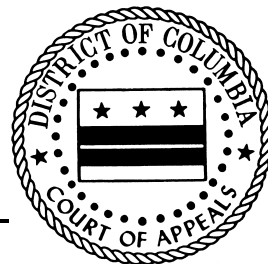


22-CV-0721 (Lead)
22-CV-0736, 22-CV-0741, 22-CV-0752 (Consolidated)



DISTRICT OF COLUMBIA COURT OF APPEALS

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No. 22-CV-0721 RUBY NICDAO, Appellant,
Lead v.
TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED,
et al., Appellees.

No. 22-CV-0736 LARRY CIRIGNANO, Appellant,
Consolidated v.
TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED,
et al., Appellees.

No. 22-CV-0741 JONATHAN DARNEL, Appellant,
Consolidated v.
TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED,
et al., Appellees.

No. 22-CV-0752 TWO RIVERS PUBLIC CHARTER SCHOOL,
Cross-Appeal INCORPORATED, Cross-Appellant,
Consolidated v.
RUBY NICDAO, et al., Cross-Appellees.

Appeals from the Superior Court of the District of Columbia
Civil Action No. 2015-CA-009512-B

**APPELLANTS' JOINT BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEF OF
INTERVENOR-APPELLEE THE DISTRICT OF COLUMBIA**

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INTRODUCTION

Intervenor District of Columbia (“District”) asks this Court to perform judicial surgery on the Anti-SLAPP Act—amputating its fee-shifting provision as to Plaintiff Two Rivers Public Charter School (“School”) while leaving its core protection against abusive litigation intact. But courts do not rewrite statutes; they apply them as written. And the statute is clear: prevailing defendants under the Anti-SLAPP Act are presumptively entitled to attorney’s fees. *See Jacobson v. Clack*, 309 A.3d 571, 578 (D.C. 2024). Here, that entitlement vested when the School’s failed strategic lawsuit against public participation was dismissed with prejudice and final judgment was entered for Defendants. The D.C. Council’s attempt, through the November 2022 Amendment to the Anti-SLAPP Act (“Amendment”), to deny Defendants their statutory entitlement to fees is not only at odds with the Act’s plain language—it is unconstitutional under settled due process principles.

What is more, the District’s argument cannot be squared with the Amendment’s own text. The D.C. Council did not merely exempt the School from fee liability—it declared that the entire Anti-SLAPP Act “shall not apply” to it. D.C. Code § 16-5505(a)(2). If the Court were to apply the Amendment retroactively, it would have to do so fully, meaning not only nullifying fee liability but also vacating the School’s dismissal altogether. Yet the District does not—and cannot—ask for that unconstitutional result, because the judgment dismissing the School’s claims was already final and unreviewable when the Amendment was enacted, and therefore became immune to retroactive nullification by legislative fiat. That fact alone dooms the District’s position under *Public Media Lab, Inc. v. District of Columbia*, 276 A.3d 1, 9 (D.C. 2022), *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 175–76 (D.C. 2008), and a century of Supreme Court precedent barring legislatures from retroactively disturbing final judgments.

Beyond the impossibility of applying the Amendment as written and enacted, the Amendment cannot be applied retroactively in this case because Defendants had a substantive and presumptive right to fees after prevailing on their anti-SLAPP motions, and that right is determined by the law as it existed at the termination of this action via final judgment on the merits, which is also when that right accrued and vested. The District’s contrary arguments fail at every turn, most notably its reliance on *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972). That case involved Congress eliminating judicial review itself, and with it, judicially-crafted fee liability, not retroactively wiping out substantive rights to attorney’s fees granted and secured by statute. At bottom, the District wants this Court to do what the legislature did not: rewrite the statute to say what it does not say, and eliminate a liability that it did not expressly extinguish. But statutes mean what they say, and courts apply the law as it is written, and never when it violates due process. Under the Act, Defendants are entitled to their fees. This Court should reverse.

LAW AND ARGUMENT

A. The Amendment’s Purported Exemption of the School from the Reach of the Anti-SLAPP Act Altogether Is Impossible to Apply in this Case as Written and Enacted.

The District’s contention that the 2022 Amendment to the Anti-SLAPP Act exempts the School from any liability for attorney’s fees ignores the text and structure of that Amendment, and essentially asks this Court to re-write it, which this Court may not do. As written and enacted by the D.C. Council in November 2022, the Amendment purports to exempt the School not only from fee liability, but rather from the entire reach of the Act altogether:

This chapter shall not apply to ... (2) Any claim brought by the District government, including District public charter schools.

D.C. Code § 16-5505 (emphasis added). Critically, the D.C. Council enacted the Amendment to purport to exempt charter schools not only from § 16-5504—the specific section of the Anti-SLAPP Act that imposes fee liability upon those who, like the School, file strategic lawsuits

against public participation—but from the entire “chapter,” meaning the entire Act, including, for example, § 16-5502, which requires the dismissal of such lawsuits.

This distinction is critical here, because, if this Court could apply the 2022 Amendment retroactively in this case, as that Amendment was written and enacted by the D.C. Council, the Court would need to exempt the School not only from fee liability for its failed lawsuit under § 16-5504, but also from application of § 16-5502, which required dismissal of the School’s lawsuit in the first place, and the Court would have to vacate that dismissal. That is the only way in which the 2022 Amendment could be faithfully applied as written and enacted to exempt the School from “this chapter.” D.C. Code § 16-5505.

But, the District does not request this relief, nor could the Court provide such relief even if it did. This is because the judgment of dismissal with prejudice under § 16-5502 entered by the Superior Court against the School on July 5, 2022, was already final and unreviewable by the time the Amendment was enacted in November of that same year. As such, the final and unreviewable judgment of dismissal could no longer be retroactively meddled with or abrogated by the legislature, because doing so would violate due process under the clear and binding holding of this Court in *Public Media Lab, Inc. v. District of Columbia*, 276 A.3d 1 (2022). *See id.* at 9 (holding that due process allows retroactive application of Anti-SLAPP Act Amendment at issue here only as to “an action [that] has not reached final, unreviewable judgment”) (citing *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 175–76 (D.C. 2008)). While retroactive application of the Amendment was constitutionally permissible in *Public Media Lab* because that action had not yet been terminated on the merits and had not yet resulted in a final and unreviewable judgment, it is impermissible here, because this action was terminated on the merits through a final judgment that became unreviewable several months prior to the Amendment.

The Supreme Court settled this issue more than a century ago, and has reaffirmed it many times since. *See, e.g., McCullough v. Com. of Virginia*, 172 U.S. 102, 123–24 (1898) (“It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (“Having achieved finality, ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”); *cf. Martin v. Hadix*, 527 U.S. 343, 360 (1999) (“[F]rom the beginning of these suits, the parties have proceeded on the assumption that 42 U.S.C. § 1988 would govern. The PLRA was not passed until well after respondents had been declared prevailing parties and thus entitled to attorney’s fees. To impose the new standards now, for work performed before the PLRA became effective, would upset the reasonable expectations of the parties.”).

On this point, at oral argument Judge Shanker astutely asked the School’s counsel, “Why aren’t you asking us to undo the dismissal?” *See* 10/31 Oral Arg., at 25:10. Initially, counsel attempted to punt on the question and said that undoing the dismissal is “unnecessary.” *Id.* at 25:16–25:40. But a faithful application of the Amendment would absolutely require undoing the dismissal, because that is the only way to exempt the School from the entire “chapter.” When pressed further by Judge Ruiz, and when Judge Shanker insisted on obtaining the School’s position on whether the Court *could* set aside the dismissal, the School’s counsel said “I don’t think anything prevents that because, again, the entire action wasn’t final and unreviewable.” *Id.* at 25:40–26:13. This is plainly incorrect. Consistent with over a century of precedent from the

Supreme Court, this Court’s clear teaching in *Beretta* and *Public Media Lab* is that, once a judgment has become final and unreviewable—as the judgment of dismissal clearly had become in this case—constitutional due process no longer allows its retroactive nullification by legislative fiat. And so the correct answer to the questions posed by Judges Shanker and Ruiz is that undoing the dismissal in this case is flatly prohibited by due process and binding precedent, and yet that is the very thing that the Amendment enacted by the D.C. Council seeks to accomplish retroactively, by purporting to exempt the School not only from fee liability but from the entire reach of the Anti-SLAPP Act.

Courts must apply statutes as written and enacted, and should not re-write them. *See, e.g., Valdez v. United States*, 320 A.3d 339, 383 (D.C. 2024) (“[A] court should take care not to overstep its role and usurp the prerogatives of the legislature by ‘rewriting the law to conform it to constitutional requirements’” (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 321 (2006) (cleaned up)); *In re Te.L.*, 844 A.2d 333, 339 (D.C. 2004) (“It is not within the judicial function ... to rewrite the statute, or to supply omissions in it, in order to make it more fair...”) (quoting *1841 Columbia Rd. Tenants Ass’n v. D.C. Rental Hous. Comm’n*, 575 A.2d 306, 308 (D.C. 1990)).

Here, the Court cannot apply the 2022 Amendment as written and enacted, because it cannot completely exempt the School from the Anti-SLAPP Act by virtue of the final and unreviewable judgment of dismissal that antedated the Amendment. The Court should therefore decline to rewrite the Amendment to exempt the School from a specific section of the Act rather than the entire chapter. The Court should instead apply the Act as it existed when this action was terminated on the merits, and find that the School is liable for the attorney’s fees occasioned by its strategic lawsuit against public participation.

B. The Amendment’s Purported Exemption of the School Cannot Be Retroactively Applied in this Case Because it was Preceded By a Final, Unreviewable Judgment that Terminated the Action and Vested a Right to Fees in the Appellants.

1. Entitlement to Fees is Determined by the Law in Force at the Termination of the Action, and the Right to Fees Vests at the Termination of the Action Based on Then-Existing Law.

Without any authority that actually supports its novel argument, the District labors strenuously to entreat this Court away from the well settled rule that “the right to attorney fees and costs is statutory, and depends upon the statute in force at the termination of the proceedings.” *Bankers Tr. Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). Numerous courts across the United States have so held, uniformly and repeatedly. *See, e.g., Igoe Bros. v. Nat’l Sur. Co.*, 112 N.J.L. 243, 251–52 (1934) (“the right to costs and the amount and items taxable are as a general rule governed by the statute in force at the time of the termination of the action”) (affirming award of attorney’s fees because “allowance of the counsel fee in the instant case was made in pursuance of and in compliance with the terms of the statute existing at the time judgment was signed and entered”); *Petersen v. Port of Seattle*, 94 Wash. 2d 479, 487 (1980) (“the right to attorney fees, as well as the determination of the amount thereof, is governed by the statute in force at the termination of the action”) (quoting *In re Bellingham*, 10 Wash. App. 606, 608 (1974) (cleaned up)); *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 376–77 (1986) (“We follow *the settled rule* that recoverable litigation costs [including attorney’s fees] are subject to change by the legislature and are governed by the law in effect at the time of judgment.”) (emphasis added) (awarding attorney’s fees based on statute in existence at termination of action) (citing *Am. Bank and Trust Co. v. Cmty. Hosp.*, 36 Cal.3d 359 (1984); *Coast Bank v. Holmes*, 19 Cal.App. 581 (1971); *Songer v. State Farm Fire & Cas. Co.*, 91 Ill. App. 3d 248 (1980)). *See also* Robert L. Rossi, *Attorneys’ Fees* § 6:10 (3d ed. May 2024) (“[i]t has been held that the allowance of an

attorney's fee as part of the costs or expenses of an action is generally dependent upon the statute in force at the time of the termination of the action") (collecting cases).

Because entitlement to fees is determined based on the law as it exists at the termination of an action, the right to fees necessarily accrues and vests when an action is terminated:

The right to costs [including fees] *accrues* at the termination of the proceedings and this right exists solely by virtue of the statute. The extent of the right can be governed only by the statute in existence *at the time the right vests*. Therefore, Iowa Code section 625.22 (1981) controls attorney fees to be taxed as part of the costs in the present case.

Bankers Tr. Co., 326 N.W.2d at 278 (emphasis added). *See also Public Media Lab*, 276 A.3d at 9 (explaining that "causes of action that have reached final, unreviewable judgment" "in *that* sense have vested" for retroactivity purposes) (emphasis in original) (quoting *Beretta*, 940 A.2d at 176).

2. This Action was Terminated Upon the Entry of the Final Judgment of Dismissal With Prejudice on July 5, 2022, and Collateral Proceedings as to Attorney's Fees Cannot Undo that Termination.

Consistent with the above authorities, this action was terminated on July 5, 2022, when the Superior Court entered a final judgment of dismissal with prejudice under the SLAPP Act. This final merits adjudication was never appealed by the School, nor could it have been, since the dismissal was required by this Court through the reversal of the Superior Court's earlier denial of Defendants' SLAPP motion. *See Nicdao v. Two Rivers Pub. Charter Sch., Inc.*, 275 A.3d 1287, 1294 (D.C. 2022) ("For the foregoing reasons, the trial court's decision is reversed, and we remand so that it may dismiss the case."). Therefore, the final, unreviewable, merits-based judgment of July 5, 2022, terminated this action.

The School and the District both contend that this action was not *entirely* terminated with the entry of the final judgment of dismissal, because the proceedings continued after that point to determine Defendants' entitlement and amount of fees. However, "[i]t is well established that a federal court may consider collateral issues *after an action is no longer pending.*" *Cooter & Gell*

v. Hartmarx Corp., 496 U.S. 384, 395–96 (1990) (emphasis added). “For example, district courts may award costs [including attorney’s fees] after an action is dismissed for want of jurisdiction.” *Id.* “A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.” *Id.* (citing *United States v. Mine Workers*, 330 U.S. 258, 294 (1947)). But, critically, the existence of collateral post-judgment proceedings over costs, fees, and the like, does nothing to alter the termination of *the action* in which those proceedings arise:

Like the imposition of costs, attorney’s fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made *after the principal suit has been terminated*.

Cooter, 496 U.S. at 396 (emphasis added).

Indeed, this Court just last year recognized that disputes over attorney’s fees are collateral and supplemental to the action in which they arise, and that their consideration is proper “after an action is no longer pending,” which necessarily means that their consideration does not alter the termination or revive the action:

Courts may consider collateral issues after an action is no longer pending following a voluntary dismissal. Those collateral issues include awards of attorneys’ fees, which involve independent proceedings supplemental to the original proceeding.

Jacobson v. Clack, 309 A.3d 571, 578 n.4 (D.C. 2024) (quoting *Cooter*, 496 U.S. at 395) (cleaned up). And, the Supreme Court and this Court have repeatedly held that an action is terminated upon final judgment, and attorney fee disputes and proceedings post-judgment do not alter that termination. *See, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988) (holding that decision on merits is “final decision” for purpose of appeal, whether or not there remains for adjudication a request for attorney fees attributable to case); *Purcell v. Thomas*, 28 A.3d 1138, 1141 (D.C. 2011) (“Generally, a ‘request for attorneys’ fees raises issues that are, for all practical

purposes, collateral to and separate from the decision on the merits’ of the underlying litigation.” (quoting *Weaver v. Graffio*, 595 A.2d 983, 986 (D.C. 1991) (cleaned up)); *Dyer v. William S. Bergman & Assocs., Inc.*, 635 A.2d 1285, 1288 n. 6 (D.C. 1993) (“[T]he pendency of a request for attorney’s fees after the entry of judgment on the merits does not affect the finality of that judgment[.]”).

Neither the District nor the School has provided any authority to support their contention that the final judgment of dismissal in this case was somehow not sufficiently final to terminate the entire case. At oral argument, the School’s counsel asserted that retroactive application of the Amendment is permissible because “judgment was not final,” and “the entire case was not final” when the final judgment of dismissal was entered on July 5, 2022. *See* 10/31 Oral Arg., at 24:20-24:46. Judge Beckwith then asked the School’s counsel, “What is your best case for saying that the entire case has to be final?” *Id.* at 24:50–24:56. The School’s counsel pointed only to *Public Media Lab*, and only to the following part of its holding: “So long as an action has not reached final, unreviewable judgment, the legislative determination provides all the process that is due.” *Id.* at 24:56–25:12 (quoting *Public Media Lab*, 276 A.3d at 9). But there is nothing in the portion of *Public Media Lab* quoted by counsel, nor in any other part of its holding, that suggests that there are different tiers or levels of finality for an action. An action reaches “final, unreviewable judgment” upon the entry of final judgment (once that judgment is not appealed). For this action, that happened on July 5, 2022, several months before the Amendment was enacted.

Accordingly, the School and the District are both wrong in their contention that this action was not *entirely* terminated at the entry of the final judgment of dismissal, because of the existence of post-judgment collateral proceedings. The authorities above teach that an action is either terminated through a final judgment, or it is not terminated in the absence of a final judgment—

there is no in-between. At oral argument, the School’s counsel finally admitted that “if the entire case had been final and unreviewable, I think we’d have a problem.” *See* 10/31 Oral Arg., at 24:45–24:50. And the problem for the School is that this action was indisputably terminated when final judgment was entered. The subsequent post-judgment proceedings over fees were only collateral matters that did not somehow revive the action.

3. Upon the Termination of this Action, Appellants Had a Substantive, Vested and Presumptive Right to Attorney’s Fees, Which Cannot be Retroactively Eliminated by the Legislature.

Because entitlement to fees is determined by the law as it exists at the termination of an action (section B.1, *supra*), and because this action was terminated upon the entry of the final judgment of dismissal on July 5, 2022 (section B.2, *supra*), Defendants’ entitlement to fees must be determined by the Anti-SLAPP Act as it existed on July 5, 2022. On that day, the School was indisputably subject to the Act, and presumptively liable for the fees occasioned by its failed strategic lawsuit against public participation, because the Amendment purporting to exempt the School was not enacted until November 2022. Accordingly, the School is not exempt from the Act, and this Court should reverse the Superior Court’s denial of fees.

Importantly, even if this action was not terminated on July 5, 2022, and even if Defendants’ right to fees was not determined by the law as it existed then, the 2022 Amendment could still not be retroactively applied in this case because Defendants had a substantive legal right to fees before the enactment of the Amendment. When this action was terminated, and Defendants prevailed by obtaining dismissal on the merits through their successful anti-SLAPP motions, Defendants as the prevailing parties became *presumptively entitled to attorney’s fees*. *See Jacobson v. Clack, supra*, 309 A.3d at 578 (“A successful movant is presumptively entitled to a fee award....”). And, critically, because that presumptive right emanated from a statute that imposed substantive obligations on the School (*i.e.*, to refrain from filing a strategic lawsuit against public participation

or to suffer its dismissal and become liable for the occasioned fees), Defendants’ right to fees was substantive, not merely procedural. *See, e.g., Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 878–79 (Fla. 2010) (“we have previously held that the statutory right to attorneys’ fees is not a procedural right, but rather a substantive right,” and, therefore the “statutory amendment cannot be applied retroactively because it allows an insurer to avoid an award of attorneys’ fees, which constitutes a substantive change to the statute in effect at the time the insureds’ insurance policy was issued”); *Water Damage Express, LLC v. First Protective Ins. Co.*, 336 So. 3d 310, 312–13 (Fla. Dist. Ct. App. 2022) (“the statutory right to attorney’s fees is substantive, and accordingly statutes limiting the right to recover attorney’s fees do not apply retroactively.”).

As one federal district court observed,

Even if the Florida Legislature intended for retroactive application, a court must reject such an application if the statute impairs a vested right, creates a new obligation, imposes a new penalty, or attaches new legal consequences to events completed before the statutory enactment. Retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations. Florida courts have consistently held that statutes limiting the right to recover attorney fees impair a substantive right and do not apply retroactively.

Procraft Exteriors, Inc v. Metro. Cas. Ins. Co., 2020 WL 5943845, at *2 (M.D. Fla. May 13, 2020) (emphasis added) (cleaned up). Unquestionably, the Amendment here seeks not only to impair Defendants’ “vested right” to fees occasioned by the School’s improper lawsuit, but also to “attach new legal consequences to events completed before the statutory enactment,” *id.*, that is to wipe out the preexisting legal consequences for the School’s improper lawsuit filed before the Amendment, and to transfer the burden of funding the legal defense from the School to the Defendants. None of this is permissible by “constitutional due process considerations.” *Id.*

Moreover, the Supreme Court’s decision in *Martin v. Hadix*, 527 U.S. 343 (1999), reaffirms the fundamental principle that a statute cannot retroactively alter obligations that have already attached. There, Congress enacted the Prison Litigation Reform Act (PLRA), which

imposed a cap on attorney's fees in prisoner rights litigation. The government argued that this cap should apply to all fee awards, including those for legal work performed before the PLRA's enactment. The Court rejected that argument, holding that applying the cap to pre-enactment work would impermissibly "attach new legal consequences" to completed conduct. *Id.* at 359 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The attorneys had worked under a system where fees were calculated at market rates, with no expectation that Congress would retroactively reduce them. The Court held that the PLRA could not retroactively alter that settled expectation, and that *the attorneys were entitled to recover their fees under the statutes as they existed when their clients "had been declared prevailing parties and thus entitled to attorney's fees."* *Id.* at 360 (emphasis added).

The same principle controls here. Under the Anti-SLAPP Act, the prevailing Defendants were statutorily entitled to recover attorneys' fees, and their counsel "worked in reasonable reliance" on this fee statute. *Martin*, 527 U.S. at 358. That entitlement vested the moment the trial court dismissed the School's claims. The D.C. Council's attempt to nullify that fee liability retroactively is no different from the government's failed attempt in *Martin* to apply new fee caps to fees for legal work already performed. Just as the Court in *Martin* refused to allow the PLRA to "rework the past," *id.*, so too should this Court reject the District's attempt to rewrite the law after the fact. And just as the Court in *Martin* awarded fees under the statutory framework in existence when the attorneys' clients prevailed in the underlying lawsuits, this Court should hold that Defendants are entitled to recover fees under the Anti-SLAPP Act as it existed when Defendants prevailed by obtaining a final dismissal on the merits.

The District labors in vain to escape these well-established principles. The District's citation to *Metropolitan Police Department v. Public Employee Relations Board*, 301 A.3d 714

(D.C. 2023), and *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), to suggest that prevailing party statutory rights to attorney’s fees are not sufficiently vested to escape retroactive nullification, is misplaced. Neither case bears any resemblance to the issue at hand—whether a statutory entitlement to attorneys’ fees, granted upon dismissal under the pre-Amendment Anti-SLAPP Act, constitutes a vested right shielded from retroactive nullification.

In *Metropolitan Police Department*, the court addressed the repeal of a police disciplinary rule—an administrative process, not a substantive statutory entitlement. 301 A.3d at 718. Specifically, the decision turned on the repeal of a 90-day statute of limitations governing disciplinary proceedings against police officers, not on whether the government could revoke a financial liability already incurred by a losing party. *See id.* at 719. Here, by contrast, the Anti-SLAPP Act presumptively guaranteed prevailing Defendants the right to recover fees. That right materialized the moment the trial court dismissed the School’s improper lawsuit. The District cannot erase that entitlement after the fact by pointing to an inapposite ruling about administrative procedure.

Fernandez-Vargas is an even stranger choice. That case involved an individual who had unlawfully reentered the country before Congress tightened immigration laws. 548 U.S. at 35. The Supreme Court found that he had no vested right to remain because his presence was unlawful to begin with. *See id.* at 44. There is no comparison between a statutory right to attorneys’ fees—expressly granted by the Council—and a continuing violation of immigration law. Unlike *Fernandez-Vargas*, where the petitioner never had a lawful right to remain in the first place, the Anti-SLAPP Act unambiguously conferred a substantive right to fees on prevailing Defendants. That right is not discretionary, speculative, or contingent—it attaches by operation of law when the movant prevails in whole or in part. The District’s attempt to lump this case in with *Fernandez-*

Vargas ignores a fundamental distinction: the Anti-SLAPP Act did not merely create a hope to seek fees—it created a presumptive liability on the losing party, which the legislature cannot retroactively undo.

The District’s extensive reliance (Br. 5–6) on *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972), is similarly unavailing. That case addressed whether a Congressional amendment eliminating *judicial review* of veterans’ benefits claims stripped courts of jurisdiction to award attorney’s fees *under judicially-crafted principles* for work performed before the amendment. *See* 461 F.2d at 1242. It did not concern the retroactive elimination of a *statutory* entitlement but rather the effect of Congress’s decision to strip courts of jurisdiction over veterans’ benefits claims. *See id.* The court held that once Congress eliminated judicial review, courts could no longer adjudicate any issues related to those cases, including awarding non-statutory fees that the courts themselves had created. *See id.* at 1242. Critically, the fee awards at issue were derived solely from the courts’ exercise of equitable discretion, meaning they had no independent statutory foundation, and could not survive once the courts’ power was taken away. *Id.* at 1254–55. That critical distinction renders *De Rodulfa* wholly inapplicable to the present case.

The District nevertheless seizes (Br. at 4) on *De Rodulfa*’s language that a “change in the law between a [trial court order] and an appellate decision requires the appellate court to apply the changed law.” 461 F.2d at 1246. But that action was simply because the change in law directly affected the court’s authority to decide the case. *See id.* at 1242 (“Our consideration of the contest over the fees was interrupted, however, by the need to determine whether a change—while the appeals were under submission—in the statute *governing judicial review* of decisions of the Administrator of Veterans’ Affairs on claims for noncontractual benefits *deprives the courts of jurisdiction to deal with such matters.*” (emphasis added)). Congress did not merely amend the

benefits statute—it entirely eliminated judicial review of such claims, which meant the court could no longer adjudicate any aspect of them, including judicially-created, non-statutory attorney’s fees. *See id.* at 1254–55. The court’s ruling was dictated by the fact that it was stripped of jurisdiction to consider the matter at all.

That is not the situation here. Indeed, and unlike in *De Rodulfa*, where the plaintiffs’ attorneys had no statutory right to fees and relied solely on the court’s equitable discretion, the Anti-SLAPP Act explicitly provides for prevailing defendants a presumptive right to recover fees. D.C. Code § 16-5504(a) (“The court may award a moving party who prevails ... the costs of litigation, including reasonable attorney fees.”). That right vested the moment the trial court dismissed the School’s claims.¹

At issue here, on the other hand, is a statutorily conferred substantive right to attorneys’ fees under the Anti-SLAPP Act. Unlike in *De Rodulfa*, where fee awards were not guaranteed by statute but rather arose as a matter of judicial discretion, the Act provides for a presumptive award of fees to prevailing defendants. D.C. Code § 16-5504(a) (“The court may award a moving party who prevails ... the costs of litigation, including reasonable attorney fees.”). This is not a case of courts exercising equitable authority to award fees in the absence of a statutory directive; the right to fees is embedded in the statutory scheme itself.

Moreover, *De Rodulfa* turned on the elimination of judicial review—an inherently procedural change that affected how claims could be litigated, not whether a substantive entitlement existed in the first place. The D.C. Circuit reasoned that Congress had only changed

¹ Indeed, the *De Rodulfa* court itself recognized that a change in law cannot retroactively eliminate rights conferred by a final judgment: “[A] change of law does not retroactively affect a proceeding which has already been terminated by a final judgment prior to the change.” *Id.* at 1252.

the forum in which veterans' claims could be decided (from judicial to administrative), rather than extinguishing any preexisting liability. *See id.* at 1254 (“The modification Congress effected by amended Section 211(a) did not ‘release or extinguish’ any liability the Administrator had either to compensation beneficiaries or to their lawyers; rather, it left the Administrator’s liabilities outstanding and litigable, albeit in administrative proceedings.”). That analysis is irrelevant here, where the Amendment to the Anti-SLAPP Act does not merely transfer fee disputes to a different adjudicative forum—it is an attempt by the D.C. Council to deny Defendants their substantive, statutory entitlement to fees.

At bottom, the distinction is straightforward: In *De Rodulfa*, there was no statutory right to fees to begin with, and the court’s discretionary awards were deemed procedural casualties of Congress’s decision to eliminate judicial review. Here, by contrast, the Anti-SLAPP Act expressly created a statutory, substantive, and presumptive entitlement to fees, which vested upon dismissal. The District’s attempt to rely on *De Rodulfa* collapses under the weight of this fundamental distinction.

C. The Amendment’s Purported Exemption of the School Cannot be Retroactively Applied in this Case Because of the District’s Savings Statute.

The District’s reliance on *De Rodulfa* (Dist. Br. at 4-5) is misplaced not only because that case dealt with a federal benefits scheme and a judicially-created, not statutory, fee entitlement, but also because it involved the inapposite federal General Savings Statute, 1 U.S.C. § 109. *See* 461 F.2d at 1253. *De Rodulfa* has nothing to say about how the District treats the repeal or amendment of its own statutes. Nevertheless, and perhaps unintended by the District, its chief reliance on *De Rodulfa* invites the proper inquiry: does the District’s own savings statute, D.C.

Code § 45-404, permit the retroactive nullification of the School's preexisting fee liability to Defendants?² It does not.

Indeed, the District's own savings statute squarely forecloses the D.C. Council's attempt to retroactively nullify Defendants' entitlement to fees:

The repeal of any act of the Council shall not release or extinguish any penalty, forfeiture, or *liability incurred pursuant to the act*, and the act shall be treated as *remaining in force* for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability, *unless* the repealing act *expressly provides* for the release or extinguishment of any penalty, forfeiture or liability.

D.C. Code § 45-404(a) (emphasis added). Interpreting cases leave no room for doubt: An amendment does not retroactively erase liabilities unless it expressly says so. *See, e.g., Holiday v. United States*, 683 A.2d 61 (D.C. 1996) (holding that, under both federal and District savings statutes, mandatory minimum sentences for drug offenses under District law were not repealed, as to persons already convicted but not sentenced under the law, by repeal of mandatory minimum sentences); *Washington v. United States*, 111 A.3d 640 (D.C. 2015) (holding that, under general savings statutes, law amending statute criminalizing possession of marijuana did not apply retroactively to defendant who committed and was sentenced for such offenses after effective date of amendment).

The Anti-SLAPP Act presumptively entitled Defendants, as the prevailing parties, to recover attorneys' fees. *See Jacobson, supra*, 309 A.3d at 578 ("A successful movant is presumptively entitled to a fee award...."). The School's liability to Defendants arose the moment

² Defendants acknowledge that "[i]t is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief." *Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997). Defendants advance this saving clause argument because the District "chiefly rel[ied]" on *De Rodulfa* in its brief. *See* D.C. Br. at ii. Because the District made *De Rodulfa* a key part of its retroactivity argument, and because *De Rodulfa's* analysis focuses on the inapposite federal savings statute, addressing the controlling D.C. savings statute is a necessary rebuttal.

the trial court granted dismissal under the Act. “Liability” is “[t]he quality, state, or condition of being legally obligated or accountable,” or a “legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” *Liability*, Black’s Law Dictionary (12th ed. 2024). Because the Act imposed a liability on the School to pay those fees, the savings statute preserves that liability unless the amendment “expressly” extinguishes it, which it does not. D.C. Code § 45-404(a).

Here, the Amendment sought to repeal the Anti-SLAPP Act as to the School, but that purported repeal does not “expressly provide” for the release or extinguishment of the School’s pre-existing liability under that Act, as would have been required under the District’s savings statute. The Amendment does not even refer to, let alone *expressly* release or extinguish, the School’s pre-existing liability for fees by virtue of the dismissal of its improper strategic lawsuit against public participation, nor to Defendants’ entitlement to attorney’s fees as the prevailing parties. The District’s savings statute preserves the School’s liability for and Defendants’ presumptive entitlement to fees, and the fee-shifting obligation here is just that—a liability incurred under the Act. The D.C. Council’s Amendment, therefore, does not retroactively relieve Two Rivers of that liability.

That the *De Rodulfa* court reached a different conclusion under the federal savings statute has no bearing here. *See* 461 F.2d at 1254–1255. The court there determined that the General Savings Statute did not apply because attorney’s fees were not a liability incurred under the repealed statute. *See id.* at 1254. The court observed that the veterans’ benefits statute governed benefits for widows, not attorney’s fees, and thus any fee obligation had to “seek its source outside the scheme of those laws.” *Id.* In other words, because the veterans’ law never imposed an obligation to pay attorney’s fees, no such liability could be preserved under the General Savings

Statute. Here, however, the SLAPP Act contains an express fee-shifting provision. *See* D.C. Code § 16-5504. As such, the moment the Superior Court dismissed the claims against Defendants under the pre-amendment Act, the School presumptively incurred liability for attorney’s fees. Under the District’s savings statute, that liability remains enforceable unless the amendment “expressly provides for the release or extinguishment” of it—which it does not, as discussed above. D.C. Code § 45-404(a). The statutory scheme here could not be more different from the one in *De Rodulfa*.

Another fundamental distinction is that *De Rodulfa* involved the elimination of judicial review, and with it, judicially-created entitlement to fees, not the retroactive erasure of a substantive, statutory liability. The *De Rodulfa* court emphasized this point: “There is a great difference, in terms of the General Savings Statute, between the amendment or repeal of a statute which confers substantive rights and, on the other hand, one which removes the jurisdiction of the court to review administrative adjudications of rights.” *Id.* at 1254. Congress changed the law so that veterans’ benefit disputes could no longer be reviewed in court. The underlying benefits themselves were still available; they just had to be litigated in a different forum. Not so here. The D.C. Council’s Amendment does not simply change the forum for attorney’s fees—it purports to eliminate the liability entirely. That is not a jurisdictional change; it is a substantive one. Unlike in *De Rodulfa*, there is no administrative tribunal where Defendants can now pursue a claim for fees. The D.C. Council’s Amendment does not “relegate” Defendants’ fee petition to a different forum—it attempts to cut it out altogether. And that is precisely the type of nullification that D.C.’s savings statute prevents. If a party incurred a liability under a prior law, Section 45-404(a) preserves it unless the amendment “expressly” extinguishes it. Because the Anti-SLAPP

amendment contains no such express language, Defendants are entitled to fees regardless of the amendment.

CONCLUSION

For the foregoing reasons, and those previously briefed and argued by Defendants-Appellants in this appeal, the Court should reverse the Superior Court's denial of attorney's fees.

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