DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318

MORGAN BANKS, et al.,
Plaintiffs–Appellants,

v.

DAVID H. HOFFMAN, et al.,
Defendants–Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, No. 2017 CA 005989 B
Hon. Hiram E. Puig-Lugo, Senior Judge

PROPOSED BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 32 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

Lead amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of the news media. It was founded by leading 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. The Reporters Committee regularly serves as amicus curiae in this Court, including in matters involving application of the D.C. anti-SLAPP statute to libel claims. *See, e.g.*, Br. of Amici Curiae Supporting Appellant, *Doe No. 1 v. Burke*, 133 A.3d 569 (D.C. 2016) (No. 15-cv-690); Br. of Reporters Comm. & 28 Other Media Orgs. in Supp. of Appellants, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018) (Nos. 14-cv-101, 14-cv-126).

The following media and news organizations that gather and report news in Washington, D.C., or represent the interests of journalists and news organizations that do, join this amici brief: The Atlantic Monthly Group LLC, Axios Media, Inc., the Center for Investigative Reporting d/b/a Reveal, Dow Jones, The E.W. Scripps Company, First Amendment Coalition, Gannett, Intercept Media, Inc, Investigative

Studios, Inc., Los Angeles Times Communications LLC, the McClatchy Company, the Media Institute, the Media Law Resource Center, Inc, the National Freedom of Information Coalition, the National Press Club, the National Press Club Journalism Institute, the National Press Photographers Association, the News/Media Alliance, The New York Times Company, the Online News Association, Pro Publica, Inc., the Seattle Times Company, the Slate Group, the Society of Environmental Journalists, the Society of Professional Journalists, the Student Press Law Center, TEGNA Inc., Tribune Publishing Company, the Tully Center for Free Speech, VICE Media, Vox Media, LLC, and The Washington Post. A statement of interest of all amici is included in the Motion.[1]

SUMMARY OF ARGUMENT

"The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because it is the government officials who carry out the

[1] No party's counsel authored the brief in whole or part or contributed money intended to fund preparing or submitting the brief, and no party other than amici contributed money to fund preparing or submitting the brief. *See* D.C. App. R. 29(a)(4)(A). Counsel for all parties have consented to the filing of this brief. D.C. App. R. 29(a)(2).

public's business, "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). To afford necessary "breathing space" to criticism and debate about public issues, a public official who sues for defamation cannot prevail without proving that the defendant published the challenged statement with knowledge it was false or with a high degree of awareness of its probable falsity. *See Sullivan*, 376 U.S. at 272, 280 (citation omitted); *see also Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 509 (D.C. 2020).

Plaintiffs-Appellants are three leading military psychologists who were, *inter alia*, at the forefront of developing U.S. military policies relating to interrogation tactics after the September 11, 2001 terrorist attacks, and instrumental in implementing and training subordinates and military personnel on those policies. Defendants-Appellees are authors of a 541-page report published in 2015 that was commissioned by the American Psychological Association ("APA") to review its own ethical guidelines and investigate and understand its role as an organization, and the role of APA members, in the development of interrogation tactics used on detainees suspected of terrorist ties (the "Report"). In Plaintiffs-Appellants' ensuing defamation suit over the Report, the Superior Court correctly held they were public officials required to prove constitutional actual malice because they "'have, or appear to the public to have, substantial responsibility for or control over the conduct

of governmental affairs.'" Amended Order at 15, *Behnke v. Hoffman*, No. 2017 CA 005989 B (D.C. Super. Ct. Mar. 12, 2020) ("Order") (quoting *Rosenblatt*, 383 U.S. at 85). Specifically, the Superior Court concluded that senior military psychologists involved in drafting and implementing policies pertaining to the interrogation and treatment of detainees had significant government authority and responsibility—the standard for "public officials." *Id.* at 17–18. In addition, the Superior Court correctly applied the "single publication rule" to find that sharing of a hyperlink to the allegedly defamatory Report did not constitute "republication." *Id.* at 21.

The Superior Court's ruling reflects the correct application of settled law on two matters of the utmost importance to the ability of the press to report on matters of public concern. The public official doctrine ensures journalists and news organizations can report on the work of government officials, who may possess significant policymaking power regardless of their notoriety. *See Rosenblatt*, 383 U.S. at 85 (explaining that the "public official doctrine" seeks to protect criticism of "those responsible for government operations"). To constrain the universe of those who may be considered public officials by adding requirements disconnected from the rationales underlying the Supreme Court's creation of the doctrine would result in "a chilling effect" that "might particularly impact on the press' ability to perform its 'checking' function." *Herbert v. Lando*, 441 U.S. 153, 191 n.11 (1979). Further, application of the single publication rule to the Internet, and recognition that a

hyperlink to information is not, without more, a republication of that information, is vital to the news media's ability to use hyperlinks to provide context and substantiation for its reporting.

Accordingly, for the reasons herein, amici urge this Court to affirm the Superior Court's order of dismissal.

ARGUMENT

The Superior Court applied well-settled principles of defamation law when it dismissed Plaintiffs-Appellants' complaint pursuant to the D.C. anti-SLAPP Act, D.C. Code §§ 16-5501 *et seq.* (the "Act").[2] *First*, it correctly held that Plaintiffs-Appellants—three U.S. Army Colonels and leading psychologists who helped develop interrogation techniques used by the United States military in the wake of the September 11, 2001 terrorist attacks—were public officials and, accordingly, were required to meet *Sullivan*'s "actual malice" standard. *Second*, the Superior Court correctly held that Defendants-Appellees did not republish the Report by hyperlinking to it. Both of these well-established bodies of defamation law safeguard journalism in the public interest.

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[2] The Act provides for the speedy dismissal of "Strategic Lawsuits Against Public Participation" or "SLAPPs"—meritless actions 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 automatically staying discovery once a "special motion to dismiss" is filed, *id.* at 1036 (quoting D.C. Code § 16-5502(c)).

I. The Superior Court correctly applied the public official doctrine.

As the Supreme Court held in *Sullivan*, the First Amendment requires certain defamation plaintiffs to prove "actual malice"—*i.e.*, that the defendant published the allegedly defamatory statement with knowledge of its falsity or with a high degree of awareness of its probable falsity. In that seminal decision, the Court applied that constitutional standard to the city public affairs commissioner who sought to retaliate against and silence *The New York Times* for critical coverage of his execution of his government duties. Two years later, the Court reaffirmed application of this constitutional standard to other government employees that qualified as "public officials" and observed that it serves to protect criticism of "those responsible for government operations." *Rosenblatt*, 383 U.S. at 85.

A. Public officials are defined by their government roles and responsibilities.

The Supreme Court in *Rosenblatt* delineated the contours of a "public official" by reference to the animating principles of *Sullivan*: protection of debate and the "breathing space" for that debate on matters of public concern. The Court explained:

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate *about those persons who are in a position significantly to influence the resolution of those issues*. . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both

> elements we identified in *New York Times [v. Sullivan]* are present and the *New York Times* malice standards apply.

Rosenblatt, 383 U.S. at 85–86 (emphasis added).

In applying that guidance, this Court observed that not all government employees are "public officials" but "the designation '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.'" *Thompson v. Armstrong*, 134 A.3d 305, 312 (D.C. 2016) (emphasis original) (quoting *Rosenblatt*, 383 U.S. at 85). Put another way, public servants at various levels possessing "either actual or apparent substantial responsibility can be deemed a public official for purposes of a defamation claim." *Horne v. WTVR, LLC*, 893 F.3d 201, 207 (4th Cir. 2018) (citing *Rosenblatt*, 383 U.S. at 85). It is therefore the case that "[t]he public official category is by no means limited to upper echelons of government." 1 Robert D. Sack, *Sack on Defamation* § 5:2.1, at 5–7 (5th ed. 2017) (citing cases). Whether a plaintiff is a public official is a question of law for the court. *Thompson*, 134 A.3d at 312.

The touchstone of the inquiry is the government employee's "responsibility": a government employee with either actual or apparent substantial responsibility is a public official. *Id.* at 311–12. Employees whose decisions "directly and personally affect individual freedoms," for instance, qualify as "public officials" who must prove actual malice. *Meiners v. Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977)

(holding that federal agents who decide whether to conduct a search or arrest are public officials). Neither the person as an individual, nor each specific task he performs, need to "invite public scrutiny"; rather, courts ask whether "the position itself invites scrutiny." *Horne*, 893 F.3d at 209 (holding county's school budget director was a public official "because she has apparent substantial responsibility and control over the school system budget and finances"). Sometimes a position invites scrutiny because of the particularly "sensitive nature" of the public issues the government employee touches, such as matters of war and peace and international relations. *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 805 (9th Cir. 1978) (holding captain of Navy vessel who was removed by commanding officers a public official because his wartime government role was of a "sensitive nature" and "invite[d] 'public scrutiny and discussion'" (citation omitted)). Simply put, it is "not necessary that all [of a public official's] work be performed with the kind of discretion that would invite public scrutiny," particularly when weighed against the "perceivable and presumably actual importance" of his or her role. *Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 273 (4th Cir. 2022) (Colonel who was former member of National Security Council and senior advisor to U.S. Congressman was a public official).

This Court in *Thompson v. Armstrong* found the plaintiff, "an Assistant Special Agent in Charge" at the Treasury Department, to be a public official. The

plaintiff, *inter alia*, supervised five to seven 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, and had "access to sensitive databases and information." 134 A.3d at 311–12. This Court found that, given plaintiff's authority and responsibilities connected to his government duties, his role was sufficiently important to the public to make him a public figure.

Other courts likewise focus their analysis on the importance of plaintiff's role and degree of responsibility and authority. *See, e.g., Reina v. Lin Television Corp.*, 421 P.3d 860, 865–66 (N.M. 2018) (public hearing officer, while not a public figure, was a public official because her role was "extensive in both the scope of her authority and in the subject matter to which her authority extended"); *Greer v. Abraham*, 489 S.W.3d 440, 446 (Tex. 2016) (school board trustees were public officials due to their many "public responsibilities"); *Palmer v. Bennington Sch. Dist., Inc.*, 615 A.2d 498, 501 (Vt. 1992) (school principal was public official due to his "substantial responsibility for or control over the conduct" of public education (citation omitted)); *Clawson v. Longview Publ'g Co.*, 589 P.2d 1223, 1227 (Wash. 1979) (county sheriff was public official); *Murray v. Williams*, 305 S.E.2d 502, 503 (Ga. Ct. App. 1983) (board member of municipal transit agency was a public official).

B. The Superior Court correctly held that Plaintiffs-Appellants are public officials.

Applying this well-established case law, the Superior Court properly considered Plaintiffs-Appellants' titles, ranks, and the scope of their governmental responsibilities as alleged in their complaint, and concluded they "comfortably fit within the hierarchy of public officials as provided in *Rosenblatt*." Order at 18–19. Indeed, in view of their extensive supervisory, training, and policymaking responsibilities within the U.S. Army, it would seem clear they possess the actual or apparent "substantial responsibility" necessary to meet the definition of public officials. *Thompson*, 134 A.3d at 311–12 (citation omitted).

Plaintiff-Appellant Dr. L. Morgan Banks, III, Col. (Ret.) served as "Director of Psychological Applications for the United States Army's Special Operations Command," where he, *inter alia*, "provided ethical" and "technical oversight" for Special Operations psychologists. Order at 3, 17. Plaintiff-Appellant Dr. Debra L. Dunivin, Col. (Ret.) was chief of the Psychology Departments at both Walter Reed Medical Center and Walter Reed National Military Medical Center and was authorized to "consult[] with commanders in Guantanamo, Iraq, and the Army Medical Command." *Id.* at 3, 17–18. She also inspected detention facilities in connection with her role for the Army Inspector General. *Id.* at 3, 18. And Plaintiff-Appellant Dr. Larry C. James, Col. (Ret.) led the Psychology Department at Walter Reed Medical Center before serving as "Director of Behavioral Science at

Guantanamo and Abu Ghraib, Iraq." *Id.* Their significant responsibilities within government—not to mention the roughly dozen separate averments in their complaint about their roles in developing U.S. policy—support the conclusion that Plaintiffs-Appellants are public officials.[3]

In short, as their own allegations reflect, Plaintiffs-Appellants made decisions, shaped government policies, and supervised subordinates in a way that reflected substantial responsibility, *see Thompson*, 134 A.3d at 311–12, and "affect[ed] individual freedoms" of others, *see Meiners*, 563 F.2d at 352, in connection with a public controversy of national and international import, *see Arnheiter*, 578 F.2d at 805.[4] They were not low- or mid-level employees merely tasked with carrying out

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[3] Most of these averments pertain to Plaintiffs-Appellants' leadership on detainee questioning, such as their assertion: "'The Military Plaintiffs Took a Leading Role in Creating Policies and Procedures to Prevent Abusive Interrogations.'" Order at 18 (quoting Suppl. Compl. Heading 4 at 36); *see also id.* at 19 ("'Banks became an author of the Army Inspector General's Report . . . and at the time of PENS, Banks was consulting to the Army on a revision to the Army Field Manual.'" (quoting Suppl. Compl. ¶ 125)); *id.* at 18 ("'In the aftermath of the abuses at interrogation sites after 9/11 . . . Plaintiffs . . . were called upon to help put in place policies . . . .'" (quoting Suppl. Compl. ¶ 122)).

[4] *See, e.g.*, Jason Leopold, *Accused of Enabling Torture, a US Military Psychologist Says He Was Doing the Opposite*, VICE NEWS (July 15, 2015), https://www.vice.com/en/article/wja8ky/accused-of-enabling-torture-a-us-military-psychologist-says-he-was-doing-the-opposite; Sheri Fink & James Risen, *Psychologists Open a Window on Brutal C.I.A. Interrogations*, N.Y. TIMES (June 21, 2007), https://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html; Jenna McLaughlin, *For American Psychological Association, National Security Trumped Torture Concerns*, THE INTERCEPT (July 14, 2015), https://theintercept.com/2015/07/14/cia-involving-psychologists-torture-sounds-bad-ok/.

the orders of others. *See Kassel v. Gannett Co.*, 875 F.2d 935, 941 (1st Cir. 1989) (staff psychologist at a Veterans Administration hospital not a public official because he did not supervise or manage subordinates nor formulate policy, and his job did not invite public scrutiny or discussion).[5] Given the pleaded facts, no further discovery was required for the Superior Court to find Plaintiffs-Appellants are public officials as a matter of law.

C. The Superior Court's analysis is faithful to the public official doctrine and protects reporting on government officials who make and carry out policy.

Plaintiffs-Appellants argue that the Superior Court erred by not requiring discovery regarding their access to the media. Appellants' Br. at 37–39. In making that argument, Plaintiffs-Appellants appear to conflate public *officials* with public *figures*, which form a related but distinct category of defamation plaintiffs, thereby introducing a requirement not adopted by District of Columbia courts.

Public figures for purposes of defamation law are those who "have assumed roles of especial prominence in the affairs of society"—usually by "thrust[ing] themselves to the forefront of particular public controversies." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Following the Supreme Court's decision in

[5] The First Circuit in *Kassel* referenced media access, making it an outlier in its public official analysis, but the result in *Kassel*—that a staff psychologist without supervisory or policymaking responsibility is not a public official—is consistent with the District's faithful application of *Rosenblatt*.

Gertz, which established the public figure plaintiff, many courts have considered access to the media to be a relevant factor for determining whether a defamation plaintiff is what is called a "limited-purpose public figure." *See, e.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295, 1300 (D.C. Cir. 1980) (factors in the public figure analysis include "the availability of self-help through press coverage . . . and whether [plaintiff] has access to the media," which can be judged in part by plaintiff's "prior dealings with the media"); *Thompson*, 134 A.3d at 312 (same). Consideration of a defamation plaintiff's access to channels of communication (to refute an allegedly false claim and tell one's own story) follows from the rationale of holding public figures to a heightened standard of fault: they "invite attention and comment" and, thus, "assume the risk" of wading into public controversies. *Gertz*, 418 U.S. at 345, 364.

The requirement that public *officials* satisfy *Sullivan*'s constitutional "actual malice" standard, on the other hand, is rooted less in tort law theories and more in the need for open debate about the conduct of government in a democracy. *Rosenblatt*, 383 U.S. at 85. As some courts have explicitly observed, "public figures and public officials are different in nature. Unlike a public official, '[a] person becomes a public figure not by her government employment, but by voluntarily entering a public controversy.'" *MacDonald v. Brodkorb*, 939 N.W.2d 468, 480

(Minn. Ct. App. 2020) (quoting *Britton v. Koep*, 470 N.W.2d 518, 521 n.1 (Minn. 1991)).[6]

Some public officials, by virtue of their especially prominent roles in government, do thrust themselves into public controversies and garner media attention, satisfying the criteria of both *Gertz* and *Rosenblatt*. But while access to media may be a feature of certain government employees' roles, it is not a factor that courts in the District consider in determining whether a defamation plaintiff *is* a public *official*. *See Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990) (observing that public officials may have "superior access to the media" due to their public roles but reasoning that *Sullivan*'s constitutional standard for public official defamation plaintiffs arises out of the strong public interest in robust debate about government issues).

There is no shortage of cases that illustrate these points. When this Court in *Thompson* found a Treasury Department Assistant Special Agent to be a public official, it analyzed his responsibilities and the actual and apparent authority he had in connection with his role. 134 A.3d at 311–12. This Court did not consider his

[6] Most courts recognize the different doctrines, but a few have "unhelpfully conflated public officials and public figures and treated the two concepts as if no difference existed between them in the eyes of the First Amendment." *O'Connor v. Burningham*, 165 P.3d 1214, 1220 (Utah 2007) (applying the *Rosenblatt* analysis to find that a collegiate basketball coach who did not possess any policymaking or supervisory responsibility was not a public official and noting the different tests for public figures and public officials).

access to the media. The same was true in *Beeton v. District of Columbia*, 779 A.2d 918 (D.C. 2001), in which this Court affirmed that a correctional "Officer in Charge" and "Corporal" at a D.C. Department of Corrections facility was a public figure. *Id.* at 924.

In *Moss v. Stockard*, this Court applied the same standard, though it reached a different result. The *Moss* Court held that the women's head basketball coach at the University of the District of Columbia was not a public official because, although she was a role model to her assistant coaches and players, she "was a subordinate employee in a department of a public educational institution *with minimal control over or responsibility for policy matters*." 580 A.2d at 1030 (emphasis added) (citing *Rosenblatt*, 383 U.S. at 85–86). "[H]er position" was "not invest[ed]" with the responsibilities and stature that "'invit[ed] public scrutiny and discussion.'" *Id.* (quoting *Rosenblatt*, 383 U.S. at 87 n.13). 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. Federal courts of appeals, likewise, have analyzed the public official question without considering the plaintiff's access to the media. *See, e.g.*, *Horne*, 893 F.3d at 207 (school district

employee); *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002) (former FBI employee); *St. Amant v. Thompson*, 390 U.S. 727, 730 n.2 (1968) (deputy sheriff).[7]

Because journalists and news organizations rely on the First Amendment's "actual malice" standard when reporting critically about the government, certainty as to the application of the threshold question of whether a government employee is a public official that must satisfy that constitutional standard is essential. "In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342 (citation omitted).

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[7] That most members of law enforcement, at nearly all ranks, have been held to be public officials further demonstrates that defamation plaintiffs need not possess special media access. *See Thompson*, 134 A.3d at 312 (noting that state and federal law enforcement officers are usually deemed public officials); *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 10 (D.D.C. 1993) (same, and listing cases); *see also Time, Inc. v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives of the Chicago Police Department); *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (captain in Washington, D.C. Metropolitan Police Department). Patrol and beat officers—less likely to have special access to media than top-ranking officers—are frequently deemed public officials due to their roles in government supervision and their responsibilities. *See Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 288 (Mass. 2000) (holding "[l]aw enforcement officials, from a chief of police to a patrol officer, necessarily exercise State power in the performance of their duties" and are thus public officials); *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977) (same for federal agents); *Scelfo v. Rutgers Univ.*, 282 A.2d 445, 450 (N.J. Super. Ct. Law Div. 1971) (holding that a patrolman was a public official because "his duties are peculiarly 'governmental' in character and highly charged with the public interest," and the abuse of his office has "great potentiality for social harm").

The public official doctrine, correctly applied by the Superior Court, below, protects the exercise of First Amendment rights, including the ability of the press to report, without fear or favor, on the actions of government employees who influence, develop or carry out government policy. This Court should reject Plaintiffs-Appellants' invitation to inject uncertainty into the application of that well-settled doctrine—a doctrine that enables reporting in the public interest about government employees who, while not in the media spotlight, wield authority via their positions that affect the public. *Rosenblatt*, 383 U.S. at 85 (holding public officials to actual malice standard protects criticism of government).

II. The Superior Court correctly applied the republication doctrine.

The Superior Court correctly rejected Plaintiffs-Appellants' invitation for it to expand defamation liability for hyperlinked content—a ruling of vital importance to informative and explanatory journalism. Under the republication doctrine, "[t]he original publisher of a defamatory statement may be liable for republication"—repetition of the allegedly libelous statement—"if the republication is reasonably foreseeable." *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005) (citing *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985)). To properly limit the republication doctrine in an age of mass communications, the District of Columbia and "virtually all jurisdictions have adopted the modern 'single publication' rule." *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 n.2 (D.C. 2001). The single publication rule

provides that "for purposes of the statute of limitations in defamation claims, a book, magazine, or newspaper has one publication date[:] the date on which it is first generally available to the public." *Id.* In other words, each new copy of the allegedly defamatory publication does not give rise to a new claim with a newly started limitations period. *Chandler v. Berlin*, 998 F.3d 965, 976 (D.C. Cir. 2021). Instead, the continuing existence or circulation of unaltered material remains part of the single publication, whereas republication may occur when the more recent publication has been modified and intended to reach new audiences. *See, e.g.*, *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007).

The single publication rule applies fully to online content. *See id.* ("In the print media world, the copying of an article by a reader—even for wide distribution—does not constitute a new publication" and "[t]he equivalent occurrence should be treated no differently on the Internet"). As the D.C. Circuit has observed, the "rule was designed as an accommodation to new forms of communication, and in applying the rule to the Internet, the court must be mindful of the rule's purpose," which is to avoid multiple legal actions on the same published material, as well as "harassment of defendants and possible hardship upon the plaintiff himself." *Id.* (quoting Restatement (Second) of Torts § 577A cmt. d (Am. L. Inst. 1977)).

Guided by these principles, "courts addressing the doctrine in the context of Internet publications generally distinguish between linking, adding unrelated content, or making technical changes to an already published website[,]" which do not constitute republication, "and adding substantive material related to the allegedly defamatory material to an already published website," which does. *In re Phila. Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012), *as corrected* (Oct. 25, 2012). "'[P]assive maintenance of a web site' is not considered a republication," nor is the "chang[ing of] the URL where statements were posted but left . . . unaltered," nor is the "publication of new articles and blogposts providing hyperlinks to already-published defamatory material." *Kiebala v. Boris*, 928 F.3d 680, 687 & n.4 (7th Cir. 2019) (citations omitted); *see also Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1054–55 (D.N.D. 2006) (holding minor modification of website showcasing allegedly defamatory content did not constitute republication). For these reasons, "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." *Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *4–5 (S.D.N.Y. Aug. 11, 2021) (dismissing action because including in an article a hyperlink to allegedly defamatory statements the publisher had not "affirmatively reiterated [the defamation] in an attempt to reach a new audience that the statement's prior dissemination did not encompass" (citations and internal

quotation marks omitted)); *see also Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 505 (6th Cir. 2015) ("statements posted to a generally accessible website are not republished by conduct such as . . . creating hypertext links to previously published statements"); *Salyer v. S. Poverty L. Ctr., Inc.*, 701 F. Supp. 2d 912, 916–17 (W.D. Ky. 2009) ("[T]he hyperlink is simply a new means for accessing the referenced article. Making access to the referenced article easier does not appear to warrant a different conclusion from the analysis of a basic reference."); *United States ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) ("a mere reference or URL is not a publication of the contents of the materials referred to").

The decision of the Third Circuit Court of Appeals in *In re Philadelphia Newspapers* is instructive. There the court explained that a hyperlink, like a footnote or other reference, "may call the *existence* of the article to the attention of a new audience," but it does not serve as republication because "it does not present the *defamatory contents* of the article to the [new] audience." 690 F.3d at 175 (citation omitted); *accord Kiebala*, 928 F.3d at 687 n.4 (later publication of such a hyperlink is "simply a new means for accessing the referenced article . . . [m]aking access to the referenced article easier," while lacking "the critical feature of republication"—namely, "that the original text of the article was changed or the contents of the article presented directly to a new audience" (citation omitted)). Linking to previously

published online content does not "republish" that content in the context of a defamation claim.

In light of the foregoing, dismissal of claims that allege defamation based on the content of hyperlinked material is commonplace. *See*, *e.g.*, *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1169 (9th Cir. 2011) (affirming denial of discovery request and grant of anti-SLAPP motion in claim over hyperlink to defamatory press release); *In re Phila. Newspapers, LLC*, 690 F.3d at 175 (affirming dismissal of defamation claim based on hyperlink); *Lokhova v. Halper*, 995 F.3d 134, 142–43 (4th Cir. 2021) (same).

A significant amount of reporting published online would be curtailed if the law were otherwise. "Websites are constantly linked and updated. If each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated." *In re Phila. Newspapers, LLC*, 690 F.3d at 175 (holding publishing of link to allegedly defamatory material not republication from which statute of limitations is retriggered). "[A] multiple publication rule," further complicates litigation of speech by "implicat[ing] an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of

information and ideas over the Internet, which is, of course, its greatest beneficial promise." *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002).

Moreover, a great deal of context and information that is currently presented by news organizations through hyperlinks, to the benefit of the public, would be lost if news organizations were suddenly liable in defamation for the inclusion of such links. *See, e.g.*, Jonathan Stray, *Why Link Out? Four Journalistic Purposes of the Noble Hyperlink*, NIEMAN LAB (June 8, 2010), https://perma.cc/5VD8-L8UR (describing the ways in which hyperlinking aids and promotes good journalism and better informed news audiences); Michael Schudson & Katherine Fink, *Link Think*, COLUM. JOURNALISM REV. (Mar./Apr. 2012), https://perma.cc/695LXLRJ (discussing how hyperlinking helps readers "who seek greater depth [obtain] a richer array of information" while showing them "the extensive research behind the story they are reading"). Hyperlinking also promotes transparency by encouraging citation to the source of ideas and information. *See* Felix Salmon, *Why Journalists Need to Link*, REUTERS (Feb. 27, 2012), https://perma.cc/8ZC4-LN7R. And while hyperlinks allow a news outlet to easily attribute and provide context for information, by linking to another source the news media organization does not necessarily endorse its content.

Applying the single publication rule comports with the practical reality of publishing and sharing information online and fosters the dissemination of news—

and the background or context sometimes needed to understand the news—to the public.

For these reasons, this Court should reject Plaintiffs-Appellants' argument that the inclusion of a link to the APA's Timeline webpage—which itself included more than 170 links, among them a link to the Report—and a reference to that Timeline webpage link in an email constitute republication of the Report and give rise to a separate claim for defamation. As the Superior Court noted, changes to the APA website in 2018 did not create a new URL for the 2015 Report but left it accessible only through a link to the APA's Timeline webpage. Neither the Report, nor the URL where it lived, changed after it was originally published in 2015. Order at 20. Moreover, subsequent sharing of a link to the Timeline webpage did not modify the substance of the Report in any way that could be construed as a new publication, nor did it give rise to a new audience for the Report. *See id.*; *accord In re Phila. Newspapers, LLC*, 690 F.3d at 175. For these reasons, amici urge the Court to affirm the Superior Court's application of the single publication rule here.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the Order of the Superior Court dismissing the complaint pursuant to the Act.

Dated: April 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2024, I caused the foregoing Proposed Amici Curiae Brief of the Reporters Committee for Freedom of the Press and 32 Media Organizations to be electronically filed with the Clerk of the Court using this Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

Dated: April 17, 2024

/s/Katie Townsend
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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Katie Townsend
Signature

20-cv-0318
Case Number(s)

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