reilly
Chief Judge
District of Columbia Court of Appeals
Washington, D. C.

DOCUMENT 8

THE WHITE HOUSE

WASHINGTON

February 25, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF

SUBJECT: D.C. Enrolled Act 1-88 - District of Columbia Shop-Book Rule Act

The Office of Legislative Affairs concurs with the agencies that the Act be disapproved.

Attachments

Date: February 23 Time: 700pm

FOR ACTION:

Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann

cc (for information):

Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act I-88-District of Columbia Shop-Book Rule Act

ACTION REQUESTED:

___ For Necessary Action

___ Prepare Agenda and Brief

x__ For Your Comments

___ For Your Recommendations

___ Draft Reply

___ Draft Remarks

REMARKS:

Please return to. Judy Johnston, Ground Floor West Wing

Recommend disapproval in accordance with the views of the Department of Justice. Would also note that if the assertion of authority by the D. C. Council is allowed to stand in this instance, there are indications that further changes would be made in local rules of evidence which could further erode the process of law enforcement in the District.

Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

DOCUMENT 9

Last day for action:
February 27, 1976

THE WHITE HOUSE

WASHINGTON

February 27, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Presidential Policy on Home Rule

This is an important issue related to your policy of federal, state and local relationships.

In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) which was to provide for home rule in and by the city of Washington. Part of that law provides that if the D.C. Council passes a bill, has it vetoed by the Mayor and then overrides his veto, the bill must be sent to the President for his review. The President has 30 days in which to disapprove the bill or take no action. If he takes no action, then Congress has 30 days in which it can override the D.C. Council action. If neither the President nor Congress acts, then the bill becomes law. D.C. laws are, of course, subject to judicial review.

Up to now, this issue has not come before you. Now there are two such bills which have been presented for your review. What you do on these bills will probably set a precedent not only for your Administration but for Presidents who follow you.

PRIMARY ISSUE

The fundamental issue can be stated in these two options:

Option I

Should the President intervene in the District of Columbia home rule process only if there is a clear and compelling Federal interest?

Option II

Should the President intervene if there is a substantial Federal interest?

Arguments in favor of Option I

A. The presidential authority to disapprove actions of the D.C. Council as intended as a safeguard of Federal interest in the District and not as a general check on the wisdom of council decisions.

B. Unless there is an overriding Federal interest, the President should not intervene in home rule decisions in Washington any more than he intervenes in similar decisions by, for example, the City of Baltimore.

Arguments in Favor of Option II

A. Washington is unique as a federal city, and the President has an obligation to safeguard a special Federal interest in the District.

B. The President must insure that the intent of Congress in delegating legislative authority to the D.C. Council is properly carried over.

SECONDARY ISSUES

1-87 Affirmative Action in District Government Employment Act

It is intended to promote the concept of affirmative action in D.C. government employment by establishing the goal of representation in all D.C. government jobs of minorities and women in proportion to their representation in the available work force. The "available work force" is defined as the total population of the District of Columbia between the ages of 18 and 63.

OMB, the U.S. Civil Services Commission and the U.S. Commission on Civil Rights have recommended disapproval of the bill because they believe it would require District government agencies to select minority group members and women for employment on the basis of race or sex, without regard to their qualifications for the jobs, since, in defining "available work force," no mention is made of a skill or an ability requirement. This result is of concern to the Federal government because of the responsibility of the Civil Service Commission to insure that competitive service positions in the District government are filled in accordance with merit principles.

The Department of Justice, on the other hand, believes that a skill or an ability requirement can be read into the law and, therefore, the law can be administered in accordance with the merit system. Therfore, Justice does not oppose enactment of the law.

The OMB enrolled bill memorandum on this bill is attached at Tab A.

1-88 District of Columbia Shop-Book Rule Act

In this bill, the D.C. Council may have reached beyond its authority under the Home Rule Act. Specifically, the bill provides that any documentary record of any business transaction, event or occurrence shall be

admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia.

OMB and the Department of Justice have recommended disapproval of the bill on the ground that the D.C.

Council had no authority to enact it. They point out that, under the D.C. Court Reorganization Act, the power to prescribe rules of judicial procedure, including rules of evidence, is vested exclusively in the D.C. courts. OMB and Justice believe there is a Federal interest here in ensuring that the intent of Congress in delegating legislative authority to the Council is being appropriately carried out.

The OMB enrolled bill memorandum on this bill is attached at Tab B.

RECOMMENDATION

1. OMB recommends disapproval of both bills.
2. The President's Counsel (Lazarus) recommends no action on 1-87 and disapproval of 1-88.
3. Max Friedersdorf, Dick Parsons and I recommend you take no action on either bill. We do not believe that the Federal interest involved in either case is sufficiently compelling to warrant Presidential disapproval. If home rule is to have real meaning, the sanctity of the local political process must be respected where no compelling federal interest exists. This position is, I believe, also consistent with your general view that local governments should retain, to the maximum extent possible, control over local matters.

If you concur in this recommendation, I suggest you issue a statement explaining your reasons for taking no action (draft attached at Tab E).

If you decide to disapprove one bill and not the other, the draft statement at Tab E can be amended to make essentially the same point about home rule.

DECISION

D.C. Enrolled Act 1-87 (Affirmative Action)

GRF Take no action (not sustain Mayor's veto).

___ Disapprove the bill (sustain Mayor's veto).
(Statement at Tab F)

D.C. Enrolled Act 1-88 (Shop-Book Rule)

___ Take no action (not sustain Mayor's veto).

GRF Disapprove the bill (sustain Mayor's veto).
(Statement at Tab G)

DOCUMENT 10

FOR IMMEDIATE RELEASE

FEBRUARY 28, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book rule" is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District

of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act I-88.

GERALD R. FORD

THE WHITE HOUSE,

February 27, 1976.

DOCUMENT 11

FEBRUARY 28, 1976

Office of the White House Press Secretary

NOTICE TO THE PRESS

The President has taken action on two Acts of the District of Columbia Council which had been transmitted to the President for his review after being vetoed by the Mayor and then overridden by the Council. Such action is required under the District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act),. which gives the President thirty days in which to act.

The President has disapproved D.C. Enrolled Act 1-88, relating to the so-called Shop-Book Rule of evidence, on the grounds that it exceeds the authority delegated to the Council under the Home Rule Act. The President has chosen not to disapprove Act 1-87 relating to affirmative action in D. C. government employment, despite reservations.

FOR IMMEDIATE RELEASE

FEBRUARY 28, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

The District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act) provides that Acts of the D.C. Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted to the President for his review. The President shall then have

thirty days in which to disapprove these Acts or allow them to become law.

D.C. Enrolled Acts 1-87, relating to affirmative action in D.C. government employment, and 1-88, relating to the so-called Shop-Book Rule of evidence, are the first such acts to be sent to the President for his review since the Home Rule Act was enacted.

If home rule for the District is to have real meaning, the integrity and responsibility of local government processes must be respected. The Federal government should intervene only where there is a clear and substantial Federal interest.

I have been advised by the Department of Justice that, in enacting Act 1-88, the D.C. Council exceeded the authority which the Congress had delegated to it under the Home Rule Act; therefore, I disapproved it. I have chosen not to disapprove Act 1-87, however, because, while I have serious reservations about the merits of the Act, I believe my disapproval of it would violate the sound precepts of home rule. The Federal interest involved here is not clear and substantial.

DOCUMENT 12

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

GERARD REILLY
CHIEF JUDGE

March 1, 1976

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

I am deeply grateful to you for reviewing the problem which I raised in connection with the District of Columbia Council's overriding the Mayor's veto of their Bill No. 1-137. My colleagues and I were greatly relieved by the President's action in sustaining the Mayor's veto.

Had the matter been left to stand, it would have set a dangerous precedent by permitting the encroachment by the Council upon the rule-making powers of the courts.

With best regards,

Faithfully yours,

/s/ Gerard D. Reilly
Gerard D. Reilly

APPENDIX K

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 20-CV-318

MORGAN BANKS, *et al.*, APPELLANTS,

V.

DAVID H. HOFFMAN, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA'S PETITION FOR
REHEARING OR REHEARING EN BANC

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Solicitor General

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INTRODUCTION

This Court should grant either panel rehearing or rehearing en banc in this case, where the Division used an overly restrictive interpretation of the Home Rule Act to invalidate a key provision of the District's Anti-SLAPP Act. In doing so, the Division overlooked or misapprehended important points of law, as well as the serious practical consequences of its decision. *See* D.C. App. R. 40(a)(2). Absent Division rehearing, en banc review is needed to maintain uniformity of the court's decisions and to resolve questions of exceptional importance. *See* D.C. App. R. 35(a). The decision here not only risks gutting the Anti-SLAPP Act—which this Court has repeatedly upheld against past challenges—but also unduly impairs the Council's legislative authority through a legal test that could threaten many other statutory provisions.

The decision is a stark departure from this Court's prior decisions construing Home Rule Act limitations on legislative authority narrowly, so as only to preclude Council legislation that amends or runs directly contrary to the terms of Title 11 of the D.C.

Code. Instead, the Division interpreted this limitation expansively to strike down any statute that "answers the same question" as a rule of civil procedure. But that is not the right test. And employing it would cause grave harm. Like any legislature, the Council routinely creates and protects substantive rights in a way that might affect court procedures. The Division's decision thus casts a cloud of uncertainty over swaths of the D.C. Code. And it produces a nonsensical division between the Council's authority to amend *criminal* rules—which it can do by modifying Title 23—and its inability to affect civil rules even indirectly. Rehearing is necessary to resolve this decision's inconsistency with past precedent and to remedy the blow it may strike to the Council's ability to legislate.

BACKGROUND

Like the legislatures in most states, the Council of the District of Columbia has enacted an anti-SLAPP statute to protect free expression. *See* D.C. Council, Report on Bill 18-893, at 3 (Nov. 18, 2010) (noting that the Council joined nearly 40 other jurisdictions that had already adopted or were considering anti-SLAPP legislation). The Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, targets strategic lawsuits against public participation ("SLAPPs"), which are "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Id.* at 1. The goal of such lawsuits is to "intimidate [opponents] into silence" by requiring them to "dedicate a substantial[] amount of time, money, and legal resources" to litigation. *Id.* at 1, 4. To remedy this problem, the Act "create[s] a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures" when defendants face

legally insufficient claims. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016).

Under the Anti-SLAPP Act, when a person is sued for an "act in furtherance of the right of advocacy on issues of public interest," she may file an expedited "special motion to dismiss." D.C. Code § 16-5502(b). While the motion is pending, "discovery proceedings on the claim shall be stayed." *Id.* § 16-5502(c)(1). However, "[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). The Act further directs the court to "hold an expedited hearing on the special motion to dismiss" and "issue a ruling as soon as practicable" afterward. *Id*. § 16-5502(d).

For the past decade, this Court has repeatedly rejected challenges to the validity of the Anti-SLAPP Act—until the Division's decision in this case. That decision invalidated, under the Home Rule Act, the Anti-SLAPP Act's discovery-limiting provision, *id*. § 16-5502(c), and its expedited hearing provision, to the extent that it would curtail discovery, *id.* § 16-5502(d). Op. 44. The Division recognized the Home Rule Act's grant to the Council of "broad authority to legislate." Op. 28. But it held that these discovery-limiting provisions contravened a restriction on that authority found in D.C. Code § 1-206.02(a)(4), which precludes the Council from enacting an "act . . . with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." The Title 11 provision at issue here is D.C. Code § 11-946, which provides:

> The Superior Court shall conduct its business according to the Federal Rules of Civil

> Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules.

The Division reasoned that because the discovery-limiting provisions for special motions to dismiss "conflict with [Fed. R. Civ. P.] 56"—which places fewer limits on discovery prior to summary judgment, *see* Fed. R. Civ. P. 56(d)—the Anti-SLAPP Act necessarily "violates the Home Rule Act." Op. 37. This conclusion relied on the test for whether state laws apply in federal court in diversity cases. Op. 33-36. The Division further found no construction that could save these statutory provisions, rejecting any "possibility . . . of adopting a broad or fluid interpretation of a term or phrase used in Title 11 or in the Home Rule Act in a way that" would permit "deference to the Council's intent." Op. 26. Nor did it attempt to harmonize the Anti-SLAPP Act with the federal rules to avoid a conflict.

DISCUSSION

I. Contravening This Court's Precedents, The Division Imposed A Rigid And Unjustified Limitation On The Council's Legislative Authority Under The Home Rule Act.

Congress passed the Home Rule Act "with the intent of giving the Council" "broad authority to legislate upon 'all rightful subjects of legislation within the District.'" *Woodroof v. Cunningham*, 147 A.3d 777, 782 (D.C. 2016) (quoting D.C. Code § 1-203.02). Exceptions to this authority "must be narrowly construed, so as not to thwart the paramount purpose of [the Home Rule Act], namely, to 'grant to the inhabitants of the District of Columbia powers of local self-government.'" *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (quoting D.C. Code § 1-201.02(a)). And "the D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988).

Consistent with these principles, this Court has historically read D.C. Code § 1-206.02(a)(4) "narrowly to mean" only "that the Council is precluded from amending Title 11 *itself*." *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019) (emphasis added). The Court thus asks whether the challenged legislation "attempt[s] to amend [Title 11] itself" or "run[s] directly contrary to the terms of Title 11." *Woodroof*, 147 A.3d at 782, 784. This limitation is not applied "rigidly," but "in a flexible, practical manner." *Id.* at 784. For example, the Council may "chang[e] the District's substantive law, even if those changes do affect the jurisdiction of the courts in a sense." *Id*. (internal quotation marks omitted). In

considering whether Council legislation runs afoul of this limitation, the Court has "attempted to respect the intent of the Council as expressed in the 'overarching statutory scheme'" that it has enacted. *Id.* at 782.

A. The Anti-SLAPP Act comports with the Home Rule Act because it does not amend or run directly contrary to the terms of Title 11.

The Anti-SLAPP Act passes the established test for compliance with Section 1-206.02(a)(4): it neither "attempt[s] to amend [Title 11] itself" nor "run[s] directly contrary to the terms of Title 11." *Woodroof*, 147 A.3d at 782, 784. To begin, the Act does not amend Title 11, as it "do[es] not change a single word" of Section 11-946. *Apt. & Off. Bldg. Ass'n v. Pub. Serv. Comm'n*, 203 A.3d 772, 782 (D.C. 2019). In addition, the Act does not run directly contrary to the terms of Section 11-946 either. The Act's discovery-limiting provision does not remove that section's default rule that the Superior Court follow the Federal Rules of Civil and Criminal Procedure. *See* D.C. Code § 11-946. The Superior Court retains the authority to adopt its own rules. *See id*. And the same limitation on that authority exists as before: the Superior Court must obtain the approval of this Court before it may modify the federal rules. *See id*.

Notably, although Section 11-946 describes the courts' ability to alter the rules of procedure, nothing in its text makes that authority exclusive. An interpretation of Section 11-946 enabling the Council to alter court rules through legislation—in addition to allowing revision by the courts—would apply Section 1-206.02(a)(4) narrowly and "in a flexible, practical manner." *Woodroof*, 147 A.3d at 782, 784. It would also parallel the federal scheme for court rules. The Rules

Enabling Act, 28 U.S.C. § 2702, gives the federal courts the authority to make their own rules, but Congress still retains the ability to modify them.[1] There is no reason that the same should not be true in the District. But the Division never considered this more "fluid" interpretation of Title 11, which would have preserved the Anti-SLAPP Act and not cast doubt on other commonplace Council enactments. *See infra* Part II.

Even if the Court believes that the Council cannot *directly* repeal or amend the federal rules under Section 11-946, Title 11 nonetheless must permit the Council to enact substantive legislation that affects the rules indirectly. After all, there is a "definitional mire" created by separating the "procedural" from the "substantive." *Pratt v. Nat'l Distillers & Chem. Corp.*, 853 F.2d 1329, 1335 (6th Cir. 1988). The "two categories are not rigid boxes, but are subtle and fluid"; substantive rights often require procedures to be effective, and many procedures have some substantive effect as well. *Id.* Precluding the Council from even indirectly impacting court rules and procedures through targeted, substantive legislation would severely restrict its ability to legislate. And here, the effect on the court's rules is indirect at best. In the vast majority of civil cases, the Anti-SLAPP Act has no application whatsoever. It simply adjusts the rights of two specific classes of people—those who engage in advocacy on issues of public interest and those who believe that

[1] To be sure, while Congress could change the Rules Enabling Act, the Council cannot change Section 11-946. But there is no indication that the Home Rule Act meant to completely preclude the Council from passing legislation with some procedural effect—and there is at least one indication in the text of Section 11-946 itself that the Council was permitted to do just that. *See infra* pp. 8-9.

this advocacy defames or otherwise injures them. The carefully calibrated adjustment of those rights and provision of new remedies in a small subset of cases is a quintessential legislative function that state legislatures across the country have undertaken through their own anti-SLAPP statutes. A narrow and flexible interpretation of Section 1-206.02(a)(4) would allow the Council to perform that same core legislative function as well.

In holding otherwise, the Division created a conflict with this Court's decision in *Bergman*. In that case, the Court rejected a Home Rule Act challenge to the White Collar Insurance Fraud Prosecution Enhancement Amendment Act, which prohibited certain types of intrusive solicitation of car accident victims by lawyers. 986 A.2d at 1211-12. The challenger claimed that the act contravened another Title 11 provision, Section 11-2501(a), which gives the Court authority "to make such rules as it deems proper" to regulate the conduct of lawyers. *Id*. at 1225-26. He argued that the White Collar Act conflicted with this Court's Rule of Professional Conduct 7.1, which governed intrusive solicitation. *Id*. at 1229. The Court, however, concluded that its own "inherent and statutory authority to regulate the practice of law in the District of Columbia *is not exclusive* in the sense that it would preclude the Council from enacting legislation pursuant to its police powers that might also affect the conduct of lawyers in some respect." *Id*. (internal quotation marks omitted) (emphasis added). In the exact same way, the courts' statutory authority to adopt its own rules would not bar the Council from enacting legislation tailored to protect the public from the specific threat of SLAPPs, even if this might affect those rules "in some respect."

The Division's interpretation also creates an irrational disparity in the Council's ability to alter civil rules as opposed to criminal rules. Recall that Section 11-946 requires the Superior Court, as a default, to follow "the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (*except as otherwise provided in Title 23*)." D.C. Code § 11-946 (emphasis added). Title 23 contains the Code provisions on criminal procedure, and the Home Rule Act clearly permits the Council to change those provisions. *Id*. § 1-206.02(a)(9) (precluding the Council from enacting an act "with respect to any provision of Title 23 (relating to criminal procedure)" for only the first four years of home rule). Yet if the Home Rule Act authorizes the Council to directly enact rules of *criminal* procedure, it would make no sense to preclude it from passing laws that have even an indirect effect on the civil rules. Congress could not have intended such an absurd result.

B. The Division applied the wrong test, looking to whether the Act's provisions conflict with a court rule, not Title 11, and whether they would apply in federal court.

The Division applied a test that differed from this Court's established test in two ways. First, it erroneously asked whether the Act's discovery-limiting features "conflict with [Rule] 56." Op. 37. The proper test, though, is whether the Act "run[s] directly contrary to the terms of Title 11," not the terms of some other provision of law, such as a court rule. *Woodroof*, 147 A.3d at 784. This Court has expressly rejected that "[S]ection 11-946 grant[s] the Superior Court (or this [C]ourt) the power to overturn any District of Columbia statute by adopting a court rule." *Flemming v. United States*, 546 A.2d 1001, 1004 (D.C. 1988).

Indeed, this Court has repeatedly "annulled Superior Court rules that [run] contrary" to District statutes—not the other way around. *Ford v. ChartOne, Inc.*, 834 A.2d 875, 879 (D.C. 2003) (listing cases).

Second, even if the proper inquiry were whether the Act conflicted with Rule 56, the Division mistakenly resolved this inquiry based on whether the Act applies in a federal diversity suit. Op. 33-36 & n.24. In diversity suits, a federal court must ask whether "a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule." *Abbas v. Foreign Pol'y Grp.,* 783 F.3d 1328, 1333 (D.C. Cir. 2015) (quoting *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010)). That test is broadly preemptive and meant to ensure "a uniform and consistent system of rules governing federal practice and procedure" from state to state. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). Here, by contrast, the test to be applied is narrow and construed to avoid the invalidation of Council-enacted statutes whenever possible. *See Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 723-24 (D.C. 1995). Those tests are distinct and in some ways diametrically opposed—yet the Division treated the answers-the-same-question test as if it resolved the Home Rule Act question. Op. 33-37.

Applying the correct test, the Anti-SLAPP Act's discovery-limiting provisions are not "directly contrary to the terms of" Rule 56 (let alone, properly, Title 11). The Act does not displace Rule 56 or the general summary judgment procedure. Rather, in a defined subset of cases, it provides a process that sits somewhere between a Rule 12(b)(6) motion to dismiss and a full-blown Rule 56 motion for summary judgment. Importantly, the Act's discovery-limiting

provisions *do not apply* to actual summary judgment motions, but only to the Act's special motion to dismiss. As this Court has noted, "even if the Anti-SLAPP special motion to dismiss is unsuccessful, the defendant preserves the ability to move for summary judgment under Rule 56 later in the litigation," where the plaintiff would be entitled to the protections of Rule 56(d). *Mann*, 150 A.3d at 1238. The Act's special-motion-to-dismiss provision, at most, *supplements* Rules 12 and 56 by allowing a small class of defendants "to up the ante early in the litigation" by "requir[ing] the plaintiff to put his evidentiary cards on the table." *Id.* This remedy is not generally applicable in any civil action, but applies only in a narrow, and substantively defined, category of claims. The Anti-SLAPP Act and Rule 56 can thus harmoniously co-exist.

Nor can a conflict be created by reading Rule 56 to guarantee "full" discovery. Op. 40. Rule 56(d)'s text provides merely that if a party opposing summary judgment shows by declaration "that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." The Division noted one federal court's interpretive gloss on the rule as "*requiring*, rather than merely permitting, discovery" in this situation. Op. 32 (citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)). But by its terms, the rule creates no free-standing entitlement to any particular form or degree of discovery before a court can ever test a claim's evidentiary sufficiency. Indeed, trial courts properly limit discovery all the time. And the Anti-SLAPP Act would not negate any discovery entitlement in any event, since it permits

targeted discovery if needed to defeat a special motion to dismiss. D.C. Code § 16-5502(c)(2).

The Division believed, incorrectly, that it could not follow this Court's past approaches in interpreting Section 1-206.02(a). It saw "no [basis] for a narrow construction" and no possibility to interpret the Home Rule Act or Title 11 "in a way that enables us to give deference" the Council's intent. Op. 26, 28. At each stage of its analysis, the Division opted for a rigid view of Section 1-206.02(a)(4), in conflict with past precedent. The Division should have sought to achieve harmony between these various provisions rather than create dissonance using the wrong test. On this basis alone, rehearing is warranted.

II. The Division's Decision Threatens To Eviscerate The Anti-SLAPP Act And Invalidate Multiple Statutory Provisions That Arguably Conflict With Procedural Rules.

Beyond its immediate impact in this case, the Division's decision imperils the entire Anti-SLAPP Act and could threaten a host of other Council legislation. As to the Anti-SLAPP Act, its substantive protections are integrally tied to the discovery-limiting provisions that the Court invalidated. If "full" discovery must always occur unless the complaint fails to state a claim under Rule 12(b)(6), a SLAPP defendant would then suffer the very harm that the Act sought to prevent: the burdens and expense of extended litigation. *See Mann*, 150 A.3d at 1231. Moreover, because the Act requires that a special motion to dismiss be filed within 45 days after service of a claim, D.C. Code § 16-5502(a), the decision here could cause a trial judge to simply deny the special motion so that the case proceeds to full discovery and summary judgment. Even if the defendant later wins at summary

judgment, the Act will have secured him no benefit; attorneys' fees are available only if the defendant prevails on the special motion. *Id*. § 16-5504(a). Although trial judges could improvise some work-arounds, or the Council could try to cobble together a legislative fix, it is not clear that such efforts would succeed or prove as effective as the Act itself.

The Court's suggestion that the Superior Court itself could adopt the stricken Anti-SLAPP Act provisions as rules is similarly untested. Op. 30 n.22, 44. There is no guarantee that the court would adopt any such rules or that this Court would approve them. But even if eventually codified in some form, they would then be subject to a potential challenge as beyond the courts' authority. This Court has held that "Congress in enacting § 11-946 did not intend to grant a power to the Superior Court which it withheld from the Supreme Court." *In re C.A.P.*, 356 A.2d 335, 343 (D.C. 1976). Thus, the Superior Court may adopt only "general rules of practice and procedure," which further may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2702(a)-(b). Here, the Anti-SLAPP Act's discovery-limiting provisions operate not as "general rules," but apply only in a narrow subset of claims. They are "intended to provide substantive protections," Op. 20, and are all but inseparable from the "substantive right" that the Council sought to create, *Mann*, 150 A.3d at 1231. Whether a court by rule may adopt such substantive ends, which is traditionally the legislature's role, is a question that could invite legal challenges.

Finally, under the Division's logic, many other statutory provisions throughout the Code could now be

vulnerable to legal attack.[2] The Council, like any legislature, regularly includes provisions affecting rules of procedure when it enacts or modifies a comprehensive regime of rights and remedies in a particular area. For example, several Council-enacted statutes have provisions, like the one that the Division invalidated, that stay discovery, including the False Claims Act, D.C. Code § 2-381.03, the Medical Malpractice Amendment Act of 2006, *id.* § 16-2821, and various Uniform Business Organization Code chapters, *id*. §§ 29-709.06 (limited partnerships), 29-808.05 (limited liability companies), 29-1013.06 (limited cooperative associations), 29-1206.14 (statutory trusts). And that is just the tip of the iceberg. There are other types of provisions, too numerous to list, that also share an arguably "procedural nature" that could be framed as conflicting with the federal rules under the Division's broad test. Op. 20. These include provisions on the contents of a complaint, *see, e.g*., D.C. Code § 47-1370(c) (suit to foreclose right of redemption); stays of proceedings, *see, e.g*., *id.* § 28-3905(k)(7)(A) (Consumer Protection Procedures Act); joinder, *see, e.g*., *id*. § 16-2933(a)(3) (real property partitions); consolidation, *see, e.g*., *id.* § 16-1063(a)(2) (anti-stalking statute); enforcement of subpoenas, *see, e.g*., *id*. § 13-449 (Human Rights Sanctuary Amendment Act of 2022); and the conduct of mediation, *see, e.g*., *id*. § 16-4201 *et seq.* (Uniform Mediation Act).

Indeed, the courts could become bogged down in never-ending litigation over the validity of whole chapters of the D.C. Code. Take just one statute, for example, the Nuisance Abatement Act, D.C. Code § 42-

[2] The District does not concede that such challenges would have merit, but litigation itself creates risks and uncertainties, as well as burdens on the parties and the courts.

3101 *et seq*. It provides for the inclusion of particular information in the complaint, *id*. § 42-3103(b), the attachment of an affidavit to the complaint under certain circumstances, *id*. § 42-3103(c), the time when the first hearing in the action may be conducted, *id*. § 42-3103(d), the deadline for a hearing on a preliminary injunction motion, *id*. § 42-3104(a), protective orders that may be issued for witnesses, *id*. § 42-3105, and security bond requirements for preliminary injunctive relief, *id*. § 42-3107. Other chapters of the D.C. Code are similarly replete with matters of procedure, such as those found in Title 16 (Particular Actions, Proceedings, and Matters), Title 20 (Probate and Administration of Decedents' Estates), and Title 21 (Fiduciary Relations and Persons with Mental Illness). Given the possible consequences of the Division's reasoning, the issues here are of exceptional importance.

CONCLUSION

The Court should grant this petition for rehearing or rehearing en banc.

Respectfully submitted,

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October 2023

APPENDIX L

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Request for Comments
Anti-SLAPP Discovery Limiting Rules

The District of Columbia Superior Court Rules Committee seeks comments from the Bar and the general public on whether the Committee should recommend the adoption of amendments to the Superior Court Rules of Civil Procedure, similar to the discovery-limiting provisions of the D.C. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act recently invalidated by the Court of Appeals in *Banks v. Hoffman*, No. 20-CV-0318, 2023 WL 5761926 (D.C. Sept. 7, 2023). The stated purposes of the D.C. Anti-SLAPP Act are, *inter alia*, to provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation and, subject to limited exceptions, to stay discovery proceedings until the special motion is disposed of. Anti-SLAPP Act of 2010, D.C. Law 18-351, 58 D.C. Reg. 741 (2011); D.C. Code §§ 16-5502(a)-(c); *see Banks* at *2.

The Court of Appeals held in *Banks v. Hoffman* that the discovery-limiting aspects of the Act's special-motion-to-dismiss procedures, D.C. Code § 16-5502(c), violate Section 602(a)(4) of the Home Rule Act, D.C. Code § 1-206.02(a)(4), and are thus unenforceable. *Banks* at *5. The opinion is available for download at https://www.dccourts.gov/sites/default/files/2023-09/Banks%20et%20al.%20v.%20Hoffman%20et%20al.%2020-CV-318.pdf.

No specific amendments are proposed or posted along with this Notice. Rather, the Rules Committee seeks public comment on whether it should propose

amendments to Civil Rule 56 or other rules that would restore the Anti-SLAPP discovery procedures invalidated by *Banks*. To the extent any Anti-SLAPP rule amendments or additions are proposed in the future, they would be considered under the Superior Court's regular rulemaking process, including publication of draft amendments for notice and request for comment. *See The Rulemaking Process*, https://www.dccourts.gov/superior-court/rules-committee/rule-making-process; D.C. Code § 11-946.

Written comments must be submitted by 5 P.M. EST on November 20, 2023. Comments may be emailed to Pedro.Briones@dccsystem.gov or may be mailed to:

Pedro E. Briones
Associate General Counsel
District of Columbia Courts
500 Indiana Avenue, N.W., Room C620
Washington, D.C. 20001

All comments submitted in response to this notice will be available to the public.

From: Briones, Pedro

To: Bonny Forrest

Subject: RE: comments on anti-slapp

Date: Tuesday, November 28, 2023 8:17:36 AM

Good morning Ms. Forrest,

Thank you for contacting the D.C. Courts. No comments were received in response to the notice regarding the Anti-SLAPP discovery limiting provision.

Kind regards,

Pedro

Pedro E. Briones | Associate General Counsel | he/him
District of Columbia Courts | 500 Indiana Avenue, NW | Washington, DC 20001 Direct: 202.879.1694 | Mobile: 202.345.7424 | Pedro.Briones@DCCSystem.gov

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From: Bonny Forrest <bonny.forrest@firmleader.com>
Sent: Tuesday, November 28, 2023 11:16 AM
To: Briones, Pedro <Pedro.Briones@dccsystem.gov>
Subject: comments on anti-slapp

Good morning Mr. Briones,

I am wondering if I could inquire about the comments received from the public regarding the D.C. anti-SLAPP statute.

Have a fabulous day.

Kindest regards,

Dr. Forrest

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THE RULEMAKING PROCESS

1

Step One: Review by the Advisory Committee
The relevant advisory committee reviews proposed changes to the rules. In addition to proposals submitted by the public or committee members, the Civil Rules Advisory Committee and the Criminal Rules Advisory Committee review annual additions or amendments to the Federal Rules of Civil and Criminal Procedure.

2

Step Two: Review by the Superior Court Rules Committee
If an advisory committee approves a proposal (or a variation of it), the proposal is transmitted to the Superior Court Rules Committee for review. In the case of federal amendments, the Civil Rules Advisory Committee or the Criminal Rules Advisory Committee will also alert the Superior Court Rules Committee if it wishes to reject a federal amendment.

3

Step Three: Publication of Notice and Request for Comment
Any amendments or additions approved by the Superior Court Rules Committee are then published for public comment in the Daily Washington Law Reporter and on the DC Courts' website. The Notice and Request for Comment is also distributed to the DC Bar and other stakeholders.

4

Step Four: Review of Public Comments and Recommendation to Board of Judges
The Superior Court Rules Committee reviews and considers any comments received from the public in formulating its recommendation to the Superior Court Board of Judges.

5

Step Five: Consideration by the Board of Judges
The Superior Court Board of Judges reviews and considers rule changes recommended by the Superior Court Rules Committee.

6

Step Six: Transmission to the Court of Appeals and/or Promulgation
If the Superior Court Board of Judges approves changes to the Superior Court Rules of Civil or Criminal Procedure, and these changes modify the corresponding federal rules, then the changes must be submitted to the District of Columbia Court of Appeals ("DCCA") for approval. All other rules approved by the Superior Court Board of Judges can be promulgated immediately by the Chief Judge of the Superior Court. In the case of civil and criminal rules submitted to the DCCA, the Chief Judge can promulgate the amendments or new rules upon receiving the DCCA's approval.