DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318

MORGAN BANKS, et al.,
Plaintiffs–Appellants,
v.

DAVID D. HOFFMAN, et al.,

Defendants–Appellees.

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

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 24 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

CORPORTATE DISCLOSURE STATEMENT v

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The panel erred in invalidating the discovery-stay provision of the Act. 2

II. The panel erred by holding that a defendant must show a public official plaintiff had special access to the media. 4

III. Hyperlinking is not a republication as a matter of law. 8

CONCLUSION 10

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Page(s):

Cases:

Banks v. Hoffman,
No. 20-CV-0318, 2023 WL 5761926 (D.C. Sept. 7, 2023) 4, 7, 8, 9, 10

Biro v. Conde Nast,
171 A.D.3d 463 (N.Y. App. Div. 2019).....9

Doe No. 1 v. Burke,
91 A.3d 1031 (D.C. 2014).....1, 2, 3

Doe v. Burke,
133 A.3d 569 (D.C. 2016).....3

Gertz v. Robert Welch Inc.,
418 U.S. 323 (1974) 7

Horne v. WTVR, LLC,
893 F.3d 201 (4th Cir. 2018).....6

In re Phila. Newspapers, LLC,
690 F.3d 161 (3d Cir. 2012).....8, 9, 10

Life Designs Ranch, Inc. v. Sommer,
364 P.3d 129, 191 Wash. App. 320 (Wash. Ct. App. 2015) 8

Lindberg v. Dow Jones & Co., Inc.,
No. 20-CV-8231 (LAK), 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021) 9, 10

Lokhova v. Halper,
995 F.3d 134 (4th Cir. 2021).....8, 9

McFarlane v. Esquire Mag.,
74 F.3d 1296 (D.C. Cir. 1996) 6

Moss v. Stockard,
580 A.2d 1011 (D.C. 1990).....5, 6

Mullin v. Wash. Free Weekly Inc.,
785 A.2d 296 (D.C. 2001).....8

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 4, 7

Price v. D.C. Bd. of Ethics & Gov't Accountability,
212 A.3d 841 (D.C. 2019) 3

Revell v. Hoffman,
309 F.3d 1228 (10th Cir. 2002) 6

Rosenblatt v. Baer,
383 U.S. 75 (1966) 4, 5, 6, 8

Salyer v. S. Poverty Law Ctr., Inc.,
701 F. Supp. 2d 912 (W.D. Ky. 2009) 10

St. Amant v. Thompson,
390 U.S. 727 (1968) 6

Thompson v. Armstrong,
134 A.3d 305 (D.C. 2016) 4, 5

Statutes:

D.C. Code § 1-206.02(a)(4) 3

D.C. Code § 16-5501 1

Other Authorities:

Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, Reporters Comm. for Freedom of the Press 2, 3

Robert D. Sack, Sack on Defamation § 5:2.1 (5th ed. 2017) 5

Rules:

D.C. App. R. 29 1

CORPORTATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

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The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

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Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

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The National Freedom of Information Coalition is a nonprofit organization that has not issued any shares or debt securities to the public, and has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

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The Tully Center for Free Speech is a subsidiary of Syracuse University.

INTEREST OF AMICI CURIAE

Lead amicus the Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of the news media. Founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. A statement of interest of all amici is included in the Motion.[1]

SUMMARY OF THE ARGUMENT

The District of Columbia enacted the anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* (the "D.C. Anti-SLAPP Act" or "Act") to provide for the speedy dismissal of "Strategic Lawsuits Against Public Participation" or "SLAPPs"—meritless lawsuits targeting the exercise of First Amendment rights. Because "a SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence speech," the Act "protect[s] the targets of such suits," *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014), from the costs and burdens of protracted litigation, including by

[1] No party's counsel authored the brief in whole or part or contributed money intended to fund preparing or submitting the brief, and none other than amici contributed money to fund preparing or submitting the brief. D.C. App. R. 29(a)(4)(A). Counsel for all parties have consented to the filing of this brief.

automatically staying discovery once a "special motion to dismiss" a SLAPP is filed, *id.* at 1036. The panel's extraordinary decision that the discovery-stay provision of the D.C. anti-SLAPP Act—a provision critical to the Act's efficacy—violates the District's Home Rule Act necessitates this Court's *en banc* review.

The panel also erred in two other respects that warrant rehearing. First, it held that despite the lower court's detailed and appropriate focus on plaintiffs' actual and apparent authority—the focus of *Rosenblatt* and its progeny—remand was required because the trial court did not also consider plaintiffs' access to the media in holding them to be public officials. If left undisturbed, that holding, which misapprehends and misapplies the law—will have broad consequences for journalists reporting on the conduct of public officials at all levels. Second, the panel erred by failing to join the overwhelming number of state and federal courts that have held that a hyperlink, without more, does not constitute republication as a matter of law.

Amici urge the Court to grant Appellees' petition for rehearing *en banc*.

ARGUMENT

I. The panel erred in invalidating the discovery-stay provision of the Act.

Provisions that automatically stay discovery while an anti-SLAPP motion is pending are a key component of most state anti-SLAPP statutes and are critical to their efficacy. *See* Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP*

Laws, Reporters Comm. for Freedom of the Press, https://perma.cc/5M5A-QQ8B. As this Court has previously held, the automatic stay provision of the D.C. anti-SLAPP Act is substantive, not procedural. *Doe v. Burke*, 133 A.3d 569, 575–76 (D.C. 2016) (discussing the "substantive rights" the Act creates); *see* Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010) (Act creates "substantive rights"). And, as the Government correctly argues, the automatic-stay provision does not expand or contract the jurisdiction of D.C. courts and does not, therefore, run afoul of the Home Rule Act. D.C. Gov't Pet. at 2–3; *see Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019); D.C. Code § 1-206.02(a)(4).

The panel's erroneous application of the Home Rule Act to the D.C. Anti-SLAPP Act is enormously consequential. The Act is meant to allow for early dismissal of meritless lawsuits intended to drain the pockets of defendants. *Doe No. 1*, 91 A.3d at 1033–34. Without an automatic stay, defendants would face expensive and burdensome discovery while awaiting disposition of their anti-SLAPP motions. Even if the motion is ultimately successful, and the SLAPP dismissed, there is no turning back the clock: the defendant sued for exercising First Amendment rights will have poured resources into defending the case.

Excising the Act's discovery-stay provision will significantly undercut its effectiveness as a protective measure against SLAPPs. At minimum, this drastic step should not be taken without consideration by the full Court sitting *en banc*.

II. The panel erred by holding that a defendant must show a public official plaintiff had special access to the media.

The panel held that to be deemed a public official plaintiff required to prove constitutional actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a defamation plaintiff must be shown to have special access to the media. *Banks v. Hoffman*, No. 20-CV-0318, 2023 WL 5761926 (D.C. Sept. 7, 2023) ("Op.") at 50–52. This holding is inconsistent with the cases on which the opinion purports to rely. In creating a separate standard for public officials, the Supreme Court in *Rosenblatt v. Baer* stated that criticism of "those *responsible for government operations* . . . must be free[.]" 383 U.S. 75, 85 (1966) (emphasis added). Elaborating on that ruling, this Court has explained that not all public employees are public officials; that designation applies to "those among the hierarchy of government employees *who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs*." *Thompson v. Armstrong*, 134 A.3d 305, 311–12 (D.C. 2016) (citing *Rosenblatt,* 383 U.S. at 85) (emphasis added).

In other words, the touchstone of the inquiry is the government employee's "responsibility" or authority, and an employee with either actual or apparent

substantial responsibility is a public official required to plead and prove actual malice. *See id*; *see also* Robert D. Sack, Sack on Defamation § 5:2.1, at 5–7 (5th ed. 2017) ("The public official category is by no means limited to upper echelons of government. All important government employees are subject to discussion by the people who employ them and by others who would comment on their behavior.") For apparent authority to exist, "the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scruting and discussion occasioned by the particular charges in controversy." *Rosenblatt*, 383 U.S. at 86 n.13.

Against that well-settled standard, this Court in *Thompson v. Armstrong*, 134 A.3d 305 (D.C. 2016), found "an Assistant Special Agent in Charge" at the Treasury Department to be a public official. He, *inter alia*, supervised employees with important duties of their own, had "presented the results of [his prior unit's] investigations" to adjudicators or the United States Attorney's Office, was required to carry a firearm, and had "access to sensitive databases and information." *Id.* at 311–12. The Court did not consider whether he had access to the media.

Likewise, in *Moss v. Stockard*, this Court considered whether the women's basketball coach at the University of the District of Columbia, a public school, was of such "apparent public importance" to qualify as a public official. 580 A.2d 1011, 1030 (D.C. 1990) (citing *Rosenblatt*, 383 U.S. at 86). In concluding that she

was not, the Court reasoned that she "was a subordinate employee in a department of a public educational institution with minimal control over or responsibility for policy matters." *Id.* That "she may have been a role model to" her players and assistant coaches "and affected their daily lives did not invest her position with a stature 'invit[ing] public scrutiny and discussion.'" *Id.* (quoting *Rosenblatt*, 383 U.S. at 87 n.13) (internal citations omitted). In considering her public official status (separate from the alternative argument that she was a limited purpose public figure), the Court did not consider her access to the media.[2]

In this case, the trial court reasoned that the plaintiffs-appellants' titles, ranks, and their own descriptions of their government responsibilities alleged in their complaint (which included, *inter alia*, serving as "Director of Psychological Applications for the U.S. Army's Special Operations Command," "Director of Behavioral Science at Guantanamo and Iraq," and chief of the psychology departments at Walter Reed Medical Center and Walter Reed National Military Medical Center) reflected the kind of authority, responsibility, and influence in government affairs that made them public officials for purposes of defamation law.

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[2] *Armstrong* and *Moss* are but two precedential examples from this Court. There is no shortage of cases analyzing the public official question without considering the plaintiff's access to the media. *See, e.g.*, *Horne v. WTVR, LLC*, 893 F.3d 201, 207 (4th Cir. 2018) (school district employee); *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002) (former FBI employee); *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1301 (D.C. Cir. 1996) (congressional aide); *St. Amant v. Thompson*, 390 U.S. 727, 730 n.2 (1968) (deputy sheriff).

Op. 49–50 & 49 n. 40. The trial court correctly applied the law when it focused on appellants' own pleaded responsibilities in their clearly influential roles within the U.S. military and did not err by declining to order discovery into appellants' media influence, which was not necessary to the public *official* analysis.[3]

The impact on the news media of the panel's flawed decision is two-fold. First, it introduces ambiguity into the public official analysis, which has been a fact specific but analytically consistent area of law. Ambiguity on such an important issue—who qualifies as a public official—is detrimental to news organizations that rely on the constitutional protections set forth in *New York Times v. Sullivan*. Additionally, the panel decision conflates the public official test and the public figure test, which risks chilling reporting on conduct by government employees who may not be in the media spotlight but nevertheless have authority via their

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[3] Courts have observed, as a practical matter, that public figures and public officials typically have "significantly greater access to the channels of effective communication" than private individuals, giving them "a more realistic opportunity to counteract false statements." *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 344 (1974). For this reason among others, *Gertz* and its progeny explain the rationale for a different fault standard for private figure plaintiffs. Yet neither *Gertz* nor the other decisions partially quoted by the panel support its holding that media access is a factor in the actual or apparent authority inquiry for public figure plaintiffs—much less a dispositive factor. Even in the limited purpose public figure context, where access to the media is a factor, the Supreme Court has cautioned that considerations like "self-help" through the media were "generalities that do not obtain in every instance." 418 U.S. at 344, 345.

positions to impact the public's lives. *Rosenblatt,* 383 U.S. at 85 (holding public officials to actual malice standard protects criticism of government).

III. Hyperlinking is not a republication as a matter of law.

The panel correctly observed that this Court has adopted the single publication rule. Op. at 60 (citing *Mullin v. Wash. Free Weekly Inc.*, 785 A.2d 296, 298 n.2 (D.C. 2001)). Despite that rule, appellants claim that defendant's email containing a link to the American Psychological Association's website that, in turn, included a link to the challenged Report—alongside "over 170 links to other documents, including some documents critical of the [challenged] Report"—constitutes a republication of the allegedly defamatory material. Op. at 58.

The panel acknowledged the overwhelming number of courts that have held that transmitting a link is not, as a matter of law, a republication. *See, e.g.*, *Lokhova v. Halper*, 995 F.3d 134, 142 (4th Cir. 2021); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012); *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 138 (Wash. Ct. App. 2015). Nevertheless, it declined to decide that issue; instead remanding to the district court for discovery. That was error.

Courts routinely resolve, without discovery, the issue of whether hyperlinking to an allegedly defamatory communication is a republication giving rise to a new claim. *See, e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d at 175 (affirming dismissal of defamation claim based on hyperlink); *see Lokhova*, 995

F.3d at 142–43 (same); *Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *6 (S.D.N.Y. Aug. 11, 2021) (dismissing because "courts consistently agree that the publication of a hyperlink that reference[s] ... an article" but "does not restate the defamatory material is not a republication of the material." (citations omitted)). In *In re Phila. Newspapers*, the Third Circuit observed that those courts to have considered the issue have held it is not republication because "a link is akin to the release of an additional copy of the same edition of a publication because it does not alter the substance of the original publication." 690 F.3d at 174.

The panel concluded discovery was required to determine whether (and how) new readers were enticed, "[the] website is managed statically or dynamically, the context of a particular hyperlink," and "how many additional steps are necessary to reach the defamatory content from the hyperlink in question." Op. at 61. But as one court put it in rejecting a similar argument,

> [A]s with a traditional reference, it is irrelevant whether the "purpose of the hyperlink [is] to entice new readers who had not previously read [the defamatory article] to click on the link and be directed to the article." . . . [A] reference accompanied by a hyperlink "may call the *existence* of [an] article to the attention of a new audience" but does not amount to a republication because it "does not present the *defamatory contents* of the article to the audience."

Lindberg, 2021 WL 3605621, at *6 (quoting *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916–17 (W.D. Ky. 2009)).

By requiring discovery on the question of republication in the absence of any unique facts that would warrant a departure from the prevailing treatment of hyperlinks simply to have "a more fully developed record," Op. at 60–61, the panel opinion will inevitably invite more protracted defamation litigation. This is of particular concern because news organizations frequently use hyperlinks in their publications to refer to previously published articles in order to provide context to readers. *Lindberg*, 2021 WL 3605621, at *6. Sometimes that background information includes dissenting views, as it did here, which leaves readers better informed. Op. at 20. By remanding for discovery and declining to consider whether mere hyperlinking constitutes republication as a matter of law, the panel made the District of Columbia an outlier on this important First Amendment issue.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to grant Appellees' petition for rehearing *en banc* and reverse the panel decision.

Dated: October 26, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of D.C. App. R. 29(b)(4) because it contains 10 pages, excluding the parts of the brief exempted by D.C. App. R. 32(a)(6).

2. This brief complies with the typeface and typestyle requirements of D.C. App. R. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 26, 2023

/s/ Katie Townsend
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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2023, I caused the foregoing Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 24 Media Organizations to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated: October 26, 2023

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