

**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

DEFENDANTS' AMENDED 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 Amended 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.

Respectfully submitted,

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September 17, 2021

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
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MUSLIM ADVOCATES,

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FACEBOOK, INC., *et al.*,

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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. To enforce its Community Standards, Facebook must be made aware of the potentially violating content (either through its own efforts or third-party reports) and then make judgments about whether that content violates its 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, which means engaging with 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 and communicated with Plaintiff by email regarding the Community Standards.

Plaintiff asserts claims against Facebook and four of its executives under the D.C. Consumer Protection Procedures Act (“CPPA”) and common law. According to Plaintiff, Facebook has made statements to Congress, members of Congress and their staff, and civil rights organizations representing that Facebook removes *all* content--without exception--that violates the Community Standards. As explained below, none of the alleged statements make any such representation. To the contrary, Facebook has repeatedly and consistently explained that its enforcement of the Community Standards depends on whether it is made aware of potentially violating content and on judgments about whether the content in fact violates those Standards. 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 contends it has been injured by alleged misrepresentations that Facebook removes all third-party content that violates the Community Standards because Facebook’s failure to remove such content resulted in (1) consumers not receiving accurate information about Facebook’s platform, (2) Plaintiff expending resources engaging with Facebook regarding its Community Standards, and (3) Plaintiff expending resources to mitigate “real-world harms” resulting from purportedly violating third-party content appearing on Facebook’s platform. None of these alleged injuries demonstrate Article III standing. Category (1) does not identify any injury in fact that is particular to Plaintiff. Categories (2) and (3) are not traceable to Facebook because Plaintiff’s allegations show that any expenditure of resources could not have resulted from the alleged misrepresentations and any “real-world harm” resulted from third parties who posted the violating content, not Facebook.

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. Plaintiff attempts to plead around the CDA by bringing misrepresentation claims, but the Amended Complaint unquestionably challenges Facebook’s 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 statements that are not, as a matter of law, false or misleading. According to Plaintiff, in Congressional testimony and other communications with members of Congress and their staff and civil right groups, Facebook has represented that it removes *all* third-party content that violates the Community Standards, without exception. But Plaintiff relies entirely on statements that, when viewed in context, make clear that enforcement of the Community Standards depends on whether Facebook is aware of the potentially violating content and determines that it violates those standards—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 alleged misrepresentation, or any intent by Facebook to induce such reliance.

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.” Amended Complaint (“Am. Compl.”) ¶ 35. 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,

¹ The Introduction to the Community Standards is attached as Exhibit A. The entirety of the Community Standards is available at <https://www.facebook.com/communitystandards/>. Because Plaintiff quotes from and relies on the Community Standards, Congressional testimony, and emails from Facebook to Plaintiff, 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”).

when we limit expression, we do it in service of one or more of the following values: [authenticity, safety, privacy, and dignity].” *Id.* at 2-3.

Between January and June 2021, Facebook took action on over 56 million pieces of content on Facebook and Instagram for violating Community Standards on hate speech alone.²

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

Plaintiff alleges that Facebook “routinely” decides not to remove third-party content that violates the Community Standards. Am. Compl. ¶ 90. In support of that conclusion, Plaintiff alleges that Facebook should have removed third-party content falling into three categories.

First, Plaintiff alleges that Plaintiff and others reported certain third-party content that they believe violates the Community Standards, and that Facebook removed some but not all of the reported content. *Id.* ¶¶ 107-117, 120, 127, 147, 152-155, 158.

Second, Plaintiff alleges that certain 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.* ¶¶ 126, 128, 132, 134-39, 177.

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.* ¶¶ 143, 146, 158-59.

² See Community Standards Enforcement Report (Q2 2021), available at <https://transparency.fb.com/data/community-standards-enforcement/>.

III. Alleged Misrepresentations Regarding the Community Standards

Plaintiff alleges misrepresentations falling into four categories: (1) statements by Facebook executives in Congressional testimony, *id.* ¶¶ 56-71; (2) statements by Facebook executives in three emails to Plaintiff, *id.* ¶¶ 72-75; (3) two statements by an unidentified “Facebook spokesperson” in *The Guardian*, *id.* ¶¶ 77-78; and (4) unidentified statements made by unidentified “Facebook leaders” in meetings with unidentified members of Congress and their staff, civil rights groups, “and other leaders,” *id.* ¶ 79. According to Plaintiff, these statements represented that Facebook would remove “all content and groups that violate Facebook’s Community Standards, policies, and other standards.” *Id.* ¶ 160.

Plaintiff does not identify any specific statements in category (4) or any facts about who made statements in categories (3) and (4) or why they were misleading. With respect to categories (1) and (2), Plaintiff relies on a handful of statements excerpted from over a thousand pages of Congressional testimony and a few sentences from three emails from Facebook to Plaintiff, all of which are misleadingly quoted by omitting relevant context. *Id.* ¶¶ 51-70.

For example, Plaintiff quotes the following from the Congressional testimony of Mark Zuckerberg 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.* ¶ 56 (emphasis in Amended Complaint). But Plaintiff omits other statements by Mr. Zuckerberg during the same hearing explaining that Facebook is “not perfect” and that “mistakes” are made.

Similarly, Plaintiff quotes the following from an email sent by Kevin Martin to Plaintiff: “On hate speech—which we define as violent or dehumanizing speech, statements of inferiority, or calls for exclusion and/or segregation, based on protected characteristics—*our policies strictly prohibit anti-Muslim, white supremacist, and hate group content*.... We do not and will not

tolerate harassment or discrimination in our workplace, *nor do we allow hate figures or hate groups to have a presence on our platform.*” *Id.* ¶ 75 (emphasis and alterations in Amended Complaint). But Plaintiff omits portions of the email in which Mr. Martin explains “technical limitations” on Facebook’s ability to recognize hate speech and emphasizes Facebook’s commitment to “being transparent about our efforts to combat hate” and to continuing engagement with Plaintiff on this issue. Exh. D.

Based on allegations that Facebook did not remove certain third-party content that Plaintiff believes violates the Community Standards, Plaintiff asserts misrepresentation claims against Facebook and all of the individual Defendants under the CPPA, as well as common law claims against Facebook and two individual defendants for fraudulent and negligent misrepresentation.

ARGUMENT

I. Plaintiff Lacks 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 alleges three types of injuries: (1) deprivation of information to consumers about the risk of third-party harms resulting from their use of Facebook, Am. Compl. ¶¶ 190, 192; (2) expenditure of resources by Plaintiff engaging in discussions with Facebook about hate speech on the

platform, *id.* ¶ 165; and (3) expenditure of resources by Plaintiff because “[t]he existence of hate speech on the platform ... resulted in [Plaintiff] working to mitigate the real-world consequences of that content.” *Id.* ¶ 174. None of the claimed injuries establish Article III standing, which requires dismissal of Plaintiff’s claims.

A. Alleged Deprivation of Information to Consumers Does Not Establish Any Injury in Fact to Plaintiff

According to Plaintiff, alleged misrepresentations that Facebook removes *all* third-party content that violates the Community Standards deprived *consumers*--that is, Facebook users--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.” Am. Compl. ¶¶ 190, 192. This alleged informational injury does not establish any injury in fact as to *Plaintiff*.

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.” *Vining v. Exec. Bd. of Dist. of Columbia Health Benefit Exch. Auth.*, 174 A.3d 272, 278 (D.C. 2017) (internal quotation marks omitted). “A particularized injury is one that ‘affects the plaintiff in a personal and individual way.’” *Id.* at n.26. Plaintiff’s allegation that Facebook deprived all consumers of information is nothing more than a generalized grievance. Plaintiff does not allege any facts showing how any alleged denial of information to consumers affects Plaintiff, let alone in a way that is distinct from consumers generally, as required to establish Article III standing. *See Grayson v. AT&T Corp.*, 15 A.3d 219, 246 (D.C. 2011) (holding that allegations of misrepresentations to the 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). Accordingly, Plaintiff cannot establish injury based on any alleged denial of information.

B. Alleged Expenditure of Resources Engaging with Facebook Does Not Establish Traceability or Redressability

Plaintiff alleges that, “[i]n reliance on Facebook’s representations that it removes content that violates its Community Standards and will remove such content in the future,” Plaintiff “committed substantial resources to engage with and provide services to assist Facebook.” Am. Compl. ¶ 165. This allegation does not establish any injury that is traceable to the alleged misrepresentations, or that would be redressed by a finding of liability in this case. *See Gordon v. Haas*, 828 F. Supp. 2d 13, 18 (D.D.C. 2011) (“The causation prong of the standing requirement is only met if plaintiffs ‘allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct.’”) (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991) (“[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.”). Plaintiff alleges that it has been engaging in dialogue with Facebook since “as early as 2013,” Am. Compl. ¶ 166, but the alleged misrepresentations occurred between 2018 and 2020.

As Facebook pointed out in its motion to dismiss Plaintiff’s initial Complaint, these allegations admit the purported misrepresentations occurred long after Plaintiff began engaging with Facebook about the Community Standards, Compl. ¶ 124, and therefore any expenditure of resources by Plaintiff on that engagement is not traceable to those statements. In the Amended Complaint, Plaintiff attempts to avoid this defect by alleging that, “Although [Plaintiff] provided some (though not all) of these services [to Facebook] as early as 2013, it did so more recently in reliance on” alleged misrepresentations between 2018 and 2020. Am. Compl. ¶ 166.

But this allegation does not cure the defect because Plaintiff also alleges that, between 2017 and 2020, Facebook did not remove all of the third-party content identified by Plaintiff and

other third parties as violating the Community Standards. *Id.* ¶¶ 73, 107-117, 119-120. Plaintiff therefore admits that, after the alleged misrepresentations were supposedly made, Plaintiff continued engaging in dialogue with Facebook even after it was clear that Facebook did not remove *all* third-party content that Plaintiff believed violated the Community Standards. *See, e.g., Blocker v. Small Business Admin.*, 916 F. Supp. 37, 42 (D.D.C. 1996) (causation requirement not met where alleged injury “would still have been incurred regardless of the [defendant’s] action”). These allegations show, as a matter of law, that any resources Plaintiff expended engaging with Facebook was not in reliance on any statement by Facebook that it would remove *all* third-party content that violates its Community Standards.

C. Alleged Expenditure of Resources Mitigating “Real-World Harm” Allegedly Caused by Third-Party Content Is Not Traceable to Facebook.

Plaintiff alleges that “[t]he existence of hate speech on the platform—because Facebook did not live up to its promises [to remove all third-party content that violates the Community Standards]—also resulted in [Plaintiff] working to mitigate the real-world consequences of that content.” Am. Compl. ¶ 174. The Amended Complaint does not quantify or even specify what type of work Plaintiff alleges it was required to perform as a result of Facebook’s actions, beyond a single example of unspecified content related to an unidentified protest in Dallas. In any event, any real-world harm resulting from third-party content posted on Facebook, and therefore any injury from efforts to mitigate it, would have been caused by the third parties who posted that content, not by Facebook. Accordingly, any injury to Plaintiff based on these alleged mitigation efforts is not traceable to Facebook, and therefore does not support Article III standing. *See Foundation on Economic Trends v. Thomas*, 661 F. Supp. 713, 719 n.18 (D.D.C. 1986); *see also Fulani*, 935 F.2d at 1329 (“[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.”).

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”). Plaintiff attempts to avoid the CDA by characterizing its claims as challenging alleged misrepresentations by Facebook that it removes *all* third-party content that violates the Community Standards. But Plaintiffs’ misrepresentation claims rely on allegations that Facebook failed to remove certain third-party content that Plaintiff believes violates the Community Standards. Thus, all of Plaintiff’s claims challenge Facebook’s alleged failure to remove third-party content from its platform, and therefore are barred by the CDA. “[T]he 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 the CDA to dismiss claims against Facebook and its officers arising from third-party content that was removed or remains on its platform.³ That result is warranted here.⁴

³ *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*, 697 F. App’x 526 (9th Cir. 2017).

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

A. Defendants are “Interactive Computer Service” Providers

As a “social networking website” (Am. Compl. ¶ 10), 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, the individual 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 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., Am. Compl. ¶ 96* (referencing “anti-Muslim groups” posting content); ¶ 124 (referencing “white nationalists, militias, and anti-Muslim hate groups” as sources 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.”).

C. Plaintiff’s Claims Treat Defendants as “Publishers” of Third-Party Content

“[T]he decision whether to print or retract a given piece of content—the very actions for which [Plaintiff] 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”). Plaintiff attempts to avoid the CDA by characterizing its claims as challenging supposed representations by Facebook that it removes any and all third-party content that violates the Community Standards. Plaintiff’s theory of liability therefore challenges Facebook’s assessment of whether certain third-party content violates its Community Standards and should be removed from, or allowed to stay up on, the platform. As a result, Plaintiffs’ claims undoubtedly seek to impose liability on Facebook as the “publisher” of third-party content under the CDA.

In applying the CDA, “what matters is not the name of the cause of action,” but rather “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). All of the alleged misrepresentations rely on allegations that Facebook did not remove certain third-party content that Plaintiff believes should have been removed under the Community Standards. According to Plaintiff, those allegations are necessary to Plaintiff’s claims because they show that Facebook “routinely and reliably decide[s] not to remove all content from Facebook’s platform that squarely violates Facebook’s Community Standards....” Am. Compl. ¶ 188; *see id.* ¶¶ 202, 211. As a result, to determine whether a misrepresentation occurred, this Court would have to evaluate each piece of identified third-party content to determine the correctness of Facebook’s moderation decisions regarding that content. “But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.”

Barnes, 570 F.3d at 1103. Accordingly, all of Plaintiff’s claims treat Facebook as a publisher of third-party content under the CDA.⁵

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 purpose because, if accepted, anyone who disagrees with Facebook’s decisions about enforcement of its Community Standards could pursue that dispute in court simply by framing challenges to those decisions in terms of alleged misrepresentations about the Community Standards. 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

⁵ *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*, 167 F. Supp. 3d at 1065-66 (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, 25 (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).

could avoid simply by doing nothing. The CDA was enacted precisely to prevent such a result. *See id.*

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 material fact); *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 255-56 (D.C. 2013) (CPPA claim requires false or misleading statement of material fact). Plaintiff asserts that statements in Congressional testimony and three emails to Plaintiff represent that Facebook without exception “remove[s] *all* content and groups that violate Facebook’s Community Standards, policies, and other standards articulated to Congress and privately to [Plaintiff’s] staff.” Am. Compl. ¶ 160 (emphasis added).⁶ None of the statements identified by Plaintiff make any such representation.

All of the statements, when viewed in context, describe Facebook’s goal of continuing to improve its enforcement efforts, which require an awareness of potentially violating third-party content and judgments as to whether to remove such content, which Facebook has repeatedly and consistently acknowledged are subject to disagreement and mistakes. Indeed, the vast majority of the statements relied upon by Plaintiff explain in the same sentence that Facebook must be aware of potentially violating third-party content. *See e.g., id.* ¶ 57 (“when content gets flagged to us ... if it violates our policies, then we take it down” (emphasis omitted)); ¶ 58 (“if the ads

⁶ 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 Amended Complaint come from Congressional testimony and three Facebook emails.

‘are flagged for us we will review and take [them] down if they violate our policies[.]’”) (alterations in original); ¶ 59 (“*When we find things that violate these standards, we remove them*”); ¶ 61 (“When we find bad actors, we will block them. And *when we find content that violates our policies, we will take it down*”); ¶ 65 (“We also remove any content that praises or supports terrorists or their actions whenever we become aware of it”); ¶ 70 (“*[w]hen we become aware of these pages we will remove them*”). Other statements are part of a discussion or exchange in which this is also made clear.

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.* ¶ 56 (emphasis omitted). 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 “mistakes,” and always “improving.”⁷

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

⁷ *An Examination of Facebook and Its Impact on the Financial Services and Housing Sectors: Hearing before H. Comm. on Fin. Servs.*, 116th Cong. 59 (2019) (statement of Mark Zuckerberg), available at <https://financialservices.house.gov/uploadedfiles/chrg-116hhrg42452.pdf>.

always working to improve.”);⁸ *Securing U.S. Election Infrastructure & Protecting Political Discourse: Hearing before Subcomm. On Nat’l Sec. of the H. Comm. on Oversight & Reform*, 116th Cong. 53 (2019) (statement 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.”);⁹ *Hate Crimes and the Rise of White Nationalism: Hearing before the H. Committee on the Judiciary*, 119th Cong. 5 (2019) (statement of Neil Potts) (“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.”).¹⁰

Likewise, the three emails from Facebook to Plaintiff relied upon by Plaintiff reflect Facebook’s goal of improving its enforcement efforts and a recognition that those efforts are not always perfect. The *first email*, sent on March 26, 2019, responded to a question from Plaintiff about Facebook’s dangerous organizations policy and how that policy applied to a particular group, ACT for America. Am. Compl. ¶ 73. The sender explained that Facebook has “a process for evaluating people and groups as hate figures and organizations,” and considers “a number of different factors, among them organization of hate rallies and association with recognized hate groups.” Exh. C. She further explained that ACT for America “doesn’t currently meet our criteria for designation as a hate organization,” and invited Plaintiff to provide any new information it might learn in the future: “If you do see on or offline signals tied to ACT for America that we should look into, please let us know. New evidence is always something we want to take into account when making determinations about hate figures and organizations.” *Id.*

⁸ Available at <https://www.commerce.senate.gov/services/files/9D8E069D-2670-4530-BCDC-D3A63A8831C4>.

⁹ Available at <https://docs.house.gov/meetings/GO/GO06/20190522/109538/HHRG-116-GO06-Transcript-20190522.pdf>.

¹⁰ Available at <https://www.congress.gov/116/meeting/house/109266/witnesses/HHRG-116-JU00-Wstate-PottsN-20190409.pdf>.

The *second email*, from Kevin Martin on March 17, 2020, explained that Facebook has “invested in proactive detection so that we can find [hate speech] before people even report it to us and sometimes before anyone sees it.” Exh. D. Mr. Martin further explained limitations previously discussed with Plaintiff: “As we discussed with Muslim Advocates Special Counsel for Anti-Muslim Bigotry Madihha Ahussain in January, there are technical limitations to this process, namely because it is difficult for our AI systems to recognize context (e.g. whether a user is using a slur to attack someone or promote bigotry versus reappropriating or using it self-referentially).” *Id.* Mr. Martin went on to describe other efforts by Facebook to combat hate speech and Facebook’s commitment to “continuing this work and being transparent about our efforts to combat hate,” including through continued engagement with Plaintiff: “We hope to continue to engage with you and your organization, including on ways to increase the online safety and security of all of our users.” *Id.*

The *third email*, from Sheryl Sandberg on May 1, 2019, is quoted in the Amended Complaint as follows: “We will remove anything that violates our Community Standards.” Am. Compl. ¶ 74. But Plaintiff misleadingly omits the preceding statement in the same email making clear that the quoted statement referred to specific potentially violating content reported to Facebook by a user. Together, the statements read as follows: “I am having my team do a careful review of the content that Rep. Omar has reported to us...on both Facebook and Instagram. We will remove anything that violates our Community Standards.” Exh. E.

Plaintiff has not alleged any actionable false or misleading statement of fact by Facebook because the Congressional testimony and emails relied upon by Plaintiff, viewed in context, make clear that they describe Facebook’s goal improving its enforcement efforts, which require both an awareness of potentially violating content and judgments as to whether to remove it. *See*

Sibley v. St. Albans School, 134 A.3d 789, 813 (D.C. 2016) (concluding 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

Plaintiff’s CPPA claims should also be dismissed because Plaintiff does not adequately allege that the statements at issue arise out of any consumer transaction or any consumer-merchant relationship with Facebook. Plaintiff’s CPPA claims against the individual Defendants fail for the additional reason that Plaintiff does not adequately allege that those individuals are “merchants.”

As relevant here, the CPPA makes it unlawful for “any person to engage in an unfair or deceptive trade practice.” D.C. Code § 28-3904. The statute 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). An “unfair or deceptive trade practice” includes, *inter alia*, “(a) represent[ing] that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have,” “(d) represent[ing] that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another,” “(e) misrepresent[ing] as to a material fact which has a tendency to mislead,” or “(f) fail[ing] to state a material fact if such failure tends to mislead.” *Id.* § 28-3904(a), (d), (e), (f). Plaintiff asserts that Facebook has violated all of the above provisions based on statements allegedly “representing Facebook’s applications to be governed by Community Standards when they knew or should have known that Facebook routinely did not enforce its Community Standards.” Am. Compl. ¶ 187.

A. Plaintiff Does Not Adequately Allege That the Statements Arise out of a Consumer Transaction or a Consumer-Merchant Relationship

The CPPA “was designed to police trade practices arising only out of consumer-merchant relationships.” *Howard v. Riggs Nat’l Bank*, 432 A.2d 701, 709 (D.C. 1981). It “does not apply to commercial dealings outside the consumer sphere.” *Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006). Accordingly, “a valid claim for relief under the CPPA must originate out of a consumer transaction,” *id.*, and must concern a consumer-merchant relationship, *Sundberg*, 109 A.3d at 1129. Plaintiff has not adequately alleged either requirement.

First, the statements at issue do not originate out of a consumer transaction. Whether this standard is met is analyzed “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). Plaintiff does not allege any facts showing that the Congressional testimony or emails from Facebook to Plaintiff were directed to consumers, let alone that a reasonable consumer who was aware of those statements would understand them as originating out of a consumer transaction.

Second, the statements at issue do not arise out of a consumer-merchant relationship. 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)); *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.”). Plaintiff alleges that Defendants are “merchants” because they “transfer, sell, and/or lease their products and services in return for users’ data.” Am. Compl. ¶ 186. Defendants are not aware of any case in which the D.C. courts have found a “consumer-merchant relationship” based solely on a “consumer” allegedly providing data to a “merchant,” as opposed to paying a merchant for its services, and Plaintiff admits that Facebook’s services

are free of charge, *id.* ¶ 18. Even if a “consumer-merchant relationship” could be established based on a service’s collection and use of online data, Plaintiff does not allege that it is a Facebook user who provided data to Facebook based on the challenged statements. Instead, Plaintiff alleges that it is a civil rights organization who has engaged in dialogue with Facebook regarding third-party content on its platform that Plaintiff believes violates the Community Standards. Accordingly, Plaintiff has not adequately alleged a consumer-merchant relationship as required to state a claim under the CPPA.

B. 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 the individual Defendants personally sell or supply consumer goods or services to Plaintiff or anyone else. Therefore, the CPPA claim against the individual Defendants should be dismissed.

V. Plaintiff Has Not Adequately Alleged Reliance in Support of Any Tort Claim

Plaintiff has not adequately alleged that the alleged misrepresentations “played a substantial part . . . in influencing [its] decision” to engage with Facebook regarding the Community Standards and anti-Muslim hate speech, *Virginia Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1238 (D.C. 2005), or that any such reliance was “objectively reasonable,” *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 933 (D.C. 1992).

First, Plaintiff has not adequately alleged that the purported misrepresentations, which Plaintiff alleges occurred between 2018 and 2020, “played a substantial part” in its decision to

engage in discussions with Facebook regarding the Community Standards and anti-Muslim hate speech. In the initial Complaint, Plaintiff alleged that it has engaged in discussions with Facebook on these issues since 2013. Compl. ¶ 124. In moving to dismiss the initial Complaint, Defendants argued that this allegation defeated any claim that Plaintiff relied on the alleged misrepresentations since they occurred five years into Plaintiff's engagement with Facebook. In the Amended Complaint, Plaintiff removed this allegation, and instead alleges that, while it engaged with Facebook on these issues "as early as 2013, it did so more recently in reliance on Facebook's repeated representations about removing content that violates Facebook's community standards." Am. Compl. ¶ 166.

Plaintiff still does not allege any fact supporting a reasonable inference that, five years into its ongoing discussions with Facebook, the alleged misrepresentations caused Plaintiff to continue to engage in those discussions. Plaintiff does not allege that it intended to stop engaging with Facebook before the alleged misrepresentations, or that its discussions with Facebook changed in any meaningful way after the alleged misrepresentations. On the contrary, Plaintiff admits that it provided the following "services" to Facebook before and after the alleged misrepresentations: "providing examples of Facebook users using the platform's event pages to direct harassment and violence at vulnerable communities, explaining how ordinary Facebook users are radicalized into spreading anti-Muslim hate through Facebook groups, and pointing to viral anti-Muslim posts elevated by Facebook's algorithm." *Id.* Plaintiff's admission that it "continued to provide these services" after the alleged misrepresentations (and while Plaintiff was aware of their alleged falsity) is fatal to its claim. *See Virginia Acad. of Clinical Psychologists, Inc.*, 878 A.2d at 1238.

Second, Plaintiff has not adequately alleged that any reliance on the purported misrepresentations was objectively reasonable, which requires Plaintiff to show that it was “ignorant 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, Plaintiff’s allegations preclude any such showing. Plaintiff admits that by the time the alleged misrepresentations began in 2018, Plaintiff knew that Facebook did not remove all third-party content--without exception--that, in Plaintiff’s view, violated the Community Standards. Am. Compl. ¶¶ 166-171. In fact, that was exactly why Plaintiff continued to engage with Facebook on these issues. Plaintiff alleges that it published reports on the subject and notified Facebook of third-party content it believed violated the Community Standards, and that Facebook removed some but not all of that content. *Id.* ¶¶ 119, 125. These allegations show that Plaintiff was well aware that Facebook does not remove all third-party content Plaintiff believes violates the Community Standards, such that, even if Plaintiff relied on statements allegedly representing that Facebook removes *all* violating third-party content, Plaintiff has not adequately alleged that any such reliance was objectively reasonable.

VI. Plaintiff Fails To State Any Claim against Defendants Kaplan and Martin

Plaintiff’s CPPA claims against individual Defendants Joel Kaplan and Kevin Martin fail as a matter of law.¹¹ As set forth above, the Amended Complaint does not adequately allege that any of the individual Defendants, including Mr. Kaplan and Mr. Martin, is a “merchant” under

¹¹ The original Complaint named Kaplan and Martin as defendants in the CPPA claim (Count One) and included a separate claim against Kaplan and Martin for aiding and abetting fraudulent and negligent misrepresentation (Count Four). After the Defendants argued in their original motion to dismiss that aiding and abetting is not an actionable theory of liability under D.C. law, Plaintiff filed the Amended Complaint dropping Count Four but continuing to include Kaplan and Martin in Count One.

the CPPA. In addition, Plaintiff does not allege any “deceptive trade practice” with respect to either of those Defendants. Plaintiff does not allege that Mr. Kaplan made any statements at all, only that he “approved and/or helped to draft and direct the [Congressional] testimony” of the other individual Defendants. Am. Compl. ¶ 71. This threadbare allegation is insufficient to state a claim under the CPPA, even under an aiding and abetting theory of liability, which the District of Columbia Court of Appeals has held is not available under the CPPA. *Sundberg*, 109 A.3d at 1129-30; see *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 87 (D.D.C. 2017) (recognizing that in *Sundberg* “the D.C. Court of Appeals held that vicarious liability under an aiding and abetting theory was not available under the” CPPA). With respect to Mr. Martin, Plaintiff relies on a single statement in an email to Plaintiff, which does not contain any false or misleading statement by Mr. Martin for reasons explained above.

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*

September 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 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

- Introduction**

- I. Violence and Criminal Behavior**

- II. Safety**

- III. Objectionable Content**

- IV. Integrity and Authenticity**

- V. Respecting Intellectual Property**

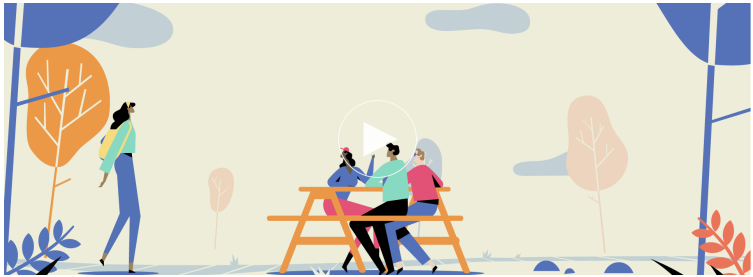
- VI. Content-Related Requests and Decisions**

- Additional Information**

COVID-19: Community Standards Updates and Protections

[LEARN MORE](#)

Community Standards



The illustration shows a stylized park scene with people sitting on a wooden bench. One person is holding a magnifying glass over the others. In the top right corner, there is a circular inset showing a person reading a book.

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:



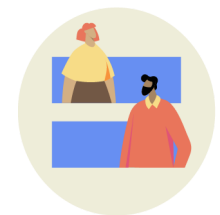
Authenticity: We want to make sure the content people are seeing on Facebook is authentic. We believe that authenticity creates a better environment for sharing, and that's why we don't want people using Facebook to misrepresent who they are or what they're doing.



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

2010 NOV 19 PM 12:55

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"

Phil Mendelson
OFFICE OF THE
SECRETARY

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.

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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

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=enlglaw> (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 developed 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

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 (CASPP) 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 “[*I*]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.

- | | |
|------------------|---|
| <u>Section 1</u> | States the short title of Bill 18-893. |
| <u>Section 2</u> | Incorporates definitions to be used throughout the act. |
| <u>Section 3</u> | 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*
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

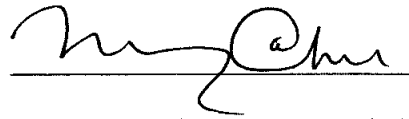
The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

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

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

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

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

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

14 Sec. 3. Special Motion to Dismiss.

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

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

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

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

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

6 Sec. 4. Special Motion to Quash.

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

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

15 Sec. 5. Fees and costs.

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

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

21 Sec. 6. Exemptions.

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

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

6 Sec. 7. Fiscal impact statement.

7 The Council adopts the fiscal impact statement in the committee report as the
8 fiscal impact statement required by section 602(c)(3) of the District of Columbia Home
9 Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-
10 206.02(c)(3)).

11 Sec. 8. Effective date.

12 This act shall take effect following approval by the Mayor (or in the event of veto
13 by the Mayor, action by the Council to override the veto), a 30-day period of
14 Congressional review as provided in section 602(c)(1) of the District of Columbia Home
15 Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-
16 206.02(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.

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.

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 or 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

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):

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.

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

2010 SEP 17 PM 4:11



ATTORNEY GENERAL

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
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 1
or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees 2
and costs to the responding party. 3

Sec. 6. Exemptions. 4

This Act shall not apply to claims brought against a person primarily engaged in the 5
business of selling or leasing goods or services, if the statement or conduct from which the claim 6
arises is a representation of fact made for the purpose of promoting, securing, or completing sales 7
or leases of, or commercial transactions in, the person's goods or services, and the intended 8
audience is an actual or potential buyer or customer. 9

Sec. 7. Fiscal impact statement. 10

The Council adopts the attached fiscal impact statement as the fiscal impact statement 11
required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 12
24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)). 13

Sec. 8. Effective date. 14

This act shall take effect following approval by the Mayor (or in the event of veto by the 15
Mayor, action by the Council to override the veto), a 30-day period of Congressional review as 16
provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 17
24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of 18
Columbia Register. 19

EXHIBIT C

Kravis, Jonathan

From: Monique Dorsainvil [REDACTED]
Sent: Tuesday, March 26, 2019 10:54 PM
To: Farhana Khera
Cc: Monika Bickert; Neil Potts; Shaarik Zafar
Subject: Re: Follow-up

[Shifting Sheryl to Bcc. Adding Monika Bickert, Neil Potts, & Shaarik Zafar]

Dear Farhana -

Thank you for inquiring about the policy in more detail and asking these important follow-up questions.

The new policy will ban praise, support and representation of white nationalism and separatism, so it will focus on individual pieces of content (a post that says, "I'm not racist, I'm a white nationalist"). That said, this isn't the only policy implicated when we're talking about hateful groups and people.

Under our dangerous organizations policy, for example, we will remove hate figures and organizations – they aren't allowed to maintain a presence on the platform even if they're using Facebook or Instagram to post family pictures. We have a process for evaluating people and groups as hate figures and organizations, and we consider a number of different factors, among them organization of hate rallies and association with recognized hate groups. ACT for America doesn't currently meet our criteria for designation as a hate organization, but we did designate one of their local chapters, ACT for America Marlette.

As mentioned in a meeting with Muslim Advocates recently at our DC office, we expanded our credible violence policy such that we now remove content that encourages people to bring weapons to an event or location in order to intimidate or harass. I know this is something that Muslim Advocates specifically flagged to us as a trend your team was seeing on- and offline.

If you do see on or offline signals tied to ACT for America that we should look into, please let us know. New evidence is always something we want to take into account when making determinations about hate figures and organizations.

Thank you again for the follow up, Farhana. Please let me know if there is any additional context or information I can help provide.

Warm Regards,
Monique

On Mar 26, 2019, at 9:07 PM, Farhana Khera [REDACTED] > wrote:

Thank you!

Monique: I look forward to hearing from you.

Best,
Farhana

Sent from my iPhone

On Mar 26, 2019, at 7:24 PM, Sheryl Sandberg [REDACTED] wrote:

Thank you for reaching out.

Adding Monique to respond and share more information on this.

From: Farhana Khera [REDACTED]
Sent: Tuesday, March 26, 2019 4:12 PM
To: Sheryl Sandberg [REDACTED]
Subject: Follow-up

Dear Sheryl,

Many thanks again for reaching out with the policy news. I was thinking about our conversation and have a question: what would the policy say? Specifically, how does it define white nationalist/nationalism? Would it include anti-Muslim hate motivated groups and movements?

One example of an anti-Muslim hate group is ACT for America. ACT for America, which is the largest anti-Muslim hate group in the U.S. with 750,000 members, promotes hate and violence toward Muslims by spreading myths about Muslims seeking to bring Sharia law and that Muslims are inherently violent and disloyal Americans. They have overlap with anti-government and neo-Nazi groups and individuals and have organized hate rallies outside mosques and in other public spaces in recent years, seeking to further intimidate an already vulnerable community. The group was recently banned by Hyatt Hotels and cannot use its facilities for meetings or event.

Under the new policy, would ACT for America be banned from the FB and IG platforms?

If you or a member of your team could respond and help me understand the new policy, I would greatly appreciate it.

Many thanks again.

Best,
Farhana

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Farhana Khera | Muslim Advocates
President & Executive Director
www.muslimadvocates.org

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EXHIBIT D

March 17, 2020

Dear Naheed,

I am responding to the email you sent to Nick Clegg on February 25, 2020.

We are sorry that Muslim Advocates did not attend the salon dinner Nick hosted last month. The focus of the discussion was on possible proactive regulation of the internet, including in the areas Mark Zuckerberg highlighted in his [Washington Post](#) and [Financial Times](#) op-eds: (1) content moderation; (2) data portability; (3) elections; and (4) privacy. The dinner was an opportunity for Nick and other policy team members to discuss these issues with leaders from the civil rights and progressive communities. We believe such feedback is invaluable; as such, we would still welcome your thoughts and insights.

Separately, we want to thank you for the specific points you raised in your note.

Regarding Facebook Events, we continue to believe that this is an important tool that allows our users to organize events, including social gatherings, political protests, and marches. With that said, your concern is an important one – events have the potential to be used in abusive and harmful ways. This is why – following our discussions with Muslim Advocates and other civil rights groups – we updated our [violence and incitement policy](#) based on the concerns you raised. The policy now bans “Statements of intent or advocacy, calls to action, or aspirational or conditional statements to bring weapons to locations, including but not limited to places of worship, educational facilities or polling places (or encouraging others to do the same).”

On hate speech – which we define as violent or dehumanizing speech, statements of inferiority, or calls for exclusion and/or segregation, based on protected characteristics – our policies strictly prohibit anti-Muslim, white supremacist, and hate group content. Additionally, we have invested in proactive detection so that we can find such content before people even report it to us and sometimes before anyone sees it. As we discussed with Muslim Advocates Special Counsel for Anti-Muslim Bigotry Madihha Ahussain in January, there are technical limitations to this process, namely because it is difficult for our AI systems to recognize context (e.g. whether a user is using a slur to attack someone or promote bigotry versus reappropriating or using it self-referentially). However, because of improvements in our detection systems, we now proactively detect 80% of the hate speech we remove before people report it to us, which is up from 60% over the past six months.

We are committed to continuing this work and being transparent about our efforts to combat hate. As a next step, when we share the fifth edition of the [Community Standards Enforcement Report](#) in May, we will share metrics on how we are doing at enforcing our policy against organized hate for the first time.

An additional point: our work to combat hate also goes beyond our policies. When someone searches for something related to hate and violent extremism in the United States, we point them to resources that help people leave behind hate groups in partnership with the organization Life After Hate. We have also more recently expanded this program to Australia in partnership with EXIT Australia, an organization focused on helping to redirect people away from hate in their local communities.

Regarding the NO BAN Act, we appreciate the importance of the issue. Our views have not changed: as we have said regarding earlier efforts to limit immigration on a country-specific basis, we believe that as a nation of immigrants, we all benefit from welcoming people from around the world to contribute to our society. And as [Mark has stated previously](#), “we all benefit when the best and brightest from around the world can live, work and contribute here.”

Finally, I want to address your point regarding our employees and consultants. We do not and will not tolerate harassment or discrimination in our workplace, nor do we allow hate figures or hate groups to have a presence on our platform. Moreover, in developing our policies – including our Community Standards – [we believe it is important to engage a range of stakeholders with diverse viewpoints and across the political spectrum](#).

Thank you again for your note. We value our relationship with Muslim Advocates. We appreciated the opportunity to speak with Madihha in January, including to discuss the issues Muslim Advocates Executive Director Farhana Khara raised with Mark following the dinner he hosted with civil rights leaders last November. We hope to continue to engage with you and your organization, including on ways to increase the online safety and security of all of our users.

Sincerely,



Kevin Martin
Vice President, US Public Policy

CC: Laura Murphy

EXHIBIT E

Kravis, Jonathan

From: Sheryl Sandberg [REDACTED]
Sent: Wednesday, May 1, 2019 8:15 PM
To: [REDACTED]
Cc: Schuyler Milender; Shaarik Zafar; Catlin O'Neill (US Public Policy)
Subject: Re: Sheryl -- Need your help

Farhana,

Thank you for reaching out to me directly. We take threats of violence and hate speech very seriously, and I am so sorry to hear this has been Representative Omar's experience.

I am having my team do a careful review of the content that Rep. Omar has reported to us – for her accounts and her daughter's, on both Facebook and Instagram. We will remove anything that violates our Community Standards. To reduce the burden for Rep. Omar and her staff, we are also proactively reviewing the accounts for threats and hateful content.

My team is reaching out to hers so that we can talk through the steps we're taking, see how we can better support her, and build direct lines of communication so any issues get resolved quickly.

Thank you again for escalating this – we need to do better, and we will.

Sheryl

sheryl sandberg | chief operating officer | facebook
1 facebook way | menlo park, ca | 94025
[REDACTED]

From: Farhana Khera [REDACTED]
Sent: Wednesday, May 1, 2019 9:36 AM
To: Sheryl Sandberg
Subject: Sheryl -- Need your help

Dear Sheryl,

I hope you're doing well. I'm reaching out on an urgent matter and could really use your personal attention. I thank you in advance.

I'm writing to share concerns with you about the way in which Facebook and Instagram have been used to target Congresswoman Ilhan Omar because she is an immigrant, an African-American and one of the first Muslim women to become a member of Congress. She is receiving serious death threats on a daily basis and deserves an immediate response from Facebook.

As you know, President Trump recently tweeted a highly offensive video that juxtaposed footage from the 9/11 attacks with images of Rep. Omar and her words distorted and taken out of context, clearly implying that Rep. Omar somehow condoned the 9/11 attacks or possibly terrorism more generally. Unfortunately, though not surprisingly, this has led to a dramatic increase in the number of targeted

attacks and threats against her. She is regularly receiving death threats on various platforms, including Facebook and Instagram, and now her children are being attacked and feel they are also in danger. **In fact, we have heard directly from Rep. Omar's office that her daughter's Instagram page is being flooded with hateful posts and threats targeting the Congresswoman.**

Per your team's request, Rep. Omar's staff and others are doing the best they can to report this abusive and hateful content when they see it, but they are completely overwhelmed. The sheer volume of hateful content and threats directed at the Congresswoman makes it impossible for any person or team to catalog. But more importantly, **it is completely inappropriate that the burden for addressing bigoted and hateful content on Facebook is often shifted to the victim of the attack.** This is Facebook's platform; it's Facebook's responsibility to remove this content.

Furthermore, in many instances, the content has not been removed when Rep Omar's staff has reported it -- even when the wording of the post mimics wording in Facebook's own examples of prohibited speech or content. It is also our understanding that a man who was recently charged with threatening to kill Rep. Omar was [permitted to post violent content on Facebook](#) for years without any restrictions.

Given the widespread attention to this by media outlets and government officials -- so much so that Speaker Nancy Pelosi had to call for increased security for Congresswoman Omar -- there must be more that Facebook can do to ensure that she can safely use your platform. Otherwise inevitably, bigots and hate groups will win by successfully driving representatives of vulnerable communities off of Facebook and Instagram.

I hope that your team will take this seriously, and I look forward to hearing more from you about steps the company will take to address these concerns.

Thank you again in advance for your time and attention to this serious issue.

Best regards,
Farhana

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Farhana Khera | Muslim Advocates
President & Executive Director
www.muslimadvocates.org

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