No. 22-CV-274

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

RESPONSE TO PETITION FOR REHEARING EN BANC

Madeline Meth
BOSTON UNIVERSITY SCHOOL OF LAW
APPELLATE CLINIC
765 Commonwealth Ave.
Suite 1304
Boston, MA 02215
(617) 835-0884

Brian Wolfman
Becca Steinberg
Regina Wang
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW,
Suite 312
Washington, D.C. 20001
(202) 662-9549

Elizabeth Brownstein
Nathaniel Allen Deacon
Student counsel

Counsel for Appellant/Cross-Appellee Felicia Sonmez

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Introduction

Felicia Sonmez alleges that the Washington Post violated the D.C. Human Rights Act by banning her from covering certain stories because she is a woman and a sexual-assault survivor. Op. 2-3. After finding Sonmez's detailed allegations plausible, a panel of this Court rejected as premature the Post's First Amendment defense that its decision was driven not by discrimination but by a desire to maintain an appearance of objectivity. Op. 4. Because "what actually motivated the Post editors to impose the bans on Sonmez is a factual question," the panel held, the Post's First Amendment defense could not be resolved on a motion to dismiss. Op. 94-97. Now, in seeking rehearing, the Post argues for the first time that, regardless of what motivated its coverage bans, its decisions are categorically protected by the First Amendment. Generally, this Court will not entertain arguments that are first presented in a petition for rehearing. *See Nixon v. United States*, 736 A.2d 1031, 1032 (D.C. 1999).

No matter. The Post's theory—that any assignment decision a newspaper makes is protected by the First Amendment regardless of the reason for that decision—is badly misguided. On the Post's theory, a paper could freely ban Black reporters from covering national politics because the White editors of that section prefer a segregated work environment, or it could cancel the column of a union-associated reporter, not because of any concerns with the column's content, but to retaliate against the employee. This is not hyperbole. The Post has said so. *See* Pet. 1-2. And, according to the Post, courts are categorically prohibited from inquiring into these decisions. Pet. 2. But the First Amendment does not give newspapers the freedom to discriminate whenever an

assignment decision is made by editors. To exercise First Amendment-protected editorial discretion in reassigning a reporter, a newspaper must, at least, take this action for a communicative purpose. The panel correctly remanded for a factual determination as to whether the Post had that purpose here. Op. 96-97. Time will tell. Meanwhile, this case is not ripe for further review and poses no question of exceptional importance. The petition should be denied.

Background

A. Facts. Felicia Sonmez was hired as a politics reporter on the Washington Post's breaking news team in 2018. Op. 7. Before working at the Post, Sonmez was sexually assaulted by the L.A. Times's Beijing Bureau Chief while she was in Beijing. Op. 5; JA 11 (Compl. 2). Months after her assault, Sonmez felt compelled to share her experience publicly to counter her assailant's misrepresentations about his behavior and to protect other women from him. Op. 6-7. All of this came up when Sonmez interviewed for her position at the Post, so the Post knew when it hired her that she had publicly discussed her experience with sexual assault. Op. 7.

In her first few months at the Post, Sonmez authored over 140 news stories, including at least seven involving claims of sexual misconduct. Op. 8. No one suggested that her work exhibited any bias or created an appearance of bias. Op. 8.

During this time, the L.A. Times conducted an investigation into Sonmez's assailant. Op. 8. When the investigation ended, a Post editor told Sonmez to expect online attacks and offered the Post's communications team to help prepare a public statement. Op. 8. Around then, Sonmez was assigned to cover Justice Brett Kavanaugh's Supreme Court

confirmation hearing, including the sexual-assault allegations by Christine Blasey Ford. Op. 8. When Sonmez met with her Post editors to discuss her statement, one asked Sonmez how she was doing given Ford's allegations. Op. 9. Sonmez responded that she found them difficult to read at first, but that she was writing the story "as usual." Op. 9.

Having received approval of her statement from Post editors and lawyers, Sonmez sent it to news outlets. Op. 9-10. The statement was about Sonmez's own experiences and assailant and did not comment on the #MeToo movement generally. Op. 10, 62-63. Though no one at the Post suggested Sonmez "could face any job-related repercussions as a result of putting out the statement," Op. 9, Post editors subsequently informed Sonmez that she was barred from writing about the Kavanaugh story until further notice because Ford's allegations were "too similar" to Sonmez's own experience and because the editors were not happy with her L.A. Times-related statement that they themselves had just approved, Op. 10-11 (quoting JA 12 (Compl. 3)). The same day, a Post editor asked Sonmez why she didn't go to the Beijing police to report the sexual assault and told her that women should "just say no." Op. 11.

Sonmez was upset by the ban and emailed her editors, protesting "the decision 'to sideline her from this story based on what happened to her in Beijing'"—that is, based not on the quality of Sonmez's work (which no one disputed), but because of her status as a sexual-assault victim. Op. 11 (quoting JA 23 (Compl. 14)) (cleaned up). Instead of remedying the situation, the Post then expanded the first reporting ban to prohibit Sonmez from working on any #MeToo-related stories until after the 2018 midterm elections. Op. 15. The ban was so broad that it prevented Sonmez from working on stories that were "barely (if at all) related to sexual misconduct." Op. 15. The Post

imposed the ban even though it retained "substantive and stylistic" control over any articles Sonmez would write because, as always, her work would be subject to review and approval by her editors. Op. 94.

The Post would not let Sonmez send an email to the reporters and editors she regularly worked with to inform them about the coverage ban. Op. 13, 18. As a result, Sonmez was forced repeatedly to explain to individual colleagues that she was prohibited from covering stories because she was a sexual-assault victim. Op. 13, 18.

Less than a year after the first ban ended, Reason Magazine and an NPR guest aggressively criticized Sonmez's sexual-assault allegations. Op. 17-18. These events produced "wave[s] of online abuse of Sonmez," with people telling Sonmez to kill herself and that she deserved to be raped. Op. 17-18. Sonmez defended herself on Twitter, including by pinning a correction to the Reason Magazine article to her account. Op. 17. These tweets all concerned Sonmez's own experiences and victimization and did not contain commentary on #MeToo more broadly. Op. 62-63.

In September 2019, the Post imposed a second ban, telling Sonmez she was indefinitely prohibited from covering any #MeToo stories. Op. 18. An editor then told Sonmez to remove the pinned tweet because it made him "uncomfortable." Op. 19.

In April 2020, while the second ban was ongoing, Sonmez received a low 2019 performance evaluation, which resulted in a reduced raise. Op. 25. The Post took this action because of Sonmez's "tweets defending herself from false claims related to [her own] sexual assault." Op. 25 (quoting JA 40 (Compl. 31)). The second ban lasted a year-and-a-half. Op. 27. The Post abruptly lifted it two days after Politico published a story communicating the ban's existence to the public. Op. 27-28.

The Post treated other reporters who spoke publicly about issues very differently than it treated Sonmez. Op. 26. For example, Post reporter Michelle Ye Hee Lee, President of the Asian American Journalists Association, often issued public statements condemning anti-Asian hate crimes and accusing other news organizations of improperly covering them. Op. 26. Yet, Lee was assigned to report on these issues and was never subject to a reporting ban. Op. 26. "Rather than criticize or rein in Lee's activities," the Post supported and praised her work. Op. 26.

B. Procedure. Sonmez sued the Post and six of its editors (collectively, the Post) for violations of the D.C. Human Rights Act. Op. 2. Sonmez maintained that the Post unlawfully discriminated against her based on her protected status as a victim of sexual assault and her sex by taking adverse employment actions, including the second coverage ban and her lower performance review. Op. 2-3, 21, 26.

The Superior Court denied the Post's special motion to dismiss based on the D.C. Anti-SLAPP Act because Sonmez's claims did not arise from acts in furtherance of the right of advocacy on issues of public interest. Op. 3. Because the "Post stated that its First Amendment argument [was] subsumed in its special motion to dismiss," the Superior Court did not separately address the Post's First Amendment defense. JA159 n.4. It granted the Post's motion to dismiss under Rule (12)(b)(6), however, holding that Sonmez had not plausibly alleged that the Post's actions were "motivated by unlawful discrimination." Op. 3.

Sonmez appealed the dismissal of her DCHRA claims, and the Post cross-appealed the denial of its special motion to dismiss. Op. 3. In a 2-1 ruling, a panel of this Court affirmed the denial of the Post's special motion on the same grounds as had the lower

court. Op. 4. And it reversed on Sonmez's DCHRA claims, concluding that her complaint "plausibly allege[s] that the defendants discriminatorily took certain adverse employment actions": the second coverage ban and the lower performance review. Op. 4.

The Post also raised its First Amendment defense on appeal, arguing that Sonmez's claims "challenge The Post's exercise of editorial discretion" because the bans were motivated by the need to preserve public trust in its objectivity, not by discrimination. Defs.' Opening Br. 47, 49-50. The panel held that it was premature to decide this issue, and discovery was needed, because "what actually motivated the Post editors to impose the bans on Sonmez" is a disputed factual question that cannot be decided on the pleadings given the majority's conclusion that "Sonmez's complaint plausibly alleges that discriminatory motivations underlay the bans." Op. 96-97. The dissent agreed that Sonmez's complaint plausibly alleged discrimination but maintained that the Post's bans were nonetheless constitutionally protected because "the motivations underlying editorial decisions do not matter to the proper First Amendment analysis." Op. 106 & n.3 (Deahl, J., dissenting). The dissent arrived at this conclusion even though the Post had not argued this "radical position" before the panel. Op. 95 n.111; *see* Defs.' Opening Br. 47-50.

Reasons for Denying En Banc Review

I. The panel correctly applied settled First Amendment precedent.

A. Nearly a century of precedent confirms that when a newspaper takes an adverse employment action that is not motivated by a desire to communicate a message, that

action is not First Amendment-protected "editorial discretion." *See, e.g.*, *Associated Press v. NLRB*, 301 U.S. 103, 131-33 (1937); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1555-56 (D.C. Cir. 1984). As the Post recognized in its brief to the panel, "courts agree that an 'exercise of editorial discretion,' … 'constitutes … expressive conduct.'" Defs' Opening Br. 15 (quoting *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 250 (D.D.C. 2017)). And for conduct to be expressive, it must seek to convey a message. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Ignoring this precedent, the Post now argues for the first time that even if its decision to re-assign Sonmez was animated by a desire to discriminate against women and sexual-assault survivors, and not by a desire to communicate any message, it would still be an exercise of protected "editorial discretion" because "the motivations underlying editorial decisions do not matter to the proper First Amendment analysis." Pet. 12-13 (quoting Op. 106 n.3 (Deahl, J., dissenting)). The panel's ruling is the latest in a line of decisions rejecting this argument in the newspaper-employment context.

The seminal case is *Associated Press v. NLRB*, 301 U.S. 103 (1937). There, the AP argued that even though undisputed findings showed its decision to discharge a news editor was motivated by the editor's statutorily protected union activity, it was immune from regulation by the statute because the First Amendment gave it "absolute and unrestricted freedom to employ and to discharge those who … edit the news." *Id.* at 131. The Court rejected this argument, finding that because retaliation for union activity—not concerns over the editor's objectivity—was the "real motive" of the AP's employment decision, the First Amendment did not protect the paper. *Id.* at 132.

Applying *Associated Press* decades later, the D.C. Circuit in *Passaic Daily News v. NLRB* recognized that the case's logic extends beyond the employment-discharge context. 736 F.2d at 1556 n.19. There, the Passaic Daily News's cancellation of an employee's weekly column "was motivated, at least in part" by his protected union activities. *Id.* at 1555. The paper argued that its decision to cancel the column was "an editorial one," so the First Amendment precluded the government "from inquiring into [its] motives." *Id.* at 1556. The court rejected this argument, concluding that, under *Associated Press*, "the First Amendment does not preclude inquiry into the Company's motives for its decision" to cancel the column. *Id.* After finding substantial support for the conclusion that the paper's motive for canceling the column was retaliation for protected union activities, the court remanded for consideration of appropriate remedies. *Id.* at 1555-56, 1559.

Associated Press and *Passaic* make clear that a news organization's adverse employment actions are not protected editorial discretion unless they are taken for a protected communicative purpose. The First Amendment provided no protection to the AP and the Passaic Daily News because the real motive for their adverse employment actions was not a concern about the journalists' objectivity but rather that the employees had engaged in protected union activity. *Associated Press*, 301 U.S. at 131-32; *Passaic*, 736 F.2d at 1555-56. The Post's real motive for re-assigning Sonmez is similarly legally relevant. If, as Sonmez has plausibly alleged, *see* Op. 97; Op. 106 (Deahl, J., dissenting), the Post re-assigned her not because of objectivity concerns, but rather because she is a woman or a sexual-assault survivor, then it hasn't exercised protected editorial discretion.

Other precedents in the "editorial discretion" line of cases further underscore that communicative intent is an essential component of editorial discretion. In *Turner Broadcasting System, Inc. v. FCC*, for example, the Court found that cable operators engaged in editorial discretion because they "see[k] to communicate messages" by selecting which stations to include in their offerings. 512 U.S. 622, 636 (1994) (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). And in other leading cases, the First Amendment burden on editorial discretion "resulted from interference with a speaker's *desired message*." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Pac. Gas & Elec. Co. v. Pub. Utilities Commn. of Cal.*, 475 U.S. 1, 8-9 (1986)) (emphasis added). Unless the Post can show that its intent in taking the adverse employment actions was similarly communicative, the actions cannot be exercises of protected editorial discretion.

It's not hard to see why communicative intent is essential to a finding of editorial discretion. A contrary rule would defy the principle that "[t]he publisher of a newspaper has no special immunity from the application of general laws." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (quoting *Associated Press*, 301 U.S. at 132-33). Without this communicative-intent requirement, a newspaper would be engaged in First Amendment-protected conduct if it reassigned anyone who voted to join a union to the least attractive beats solely to retaliate; it would be engaged in protected conduct if it refused to assign important stories to Jewish reporters solely to damage their careers; and it would be engaged in protected conduct if it banned anyone who requested disability accommodations from covering politics solely to deter those requests. Though

these assignment decisions perhaps could be described as "editorial" in common parlance, they are not exercises of First Amendment-protected editorial discretion because they are not intended to communicate.

None of this is to say that a newspaper could never engage in protected editorial discretion by assigning a reporter of a certain identity to a story. We don't reject the possibility that "*sometimes* the identity of the reporter … plays a role" in a newspaper's communicative choice and readers' perception of that choice. Pet. 8 (emphasis added). And applications of the DCHRA that burden that communicative choice could burden protected editorial discretion. But communicative motivations matter. *See Associated Press*, 301 U.S. at 131-32. And when a newspaper's intent in taking an adverse employment action is not communicative, as Sonmez's complaint alleges the Post's wasn't, *see* Op. 97; Op. 106 (Deahl, J., dissenting), that action is not First Amendment-protected "editorial discretion."

B. Seeking escape from *Associated Press*'s and *Passaic*'s flat rejection of its contention that "the motivations underlying editorial decisions do not matter for the first amendment analysis," Pet. 13 (quoting Op. 106 n.3 (Deahl, J., dissenting)), the Post relies on a series of cases from less analogous contexts. *See* Pet. 7-10. But even the Post's chosen cases say that an entity exercises protected "editorial discretion" only when its conduct is driven by an intent to communicate a message that a reasonable observer would understand.

Start with the Post's citation to three Supreme Court decisions concerning "editorial discretion" outside the newspaper-employment context. Pet. 6-7 (citing *Tornillo*, 418 U.S. at 258; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575

(1995); *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024)). In *Tornillo*, the Court found that a newspaper exercises editorial discretion in choosing to communicate particular messages by publishing certain articles or not. 418 U.S. at 258. That is, the "violation[] in *Tornillo* … resulted from interference with a speaker's *desired message*." *Rumsfeld*, 547 U.S. at 64 (emphasis added). Similarly, in *Hurley*, the Court found that parade organizers' exclusion of a pride float involved protected editorial discretion in-part because the organizers sought to avoid conveying a pro-homosexuality message. *See* 515 U.S. at 570, 574-75. Had the parade organizers sought to "exclude homosexuals as such" (that is, exclude them for a non-communicative purpose), they wouldn't have exercised protected editorial discretion. *See id.* at 572. Finally, in *Moody*, the Court noted that social-media platforms exercise protected editorial discretion only when they choose to convey a message through their compilations of third-party speech. *See* 603 U.S. at 716-18, 724-26. Analyzing a facial challenge to a law, *Moody* expressly contemplated that many services provided by social-media platforms wouldn't count as expressive and remanded for further fact-finding. *See id.*; *see also id.* at 745-46 (Barrett, J., concurring).

The Post's other cases similarly confirm that communicative intent is necessary to the exercise of editorial discretion. Pet. 8-9. Thus, the Ninth Circuit found that an injunction reversing the discharge of eight employees for union activity carried a "significant risk" of burdening protected editorial discretion only because the union activity in question sought to compel editorial changes to the paper, such that it was not possible to separate the paper's "animus toward the Union generally from its *desire* to protect its editorial discretion," so "[t]he *motives* necessarily overlapped… ." *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 955, 959, 961 (9th Cir. 2010) (emphasis added).

And the Washington Supreme Court held that a paper's firing of a reporter who had engaged in political activism amounted to an exercise of protected editorial discretion because, unlike in *Associated Press*, it was motivated by a desire to maintain an appearance of impartiality. *See Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1132 (Wash. 1997) (citing *Associated Press*, 301 U.S. at 132). Whether the Post's adverse action was similarly motivated by impartiality concerns is the exact factual question the panel realized it could not resolve on a motion to dismiss. Op. 96-97.[1]

C. The Post's remaining arguments also fail. First, the Post notes that courts reject remedies that would force a newspaper to print a particular piece. Pet. 8-10 (citing *Nelson*, 936 P.2d at 1131; *Passaic*, 736 F.2d at 1558). But Sonmez has not requested that remedy. Op. 94 "[A]s Sonmez concedes, had the bans not been imposed on her, anything she wrote would still have been subject to the review and approval of her editors." Op. 94. And in *Passaic* itself, the court rejected the paper's broad First Amendment defense and ordered the NLRB on remand to "invoke any specific, alternate remedies" for the paper's labor-law violations. *Passaic*, 736 F.2d at 1558; *see also Herald News*, 276 NLRB 605, 606 (1985) (on remand from *Passaic*, amending the order so as not to require the paper to publish any specific column).

[1] The other state-court case that the Post cites, *Hunter v. CBS Broad. Inc.*, 165 Cal. Rptr. 3d 123 (Cal. Ct. App. 2013), is inapposite. There, the court expressly noted that whether a broadcaster's alleged discriminatory hiring decision was "an exercise of free speech rights" was not "an issue we need decide" because the California anti-SLAPP defense at issue differed from the First Amendment. *Id.* at 135.

Second, the Post accuses the panel of "completely miss[ing] the point" in determining that its First Amendment defense will succeed only if it can prove that its reassignment was driven by a communicative motive because, if the Post could prove as much, it would have a "non-discriminatory reason" sufficient for it to "prevail[] … as a statutory matter." Pet. 13. That's a non sequitur. Courts routinely recognize First Amendment defenses that, if proved, would imply the defendant's success as a statutory matter, such that they formally have "no need," Pet. 13, for the constitutional defense. For example, if a defendant charged with distributing obscenity under 18 U.S.C. § 1466 can prove that the material at issue is not obscene for First Amendment purposes, then it will prevail on the merits as a statutory matter. *See Eckstein v. Melson*, 18 F.3d 1181, 1183-84 (4th Cir. 1994) (noting "obscenity" means the same thing in Section 1466 as it does in First Amendment caselaw).

II. This case is a poor vehicle for en banc review for additional reasons.

A. Review would be premature. The Post's petition poses this question: "Can a newspaper's fundamental right to editorial control be restricted by anti-discrimination statutes like the [DCHRA]?" Pet. 1. But, as explained above, determining that the Post exercised editorial discretion implicating the First Amendment requires a factual finding that the Post intended to communicate a message with its adverse employment actions. For example, a court would analyze the stories Sonmez was banned from, looking at their specific facts and relationship with the #MeToo movement, to help determine intent. It is difficult to see how her removal from a story that was unrelated to sexual

misconduct could intend to send an objectivity message. *See* Op. 15 n.2. Thus, the panel correctly reserved this First Amendment question to allow for fact finding. Op. 96-97.

This factual determination on remand could result in three different types of outcomes, and only one would require answering the question the Post now poses. First, if Sonmez proves that the Post took its adverse employment action for a "wholly or partially discriminatory reason based upon" one or both of Sonmez's protected statuses, D.C. Code § 2-1402.11(a)(1)(A), and the Post cannot prove that it intended to communicate a message and thus engaged in editorial discretion, then application of the DCHRA would raise no First Amendment concerns. *See supra* at 6-9. Second, if the Post prevails under the DCHRA because it had non-discriminatory reasons for its adverse employment actions, then, consistent with usual principles of constitutional avoidance, *Olevsky v. District of Columbia*, 548 A.2d 78, 81 (D.C. 1988), any First Amendment defense need not (and should not) be addressed. *See* Pet. 13. Third, if the facts show that the Post's adverse employment actions both discriminated against Sonmez based on her protected statuses and did so with an intent to communicate a message that would be reasonably understood by readers, then—and only then—does the question the Post presents ripen. *See supra* at 10. Because a plausible First Amendment defense may not be available to the Post after fact finding, Op. 94-97, en banc review at this stage would be at best premature and at worst unnecessary.

Even if this case ends up in outcome three, the Superior Court then would need to actually apply First Amendment scrutiny to the facts of this case. The court would likely employ intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1969), which the DCHRA would likely pass. *Id.* at 377; *see* Op. 90-91. But because this question has

not yet been before the Superior Court, that court has had no chance to engage in this fact-bound analysis. For the en banc court to do so now would be premature. This Court is "a court of review, not of first view." *Newell-Brinkley v. Walton*, 84 A.3d 53, 61 (D.C. 2014) (cleaned up).

B. The lower-performance-review claim is preserved. The Post implicitly acknowledges that further review would be inappropriate unless a decision of the en banc Court would dispose of the case. Pet. 10 n.10. That's a problem for the Post because Sonmez possesses a DCHRA claim based on her lower 2019 performance evaluation and reduction in pay, which, the Post concedes, is not barred by the First Amendment. Pet. 10 n.10; *see* Op. 89-90. So, the Post pivots, arguing that this claim is "subject to ready dismissal on remand" as time-barred under this Court's recent interpretation of COVID-19 tolling orders. Pet. 10 n.10 (citing *Tovar v. Regan Zambri Long, PLLC*, 321 A.3d 600, 617-18 (D.C. 2024)). That's flatly wrong: The Post forfeited that timeliness defense, as the panel recognized, *see* Op. 31 n.4, and, besides, Sonmez argues that even if the claim was not saved by COVID-19 tolling orders, it was subject to equitable tolling, *see* Opening Br. 24-25.

The Post forfeited any timeliness argument when it failed to raise it in its opening or response briefs, even after Sonmez briefed the topic extensively, Opening Br. 21-27, "effectively conced[ing]" the timeliness of Sonmez's claim. *See Classic CAB v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 706-07 (D.C. 2021) (citing *Thorn v. Walker*, 912 A.2d 1192, 1197 n.2 (D.C. 2006)). Any en banc decision would thus be non-dispositive.

Conclusion

Rehearing en banc should be denied.

Respectfully submitted,

/s/Brian Wolfman

Elizabeth Brownstein
Nathaniel Allen Deacon
Student Counsel

Brian Wolfman
Becca Steinberg
Regina Wang
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave. NW,
Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Madeline Meth
BOSTON UNIVERSITY SCHOOL OF LAW
APPELLATE CLINIC
765 Commonwealth Ave.
Suite 1304
Boston, MA 02215
(617) 835-0884

Counsel for Appellant/Cross-Appellee
Felicia Sonmez

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Certificate of Service

I certify that, on April 1, 2025, this response to petition for rehearing en banc 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 response to petition for rehearing en banc.

/s/Brian Wolfman
Brian Wolfman

Counsel for Plaintiff-Appellant/Cross-Appellee