IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MUSLIM ADVOCATES, Plaintiff, v. **FACEBOOK, INC., *et al.*,** Defendants.	**Case No.: 2021 CA 001114 B** Judge Anthony C. Epstein Next Event: Initial Scheduling Conference Date: July 9, 2021 at 9:30 AM

DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)

Defendants Facebook, Inc, Mark Zuckerberg, Sheryl K. Sandberg, Joel Kaplan, and Kevin Martin respectfully request that, pursuant to Rule 12(b), this Court dismiss in its entirety the Complaint filed by Plaintiff Muslim Advocates. In support of this motion, Defendants submit a Memorandum of Points and Authorities and a proposed order. Plaintiff does not consent to this motion.

May 28, 2021

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12(b)

Billions of people use social media to express themselves, which means that content reflecting the full range of human experience finds expression on platforms like Facebook. Facebook agrees with Plaintiff Muslim Advocates that anti-Muslim hate speech is vile, and devotes significant resources to keeping such abuse off its platform based on Community Standards that outline what is and is not allowed on Facebook. Enforcement of the Community Standards requires being aware of potentially violating content, either through Facebook's own efforts or reports by third parties, and making judgments as to whether that content should be removed as violating the Community Standards. As Facebook has candidly acknowledged, these judgments are subject to disagreement and error, but Facebook remains committed to making its service a place where people feel safe to share with others and express themselves.

Managing a global community in this way has never been done before. Facebook is committed to continuing to improve its enforcement efforts and believes that means engaging Congress and other stakeholders to share and seek input on its policies and practices. As part of this ongoing dialogue, Facebook executives have testified before Congress regarding the Community Standards.

Plaintiff asserts misrepresentation claims against Facebook and four of its executives under the D.C. Consumer Protection Procedures Act ("CPPA") and common law. According to Plaintiff, Defendants have misrepresented to Congress that Facebook removes all content that violates the Community Standards. As explained below, the alleged statements make no such misrepresentation. On the contrary, Facebook executives have explained that Facebook's enforcement of the Community Standards depends on being aware of potentially violating content and making judgments about removing that content. At bottom, Plaintiff's claims challenge those judgments, and are subject to dismissal on multiple independent grounds.

First, Plaintiff fails to establish Article III standing. Plaintiff claims it has been harmed because it allegedly did not receive accurate information about Facebook's service and because Facebook allegedly received revenue due to Plaintiff's continued use of the service. Neither of these alleged harms is particular to Plaintiff, and therefore does not establish an injury in fact. Allegations that Plaintiff expended resources in reliance on the alleged misrepresentations also do not establish any injury in fact because, as Plaintiff acknowledges, it expended resources and engaged with Facebook regarding third-party content long before the Congressional testimony containing the alleged misrepresentations.

Second, all of Plaintiff's claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), because they seek to impose liability on Facebook for not removing third-party content that Plaintiff believes should be removed. Plaintiff attempts to plead around the CDA by bringing misrepresentation claims, but it is clear from the Complaint that Plaintiff is challenging Facebook's alleged failure to remove certain third-party content that Plaintiff believes violates the Community Standards. These are editorial decisions that go to the core of conduct protected by the CDA.

Third, all of Plaintiff's claims fail because they are based on alleged misrepresentations that are not, as a matter of law, false or misleading statements of material fact. Contrary to Plaintiff's assertion that Facebook executives represented in Congressional testimony that Facebook removes *all* content that violates the Community Standards, that testimony makes clear that enforcement of the Community Standards depends on Facebook being aware of potentially violating content and making judgments that are subject to disagreement and error.

Fourth, Plaintiff cannot state any claim under the CPPA because it regulates conduct arising out of consumer-merchant relationships, and Plaintiff does not, and cannot, allege any such relationship with Facebook, or that the alleged misrepresentations were made in connection with the sale of goods or services to Plaintiff or anyone else.

Finally, Plaintiff cannot state any common law misrepresentation claim because Plaintiff does not, and cannot, allege reasonable reliance on any Congressional testimony by Facebook executives that Facebook removes *all* content that violates the Community Standards, or any intent by Defendants to induce such reliance for the same reason Plaintiff cannot establish any false or misleading statement of material fact.

Facebook is committed to improving its efforts to keep hate speech off its platform, and to continuing to engage with Congress and other stakeholders on this important issue of public interest. But if Facebook does not remove all third-party content that Plaintiff or others believe violate its Community Standards, that does not create a legal cause of action. Accordingly, Plaintiff's claims should be dismissed.

BACKGROUND

I. Facebook's Community Standards

Plaintiff alleges that, "[s]ince at least 2011, Facebook has had Community Standards." Compl. ¶ 20. As the Community Standards explain, they are a set of policies that "outline what is and is not allowed on Facebook," and reflect Facebook's judgment on how to balance its "commitment to expression" with its "role in keeping abuse off" its platform. Exh. A, at 1.[1]

The Community Standards further explain that Facebook's enforcement "relies on "information available to [it]." *Id.* at 3. That means Facebook "may not detect" third-party content that violates the Community Standards, and that when potentially violating conduct is identified by Facebook or reported by third parties, there are further judgments to be made, based on, among other things, specific words and/or images used, the intent behind them, and the context in which they appear. *Id.* "Our commitment to expression is paramount, but we recognize the internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values: [authenticity, safety, privacy, and dignity]." *Id.* at 2.

Between January and March 2021, Facebook took action on over 30 million pieces of content on Facebook and Instagram for violating Community Standards on hate speech alone.[2]

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[1] The Introduction to the Community Standards is attached as Exhibit A. Because Plaintiff quotes from and relies on the Community Standards and testimony of Facebook executives, the entirety of those materials are incorporated by reference into the Complaint and are therefore properly considered by the Court on a motion to dismiss. *See Washkoviak v. Student Loan Mktg. Ass'n*, 900 A.2d 168, 178 (D.C. 2006) (noting that "[c]ourts may consider documents 'incorporated in the complaint' when considering a 12(b)(6) motion").

[2] *See* Community Standards Enforcement Report (Q1 2021), *available at* https://transparency.fb.com/data/community-standards-enforcement/.

II. Third-Party Content That Plaintiff Alleges Facebook Should Have Removed

Plaintiff alleges that Facebook "routinely" decides not to remove content that violates the Community Standards. Compl. ¶ 52. In support of that conclusion, Plaintiff relies on three types of content that Plaintiff asserts should have been removed as violating the Community Standards.

First, Plaintiff alleges that, in response to reports by Plaintiff and others that certain specific third-party content violates the Community Standards, Facebook removed some but not all of the reported content from the platform. *Id.* ¶¶ 65-72, 75, 83-84, 98, 101-104.

Second, Plaintiff alleges that certain specific third-party content remains on the platform, even though Plaintiff believes it violates the Community Standards. Plaintiff does not allege that it was detected by or reported to Facebook, or that it appears on the platform because of any decision by Facebook not to remove it. *Id.* ¶¶ 82, 85, 86, 87-92, 113.

Third, Plaintiff alleges that broad categories of unspecified third-party content remain on the platform, even though Plaintiff believes they violate the Community Standards. But, again, Plaintiff does not allege that it was detected by or reported to Facebook, or that it appears on the platform because of any decision by Facebook not to remove it. *Id.* ¶¶ 96, 97, 107, 108.

III. Alleged Misrepresentations Regarding the Community Standards

Plaintiff identifies three types of alleged misrepresentations: (1) statements by Facebook executives in testimony before Congress, *id.* ¶¶ 33-48; (2) unspecified statements made by unidentified "Facebook leaders" in unspecified meetings with members of Congress and their staff, civil rights groups, including Plaintiff, and "other leaders," *id.* ¶ 52; and (3) two statements by "a Facebook spokesperson" in *The Guardian* newspaper, *id.* ¶ 51. According to Plaintiff, these "repeated statements by Facebook's executives about removing all content and groups that violate Facebook's standards, policies, and other standards articulated by Congress were intentionally false." *Id.* ¶ 114.

With respect to the Congressional testimony, Plaintiff alleges that, because the content above was not removed from Facebook, Defendants misrepresented to Congress that Facebook "takes down any content that violates its policies." *Id.* at p. 2. But Plaintiff does not identify any statements that support this conclusory assertion. Instead, Plaintiff relies on a handful of statements excerpted from over a thousand pages of testimony by Facebook executives that do not reflect their full testimony. *Id.* ¶¶ 29-48.[3]

For example, Plaintiff quotes the following from Mark Zuckerberg's testimony before the House Financial Services Committee on October 23, 2019: "If *anyone*, including a politician, *is saying things that can cause, that is calling for violence* or could risk imminent physical harm, or voter or census suppression when we roll out the census suppression policy, *we will take that content down*." *Id.* ¶ 34 (emphasis in Complaint). But Plaintiff omits other statements by Mr. Zuckerberg during the same hearing, explaining that Facebook is "not perfect" and that "mistakes" are made.[4]

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Based on the above alleged misrepresentations, Plaintiff asserts claims against Facebook and all of the individual Defendants under the CPPA, as well as common law claims against Facebook and three of the individual Defendants for fraudulent and negligent misrepresentation and for aiding and abetting those torts against two of the individual Defendants.

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[3] Some of the alleged statements do not concern the Community Standards. For example, the alleged statement in paragraph 36 was made in response to a question about opioid ads. Similarly, the testimony record cited in paragraphs 39 and 40 was about election interference.

[4] *An Examination of Facebook and Its Impact on the Financial Services and Housing Sectors before H. Comm. on Fin. Servs.*, 116th Cong. 59 (2019) (testimony of Mark Zuckerberg), available at https://financialservices.house.gov/uploadedfiles/chrg-116hhrg42452.pdf.

ARGUMENT

I. Plaintiff Fails to Establish Article III Standing

A plaintiff seeking to invoke this Court's jurisdiction must satisfy Article III standing requirements. *See Padou v. District of Columbia Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013) ("Although Congress did not establish this court under Article III of the Constitution, we still apply in every case the constitutional requirement of a case or controversy and the prudential prerequisites of standing." (internal quotation marks omitted)). To establish Article III standing, a plaintiff must show: "(1) an injury in fact; (2) a causal connection between the injury and the conduct of which the party complains; and (3) redressability." *Id.* Plaintiff does not allege facts establishing any of these elements of Article III standing.

A. Alleged Lack of Information Does Not Establish Injury

Plaintiff asserts that the alleged misrepresentations deprived consumers of information about "the risk of third-party harms from the product they are using" and "how their product choices might create harm to others." Compl. ¶¶ 143, 145. Those allegations do not show any injury that is particularized to Plaintiff and therefore do not establish any injury in fact.

To establish an injury in fact, a plaintiff must identify "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Vining v. Executive Bd. of District of Columbia Health Benefit Exchange Authority*, 174 A.3d 272, 278 (D.C. 2017). "A particularized injury is one that 'affects the plaintiff in a personal and individual way.'" *Id.* at n.26. Allegations of injury based on purported misrepresentations to the general public "without any other 'distinct and palpable injury' personal to" the particular plaintiff "cannot justify the invocation of" the jurisdiction of courts in this District. *Grayson v. AT&T Corp.*, 15 A.3d 219, 246 (D.C. 2011); *see also Beyond Pesticides v. Dr Pepper Snapple Grp., Inc.*, 2019 WL 2744685, at *1 (D.D.C. July 1, 2019)

(concluding plaintiff organization lacked standing because the plaintiff "never shows it or a member suffered an actual injury").

Here, as in *Grayson*, Plaintiff does not allege that it suffered any harm from the alleged misrepresentations that distinguishes it from any other resident of the District. Accordingly, the alleged lack of information about Facebook's platform from the alleged misrepresentations is not particular to Plaintiff and therefore does not establish any injury in fact.

B. Alleged Revenues to Facebook Does Not Establish Injury Or Traceability

Plaintiff alleges that "District consumers, including [Plaintiff], have . . . reasonably relied on Defendants' misrepresentations in continuing to operate their Facebook accounts and take other actions that increased Facebook's revenues and profits, and, in turn, increased the income and/or wealth of the other Defendants." Compl. ¶ 149. Plaintiff does not explain how any financial benefit to Facebook from Plaintiff's continued use of the service *harmed* Plaintiff or how any such harm is particular to Plaintiff, which again means these allegations do not establish any injury in fact. *Cf. Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013) (rejecting the argument that "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful"). Plaintiff also does not explain how its continued use of Facebook is traceable to any alleged misrepresentation by Facebook executives.

C. Alleged Expenditure of Resources Does Not Establish Traceability Or Redressability

Plaintiff alleges that it expended considerable time and resources to educate Facebook and the public about anti-Muslim content and to identify and combat anti-Muslim statements on the platform. *See* Compl. ¶¶ 119-133. These allegations do not establish any injury that is traceable to the alleged misrepresentations in Congressional testimony by Facebook executives, or that would be redressed by a finding of liability in this case.

On traceability, "[t]he causation prong of the standing requirement is only met if plaintiffs 'allege personal injury fairly traceable to the defendant's *allegedly unlawful conduct*.'" *Gordon v. Haas*, 828 F. Supp. 2d 13, 18 (D.D.C. 2011) (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). "[A]n injury will not be 'fairly traceable' to the defendant's challenged conduct nor 'redressable' where the injury depends not only on that conduct, but on independent intervening or additional causal factors." *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991). Thus, a plaintiff that would have been injured regardless of any alleged conduct by the defendant cannot establish causation. *See, e.g.*, *Blocker v. Small Business Admin.*, 916 F. Supp. 37, 42 (D.D.C. 1996) (causation requirement not met where alleged injury, overdraft charges, "would still have been incurred regardless of the [defendant's] action").

Plaintiff alleges that, "[s]ince 2013, [it] has attended many calls and meetings every year with Facebook staff members to educate them about the dangers of allowing anti-Muslim content to flourish on the platform and *not removing content that violates the company's standards and policies*." Compl. ¶ 124 (emphasis added). For a 2014 report "which highlighted examples of anti-Muslim content online, including on Facebook's platform," Plaintiff alleges that it "spent well over 200 hours compiling examples of anti-Muslim content," *id.* ¶ 125, though it does not allege how much of that time was devoted to reviewing Facebook. Plaintiff also alleges that, since 2018, it "has dedicated at least 30 hours of work per week (i.e., at least 2,000 hours a year), and often much more, to the effort to rid Facebook of anti-Muslim content that violates Facebook's standards and policies." *Id.* ¶ 130.

None of these alleged expenditures is traceable to any alleged misrepresentation by Defendants. *First*, most of the alleged expenditures predated any alleged misrepresentations, which are based on Congressional testimony between 2018 and 2020, and therefore could not

have been caused by them. *Second*, all of the alleged expenditures are caused by anti-Muslim content posted by third parties, which Plaintiff admits is not limited to Facebook, and therefore were caused by those third parties, not by Congressional testimony of Facebook executives. *See Foundation on Economic Trends v. Thomas*, 661 F. Supp. 713, 719 n.18 (D.D.C. 1986).

II. Plaintiff's Claims Are Barred by the Communications Decency Act.

All of Plaintiff's claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), because they seek to hold Defendants liable for not removing certain third-party content that Plaintiff believes violates the Community Standards. At bottom, Plaintiff challenges Facebook's failure to remove third-party content from its platform. But "the decision whether to print or retract a given piece of content—the very actions for which [the Complaint] seeks to hold Facebook liable"—is the "very essence" of conduct that is protected by the CDA. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359–60 (D.C. Cir. 2014) (collecting cases).

Congress enacted the CDA to address the "specter of tort liability" on the Internet and its "obvious chilling effect." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)). As Congress recognized, "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Id.* "By the same token, however, the CDA 'encourage[s] service providers to self-regulate the dissemination of offensive material over their services.'" *Id.*

To effectuate these goals, the statute provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The law bars liability "under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). The CDA "establish[es] broad 'federal immunity to any cause of action that would make service providers liable for

information originating with a third-party user of the service.'" *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007).

"Consistent with Congress' intent to confer broad immunity for the re-publication of third-party content, internet services may invoke § 230 immunity as grounds for dismissal" on the pleadings. *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267–68 (D.C. Cir. 2019); *see also Klayman*, 753 F.3d at 1357 ("Preemption under the [CDA] is an affirmative defense, but it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint."); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process.").

The CDA "mandates dismissal if (i) [the defendant] is a 'provider or user of an interactive computer service,' (ii) the information for which [the plaintiff] seeks to hold [the defendant] liable was 'information provided by another information content provider,' and (iii) the complaint seeks to hold [the defendant] liable as the 'publisher or speaker' of that information." *Marshall's Locksmith,* 925 F.3d at 1268 (quoting *Klayman*, 753 F.3d at 1357 (quoting 47 U.S.C. § 230(c)(1)); brackets in original). Applying this standard, courts consistently apply CDA immunity to dismiss claims against Facebook and its officers arising from third-party content that was removed or remains on its platform.[5] The same result in warranted here.[6]

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[5] *See, e.g., Klayman,* 753 F.3d at 1357 (dismissing claims against Facebook and an individual defendant); *Caraccioli v. Facebook*, Inc., 167 F. Supp. 3d 1056, 1065–66 (N.D. Cal. 2016); *Sikhs for Justice, "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095–96 (N.D. Cal. 2015), *affirmed sub nom.*, *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017).

[6] "'None of this means, of course, that the original culpable party who posts defamatory messages [will] escape accountability.'" *Bennett*, 882 F.3d at 1168 (quoting *Zeran*, 129 F.3d at

A. Defendants are "Interactive Computer Service" Providers

As a "social networking website" (Compl. ¶ 7), Facebook is a provider of an "interactive computer service." *See, e.g., Klayman*, 753 F.3d at 1357 ("Facebook qualifies as an interactive computer service because it is a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server,' 47 U.S.C. § 230(f)(2)"); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016) (same). As Facebook executives, Defendants are also "providers" entitled to the protections of the CDA. *See Klayman*, 753 F.3d at 1357; *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011).

B. Plaintiff's Claims Treat Defendants As "Publishers" of Third-Party Content

It is well settled that "the decision whether to print or retract a given piece of content—the very actions for which [the Complaint] seeks to hold Facebook liable"—is the "very essence" of conduct protected by the CDA. *Klayman,* 753 F.3d at 1359–60; *see also, e.g., Bennett,* 882 F.3d at 1167-68 ("the decision to print or retract is fundamentally a publishing decision for which the CDA provides explicit immunity"). "[B]oth the negligent communication of a [harmful] statement and the failure to remove such a statement when first communicated by another party . . . constitute publication." *Zeran*, 129 F.3d at 332.

Plaintiff attempts to avoid the CDA by asserting misrepresentation claims based on statements that Plaintiff alleges are false and misleading because of Facebook's purported failure to "remove hateful and harmful content" from its platform. *See e.g.*, Compl.¶¶ 52 ("Facebook routinely did not and does not remove content that clearly violates its Community Standards"); ¶ 55 ("Facebook has routinely decided not to remove" third-party content); ¶¶ 57-113 (relying on

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330). "It means only that [plaintiffs'] legal remedy is against . . . the content provider, not against [Facebook] as the publisher." *Id.*

"instances in which Facebook has not removed or taken down anti-Muslim content or groups that violate Facebook's Community Standards"); ¶ 141 (alleging that Facebook violated the CPPA by "routinely and reliably decid[ing] not to take down or remove all content from Facebook's platform that violates Facebook's Community Standards"); ¶ 142 (same, CPPA cause of action); ¶ 153 (same, fraudulent misrepresentation cause of action); ¶ 163 (same, negligent misrepresentation cause of action); ¶¶ 166-67 (same, aiding and abetting cause of action).

Courts have consistently rejected such artful pleading where, as here, plaintiff's theory of liability turns on decisions by the defendant regarding third-party content, and therefore treats the defendant as the publisher of that content. *See e.g.*, *Klayman*, 753 F.3d at 1359–60 (applying CDA to dismiss negligence claims based on Facebook's alleged failure to remove third-party content that the plaintiff alleged was violent and hateful); *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119 (N.D. Cal. 2020) (applying CDA to dismiss contract claim based on Facebook's removal of third-party content allegedly in violation of statements in its terms of service); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016) (applying CDA to dismiss tort, contract, and consumer protection claims based on Facebook's alleged failure to remove third-party content that the plaintiff alleged violated the terms of service); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 207 (2017) (applying CDA to dismiss breach of contract and negligence claims based on Facebook's alleged "failure to remove content posted by others"); *see also Doe v. MySpace*, 528 F.3d 413, 419-20 (5th Cir. 2008) (applying CDA to dismiss negligence claim based on defendant provider's failure to remove third-party content); *Murguly v. Google LLC*, 2020 WL 907919, at *3 (D.N.J. Feb. 25, 2020) (applying CDA to dismiss negligence claim based on provider's "decisions relating to the monitoring, screening, and deletion of content from its network") (citation omitted); *Murphy v. Twitter, Inc.*,

60 Cal. App. 5th 12 (2021) (applying CDA to dismiss contract and consumer protection claims based on provider's removal of third-party content allegedly violating statements in the provider's user agreement).

Here, as in those cases, Plaintiff's claims challenge Facebook's decisions regarding third-party content, and therefore those claims seek to impose liability on Facebook as the "publisher" of third-party content under the CDA. *Cross*, 14 Cal. App. 5th at 207 ("[W]hat matters is not the name of the cause of action," but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.") (internal citations and quotation marks omitted).

C. Plaintiff's Claims Are Based on Third-Party Content

All of Plaintiff's claims are based on Facebook's alleged failure to remove content from its platform that was "provided by another information content provider." 47 U.S.C. § 230(c)(1). Plaintiff admits that all of the content that it alleges Facebook should have removed was created by third parties. *See, e.g.*, Compl. ¶ 56 (referencing "anti-Muslim groups" posting content); ¶ 79 (referencing "international fake news operation that spread anti-Muslim propaganda on Facebook"); ¶ 81 (referencing "white nationalists, militias, and anti-Muslim hate groups" as source of content). That Facebook provides a platform for third-party content and makes certain content moderation policies and decisions does not make Facebook an "information content provider." *See Bennett,* 882 F.3d at 1167-68 (rejecting argument "that by establishing and enforcing its Blogger Content Policy, Google is influencing—and thus creating—the content it publishes. This argument ignores the core of CDA immunity").

D. The Purpose of the CDA Supports Its Application Here

Congress's core purpose in enacting the CDA was to encourage platforms like Facebook to engage in efforts to remove inappropriate third-party content without fear of liability. *See*

Bennett, 882 F.3d at 1166 (the "CDA 'encourage[s] service providers to self-regulate the dissemination of offensive material over their services'" and "corrected the trajectory of earlier state court decisions that had held computer service providers liable when they removed some—but not all—offensive material from their websites"). Plaintiff's claims contravene that core purpose because, if accepted, anyone who disagrees with how Facebook enforces its Community Standards could pursue that dispute in court. Platforms like Facebook would face powerful disincentives to adopt and enforce policies to combat inappropriate conduct because the very act of doing so would subject them to liability that they could avoid simply by doing nothing. The CDA was enacted precisely to prevent such a result.

III. All of Plaintiff's Claims Fail Because Plaintiff Does Not Allege Any False Or Misleading Statement of Material Fact

All of Plaintiff's claims require a false or misleading statement of material fact. *See Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130-31 (D.C. 2015) (misrepresentation torts require false statement of fact); *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 255-56 (D.C. 2013) (CPPA claim requires false or misleading statement of fact). Plaintiff asserts that Facebook executives stated in Congressional testimony that Facebook "remove[s] *all* content and groups that violate Facebook's standards, policies, and other standards articulated to Congress," Compl. ¶ 114 (emphasis added), and these statements were false and misleading because, at the time they were made, Facebook "routinely did not remove content" that violated the Community Standards, *id.* ¶ 53.[7] None of the alleged statements supports that assertion.

[7] Plaintiff also purports to assert claims based on statements by Facebook executives in meetings with members of Congress and their staff and civil rights groups and in *The Guardian* newspaper. But Plaintiff does not identify a single specific statement in the meetings, or any facts regarding the circumstances of these alleged statements, including who made the alleged statements or why they were misleading. The only statements specifically identified in the Complaint come from Congressional testimony by Facebook executives.

First, the vast majority of statements expressly state that Facebook must be aware of potentially violating third-party content to remove it as violating the Community Standards. *See e.g., id.* ¶ ¶ 35 ("when content gets flagged to us … if it violates our policies, then we take it down"); ¶ 36 ("ads [that are] flagged for us we will review and take [them] down if they violate our policies[.]"); ¶ 37 ("*When we find things that violate these standards, we remove them*") (emphasis added in Complaint); ¶ 39 ("*When we find bad actors, we will block them*. And *when we find content that violates our policies, we will take it down*") (emphasis added in Complaint); 40 ("We remove this content when we become aware of it"); ¶ 42 ("We also remove any content that praises or supports terrorists or their actions whenever we become aware of it"); ¶ 48 ("*[w]hen we become aware of these pages we will remove them*") (emphasis in Complaint).

Second, all of the statements, when viewed in context, make clear that they describe Facebook's goal of always improving its enforcement efforts, which requires both an awareness of potentially violating third-party content and judgments as to whether to remove it as violating the Community Standards that Facebook executives candidly and consistently admit are subject to disagreement and mistakes. For example, Plaintiff quotes the following from Mr. Zuckerberg's testimony before the House Financial Services Committee on October 23, 2019: "*If anyone*, including a politician, *is saying things that can cause, that is calling for violence* or could risk imminent physical harm, or voter or census suppression when we roll out the census suppression policy, *we will take that content down*." *Id.* ¶ 34 (emphasis in Complaint). But Plaintiff omits his statements during the same hearing explaining that "more than 100 billion pieces of content a day" are posted across Facebook products, which means that content is

"missed," and that enforcing the Community Standards requires Facebook to make judgments that are "nuanced," subject to "errors," and always "improving."[8]

Other Facebook executives also made these points in the same Congressional testimony relied upon by Plaintiff. *See, e.g.*, *Facebook, Inc. Responses to Questions for the Record, S. Comm. on Commerce, Science & Transp.*, 60 (June 8, 2018) ("[O]ur enforcement is not perfect. We make mistakes because our processes involve people, and people are not infallible. We are always working to improve.");[9] *Securing U.S. Election Infrastucture & Protecting Political Discourse before Subcomm. On Nat'l Sec. of the H. Comm. on Oversight & Reform*, 116th Cong. 53 (May 22, 2019) (Testimony of Nathaniel Gleicher) ("[O]ne of the things that we have seen very clearly is we are not going to be perfect. We make mistakes.");[10] *Hate Crimes and the Rise of White Nationalism before the H. Committee on the Judiciary*, 119th Cong. Statement of Neil Potts 5 (Apr. 9, 2019) ("These can be difficult decisions, and we will not get them all right, but we strive to apply our policies consistently and fairly to a global and diverse community.").[11]

The testimony cited by Plaintiff, when viewed in context, makes clear that it describes Facebook's goal of always improving its enforcement efforts, which require both an awareness of potentially violating content and judgments by Facebook as to whether to remove it. Accordingly, Plaintiff has not alleged and cannot prove any actionable false or misleading

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[8] *An Examination of Facebook and Its Impact on the Financial Services and Housing Sectors before H. Comm. on Fin. Servs.*, 116th Cong. 59 (2019) (testimony of Mark Zuckerberg), available at https://financialservices.house.gov/uploadedfiles/chrg-116hhrg42452.pdf.

[9] Available at https://www.commerce.senate.gov/services/files/9D8E069D-2670-4530-BCDC-D3A63A8831C4.

[10] Available at https://docs.house.gov/meetings/GO/GO06/20190522/109538/HHRG-116-GO06-Transcript-20190522.pdf.

[11] Available at https://www.congress.gov/116/meeting/house/109266/witnesses/HHRG-116-JU00-Wstate-PottsN-20190409.pdf.

statement of material fact in support of its claims. *See Sibley v. St. Albans School*, 134 A.3d 789, 813 (D.C. 2016) (holding that defendant's mission statement was not a false statement of fact for purposes of fraud claim).

IV. Plaintiff Fails to State Any Claim Under the CPPA

The Complaint does not adequately allege any violation of the CPPA. As relevant here, the CPPA makes it unlawful for "any person to engage in an unfair or deceptive trade practice," including by "misrepresent[ing] as to a material fact which has a tendency to mislead." D.C. Code § 28-3904(e); *see* Compl. ¶ 141. Liability under Section 28-3904(e) is cabined by the CPPA's limited purpose, which is to "establish[] an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c). Thus, "the CPPA does not cover all consumer transactions, and instead only covers 'trade practices arising out of consumer-merchant relationships.'" *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (quoting *Snowder v. District of Columbia*, 949 A.2d 590, 599 (D.C. 2008)).

A. Plaintiff Does Not Allege a "Trade Practice"

The CPPA defines a "trade practice" to mean "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, *a sale, lease or transfer,* of consumer goods or services." D.C. Code § 28-3901(a)(6) (emphasis added). The statute further defines "goods and services" to mean "any and all parts of the economic output of society," including "consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types." *Id.* § 28-3901(a)(7). Under this statutory language, "a valid claim for relief under the CPPA must originate out of a consumer transaction." *Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006). Allegations of an unfair trade practice are considered "in terms of how the practice would be

viewed and understood by a reasonable consumer." *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008).

Here, the alleged statements do not constitute a "trade practice" because they do not arise out of any "consumer transaction," *Ford*, 908 A.2d at 81. They appear in congressional testimony by Facebook executives and concern Facebook's application of its Community Standards to third-party content. No "reasonable consumer," *Pearson*, 961 A.2d at 1075, would understand those statements to concern a sale, lease, or transfer of consumer goods and services.

The Complaint alleges that the statements at issue are connected to Facebook's promotion of its platform to users. But, as Plaintiff admits, Compl. ¶ 11, access to Facebook's platform is free, and therefore providing access to Facebook is not "a *consumer* transaction," *Ford*, 908 A.2d at 81 (emphasis added). *See Adler v. Vision Lab Telecomms., Inc.*, 393 F. Supp. 2d 35, 40 (D.D.C. 2005) (dismissing CPPA claim based on allegations that defendants sent plaintiffs unsolicited faxes on the ground that plaintiffs did not adequately allege that they actually purchase, lease, or receive services from defendants); *see also Krukas v. AARP, Inc.* 376 F. Supp. 3d 1, 38 (D.D.C. 2019) (concluding that *Adler* held that "no consumer-merchant relationship existed because the plaintiffs *never bought anything*," and thus were not consumers) (emphasis in original); *Cross*, 14 Cal. App. 5th at 203 (noting that Facebook "is not primarily engaged in the business of selling or leasing goods or services" because Facebook "offers a free service to its users") (internal quotation marks omitted). Accordingly, the Complaint does not adequately allege facts that would establish that the statements at issue constitute a "trade practice" under the CPPA.

B. Plaintiff Does Not Allege a Consumer-Merchant Relationship with Facebook

Second, and relatedly, the Complaint does not adequately allege the existence of a consumer-merchant relationship between Facebook and Plaintiff. The statute defines a

"merchant" as a person "who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice." D.C. Code § 28-3901(a)(3). Under the CPPA, a "merchant" is "a person who, in the ordinary course of business, sells or supplies consumer goods or services." *Sundberg*, 109 A.3d at 1129 (citing D.C. Code § 28-3901(a)(3)).

The Complaint does not allege that Facebook supplied Plaintiff with *any* commercial goods or services or that Facebook was "connected with the 'supply' side of the consumer transaction" impacted by the alleged misrepresentation, as is required to state a claim for relief under the CPPA. *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 91 (D.D.C. 2016); *see also Howard*, 432 A.2d at 709 ("While a 'merchant' is not limited to the actual seller of the goods or services complained of, he must be a 'person' connected with the 'supply' side of a consumer transaction."). Indeed, the only alleged commercial activity by Facebook—the sale of advertising space to companies seeking to promote their products on Facebook's free service, *see* Compl. ¶¶ 11, 139—has nothing to do with either Plaintiff or the statements at issue, which do not originate from and are not about Facebook's ad business. *See Snowder*, 949 A.2d at 600.

C. Plaintiffs Do Not Allege That The Individual Defendants Are "Merchants"

Finally, the CPPA claim against the individual Defendants should be dismissed for the additional reason that the Complaint does not adequately allege those individuals are "merchants" under the CPPA. As set forth above, a "merchant" is "a person who, in the ordinary course of business, sells or supplies consumer goods or services." *Sundberg*, 109 A.3d at 1129 (citing D.C. Code § 28-3901(a)(3)). The Complaint does not, and cannot, allege that they sell or supply consumer goods or services to Plaintiff or anyone else. For that reason alone, the CPPA claim against the individual Defendants should be dismissed.

V. Plaintiff Fails to State Any Common Law Misrepresentation Claim

Plaintiff is a non-profit organization that has been engaging with Facebook on the issue of hate speech since 2013. Compl. ¶¶ 1, 122. During that time, Facebook has removed some but not all third-party content flagged by Plaintiff. In light of that long track record of advocacy and engagement, Plaintiff cannot establish a likelihood of success in proving either that the congressional testimony identified in the Complaint "played a substantial part . . . in influencing [its] decision" to take some action, *Virginia Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1238 (D.C. 2005), or that any purported reliance on those statements was "objectively reasonable," *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 933 (D.C. 1992).

First, Plaintiff cannot establish that it took any action at all in response to the statements at issue, which began in April 2018. By April 2018, according to the Complaint, Plaintiff was already five years into its advocacy campaign regarding Facebook's content moderation policies and enforcement processes. Compl. ¶¶ 122, 124. That effort included publishing reports, drafting letters and other correspondence to Facebook, reporting content to Facebook, advocating for a full-scale audit of Facebook's platform, working with other community-based organizations, and "attend[ing] many calls and meetings every year with Facebook staff members." *Id.* ¶¶ 122-129. Plaintiff did all these things *before* any of the statements at issue were made. Plaintiff does not allege that, when the challenged statements began in April 2018, those statements "played a substantial part . . . in influencing [its] decision" to do anything new or different, *Virginia Acad. of Clinical Psychologists, Inc.*, 878 A.2d at 1238. To the contrary, Plaintiff alleges that it simply "continued" to do what it had been doing previously. Compl. ¶ 157. That admission is fatal to its claim.

Second, to establish reliance on the statements at issue, Plaintiff must show that it was "ignoran[t] of [the statements' alleged] falsity." *Morris v. Morris*, 110 A.3d 1273, 1274 (D.C. 2015) (quoting *Shappirio v. Goldberg*, 20 App. D.C. 185, 194 (D.C. Cir. 1902), *aff'd*, 192 U.S. 232 (1904)). Here again, however, the Complaint alleges the opposite of what Plaintiff must prove. Plaintiff alleges that by the time the challenged statements began in 2018, it had been aware for five years that Facebook did not always remove content that, in Plaintiff's view, violated the Community Standards. Compl. ¶¶ 122-128. Plaintiff published reports on the subject and flagged specific third-party content for Facebook, which did not remove at least some of that content. *Id.* Thus, by the time Defendants made the statements at issue here, Plaintiff knew that Facebook did not always remove content that Plaintiff flagged for Facebook as allegedly violating the Community Standards, and therefore Plaintiff cannot establish a likelihood of demonstrating that it was ignorant of its disagreements with Facebook over enforcement of its Community Standards.

Third, insofar as Plaintiff characterizes the challenged statements as guarantees that Facebook would always enforce its Community Standards in the manner Plaintiff advocated, or as guarantees of 100% success in timely and accurate enforcement, reliance on such statements would not have been reasonable, particularly in light of the context of those statements, as discussed above. In other words, "no reasonable jury could find that a person in [Plaintiff's] position who read[]" the challenged statements in a transcript, or heard them in a hearing, "would have reasonably taken [them] as a guarantee" along those lines. *Sibley*, 134 A.3d at 813.

VI. Plaintiff Fails to State Any Claim For Aiding and Abetting

Plaintiff's claims against individual Defendants Joel Kaplan and Kevin Martin for aiding and abetting fails as a matter of law. Aiding and abetting is not an actionable theory of liability under D.C. law. *See, e.g., Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 107 (D.D.C.

2010); *Sundberg*, 109 A.3d at 1129. Although courts have held open the possibility that aiding and abetting could be "at most a means of establishing vicarious liability" for an underlying tort if certain additional elements were met, *Econ. Rsch. Servs., Inc. v. Resol. Econ., LLC*, 208 F. Supp. 3d 219, 236 (D.D.C. 2016), this Court need not decide that issue here. For all the reasons discussed above, Plaintiff has not adequately alleged any underlying tort. Moreover, Plaintiff's "threadbare recitals" of the legal elements required to establish vicarious liability under any aiding-and-abetting theory (¶¶ 166-167), "supported by mere conclusory statements," fails to adequately plead an aiding-or-abetting theory against either Mr. Kaplan or Mr. Martin. *Econ. Rsch. Servs., Inc.*, 208 F. Supp. 3d at 236 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant the motion and dismiss the Complaint under Rule 12(b).

Respectfully submitted,

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Counsel for Defendants Facebook, Inc., Mark Zuckerberg, Sheryl K. Sandberg, Joel Kaplan, and Kevin Martin

May 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2021, I caused a copy of the foregoing **DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)** to be served by the Court's electronic filing system (CaseFileXpress) on all counsel of record.

/s/ Jonathan I. Kravis
Jonathan I. Kravis (DC Bar No. 973780)

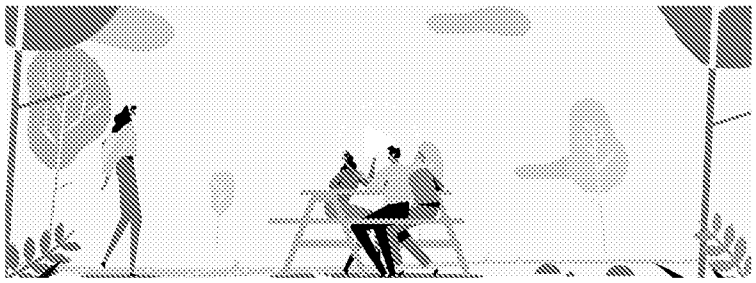
EXHIBIT A

Search the Community Standards

COVID-19: Community Standards Updates and Protections

LEARN MORE

Community Standards



INTRODUCTION

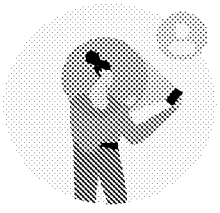
Every day, people use Facebook to share their experiences, connect with friends and family, and build communities. We are a service for more than two billion people to freely express themselves across countries and cultures and in dozens of languages.

We recognize how important it is for Facebook to be a place where people feel empowered to communicate, and we take seriously our role in keeping abuse off our service. That's why we've developed a set of Community Standards that outline what is and is not allowed on Facebook. Our policies are based on feedback from our community and the advice of experts in fields such as technology, public safety and human rights. To ensure that everyone's voice is valued, we take great care to craft policies that are inclusive of different views and beliefs, in particular those of people and communities that might otherwise be overlooked or marginalized.

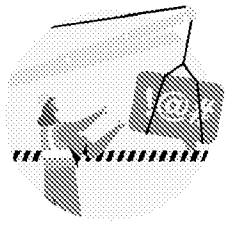
REITERATING OUR COMMITMENT TO VOICE

The goal of our Community Standards has always been to create a place for expression and give people a voice. This has not and will not change. Building community and bringing the world closer together depends on people's ability to share diverse views, experiences, ideas and information. We want people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable. In some cases, we allow content for public awareness which would otherwise go against our Community Standards – if it is newsworthy and in the public interest. We do this only after weighing the public interest value against the risk of harm and we look to international human rights standards, as reflected in our Corporate Human Rights Policy, to make these judgments. As such, we consider the newsworthiness of content posted by anyone, including news organizations and individuals users. For example, we have allowed content that graphically depicts war or the consequences of war where it is important to public discourse.

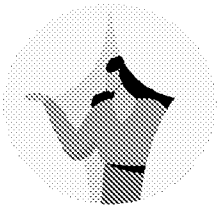
Our commitment to expression is paramount, but we recognize the internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values:



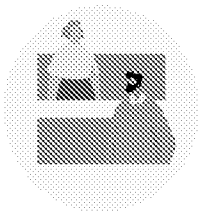
Authenticity: We want to make sure the content people are seeing on Facebook is authentic. We believe that authenticity creates a better environment for sharing, and that's why we don't want people using Facebook to misrepresent who they are or what they're doing.



Safety: We are committed to making Facebook a safe place. Expression that threatens people has the potential to intimidate, exclude or silence others and isn't allowed on Facebook.



Privacy: We are committed to protecting personal privacy and information. Privacy gives people the freedom to be themselves, and to choose how and when to share on Facebook and to connect more easily.



Dignity: We believe that all people are equal in dignity and rights. We expect that people will respect the dignity of others and not harass or degrade others.

Our Community Standards apply to everyone, all around the world, and to all types of content. They're designed to be comprehensive – for example, content that might not be considered hateful may still be removed for violating a different policy. We recognize that words mean different things or affect people differently depending on their local community, language, or background. We work hard to account for these nuances while also applying our policies consistently and fairly to people and their expression. Our enforcement of these standards relies on information available to us. In some cases, this means that we may not detect content and behavior that violates these standards, and in others, enforcement

may be limited to circumstances where we have been provided with additional information and context.

People can report potentially violating content, including Pages, Groups, Profiles, individual content, and comments. We also give people control over their own experience by allowing them to block, unfollow or hide people and posts.

The consequences for violating our Community Standards vary depending on the severity of the violation and the person's history on the platform. For instance, we may warn someone for a first violation, but if they continue to violate our policies, we may restrict their ability to post on Facebook or disable their profile. We also may notify law enforcement when we believe there is a genuine risk of physical harm or a direct threat to public safety.

Our Community Standards are a guide for what is and isn't allowed on Facebook. It is in this spirit that we ask members of the Facebook community to follow these guidelines.

Please note that the US English version of the Community Standards reflects the most up-to-date set of the policies and should be used as the master document.

I. Violence and Criminal Behavior ›

EXHIBIT B

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

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

DATE: November 18, 2010

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

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

CONTENTS

I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

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

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

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

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

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).

[2] *Id.* at 7-8.

[3] *Id.* at 8-9.

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

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

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

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

SLAPPs in the District of Columbia:

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

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

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plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

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

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

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

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

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

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

District Anti-SLAPP Act:

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

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

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

II. LEGISLATIVE CHRONOLOGY

June 29, 2010 — Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register*.
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register*.
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

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

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

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

V. SUMMARY OF TESTIMONY

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

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

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

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

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

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

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

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

VIII. SECTION-BY-SECTION ANALYSIS

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

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

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

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

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

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

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

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

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

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

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

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

Section 7 — Adopts the Fiscal Impact Statement.

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

IX. COMMITTEE ACTION

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

X. ATTACHMENTS

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

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

Memorandum

To: Members of the Council

From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)
Referral of Proposed Legislation

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

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

INTRODUCED BY: Councilmembers Cheh and Mendelson

CO-SPONSORED BY: Councilmember M. Brown

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

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Phil Mendelson

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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

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

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

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

(A) Any written or oral statement made:

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

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

(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

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

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

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

Sec. 3. Special Motion to Dismiss.

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

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

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

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

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

Sec. 4. Special Motion to Quash.

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

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

Sec. 5. Fees and costs.

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

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

Sec. 6. Exemptions.

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

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

Sec. 7. Fiscal impact statement.

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

Sec. 8. Effective date.

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

Testimony of the
American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

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

on

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

September 17, 2010

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

Background

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

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

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

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

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

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

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

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

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

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

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

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

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

Bill 18-893

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

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.
- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

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

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

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

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

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

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement made "In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves anti-SLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding regarding the construction of a slaughterhouse has yet begun.[4]

[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H.R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee (*available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4364.IH:). In that bill it is clear that speech or activity that falls under any one of these definitions is covered.

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

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest."

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

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

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

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

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

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

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

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

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

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

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

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

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

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

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

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

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

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

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

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

"brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

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

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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

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

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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[redacted]

ATTORNEY GENERAL

[redacted]

September 17, 2010

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

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

Dear Chairperson Mendelson:

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

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]." As you know, the Superior Court subsequently adopted rules of procedure for civil actions, including Rules 12(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that – if you have not already done so – you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

Peter J. Nickles

Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Vincent C. Gray** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**November 16, 2010**
SUBJECT:	**Fiscal Impact Statement – "Anti-SLAPP Act of 2010"**
REFERENCE:	**Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010**

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

[1] Defined in the proposed legislation as (A) Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

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

(A) Any written or oral statement made:

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

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

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

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

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

Sec. 3. Special Motion to Dismiss.

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

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

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

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

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

Sec. 4. Special Motion to Quash.

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

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

Sec. 5. Fees and costs.

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

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

Sec. 6. Exemptions.

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

Sec. 7. Fiscal impact statement.

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

Sec. 8. Effective date.

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