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No. 22-CV-0274/22-CV-0301

DISTRICT OF COLUMBIA COURT OF APPEALS

Felicia M. Sonmez,

Appellant/Cross-Appellee,

v.

WP Company LLC et al.,

Appellees/Cross-Appellants.

On Appeal from a Final Judgment of the
Superior Court of the District of Columbia, Civil Division
Case No. 2021 CA 002497 B, Judge Anthony C. Epstein

REPLY/RESPONSE BRIEF FOR APPELLANT/CROSS-APPELLEE FELICIA SONMEZ

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Rule 28(a)(2)(A) Statement

The parties are plaintiff-appellant/cross-appellee Felicia Sonmez and defendants-appellees/cross-appellants the Washington Post, Martin Baron, Cameron Barr, Steven Ginsberg, Tracy Grant, Lori Montgomery, and Peter Wallsten. In the Superior Court, Sundeep Hora of Alderman, Devorsetz & Hora PLLC represented Sonmez, and Jacqueline M. Holmes, Yaakov M. Roth, and Joseph P. Falvey of Jones Day represented defendants. On appeal, the same counsel remain for defendants. Sonmez is represented on appeal by the same people and entities named in our opening brief (at ii) and additional student counsel Daphne Assimakopoulos, Monica Kofron, and Chase Woods.

Amici curiae for Sonmez are Claire Goforth and L.L. Dunn Law Firm, PLLC represented by Matthew K. Handley of Handley Farah & Anderson PLLC and Jim Davy of All Rise Trial & Appellate; and Maryland Coalition Against Sexual Assault represented by Filippo A. Raso and Allison Holt Ryan of Hogan Lovells, LLP, and Alejandra Caraballo of Harvard Cyberlaw Clinic. Amici curiae for defendants are Boston Globe Media Partners, LLC, E.W. Scripps Co., Los Angeles Times Communications LLC, The Maryland-Delaware-DC Press Association, the National Association of Broadcasters, the National Press Club, the National Press Club Journalism Institute, National Review Institute, and Yelp Inc. represented by Charles D. Tobin and Alia L. Smith of Ballard Spahr LLP.

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Introduction and Summary of the Argument

The Washington Post and various of its editors discriminated against Felicia Sonmez and violated the DCHRA when they banned her from covering stories related to #MeToo, denied her timely security protection in the face of violent threats, suspended her, and issued an unjustified poor-performance review that resulted in a lower annual raise. In an attempt to escape the merits, defendants cross-appealed the Superior Court's denial of their special motion to dismiss under D.C.'s Anti-SLAPP Act—a law designed to stop strategic lawsuits aimed at hindering public discourse, not employment-discrimination suits in which the defendant has not engaged in public advocacy.

Response Argument (22-CV-0301)

I. Defendants fail to make out their prima facie case under the Anti-SLAPP Act, forcing Sonmez to shadow box their conclusory arguments. Even when Sonmez sharpens defendants' position to give her something to rebut, straightforward application of the Act's prima facie elements demonstrates that they are not entitled to its extraordinary relief. The only personnel decision that even tangentially relates to First Amendment protected activity (and thus the Anti-SLAPP law) is defendants' discriminatory coverage ban. But that discrimination was not "expressive conduct." The ban conveyed no clear message to "members of the public." Indeed, defendants cannot point to any time that reassigning a story to another reporter led the Post to "communicat[e]" different "views" than had Sonmez been permitted to write the story herself. Moreover, defendants never engage with the allegations in Sonmez's

complaint that show that their discrimination related primarily to "commercial interests," rather than the "issues of public interest" required to gain the Act's protection.

II. If this Court rejects the Superior Court's holding that defendants failed to make out their prima facie case, Sonmez's coverage-ban claims should nonetheless proceed because her case is not a meritless, strategically deployed lawsuit designed to chill First Amendment protected conduct. Accepting defendants' "objectivity" justification as true for the limited purpose of the Anti-SLAPP motion, Sonmez is still likely to succeed on her ban-related DCHRA claims because this stated reason is direct evidence of discrimination. Alternatively, because remand is certainly required for Sonmez's DCHRA claims that do not arise from the coverage ban, Sonmez should have the opportunity to present evidence on remand.

Reply Argument (22-CV-0274)

I. The First Amendment does not shield defendants from DCHRA liability. The coverage bans are not the type of expressive conduct to which protection attaches, and the First Amendment does not immunize newspapers from generally applicable laws like the DCHRA.

II. Defendants provide no legitimate answer to the plausible factual allegations that they discriminated against Sonmez with respect to the "terms, conditions, or privileges" of her employment because of her status as a survivor of sexual assault and because of her sex. They ask this Court to bulldoze past the allegations of direct evidence—defendants' statements that they removed her from stories because of her status as a victim of sexual assault. In any case, defendants' purportedly neutral

motive of objectivity is anything but. The perception of Sonmez as biased is part and parcel of her victim status and sex, as defendants' own statements and conduct show. Sonmez also pleaded indirect evidence, comparing her circumstances to those of other Post journalists who spoke out on other issues or were targeted by online harassment and were, unlike Sonmez, protected and even celebrated by defendants. Defendants' actions were also sex discrimination for three reasons. Victim-status discrimination necessarily includes sex discrimination; defendants banned Sonmez from covering sexism (not just sexual assault); and the allegations show that defendants relied on impermissible sex stereotypes about how a woman should react to an assault. Finally, defendants respond with outdated precedent to Sonmez's point that their discriminatory actions altered the terms, conditions, or privileges of her employment. But even if Sonmez had to allege narrowly defined "adverse employment actions," she has done so.

III. Defendants subjected Sonmez to a hostile work environment. Contrary to defendants' suggestion, Sonmez experienced one workplace environment. The atmosphere she faced in the newsroom and on Twitter cannot be broken apart. Defendants trivialize the coverage bans that forced Sonmez repeatedly to disclose her victim status to her colleagues and prevented her from doing her job. Defendants failed to provide timely security when she faced rape and death threats online. This misconduct is attributable to the Post because instead of working to remedy the harassment as it did when other reporters faced online abuse, the Post both dragged its feet and further inflamed the abuse.

IV. Sonmez alleges a clear account of persistent retaliation. Sonmez opposed the bans and her manager's demands that she remove her pinned tweets. She had a reasonable, good-faith belief that both acts were illegal discrimination under the DCHRA. She voiced her opposition by explaining to her managers why each act was discriminatory. As for causation, defendants' brief willfully ignores the big picture—a continuing campaign of escalating hostility directed toward Sonmez.

Issues Presented

Defendants' cross-appeal (22-CV-0301): Whether defendants made out their prima facie showing that Sonmez's DCHRA claims arise from an act by defendants in furtherance of the right of advocacy on issues of public interest, or, in any case, whether Sonmez's claims are likely to succeed on the merits.

Sonmez's appeal (22-CV-0274): For the issues presented in Sonmez's appeal, *see* Opening Br. 3, except that defendants have conceded that Sonmez's claims are timely, *see* Defs.' Br. 21-50.[1]

Procedural Background

Our opening brief addressed only the DCHRA issues. Defendants' cross-appeal challenges the Superior Court's rejection of their special motion to dismiss under the Anti-SLAPP Act, and further procedural background—beyond that in our opening brief (at 17-19)—is therefore necessary.

[1] By failing to challenge the timeliness of Sonmez's claims on appeal, defendants have forfeited that affirmative defense. *See Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1108-09 (D.C. Cir. 2019).

Defendants' Anti-SLAPP motion argued that even if they discriminated and retaliated against Sonmez that conduct related to "the Post's editorial decision to have *other* reporters covering stories relating to the #MeToo movement," which in defendants' view implicated their "rights under the Free Press and Free Speech Clauses of the First Amendment." Mem. in support of mot. to dismiss 29. They asserted that communicating with the public "is exactly what newspapers … do every day" and maintained that "Sonmez's claims arise from actions 'in connection with' that expression on matters of public interest like the #MeToo movement." *Id.* They nowhere supported this assertion with allegations in Sonmez's complaint. *Id*. And they did not explain how the specific employment decisions here constituted expressive conduct that communicated with the public on an issue of public interest. *Id.*

The Superior Court held that defendants did not make their prima facie showing that the coverage bans triggered the Anti-SLAPP Act's protections. JA170. It reasoned that the Anti-SLAPP Act protects only speech and the bans did not qualify. JA171-72. The court focused its Anti-SLAPP analysis on the coverage bans, addressing the other adverse actions like the suspension and diminished raise in a footnote that explained, correctly, that defendants had not argued that personnel decisions other than the bans were entitled to Anti-SLAPP protection. JA171 n.16.[2]

[2] The Superior Court held that defendants met their prima facie burden to show that their public statement about Sonmez's suspension was protected under the Anti-SLAPP Act. JA172 n.16. However, the claims Sonmez pursues on appeal do not arise from that public statement, *see* Opening Br. 17 n.3, and defendants have not argued otherwise, *see* Defs.' Br. 13-21.

The court noted that had defendants met their prima facie Anti-SLAPP burden, it would have granted their special motion because Sonmez did not present any evidence. JA170-71.

Standard of Review

This Court reviews both the denial of a special Anti-SLAPP motion to dismiss and the grant of a 12(b)(6) motion to dismiss de novo. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016); *Williams v. District of Columbia*, 9 A.3d 484, 488 (D.C. 2010).

Response Argument (22-CV-0301)

We begin with what's not at issue in defendants' cross-appeal. Defendants point to only the second coverage ban—their internal decision to forbid Sonmez from reporting on stories with any connection to sexual assault—in their special Anti-SLAPP motion to dismiss, which is thus properly characterized as a partial motion. Defs.' Br. 15-21; *see also* JA171 & n.16. Sonmez's claims that arise from the negative performance review, security denial, suspension, and online harassment are thus subject solely to the ordinary Rule 12(b)(6) standard. As explained in our opening brief and in the Reply Argument below, those claims easily survive that standard.[3]

[3] Even if Sonmez cannot recover for the harm suffered because of the bans, she is permitted to rely on evidence related to them in support of the discrimination element of her other claims, much like how time-barred events can be considered as evidence of discriminatory intent motivating other timely claims. *See Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 146 n.9 (D.C. 2014).

I. This Court should affirm the Superior Court's denial of defendants' partial special motion to dismiss because defendants failed to meet their prima facie burden.

The Anti-SLAPP statute seeks to stop powerful litigants—not plaintiffs like Sonmez—from chilling First Amendment protected activities of the less powerful with frivolous, costly, strategically deployed litigation. *See* D.C. Council Comm. on Pub. Safety & the Judiciary, Report on Bill 18-893, Anti-SLAPP Act of 2010, at 2-4 (2010). "[T]he goal of a SLAPP"—a strategic lawsuit against public participation—"is not to win the lawsuit but to punish the opponent and intimidate them into silence." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (citation omitted). So, the Anti-SLAPP Act provides defendants faced with abusive suits with special procedures that expedite dismissal of "meritless claims filed to harass the defendant for exercising First Amendment rights." *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 744 (D.C. 2021) (quoting *Mann*, 150 A.3d at 1239).

These special procedures apply only when, at step one of the analysis, the defendant shows that the plaintiff's claim arises from the defendant's (1) "act in furtherance of the right of advocacy" (2) "on issues of public interest." D.C. Code § 16-5502(a)-(b). The defendant must show that the Act applies on a claim-by-claim basis. *See* D.C. Code § 16-5502(a); *Bronner*, 259 A.3d at 734. Although this burden is "not onerous," *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 606 (D.C. 2020), it is a burden nonetheless: The defendant must specify what conduct is covered by the Act and point to the complaint's factual allegations that demonstrate that the plaintiff's claim arises from advocacy on an issue of public

interest. *See Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 502-03 (D.C. 2020); *see also Bronner*, 259 A.3d at 734.

A. Defendants' coverage ban was not "an act in furtherance of the right of advocacy."

Defendants' coverage ban preventing Sonmez from reporting on #MeToo-related topics, *see* JA28-29, 31, was not an "[a]ct in furtherance of the right of advocacy," which includes "[a]ny … expression or expressive conduct that involves … communicating views to members of the public." D.C. Code § 16-5501(1). Given the Act's coverage of "expressive conduct," we agree with defendants and their amici (Br. 8-10) that the Anti-SLAPP Act reaches more than "speech" only. *See, e.g.*, *Bronner*, 259 A.3d at 744.[4]

1. The ban was not "expressive conduct."

D.C.'s Anti-SLAPP Act protects only "expressive conduct" that enjoys First Amendment protection. *See Bronner*, 259 A.3d at 744; *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 142 (D.C. 2021). In the First Amendment context, "expressive conduct" is conduct with "[a]n intent to convey a particularized message" likely to "be understood by those who view[] it." *Texas v. Johnson*, 491 U.S. 397, 404-06 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The

[4] Defendants advance a footnoted "belie[f]" that "the Anti-SLAPP Act is broader than the First Amendment." Defs.' Br. 50 n.5. Setting aside its conclusory nature, this statement is inconsistent with this Court's precedent, *see Bronner*, 259 A.3d at 744 (quoting *Mann*, 150 A.3d at 1239); *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 142 (D.C. 2021), and with the position of defendants' amici, Defs.' Amicus Br. 8-10, 10 n.2.

discriminatory coverage ban—which carried no comprehensible "message" to the public at all—is not included. *See id.* at 404. Three clear limitations on the definition of "expressive conduct" highlight why the ban is not entitled to Anti-SLAPP protection.

First, a newspaper's decision to limit reporter responsibilities based solely on unfounded concerns about reporter bias is not protected "expressive conduct." In considering whether the First Amendment granted the Associated Press "absolute and unrestricted freedom" to fire unionized employees based on mere speculations about bias, the Supreme Court criticized as an "unsound generalization" the argument that "there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee." *Associated Press v. NLRB*, 301 U.S. 103, 131 (1937). Although a newspaper "is free at any time to discharge … any editorial employee who *fails to comply* with the policies it may adopt," the First Amendment does not provide blanket protection for news organizations that wish to discipline compliant employees and, in doing so, violate other laws—in *Associated Press*, the National Labor Relations Act, and here, the DCHRA. *See id.* at 131-33 (emphasis added).

Wilson v. Cable News Network, Inc., 444 P.3d 706 (Cal. 2019), on which defendants heavily rely, *see* Defs.' Br. 16, expands on this distinction. *Wilson* interpreted protected "expressive conduct" under California's Anti-SLAPP law to include the decision to fire a reporter based on a specific allegation of past plagiarism. *See* 444 P.3d at 719-20, 722-23. But assignments or firing decisions made in the absence of specific alleged violations of internal policies or standards

are not expressive conduct. *See id.* Defendants here do not specifically allege a violation of any internal policy other than the "vague and inconsistently applied Social Media Policy," which Sonmez was found not to have violated, and which did not motivate the ban. JA31-32, 33, 38. And by citing an interest in "the newspaper's appearance of objectivity," without identifying any actual biased reporting by Sonmez, Defs.' Br. 21, defendants rely explicitly (and exclusively) on Sonmez's protected status as the impetus for their discriminatory actions. JA21; *see infra* 20-26. This stands in stark contrast to the plausibly neutral plagiarism allegations in *Wilson*.[5]

Second, although "expressive conduct" may include editorial decisions not to publish specific, objectionable content, defendants have not identified any specific, objectionable content that Sonmez sought to publish. *See* Opening Br. 40. Defendants rely on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to argue that the Anti-SLAPP Act protects "[t]he Post's refusal to publish Sonmez's reporting on a particular subject." Defs.' Br. 15. But *Tornillo* concerned a state requirement that a newspaper publish "*any* reply" that a political candidate wished

[5] California's Anti-SLAPP law provides broader protection than D.C.'s because it protects not only expressive conduct that itself qualifies as constitutionally protected speech, but also "conduct *in furtherance of* the exercise of … the constitutional right of free speech." Cal. Civ. Proc. Code § 425.16(e)(4) (emphasis added); *see Wilson*, 444 P.3d at 719. As *Wilson* illustrates, defendants' coverage ban would not fall within even this broader definition. Although D.C.'s Act also uses the phrase "[a]ct *in furtherance of* the right of advocacy," the words "in furtherance of" have no independent meaning because the entire phrase "[a]ct in furtherance of the right of advocacy" is defined by the statute. *See* D.C. Code § 16-5501(1) (emphasis added).

to make to negative coverage of their candidacy by that newspaper; the Court held only that this requirement to "print verbatim" particular content offended the First Amendment. 418 U.S. at 243-44, 258 (emphasis added). Unlike the *Tornillo* plaintiff, Sonmez has not "demanded that [the Post] print" any particular version of any of her work, let alone "verbatim." *See id.* at 243-44; *see also Hausch v. Donrey of Nev.*, 833 F. Supp. 822, 830 (D. Nev. 1993) (distinguishing *Tornillo* because "application of Title VII in no way requires [a] newspaper to publish any material it does not wish to publish"). To the contrary, all Post reporters, including Sonmez, participated in layers of review by editors prior to publication. *See* JA19, 22-23. The First Amendment and the Anti-SLAPP Act therefore do not protect defendants' decision to ban Sonmez from producing content in the first place.

Finally, although "expressive conduct" may include employment decisions involving high-ranking employees with editorial responsibilities, it does not include all employment decisions involving employees like Sonmez who are not top-level editors. The California Supreme Court recognized this distinction under the Anti-SLAPP law in *Wilson*. *Wilson* distinguished between "an employee who is vested with ultimate authority to determine a news organization's message," whose firing likely would qualify as protected expressive conduct, and "other employees in a newsroom who may contribute to, but lack ultimate say over, their employer's speech," whose firing likely would not. 444 P.3d at 721. *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950, 953, 960-61 (9th Cir. 2010), on which defendants rely for the general proposition that the Anti-SLAPP Act protects publications' "decisions about *who* should author a story," Defs.' Br. 15, is consistent with *Wilson*

because, in *McDermott*, employees without editorial discretion explicitly sought editorial control. Sonmez falls into *Wilson*'s second category of employees, whose reassignment does not itself qualify as "expressive conduct" because their writing is subject to others' editorial control. *See* 444 P.3d at 721; JA19. Indeed, if defendants did not have editorial control over Sonmez, they would not have been able to impose the discriminatory ban in the first place.

2. The ban did not "communicat[e] views to members of the public."

Again, defendants' behind-the-scenes coverage ban did not communicate anything to anyone outside the Post. And a defendant asking for Anti-SLAPP protection must show that the disputed conduct involves "*public* expression of *views*." *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 580 (D.C. 2022) (emphasis added). The statute protects speakers engaged with "one side of a political or public policy debate." *Nadel*, 248 A.3d at 144 (quoting *Mann*, 150 A.3d at 1227). Here, the Post was not engaging with "a political or public policy debate" when it reassigned sexual-assault-related stories from Sonmez to other reporters—for example, when Sonmez was prevented from covering the death of Herman Cain because he had been accused of sexual misconduct, but a male colleague with the same job title as Sonmez was permitted to write the same story. JA29-30, 41. In fact, defendants fail to identify a single specific story for which reassignment to another reporter communicated different views than had Sonmez been permitted to write the story herself. The concern that "litigation [could be] used to … push[] news and artistic organizations away from controversial projects," Defs.' Amicus Br. 6, is simply not

present here, where the stories printed by the Post provided the same information that they would have had defendants not imposed a discriminatory coverage ban on Sonmez.

B. Defendants' coverage ban did not communicate on "issues of public interest" under the Anti-SLAPP Act.

Defendants fail to specify how their coverage ban communicated about "issues of public interest," D.C. Code § 16-5502(a), which the Anti-SLAPP Act defines as "issue[s] 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," D.C. Code § 16-5501(3). Perhaps anticipating commercially influenced motions like the Post's, the Anti-SLAPP Act provides that "[t]he term 'issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests." D.C. Code § 16-5501(3). Commercial interests include, for example, personal financial gain. *See Nadel*, 248 A.3d at 143-44. Although "intermix[ing]" of public interests and commercial interests is permissible, *Fells*, 281 A.3d at 582, mere proximity to issues of public interest does not render a fundamentally commercially interested act protected, *see Nadel*, 248 A.3d at 144. For example, when an attorney's statements published online "related primarily to a private dispute" involving the financial interests of the attorney's clients, that the statements appeared in an article about cybercrime was insufficient to establish a prima facie case under the Anti-SLAPP Act. *Nadel*, 248 A.3d at 144, 146 (quotation marks omitted).

Defendants fail to address Sonmez's allegations that the Post prioritized its own commercial interests in the form of financial gain, *see Nadel*, 248 A.3d at 143, when it took actions aimed primarily at boosting its own business image and prestige, JA24, 42-43. For example, defendants initially supported Sonmez in releasing a public statement about her sexual assault, but they rescinded their support once they became concerned about "the Post's ability to win prizes for its coverage." JA20-21, 23-24; Opening Br. 30-31. Defendants also praised reporters who had spoken publicly on issues other than sexual assault. JA42-43. In doing so, defendants seemingly created a hierarchy of issues based on their own perception of their customers' biases—ultimately putting the company's commercial interests front and center. *See* Opening Br. 34. Defendants' argument that the Post was "indulg[ing] its readers' preferences for *objectivity*," absent any indication in the complaint that Sonmez's reporting actually lacked objectivity, Defs.' Br. 27, admits reliance on commercial interests in the form of "stereotyped customer preference," which does not "justify a sexually discriminatory practice." *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *see Esteños v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 888-89 (D.C. 2008).

Had defendants been primarily concerned with producing bias-free content rather than pandering to readers perceived as less likely to subscribe to the Post based on objections to reporters' protected characteristics, they could have relied on less restrictive forms of review of Sonmez's reporting, as they did before the ban. JA19, 21. Similarly, were the ban motivated by a purely public interest in actual or apparent objectivity, *see* Defs.' Br. 17-18, defendants would have had no reason to attempt to

maintain the confidentiality of the ban by prohibiting Sonmez from proactively disclosing it to the colleagues and editors with whom she worked most frequently, JA24. After Politico published a news story on the ban—prompting a public outcry and a wave of criticism of the Post—defendants lifted the ban just one day later. JA46; Opening Br. 33. Under these circumstances, defendants' ban prioritized the Post's "commercial interests, which are not protected under the Anti-SLAPP Act." *Nadel*, 248 A.3d at 144.

II. If this Court finds that defendants made out their prima facie case, Sonmez is nonetheless likely to succeed on the merits.

As demonstrated above, defendants failed to make out their prima facie case that the Anti-SLAPP Act protects their discriminatory conduct. Should this Court disagree, and move to step two of the special Anti-SLAPP motion-to-dismiss analysis, the burden would shift to Sonmez to demonstrate she will likely succeed on the merits. D.C. Code § 16-5502(b). Sonmez did not present evidence below, but her DCHRA claims arising from the second ban survive the special motion to dismiss for two distinct reasons: (1) accepting defendants' objectivity motivation as undisputed for the purposes of step two of the Anti-SLAPP analysis, that motivation is still discriminatory, and it demonstrates Sonmez's likelihood to succeed on the merits under the Act's expedited summary-judgment standard; and (2) alternatively, given the unique circumstances here, Sonmez should have an opportunity to supplement her thorough complaint with evidence.

A. Sonmez's claim is likely to succeed because defendants' objectivity defense is direct evidence of discrimination.

A complaint should be dismissed at step two "only if the court can conclude that the claimant could not prevail as a matter of law." *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 585 (D.C. 2022) (emphasis omitted) (quoting *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016)). This assessment "is essentially an expedited summary judgment" proceeding. *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 740-41 (D.C. 2021); *see also Fells*, 281 A.3d at 585 n.7. When the burden shifts to the plaintiff to show a likelihood of success on the merits, the plaintiff is typically required to present "something more than argument based on allegations," namely, evidence. *Bronner*, 259 A.3d at 740 (quoting *Mann*, 150 A.3d at 1233). But just as in a summary-judgment proceeding, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact," the court can simply "consider the fact undisputed for purposes of the motion." D.C. R. Civ. P. 56(e).

That Sonmez has yet to present evidence is thus not fatal, but allows this Court to accept defendants' version of events as stated in their special motion to dismiss. And Sonmez's claims are nevertheless meritorious under this standard because defendants' proffered objectivity justification for the ban is direct evidence of discrimination. *See* Opening Br. 31, 33; *infra* 20-21.[6] When explaining their

[6] Sonmez is willing to accept defendants' assertion of fact only for purposes of assessing her likelihood of success at step two of the Anti-SLAPP inquiry. She does not relinquish her right to have disputed facts resolved in her favor under a 12(b)(6) standard.

objectivity basis for the ban, defendants expressly told Sonmez that they were relying on her protected characteristic. They stated that "[t]he work you do intersects with what you experienced in your life" and that the circumstances of Sonmez's sexual assault were "too similar" to the accusation levied against then-Judge Kavanaugh for Sonmez to report on the topic. JA21, 24. Defendants are not saved by pointing to their "readers' preferences for *objectivity*." Defs.' Br. 27. An employer is not absolved of discrimination because it stems from customers' preferences. Opening Br. 31; *see* D.C. Code § 2-1401.03 ("[A] 'business necessity' exception cannot be justified by … the preferences of co-workers, employers, customers or any other person."); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *see also* EEOC Compl. Man., § 625.5(d), 2015 WL 6880638 (2015). And the belief that a survivor of sexual assault, or that, in particular, a woman survivor of sexual assault, could not impartially cover #MeToo-related stories is discriminatory. When, accepting the moving party's version of events, the claimant can still succeed as a matter of law, the special motion to dismiss must be denied. *See Fells*, 281 A.3d at 585. That's the case here with Sonmez's DCHRA claims.

B. Sonmez should have an opportunity to present evidence if necessary.

Even if this Court does not agree with Sonmez that she is likely to prevail when adopting defendants' version of events, it should reject defendants' request that it dismiss Sonmez's coverage-ban-related claims based on a technicality. Defs.' Br. 13-14. True, Sonmez has not yet introduced evidence, but on remand—which will be required anyway for her claims that are unaffected by the special motion, *see infra*

18-38 and *supra* 6—she would promptly submit evidence. It is obvious from her meticulously detailed complaint, which is based almost entirely on personal knowledge, that Sonmez could readily submit a sworn affidavit and other written records. For example, the complaint details an April 29, 2020, correspondence in which Sonmez inquired about the status of the second ban. JA39. The complaint specifies that when defendant-editor Steven Ginsberg responded that it would persist, Sonmez wrote back that the ban was "simply discriminatory." *Id*. She then stated, "I just want to do my job," and, "I've already proven that I can write with clarity, speed and authority on this topic." JA40. Sonmez further recounts personal knowledge of conversations with defendants related to the first ban (JA21-24), the second ban (JA31-32), her opposition to defendants' request to remove her pinned tweet (JA32-33), and defendants' refusal to provide timely security assistance in response to virulent online harassment (JA35-37). The complaint is buttressed with references to public records including Twitter posts and news reports. *See, e.g.*, JA20 (Sonmez's public statement addressing the investigation of her assailant); JA35 (referencing abusive and threatening messages online); JA37 (referencing news coverage of Sonmez's suspension).

Reply Argument (22-CV-0274)

I. The First Amendment does not excuse defendants' DCHRA violations.

Defendants are wrong that "even the DCHRA must yield to the First Amendment" when a newspaper's discrimination relates "to the credibility and impartiality of the newspaper." Defs.' Br. 50 (quotation marks omitted). Granting

First Amendment protection in this case—where defendants' personnel decisions communicated nothing—would mean contradicting the well-established principle that "a newspaper has no special immunity from the application of general laws." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). It also would give news organizations like the Post permission "to make any and all discriminatory personnel decisions," based on any protected characteristic. *See Johnson v. P.G. Publ'g Co.*, No. 20-cv-885, 2021 WL 3634673, at *1 (W.D. Pa. Aug. 17, 2021).

As explained above (at 8-12), defendants' coverage ban does not qualify as the type of "expressive conduct" to which First Amendment protection attaches. Defendants' reliance on *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997), Defs.' Br. 49, is misplaced because, there, a reporter engaged in advocacy that both represented an "admitted violation of [the newspaper's] code of ethics" and caused actual, documented public confusion about the newspaper's position. 936 P.2d at 1126, 1132. Sonmez, by contrast, did neither of these things. She spoke about her personal experience as a victim of sexual assault via a Post-approved, first-person statement, JA20, and later defended her credibility online following attacks related to her sexual assault—with no indication from defendants that she "was in violation of any company policy." JA31-32.[7]

[7] Defendants forfeited any First Amendment defense for claims arising from the suspension, failure to follow security protocol, negative performance review (with effects on pay), and negligent response to online harassment. *See* Defs.' Br. 47-50.

II. Defendants discriminated against Sonmez with respect to workplace "terms, conditions, or privileges" because of protected characteristics.

A. Defendants discriminated against Sonmez because of her victim status in violation of the DCHRA.

1. Defendants' statements are direct evidence of status-based discrimination.

Defendants told Sonmez she was being banned from covering #MeToo because she was sexually assaulted. In their view, Sonmez was disqualified from covering sexual assault allegations against then-Judge Kavanaugh because her experience was "too similar" to Christine Blasey Ford's allegations. JA21. As our opening brief explains (at 29), direct evidence allegations of discrimination make an employer's proffered non-discriminatory motives for its differential treatment irrelevant ahead of trial. Defendants argue that "Sonmez gives no reason to think that the Post sought to indulge readers' discriminatory 'prejudices.'" Defs.' Br. 27. They ignore that the "reason" defendants themselves have provided—the similarity between Sonmez's sexual assault and Blasey Ford's allegations—plausibly leads to that conclusion. Opening Br. 29-30. Defendants' argument that any challenge to the first ban is time-barred, Defs.' Br. 26, misses the point that the reasons relied on to impose the first ban are relevant to the discriminatory intent behind their subsequent acts. Opening Br. 29-30.

Defendants' appearance-of-conflict motive is still discriminatory. The Post's assertion that it would present the "appearance of a conflict" if Sonmez were to report on stories of sexual misconduct, *see* Defs.' Br. 23-24, assumes that *her status as a survivor* would be viewed as compromising her journalism and admits reliance

on this protected characteristic, which is enough to demonstrate unlawful differential treatment. *See* Opening Br. 31. Sonmez must plead facts showing only that reliance on a protected characteristic was more likely than not one motivating factor among others in the employer's decision. *Hollins v. Fed. Nat'l Mortg. Ass'n*, 760 A.2d 563, 575 (D.C. 2000). And by defendants' own admission, Sonmez's status as a survivor necessarily played a role in their decision-making process. *See* Opening Br. 29-30.

Invoking Sonmez's attention to her mental health and the Post's workplace-disruption concerns, defendants admit victim-status discrimination. Just before Sonmez was banned from covering then-Judge Kavanaugh, she shared with her editors that reading the accusations against him had at first been difficult, but that after taking a walk around the block to clear her head, she was able to work on the story without issue. JA19-20. Defendants then told Sonmez they were imposing the ban in part because she went for this walk. JA20-21. Before defendants imposed the second ban, Sonmez's workplace was subjected to vicious online harassment after she requested a correction to a *Reason Magazine* article containing numerous inaccuracies about her assault. JA30-31. Defendants told Sonmez that this workplace disruption was a motivating factor behind the second ban. *See* JA32, 33.

Defendants characterize Sonmez's reliance on these allegations related to mental-health treatment and third-party workplace disruption as "new claims," Defs.' Br. 30, but these allegations simply support Sonmez's victim-status discrimination claims. Indeed, the statute defines victim-status discrimination to include punishing an employee with these justifications when they relate to the employee's victim status. D.C. Code § 2-1402.11(c-1)(1)(B), (C). Sonmez therefore forfeited nothing.

Defendants do not respond to Sonmez's point that when an employer tells an employee she is being punished for seeking mental-health treatment related to her victim status or uses third-party workplace disruption to justify an adverse action, the plaintiff has direct evidence of victim-status discrimination. Instead, defendants argue that Sonmez's allegations are irrelevant because, in their view, going for a walk to settle oneself is never a form of mental-health treatment, nor do online platforms such as Twitter constitute the workplace. Defs.' Br. 30. But a reasonable jury could conclude otherwise. *See* Opening Br. 31; *infra* 24-25.

2. Sonmez also pleaded indirect evidence that establishes a plausible inference of discrimination.

Defendants ask this Court to apply an upside-down motion-to-dismiss standard. Defendants repeatedly posit their conduct—the first and second ban, the poor performance review, the suspension, the refusal to follow security protocol, and more—as being motivated by Sonmez's "advocacy." Defs.' Br. 22-24, 28-29. But viewing the facts in Sonmez's favor, she never acted as an advocate. Opening Br. 30. Instead, Sonmez's public comments—vetted by defendants—referred to her own sexual assault and *not* to abstract discussions of the #MeToo movement. JA20.

Relevant comparators. Defendants argue that Sonmez has not pointed to indirect discrimination evidence because she lacks comparators, but they misapply *Johnson v. District of Columbia*, 225 A.3d 1269 (D.C. 2020), to reach that conclusion. Defs.' Br. 28-29. There, the plaintiff pointed to a comparator who had a poor relationship with a shared supervisor but had not engaged in the same misconduct as the plaintiff and was therefore not terminated. *Johnson*, 225 A.3d at

1283-84. Sonmez, on the other hand, has pointed to comparators who a jury could conclude engaged in nearly identical conduct but were not discriminated against.

a. Sonmez and Lee. Defendants frame Sonmez's comments about her sexual assault as taking a side on the merits of the #MeToo movement, a purportedly controversial issue. Defs.' Br. 29. By contrast, defendants describe Post reporter Michelle Ye Hee Lee's condemnation of anti-Asian hate crimes and criticism of the way other news organizations covered such incidents as statements on an uncontroversial issue. Defs.' Br. 28-29.

First, defendants are wrong that Sonmez engaged in advocacy, so a jury could conclude that their appearance-of-bias reason for taking action against Sonmez was pretext. Sonmez's comments concerned only her *own* sexual assault. JA20. Sonmez never made claims about the #MeToo movement. *Id*. It's true that in a Post-approved statement, *id.,* Sonmez noted that "institutions" play a role in "combatting sexual misconduct," but, to use defendants' words, "everyone condemns sexual assault." Defs.' Br. 29. Defendants maintain that Sonmez expressed "solidarity" with "accusers" generally, *id.*, but Sonmez referenced only one person—the woman with whom she shared an assailant, JA20. Likewise, Sonmez did not "condemn" the L.A. Times, as defendants argue; rather, she stated that she was "grateful" to the newspaper for taking her accusation seriously and investigating her assailant's behavior. *Id*. Likewise, the allegations show that Sonmez did not push back against the *Reason Magazine* article because of its criticism of #MeToo, but because the article mischaracterized *her* assault. JA30-31.

Second, defendants ignore that Sonmez and Lee engaged in nearly identical conduct. Both were reporters on the National Desk who made public statements that referenced issues related to personal characteristics. JA42-43. Both used social-media accounts for work and to make these statements. *Id.* Both were sometimes allowed to report on stories related to the traits on which they had previously made public statements. *Id.* Although Sonmez and Lee engaged in similar activities, defendants punished only Sonmez, leading to an inference of discrimination.

b. Sonmez and Kim. Sonmez and Seung Min Kim, another Post reporter, were both subjected to intense online harassment, but the Post followed its security protocol and offered public support only for Kim. JA42. Defendants deflect, arguing that the complaint lacks allegations that Kim was allowed to cover stories related to her experience. Defs.' Br. 29. That ignores that Kim is a relevant comparator for the denial-of-timely-security claim and that defendants' steady discrimination against Sonmez formed an interrelated campaign. Opening Br. 34-35, 40.

As to the security-protocol disparate treatment, defendants also argue that their untimely response to Sonmez's request for security was permissible because Kim faced harassment "based on her work" while Sonmez faced harassment because of tweets she sent after Kobe Bryant's death. Defs.' Br. 29. But defendants did not employ their security protocol the other times Sonmez faced online threats. *See* JA30-31. Also, what matters is that a jury could conclude that both Sonmez and Kim experienced workplace harassment, and the Post manufactured a pretextual reason to treat Sonmez differently than an employee outside her protected class. Being an engaged Twitter user was a part of Sonmez's job, as is true for Kim and virtually all

other modern journalists. Br. Claire Goforth as Amicus Curiae 1. Sonmez did not violate the Post's Social Media Policy, and defendants have never explained why they thought she might have or how they determined (once under public scrutiny) that she had not. JA37-38. Defendants' argument that their discrimination against Sonmez is not actionable because she was harassed for publicly sharing a news article from a reputable source (at 29)—something journalists do every day—and not for engaging in official Post business thus draws a distinction that a jury could conclude is meaningless.

Additional indirect evidence. Defendants misunderstand Sonmez's reliance on allegations that Ginsberg "took a side on the issue" of online harassment and faced no coverage ban. Defs.' Br. 29; Opening Br. 16, 34. Sonmez does not suggest that Ginsberg was otherwise similarly situated to her as a comparator. But comparator evidence is not the only type of indirect discrimination evidence. *See* Opening Br. 33-34. Ginsberg's conduct—his public support for Kim and statements against anti-Asian hate crimes compared with his hostility toward Sonmez—helps establish that discrimination motivated the adverse actions taken against Sonmez. JA42, 44-45.

The timeline also contradicts defendants' argument that Sonmez was punished solely for making public statements, Defs.' Br. 27, and supports the conclusion that defendants instead acted against her because of third-party discriminatory preferences and disruption. Before defendants hired her, Sonmez had already made public statements about her assault similar to those at issue here. JA16. Moreover, defendants approved Sonmez's first statement after she was hired and did not warn

her that speaking publicly about her personal experience would limit her job responsibilities. JA18-19.

As for the second ban, Sonmez pinned a tweet requesting a correction from *Reason Magazine*—part of defendants' purported rationale for the second ban, *see* Defs.' Br. 22-23—ten days before defendants acted against her. JA31. That nearly two-week lag sits in contrast with what happened one day before the ban's reinstatement: Sonmez was publicly harassed by a prominent writer and faced yet another wave of online threats and abuse. *Id.* A jury could thus draw the inference that defendants punished Sonmez not for making public statements about her sexual assault, but because individuals "caused a disruption" in Sonmez's "workplace" because of her victim status. D.C. Code § 2-1402.11(c-1)(1)(C).

B. Defendants discriminated against Sonmez based on sex.

1. Defendants' discrimination against Sonmez based on victim status was discrimination based on sex.

If this Court finds that defendants discriminated against Sonmez based on victim status, *see supra* 20-26, it must also find that defendants discriminated based on sex. Contrary to defendants' position, Defs.' Br. 31, the D.C. Council's choice to add victim status as a protected status strengthens, rather than precludes, Sonmez's sex-discrimination claim. The overlap in the list of protected statuses indicates the D.C. Council's effort "to plug loopholes." *See, e.g.*, *United States v. Costello*, 666 F.3d 1040, 1046 (7th Cir. 2012). The DCHRA's language includes multiple examples of this drafting strategy, such as the inclusion of both "sex" and "sexual orientation" as

protected statuses, *see* D.C. Code § 2-1402.11(a), even though it is impossible to discriminate based on sexual orientation without discriminating based on sex.

Furthermore, because an employer's inappropriate response to sexual harassment is sex discrimination, *see Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986), it follows that an employer's inappropriate response to sexual assault—in other words, discrimination based on victim status—is also sex discrimination. *See* Opening Br. 35-36. Defendants are not absolved of liability for their treatment of Sonmez merely because they were not responsible for the actions of Sonmez's assailant. *See* Defs.' Br. 31. Defendants' argument that they did not "condone[] or ratif[y] a rape" is therefore misplaced. *See* Defs.' Br. 31 (quoting *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1167 (9th Cir. 2017)). As defendants' precedent acknowledges, an employer may be liable for "its response to … [the] effects" of a rape or sexual assault. *Fuller*, 865 F.3d at 1166-67. When defendants punished Sonmez based on her perceived inability to be objective due to her victim status, JA48, they targeted her for the "effects" of her sexual assault, and that, in turn, is sex discrimination. *See* Br. L.L. Dunn Law Firm, PLLC & Maryland Coalition Against Sexual Assault as Amici Curiae (Sex Discrimination Amicus Br.) 7-8.

2. Defendants' refusal to allow Sonmez, a female reporter, to cover sexism-related stories was sex discrimination.

By taking Sonmez off sexism-related stories, including stories that "barely related to sexual misconduct," JA28-29, defendants discriminated based on sex. Opening Br. 36-37. Defendants are incorrect that Sonmez forfeited this argument,

Defs.' Br. 31, because this is not an "issue[] raised for the first time on appeal." *Hollins*, 760 A.2d at 574; *see* JA29; mem. in opp'n to defs.' mot. to dismiss 11.

Defendants' own justifications for their conduct explain how they discriminated based on sex. For example, when defendants explained that Sonmez would not be permitted to cover Blasey Ford's allegations of sexual assault because they were "too similar" to Sonmez's own experience, JA21; *see supra* 20, defendants explicitly drew parallels between two female victims of sexual violence perpetrated by males and discriminated against Sonmez on this basis. The justification thus relied on sex. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

Defendants' argument that *some* women were permitted to cover sexism-related stories is irrelevant. Opening Br. 37. A woman who is terminated, allegedly based on sex, is not denied recovery just because other women keep their jobs, *United Mine Workers of Am., Int'l Union v. Moore*, 717 A.2d 332, 338 (D.C. 1998); that's another way of saying that defendants are not free to discriminate against Sonmez just because they don't discriminate against *all* female employees, *Bostock*, 140 S. Ct. at 1741. Besides, defendants' argument that "Sonmez does not allege that [banned] stories were exclusively reassigned to *male* reporters," Defs.' Br. 32, ignores that Sonmez was replaced multiple times by a male reporter, JA41, and a jury could draw an inference of sex discrimination from these decisions.

3. Defendants' sex stereotyping was sex discrimination.

Sonmez did not forfeit her argument that defendants' sex stereotyping constituted sex discrimination. *See Urquhart-Bradley v. Mobley*, 964 F.3d 36, 45 (D.C. Cir. 2020); JA27; mem. in opp'n to defs.' mot. to dismiss 16, 23 & n.23.

Defendants assert that Sonmez fails to connect the dots between sexist stereotypes and the adverse actions taken against her. Defs.' Br. 34. But Sonmez has made a sufficient showing to survive defendants' motion to dismiss. For example, with respect to the "prove-it-again bias" stereotype, Opening Br. 40, defendants say their support for a male veteran covering the military did not demonstrate that Sonmez was held to a higher standard because the male reporter had not "engaged in any public advocacy." Defs.' Br. 33. But as explained above (at 23), Sonmez had not engaged in any advocacy by sharing her own experience. JA20, 31. Moreover, a jury could reasonably conclude that defendants' preferential treatment of the male reporter *was* based on sex because personal experience with war, unlike personal experience with sexual assault, is coded as a male experience. *See* Sex Discrimination Amicus Br. 6-7. Drawing inferences in Sonmez's favor, as is required, Sonmez's sex-discrimination claim should not be dismissed.

C. Defendants' discrimination affected the terms, conditions, or privileges of Sonmez's employment.

Defendants violated the DCHRA by discriminating against Sonmez "with respect to compensation, terms, conditions, or privileges of employment." Opening Br. 41-42 (quoting D.C. Code § 2-1402.11(a)(1)(A)). Defendants ignore the DCHRA's text and dismiss *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en

banc), as non-binding without addressing its merits. Defs.' Br. 40. This Court relies on federal Title VII case law to interpret the DCHRA's nearly identical language. *E.g.*, *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 16-17 (D.C. 2011). Thus, when *Chambers* overruled the precedent that this Court's adverse-employment-action doctrine was built on, it left no room for doubt that this Court's objectively-tangible-harm rule is no longer good law. Although we maintain that the straightforward interpretation of the DCHRA's text is all that matters, defendants' discriminatory actions satisfy even the outdated "adverse employment action" standard that they advocate. Defs.' Br. 39.[8]

Failure to follow security protocol. Defendants rely on *Hishon v. King & Spalding*, 467 U.S. 69 (1984), arguing that their failure to follow the Post's security protocol was not an "adverse employment action." Defs.' Br. 42-43. But they mischaracterize *Hishon*, which holds that denials of benefits that are "part and parcel of the employment relationship" need not be part of an employment contract to constitute actionable claims. 467 U.S. at 75. At the Post, providing security for reporters threatened online was "part and parcel of the employment relationship," *see id.*, because it was "protocol," JA13, 36. When defendants required Sonmez, unlike other reporters, to "repeatedly beg her editors to provide security," JA13, defendants subjected Sonmez to an "adverse employment action" whether or not access to security services was codified in an employment contract.

[8] Defendants concede (at 44 n.3) that Sonmez's allegations of a reduced performance rating accompanied by a reduced raise meet any "adverse employment action" threshold.

Coverage ban. As defendants recognize, Defs.' Br. 41, "an employee's 'reassignment with significantly different responsibilities' can constitute an adverse employment action if it has 'materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities.'" *D.C. Dep't of Pub. Works v. D.C. Off. of Hum. Rts.*, 195 A.3d 483, 491 (D.C. 2018). The ban did so by drastically restricting the stories Sonmez was allowed to cover and requiring her to regularly disclose to colleagues her victim status. JA24, 28, 39. By alleging that she "missed out on significant news stories … which would have elevated her professional profile," JA29, Sonmez sufficiently pleaded that the ban affected her "future employment opportunities." *See D.C. Dep't of Pub. Works*, 195 A.3d at 491.

Suspension. *Davis v. Legal Services Alabama, Inc.*, 19 F.4th 1261 (11th Cir. 2021), *petition for cert. filed*, No. 22-231 (U.S. Sept. 13, 2022), on which defendants rely (at 43) for the proposition that a "simple paid suspension" cannot be an adverse employment action, is wrongly decided. *Davis*'s focus on the paid nature of the suspension belies the magnitude of a suspension in the context of an employment relationship: the employee must *stop working completely*, which (obviously) is "*a significant change* in employment status" even under defendants' definition. *See* Defs.' Br. 39.[9]

But even under *Davis*, extenuating circumstances may "escalat[e] [a plaintiff's] paid suspension to an adverse employment action," 19 F.4th at 1267, especially

[9] The Supreme Court recently called for the views of the Solicitor General in *Davis*. 143 S. Ct. 560 (2023) (mem.).

when "the employer has" not "simply applied reasonable disciplinary procedures," but "has exceeded those procedures," *Joseph v. Leavitt*, 465 F.3d 87, 92 n.1 (2d Cir. 2006); *see also Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326-27 (3d Cir. 2015). A jury could conclude that defendants' invocation of "vague and inconsistently enforced social media guidelines," JA33, to impose a paid suspension at a time when Sonmez "was afraid to go home"—due to death and rape threats and public sharing of her home address online, JA36-37—sufficiently exceeded the typical "simple paid suspension" to constitute an adverse employment action.

III. Defendants subjected Sonmez to a hostile work environment.[10]

A. The coverage bans, online harassment, and antagonism by managers plausibly allege "severe or pervasive" harassment.

Defendants do not dispute inclusion of the first ban in the assessment of the hostile environment under a continuing-violation theory, Opening Br. 25-27, but they misapply the "severe or pervasive" standard by breaking the hostile work environment into separate, discrete incidents. Defs.' Br. 46; *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 889-90 (D.C. 2003). For example, defendants state that meetings in which defendants raised their voices or made sarcastic comments about sexual assault are insufficiently severe. Defs.' Br. 46. But a hostile-work-environment claim encompasses the "cumulative effect of incidents comprising that claim," "one unlawful employment practice" that "focuses on the 'entire mosaic.'"

[10] Because defendants do not address whether the online harassment—consisting of virulent death and rape threats—was based on sex or victim status, *see* Defs.' Br. 46-47, Sonmez rests on her opening brief (at 44) to explain why she would not have been the object of online harassment but for her protected statuses.

Lively, 830 A.2d at 889-90 (quoting *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 794 (D.C. 2001)).

Defendants downplay the two bans by characterizing them as the "removal of important assignments" and suggest that removal of work assignments cannot create a hostile work environment. Defs.' Br. 46. This ignores how the bans hung over Sonmez's daily work to transform the atmosphere into one pervaded by discrimination. Sonmez was not only prevented from doing her job, JA40, 45, 46, but was forced repeatedly to disclose her victim status to her colleagues, without warning, for nearly two years—sometimes multiple times a day. JA24, 28. Often, stories that were seemingly unrelated to sexual assault unpredictably developed into stories covered by the ban. JA27-29. As a result, Sonmez could not just easily steer clear of a handful of high-profile #MeToo cases. To comply with the ban, she existed in a perpetual state of hypervigilance about sexual assault. *See id.* In none of the cases cited by defendants (at 44-46) was an employee banned from doing her job in such a cruel manner.

B. The hostile work environment, including the third-party online abuse, is imputable to the Post.

As our opening brief noted (at 42 n.13), defendants forfeited the argument that conduct cannot be imputed to defendants by failing to move for dismissal on this basis. Regardless, the complaint alleges facts demonstrating that the Post is liable based on (1) its negligence and (2) vicarious liability. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759, 765 (1998).

1. The Post is liable for its negligent response to the online workplace harassment.

Sonmez did not forfeit her argument that third-party Twitter abuse created a hostile work environment, *see* Defs.' Br. 46, because this position was argued below. *See* JA52-53; mem. in opp'n to defs.' mot. to dismiss 31.

An employer that knows about harassment and fails to promptly respond is negligent and thus liable for the hostile work environment. *Ellerth*, 524 U.S. at 758-59. It doesn't matter whether a hostile work environment is caused by an employee or non-employee, even an anonymous one; the employer is liable because it ultimately controls the conditions of the workplace. *See, e.g.*, *Pryor v. United Air Lines Inc.*, 791 F.3d 488, 497-98 (4th Cir. 2015).

The Post responded negligently. As already explained (at 24-25), Sonmez was required to be on Twitter to do her job, so the platform was part of her workplace. Imposing liability would not, as defendants characterize it, "unreasonably expect employers to police the Internet." Defs.' Br. 47. It would instead require employers to take *some* ameliorative action when, as here, they are made aware of workplace harassment. JA31-32, 35. Rather than remedying the harassment, the Post exacerbated it by demanding that Sonmez remove her pinned tweet containing corrections to the *Reason Magazine* article, dismantling one of the few protections she had against online abuse. JA30-32. When Sonmez was bombarded online with sexist messages in January 2020, she asked Tracy Grant, managing editor in charge of staff development and standards, for assistance three times. JA35-37. In response,

the Post dragged its feet. JA37. The Post's failure to act expeditiously is glaring in contrast to its swift support for other journalists. *See supra* 24-26.

2. The Post is vicariously liable for its supervisors' conduct.

An employer is vicariously liable when supervisors take tangible employment actions against the victim of harassment. *Ellerth*, 524 U.S. at 765. The Post is vicariously liable because the individual defendants are "supervisor[s] with immediate (or successively higher) authority over" Sonmez who are empowered by the Post to take a "tangible employment action." *Id.* All individual defendants were either Sonmez's direct editors or supervisors of her editors. JA13-14. As we've already explained, defendants took myriad tangible employment actions against Sonmez, *supra* 29-32, including lowering her expected raise, JA39.

IV. Defendants retaliated against Sonmez.[11]

A. Sonmez engaged in protected activity.

The DCHRA does not require employees to specify their opposition using "magic words"—a plaintiff need only show a reasonable, good-faith belief that the practice opposed was unlawful. *Howard Univ. v. Green*, 652 A.2d 41, 46-47 (D.C. 1994); *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 586 (D.C. 2001). Opposition is protected even if the employee is mistaken that the law has been violated. *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 790 (D.C. 2001).

[11] Defendants engage in a conclusory way with the retaliatory adverse actions Sonmez alleges, Defs.' Br. 35, 37, so Sonmez rests on the many adverse actions already raised in her opening brief, Opening Br. 48; *supra* 29-32.

1. Sonmez opposed both discriminatory bans.

Defendants do not dispute that Sonmez pushed back against both bans. Defs.' Br. 35-36. As our opening brief explains (at 29-30), although the first ban is time-barred, it explains the motivations for the second. *See supra* 20. Sonmez opposed the second ban for the "same reasons" as she did the first—that the coverage restrictions were impermissibly based on her victim status and sex. JA22-23, 32. Defendants characterize this opposition as "general" and "conclusory." Defs.' Br. 36. But the connection is clear. Sonmez believed the first ban was imposed because of "what happened to [her] in Beijing," a specific reference to her status as a victim of sexual assault and her sex. JA23. She referenced this motivation again when she opposed the second ban. JA32. After several months working under the second ban, Sonmez again expressed her disagreement, stating that "it's simply discriminatory for the Post to bar one of its reporters from covering sexual assault due to her identity as a sexual assault survivor who has publicly come forward." JA39.

Sonmez's reasonable belief is not negated by the fact that the DCHRA did not include victim status as a protected characteristic at the time of the first ban. *See* Opening Br. 46-47. When the second ban was imposed in September 2019, the DCHRA had been amended to include victim status. D.C. Council L. 22-281, 2017-2018 Council, 22d Sess. (D.C. 2018) (amendment effective April 11, 2019). Regardless, victim-status discrimination is sex discrimination. *Supra* 26-27.

2. Sonmez opposed defendants' refusal to allow her to protect herself from online harassment.

Defendants are wrong that Sonmez forfeited the argument that she opposed discrimination by trying to protect herself online, Defs.' Br. 38, because defendants did not move to dismiss her complaint on that basis, mem. in support of mot. to dismiss 19-20. *See Costello v. Grundon*, 651 F.3d 614, 629 (7th Cir. 2011). Defendants mischaracterize Sonmez's actions as "criticizing other news media." Defs.' Br. 37. But our opening brief (at 47) detailed that Sonmez's resistance to Ginsberg's demand that she remove her pinned tweet constituted opposition to a hostile work environment. *See supra* 32-35. Sonmez identified discrimination and connected it to the workplace condition she opposed by telling Ginsberg that she used the tweet to "protect herself," making clear that it "was a safety measure designed *to prevent* future attacks." JA32.

B. A causal link exists between Sonmez's protected activity and defendants' adverse actions.

Causation is assessed with an eye toward the big picture, with courts considering the record as a whole. *See Holbrook v. District of Columbia*, 259 A.3d 78, 92-93 (D.C. 2021); *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). Hampered by their myopia, defendants ask this Court to view each retaliatory act alone. But viewing all of the facts (and their interrelatedness) in Sonmez's favor, each act is a part of one overarching pattern of retaliation supporting an inference of causation. *Payne v. District of Columbia*, 4 F. Supp. 3d 80, 89-90 (D.D.C. 2013) (vacated on other grounds). Defendants further fixate on the timing of events, maintaining that

the time between some protected activity and adverse actions exceeded three months as if that is a hard and fast barrier (it is not). Defs.' Br. 36-38; *see Lettieri*, 478 F.3d at 650-51. And an inference of causation is strengthened when the adverse action is taken at the "first actual opportunity." *See Summa v. Hofstra Univ.*, 708 F.3d 115, 128 (2d Cir. 2013).

As explained in our opening brief (at 49), there is temporal proximity. After the first ban, defendants made their animosity toward Sonmez clear in increasingly antagonistic interactions with her. JA23-24, 26, 33-34. They scrutinized her social media and dragged their feet in implementing their security protocol after harassers leaked her home address online amid violent, sexualized threats. JA32, 36-37. They reimplemented the humiliating coverage ban. JA31. They suspended her and, at the first opportunity, gave her a poor performance review and a lower-than-expected raise. JA37, 39-40. These facts—accepted as true, with inferences drawn in Sonmez's favor—plausibly state a claim of retaliation.

Conclusion

This Court should affirm the Superior Court's denial of defendants' partial special Anti-SLAPP motion to dismiss, reverse the Superior Court's judgment on all of Sonmez's DCHRA claims, and remand for further proceedings.

Respectfully submitted,

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

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.

Madeline Meth
Signature

22-CV-0274/22-CV-0301
Case Number(s)

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March 10, 2023
Date

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Certificate of Service

I certify that, on March 10, 2023, this brief was filed via the Court's e-filing system. All participants in the case are e-filers and were served electronically via that system with a copy of this brief.

/s/Madeline Meth
Madeline Meth

Counsel for plaintiff-appellant/cross-appellee