Appeal No. 13-CV-83

DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN DOE No. 1,

Appellant,

v.

SUSAN L. BURKE,

Appellee.

On Appeal from the Superior Court for the District of Columbia

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BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AMERICAN SOCIETY OF NEWS EDITORS, DIGITAL MEDIA LAW PROJECT, GANNETT CO., INC., THE MCCLATCHY COMPANY, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AND THE WASHINGTON POST IN SUPPORT OF APPELLANT, SUPPORTING REVERSAL

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STATEMENT OF INTEREST

Pursuant to D.C. App. R. 29, the Reporters Committee for Freedom of the Press, through undersigned counsel, respectfully submit this brief as amicus curiae in support of appellant John Doe No. 1. Pursuant to D.C. App. R. 29 (a), this brief is filed with the consent of both parties.

Amici are journalism and civil rights organizations that represent the interests of reporters and other speakers who are protected under the anti-SLAPP statute. The input of *amici* may be valuable to this Court because of their experience analyzing legal issues that touch on First Amendment rights, and because of their direct interests in protecting freedom of speech interests.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Civil Liberties Union of the Nation's Capital ("ACLU") is a non-profit membership organization devoted to the protection of civil liberties and civil rights for the people of the District of Columbia, including especially the right to speak freely on matters of public interest. The ACLU was actively involved in the legislative process leading to the enactment of the D.C. Anti-SLAPP Act, because our experience with SLAPP suits in the District of Columbia and around the nation leads us to believes that such statutes are essential to protecting the ability of ordinary citizens to participate in public debate on matters of public concern, as the financial and psychological burden of defending even non-meritorious lawsuits targeting such speech often causes citizens to withdraw from the debate and deters others from ever participating.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Digital Media Law Project ("DMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites as well as numerous community newspapers and niche publications.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution.

NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

WP Company LLC d/b/a The Washington Post is one of the nation's most prominent daily newspapers, and its website, www.washingtonpost.com, is read by an average of more than 20 million unique visitors per month.

DISCLOSURE STATEMENT

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

The American Civil Liberties Union of the Nation's Capital ("ACLU") is a non-profit membership organization with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

Digital Media Law Project ("DMLP") is an unincorporated association based at the Berkman Center for Internet & Society at Harvard University. DMLP is not a publicly held corporation or other publicly held entity. DMLP has no parent corporation, and no publicly held company owns 10% or more of DMLP.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

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SUMMARY OF THE ARGUMENT

The District of Columbia enacted the anti-SLAPP statute, D.C. Code §§ 16-5501 *et seq.*, to prevent claims based on speech about matters of public interest from advancing past the initial stages of litigation unless the plaintiff can demonstrate a likelihood of success on the merits. In addition to providing for a "special motion to dismiss" lawsuits that qualify as SLAPPs, the statute also provides for a "special motion to quash" subpoenas or discovery seeking the identity of anonymous speakers. Both special motions are designed to protect free speech about issues of public interest. The Superior Court in this case dismissed Doe's special motion to quash in a single paragraph, finding that Doe failed each element of the D.C. anti-SLAPP statute but failing to explain why. Order Den. Mot. (D.C. Super. Ct. Jan. 30, 2013). The Superior Court's conclusory decision undermines the purpose of the statute and should be reversed.

This brief addresses issues relating both to jurisdiction and to the merits of this case, and it highlights a few elements of the statute that require further clarification, given the Superior Court's ruling below.

First, this brief argues that this court has jurisdiction to hear an appeal of the denial of a special motion to quash under the D.C. anti-SLAPP statute. Appellate courts have been tasked with independent review in defamation cases, and rulings against defendants are frequently overturned. Therefore, it is imperative that non-meritorious defamation cases on matters of public interest can be brought before appellate courts expediently, before they burden speakers with unnecessary litigation. Furthermore, while the importance of an appeal of the denial of a special motion to dismiss under the D.C. anti-SLAPP statute has been well argued, *see* Brief Amicus Curiae of the American Civil Liberties Union of the Nation's Capital (attaching Brief of *Amici Curiae* Public Citizen, Inc. and the American Civil Liberties Union of the Nation's Capital in

Support of Neither Party, *Sherrod v. Breitbart*, __U.S. App. D.C. __, 720 F.3d 932 (2013) (No. 11-7088)), this brief specifically addresses the importance of hearing an immediate appeal of the denial of a special motion to quash, which is equally important given the irreparable injury that will result from denial of a special motion to quash.

Second, this brief urges this court to clarify elements of the "public interest" and "likelihood of success" requirements in the anti-SLAPP statute that were improperly decided in the Superior Court. Individuals who thrust themselves into a public controversy are limited-purpose public figures for purposes of that controversy, and the court should consider the controversy as a whole when making that determination. Furthermore, the commercial interest exception was not meant to exclude paid speakers from protection under the anti-SLAPP statute. Finally, when considering the plaintiff's likelihood of success on the merits, the court should consider the context of the allegedly defamatory statements, including hyperlinks leading to outside sources.

ARGUMENT

I. This court has jurisdiction to hear an interlocutory appeal of a denied claim under the D.C. anti-SLAPP statute.

Earlier briefing in this appeal addressed the issue of this court's jurisdiction to hear an immediate appeal of an order denying a motion to dismiss under the D.C. anti-SLAPP statute. However, there are other interests supporting interlocutory appeals in SLAPP cases that warrant this court's attention, including the frequency with which defamation decisions are overturned and the important interests served by a special motion to quash.

A. The important constitutional role appellate courts play in reviewing defamation cases and the frequency with which decisions against defendants are overturned justifies immediate appellate review.

At its heart, this case is about getting an action before an appellate court promptly, so that the purpose of an anti-SLAPP motion – avoidance of litigation over non-meritorious claims

about speech on issues of public interest – is not frustrated. Such appellate review has even greater import in light of the role appellate courts often play in recognizing First Amendment rights, and supports the interest in allowing interlocutory appeals.

The importance of searching appellate review in defamation cases has long been established. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685-86 (1989); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). Because of "[o]ur profound national commitment to the free exchange of ideas," *Connaughton*, *supra*, 491 U.S. at 686, and the Court's fear that "decisions by triers of fact may inhibit the expression of protected ideas," *Bose Corp.*, *supra*, 466 U.S. at 505, the Supreme Court has held that appellate judges must independently review trial court findings of defamation, *Bose Corp.*, *supra*, 466 U.S. at 505.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .

Bose Corp., *supra*, 466 U.S. at 511.

This heightened appellate review has had a significant impact on the number of defamation decisions overturned or modified. Between 1980 and 2011, defamation plaintiffs won 58.7 percent of their cases at trial, but defendants who appealed were able to reverse or modify nearly 70 percent of those decisions. *See MLRC 2012 Report on Trials and Damages*, Media L. Resource Center, Feb. 2012, at 36 tbl.1, 74 tbl.12A (reporting that 145 out of 215 cases that were appealed, or 67.4 percent, were reversed or modified).

This case presents a perfect example of the need for prompt appellate review. The Superior Court's denial of Doe's motion to quash is precisely the type of First Amendment abridgement from which appellate courts are meant to protect speakers.

The statute was enacted so that defendants in cases involving speech on issues of public interest could quickly have meritless claims dismissed before litigation costs became too burdensome, acting as a punishment in itself. Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010), at 4 ("Committee Report"). Given that nearly 70 percent of defamation decisions that defendants appeal are overturned or reversed, *see MLRC 2012 Report on Trials and Damages*, *supra*, it is imperative to permit immediate appellate review of denials of anti-SLAPP motions. It is not only burdensome on the parties but a waste of the court's limited time and resources to allow a defamation claim to linger in a lengthy and costly litigation that ultimately leads to an appeals process it is not likely to survive.

B. Appellate review of the denial of a special motion to quash requires the same interlocutory procedures as appellate review of the denial of a special motion to dismiss under the D.C. anti-SLAPP statute.

The importance of allowing immediate appeals of orders denying anti-SLAPP motions has been recognized by several federal circuit and state high courts. *See Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009); *Morse Bros., Inc. v. Webster*, 772 A.2d 842, 848 (Me. 2001); *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002). Each of these courts recognized that the anti-SLAPP statute conveyed a right – avoiding the costs and harassment associated with discovery in meritless suits – that would be lost if the denial of an anti-SLAPP motion were not immediately appealable.

The D.C. anti-SLAPP statute creates both "special motions to dismiss" and "special motions to quash." *See* D.C. Code §§ 16-5502, -03. The importance of an interlocutory appeal in relation to motions to dismiss has already been argued in an amicus brief filed in this case. *See* Brief Amicus Curiae of the American Civil Liberties Union of the Nation's Capital, *supra*. But

the interest in an immediate appeal of an order denying a special motion to quash, which is the subject of this appeal, is just as important.

This court has not yet had a chance to interpret the special motion to quash element of the D.C. anti-SLAPP statute, but it previously held that "[b]efore enforcing a subpoena for identifying information, a court must conduct a preliminary screening to ensure that there is a viable claim that justifies overriding an asserted right to anonymity." *Solers, Inc. v. Doe*, 977 A.2d 941, 951 (D.C. 2009).

The John Doe in this case uses the pseudonym Zujua. Mem. P. & A. Supp. Mot. Protective Order & Special Mot. Quash Pl.'s Subpoena. Denial of Zujua's special motion to quash under the D.C. anti-SLAPP statute will result in irreparable injury to Zujua. Once his or her identity is revealed, that action cannot be undone. Moreover, if Zujua is identified, his or her identity will be linked not only to the speech on Burke's Wikipedia page but to every Wikipedia posting under the name Zujua. Even if Zujua eventually prevailed on the merits, his or her identity would forever be known, and that would surely chill the speech of countless other pseudonymous speakers. The Superior Court, in its conclusory one-page order, did not give adequate attention to the weight of the irreparable injury that would result if Doe's identity were revealed. This court's review is necessary to prevent such irreparable injury.

II. This court should clarify the "public figure" and "commercial interest" provisions of the D.C. anti-SLAPP statute.

The D.C. anti-SLAPP statute went into effect March 31, 2011, and has come before the D.C. Superior Court and Court of Appeals in only a few instances. *See Newmyer v. Sidwell Friends Sch.*, 2012 D.C. App. LEXIS 733 (Dec. 5, 2012); *Mann v. Nat'l Review, Inc.*, 2013 D.C. Super. LEXIS 7 (D.C. Super. Ct. 2013); *Lehan v. Fox TV Stations Inc.*, 2011 D.C. Super. LEXIS 14 (2011). Certain elements of the statute, such as the "commercial interest" exception under the

"issue of public interest" definition, § 16-5501 (3), have yet to be interpreted by D.C. courts. The Superior Court's dismissal of Doe's special motion to quash apparently rests on misinterpretations of several important elements of the statute that this court should correct.

This brief addresses three elements of the Superior Court's order that merit reversal. First, under the "issues of public interest" definition in the statute, who qualifies as a "public figure" must be construed in the context of the controversy as a whole, not narrow gradations of the controversy. Second, also under the "public interest" definition of the statute, the "commercial interest" exception does not preclude protection to speakers simply because they were paid or because their publishing entity earns a profit. Finally, under the "likelihood of success" requirement, the context surrounding the allegedly defamatory statements, including hyperlinks to outside material, must be considered by the court.

A. Individuals who thrust themselves into public controversies, and therefore have the ability to influence the discussion and correct allegedly defamatory statements, are public figures under the D.C. anti-SLAPP law.

To be protected by the D.C. Anti-SLAPP statute, a speaker must be acting "in furtherance of the right of advocacy on issues of public interest," which includes speech related to a "public figure." D.C. Code §§ 16-5501 (3), -5502 (b), -5503 (a). It is clear that Burke is a public figure for purposes of the D.C. anti-SLAPP law.

In determining whether an individual is a "public figure" under the D.C. anti-SLAPP statute, the U.S. District Court for the District of Columbia has employed the traditional definition used in libel law. *Boley v. Atlantic Monthly Grp.*, No. 13-89, 2013 U.S. Dist. LEXIS 88494, 11 (D.D.C. June 25, 2013) ("Although the Anti-SLAPP Act does not define 'public figure,' this is a term of art in the context of constitutional defamation law, and . . . Boley qualifies as a 'limited purpose public figure' under that body of law."). In libel cases, a person can be deemed a

public figure for a general or limited purpose. *Gertz v. Robert Welch*, 418 U.S. 323 (1974). A limited-purpose public figure is one who "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351. This person "is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." *Waldbaum v. Fairchild Publ'ns*, 201 U.S. App. D.C. 301, 627 F.2d 1287 (1980).

The Superior Court incorrectly held that Burke is not a limited-purpose public figure for the purpose of this case. Appellant's brief chronicles the multitude of ways Burke injected herself into the debate regarding the Blackwater corporation's activities in Iraq. *See* Appellant's Supplemental Br. Merits 8-16, 24-28. Courts consistently reaffirm that the First Amendment must be given "breathing space," *Gertz*, *supra*, 418 U.S. at 344; *Waldbaum*, *supra*, 627 F.2d at 1291, yet Burke's interpretation of a limited public figure is narrow to the point of suffocating it. Burke contends that because she was not involved in the criminal action against certain Blackwater personnel, but only in the civil action against Blackwater, she cannot be a limited-purpose public figure with respect to the criminal prosecution. Pl.'s Mem. Opp'n Def.'s Mot. Quash Pl.'s Subpoena 6-7. That cramped reasoning fails to take into account the fact that the controversy surrounding Blackwater's actions in Iraq is not artificially separated into "civil litigation" and "criminal litigation" components, and it also ignores the fact that defendant Doe's edits were incorporated into the very paragraph on Burke's Wikipedia page discussing her civil case against Blackwater. *See* Mem. P. & A. Supp. Mot. Protective Order & Special Mot. Quash Pl.'s Subpoena.

In *Boley v. Atlantic Monthly Group*, Liberian rebel leader George Boley claimed *Atlantic Monthly* defamed him by calling him a "warlord," which he denied being. 2013 U.S. Dist. LEXIS 88494 at *26 (D.D.C. June 25, 2013). The court found him to be a limited-purpose public figure because he was chairman of the Liberian Peace Council and sought an "amicable end to the civil war." *Id.* at *26. The court did not restrict its analysis to whether Boley was a limited-purpose public figure as a warlord but rather whether Boley thrust himself into the Liberian conflict generally. *Id.* at *26-27 (identifying the Liberian Civil War as a "public controversy" and then finding that "Boley played a sufficiently central role in the controversy" by trying to influence the outcome through his efforts on the Liberia Peace Council).

Likewise, this court should look at whether Burke injected herself into the controversy surrounding Blackwater's actions in Iraq in determining whether she is a limited-purpose public figure. Burke represented private individuals in a lawsuit against Blackwater stemming from a shooting in Nisour Square in Iraq that left 17 dead, which is the same incident that gave rise to a criminal case against certain Blackwater personnel. *See* Charlie Savage, Judge Drops Charges from Blackwater Deaths in Iraq, N.Y. Times, Dec. 31, 2009, http://nyti.ms/GYvfX6. Burke is certainly a limited-purpose public figure in relation to the controversy surrounding Blackwater's actions in Iraq, and her attempts to draw a line between one sentence in her Wikipedia page and the next leaves no "breathing space" for the First Amendment.

Additionally, public figures are distinguished from private individuals, in part, because their ease of access to media gives them "a more realistic opportunity to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz*, *supra*, 418 U.S. at 344. Even more so than the media that existed at the time of *Gertz*, Wikipedia is the epitome of an accessible medium through which an allegedly defamed individual can "contradict the lie

or correct the error." According to Wikipedia's official policies, subjects of pages can correct "very obvious errors" themselves but otherwise should post their concerns on the article talk page so that disinterested editors can make the corrections. Wikipedia: Biographies of Living Persons, http://en.wikipedia.org/wiki/Wikipedia:Biographies_of_living_persons#Maintenance_of_BLPs (last modified Oct. 7, 2013). Furthermore, subjects can contact a "volunteer response team" to correct serious errors on their pages. *Id.*

The ability to correct information does not make anyone mentioned on Wikipedia a public figure; instead, it shows that the justifications for holding public figures to higher standards in libel claims – because they influence important discussions and have access to the forum to correct mistakes – are at their zenith in a forum like Wikipedia. Similarly, this straightforward ability to correct false statements supports the notion that libel cases brought by individuals mentioned in Wikipedia entries can be subject to dismissal under an anti-SLAPP statute without contravening the public interest in allowing libel suits in the first place. When there is a remedy easily available to the complaining party, the need for defense of reputation through a libel suit is dramatically diminished.

Burke had at her disposal the means to correct any potentially defamatory speech without having to resort to litigation. Burke attempted to delete the incorrect content from her Wikipedia page herself, but an editor, identified as CapBasics359, reverted to the previous version because the editor thought Burke was simply trying to remove unfavorable content from her page. *See* User talk:Susanburkelawyer, Wikipedia, http://en.wikipedia.org/wiki/User_talk:Susanburkelawyer (last modified Sept. 25, 2013). Once Burke informed CapBasics359 that the information was false, CapBasic359 agreed to make corrections. User talk:CapBasics359, Wikipedia, http://en.wikipedia.org/wiki/User_talk:CapBasics359 (last modified Nov. 21, 2012). This sys-

tem of peer editing enables allegedly defamed individuals to remedy falsehoods in a far more effective manner than traditional newspapers and broadcasts ever could. Had Burke followed the Wikipedia policies on not editing one's own page and instead requested a correction from a disinterested editor, she likely could have had the matter resolved even faster.

B. The "commercial interest" exception in the D.C. anti-SLAPP statute does not deny protection to speech on the basis that the speaker was paid or that the publication earned a profit.

Individuals may seek protection under the D.C. anti-SLAPP statute when they are acting "in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502 (b). However, "[t]he 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." *Id.* § 16-5501 (3).

The scope of the "commercial interest" exemption to the D.C. anti-SLAPP statute is an issue of first impression in this court. The statute's legislative history does not directly address the reasoning behind the "commercial interest" language. *See* Committee Report. It does note, however, that the statute "closely mirrored the federal legislation introduced the previous year," and the definition of "an issue of public interest" in the D.C. statute closely resembles the definition in the proposed federal bill. *Compare* D.C. Code § 16-5501 (3) (exempting "statements directed primarily toward protecting the speaker's commercial interests"),[1] *with* Citizen Participa-

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[1] The D.C. anti-SLAPP statute provides:

> "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.

tion Act of 2009, H.R. 4364, 111th Cong. § 11(5) (2009) (exempting "statements directed primarily toward protecting the speaker's business interests").[2] However, as the federal bill was never passed by the committee, there is no legislative history to explain the "business interest" language in the federal bill.

It may be instructive to borrow from First Amendment jurisprudence governing commercial speech, which has long held that the profit motive of a speaker is not determinative of whether the speech can be classified as commercial. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it" or because "it is carried in a form that is 'sold' for profit."); *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.").

It may also be instructive to look to decisions from other jurisdictions for guidance, as the U.S. District Court for the District of Columbia has done when interpreting the D.C. anti-SLAPP statute. *See Abbas v. Foreign Policy Grp., LLC*, No. 12–1565, 2013 U.S. Dist. LEXIS 139177, at *9 (D.D.C. Sept. 27, 2013) ("(the Act) follows the model set forth in a number of other juris-

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D.C. Code § 16-5501 (3).

[2] The proposed federal anti-SLAPP legislation provides:

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

H.R. 4364, 111th Cong. § 11(5) (2009).

dictions") (quoting Rep. of the D.C. Comm. on Public Safety & Judiciary on B. 18-893 (Nov. 19, 2010)); *Boley*, *supra*, No. 13–89 at *9. The court noted that California is a "particularly" useful resource for interpretive guidance because of the state's "well-developed body of case law" and because the California statute is "similar" to the D.C. anti-SLAPP statute. *Boley*, *supra*, No. 13–89, at *3; *Abbas*, *supra*, No. 12–1565, at *3. The California anti-SLAPP statute does not define an "issue of public interest" in the same way as the D.C. statute (that is, as excluding speech "directed primarily toward protecting the speaker's commercial interests"). However, the California statute excludes speech by "a person primarily engaged in the business of selling or leasing goods or services" under certain conditions.[3]

California courts have "narrowly construed" the commercial speech exemption to the California anti-SLAPP. *See Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117, 1123 (Cal. 2010); *Taheri Law Grp. v. Evans*, 72 Cal. Rptr. 3d 847, 854–55 (Cal. Ct. App. 2008); *Kronemyer v. IMDB*, 59 Cal. Rptr. 3d 48, 54 (Cal. Ct. App. 2007). California's anti-SLAPP statute protects speech that is geared toward informing the public but not speech that is directed at sales. *Kronemyer*, *supra*, 59 Cal. Rptr. 3d at 54. In *Kronemyer*, a movie producer sued the Internet Movie Database (IMDb) for not including his name among various movie credits on its website. *Id.* at 50. The court held that IMDb was entitled to protection under California's anti-SLAPP act, as the financial gain in running a website is not sufficient to categorize the speech as com-

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[3] The California statute provides:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, . . . if both of the following conditions exist:
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services . . . .
> (2) The intended audience is an actual or potential buyer or customer . . . or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation . . . .

Cal. Civ. Proc. Code § 425.17 (West 2013).

mercial. *Id.* at 54. "If appellant's position that the prospect of some financial benefit from a publication places all material in the area of commercial speech, it would include virtually all books, magazines, newspapers, and broadcasts. There is no authority for so sweeping a definition." *Id.*

Even some speech with a commercial element may be covered by the California anti-SLAPP statute. *See Taheri, supra*, 72 Cal. Rptr. 3d at 854-55. The court in *Taheri* found that a lawyer's advice to a potential client was not commercial speech even though he was soliciting business from the potential client at the same time. *Id.* Although the lawyer's speech had a commercial element, the court held that the "essence" of the speech was advisory and therefore was "fundamentally different from the 'commercial disputes' intended to be exempted." *Id.*

Similarly, the Texas anti-SLAPP statute does not protect statements by sellers of goods or services and aimed at buyers.[4] The fact that publishers are for-profit enterprises that engage in the sale of newspapers, books, or magazines does not preclude the content of such publications from protection under the Texas anti-SLAPP statute. "To read news content to constitute statements 'arising out of the sale or lease' of newspapers would swallow the protections the statute intended to afford . . . ." *Newspaper Holdings, Inc., v. Crazy Hotel Assisted Living, Ltd.*, 2013 Tex. App. LEXIS 5407, 34-35, 41 Media L. Rep. 1852 (Tex. App. May 2, 2013).

The Superior Court therefore erred in finding that Doe's statements are not protected under the D.C. anti-SLAPP statute because Doe failed to provide prima facie evidence that his or her comments were not commercially motivated. It is clear on the face of those statements that

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[4] The Texas statute provides: "This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b).

they do not fall within the "commercial interest" exemption to the D.C. anti-SLAPP statute. The argument made by Burke entirely misses the mark. She suggests that, because "[m]any Wikipedia commentators are paid for their services," Doe's speech may have been commercially motivated. *See* Pl.'s Mem. Opp'n Def.'s Mot. Quash Pl.'s Subpoena 8-9. But as the Supreme Court has long held, commercial speech is not defined solely by the profit motive of the speaker, *Pittsburgh Press Co.*, *supra*, 413 U.S. at 385, so the possibility that Doe was paid as a Wikipedia editor is irrelevant to the determination of whether Doe's speech was aimed at protecting a commercial interest. Likewise, as the courts in California and Texas noted, *Kronemyer*, *supra*, 59 Cal. Rptr. 3d at 54; *Newspaper Holdings*, *supra*, 2013 Tex. App. LEXIS 5407 at *34-35, interpreting commercial speech exceptions in anti-SLAPP statutes as barring any person or entity that profits from the speech from enjoying the protections of the law would completely erode the statute. No paid journalist could find shelter under an anti-SLAPP statute, nor could any book, magazine, or other publication for sale. Doe edited Burke's Wikipedia page regarding Burke's civil case against Blackwater, undeniably "an act in furtherance of the right of advocacy on issues of public interest." Whether Doe was paid to write on the issue (which there is no reason to assume) and whether Wikipedia receives financial gain from operating the website (which it does not; the website is subsidized by the nonprofit Wikimedia Foundation, *see* http://en.wikipedia.org/wiki/Wikimedia_Foundation#Finances) are inconsequential to the determination of whether Doe's speech was on an issue of public interest. Therefore, Doe's speech did not fall within the "commercial interest" exemption to the D.C. anti-SLAPP statute.

C. The context of an article, including links to content on the Internet, must be considered in determining whether a claim is likely to succeed on the merits.

The U.S. District Court for the District of Columbia has often noted the importance of hyperlinks on web pages in clarifying potentially defamatory content for readers. *See Abbas v.*

Foreign Policy Grp., LLC, No. 12–1565, 2013 U.S. Dist. LEXIS 139177 (D.D.C. Sept. 27, 2013); *Boley v. Atlantic Monthly Grp.*, No. 13-89, 2013 U.S. Dist. LEXIS 88494 (D.D.C. June 25, 2013); *Jankovic v. Int'l Crisis Grp.*, 429 F. Supp. 2d 165, 177 (D.D.C. 2006). When determining whether a statement is one of fact or one of opinion, a court must look at the language used, the context in which it was used, and the extent to which it can be verified. *Abbas*, *supra*, at *29 (citing *Ollman v. Evans*, 750 F.2d 970, 987-88 (1984)). The court in *Abbas* noted that the hyperlinks accompanying the allegedly defamatory statements, which led to articles, websites, and interviews by the plaintiff, "served to put the reader on notice that the piece is one of opinion." *Id.* The court in *Boley* likewise indicated that a link to an article in which the writer explained why he characterized Boley as a warlord was sufficient to "provid[e] the necessary context for the allegedly defamatory remark." *Boley, supra,* at *28. In *Jankovic*, an organization published a report stating, "Many of these individuals [named in the preceding sentence] . . . have at one time or another been on EU visa ban lists, while others have had their assets frozen . . . ." 429 F. Supp. 2d at 177. The plaintiffs objected because, while they had their assets frozen, they thought the sentence implied they were also on a ban list. *Id.* The court noted that a hyperlink provided in a footnote after the text, which led to the ban list and frozen assets list, sufficiently clarified the text. *Id.* at 177 n.8. "What little confusion the sentence could possibly cause is easily dispelled by any reader willing to perform minimal research." *Id.*

Doe's statements were not false in and of themselves but were simply placed on the wrong Wikipedia page. The statements related to a criminal case against Blackwater personnel arising out of a shooting in Nisour Square, not Burke's civil case against Blackwater arising out of the same shooting in Nisour Square. *See* Susan L. Burke, Wikipedia, http://en.wikipedia.org/wiki/Susan_L._Burke#Abtan_v._Blackwater (last modified Sept. 25,

2013); Savage, *supra*. Doe's edits introduced patent incongruities: for example, the paragraph on Burke's Wikipedia page discussing her lawsuit against Blackwater referred to her representing the "plaintiffs" in a "lawsuit" alleging a "violat[ion] of the federal Alien Tort Statute" – plainly referring to a civil suit – but Doe's edits added that Judge Urbina "threw out the suit" because of "the government's reckless violation of the defendants' constitutional rights," and "criticize[d] [the] prosecutors" – plainly referring to a criminal case. *See* Mem. P. & A. Supp. Mot. Protective Order & Special Mot. Quash Pl.'s Subpoena 5-6. As edited, the paragraph stated both that Judge Urbina "threw out the suit in December 2009" and that "[t]he lawsuit was dismissed in 2010." *Id.* Plainly both could not be correct.

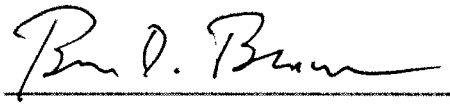
The internal discrepancies in the edited paragraph were glaringly obvious, and any attentive reader would have realized that something was seriously wrong. But immediate clarification was available via a hyperlink that accompanied the text, which led to a *New York Times* article that, as Burke noted, "does not mention Ms. Burke, actually names the prosecutor leading the [criminal] case described in the story, and notes that there is in fact another civil suit that touches on certain of the same facts underlying the criminal case that is separate and apart from the criminal prosecution." Pl.'s Mem. Opp'n Def.'s Mot. Quash Pl.'s Subpoena 3 (underscore in original) (citing Savage, *supra*). Like the statements in *Abbas*, *Boley*, and *Jankovic*, which courts held must be read in the context of the hyperlinked articles and websites, *Abbas*, *supra*, at *29; *Boley*, *supra*, at *28; *Jankovic*, *supra*, 429 F. Supp. 2d at 177, Doe's edits, if not obviously irrelevant on their face to a civil lawsuit brought by a private lawyer such as Burke, were clarified by the hyperlinked article. As the judge in *Jankovic* noted, "any reader willing to perform minimal research," 429 F. Supp. 2d at 177 n.8, would have understood that the government prosecutors who had been sanctioned in the criminal prosecution of Blackwater personnel did not include Burke.

Therefore, Burke is not likely to succeed on the merits because the statements on their face and read in conjunction with the hyperlinked article clearly did not defame her.

CONCLUSION

For the reasons given above, as well as those given in the briefs of the appellant and other *amici curiae* supporting appellant, the judgment of the Superior Court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record listed below in accordance with D.C. App. R. 25 via electronic mail, with all parties' written consent, on this the 17th day of October, 2013.

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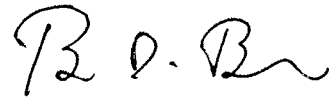

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