SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL, Plaintiff, v. **ROBERT WEILER, JR., et al.,** Defendants.	**Civil Action No. 2015 CA 009512 B** **Calendar 15** **Judge Anthony C. Epstein**

DEFENDANTS' RESPONSE BRIEF CONCERNING
THE ANTI-SLAPP EMERGENCY AMENDMENT ACT OF 2021

Defendants LARRY CIRIGNANO, RUBY NICDAO, and JONATHAN DARNEL, pursuant to the Court's Order of August 18, 2022, jointly respond to Plaintiff Two Rivers Public Charter School's Brief Concerning the Impact of the Anti-SLAPP Emergency Amendment Act of 2021 (Two Rivers' "Supplemental Brief"), and in support of Defendants' pending motions for attorney's fees.

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"A Public Charter School is a publicly funded school in the District of Columbia that is not a part of the District of Columbia public schools. Moreover, a Public Charter School shall not be deemed, considered, or construed to be an entity of the District of Columbia government."[1]

ARGUMENT

I. Two Rivers cannot appropriate the immunity of "the District" under the Anti-SLAPP Emergency Amendments of 2021 and 2022 to avoid fee liability under the Anti-SLAPP Act.

Although Two Rivers commenced this ill-considered action in its own name with its own lawyers, Two Rivers now poses as the District of Columbia in an attempt to appropriate the District's new, emergency, and temporary statutory immunity from application of the Anti-SLAPP Act. (Suppl. Br. 1–5.) But Two Rivers is not "the District"—Two Rivers is a private, nonprofit corporation which is legally and jurisdictionally distinct from the District. Thus, the Anti-SLAPP Emergency Amendments of 2021 and 2022 (the "Amendments") do not apply to Two Rivers.[2] The Amendments rightly protect the District's ability to prosecute *government* enforcement actions, but they do not protect charter schools that wrongly file lawsuits, without standing, to silence protected speech on the District's public sidewalks.[3] Two Rivers' statutory interpretation of the

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[1] *Idea Public Charter School v. Belton*, No. Civ.A. 05-467(RMC), 2006 WL 667072, at *2 (D.D.C. Mar. 15, 2006) (cleaned up).

[2] The 2021 Amendment became effective on November 8, 2021, and expired 90 days later on February 6, 2022. *See* D.C. Act 24-208, 68 D.C. Reg. 12193–94 (Nov. 19, 2021) (*see also* Suppl. Br. 3). The 2022 Amendment became effective on July 27, 2022, and will expire 90 days later on October 25, 2022. *See* D.C. Act 24-515, 69 D.C. Reg. 009781–82 (Aug. 5, 2022) (*see also* Suppl. Br. Exs. at TR073–074).

[3] Two Rivers again tries, improperly and unpersuasively, to relitigate the applicability of the Anti-SLAPP Act to its failed claims against Defendants. (Suppl. Br. 3 ("this matter is not a SLAPP"), 5 ("to root out 'specious SLAPP claims'").) As shown in Defendant Cirignano's Reply in Support of Motion for Attorney's Fees and Nontaxable Expenses, this Court already found Defendants satisfied the prima facie requirements of the Act, Two Rivers conceded the point on appeal, and the Court of Appeals did not disturb the finding. (Cirignano Reply 7.) Moreover, both the Court of Appeals' reversal and this Court's final judgment on remand were issued expressly pursuant to the Act. It is too late for Two Rivers to argue otherwise.

Amendments to include itself within their immunities is implausible on its face and impossible under District of Columbia law.

A. As a party to legal proceedings, "the District" has always meant the District of Columbia government and has always excluded charter schools.

Under the U.S. Constitution and the D.C. Code, "the District" always means the territory or government of the District of Columbia. *See* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over **such District** . . . as may. . . become the Seat of the Government of the United States . . . ."); D.C. Code § 1-101 ("The District of Columbia is that portion of the territory of the United States ceded . . . for the permanent seat of government of the United States."); D.C. Code § 1-102 ("**The District** is created **a government by the name of the 'District of Columbia,'** by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, **sue and be sued**, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation . . . .") (all emphases added).

In two separate but parallel enactments, both Congress and the District Council authorized the organization of private, nonprofit corporations to serve the District *territory* as charter schools, **but expressly excluded such charter schools from the District *government***.[4] In the since-repealed Public Charter Schools Act of 1996, D.C. Code §§ 38-1701.01 to 38-1702.19 [the "Charter Act"], the District Council defined a "charter school" as "a publicly funded school in the District of Columbia that is established in accordance with this act," and a "public school" as

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[4] The Council has legislative power for the District by grant of Congress, which also retains its constitutional legislative power for the District. *See* U.S. Const. art. I, § 8; D.C. Code §§ 1-204.04, 1-206.01 All Council legislation is subject to repeal by Congress. *See* D.C. Code § 1-206.02(c).

"either a public school under the authority and control of the [District of Columbia Board of Education] or a charter school." D.C. Code § 38-1701.01(6), (8), (14).[5] The Council designated the District Board of Education as the chartering authority. D.C. Code § 38-1702.01. The Council's Charter Act required each charter school to be "organized under the District of Columbia Nonprofit Corporation Act," empowered it "[t]o sue and be sued in its own name," and further specified that **charter schools "shall not be deemed, considered, or construed to be an entity of the District of Columbia government**." D.C. Code § 38-1702.05(b)(8), (p) (emphasis added).

In the District of Columbia School Reform Act of 1995, D.C. Code §§ 38-1800.01 to 38-1809.01 [the "Reform Act"], which remains in effect, Congress defined a "public charter school" as "a publicly funded school in the District of Columbia . . . established pursuant to [this Act] and . . . **not a part of the District of Columbia public schools**," and defined "District of Columbia public school" to exclude "a public charter school." D.C. Code § 38-1800.02(12), (29) (emphasis added).[6] Congress designated both the District Board of Education and the new Public Charter School Board as chartering authorities. D.C. Code §§ 38-1800.02(17), 38-1802.03. And, as in the Council's Charter Act, Congress's Reform Act requires charter schools to be organized under the Nonprofit Corporation Act, § 38-1802.04(c)(16), The Reform Act empowers charter schools "[t]o sue and be sued in the public charter school's own name," § 38-1802.04(a)(8), and

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[5] The Charter Act was enacted at D.C. Law 11-135 (Act 11-243), 43 D.C. Reg. 1699 (May 29, 1996), and repealed at D.C. Law 17-9 (Act 17-38), § 803, 54 D.C. Reg. 4102 (June 12, 2007). Though codified prior to repeal at D.C. Code. §§ 38-1701.01 to 38-1702.19 (2001 ed.), it was originally codified at D.C. Code §§ 31-2801 to 31-2829 (1981 ed.). *Compare* D.C. Code. Ann. (1981 ed.) vol. 7 (Michie 1998), https://archive.org/details/govlawdccode198107, *with* D.C. Code (2001 ed.) vol. 18 (West 2001), https://archive.org/details/gov.dc.18.2001.

[6] The Reform Act was enacted at PL 104–134, 110 Stat. 1321 (1996). Though currently codified at D.C. Code §§ 38-1800.01 to 38-1809.01 (2001 ed.), it was originally codified at D.C. Code §§ 31-2851 to 31-2853.91 (1981 ed.). *See* note 5, *supra*.

expressly excludes charter schools from the District of Columbia government. D.C. Code § 38-1800.02(10)(B) ("**The term 'District of Columbia Government' neither includes the Authority[7] nor a public charter school.**" (emphasis added)). Thus, under the Reform Act, the exclusion of charter schools from the District government and District public schools is total.

Courts have consistently recognized the legal distinction between the District and charter schools operating within it. For example, the D.C. federal district court summarized the statutorily prescribed separateness and autonomy of charter schools this way:

> Public Charter Schools were established in the District of Columbia to provide public schools, among other things, an option for more autonomy over their administration, operations and expenditures. To that end, a Public Charter School has the power to be responsible for its own operation, including preparation of a budget and personnel matters and to sue and be sued in its own name. A Public Charter School is a publicly funded school in the District of Columbia **that is not a part of the District of Columbia public schools. Moreover, a Public Charter School shall not be deemed, considered, or construed to be an entity of the District of Columbia government.**

Idea Public Charter School v. Belton, No. Civ.A. 05-467(RMC), 2006 WL 667072, at *2 (D.D.C. Mar. 15, 2006) (cleaned up) (emphasis added). "In addition, D.C. law makes clear that an employee of a public charter school shall not be considered to be an employee of the District of Columbia Government **for any purpose**." *Roe v. Wilson*, 365 F. Supp. 3d 71, 82 (D.D.C. 2019) (cleaned up) (emphasis added) (concluding failure of charter school to stop known child sex abuse had "little or no bearing on whether the District of Columbia failed to act in the face of a known risk"). The system, by design, "allows the charter schools to operate without being subject to the

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[7] "The term 'Authority' means the District of Columbia Financial Responsibility and Management Assistance Authority established under § 47-391.01(a)." D.C. Code § 38-1800.02(2).

District's education laws and regulations." *Kamit Inst. for Magnificent Achievers v. D.C. Pub. Charter Sch. Bd.*, 55 A.3d 894, 896 (D.C. 2012) (cleaned up).

B. Two Rivers is not "the District" under the Anti-SLAPP Emergency Amendments of 2021 and 2022.

The Amendments' application to "any claim brought by the District" excludes, by its plain language, any claim brought by a charter school. As shown above, "the District" means "a government by the name of the 'District of Columbia,' **by which name** it . . . may contract and be contracted with, **sue and be sued**, plead and be impleaded, [etc.]." D.C. Code § 1-102. Charter schools exist only by statute, and the enabling statute expressly provides that a charter school is to sue and be sued in *its own* name, and is excluded from acting as the District of Columbia government—i.e., as "the District." D.C. Code § 38-1802.04(a)(8), § 38-1800.02(10)(B).

Given the care taken by both Congress and the District Council to exclude charter schools from identifying as the District government and the District public schools, Two Rivers' argument that it *is* "the District" because it is an "instrumentality" of the District as a "publicly funded school in the District of Columbia" has no merit. (Suppl. Br. 4–5.) The argument proves too much because every contract the District has with a vendor is "publicly funded." Regardless of whether every such vendor is an "instrumentality," however, every such vendor is not "the District."

The "publicly funded" argument also proves too little because public funding only proves a public purpose, which purposes can be and are routinely performed by non-governmental vendors. For example, Two Rivers quotes the dictum in *Solid Rock Church, Disciples of Christ v. Friendship Pub. Charter Sch., Inc.*, 925 A.2d 554 (D.C. 2007) [hereinafter *Solid Rock*], that the plaintiff in the suit, "although a 'charter' school, is nonetheless . . . a District of Columbia 'public'

school." 925 A.2d at 556 n.1.[8] At face value, the court's "public school" dictum only supports its holding that adverse possession did not lie against District property dedicated to public use as a school, even after the property was acquired by a charter school, because the charter school continuously maintained the property's public *use*. 925 A.2d at 559–562. Thus, the holding is merely an example of the *limited* common law immunity reserved to charter schools by statute and tied to their explicitly public functions. *See* D.C. Code § 38-1802.04(c)(17)(B). (*See also* Def. Nicdao's Reply Supp. Mot. Atty's Fees 2–5; Def. Cirignano's Reply Supp. Mot. Atty's Fees 9.) But the *Solid Rock* holding does not bolster Two Rivers' argument that it is "the District" for purposes of the Anti-SLAPP Amendments.

Also meritless is Two Rivers' argument that the Council's use of "the District" in the Amendments instead of "the District government" broadens the meaning of "the District" to include charter schools. On the contrary, "the District" needs no further definition because its meaning has been clear since its establishment. *See* D.C. Code § 1-102 ("The District is . . . a government by the name of the 'District of Columbia' . . . ."); *Pub. Media Lab, Inc. v. D.C.*, 276 A.3d 1, 6 (D.C. 2022) (noting "the Council passed emergency and temporary legislation . . . to exempt actions brought **by the District of Columbia** from the Anti-SLAPP Act" and "the Council observed . . . defendants that have been the subject of lawsuits **by the Attorney General** have indicated that they plan to use the Anti-SLAPP Act to frustrate and delay actions brought on behalf

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[8] The *Solid Rock* court did not cite any authority for the dictum, but could have relied on the (now repealed) Charter Act which, despite expressly excluding charter schools from the District government, nonetheless classified a charter school as a "public school." D.C. Code. § 38-1701.01(14). The Charter Act, however, was repealed on June 12, 2007, 54 D.C. Reg. 4102, a few weeks after *Solid Rock* was decided on May 17, 2007, 925 A.2d 554. The Reform Act, which now governs all charter schools, including Two Rivers, *expressly excludes charter schools* from identity as the District government and District public schools. D.C. Code § 38-1800.02(10)(B), (12).

of the District" (cleaned up) (emphasis added)). Moreover, even in the absence of a special definition in the Amendments, "a statute is to be construed in the context of the entire legislative scheme." *Floyd E. Davis Mortg. Corp. v. D.C.*, 455 A.2d 910, 911 (D.C. 1983). The entire legislative scheme establishing charter schools in the District leaves no doubt that neither Congress nor the District Council intended for "the District" to include charter schools.

Finally, and still further unavailing, is Two Rivers' argument that publicity around its lawsuit necessarily meant the District Council had Two Rivers in mind when it enacted the *emergency* Amendments to exempt claims by "the District." (Suppl. Br. 5–6.) But if this were true, surely the Council would have acted before November of 2021—nearly six years after Defendants filed their Anti-SLAPP special motions to dismiss—or at least told Two Rivers about the *emergency* 2021 Amendment when it was enacted, instead of letting Two Rivers discover it months later and only after briefing on Defendants' prevailing party fee motions was completed. Given the statutory history of the District and charter schools, and the litigation history of this case, it is implausible—to say the least—that the District Attorney General had Two Rivers' failed action in mind when he advised the District Council that the November 2021 *emergency* legislation "would clarify that **government** enforcement suits are not subject to the District's anti-SLAPP law." (Suppl. Br. Ex. A at TR005 (emphasis added).)

II. The Anti-SLAPP Amendments do not apply even if Two Rivers is "the District" under the Amendments.

A. Two Rivers forfeited any immunity under the 2021 Amendment by not raising it prior to final judgment.

The 2021 Amendment became effective on November 8, 2021, and expired 90 days later on February 6, 2022. *See* D.C. Act 24-208, 68 D.C. Reg. 12193–94 (Nov. 19, 2021). The Amendment purported to apply retroactively: "As of March 31, 2011; and . . . To any claims pending as of the effective date of the [Amendment]." *Id.* Thus, posing as the District, Two Rivers

argues that Defendants should be deemed deprived of the procedural and prevailing party attorney's fee protections of the Anti-SLAPP Act. (Suppl. Br. at 6.) The Court should reject this argument, however, because even if Two Rivers is "the District," Two Rivers forfeited any exemption otherwise available under the 2021 Amendment by not raising it in the litigation before the Amendment expired.

Unlike sovereign immunity, which may be raised at any time and is absolute, statutory immunity is "carefully limited immunity" and "is an affirmative defense that can be forfeited." *Kelly v. Richard Wright Public Charter School*, 317 F. Supp. 3d 564, 568 (2018); *see also Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 WL 5187780, at *16 (N.D. Ohio Nov. 9, 2017) ("A party cannot raise new arguments in a reply brief, let alone raise affirmative defenses for the first time."), *affirmed*, 741 F. App'x 302 (6th Cir. 2018) (affirming finding of forfeiture of immunity defense). Two Rivers never raised the statutory immunity purportedly conferred by the 2021 Amendment while Two Rivers' claims were pending and before the Amendment expired. Rather, Two Rivers was content to let Defendants' appeals pend in the Court of Appeals awaiting the reversal that issued on June 9, 2022, pursuant to the Anti-SLAPP Act, and still content to say nothing before this Court entered its final Order dismissing Two Rivers' claims with prejudice on July 5, 2022, also pursuant to the Anti-SLAPP Act. Two Rivers' failure to claim statutory immunity prior to expiration of the 2021 Amendment and prior to final judgment constitutes a forfeiture of any claimed immunity.

B. The 2022 Amendment does not apply because it was enacted after final judgment.

The 2022 Amendment became effective on July 27, 2022, and will expire 90 days later on October 25, 2022. *See* D.C. Act 24-515, 69 D.C. Reg. 009781–82 (Aug. 5, 2022). Thus, Two Rivers raises the 2022 Amendment's immunity while it is in effect, but still after the final judgment

of July 5, 2022. (Suppl. Br. at 7.) And therein lies the key difference "between causes of action that have reached final, unreviewable judgment—and in *that* sense have vested—and all others, pending and future, which may be modified by rationally grounded retroactive legislation." *D.C. v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008). In applying retroactive legislation, "a court must refrain from applying an intervening change to pending petitions where to do so would violate a right which had matured or become unconditional." *Holzsager v. D.C. Alcoholic Beverage Control Bd.*, 979 A.2d 52, 57–58 (D.C. 2009) (cleaned up). The Court of Appeals laid out four binding ways in which a case would attain this standard: "(1) by the existence of a savings clause in the intervening legislation, (2) by judgment, (3) by statutory right, and (4) by ownership of property." *Id.* at 58 (cleaned up). Here, Defendants' rights to prevailing party attorney's fees matured and became unconditional upon entry of final judgment against Two Rivers pursuant to the Anti-SLAPP Act. Thus, retroactive application of the 2022 Amendment to deny fees would be improper because it would infringe Defendants' vested statutory rights. *See id.* at 57–58.

III. Retroactive application of the Anti-SLAPP Amendments to deny Defendants prevailing party attorney's fees would violate due process.

"The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). When new legislation expressly limits valuable rights of litigants in pending lawsuits, due process requires such retroactive legislation to be "rationally grounded." *Beretta*, 940 A.2d at 176. Thus, even if Two Rivers is "the District" (it isn't), and the Amendments otherwise apply (despite Two Rivers' forfeiture and the Court's entry of final judgment), due process still requires that Defendants be awarded their prevailing party

attorney's fees and costs under the Anti-SLAPP Act if application of the Amendments is not rationally grounded. As applied here, the Amendments do not satisfy the due process standard.

As shown above, the Amendments were enacted to address a purported *emergency* problem—the fouling and delay of legitimate *government* enforcement actions, specifically those brought by the District Attorney General. *See, e.g.*, *Pub. Media Lab, Inc.*, 276 A.3d at 6. (*See also* Suppl. Br. Exs. at TR005.) Even if the District Council had a "rationally grounded" *emergency* justification for exempting such government enforcement actions, presumably for the public good, saving Two Rivers from the just and known statutory consequences of its failed action against Defendants, improperly commenced without standing, *in 2015*, satisfies no *emergency* or public benefit justification. Thus, due process prohibits retroactive application of the Amendments to deprive Defendants of their right to statutory attorney's fees.

CONCLUSION

For the foregoing reasons, and the reasons in Defendants' respective fee motions and supporting briefs, the Court should grant Defendants' fee motions and bills of costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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DATED this September 7, 2022

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