No. 23-cv-0240

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SIMON BRONNER, *ET AL.*,

Plaintiffs-Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *ET AL.*,

Defendants-Appellees.

On Review from the District of Columbia Superior Court
No. 2019 CA 001712 B (Rigsby, J.)

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INTRODUCTION

The parties are here today because Defendants broke the law. They crafted a plan to capture the leadership of the American Studies Association ("ASA") and transform it from a neutral academic society into a lobbying vehicle, in contravention of its constitution. Had Defendants achieved that goal through lawful corporate means, there would be no basis for suit. But they did not. When Defendants could not win over the ASA membership through the processes required by the ASA's constitution and bylaws, they disenfranchised members and declared their Resolution enacted even though it had failed under both D.C. law and the ASA's constitution. When Plaintiff Bronner and other ASA members dissented, Defendants suppressed that dissent and fired Bronner as editor of the Encyclopedia, shuttering one of the ASA's largest financial assets. As fallout from the Resolution led to mounting expenses, Defendants changed the corporate bylaws so they could withdraw more funds to defend their illegally enacted Resolution. Plaintiffs' claims are based on this unlawful conduct—each aspect of which constitutes a breach of fiduciary duty, *ultra vires* act, and/or other corporate tort—not on Defendants' speech.

Plaintiffs acknowledge that issues even tangentially related to the Israel/Palestine conflict inspire deepfelt sentiment and may heighten the tension in this case. *See generally* Brief of Amicus Curiae Palestine Legal in Support of

Defendants-Appellees ("Palestine Legal Am. Br."). But the core issue here is that Defendants committed numerous corporate torts and now are weaponizing the D.C. Anti-SLAPP Act ("Act") to seek a crushing $2 million from the four professor Plaintiffs in attorney fees. Defendants' arguments under the Act are meritless. At Step One, Defendants misapply this Court's prior decision in *Bronner II* and attempt to stretch the Act beyond its breaking point to encompass conduct that is, at most, "tangentially" related to speech. And Plaintiffs also prevail at Step Two because their timely claims are substantiated by Bates number, record citations, and Defendants' own admissions—all of which easily meet the Act's low threshold: a "proffer." This Court should reverse and remand for Plaintiffs to pursue their claims.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN NOT EQUITABLY TOLLING THE STATUTE OF LIMITATIONS (COUNTS 2-9)

Defendants do not dispute that Plaintiffs' claims should be tolled if equitable tolling is available for statutes of limitations. Instead, Defendants argue that under D.C. law, a statute of limitations can never be tolled, *see* Brief of Appellees Lisa Duggan et al, ("ASA Br.") 13, or can never be tolled where a timely federal action is dismissed for lack of subject matter jurisdiction, *see* Brief of Appellee Dr. Steven Salaita ("Salaita Br.") 16-17. They are wrong.

First, *Bond v. Serano*, 566 A.2d 47 (D.C. 1989), cannot carry the weight Defendants put on it. That case has been superseded. Pls.' Br. 33. And while Defendants blankly assert that "[i]t is not clear where Appellants might have gotten this impression," ASA Br. 14, n.2, they ignore Plaintiffs' explanation of this point. Moreover, *Bond* is distinguishable because the court in that case, unlike the district court here, did not induce reliance on its own jurisdiction. *See Simpson v. D.C. Office of Human Rts.*, 597 A.2d 392, 401 (D.C. 1991) (distinguishing *Bond*). ASA's other cases—nearly all decades old and applying *Bond*—are similarly inapposite.[1] *Curtis v. Aluminum Association* held that *Bond* was "bind[ing]" because there was no "significant distinction between the circumstances" presented and those presented in *Bond*—recognizing that the outcome might be different were there a significant distinction. 607 A.2d 509, 510 (D.C. 1992) (per curiam). In the other cases, facts not present here weighed against equitable tolling. In *Sayyad v. Fawzi*, plaintiff's untimely filing was caused by his own "failure to comply with procedural requirements." 674 A.2d 905, 905 (D.C. 1996). And *Huang v. D'Albora* emphasized that the plaintiff's suit for the same cause of action was still pending in Maryland. 644 A.2d 1, 3 & n.4 (D.C. 1994). Here, Plaintiffs have no other venue.

[1] The sole case that does not apply *Bond*, *Stewart-Veal v. District of Columbia*, 896 A.2d 232 (D.C. 2006), is nonetheless inapposite because it concerns the distinct relation-back doctrine.

Second, contrary to ASA (at 13), this Court has applied equitable tolling to statutes of limitations. In *Simpson*, which Plaintiffs discussed extensively in their opening brief (at 30-32), this Court held that the one-year statute of limitations under D.C. Code § 1-2544(a) *could* be equitably tolled. ASA's only response (Br. 16)—that "[t]he issue on remand in *Simpson* was . . . the District's argument that plaintiff had failed to exercise due diligence"—just confirms that *Simpson* held that a statute of limitations could be equitably tolled should the Superior Court determine that the plaintiff had exercised due diligence. Nor is *Simpson* the only example. While this Court did not toll the statute of limitations in *Neill v. D.C. Pub. Emp. Rels. Bd.*, because the plaintiff failed to explain his delay, the case similarly assumes equitable tolling could have applied. 234 A.3d 177, 187 (D.C. 2020); *see* Pls.' Br. 33. And as Plaintiffs discussed (at 28, 30), this Court has equitably tolled timing rules incorporated by D.C. statute. *See Mathis v. D.C. Hous. Auth.*, 124 A.3d 1089, 1102-1103 (D.C. 2015) (D.C. Rule 15, incorporated by D.C. Code § 2-510(a)).

Defendants' attempts to distinguish *Simpson* are meritless. That Simpson was unrepresented for most of the litigation, *see* ASA Br. 16, was immaterial to the Court's decision. *See* 597 A.2d at 401 (*Bond* likely should not control "[e]ven if this were not a civil rights case brought under a statutory scheme in which lay complainants are expected to represent themselves."). While in *Simpson*, the

plaintiff initially did not have a "clear right" to sue in the second forum, Salaita Br. 17, *Simpson* is not limited to such cases. It applies when there are "substantial changes" in the operative legal circumstances, 597 A.2d at 401. That was the case here. Far from it being "clear [from] early on that Plaintiff[]s['] claims in the federal court should fail," ASA Br. 16, the federal court *twice* held otherwise, "reinforc[ing] [Plaintiffs'] belief that [they] had come to the correct tribunal," *Simpson*, 597 A.2d at 401. *See* Pls. Br. 31. And then—despite Plaintiffs' every effort to plead and prove that the amount-in-controversy requirement was met, *contra* ASA Br. 16-17; Salaita Br. 17—the court reversed its prior jurisdictional holding and held, for the first time, that the amount-in-controversy requirement was not satisfied. 364 F. Supp. 3d at 12, 21.[2]

Finally, to the extent ASA intends to argue (at 14-15) that this particular statute of limitations (D.C. Code § 12-301) is "jurisdictional" and therefore cannot be tolled, that argument is both waived and incorrect. It is waived because they did not raise this argument below. *Thornton v. Norwest Bank of Minn.*, 860 A.2d 838, 842 (D.C. 2004). And it is incorrect because the "'bright line' default is that

[2] Plaintiffs' opening brief stated (at 34) that the April 2017 filing date in federal court was one "month after their claims *accrued*." This statement was in error, *see* ASA Br. 16 & n.3, although many of Plaintiffs' claims accrued in 2017 with the discovery of Defendants' documents, and Plaintiffs' federal claims were otherwise timely. *See* JA314-315.

procedural rules, even those codified in statute, are 'nonjurisdictional in character,'" and ASA has pointed to nothing indicating the legislature has met the "stringent requirements" for "imbu[ing] a procedural bar with jurisdictional consequences." *Mathis*, 124 A.3d at 1101-1102 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-154 (2013)). To the contrary, Section 12-301's location in the "Right to Remedy" portion of the D.C. Code (D.C. Code Title 12, §§ 12-101 *et seq.*), rather than the "Jurisdiction of the Courts" portion (D.C. Code Title 11, §§ 11-101 *et seq.*), "indicates that the time bar is not jurisdictional." *United States v. Wong*, 575 U.S. 402, 411 (2015).[3]

II. DEFENDANTS FAIL TO SHOW THAT COUNTS 1-3, 5, OR 9-12 "ARISE[] FROM" PROTECTED ACTIVITY UNDER STEP ONE OF THE ACT

Defendants once again claim they can satisfy their burden at Step One by speculating about the motivation for Plaintiffs' lawsuit or describing the conduct underlying Plaintiffs' claims as "related" to the Resolution. This Court already rejected those arguments in *American Studies Association v. Bronner*, 259 A.3d

[3] The Superior Court inexplicably reversed itself and dismissed Count 12 as untimely. JA380-381. With the exception of Salaita, Defendants do not dispute that the dismissal was an error. Salaita argues (at 41) that Count 12 was untimely as to him, because this Count is "predicated on" his pre-Resolution advocacy, which Plaintiffs knew about no later than 2014. But Salaita's aiding and abetting is predicated on his conduct from 2015 through 2018. JA39, 195. And as the Superior Court found in *Bronner I*, many "of the facts which underlie this claim were only discovered in 2017" with production of Defendants' emails. Joint Appendix ("JA") 314-315.

728 (D.C. 2021) ("*Bronner II*"), explaining Defendants must demonstrate that protected activity is the subject or an element of Plaintiffs' claims. They have not and cannot. Nor can Defendants rely on cases interpreting California's distinct Anti-SLAPP statute to avoid this outcome.

1. Defendants' argument that Step One of the Anti-SLAPP test is satisfied because the Resolution is protected activity and was the "reason" for or "event precipitating the claim[s]," ignores this Court's decision in *Bronner II*. ASA Br. 9, 22; *see also id.* at 25 (claims "rest[] on … opposition to the Resolution"); ASA Br. 26 (Plaintiffs would not have pressed claims "were it not" for the Resolution); Salaita Br. 21; *see also* Palestine Legal Am. Br. 7-8; Redacted Public Brief of *Amici Curiae* Members of the "Protect The Protest" Task Force in Support of Appellees 8-9. This argument conflates Plaintiffs' alleged motivation for bringing this lawsuit with the legal "basis for [Plaintiffs'] … cause of action." This Court already squarely held that Plaintiffs' purported "underlying motives in asserting a claim" are irrelevant. JA350, 353.

Defendants likewise fail to apply *Bronner II* in arguing that they can satisfy Step One because Plaintiffs' claims are based on conduct that has a "tangential[] relat[ionship]" to the Resolution. JA351-352 (*Bronner II*). As this Court explained, the Act "provides a highly specific definition of the class of acts that the Anti-SLAPP Act shields," limiting it to "certain categories of *speech*," JA335—

specifically, speech that itself "involves petitioning the government" or "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1), (3). The Act applies only if "[a] legally objectionable aspect of the protected speech itself … [is] the subject of the claim or an element of the cause of action asserted." JA351 (*Bronner II*). Contrary to *Bronner II*, ASA advocates for a significantly more expansive test. ASA contends that the Act applies unless "the cause of action might be evaluated without *reference* to *any speech* whatsoever," regardless of whether the cause of action treats the "protected speech itself" as objectionable. Br. 23 (emphases added). This error pervades ASA's Step One arguments on each count.

ASA argues that **Counts 1-3, 5, and 9** arise out of the Resolution because the underlying conduct happened to be related to the Resolution, even though the conduct would be unlawful regardless of the substance of the Resolution. For example, ASA argues that Count 1, which alleges that Defendants breached their fiduciary duty by materially misrepresenting their plans for ASA, satisfies Step One because—while material misrepresentation is the cause of action—what Defendants misrepresented was their plan regarding the Resolution. Br. 25-26. ASA argues that Count 3, which alleges that Defendants acted *ultra vires* and breached their contracts by violating ASA's mandate that nominees be representative of the diversity of ASA's membership, satisfies Step One because—

while lack of diversity is the cause of action—the way in which they were not diverse was their views on the issues ASA faced. Br. 26-27. And ASA argues that Counts 2 and 9, which allege breach of duty and corporate waste based on the use of ASA funds for ends contrary to ASA's interests, satisfy Step One because—while misuse of funds is the cause of action—the funds were misused for "the advancement of a political position." ASA Br. 30; *see also id.* at 37 (similar for Count 5).

But as *Bronner II* makes clear, a claim is not in furtherance of the right of advocacy when, as with these counts, the speech is incidental. There, this Court explained that the Act would not entitle "a defendant sued for … misappropriating entrusted funds" to relief upon "a showing that the funds were used in furtherance of the right of advocacy." JA352, n.78. That is, that the funds were misappropriated to further advocacy does not change the basic fact that the claim arises from the defendant's defalcation, not the substance of the defendant's speech. *Id.* So too, Counts 1-3, 5, and 9 arise from misrepresenting material facts, nominating non-diverse candidates, misappropriating funds, and violating ASA's governing documents—not Defendants' speech. Defendants' discussion of this point misleadingly elides that the Court's hypothetical was about "embezzling *or misappropriating* entrusted funds." JA352 (emphasis added); *see* ASA Br. 23; Salaita Br. 26. While misappropriation, like Plaintiffs' claims, requires that the

end to which the funds are put be wrong, it is not concerned with *how*, specifically, the end is wrong.

Plaintiffs do not claim, as Defendants assert, "that otherwise commonplace corporate actions … are all tortious solely because those actions were undertaken in support of the Resolution." ASA Br. 23-24; *see also* Salaita Br. 26. Defendants' actions are tortious because they inherently meet the elements for tort liability: materially misrepresenting facts to ASA members, shuttering corporate assets, denying members corporate rights, squandering resources on a resolution passed in violation of D.C. law and the corporate charter, etc. *See* Br. 21-22. That Defendants "undert[ook]" these illegal actions "in support of the Resolution" renders them precisely analogous to the hypothetical defendant who "misappropriate[ed] entrusted funds … in furtherance of the right of advocacy." JA352 (*Bronner II*).

ASA argues **Counts 2 and 10-12** satisfy Step One because they are based on conduct that was "part of" their support for the Resolution. For example, according to ASA the conduct underlying Count 2—such as manipulating the nomination and voting process—was "part of a long-term strategy … to increase support for the Resolution." Br. 29. And Defendants' decision not to renew Bronner's contract, on which Counts 10-11 are based, "was part of their support for, and defense of, the Resolution" given Bronner's opposition to it. ASA Br. 39;

see also id. at 41. But these arguments too are foreclosed by *Bronner II* and the plain text of the Act, which limits the Act's coverage to "written or oral statement[s]" and "expression or expressive conduct"—not any conduct related to speech. JA334; D.C. Code § 16-5501(A), (B). Finally, ASA is wrong that Count 12, for aiding and abetting, arises out of the Resolution for the same reasons it is wrong about the other counts. *See* Br. 41-42.[4]

To the extent **Salaita** raises any unique argument at Step One, it rests on a faulty chronological premise. This Court previously held that "[t]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." JA335 (*Bronner II*). So too, the mere fact that Salaita engaged in speech before this action was filed does not mean it arose from that activity. Yet, that is precisely what Salaita argues, asserting that because the complaint alleges he supported the Resolution the claims against him necessarily are premised solely on his support for the Resolution. *See* Salaita Br. 15, 18-19, 21, 33-34, 40-41. That is wrong. Where Plaintiffs allege that the National Council or ASA fiduciaries acted

[4] This Court should additionally reject the undeveloped argument that various conduct satisfies Step One merely because it may be protected by the First Amendment. *E.g.*, ASA Br. 26, 30; Salaita Br. 36-37; JA372-373, 378 (*Bronner v. American Studies Ass'n, Order*, No. 2019 CA 001712 B (D.C. Super. Ct. Mar. 1, 2023) (*Bronner III*)). The Act is not coextensive with the First Amendment. It protects some speech that the First Amendment does not (*e.g.*, defamation), and leaves unprotected some speech that *is* constitutionally protected (*e.g.*, private speech that does not "communicat[e] views to members of the public").

wrongfully from July 2015 through June 2018—for claims 2, 5, and 9-12—those allegations include Salaita and are based on conduct not covered by the Act. As to Count 3, Plaintiffs alleged that Salaita provided "substantial assistance" in passing the Resolution and that he knew it "would cause great damage to the American Studies Association and its members," JA 141—conduct not covered by the Act.

Three additional points merit correction. First, Defendants argue that the misappropriation aspects of Counts 2 and 9 "rest on the assertion that adoption and defense of the Resolution" was wasteful. ASA Br. 30; Salaita Br. 25. Not quite. The Resolution was wasteful because it passed illegally. *See* Pls.' Br. 13-17. Any corporate resources spent "adopt[ing]" or "defen[ding]" illegal conduct is, by definition, corporate waste and a violation of fiduciary duty. *See id.* at 30.

Second, and relatedly, ASA misunderstands (at 30-31) Plaintiffs' distinction of *Ted Cruz for Senate v. FEC* (at 38) and has no response to the argument that *Cruz* is inapposite to Counts 2 and 9 because it did not involve waste or breach of fiduciary duty. 542 F. Supp. 3d 1, 7-8 (D.D.C. 2021). Further, *Cruz*'s actual holding—that federal regulations limiting campaign spending "restrict[] political expression," *id.* at 8—does not apply to the purely private conduct at issue here.

Third, according to Salaita, Counts 10 and 11—which in relevant part accuse Defendants of shuttering the ASA Encyclopedia, JA136-140—attack protected expression independent of the Resolution because they challenge Defendants'

"decision to not publish information on a website available to the public." Br. 36-37. This argument is waived, as Salaita failed to raise it either in *Bronner I* or *Bronner II*. *Thornton*, 860 A.2d at 842. It is also wrong. Plaintiffs do not challenge expressive conduct, unlike in Salaita's sole case applying the Act on this point. *Lawless v. Mulder* found a plaintiff triggered the Act when he sued a newspaper for "decid[ing] not to publish [the plaintiff's particular] views of [a] bankruptcy," because "[t]he choice of material to go into a newspaper" is a protected "'exercise of editorial control and judgment.'" 2021 WL 4854260, at *1, *3-4 (D.C. Super. Ct. Oct. 5, 2021). Here, Plaintiffs do not complain about "editorial" judgment at all. They grieve the complete loss of one of the ASA's most "valuable asset[s]," JA137, which had garnered tens of thousands of dollars for the ASA in previous years, and whose loss financially damaged both Bronner as an individual and Plaintiffs as fiduciaries of the ASA. Pls.' Br. 19-20.

2. As a fallback, Defendants reach for California law to suggest that Plaintiffs rely on "artifices of pleading" to "characterize" their claims as "garden-variety" non-speech conduct "when in fact" they are "predicated on protect[ed] speech." ASA Br. 24 (citing *Colyear v. Rolling Hills Cmty. Ass'n of Rancho Palos Verdes*, 9 Cal. App. 5th 119, 134 (2017)). But California law is inapposite because California's Anti-SLAPP statute is distinctly broader than the District of Columbia statute. The California statute broadly protects not just expressive activity, but also

"any other conduct in furtherance" of such activity, *Colyear*, 9 Cal. App. 5th at 134. The D.C. Council specifically rejected that identical "expansive" language "and replaced it with narrower language more clearly limited to speech." JA352-353 (*Bronner II*). Similarly, where California requires that its "'anti-SLAPP statute should be broadly construed,'" *Colyear*, 9 Cal. App. 5th at 134, the D.C. Act was drafted "narrow[ly] and precis[ely]" so as not to "stretch too far" to cover "non-speech activities … merely tangentially related to protected speech," JA350-352 (*Bronner II*).

Finally, Defendants assert that the Act's "overarching purpose would be frustrated" if not stretched to encompass Plaintiffs' claims. ASA Br. 24; *see* Salaita Br. 10. But the Act's history and purpose show that the D.C. Council was motivated by the opposite fear: sweeping up non-speech conduct under the Act's powerful—and punitive—enforcement mechanism. *See* JA352; *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016) ("[T]he special motion to dismiss … provides substantial advantages to the defendant" and "imposes procedural and financial burdens on the plaintiff"). It thus is Defendants who seek to undermine the Act's goals by "'commit[ting] tortious acts and then seek[ing] refuge in the immunity conferred by the statute,'" turning the Act into precisely the "sledgehammer" it was "not … meant to" be. *Id*. at 1239. Because Plaintiffs dared to bring claims related at most "tangentially" to speech, JA352 (*Bronner II*),

however "meritorious" those claims may be, *Bronner*, 364 F. Supp. 3d at 12, they now face a claim of $2 million in attorneys' fees. Pls.' Br. 27.

III. UNDER STEP TWO OF THE ACT, A JURY PROPERLY INSTRUCTED ON THE LAW COULD REASONABLY FIND FOR PLAINTIFFS ON ALL CLAIMS

Because Defendants have not made Step One's "threshold showing," *Mann*, 150 A.3d at 1239, this Court need not proceed to Step Two to "evaluate … on a claim-by-claim basis" whether Plaintiffs' claims are "likely to succeed on the merits." JA343 (*Bronner II*). Regardless, all claims are likely to succeed.

1. Defendants are wrong that Plaintiffs did not "even attempt" to meet their burden of persuasion on Step Two. ASA Br. 44; *see also* Salaita Br. 11-12. As the Superior Court concluded in *Bronner I* (JA325), Plaintiffs "demonstrated that they have evidence" that all "claim[s are] likely to succeed on the merits" by quoting extensively from Defendants' own documents and citing to Bates number and/or deposition transcript pages. Plaintiffs also relied on the answer filed by seven Defendants admitting to, or not refuting the accuracy of, the vast majority of Plaintiffs' quotations and references to outside documents in their December 2019 answer. *See* Pls.' Br. 23.[5]

[5] While highlighting two examples in which ASA admitted that Plaintiffs had accurately quoted documents outside the complaint, ASA now puzzlingly states (at 46) that it nevertheless did not "'admit[]' that Plaintiffs had accurately quoted any particular document," and that Plaintiffs cite no such examples. Plaintiffs' opening brief cited (at 23) numerous examples of Defendants admitting or not refuting the

While this Court has held (in the one Anti-SLAPP case ASA cites on this point) that "plaintiffs are required to present more than … mere allegations in the complaint," *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 506 (D.C. 2020), the complaint in this case did not consist of "mere allegations." Plaintiffs relied on identified documents, quotations, and admissions, and this proffer of evidence is not transformed into "mere allegations" by being reproduced in the complaint. To the contrary, just as allegations in a verified complaint are properly considered at summary judgment, *see U.S. Bank Trust, N.A. v. Omid Land Group, LLC*, 279 A.3d 374, 378 (D.C. 2022), so too are Plaintiffs' proffers, verified by Bates number, record citation, and Defendants' own answers considered at Step Two of the Act. Contrary to Defendants, *Omid* is not distinguishable simply because it contained a different form of verification—"authenticated documentary evidence in the record." ASA Br. 46; Salaita Br. 13.

That Plaintiffs hypothetically could have made alternative forms of proffer does not mean Plaintiffs' proffers were insufficient. *See* ASA Br. 46-47; Salaita

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accuracy of Plaintiffs' quotations or characterizations of evidence, referenced by JA number as required by D.C. Rule 28(e). For convenience, Plaintiffs reproduce those examples here, now referenced by paragraph number in the complaint and corresponding answer. *Compare* Compl ¶¶ 60, 69, 74, 91-92, 94, 98-100, 104-106, 109-110, 114, 120-122, 125, 134-136, 148, 154-156, 162, 166, 168, 175-176, 179, 181-187, 189-190, 192, 194-195, 229, 236 *with* Ans. ¶¶ 60, 69, 74, 91-92, 98-100, 104-106, 109-110, 114, 120-122, 125, 134-136, 148, 154-156, 162, 166, 168, 175-176, 179, 181-187, 189-190, 192, 194-195, 229, 236.

Br. 10-11; Brief of Appellees, J. Kehaulani Kauanui and Jasbir Puar ("Puar/Kauanui Br.") 7. That is especially true given that Defendants themselves challenged Plaintiffs' use of federal discovery in the Superior Court at every turn. ASA suggests (at 46) that Plaintiffs could have simply "produce[d] the actual document[s]," but omits that Defendants abused the district court's confidentiality order to oppose Plaintiffs filing a sealed unredacted complaint in the Superior Court that merely *quoted* "information … covered by the protective order." *Order* 1, No. 2019 CA 001712 B (D.C. Super. Ct. June 7, 2019). Salaita's insistence to this day (Br. 12 n.6) that "Plaintiffs cannot have even read the[ir]" own unredacted complaint "without violating the Protective Order," gives a small hint of how burdensome Defendants made the discovery and proffer process.

Although "the Act's special motion to dismiss is *in essence* an expedited summary judgment motion," *Banks v. Hoffman*, 301 A.3d 685, 696 (D.C. 2023) (emphasis added), *see* ASA Br. 44, there are important "procedural differences," JA345 (*Bronner II*). An Anti-SLAPP motion, unlike a summary judgment motion, "'requires the court to consider the legal sufficiency of the evidence presented before discovery is completed.'" *Banks*, 301 A.3d at 692. Thus, at the special motion's "preliminary stage" of litigation, the "court's role" is not "to mak[e] credibility determinations or weigh[] the evidence"—let alone "to decide the merits of the case"—but merely "to test the legal sufficiency of the evidence to

support the claims" for the sole purpose of ensuring that Plaintiffs have not brought a completely "meritless" action. *Mann*, 150 A.3d at 1227, 1240. ASA is thus incorrect (at 45) that Anti-SLAPP motions, designed so that defendants could "avoid the burdens of pretrial matters, such as discovery," *Mann*, 150 A.3d at 1230 (citation omitted), apply "the same standard for proffer of evidence" as a summary judgment motion. While on summary judgment a plaintiff must "set forth significant probative evidence," ASA Br. 45 (citing *Clampit v. American Univ.*, 957 A.2d 23, 36 (D.C. 2008)), the Act demands a mere "proffer"—that is, an "offer or tender," *Proffer*, Black's Law Dictionary (11th ed. 2019)—of evidence in support of Plaintiffs' claims. D.C. Code § 16-5502(b).

Finally, equity favors finding Plaintiffs' proffers sufficient in this case. When *Bronner I* concluded that Plaintiffs' proffers "demonstrated that they have evidence" of their claims, JA325-326, it rejected Defendants' arguments—identical to those here—that the "[m]ere allegations" in the complaint "would not suffice." *Motion to Dismiss Under Anti-SLAPP Act* 11, No. 2019 CA 001712 B (D.C. Super. Ct. May 6, 2019). On appeal, *Bronner II* did not evaluate Plaintiffs' proffers or disturb that aspect of *Bronner I*'s reasoning. Accordingly, when the case was remanded, Plaintiffs reasonably believed that they had prevailed on this issue, and were given no notice that they should respond in any other way.

2. The Superior Court largely did not address the merits of Plaintiffs' claims, instead resting its about-face Step Two ruling on its erroneous conclusion that Plaintiffs could not rely on anything in the complaint for their proffer. If the Court finds it necessary to reach Step Two, it should conclude that Plaintiffs have met the low bar of demonstrating that their claims are not "meritless." *Mann*, 150 A.3d at 1240. First, none of Plaintiffs' counts are time-barred, as explained *supra* pp.2-6. Second, a jury could reasonably find for Plaintiffs on Counts 1-3, 5, and 9-12, and Defendants do not challenge the merits of Counts 4, 6-8.[6]

Count 1. ASA mischaracterizes this Count (at 28-29) as accusing Defendants of failing to "disclose every aspect of [their] political viewpoint[s]" lest "someone belatedly f[ind] [one] to be 'important.'" The crux of Count 1 is that Defendants violated their fiduciary duties by failing to disclose the material fact that they already had formulated plans for ASA on a matter that they knew was not favored by ASA's membership and expected that their plans would result in "reputational and financial costs and the loss of good will." JA122. A reasonable

[6] At Step Two, Salaita advances the same flawed argument he advanced at Step One: that the only relevant conduct alleged as to him was support for the Resolution. But as explained *supra* pp.11-12, Plaintiffs have proffered that Salaita engaged in the same wrongful conduct as other members of the National Council from 2015 through 2018. JA47, 198, 141. Plaintiffs' Count 3 claim against Salaita is not covered by the Anti-SLAPP Act because it fails at Step One, but Plaintiffs are not arguing that Count 3 fails at Step Two.

jury could find that defendants Marez, Duggan, Maira, Kaunaui, and Puar sought to "populat[e]" the ASA "with as many supporters as possible," JA52, 57, 197, 199, 202, and agreed to hide this plan from members because their goal was to "get on the Council … not to test" public "support" for the Resolution. JA55, 201-202. A reasonable jury could also find that Defendants (correctly) anticipated that adopting the Boycott would require the ASA to "put out" costly "fires," JA77-78, and could subject the ASA to "attack," JA209, 218, but did not disclose these anticipated costs to membership. *See also* JA99 (ASA hired lawyers "even before the … Boycott passed"); JA101, 209, 218.

Counts 2 and 9. Plaintiffs' claims for misuse of funds are not collaterally estopped, *see* ASA Br. 31-34; Salaita Br. 30-31, because collateral estoppel does not bar claims that, as here, were not dismissed on the merits, *see* Pls.' Br. 48-49 (citing *Modiri v. 1342 Rest. Grp., Inc.*, 904 A.2d 391, 394 (D.C. 2006)). ASA's claim (at 32) that the district court dismissed these claims on the merits misconstrues the court's explanation. The district court dismissed the claims because "Plaintiffs had failed to make a demand on the National Council," as required for derivative claims, "not because the claims themselves, if ASA had asserted them on its own, lacked merit." *Bronner v. Duggan*, 324 F.R.D. 285, 293 n.2 (D.D.C. 2018). As Plaintiffs explained (at 48-49), the district court expressly dismissed the claims pursuant to a procedural statute that governs derivative suits,

not the merits of the corporate waste claim.

And these claims have merit. As the Superior Court initially held (before inexplicably reversing itself in *Bronner III*), JA315-318, 374, Plaintiffs bring individual, not derivative, claims because they stated a "'direct, personal interest' in the causes of action" by alleging that they were dues-paying members at the time of the events in this case, JA316-317 (*Bronner I*) (quoting *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729 (D.C. 2011)); *see also* JA42. Defendants now claim that Plaintiffs are not dues-paying members, *see* ASA Br. 32-33; Salaita Br. 31. But they did not raise this argument in *Bronner I* and have thus waived it. *Thornton*, 860 A.2d at 842. Regardless, the paragraphs they cite, which reference Plaintiffs' member status, do not say that Plaintiffs pay no dues. To the contrary, Plaintiffs alleged that they "contributed funds—including annual dues" to the ASA. JA42. Plaintiffs also proffered evidence that they maintain a personal investment "in the maintenance of the [ASA]'s reputation," which reflects on individual members. *Id.* An "emotional relationship with the organization" is sufficient to allege a personal interest in a cause of action. *Bronner*, 364 F. Supp. 3d at 21.

And a reasonable jury could find waste. As an initial matter, ASA's fact-specific contentions to the contrary—arguments that Defendants did not misuse funds (at 33-37)—are all waived because ASA did not raise them in *Bronner I*.

Thornton, 860 A.2d at 842. Regardless, ASA misrepresents the factual record. Plaintiffs proffered evidence that in 2016, Defendants changed the ASA bylaws to permit them to withdraw large sums from the ASA's trust fund, from which there had been no withdrawals since 2008, and that—*contra* ASA's suggestion (at 35) that there is "no allegation of any actual withdrawals" after the bylaws changed or that "it is impossible to say how significant such withdrawals might have been"—the subsequent withdrawal of $294,000 total in fiscal years (FYs) 2016 and 2017 significantly exceeded withdrawal amounts in previous years. JA92-95, JA213-214. These significant withdrawals were combined with revenues in FYs 2012, 2014, and 2015 that—*contra* ASA's argument (at 34) that revenues were "comparable to the prior years"—were materially lower than in *any* prior year apart from the Great Recession in 2008 and 2009. JA95-96, 215. Membership dues also fell in FYs 2014 and 2015, after the Resolution was adopted. JA97-98, 216-217.[7]

[7] While ASA correctly notes (at 34) that "there was a one-year *increase* in revenue with the adoption of the Resolution," as Plaintiffs explained (at 18), this was likely due to Defendants' enrollment of pro-Boycott supporters for the explicit purpose of passing the Resolution. *See* JA82 (Defendants discussing the enrollment of pro-Boycott supporters in 2013). And despite ASA's contention (at 34) that Plaintiffs included no "data for 2010 or 2011," Plaintiffs included those dates in their average of revenue from the ten-year period from FY 2003 through FY 2012, JA95. Defendants' Answer did not dispute the accuracy of Plaintiffs' calculations. JA215.

Contrary to ASA's claim (at 33-34) that Plaintiffs showed no causal link beyond the "temporal relationship" between this financial harm and the Boycott, Plaintiffs proffered numerous communications in which Defendants discussed using trust resources specifically for Boycott-related expenses. *E.g.*, JA95, 99-102, 215, 217-218. While it may be unclear "to what *extent*" funds from the trust were used for the Boycott, ASA Br. 34, "it is clear" from Defendants' communications "that … withdrawals from the Trust Fund in 2016 and 2017 did cover Resolution-related expenses to some extent," JA103. And because the Resolution was never lawfully enacted, it was by definition always *Defendants*' agenda, and never the ASA's agenda. A reasonable jury could find that any ASA funds spent on an unlawful Resolution unlawfully put Defendants' own interests above ASA's, *Willens v. 2720 Wis. Ave. Coop. Ass'n*, 844 A.2d 1126, 1136 (D.C. 2004), and was an "exceptionally one-sided" "diversion of corporate assets for improper and unnecessary purposes," *Daley*, 26 A.3d at 730.

Finally, Defendants suggest that the ASA money they spent on legal fees were solely in response to this particular lawsuit, and that it is not tortious to spend organizational money to defend the organization. Salaita Br. 32; ASA Br. 36-37 (similar). This is both factually and legally wrong. Factually, Plaintiffs proffered testimony that ASA paid legal fees for "numerous lawsuits"—not just the instant one—and that Defendant Stephens "hired lawyers on behalf of the [ASA] even

before the Academic Boycott passed, because he was concerned about the potential legal risk," JA99. Legally, Defendants' cases (none of which applies D.C. law) do not support them: *Kaplan v. First Hartford Corp.*, for example, explains that fiduciaries "usually" have a duty to defend the corporation "even if they individually have failed to perform in some way that caused the litigation," but leaves open the possibility that such expenditures could be "misapplication or waste." 484 F. Supp. 2d 131, 144 (D. Me. 2007). Here, a reasonable jury could find that hiring lawyers before the Resolution even passed, and then spending ASA money to defend it knowing it had not been lawfully enacted, JA99, constituted such "misapplication or waste." *See Daley*, 26 A.3d at 730.

Count 3. Plaintiffs' claim that Defendants' nomination of candidates who did not reflect the diversity of ASA's membership was *ultra vires* and a breach of contract has merit. ASA argues (at 28) that Article Six's diversity requirement does not require diversity of views about the Boycott because "diversity … must be read according to its normal, reasonable meaning"; but Defendant Stephens *himself* testified that the Nominating Committee understood "diversity … should reflect" not just diversity of backgrounds, but also different views on "the issues [] that the association is facing." JA263-265. It is undisputed that, during the relevant time period, Defendants were aware that no more than 20% of ASA membership supported the Boycott. JA66, 215. A jury could readily conclude that

Defendants flouted the diversity mandate by choosing nominees based on whether they would promote the Resolution. JA52, 199; *see also* JA53.

Count 5. ASA's only basis for arguing that Count 5 fails on the merits (Br. 37-38) is that the district court supposedly "already evaluated and rejected" it. That is incorrect. Count 5 alleges that Defendants violated ASA's founding documents by expending significant ASA resources opposing bills proposed in Congress and state legislatures. JA90, 213. When the district court evaluated a previous version of this claim, it concluded only that the Resolution *itself* was "enacted for 'academic purposes'" and did not target specific legislation. ASA Br. 38 (quoting 249 F. Supp. 3d 27, 49 (D.D.C. 2017)). A reasonable jury could readily find that Defendants subsequently expended significant ASA resources—including creating a fundraising campaign with a goal of raising $100,000—opposing the legislation specifically referenced in the complaint. JA90, 213.

Counts 10-11. A reasonable juror could also conclude that Plaintiffs adduced sufficient evidence for their claims that Defendants breached fiduciary duties and tortiously interfered with Bronner's contract when they removed Bronner as editor and shuttered the Encyclopedia. JA136-140. Plaintiffs proffered undisputed financial statements showing the significant revenue the Encyclopedia generated for the ASA under Bronner's editorship. JA104-105, 219. Plaintiffs also proffered dozens of undisputed internal emails demonstrating that Defendants

wanted to remove Bronner from the National Council and his editorship not because of job performance, but because of his refusal to support the Boycott. Sealed Joint Appendix ("SJA") 83-93; JA219-220. [redacted], SJA88-89, 93; JA220-221—a tall order given that ASA had never before "failed to renew the editor's contract" if "the editor wished to" remain. JA111, 221. Defendants ultimately [redacted], and conducted no subsequent work on the Encyclopedia. SJA86-87, 98, 104-105; JA115, 220, 222-223.

Defendants argue there was no tortious interference because ASA did not remove Bronner until the end of his contract term. *See* ASA Br. 41, 42; Salaita Br. 39. But Defendants' choice of this strategy, SJA89, 93; JA220-221, is no defense to breach of fiduciary duty or tortious interference. A reasonable jury could conclude that removal of Bronner as editor, and the subsequent shuttering of one of ASA's most significant assets, was decidedly contrary to the best interests of the ASA. *See Wisconsin Ave. Assocs. v. 2720 Wis. Ave. Coop. Ass'n*, 441 A.2d 956, 962-963 (D.C. 1982). And just as a defendant can tortiously interfere with a plaintiff's at-will employment contract by inducing termination, *see Casco Marina Dev. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 84 (D.C. 2003), so too can a defendant tortiously interfere with a term-limited contract by inducing

termination—especially where the contractual relationship was presumptively ongoing, as this one was. Further, despite Salaita's argument (at 38) that "it is not a breach of fiduciary duty to not renew the contract of someone who is suing the corporation," Plaintiffs alleged that Defendants began tortiously interfering in 2014, JA112, well before Plaintiffs sued in 2016.[8]

As to Count 11, an agent may be "held liable for tortious interference with a contract of its principal" if "the agent improperly interferes with contractual relations with actual malice or for his own benefit, rather than for the principal's interest." *Robinson v. Deutsche Bank Nat'l Tr. Co.*, 932 F. Supp. 2d 95, 110-111 (D.D.C. 2013) (quoting *Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813, 820 (D.C. 1991) (cleaned up); *see* ASA Br. 42; Salaita Br. 37. Malice requires "an independently wrongful or illegal act." *Robinson*, 932 F. Supp. 2d at 111 (quoting *Curaflex Health Servs., Inc. v. Bruni*, 899 F. Supp. 689, 697 (D.D.C. 1995)). A reasonable jury could find on Plaintiffs' evidence that Defendants interfered with Bronner's contract for their own benefit, rather than in service of the ASA, and that this action was independently wrongful. SJA83-93; JA219-220.

Separately, Count 11 also applies to the "Defendants [who] acted to interfere

[8] ASA cursorily invokes (at 41) the business-judgment rule. That rule is overcome when, as here, Plaintiffs "'allege with particularity that the Board either was tainted by self-interest [or] acted in bad faith or fraudulently.'" *Behradrezaee v. Dashtara*, 910 A.2d 349, 363 (D.C. 2006).

with Plaintiff Bronner's contract" during time periods "when they were not fiduciaries" of Bronner and the ASA. JA140. These Defendants are Duggan, who was not a fiduciary after June 2016, and [redacted] and Marez, who were not fiduciaries after June 2015. JA38-39, 112-113; SJA88-89. Bronner's contract did not end until December 2016. JA114-115.

Count 12. That the District of Columbia "'has not yet … *explicitly*'" recognized the tort of aiding-abetting, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 (D.C. 2013); Salaita Br. 41, does not render Plaintiffs' claim unlikely to succeed. "[C]ourts applying District of Columbia law have … found aiders and abettors liable for the underlying tort." *Lannan Found. v. Gingold*, 300 F. Supp. 3d 1, 29-30 (D.D.C. 2017); *see also Chen v. Bell-Smith*, 768 F. Supp. 2d 121, 140-141 (D.D.C. 2011); *Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983). According to those courts, "[a]iding and abetting the breach of fiduciary duty occurs when the defendant knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other nonetheless." *Ehlen v. Lewis*, 984 F. Supp. 5, 10 (D.D.C. 1997) (quotation marks omitted).[9] As no Defendant other than Salaita disputes (at 42),

[9] Citing nothing, ASA asserts (at 42) that "a corporation cannot aid and abet itself." This is waived because Defendants did not raise it before *Bronner I*. *Thornton*, 860 A.2d at 842. To the extent ASA intends to refer to the principle that "[f]iduciaries cannot aid and abet their own breaches of fiduciary duty," *In re DSI*

the evidence is sufficient for Count 12 if it is sufficient for the underlying counts. And Plaintiffs proffered evidence that Salaita was aware of, and substantially assisted, other Defendants' Resolution-related efforts. JA47, 141. And, contrary to ASA and Salaita, the First Amendment does not bar this claim. ASA Br. 43; Salaita Br. 42 (citing *Snyder v. Phelps*, 562 U.S. 443, 460 (2011)). The First Amendment protects only speech that is "of public concern." *Snyder*, 562 U.S. at 453 (quotation marks omitted). As Plaintiffs explained (at 34-44), none of the tortious conduct at issue in this suit was speech at all, let alone "of public concern."

IV. THE VOLUNTEER PROTECTION ACT DOES NOT IMMUNIZE PUAR/KAUANUI

The Superior Court correctly rejected Puar and Kauanui's asserted defense under the Volunteer Protection Act ("VPA"), 42 U.S.C. § 14503. JA324. The VPA immunizes nonprofit volunteers from liability for harm caused by certain acts or omissions unless, as relevant here, those volunteers caused harm through "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." 42 U.S.C. § 14503(a)(3). As *Bronner I* found, the VPA does not apply because "Plaintiffs have alleged … that Defendants' willful misconduct has harmed the

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Renal Holdings, LLC, 574 B.R. 446, 474 (Bankr. D. Del. 2017), that principle does not apply since a fiduciary is "'liable for having aided and abetted the breach of fiduciary duties by one or more of the other Defendants possessing such duties at the relevant times.'" *Id*.

ASA and her members." JA324. *E.g.*, JA30, 33-34, 49-50, 52, 54-55, 57, 63-65, 72-73, 80-83, 94-121. Plaintiffs also alleged malicious intent (at JA29), although the VPA's intent exception does not require it (*contra* Puar/Kauanui Br. 11).

CONCLUSION

This Court should reverse and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(5), (6), as modified by Plaintiff-Appellants' pending unopposed motion for leave to exceed the page limit by 10 pages.

1. Exclusive of the exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(6), the brief contains 30 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2023, a copy of the foregoing brief has been served electronically, through the appellate e-filing system, upon Thomas C. Mugavero, Jeffrey C. Seaman, Richard R. Renner, Shayana D. Kadidal, Maria LaHood, and Astha S. Pokharel.

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Seth P. Waxman
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No. 23-cv-0240
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