NOT YET SCHEDULED FOR ORAL ARGUMENT
Case No. 19-7017

In the

United States Court of Appeals

for the

District of Columbia Circuit

SIMON BRONNER, MICHAEL ROCKLAND,
CHARLES D. KUPFER and MICHAEL L. BARTON,
Appellants,

v.

LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA,
CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA,
JOHN STEPHENS and THE AMERICAN STUDIES ASSOCIATION,
Appellees.

Appeal from a Decision of the United States District Court for the District of Columbia,
Case No. 1:16-cv-00740-RC · Honorable Rudolph Contreras, U.S. District Judge

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SUMMARY OF ARGUMENT

The Supreme Court has set forth a clear rule: for purposes of diversity jurisdiction, the amount in controversy is assessed as of the commencement of the action and based on the allegations in the complaint, no proof required. Once jurisdiction attaches, the amount in controversy is not revisited absent a showing that the plaintiffs' allegations were not made in good faith. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

As Plaintiffs/Appellants ("the Professors") Corrected Appellants' Brief ("CAB") explains, the District Court's decision to revisit the amount-in-controversy requirement three years into the litigation violates that rule. It also nullifies three years of litigation, including all the rulings the District Court made in that time, as the court was stripped of jurisdiction over the case.

Plaintiffs brought this appeal seeking reversal of that dismissal. The Joint Defendants' Brief ("JAB") fails to present any authority that supports any conclusion but the obvious one: the District Court's decision to revisit the amount-in-controversy requirement violates *Red*

Cab, and the subsequent dismissal constitutes reversible error. The argument below simply refutes each of Defendant's arguments.

ARGUMENT

I. The District Court's Decision to Revisit the Amount-in-Controversy Requirement and Dismiss the Case Three Years into Litigation Constitutes Reversible Error.

The first issue raised by this appeal is whether, after finding that the amount-in-controversy requirement was satisfied in March 2017, the District Court erred in revisiting the requirement in 2019, reversing its prior finding, and dismissing the case for lack of jurisdiction.

A. The decision to revisit the amount-in-controversy requirement violates the Supreme Court's clear holding in *Red Cab*.

As explained in the Professors' Corrected Appellants' Brief ("CAB"), the District Court's decision to revisit the amount in controversy and the subsequent dismissal violate the Supreme Court's holding in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). (CAB 22-26.)

In *Red Cab*, the Supreme Court set the standard for both *when* and *how* the federal courts should determine whether the amount-in-controversy requirement is satisfied. *Red Cab* instructs that the amount in controversy is assessed when a case is commenced in federal court. The court accepts as true the allegations set forth in the

complaint, so long as they were made in good faith. 303 U.S. at 288-90 ("the sum claimed by the plaintiff controls if the claim is apparently made in good faith"). Proof is not required; and unless the court concludes "as a legal certainty" that the plaintiff cannot collect the amount alleged, the amount-in-controversy requirement is satisfied.[1]

Once jurisdiction attaches, subsequent events – including dismissal of claims, judicial rulings that affect the plaintiffs' potential recovery (exactly what occurred in this case), and amendments to the complaint – do not oust jurisdiction.

In 2017, the District Court found that the amount-in-controversy requirement was satisfied: "It is far from legally certain that Plaintiffs could not recover over $75,000." (App. 59.) The decision to revisit the amount-in-controversy requirement in 2019 violates *Red Cab* in multiple ways: it does not accept as true the allegations in the complaint, although it does not find they were made in bad faith; it dismisses the case based on subsequent events that reduce the amount in controversy; and it applies a stricter standard of proof than permitted

[1] Only in rare circumstances is the "legal certainty test" met. *See* pp. 5-6, *infra*.

by *Red Cab*, injecting an impermissible presumption *against* finding federal jurisdiction, when *Red Cab* permits no such presumption in determining the amount-in-controversy requirement.

B. If adopted, the position taken by Defendants would require an absurd result, as federal courts would be retroactively stripped of jurisdiction in every diversity case won by defendants.

Red Cab is clear: "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." 303 U.S. at 290. This includes "rulings of the district court [that] reduce the amount recoverable below the jurisdictional requirement" – exactly the circumstances here. *Id.* at 292. This rule is based in policy and practicality, as a finding that the amount-in-controversy requirement is not met entirely strips the court of jurisdiction, rendering all previous findings in the case, legal and factual, without effect.

The Seventh Circuit case, *Herremans v. Carrera Designs, Inc.*, serves as an example. 157 F.3d 1118 (7th Cir. 1998). Herremans' complaint alleged damages arising from three counts: one for $2,500, a second for $94,000, and a third for $92,000. After the second and third counts were dismissed on summary judgment, reducing the amount in

controversy from nearly $200,000 to $2,500, the court dismissed the case.

The Seventh Circuit reversed. "The test for whether a case satisfies the amount-in-controversy requirement is whether the complaint makes a good-faith claim for the amount, . . . not whether the plaintiff is actually entitled to such an amount." *Id.* at 1121. "Otherwise every diversity case that a plaintiff lost on the merits would be dismissed for lack of federal jurisdiction, allowing the plaintiff to start over in state court. . . . There would be no merits decisions for defendants in diversity cases and no finality when defendants won. And if losing an entire case does not deprive the district court of jurisdiction, neither does losing part of it." *Id.*

The Second Circuit made the same point to a defendant posing the very argument Defendants make here:

> [Defendants argue] that the subsequent revelation that the actual amount of damages never met the jurisdictional minimum . . . divests the court of jurisdiction[.] At oral argument [defendants] acknowledged that the logical extension of this argument is that the court would have been without jurisdiction over the case even if the [actual amount] was not discovered until trial.

Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 7 (1st Cir. 1995).

C. Specific arguments raised by Defendants in support of the District Court's decision to revisit the amount in controversy all fail.

1. The "legal certainty test" does not provide for revisiting the amount in controversy years after first finding that requirement was satisfied unless the plaintiff's original allegations are found to have been made in bad faith.

Defendants argue that "the legal certainty test is met 'when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff to less than'" the statutory minimum. (JBA 15, quoting *Doe v. Exxon Mobile Corp.*, 69 F. Supp. 75, 98 (D.D.C. 2014).) Defendants do not quote or even reference *Exxon Mobil* any further; if they did, it would be clear that the legal certainty test is not met in this case.

For the legal certainty test to apply (at the inception of a case, the first time the court addresses the amount in controversy) because a "specific rule of law or measure of damages" limits the amount recoverable, there must be a *statute* that explicitly limits the amount available such that there is no claim or remedy available that is not so limited. As long as there is a single claim remaining that allows for any

damages not specifically limited by statute, the test is not met. Thus, the legal certainty test is almost never (if ever) satisfied where there are one or more tort claims.

Once the court finds that the amount-in-controversy requirement is satisfied, the analysis is even more stringent. Under *Red Cab*, the court must find that the legal certainty test is satisfied ***and*** that the plaintiffs' allegations in the complaint were made in bad faith. Because the "sum claimed by the plaintiff controls if the claim is apparently made in good faith," proof must show "that his claim was therefore colorable for the purpose of conferring jurisdiction" to justify dismissal of the case. 303 U.S. at 289. In other words, a case may dismissed if, and only if, "evidence shows, to a legal certainty, that the damages never could have exceeded the jurisdictional minimum *such that* the claim was essentially feigned (colorable) in order to confer jurisdiction[.]" *Coventry Sewage Associates*, 71 F.3d at 6, emphasis in original ("a careful review of [*Red Cab*] evinces its primary concern for the plaintiff's 'good faith' in alleging the amount in controversy"). *See also Jones v. Landry*, 387 F.2d 102, 104 (5th Cir. 1967) ("there is but

one test; good faith and legal certainty are equivalents rather than two separate tests").

In this case, the court did not find that the allegations in the Professors' complaint were made in bad faith; in fact, the court never once questioned the Professors' good faith. Consequently, it cannot be that the District Court found, to a legal certainty, that "that the damages never could have exceeded the jurisdictional minimum ***such that*** the claim was essentially feigned (colorable)," and the legal certainty test does not and cannot justify the court's decision to dismiss the case.[2]

2. Red Cab does not allow courts to revisit the amount-in-controversy requirement to account for "subsequent facts" in cases originally filed in federal court.

Defendants argue that "where the 'plaintiff chooses his forum . . . his good faith in choosing the federal forum is open to challenge . . .' by subsequent facts." (JBA 15.) Selectively quoting from *Red Cab*, employing ellipses, and tagging on the words "by subsequent facts" at

[2] Nor have Defendants even argued that the Professors' allegations regarding the amount in controversy were not made in good faith, and having failed to make that argument below, they are prevented from doing so now.

the end of the quote, defendants create a sentence suggesting that *Red Cab* allows exactly what the holding of the case explicitly forbids. This suggestion is false. *Red Cab*'s "easily stated, well-settled principle" holds that "the existence or nonexistence of the amount in controversy . . . is determined on the basis of the facts and circumstances as of the time that an action is commenced in a federal court or arrives there from a state court by way of removal." 14AA Fed. Prac. & Proc. ("*Wright and Miller*") § 3702.4. *Red Cab*'s related principle, which holds that jurisdiction is not ousted by subsequent events that reduce the amount in controversy, is also unaffected by where the case was first filed: "subsequent events . . . cannot destroy the district court's subject matter jurisdiction once it has been acquired either by commencement in federal court or by way or removal." *Id.*

Moreover, even if *Red Cab* did provide that "subsequent facts" make a plaintiff's "good faith in choosing the federal forum [ ]open to challenge," that would not justify revisiting the amount in controversy and dismissing the Professors' case. There has been no challenge to the Professors' "good faith in choosing the federal forum," the District

Court's decision does not even mention the Professor's "good faith" in choosing the federal forum.

3. Any argument that the amount in controversy can be revisited because the Professors filed an amended complaint is both legally wrong and immaterial.

The heading for section B of Defendants' Brief states, "The District Court Properly Revisited the Issue of Subject Matter Jurisdiction," and the immediate subheading states, "Jurisdiction Was Based on the Allegations in the Second Amended Complaint" (JBA 14); the following subheading argues "When Plaintiffs Filed the Second Amended Complaint, All Derivative Claims Had Been Dismissed With Prejudice" (JBA 16). These headings suggest that the filing of the SAC justifies revisiting the amount in controversy.

Whether or not that is the implication Defendants intend, it is legally incorrect. A plaintiff's amendment of the complaint does not open the door to revisiting the amount in controversy. 1A Fed. Proc., L. Ed. § 1:458 ("Examples of subsequent events not affecting jurisdiction include amendment of the complaint reducing the amount of the claim").

Moreover, even if the filing of the Second Amended Complaint (SAC) did open the door to revisiting the amount in controversy, the District Court reaffirmed that the requirement was satisfied after the SAC was filed and the court granted the motion to amend. (App. 285-99.)

Defendants quote from *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 473 (2007) to suggest that the district court must look to the most recent complaint, not the original complaint, to assess jurisdiction. *Rockwell* does not involve the amount in controversy calculation, however. Indeed, *Rockwell* is not even a diversity case; subject matter jurisdiction was based on a federal question. *Rockwell* instead involved a provision of the False Claims Act that is *treated* as jurisdictional. 549 U.S. at 467-68 ("the word 'jurisdiction' does not in every context connote subject-matter jurisdiction"). Moreover, in the text referenced by Defendants, the Court discussed, as an analogy, the consideration of *diversity* in diversity jurisdiction cases – not the amount-in-controversy requirement. The language quoted by Defendants refers to an amended complaint that adds parties that destroy diversity. As is always the case, the addition of a non-diverse party – whether by amended

complaint, joinder, or otherwise – destroys diversity and thereby strips the federal court of subject matter jurisdiction – a topic that, in contrast to the regime mandated by *Red Cab*, must be revisited whenever it occurs in a federal case. This basic principle does not modify the *Red Cab* rule, which is specific to the amount in controversy, or the many cases that, applying *Red Cab*, hold that dismissal of claims and other subsequent events do not oust jurisdiction.

D. Defendants' discussion of the dismissal of derivative claims in 2017 is utterly irrelevant, as the amount-in-controversy requirement was found to be satisfied on *direct* claims in 2017, and the SAC alleges the same direct claims.

Defendants devote a subsection of their brief to argument under the heading, "When Plaintiffs filed the Second Amended Complaint, All Derivative Claims Had Been Dismissed With Prejudice." (JBA 16-18.) The entire argument is utterly irrelevant to the question of whether the district court properly revisited the amount-in-controversy requirement in 2019, for the simple reason that the amount-in-controversy requirement was found satisfied, in 2017, without any reliance on the derivative claims.

Defendants' argument here is unclear, but they appear to be suggesting that when the district court found in 2017 that the amount in controversy was satisfied, it included derivative claims in the assessment. Or, it may be that Defendants are arguing that the SAC brings derivative claims (it doesn't), and because the Professors can't bring derivative claims, the amount in controversy alleged in the SAC is overstated.

Either way, Defendants are simply wrong.

1. The District Court did not rely on the dismissed derivative claims when it found in 2017 that the amount-in-controversy requirement was satisfied.

When the district court found that the amount-in-controversy requirement was satisfied in 2017, it was not including derivative claims in the assessment. The decision affirming that the amount-in-controversy requirement was satisfied ***is the same decision*** where the district court dismissed the derivative claims. (App. 48.) The FAC alleged both direct and derivative claims, and Defendants' motion to dismiss the FAC sought dismissal of all derivative claims, for failure to satisfy the pre-filing demand requirement (and contesting the FAC's allegations that demand would futile). (App. 48.) The same motion to

dismiss also argued that the amount in controversy did not satisfy the minimum requirement, *inter alia*.

The district court agreed with the former argument, and dismissed the derivative claims; in the very same decision, the district court rejected the latter argument, and found that the amount in controversy was satisfied. Direct claims for waste, breach of contract, breach of fiduciary duty, and violation of the D.C. Nonprofit Corporations Act survived, and the Professors sought injunctive and declaratory relief as well as monetary damages. The District Court, after issuing the decision, proceeded into discovery, as a court will do after it determines that it has jurisdiction over the case in front of it.

2. *Arguments that the Professors cannot bring derivative claims are thus irrelevant, as the SAC does not include any derivative claims.*

Defendants describe in some length the dismissal of derivative claims in 2017, and argue that the Professors cannot bring derivative claims in the SAC. (JBA 16-19.) They argue that the Professors "failed to revive their derivative claims" in the SAC, and that derivative claims "remain dismissed". (JBA 17.) This argument is nothing but a red herring. There are no derivative claims in the SAC.

If the SAC alleged derivative claims, the defendants surely would have sought to dismiss those claims for failure to comply with Rule 23.1, as they did in response to the FAC. And the district court surely would have dismissed any derivative claims. None of that happened, because the SAC does not allege any derivative claims.

The purpose of Defendants' argument that the Professors cannot bring derivative claims is unclear; what is clear, however, is that these extraneous paragraphs are immaterial to the issues at hand.

II. The Amount in Controversy Exceeds the Requirement Even When Monetary Damages for Injury to the ASA Are Excluded.

In their Opening Brief, the Professors argue that the District Court erred when it decided that the amount-in-controversy requirement was not met, because – even excluding monetary damages for injury to the ASA – the amount-in-controversy requirement ***is*** met. (CAB 29-37.) Defendants fail to rebut this argument.

A. Defendants' argument that "all the claims in the SAC were derivative" is both wrong and immaterial, as the SAC brings only direct claims, D.C. law clearly provides for members of a nonprofit to bring direct claims for mismanagement of the nonprofit, and the viability of the claims is not at issue in this appeal.

Defendants argue again that "all the claims in the SAC were derivative" (JBA 18-21). As explained above, the SAC brings only direct claims. Not a single derivative claim is alleged.

The extensive discussion of derivative claims at pages 18-26 are both wrong and immaterial. These arguments are largely taken from Defendants' previous briefs, where they argued that the District Court should dismiss the case, because (they argued) all claims arise from injury to the ASA and thus are derivative claims, and the Professors may not bring derivative claims. Then, as now, the argument was wrong. First, the SAC brings a number of claims that are indisputably direct, including claims for breach of contract and breach of fiduciary duty. Second, binding precedent from the D.C. Court of Appeals holds that members of a nonprofit may bring direct claims for injury to the nonprofit, including claims for waste and breach of fiduciary duty, *inter alia*. (CAB 40-43, discussing *Daley v. Alpha Kappa Alpha*, 26 A.3d 723 (D.C. 2001) and *Jackson v. George,* 146 A.3d 405 (D.C. 2016). Third,

the District Court did not dismiss a single claim on the grounds restated at pages 18-21 of Defendants' Brief.[3] Even after the District Court decided that the Professors cannot collect *monetary damages* for injury to the ASA, the *claims* alleging injury to the ASA survived, and remedies other than an award of monetary damages to the Professors are available.

Importantly, Defendants raised the same arguments in their motions to dismiss in the Superior Court case, and the Superior Court rejected them. (Order of Nov. 15, 2019, Bronner v. Duggan, No. 2019 CA 1712 (D.C. Super. Ct.) ("11/15/2019 Order"), 25-28.) Defendants fail to acknowledge the Superior Court's holding, and argue again here – in front of a third court – that *Daley* and *Jackson* do not provide for the Professors to bring these direct claims, contrary to the very clear language in both cases.

[3] Defendants did not appeal those determinations; thus, the question of whether the Professors may bring direct claims for injury to the ASA is not at issue here.

B. Defendants misstate the applicable standard for establishing the amount in controversy.

As set forth in *Red Cab*, the standard for finding that the amount-in-controversy requirement is satisfied is lower than the standard for establishing diversity of the parties or federal question jurisdiction, and there is no presumption against finding that the amount-in-controversy requirement is met. Defendants therefore err when they argue that the Professors fail to show that the amount-in-controversy requirement is met, in part because they misstate the governing standard. (JBA 27.)

The snippets Defendants quote from various opinions incorrectly suggest that the burden is the reverse: that the plaintiff must establish the amount in controversy to a legal certainty. Defendants cite cases to suggest that there is a presumption against finding that the amount in controversy is satisfied, and that "all doubts are to be resolved against federal jurisdiction." (JBA 27.) But that standard – which may apply to other elements of subject matter jurisdiction, such as establishing that the parties are in fact diverse, or that there is a federal question at issue – is not the standard that applies to the amount-in-controversy requirement. *Red Cab* very clearly mandates a lower standard.

Red Cab recognizes that the federal courts are of limited jurisdiction, and the intention of Congress to restrict federal jurisdiction over diversity cases – an intention that "has always been rigorously enforced by the courts." *Red Cab* at 288-89. But in the next sentence, *Red Cab* sets forth the standard for establishing the amount in controversy: "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id.*

The different standard isn't a random artifact of decades-old caselaw. It is the intentional outcome of the *Red Cab* court balancing limited federal jurisdiction against a competing goal: that "preliminary jurisdictional determinations should neither unduly delay, nor unfairly deprive a party from, determination of the controversy on the merits." *Coventry Sewage Assocs.*, 71 F.3d at 4; see also *Wright & Miller* § 3702 at 12–13 (noting competing policies). This competing goal is not an issue in other jurisdictional matters. Whether or not the parties satisfy the diversity requirement and whether the case presents a federal question are straightforward questions that are easily resolved. Thus, in *Rhodes v. Lincoln Property Corp.*, the case relied on by Defendants, a higher standard, including a presumption against federal jurisdiction,

makes sense, as the issue was diversity *of the parties* – not the amount in controversy. As Defendants' cases do not in fact dispute, when the amount in controversy is at issue, the *Red Cab* rule applies.

C. The Professors seek remedies, including injunctive and declarative relief and punitive damages, which satisfy the amount-in-controversy requirement.

1. Defendants are flatly wrong in claiming that injunctive and declarative relief cannot satisfy the amount-in-controversy requirement; their argument is not even supported by the authority they cite.

Defendants misread their own authority when they argue that "declaratory and injunctive relief do not independently convey jurisdiction in the federal courts; rather, they are alternative remedies for which a pecuniary interest over $75,000 must be demonstrated. *See e.g., Animal Legal Defense Fund v. Hormel Food Corp*., 249 F. Supp.3d 53, 59 (D.D.C. 2017)." (JBA 29.)

It is indisputable that, contrary to Defendants' claim, injunctive relief *is* valued as a contributor to the amount in controversy, and that a lawsuit can be brought seeking injunctive relief alone and still satisfy the amount-in-controversy requirement. For purposes of the amount in controversy, injunctive relief can be valued as the cost to the defendant or the benefit to the plaintiff; it need not be an "alternative remedy" to

another "pecuniary" remedy over $75,000 to secure the amount in controversy. Defendants' citation to *Animal Legal Defense Fund* does not say otherwise; it is unclear why Defendants would cite this case for this principle.

Defendants further argue that the injunctive relief sought "are not equitable, but legal: Plaintiffs seek an award of money from Defendants back to ASA. Thus they are derivative claims" and no relief is available. (JBA 31.)

As discussed above, there are no derivative claims in this case, and the direct claims are correctly plead as direct claims. Moreover, the injunctive relief sought does not simply seek a return of the hundreds of thousands of dollars wrongfully extracted from the ASA. Plaintiffs also seek an injunction prohibiting the *future* annual withdrawals of about $100,000 per year. Thus, the injunctive relief sought is not limited to "an award of money from Defendants back to the ASA"; the injunction would also prohibit continued withdrawals from the ASA trust fund that are placing the financial stability of the ASA at great risk. And, because those withdrawals deprive the defendants of $100,000 per year, the injunction clearly satisfies the amount-in-controversy requirement.

III. Defendants' Miscellaneous Arguments for Dismissal, Unrelated to Subject Matter Jurisdiction, Are Not Properly In Front of the Court and Lack Merit.

A. Arguments for dismissal on the merits are not appropriate for consideration on appeal of dismissal for lack of subject matter jurisdiction.

The District Court's decision explicitly states that it dismisses the case for lack of subject matter jurisdiction, and thus "declines to address the parties' arguments regarding the merits" of the Professors' claims. Decision at 19 n.14, citing *In re Madison Guar. Sav. & Loan Ass'n*, 173 F.3d 866, 870 (D.C. Cir. 1999). Yet Defendants argue that this Court should affirm the dismissal with respect to Defendants Salaita, Kauanui, and Puar ("the New Defendants") on grounds that bear no relationship to subject matter jurisdiction, and involve heavily fact-based questions that were never passed on by the district court.

In re Madison is clear: where there is a question of jurisdiction, it is inappropriate for the federal courts to address the merits, and a court of appeal may only review alternative jurisdictional arguments to the extent it considers alternative bases to uphold the district court's dismissal. "While we need not discuss this second jurisdictional ground, having found the one asserted by the Independent Counsel to be

sufficient, *unlike a merits argument*, we are free to do so." 173 F.3d at 869-70, citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998).

Defendants cite no case where, on appeal of a dismissal for lack of jurisdiction, a federal appellate court upheld the dismissal on grounds *other than* jurisdiction. Defendants rely on *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008), for the proposition that "an appellate court may affirm a dismissal for any reason properly raised by the parties." But *Fame Jeans* did not involve a question of jurisdiction. Rather, *Fame Jeans* involved a trademark case that was dismissed by the district court, which held that some claims were waived and that the complaint did not satisfy the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 500 U.S. 544 (2007). *The district court's jurisdiction was not at issue*, and nothing in the case calls into question *In re Madison* and *Steel Co.*, or the general premise that federal courts do not address the merits of a case on appeal from dismissal for lack of jurisdiction.

B. This Court should decline to consider Defendants' Rule 12(b)(2) and 12(b)(6) arguments because the district court did not rule on or even consider them.

Following the Supreme Court's directive, federal district courts do not rule on merits questions in cases where they find they lack jurisdiction (indeed, they lack the power to do so), and "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). To reverse the dismissal for lack of jurisdiction but uphold the dismissal on other grounds, a federal court of appeal would be required to delve into and resolve factual questions with no factual record, and to decide questions of law and fact for the first time, with no district court decision to review and no explanation of the district court's rationale to consider. The appellate process and its clear distinction between the roles of the district court and the court of appeals would be turned on its head.

Defendants cite *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011), but *Bowie* does not support their position – quite the opposite. *Bowie*, like *Fame Jeans*, did not involve an appeal of dismissal for lack of jurisdiction. Moreover, the *Bowie* court refused to consider issues

that the district court did not pass on below: "Mindful of 'the general rule . . . that a federal appellate court does not consider an issue not passed upon below,' *Singleton v. Wulff*, [428 U.S. at 120], we decline to decide the validity of [Defendants' defense] in the absence of a relevant decision by the district court."

C. Defendants' miscellaneous arguments for dismissal fail on the merits.

Defendants present a number of arguments for dismissal of claims against Defendants Kauanui, Puar, and Salaita ("the New Defendants") on the merits. Although their brief fails to mention it, the New Defendants made the exact same arguments in their motions to dismiss the case pending in Superior Court. In an order issued on November 15, 2019, the Superior Court rejected the arguments out of hand.

1. The individual defendants are not exculpated by the Volunteer Protection Act or D.C. Code § 29-406.31(d), because – as both the District Court and Superior Court found – they acted intentionally and with knowledge that their acts would harm the ASA and its members.

Defendants' Brief argues that D.C. Code § 29-406.31(d) and the Volunteer Protection Act (VPA), 42 U.S.C. § 14503 exculpate the individual defendants from liability. (JBA 40-44.) Defendants' Brief does not mention that the District Court previously ruled that § 29-

406.31(d) does *not* apply, because Defendants' actions (as alleged, and supported by Defendants' own words, in their own documents) constitute "intentional infliction of harm," an explicit exception to § 29-406.31(d). (11/15/2019 Order 25-28.) ("Plaintiffs have plausibly alleged that the Individual Defendants acted with an intent to harm the ASA," and listing examples of allegations where Defendants acted "in furtherance of a Resolution that they knew was likely to harm the organization").

That decision from the district court, issued on July 6, 2018, applies to the SAC, which became the active complaint on March 6, 2018, and covers all of the Defendants named in the SAC, including the New Defendants.

The District Court did not rule on exculpation under the VPA, because the VPA had not been raised by Defendants at the time of the decision. However, the Superior Court has since held that the exceptions to the VPA clearly apply, for the very same reasons that the exceptions to § 29-406.31(d) apply. (11/15/2019 Order 33-34.) Indeed, the explicit exceptions to the VPA are *broader* than the exceptions to

D.C. Code § 29-406.31(d), in that they include gross negligence and reckless misconduct. 42 U.S.C. § 14503(a)(3).[4]

In a tortured argument, unsupported by authority from any state or federal court, Defendants argue that § 14503(a)(3)'s exceptions apply "only for conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity." (JBA 41.) This argument has no merit: the word "directed" does not even appear in § 14503(a)(3).

There is no precedent for this argument (indeed, defendants do not cite a single case in support), it is illogical (under defendants' view, the VPA would exculpate even criminal conduct against a nonprofit); it requires a reading of the statute that is grammatically flawed; and finally, it would not apply here even if true: the Professors *are* individuals who allege conduct that harmed them.

The Superior Court dismissed defendants' argument out of hand: "Plaintiffs [allege] willful misconduct that has harmed the ASA and her

[4] 42 U.S.C. § 14503(a)(3) provides that the VPA applies only where "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer".

members. Thus Defendants are not protected by this act either and the claims may proceed against them." (11/15/2019 Order 33-34.)

2. Defendant Salaita's argument that D.C. courts lack personal jurisdiction over him fails, as the Superior Court recently found.

Ignoring the basis upon which the District Court found it had personal jurisdiction over other individual defendants, Defendant Salaita argues that the District Court lacks personal jurisdiction over him because he lives Virginia, not D.C.[5] He is wrong. Although none of the individual defendants live in D.C., the district court correctly found in 2017 that it has jurisdiction over all of them, as they served as officers and directors of the ASA, a nonprofit corporation located in D.C. and organized under D.C. law, voluntarily lead the organization, and participated in the 2013 annual meeting of the ASA in D.C., including the campaign to adopt the Academic Boycott.

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[5] Defendant Salaita claims that the SAC makes a "false allegation that he resides in the District of Columbia." (JBA 50.) As Defendants are aware, Defendant Salaita was preparing to relocate after being removed from a teaching position in Beirut when the SAC was prepared. The only information available regarding his residency was an article that he wrote, stating he would be moving to the D.C. area. The SAC provided the best available information: "Defendant Salaita's residency has changed more than once in recent years. On information and belief, he is currently a resident of the District of Columbia." SAC ¶26.

All of these facts are true with respect to Defendant Salaita. As the Superior Court recently found with respect to both Defendant Salaita and Defendant Tadiar, who raised the same defense in that court, "[b]oth Defendants served as officers and leaders within the ASA, a District of Columbia organization, and are being sued for their actions in that capacity. This is sufficient to provide jurisdiction[.]" (11/15/2019 Order 34.)

3. Defendants Kauanui, Puar, and Salaita's arguments for dismissal for failure to state a claim lack merit, as the D.C. Superior Court also found.

Defendants also make fact-specific arguments on topics not addressed below, in an effort to convince this Court to dismiss particular claims against the New Defendants. (JBA 42-49.) Having found that it lacked subject matter jurisdiction over the case, the District Court appropriately declined to address these merits arguments. With subject matter jurisdiction still at issue, and with no decision below to review, the Professors respectfully argue that this Court should decline to pass on them as well.

Defendants made the same arguments to the Superior Court, which rejected them. (11/15/2019 Order 28-30, "the Court is not

persuaded that the individual Defendants did not owe some duty of loyalty or care to the ASA simply because they were not officers at the time" and "the Court is persuaded that the claim references a number of timeframes where the ASA's funds were being misappropriated . . . the Court cannot dismiss any individual Defendants at this time".)

IV. The Dismissal of the *Ultra Vires* Claim in the FAC Constitutes Reversible Error.

A. The Professors did not waive appeal of the dismissal of any other ultra vires claims, because no other ultra vires claims were dismissed.

Defendants strangely argue that the one *ultra vires* claim at issue in this appeal – the *ultra vires* claim brought in the FAC – was never before the District Court; then, even more strangely, they argue that the Professors have waived appeal of dismissal of *ultra vires* claims brought in the SAC, although the District Court didn't dismiss them. (JAB 34-35.)

The *ultra vires* claim in the FAC alleged acts "outside and inconsistent with the purpose of the ASA's constitution." (FAC ¶82-84, *see also* ¶¶4, 22-26, 30, 53, *inter alia*.) That Defendants describe the

claim differently does not make it so. The district court dismissed that claim, and that dismissal is properly on appeal.

In contrast, the *ultra vires* claims alleged in the SAC were not dismissed for failure to state a claim. The District Court declined to address the merits of any of the SAC's claims, once it found it lacked jurisdiction over the case. The Professors could not possibly have waived the right to appeal the dismissal of claims that were not dismissed. (JAB 34-35.)

B. Ultra vires acts are not limited to acts "expressly prohibited by statute or by-law".

The District Court dismissed the *ultra vires* claim on the incorrect assumption that only acts "expressly prohibited by statute or by-law" can be *ultra vires*. Under this view, acts that are clearly not encompassed by the mission and powers of an incorporation defined by its organizational documents are not *ultra vires* (unless they *also* violate a statute or bylaw forbidding the act). If this were right, there could be no *ultra vires* claim that isn't also a either a breach of contract or statutory claim, rendering the *ultra vires* doctrine without effect – and also rendering the statement of purpose or mission required in articles of incorporation irrelevant.

The cases relied on by the District Court state no such requirement. *Compton v. Alpha Kappa Alpha,* 64 F. Supp. 3d 1, 18 (D.D.C. 2014) holds that an *ultra vires* claim ***can*** be brought against an organization for violation of a statute or by-law; it does not ***restrict*** *ultra vires* claims to such violations. In fact, it explicitly states otherwise:

> An *ultra vires* claim *can* be brought against an organization "where the ... action is 'expressly prohibited by statute or by-law,' " *Daley,* 26 A.3d at 730 . . . *or where the organization has exceeded the powers conferred upon it by its certificate of incorporation, bylaws, or statute, id.*

64 F. Supp. 3d at 18, *emphasis added*.

Nor does *Daley* hold that only violations of statute or bylaw are *ultra vires*. *Daley v. AKA*, 26 A.3d at 730–31. Again, quite the opposite. *Daley* quotes *Cross v. Midtown Club, Inc*., 33 Conn. Supp. 150, 365 A.2d 1227, 1229 (1976), which holds, "affirming plaintiff's claims, 'that the corporation and its directors, in establishing those policies, have acted *ultra vires* in that they have *exceeded the powers conferred upon them*[.]'" *Id.*, emphasis added.

To the extent that Columbia Hospital for Women suggests otherwise, the language is dicta; plaintiffs in Columbia Hospital did not

bring an ultra vires claim. Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd., 15 F. Supp. 2d 1, 7 (D.D.C. 1997), aff'd, 159 F.3d 636 (D.C. Cir. 1998) ("The Bank defends against the Hospital's attack by referring to the law of ultra vires. Plaintiffs correctly note that they are not disputing the legitimacy of the January pledge agreement because it was ultra vires.").

Defendants cite no case that actually holds that *ultra vires* claims are limited to acts expressly prohibited by statute or bylaw. Defendants cite only *Welsh v. Mc Neil*, 162 A.3d 135 (D.C. 2017), which cites to *Columbia Hospital*, and finds, "as in that case, "[n]ot *ultra vires*, but the law of agency, governs [the plaintiff's] claim." 162 A.3d 135 at 150. So, like *Columbia Hospital*, *Welsh* does not dismiss an *ultra vires* claim because it fails to allege an act "expressly prohibited by statute or by-law.

* * * *

For all of the above reasons, the Professors respectfully ask that this Court reverse the District Court's dismissal of the case for lack of jurisdiction.

Respectfully submitted,

Dated: January 29, 2020

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document complies with the type-volume limitation. The document includes 6,481 words and is formatted in 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, I filed the foregoing APPELLANTS REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by and through using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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