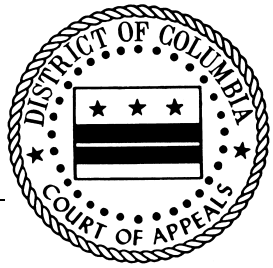
DISTRICT OF COLUMBIA COURT OF APPEALS



No. 23-CV-0240

SIMON BRONNER, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *et al.*,

Defendants-Appellees.

On Appeal from the Superior Court
for the District of Columbia
(Hon. Robert R. Rigsby, Judge)

REDACTED PUBLIC BRIEF OF *AMICI CURIAE* MEMBERS OF THE "PROTECT THE PROTEST" TASK FORCE IN SUPPORT OF APPELLEES

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RULE 29(a)(4)(A) DISCLOSURE STATEMENT

Amici are nonprofit organizations, each of which certifies it has no parent corporation and has not issued any shares of stock to any publicly held corporation.

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INTERESTS OF *AMICI CURIAE*

Amici curiae are nonprofit nongovernmental human rights, environmental, civil rights, and free speech organizations that have joined together through the "Protect the Protest" Task Force (PTP) to protect the First Amendment rights of public interest advocates against the threat of Strategic Lawsuits Against Public Participation (SLAPPs). Thirty organizations comprise PTP, and as of the date of this filing, eleven of those organizations have reviewed and agreed to join this brief. A more detailed description of *amici* is set forth in Appendix A.

Amici have relevant, first-hand knowledge of the consequences of these abusive lawsuits, which have the purpose and effect of chilling important perspectives on issues of significant public concern. *Amici* write to offer relevant knowledge of the protections afforded by D.C.'s Anti-SLAPP Act to citizens of the District engaged in the exercise of their First Amendment rights, to explain why such protection is crucially needed, and to provide context to the decision of the Superior Court, which, if reversed, could significantly undermine the protections afforded by the Anti-SLAPP Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits that pose particular dangers not only to the individuals and organizations they target, but also to our society, to human rights, and to the rule of law. SLAPPs pose a serious

threat to civil society and free speech. Without protection from SLAPPs, ordinary citizens and public interest advocates would stay silent rather than run the risk of being punished for speaking out against the powerful.

The Superior Court held that most of the claims in this case "'arise from' an act in furtherance of the right of advocacy on issues of public interest," the basic characteristic of a SLAPP suit. JA 373. In general, Appellants' claims are founded on the theory that political advocacy can form the basis of actionable claims, and that people acting in furtherance of their deeply-held beliefs (rather than their pecuniary or familial interests) are breaching their fiduciary duty to a nonprofit organization. The implications of allowing such claims to proceed are staggering. To take but one example, the Sierra Club has long had a vigorous debate over immigration policy, leading a group of members to attempt a takeover of the board on an anti-immigration platform.[1] The Sierra Club's board members' various opinions about immigration policy would clearly be covered by the Anti-SLAPP Act, but, under the Appellants' reasoning, such political controversies could easily end in litigation, with members of such organizations facing claims of breach of fiduciary duty arising out of such basic free speech activity.

Protecting people's rights to engage in political speech and advocacy is

[1] *See* Associated Press, Immigration issue divides Sierra Club, East Bay Times (Apr. 9, 2005), https://www.eastbaytimes.com/2005/04/09/immigration-issue-divides-sierra-club/ (last visited October 26, 2023).

precisely the reason that the District of Columbia has joined many states in passing its Anti-SLAPP Act ("the Act"). The mechanism by which the Act mitigates the economic and human cost of frivolous lawsuits is the creation of a special motion to dismiss that requires a minimum evidentiary showing early in the litigation process. The Act creates a two-prong procedure. First, the defendant/movant must demonstrate that the pertinent issues are matters of public interest. Second, upon satisfying this first prong, the burden is shifted to the non-moving party/plaintiff to demonstrate that its claims are likely to succeed on the merits.

While the Act does not define "likely to succeed on the merits," this Court has recognized the non-moving party must submit some form of evidence in addition to its pleadings to demonstrate that it is likely to succeed on the merits. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), as amended (Dec. 13, 2018), *cert denied sub nom Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344 (2019). It is clear that simply restating the allegations of the SLAPP complaint is insufficient. *See id.* at 1228, 1236; *see also Fridman v. Orbis Bus. Intelligence Ltd*., 229 A.3d 494, 506 (D.C. June 18, 2020).

In the instant case, the Superior Court correctly found that Appellees' acts were in furtherance of the right of advocacy on issues of public interest, and correctly found that, relying only on the allegations of their Complaint, Appellants had not carried their evidentiary burden. The Superior Court correctly applied the

correctly the analysis described in *Mann* as well as the law set forth in the prior appeal in this case, *American Studies Association. v. Bronner* ("*Bronner II*"), 259 A.3d 728 (D.C. 2021), in determining that each claim pled by Appellees arises from that protected conduct.

Appellants urge the Court to adopt an approach in which claims that arise from protected conduct would not fall under the Anti-SLAPP Act if their hornbook elements did not always include expressive conduct, and where the financing of protected conduct would not be protected. Their approach to SLAPP litigation would eviscerate the protections afforded by the D.C. Anti-SLAPP Act, encouraging SLAPP litigants to recast claims to avoid the reach of the Act. *Amici* urge this Court to reject Appellants' interpretation uphold the decision of the Superior Court.

ARGUMENT

I. Appellants' lawsuit is a quintessential SLAPP.

The goal of a SLAPP is to stop individuals or groups from exercising their political right to free speech, to punish them for engaging in such speech, or to deter others from doing the same in the future. SLAPPs accomplish this nefarious purpose by masquerading as legitimate lawsuits designed to survive a motion to dismiss for failure to state a claim, taking the allegations in the complaint as true. Such lawsuits force defendants into expensive and lengthy litigation. SLAPPs usually are camouflaged as torts: defamation, business torts such as interference

with business relations, judicial torts, conspiracy or RICO claims, and nuisance.

Over three decades ago, Professor George Pring warned of a new and disturbing trend he had observed: American citizens were being sued simply for "speaking out on political issues." George Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 Pace Envtl. L. Rev. 3, 4 (Sept. 1989). Chillingly, Pring described SLAPPs as "dispute transformation devices, a use of the court system to empower one side of a political issue, giving it the unilateral ability to transform both the forum and the issue in dispute." *Id.* at 12. Unfortunately, SLAPPs have proliferated since Pring first coined the term. Indeed, as reflected in Appellants' suit, SLAPPs remain a tool deployed to silence opponents, with increasingly creative attempts to mischaracterize them as simple tort claims.

SLAPPs strike at a wide variety of traditional American political activities. Historically, people and organizations have been sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, +campaigning in initiative or referendum elections, filing agency protests or appeals, or even speaking out on social media. Most troubling to *amici*, however, is the growing trend of major corporations and political entities suing those engaging in First Amendment protected protests and boycotts.

Amici have substantial experience representing individuals and groups who

have been "SLAPPed." As members of the Protect the Protest Task Force, *amici* have not only successfully defended citizens and groups from bullying SLAPPs, but also have advocated for anti-SLAPP laws, and educated activists and lawyers nationally on how to avoid and defend against SLAPPs. From 2017 to 2019, one organizational member of PTP (The First Amendment Project) successfully defended nine residents of the town of Weed, California, who spoke out against a corporation that claimed it owned the rights to the town's main source of spring-fed drinking water. With that assistance, the suit was successfully unmasked as a SLAPP and dismissed. The nine citizens had nothing to do with the property dispute (or quiet title action); the corporation named them as defendants simply for spite and intimidation. After that success, another PTP member, Civil Liberties Defense Center, represented the "Weed 9" in a "SLAPPBack" lawsuit seeking emotional distress damages caused by the filing of the SLAPP and the two years the corporation dragged the litigation on through an unsuccessful appeal.

Amici have also been actively involved in defending activists from the oil and energy industry's attempt to use RICO-based SLAPPs to attack and silence people and groups who are attempting to protect land, water, and Indigenous rights from exploitation and corporate profiteering.[2] *Amici* have helped community

[2] *See, e.g.*, Paul Barrett, *How a Corporate Assault on Greenpeace is Spreading*, Bloomberg Businessweek (Aug. 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-

activists in Alabama defend themselves from a defamation SLAPP brought by a landfill operator after they opposed the dumping of hazardous coal ash in a landfill in their town.

SLAPPs are not limited to environmental activism. *Amici* have provided legal defense to nonprofit organizations, activists, community organizers, media organizations, and journalists in SLAPP cases around the country. *Amici* also actively engage in SLAPP policy discussions and have advocated for the adoption of anti-SLAPP laws at the federal level, as well as the state level. Recently, *amici* assisted with the drafting of anti-SLAPP laws or amendments to laws in Texas, Kentucky, Virginia, and Colorado.[3]

Over the past several years, through their work defending against SLAPPs and educating the legal community about SLAPPs, *amici* have seen SLAPPs proliferate in the U.S. and around the world. Any activist, organizer, or private citizen speaking out on any political issue, typically on behalf of the less-popular or less-powerful, is at risk of facing a SLAPP.

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greenpeace-is-spreading (last visited October 27, 2023).

[3] *See, e.g.*, Joe Mullin, *Critical Free Speech Protections Are Under Attack in Texas*, Electronic Frontier Foundation (Mar. 14, 2019), https://www.eff.org/deeplinks/2019/03/critical-free-speech-protections-are-under-attack-texas (last visited October 27, 2023); *Factsheet: Kentucky's Anti-SLAPP Legislation*, Protect The Protest, https://protecttheprotest.org/wp-content/uploads/2020/02/Kentucky-SLAPP-Factsheet.pdf (last visited October 27, 2023).

Public political dissent has never been more crucial and, through the power of the internet, has become even more accessible to all. SLAPPs pose particular dangers, not just to individuals, but to our society, human rights, and the rule of law. SLAPPs target advocates, community leaders, journalists, professors, whistleblowers, and everyday people who exercise their constitutional rights. Their true purpose is to silence criticism and inhibit dissent. Although the majority of SLAPPs are eventually dismissed, a SLAPP does not need to result in a judgment on the merits to have its intended effect. A meritless lawsuit can take years to resolve, diverting or even draining a defendant's resources, reputation, and morale. And that is precisely the point.

Most of the tort claims in Appellants' suit are those frequently seen in SLAPP suits. Their suit has the characteristics of litigation which attempts to silence and punish those who advocated for a controversial opinion on a matter of public interest, masquerading as legitimate claims. Although couched in terms of "breach of fiduciary duty" and other recognized torts, most of these claims arise out of the notion that Appellees' choice to advocate for their beliefs – while leaders of a nonprofit organization that is so engaged in public advocacy that it has an "Activism Caucus" – violates the best interests of the organization and the rights of its members with opposing viewpoints. Appellants did not allege that Appellees were acting in their own pecuniary interest, or to benefit their family members, or

some other traditionally accepted fiduciary conflict; instead the Appellees were alleged to have been pursuing "their personal political agenda." Complaint ¶ 262. The First Amendment does not allow courts to police which viewpoints advocated for by an organization or its leadership are in the organization's best interests, and tort claims are not the proper way to resolve this issue.

Every hallmark of a SLAPP can be found in Appellants' case. Appellants have cast a wide net, attempting to draw in parties who are only tangentially related. They have filed multiple complaints in multiple jurisdictions to attempt to remain in litigation as long as possible. Most importantly, nearly every neutral-appearing tort claim actually arises out of Appellees' advocacy for, or defense of, the boycott resolution – and there seems to be no dispute that the boycott resolution itself is protected conduct. *E.g.*, *Bronner II*, 259 A.2d at 745.

Amici have seen SLAPPs become epidemic. Laws like the D.C. Anti-SLAPP Act are an important bulwark against them. Without such strong anti-SLAPP protections, anyone who has the courage to speak out on political issues runs the risk of being subjected to SLAPP harassment via the lengthy and expensive process of defending themselves from a frivolous lawsuit. Anti-SLAPP statutes are one of the few mechanisms that exist to mitigate the effects of such bullying litigation aimed at thwarting lawful First Amendment activities. *Amici* urge this Court to uphold the Superior Court's interpretation of the Anti-SLAPP Act, which is consistent with the

language and purpose of the Act.

II. The Anti-SLAPP Act requires a plaintiff to present evidence beyond the complaint.

The Anti–SLAPP Act was designed to "ensure that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Council of the District of Columbia, Report of Cmte on Pub. Safety and the Jud. on Bill 18-893 (Nov. 18, 2010). The Act creates a special motion to dismiss, and provides that if the party filing the special motion "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 § 16-5501(b).

While the Act is silent as to how "likely to succeed on the merits" might be determined, this Court has ruled that it requires "more than the mere allegations in the complaint." *Fridman*, 229 A.3d at 506. *Fridman* restated the holding of *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), where the Court conducted a painstaking and thorough analysis of the language in the Act and concluded that "likely to succeed on the merits" requires an evidentiary showing beyond the allegations set forth in the pleadings alone. *Id.* at 1232. "[T]he court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find

that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id*.

The requirement of presenting "evidence – as opposed to just pointing to unsworn-to 'facts' in his pleadings – is the only appropriate way" to effectuate the purpose of any Anti-SLAPP statute. Robert T. Sherwin, *Ambiguity in Anti-SLAPP Law and Frivolous Litigation*, 40 Colum. J.L. & Arts 431, 463-64 (2017). Pleadings alone cannot meet the evidentiary showing required by the Act; if they could, there would be little difference between a special motion to dismiss and an ordinary motion.

Although it is unusual in our system to require an evidentiary showing at the motion to dismiss stage, this is an essential feature of the Act. As this Court noted in *Mann*, "[t]he dispositive nature of a court's grant of a special motion to dismiss after the claimant has been required to proffer evidence, but without a full opportunity to engage in discovery and before trial, is critical to our interpretation of the 'likely to succeed' standard." 150 A.3d at 1235. It is clear that pleadings alone cannot satisfy the burden. It has long been the rule that "'pleadings are not evidence against the party concerned.'" *Frisby v. United States*, 35 App. D.C. 513, 517 (D.C. Cir. 1910) (quoting *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)). And *Mann* specifically held that the plaintiff must "present evidence – not simply allegations – and that the evidence must be legally sufficient to permit a jury properly instructed

on the applicable constitutional standards to reasonably find in the plaintiff's favor." 150 A.3d at 1221.

Here, it does not appear that any evidence outside the Complaint was submitted. This contrasts with *Mann*, where the Court noted the "hefty volume of evidence in the record." *Id.* at 1252. *Mann* noted that showing likelihood of success on the merits requires "more than mere reliance on allegations in the complaint and mandates the production or proffer of evidence that supports the claim." *Id*. The Superior Court correctly found that standard was not met here.

III. The Anti-SLAPP Act applies where protected conduct forms part of the Plaintiff's case.

At a minimum, claims fall under D.C.'s Anti-SLAPP Act whenever protected conduct forms part of what the plaintiff must prove in order to prevail on those claims at trial. Because SLAPP suits often do not directly attack speech, but are dressed up as other ostensibly non-speech-related torts, this test necessarily requires a practical evaluation of the allegations in the particular case – not a theoretical analysis of the elements of the claim in a vacuum. Thus, while Appellants here argue that the claims at issue here do not have, as "elements," protected conduct under the Anti-SLAPP Act, their interpretation of what is required under the Anti-SLAPP Act is flawed. While this brief does not provide a deep analysis of the application of the legal standards to the factual allegations at issue here, it appears obvious that Appellants would need to include protected conduct as part of proving their claims,

and thus the Anti-SLAPP Act applies.

A. The Anti-SLAPP Act applies where an "element" of the claim includes protected conduct, but also where the claim has a nexus with protected conduct.

Appellants confine their argument to suggesting that the "elements" of their claims do not include protected conduct, but this Court's analysis of the Anti-SLAPP Act has not been so restricted. The Court has indicated that the "element of the claim" analysis is only *one* way that a claim may arise from protected conduct under the meaning of the Act.

In the prior appeal in this case, the Court discussed at some length what is required to meet the requirement that the movant 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." D.C. Code Sec. 16-5502(b). This Court explained that "for a claim to 'arise from' an act in furtherance of public advocacy, a party's statutorily protected activity must itself be the basis for that party's asserted liability." *Bronner II*, 259 A.3d at 734. Further, "where a claim is said to 'arise from' some predicate, . . . there [must] be a 'substantial connection' or nexus between the predicate and the claim." *Id.* at 746 (quoting *1230-1250 Twenty-Third St. Cond. Unit Owners Ass'n, Inc. v. Bolandz*, 978 A2d. 1188, 1191 (D.C. 2009)). This can be shown if "some form of speech within the Anti-SLAPP Act's protection is the basis of the asserted cause of action," or, put another way, that the protected conduct is

"the subject of the claim *or* an element of the cause of action asserted." *Bronner II*, 259 A.3d at 746 (emphasis added).

Appellants seize on a later statement in *Bronner II* in which the Court summed up its discussion by stating that the movant must show that "the claim is based on the movant's protected activity, *i.e.*, that such activity is an element of the challenged cause of action." *Id.* at 749. But this one summarizing sentence should not be taken to negate the more nuanced discussion that precedes it, in which the Court clearly stated that showing that the protected conduct is an "element" of the claim is only *one* way of demonstrating that the claim arises from protected activity. The thrust of the Court's holding in *Bronner II* was rejecting the notion that "a claim should nonetheless be deemed to arise from protected activity if the plaintiff's subjective motivation for asserting the claim was a desire to chill or punish speech." *Id.* at 748. It did not suggest that claims that actually arise from protected speech, regardless of the subjective motivation of the plaintiff, do not fall under the Act. The "basis" or "nexus" test, as analyzed by Appellees, is also a valid approach under *Bronner II.*

B. Under an "elements" analysis, the Anti-SLAPP Act applies where protected conduct forms part of what the plaintiff must prove to prevail.

Assuming that Appellants are correct that the Anti-SLAPP Act only applies where protected conduct is an "element" of the claim at issue, they are wrong about how this test is applied. In this context, the "elements" are simply what the plaintiff

must prove to prevail under the facts of the case – not the abstract description of the claim in a vacuum.

While this Court apparently has not had the opportunity to discuss at length what the term "element" means, its usage in the law is straightforward: "When used as a legal term of art, an 'element' means '[a] constituent part of a claim that must be proved for the claim to succeed,' as in the elements of a cause of action or defense." *Thompson v. Ouellette*, 406 Wis. 2d 99, 117 n.8, 986 N.W.2d 338, 347 (Ct. App. 2023) (quoting Black's Law Dictionary, "Element" (10th ed. 2014)). An element is, simply, any part of what the plaintiff must prove to prevail on the claim at issue.

This analysis is not performed in a vacuum. In *Bronner II*, this Court explained that "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim *and what actions by the defendant* supply those elements and consequently form the basis for liability." *Id.* at 747 (quoting *Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 908 (Cal. 2017)) (emphasis added). Thus, the analysis requires examination of the particular alleged conduct in the particular case. Courts should not simply look up the "elements" of the cause of action and determine whether those abstract elements include protected conduct; to do so would be to circumscribe the applicability of the Anti-SLAPP Act to a vanishingly small set of claims, and it would invite plaintiffs to recast their claims in creative ways to avoid the Act's reach. Instead, courts applying the Act should look

to what, under the facts of the case, the plaintiff needs to prove in order to succeed on the claim.

Appellants assert that the Superior Court was incorrect in finding that the claims here "arose from an act in furtherance of the right of advocacy on issues of public interest" and repeatedly rely on the argument that these claims do not inherently include an element of expressive conduct. Appellants state that "neither claim, for breach of fiduciary duty or corporate waste, has as an element expressive conduct," Appellants' Br. at 37; that *ultra vires* actions cannot be subject to the Anti-SLAPP Act "regardless of Defendants' own purportedly expressive and ideological motivations," *id.* at 41; that interference with business contracts does not "involve expressive conduct as 'an element of the claim,'" *id.* at 42-43; and that their claims regarding aiding and abetting breaches of fiduciary duty also "did not involve expressive conduct." *Id.* at 43.

These arguments misapprehend what it means to be an element of a claim. While this *amicus* brief is focused on the law rather than the facts presented, *amici* understand that, as the Superior Court found, each claim depends, in part or in whole, on the boycott resolution, or Appellees' alleged actions in support of or in defense of the boycott resolution. And, as noted above, the boycott resolution is clearly protected conduct.

This Court in *Bronner II* held that it is not enough for conduct at issue in the

claims to be "related in some way" to the resolution, 259 A.2d at 745, but did not suggest that claims that depend on proving advocacy for the resolution fall outside the Anti-SLAPP Act. In short, if the Appellants must prove that Appellees engaged in advocacy for the resolution, or other protected conduct, in order to prevail on a claim, then protected conduct forms an element of that claim in this case.

Appellants' approach runs headlong into extensive D.C. caselaw on the Anti-SLAPP Act, which frequently applies the law to claims that do not *inherently* include an element of expressive conduct but instead have a substantial connection to a defendant's expressive conduct *in that particular case.* In *Nicdao v. Two Rivers Public Charter School, Inc*., 275 A.3d 1287 (D.C. 2022), for example, this Court reversed the denial of special motions to dismiss under the Anti-SLAPP Act for claims of private nuisance and conspiracy. *Id.* at 1293-94. Two Rivers, a charter school, alleged that the defendants-appellants had interfered with the use and enjoyment of school buildings and threated business and property interests by protesting on a sidewalk in front of the school. *Id.* at 1293. Neither the trial court nor this Court required a showing that private nuisance or conspiracy *inherently* involve elements of expressive conduct – they obviously do not. This Court accepted the trial court's unchallenged ruling that "appellants made a prima facie showing that Two Rivers' claims arise from appellants' protected activity under the Anti-SLAPP Act." *Id.*

Just last month, in *Salem Media Group, Inc. v. Awan*, ___ A.3d ___, No. 22-CV-0004, 2023 D.C. App. LEXIS 257 (Sep. 7, 2023), this Court likewise reversed denials of a defendant's special motion to dismiss claims for intentional infliction of emotional distress and unjust enrichment, which the plaintiffs asserted were the result of the publication of defendant's book. This Court analyzed the elements of both intentional inflict of emotional distress, *id.* *44, and unjust enrichment, *id.* at *48, and did not find, nor could have found, that these claims *inherently* include an "element of expressive conduct." It nonetheless found the Anti-SLAPP Act applicable. *Id.* at *51. *See also Saudi American Public Relations Affairs Committee v. Institute for Gulf Affairs,* 242 A.3d 602, 605-07 (D.C. 2020) (reversing a denial of a special motion to dismiss under the Anti-SLAPP Act involving a claim for intentional infliction of emotional distress); *Competitive Enter. Inst. v. Mann*, Nos. 14-CV-101, 14-CV-126, 2016 D.C. App. LEXIS 528, at *95 (Dec. 22, 2016) (reversing denial of Anti-SLAPP motion on claim of intentional infliction of emotional distress).

Similarly, *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014), involved a plaintiff bringing several claims – "defamation, tortious interference in prospective business advantage, and false light invasion of privacy" – against individuals who she alleged had falsely edited her Wikipedia page. *Id.* at 1035. This Court held that the plaintiff had waived any argument that she was likely to succeed on her tortious interference

and false light claims, but did not take issue with the notion that the Anti-SLAPP Act applied to these claims. *Id.* at 1043 n.17.

Indeed, nearly every SLAPP suit considered by D.C.'s courts has involved one or more causes of action recast as ordinary tort claims – they are rarely framed as claims that include expressive conduct as an inherent element. Thus, *Tran v. WUSA9*, 2023 D.C. Super. LEXIS 18, was framed as a negligence claim. *Id.* at *1-2. In *Lawless v. Mulder*, 2021 D.C. Super. LEXIS 26, at *7, the "primary claim" was "fraud." *Id.* at *7. *Toufanian v. Lorenz*, 2021 D.C. Super. LEXIS 48, concerned "a sole claim of tortious interference with prospective business relations." *Id.* at *4.

In all these cases, the courts applied the appropriate approach to the Anti-SLAPP Act: at a minimum, if the plaintiff needs to prove the protected conduct in order to prevail on the claim, the protected conduct is an element of the claim. It does not matter whether the elements of that claim, expressed abstractly, include expressive conduct. To take one example: *amici* understand that Appellants allege that Appellees committed misconduct by using ASA resources to defend the boycott resolution. It would appear necessary for Appellants to prove that Appellees were defending the boycott resolution – protected conduct – in order to prevail on this claim. If so, the prima facie case under the Anti-SLAPP Act has been met.

IV. Claims based on Appellees' alleged allocation of monetary resources arise from protected expressive conduct and speech.

The Superior Court correctly found that the claims that are based upon

Appellees' alleged decisions regarding use of the organization's funds " 'arise from" an act in furtherance of the right of advocacy on issues of public interest," because the funds were allegedly used "in furtherance of their support of the 2013 resolution." JA 373. Spending money to support protected conduct is necessarily also protected conduct.

What is alleged here appears to be protected conduct. Appellants attempt to characterize these claims as similar to "defalcation," Appellants' Br. at 28, 36, because in *Bronner II* this Court, in a footnote (at JA 352) indicated that it did not believe the Anti-SLAPP Act was designed to protect such behavior. 259 A.2d at 747 n.78. The Court used "defalcation" to refer to "embezzling or misappropriating entrusted funds." *Id.*[4] But, as *amici* understand, that is not what has been alleged here – instead, Appellants allege that Appellees used ASA funds to support or defend the boycott resolution, which is itself protected conduct. Thus, the allegedly improper use of funds is that Appellees supported protected conduct.

For at least sixty years, the Supreme Court has recognized that funding expression (including litigation) is itself protected expressive conduct and speech.

[4] Locating a clear definition of "defalcation" is difficult, but does not include the type of behavior alleged here, a mere choice of how to spend organizational funds. *See, e.g., Bullock v. BankChampaign, N.A.,* 569 U.S. 267, 273-74, 133 S. Ct. 1754, 1759-60 (2013) (lengthy analysis of interpretation of "defalcation" in the bankruptcy context, addressing scienter requirement).

NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding that solicitation and financing of litigation are a form of "expression and association protected by the First [Amendment]"). More than 45 years ago, the Supreme Court noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

Thus, the Superior Court correctly found that "expenditure of funds for the advancement of the 2013 resolution" is based on protected activity, as are funds used to support the Resolution, or to pay legal fees to defend it. JA 373 (citing *Citizens United v. FCC*, 558 U.S. 310, 339 (2010); *Cruz v. FEC*, 542 F. Supp. 3d, 1, 7-8 (D.D.C. 2021)). To accept Appellants' arguments would allow plaintiffs wanting to punish or suppress expressive conduct and speech to simply recast their claims as "defalcation" or a similar hoary word, without scrutiny of the type of "misuse" or "misappropriation" of funds that is being alleged. Where the "misuse" or "misappropriation" is simply a disagreement about what speech or expressive conduct to fund, the First Amendment, as well as the Anti-SLAPP Act, apply.

CONCLUSION

Adopting the arguments presented by the Appellants would undermine the purposes and plain language of the Anti-SLAPP Act. *Amici* urge this Court to uphold the Superior Court's analysis in the instant case.

Dated: October 27, 2023.

Respectfully submitted,

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APPENDIX A
IDENTITIES AND INTERESTS OF SPECIFIC AMICI CURIAE

The following *amici curiae* join in this brief:

MEMBERS OF THE "PROTECT THE PROTEST" TASK FORCE

Amazon Watch is a nonprofit organization focused on protecting the rights of Indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people and farmers living in and around the "Oriente" region of the Ecuadorian Amazon, where the operations of Chevron's predecessor, Texaco, caused one of the worst environmental disasters in history. For two decades, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities' efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the "Protect the Protest" Task Force's litigation, advocacy, education and outreach work.

Climate Defense Project (CDP) is a nonprofit organization that provides legal and intellectual support to the climate movement through legal representation, public education, and rights training. Its main activities are

supporting criminal cases involving climate protesters, advancing legal arguments in court and in the media, and publishing educational materials.

Direct Action Everywhere (DXE) is a grassroots network of animal activists working to achieve revolutionary social and political change for animals. DxE's work includes community organizing, public outreach, demonstrations, investigations, animal rescues, and legal advocacy.

EarthRights International is a nongovernmental, nonprofit organization that litigates cases on behalf of communities around the world affected by human rights and environmental abuses, and also defends the rights of human rights and environmental defenders, including those who are sued or face other forms of legal harassment for their work. EarthRights has been a member of the Protect the Protest task force since its founding, and has an interest in ensuring that those exercising rights to political speech in various contexts are able to do so without fear of intimidation.

Greenpeace is a global network of independent campaigning organizations that use peaceful protest and creative communication to expose global environmental problems and promote solutions that are essential to a green and peaceful future. Greenpeace is a member of the PTP Coalition and active in litigation, advocacy, education and outreach.

International Corporate Accountability Roundtable (ICAR) is a nonprofit organization that fights to end corporate abuse of people and planet by

advocating for legal safeguards that hold big businesses accountable. ICAR currently acts as the secretariat organization for the Protect the Protest task force.

Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

Oil & Gas Action Network (OGAN) is an organizing collective that seeks to connect mass movements and science into the direct action world. OGAN seeks new solutions and community building alternatives to global capitalism.

Union of Concerned Scientists is a national non-profit organization that puts rigorous, independent science to work to solve our planet's most pressing problems. With offices in Washington, DC, and three other cities, the organization combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future.

Water Protector Legal Collective (WPLC) is an Indigenous-led legal nonprofit that provides support and advocacy for Indigenous Peoples and Original Nations, the Earth, and climate justice movements. Born out of the #NoDAPL movement, WPLC's founding mission was to serve as the on-the-ground legal team for the Indigenous-led resistance to the Dakota Access Pipeline (DAPL) at Standing Rock where we provided legal support for Water Protectors in over 800+ criminal defense cases in North Dakota. Today, WPLC continues in the frontline legal battles

to honor the Earth and protect the Sacred, through direct representation of Indigenous Peoples in both civil and defense work; through ongoing, long-term accompaniment and legal advocacy; community legal education and training for our relatives in direct response to needs; and use of international human rights norms and mechanisms to further our legal work. WPLC recognizes the rise of Strategic Lawsuits Against Public Participation against human rights defenders and public interest organizations, and is a member organization of the Protect the Protest coalition.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via through the court's electronic filing system to the following on the 27th day of October, 2023:

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