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No. 20-cv-0318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Morgan Banks, et al.,
Appellants,

v.

David H. Hoffman, et al.,
Appellees.

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

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF APPELLEES ON REHEARING *EN BANC*

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DISCLOSURES PURSUANT TO D.C. CT. APP. R. 26.1

Pursuant to D.C. Ct. App. R. 26.1(a), TechFreedom discloses that it is a District of Columbia nonprofit organization. TechFreedom has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

INTEREST OF AMICUS CURIAE[1]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom works tirelessly to defend the promise of a free and open Internet where vibrant discourse thrives across a multiplicity of diverse forums, unfettered by government overreach and un-chilled by abusive litigation. Its experts write extensively about emerging threats to the online speech ecosystem. *See, e.g.*, Corbin Barthold, *In Internet Speech Cases, SCOTUS Should Stick Up for Reno v. ACLU*, TechDirt (Mar. 28, 2023), https://tinyurl.com/2w3eu9sn; Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare (Mar. 12, 2021), https://tinyurl.com/63w69tx2; Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, Lawfare (Feb. 3, 2021), https://tinyurl.com/2r782pdt.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

TechFreedom frequently submits comments urging regulatory agencies to protect—not regulate—online speech, see e.g., *Authority to Regulate Political Speech Should Remain Limited*, TechFreedom (Jan. 10, 2023), https://tinyurl.com/2askj4ua, and educates lawmakers on the First Amendment implications of legislative proposals. *See, e.g., Utah Age Verification Mandate Violates First Amendment*, TechFreedom (Feb. 16, 2023), https://tinyurl.com/5n8xnhpa; *Journalism and Kids' Safety Bills Both Threaten the First Amendment*, TechFreedom (Dec. 7, 2022), https://tinyurl.com/ejb3re5k.

Finally, TechFreedom also appears often as amicus curiae where civil lawsuits threaten to chill online expression, *see, e.g., Johnson v. Griffin*, No. 23-5257 (6th Cir. 2023), and where the government attempts to dictate what views are acceptable online, *see, e.g., NetChoice v. Moody*, 34 F.4th 1196 (11th Cir. 2022), or to punish jokes, satire, or other speech that falls far short of the kind of "true threats" or calls to "imminent lawless action" that lack First Amendment protection, *see Bailey v. Iles*, No. 22-30509 (5th Cir. 2022); *FDRLST Media, LLC v. NLRB*, 35 F.4th 108 (3d Cir. 2022).

TechFreedom submits this brief to inform the Court's understanding of the essentiality of hyperlinks to the Internet's core purpose, and to explain the dangers posed to the online ecosystem by a ruling that too broadly sweeps hyperlinks under the ambit of republication.

SUMMARY OF THE ARGUMENT

Plaintiffs allege, in part, that transmission or publication of a hyperlink may constitute a republication if it is directed to a new audience.[2] Appellants' br. at 66. The panel's decision, vacated by this Court's grant of rehearing *en banc*, would have declined to adopt the prevailing consensus view that an allegedly defamatory online writing is *not* republished by the transmission or publication of a hyperlink to it.

This Court should recognize that hyperlinks are the Internet's core function and hold that, absent an affirmative restatement of allegedly defamatory content or the substantive addition to/alteration of the original material, a hyperlink to preexisting material does not constitute a republication as a matter of law. Permitting a finding of republication under such circumstances would, at a minimum, permit plaintiffs to subject any publisher of information to costly discovery and dissuade the use of hyperlinks, negating the Internet's revolutionary advancement in information-sharing. At worst, it would risk subjecting every web publisher to the repeated and limitless liability that the single publication rule was

[2] Plaintiffs also allege that the APA General Counsel's email to the Council of Representatives listserv constitutes a republication because it "substantively altered or added to" the Report. While that issue is outside the scope of this brief, TechFreedom agrees with Defendant-Appellee American Psychological Association that this argument is unpersuasive, for the reasons set forth in its principal brief.

intended to foreclose. TechFreedom urges this Court to affirm the Superior Court's decision below.

ARGUMENT

I. Hyperlinks Are the Backbone of the Internet

The World Wide Web was revolutionary in that it created a universal "linked information system" in which different webpages (or "nodes") refer and relate to one another in a seamless, system-agnostic "web" of content. Tim Berners-Lee, *Information Management: A Proposal*, CERN (Mar. 1989, May 1990), https://www.w3.org/History/1989/proposal.html. Hyperlinks are a basic building block of that web. Rather than each webpage containing all possible information relevant to the topic being discussed, a web author can insert hyperlinks: words (typically denoted by underlining and/or blue text) or an image that, upon being clicked, automatically take the reader's browser to the Uniform Resource Locator ("URL") of related materials. Those materials may be source documents, contextual information, in-depth discussion of a sub-topic, opposing viewpoints, or simply items of general or secondary interest.

Hyperlinks thus effectively operate as supercharged citations that can bring readers to the referenced materials directly, without the need to search out the URL for each referenced source. They add to the richness of online communication by placing additional context and interesting information at readers' fingertips, and

they improve the online information ecosystem by permitting readers to draw more informed conclusions about the credibility of sources and ideas. *See* Kris Shaffer, *Education in the (Dis)Information Age*, Hybrid Pedagogy (Feb. 20, 2018), https://hybridpedagogy.org/education-disinformation/. As one court put it: "Hyperlinks are the signature characteristic of the World Wide Web . . . [that] can help readers understand an issue in depth . . . and can also increase the user's ability to control the information-seeking process." *Adelson v. Harris*, 402 P.3d 665, 668-69 (Nev. 2017) (internal citations and quotation marks omitted).

II. A Broad Interpretation of the Republication Exception Would Undermine the Single Publication Rule.

The single publication rule "aims to avoid the overwhelming multiplicity of lawsuits that could result from defamatory statements contained in mass publications . . . ." *Lokhova v. Halper*, 995 F.3d 134 (4th Cir. 2021) (internal quotation marks and citation omitted). Courts have acknowledged that the nature of the Internet "comes with an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 616 (7th Cir. 2013) (internal quotation marks and citation omitted). Accordingly, the growing—if not overwhelming—consensus of the courts is that unless a defendant has affirmatively restated the allegedly defamatory statements or substantively altered

or added to the original material, the publication or transmission of a hyperlink to a preexisting online writing does not constitute a republication. *See Lokhova*, 995 F.3d at 142–43.

This Court should join that consensus, accounting for the fundamental nature of the Internet as a universe of linked information rather than a hodgepodge of standalone content. If a hyperlink reference to a preexisting publication constitutes a republication on the sole basis that it is directed to a "new audience," every single contributor to the online information ecosystem will be exposed to the same increased threats of repetitive and abusive litigation that the single publication rule is intended to prevent. The republication rule would swallow the single publication rule, effectively rendering it a nullity on the Internet and chilling an enormous amount of valuable expression.

Under such a rule, third-party web publishers would be exposed to litigation for trying to provide context and references to readers of their content. "Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer." *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988) (internal citation omitted). The very essence of a hyperlink in an article, blog post, or social media post is an assumption that a reader may not be familiar with the referenced material—otherwise, a hyperlink would be unnecessary in the first place. A ruling that exposes any publisher of a hyperlink to potential liability

could dissuade *all* web publishers from hyperlinking to any resource that could possibly be alleged as defamatory, curtailing the very benefit the Internet was created to impart.[3]

Still worse, the originators of content may well be subjected to virtually unlimited liability and re-triggering of the statute of limitations based on actions outside of their control. The original publisher of defamatory statements is liable for every repetition of that statement by a third party if "the repetition was reasonably to be expected." Restatement [Second] of Torts § 576 [c]. As discussed above, hyperlinking is the *raison d'être* of the World Wide Web; the continuous linking and sharing of material is its core feature. In that sense, it is reasonably foreseeable that every single piece of online content will be linked to, and thus shared with a new audience, by a user *somewhere* on the Internet—potentially triggering renewed liability on the part of the originator each time that occurs.

The danger of this approach is further illustrated by a key fact of this case. The hyperlink provided in the email to the APA's Council of Representatives was

[3] Presently, Section 230 of the Telecommunications Act of 1996 shields online users and publishers from liability on the basis of sharing information created wholly by another party. *See* 47 U.S.C. § 230(c)(1); *see also Monge v. Univ. of Pa.*, 2023 WL 2471181 at *2 (E.D. Pa. Mar. 10, 2023) (collecting cases). But as calls for repeal of Section 230 grow more frequent, this Court should consider that its protections may not be available indefinitely.

not to the disputed Report itself, but rather to a webpage containing "over 170 links." Superior Court Am. Order at 21. This Court should be mindful of the attenuated nature of a linked-to page that in turn contains an allegedly offending link. Otherwise, plaintiffs will be invited to play "Six Degrees of Republication," *Cf. Six Degrees of Kevin Bacon*, Wikipedia, https://en.wikipedia.org/wiki/Six_Degrees_of_Kevin_Bacon (last visited Apr. 15, 2024) (describing a game by which anyone in the film industry can ultimately be connected to Kevin Bacon in six steps or fewer), traveling back through links that are contained within a hyperlinked resource to find a defamatory statement. Moreover, the cost of avoiding expensive litigation will increase exponentially, as web publishers are forced to assess for themselves a growing mass of content before publishing anything of their own.

But even if the courts do not ultimately find republication in such instances, much of the damage will have been done. A ruling permitting discovery whenever a hyperlink is alleged to have been directed to a new audience gives plaintiffs a roadmap to avoiding a motion to dismiss, allowing them to inflict much of the litigation abuse that both the single publication rule and anti-SLAPP laws are intended to guard against. Indeed, anti-SLAPP laws are predicated on the understanding that in SLAPP suits the process *is* the punishment, irrespective of the final merits adjudication:

> [SLAPPs] forc[e] the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out … the greater the expense that is inflicted and the closer the SLAPP filer moves to success. … Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992). And the costs imposed on SLAPP targets are substantial indeed, especially to ordinary Internet users: a recent calculation estimates the cost of defeating a meritless defamation lawsuit at between $21,000 and $55,000. David Keating, *Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP Law*, Institute for Free Speech (June 16, 2022), https://tinyurl.com/eeb4tush.

CONCLUSION

The Internet is a vibrant, dynamic, evolving, chaotic conversation among billions of people with wildly divergent views. Friction will sometimes occur. But the mechanism of linking to another document via URL is a well-established and deeply entrenched part of that conversation. Indeed, it is what has made the Internet the single most transformative development in human communication and information sharing in history. This Court should take care to ensure that these revolutionary advances are

not rolled back by the threat of expansive liability. For all the reasons stated above, this Court should affirm the Superior Court's judgment.

Dated: April 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of D.C. App. R. 29(b)(4) because it contains 10 pages, excluding the parts of the brief exempted by D.C. App. R. 32(a)(6).
2. This brief complies with the typeface and typestyle requirements of D.C. App. R. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 15, 2024

/s/ Bilal K. Sayyed
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2024, I caused the foregoing Brief of Amici Curiae TechFreedom to be electronically re-filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated: April 15, 2024

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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.

/s/ Bilal K. Sayyed
Signature

20-cv-0318
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