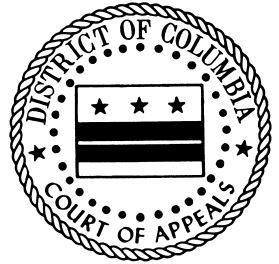


DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-cv-0318



Clerk of the Court
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MORGAN BANKS, et al.,

Plaintiffs–Appellants,

v.

DAVID H. HOFFMAN, et al.,

Defendants–Appellees.

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

**BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF APPELLEES’ PETITIONS
FOR REHEARING AND REHEARING EN BANC**

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CORPORATE 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.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE¹

Proposed amicus is the Reporters Committee for Freedom of the Press (“Reporters Committee”), an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of the news media. Founded by journalists and media lawyers in 1970, when the nation’s press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources, the Reporters Committee today provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As such, the Reporters Committee has an interest in ensuring the correct application of the law of defamation, including the constitutional actual malice standard, and the early disposition of cases that lack merit.

Amicus has moved for leave to file this brief in the accompanying motion pursuant to D.C. Ct. App. R. 29(b)(2).

SUMMARY OF THE ARGUMENT

The District of Columbia enacted the Anti-SLAPP Act, D.C. Code §§ 16-5501 *et seq.* (the “Anti-SLAPP Act” or “Act”), to provide for the speedy dismissal

¹ No party’s counsel authored the brief in whole or part or contributed money intended to fund preparing or submitting the brief, and none other than amicus contributed money to fund preparing or submitting the brief. *See* D.C. Ct. App. R. 29(a)(4).

of “Strategic Lawsuits Against Public Participation” or “SLAPPs”—meritless lawsuits targeting the exercise of First Amendment rights. As the en banc Court in this case observed, “[t]he key feature of the Anti-SLAPP Act is that it saves litigants from the potentially years-long and prohibitively expensive discovery that often accompanies even baseless litigation, thereby reducing the chilling effects that abusive lawsuits have on First Amendment activity.” *Banks v. Hoffman*, 346 A.3d 665, 674 (D.C. 2025), *as amended* (Jan. 29, 2026) (“*Banks II*”). The division’s decision to reverse the trial court’s order granting the special motion to dismiss and to remand for full discovery in this case threatens to vitiate the Anti-SLAPP Act’s protections and subject members of the press to protracted litigation on issues that could readily be resolved as a matter of law.

The division’s decision implicates at least three “questions of exceptional importance,” D.C. Ct. App. R. 40(b)(2)(C), that warrant en banc review. First, the division declined to apply or even address the principle that “the adoption of one of a number of possible rational interpretations of a document that bristle[s] with ambiguities” is not sufficient to create a triable issue of actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). Second, the division adopted a new standard for evaluating whether a plaintiff is a public official in a defamation case, directing the Superior Court to revisit whether Appellants were public officials after full discovery and with consideration of factors that neither this Court nor the Supreme

Court has ever treated as dispositive. And third, the division failed to join the overwhelming number of state and federal courts that have held that a hyperlink, without more, does not constitute republication as a matter of law. In each respect, the division's decision implicates issues of critical importance to members of the news media who report on the conduct of public officials, rely on complex source material, and utilize hyperlinking to provide context for their reporting. Amicus accordingly urges the Court to grant rehearing en banc.

ARGUMENT

I. Whether actual malice can be resolved as a matter of law in cases with complex source material is a question of exceptional importance.

The actual malice standard requires a plaintiff in a defamation case to show the defendant either had “subjective knowledge of the [alleged defamatory] statement’s falsity”—meaning “the defendant actually knew that the statement was false”—or, in the alternative, that the defendant “acted with reckless disregard for whether or not the statement was false.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1252 (D.C. 2016), *as amended* (Dec. 13, 2018) (citations and quotations omitted). The “reckless disregard” standard “requires a showing higher than mere negligence; the plaintiff must prove that the defendant in fact entertained serious doubts as to the truth of the publication.” *Id.* (cleaned up).

Against that backdrop, it has long been a key component of the actual malice analysis that “the adoption of one of a number of possible rational interpretations of

a document” is insufficient to establish actual malice, even where the publisher adopts an interpretation that “arguably reflect[s] a misconception” of the material on which it relied. *Pape*, 401 U.S. at 290. Thus, courts have consistently ruled as a matter of law that “[a]n honest misinterpretation does not amount to actual malice even if the publisher was negligent in failing to read the document carefully.” *Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 594 (D.C. Cir. 2016); *see also, e.g., Kahl v. Bureau of Nat’l Affs., Inc.*, 856 F.3d 106, 117 (D.C. Cir. 2017) (same); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 296 (4th Cir. 2008) (“[A] speaker or publisher may adopt one of a number of possible rational interpretations of sources that contain ambiguities without creating a jury issue of actual malice.” (citation omitted) (cleaned up)); *Talley v. Time, Inc.*, 923 F.3d 878, 900 (10th Cir. 2019) (similar); *Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847, 855 (Tex. 2005) (similar). Any other result would render the actual malice standard toothless because it would risk putting publishers “at the mercy of the unguided discretion of a jury” wherever complex source material could arguably be read in a way to support a plaintiff’s defamation theory. *Pape*, 401 U.S. at 291.

In keeping with these principles, this Court has likewise emphasized that “there is a substantial gap between unreasonable allegations and allegations that are knowingly or recklessly false.” *Capitol Intel. Grp., Inc. v. Waldman*, 352 A.3d 783, 798 (D.C. 2026). Thus, in *Waldman*, where a prospective property buyer sincerely

interpreted “ambiguous events” in the course of his dealings with a real estate developer when publishing an article about those dealings on his website, *id.* at 798–99, this Court concluded that the developer had failed to adduce sufficient evidence to “clear the hurdle of actual malice,” *id.* at 800. That was true even if a jury could conclude that the buyer’s allegation accusing the developer of fraud was ultimately unreasonable, because “mere unreasonableness is not actual malice.” *Id.* As *Waldman* highlights, the principle derived from *Pape* and its progeny can readily be applied to allow for the expedient dismissal of non-meritorious cases under the Anti-SLAPP Act. *Id.* (reversing denial of special motion to dismiss).

The division’s decision eschewed these principles, focusing its analysis exclusively on whether a reasonable juror could hypothetically interpret a particular document—a March 2005 guidance document for psychologists—as running contrary to the assertions in Sidley’s investigative report (the “Report”). *See* Mem. Op. & J., *Banks v. Hoffman*, No. 20-CV-0318 (D.C. May 15, 2026) (“Div. Op.”) at 11–14. In so doing, the division’s decision failed to address the more basic question of whether the assertions in the Report represent the adoption of “one of a number of possible rational interpretations of sources that contain ambiguities,” *see CACI Premier Tech.*, 536 F.3d at 296 (citation omitted) (cleaned up), the resolution of which could obviate the need for discovery and allow for the dismissal of the case at this stage, *cf. Waldman*, 352 A.3d at 800. That omission was a glaring one in light

of the fact that the decision otherwise acknowledges the ambiguity of the underlying source material. Div. Op. at 11 (acknowledging that the implications of some of the document’s references “may not be apparent from the face of the document”).

En banc review is necessary to provide clarity on the important question of whether dismissal is appropriate under the Anti-SLAPP Act where *Pape* and its progeny would ordinarily preclude the question of actual malice from being submitted to a jury. The division’s decision, if left undisturbed, will undoubtedly discourage journalists who rely on protection for their good-faith interpretation of complex source material from bringing important stories to light, for fear of being subjected to protracted litigation on the issue of actual malice. That result would thwart the Council’s intent in enacting the Anti-SLAPP Act in the first place, which was to allow publishers to “expeditiously and economically dispense of litigation aimed to prevent their engag[ement] in constitutionally protected actions on matters of public interest.” *Banks II*, 346 A.3d at 674 (quoting Council of D.C., Comm. on Pub. Safety & Judiciary, Report on Bill 18-893, at 4 (Nov. 18, 2010)).

II. Whether public official status can be determined as a matter of law is a question of exceptional importance.

The division declined to resolve definitively whether Appellants are public officials required to prove actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), instead remanding with instructions to the Superior Court to “revisit that issue, for each appellant individually, after any relevant discovery has

been completed.” Div. Op. at 2. At the same time, the division directed the Superior Court to give attention in particular to the following three factors that derive from First Circuit caselaw: “[1] ‘the extent to which the inherent attributes of a position define it as one of influence over issues of public importance,’ [2] ‘the position’s special access to the media as a means of self-help,’ and [3] ‘the risk of diminished privacy assumed upon taking the position.’” *Id.* (quoting *Mandel v. Bos. Phoenix, Inc.*, 456 F.3d 198, 204 (1st Cir. 2006)).

The division’s apparent adoption of a test that treats “special access to the media” as an additional precondition to finding public official status, *id.*, represents a significant departure from this Court’s previous guidance. The touchstone of this Court’s analysis has long been whether a plaintiff is “among the hierarchy of government employees who ha[s], or appear[s] to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Thompson v. Armstrong*, 134 A.3d 305, 312 (D.C. 2016) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)). While this Court (like the Supreme Court) has observed that public officials oftentimes will have “superior access to the media,” *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990); *cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (observing public officials, like public figures, “usually enjoy” greater access to “channels of effective communication”), access to media has never before been treated as a necessary—much less dispositive—factor in the analysis, *see Thompson*,

134 A.3d at 311–12 (analyzing responsibilities and actual and apparent authority of public employee, rather than access to media); *see also Moss*, 580 A.2d at 1029–30.

The division’s departure from this Court’s prior precedent is unwarranted. To be sure, courts have held that whether a plaintiff “has access to the media” is a relevant (though not dispositive) consideration in determining their status as a public figure. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir. 1980). But public officials—unlike public figures—are defined by whether they are “in a position significantly to influence the resolution” of public issues by virtue of their jobs, *Rosenblatt*, 383 U.S. at 85, not whether they have special access to media.

In any event, the division’s decision implicates a question of “exceptional importance,” D.C. Ct. App. R. 40(b)(2)(C), that is, the question of whom the public and the press are entitled to assume will qualify as a public official. Ambiguity about the standard that applies to such an important issue risks chilling public interest reporting and newsgathering on conduct by government employees—particularly those who may not be in the media spotlight but nevertheless have authority via their positions to impact the public’s lives. *Waldbaum*, 627 F.2d at 1293 (“Because the outcome of future litigation is never certain, members of the press might choose to err on the side of suppression when trying to predict how a court would analyze a news story’s first amendment status.”). The division’s aberrational holding on this question of exceptional importance demands en banc review.

III. Whether hyperlinking is republication as a matter of law is a question of exceptional importance.

In declining to resolve the Count 11 defamation-by-republication claim, the division directed the “Superior Court to revisit the issue of republication after any relevant discovery (including discovery directed at whether, through alleged changes to its website on August 21, 2018, APA ‘intended to, or actually did, reach a new audience’).” Div. Op. at 2. In so doing, the division adopted Part II.C of its original opinion—which declined to decide “whether defamatory material is republished when a hyperlink directing the reader to it is posted on a website.” *Banks v. Hoffman*, 301 A.3d 685, 714 (D.C. 2023) (“*Banks I*”).

That was error. An overwhelming number of courts have held that transmitting a link is not a republication as a matter of law. *See, e.g., Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021) (“[C]ourts have consistently agreed that ‘[m]erely linking to an article should not amount to republication[.]’” (citation omitted)); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (“[T]hough a link and reference may bring readers’ attention to the existence of an article, they do not republish the article.”); *Clark v. Viacom Int’l Inc.*, 617 F. App’x 495, 505 (6th Cir. 2015).

By declining to adopt a similar approach, the division made the District of Columbia an outlier on an issue of significant importance to members of the news media. Journalists frequently use hyperlinks to provide useful context and

information to members of the public. *See, e.g.,* Michael Schudson & Katherine Fink, *Link Think*, COLUM. JOURNALISM REV. (Mar./Apr. 2012), <https://perma.cc/695LXLRJ> (hyperlinking helps readers “who seek greater depth [obtain] a richer array of information” while showing them “the extensive research behind the story they are reading”). But news organizations will be discouraged from providing that additional context and information if mere hyperlinking can subject them to the risk of full discovery and potential liability. En banc review is warranted to, at a minimum, provide greater clarity on this important issue.

CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to grant rehearing en banc and reverse the division decision.

Dated: June 18, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of D.C. Ct. App. R. 29(b)(4) because it contains 10 pages, excluding the parts of the brief exempted by D.C. Ct. App. R. 32(a)(5).

2. This brief complies with the typeface and typestyle requirements of D.C. Ct. App. R. 32(a)(4) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: June 18, 2026

/s/ Bruce D. Brown
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2026, I caused the foregoing Brief of Amicus Curiae the Reporters Committee for Freedom of the Press to be electronically filed with the Clerk of the Court using the D.C. Court of Appeals Appellate E-Filing System, which will automatically send notice of such filing to all counsel of record.

Dated: June 18, 2026

/s/ Bruce D. Brown _____

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