SUMMARY
September 28, 2023

2023COA88

No. 22CA0858, *Anderson v. Senthilnathan* — Torts — Defamation; Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Constitutional Rights — Anti-SLAPP — Special Motion to Dismiss

Plaintiff, Auontai "Tay" Anderson, an elected member of the Board of Education for Denver Public Schools, sued four defendants for defamation and similar claims relating to defendants' statements regarding allegations that Anderson committed sexual assault.

A division of the court of appeals evaluates the trial court's rulings on special motions to dismiss filed by defendants under section 13-20-1101, C.R.S. 2023. Applying the framework recently established by a different division of this court in *L.S.S. v. S.A.P.*, 2022 COA 123, the division affirms in part and reverses in part the trial court's order.

COLORADO COURT OF APPEALS **2023COA88**

Court of Appeals No. 22CA0858
City and County of Denver District Court No. 21CV33673
Honorable David H. Goldberg, Judge

Auontai "Tay" Anderson,

Plaintiff-Appellant and Cross-Appellee,

v.

Jeeva Senthilnathan,

Defendant-Appellee and Cross-Appellant,

and

Black Lives Matter 5280, a Colorado nonprofit organization; Amy Brown; and Mary Katherine Brooks-Fleming;

Defendants-Appellees.

ORDER AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE LUM
J. Jones and Bernard*, JJ., concur

Announced September 28, 2023

Issa Israel Law Firm, Issa Israel, Denver, Colorado, for Plaintiff-Appellant and Cross-Appellee

Jeeva Senthilnathan, Pro Se

Richards Carrington, LLC, Todd E. Mair, Elliot J. Reaven, Denver, Colorado, for Defendants-Appellees Black Lives Matter 5280 and Amy Brown

Kishinevsky & Raykin, LLC, Igor Raykin, Michael Nolt, Aurora, Colorado, for Defendant-Appellee Mary Katherine Brooks-Fleming

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 This appeal concerns a district court order addressing three special motions to dismiss filed pursuant to section 13-20-1101, C.R.S. 2023. Plaintiff, Auontai "Tay" Anderson, appeals the portion of the order granting the motions to dismiss filed by defendants Black Lives Matter 5280 (BLM),[1] Amy Brown, and Mary Katherine Brooks-Fleming. Defendant Jeeva Senthilnathan cross-appeals the portion of the order denying her special motion to dismiss.

¶ 2 We affirm the portions of the order dismissing Anderson's claims against BLM and Brown and declining to dismiss Anderson's claims against Senthilnathan. We affirm in part and reverse in part the portion of the order dismissing Anderson's claims against Brooks-Fleming. And we remand the case for further proceedings.

I. Background

¶ 3 At various times in 2021, while Anderson served as an elected Director on the Board of Education for Denver Public Schools (DPS), BLM and Brown,[2] Brooks-Fleming, and Senthilnathan published

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[1] Black Lives Matter 5280 is a chapter of the national organization Black Lives Matter.

[2] Brown is a co-founder of BLM. Because the claims against BLM and Brown relate to their joint involvement with a single statement, we refer to them collectively as "BLM" unless otherwise noted.

separate statements alleging that Anderson had sexually assaulted one or more people. Each of the defendants was familiar with Anderson through participation in community politics.

¶ 4 An investigation commissioned by DPS was unable to substantiate the allegations of sexual assault raised by Brooks-Fleming and by a third party who had allegedly reported her assault to BLM. The results of the investigation were released before Senthilnathan made her statements.

¶ 5 Anderson brought claims against each defendant for (1) defamation; (2) defamation per se; (3) civil conspiracy; (4) "extreme and outrageous conduct [and] intentional infliction of emotional distress"; (5) "tortious interference with prospective business relationship"; (6) aiding and abetting defamation; (7) aiding and abetting extreme and outrageous conduct; and (8) aiding and abetting tortious interference. The complaint also sought preliminary and permanent injunctive relief.

¶ 6 The defendants each filed special motions to dismiss under Colorado's anti-SLAPP statutes, section 13-20-1101.[3] The district

[3] "SLAPP" stands for "strategic lawsuit against public participation."

court concluded that all statements at issue constituted petitioning activity protected by the statute and pertained to an issue of public concern. It granted BLM's and Brooks-Fleming's special motions to dismiss because it concluded that Anderson did not establish a reasonable likelihood that he could prove, by clear and convincing evidence, that their statements were made with actual malice. The court dismissed the remaining claims against BLM and Brooks-Fleming as derivative of the defamation claims. The court denied Senthilnathan's special motion to dismiss because it concluded that Anderson did establish a reasonable likelihood that he would prevail as to the claims against her. Anderson appeals, and Senthilnathan cross-appeals.

¶ 7 First, we review the anti-SLAPP framework and defamation principles applicable to all parties' claims. Next, we address Anderson's direct appeal, examining whether BLM's and Brooks-Fleming's statements were protected activity and whether Anderson can demonstrate a reasonable likelihood of prevailing on his defamation claims against them. Finally, we turn to the cross-appeal to determine whether Anderson established a reasonable

likelihood of prevailing on his defamation claim against Senthilnathan.

II. Standard of Review and Applicable Law

A. Anti-SLAPP Statute

¶ 8 We review a district court's ruling on an anti-SLAPP motion de novo. *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 19; *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 21.

¶ 9 The purpose of Colorado's anti-SLAPP statute is to "safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government . . . and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b); *see also L.S.S.*, ¶¶ 14-18; *Salazar*, ¶ 11. To balance these interests, the statute provides a mechanism to "make an early assessment about the merits" of a lawsuit brought in response to a defendant's protected petitioning or speech activity. *Salazar*, ¶ 12.

¶ 10 To that end, a defendant may file a special motion to dismiss early in a case, and the court must evaluate the special motion through a two-step process. § 13-20-1101(3)(a); *L.S.S.*, ¶¶ 20-24. First, the court must determine whether the defendant has made a

threshold showing that the plaintiff's claims fall within the scope of the statute; that is, whether the claims arise from the defendant's exercise of free speech or right to petition in connection with a public issue. *L.S.S.*, ¶ 21. Second, if the defendant meets that threshold, the burden shifts to the plaintiff to establish a reasonable likelihood of prevailing on the claim. § 13-20-1101(3)(a); *L.S.S.*, ¶ 22. If the plaintiff fails to satisfy this burden, then the court must grant the special motion to dismiss. § 13-20-1101(3)(a); *Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 23.

¶ 11 In its evaluation at the second step, the court applies a "summary judgment-like" procedure whereby it reviews the pleadings, affidavits, and evidence submitted by both sides to determine whether the plaintiff has met the burden. *L.S.S.*, ¶¶ 22-23. A court "'does not weigh evidence or resolve conflicting factual claims' but simply 'accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.'" *Id.* at ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)); *see also* § 13-20-1101(3)(b).

B. Defamation

¶ 12 The elements of defamation are

> (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication.

Lawson v. Stow, 2014 COA 26, ¶ 15 (quoting *Williams v. Dist. Ct.*, 866 P.2d 908, 911 n.4 (Colo. 1993)).

¶ 13 When the defamatory statement involves a matter of public concern, the plaintiff faces heightened standards:

> 1. The plaintiff must prove the statement's falsity by clear and convincing evidence, rather than by a mere preponderance.
>
> 2. The plaintiff must prove by clear and convincing evidence that the speaker published the statement[] with actual malice.
>
> 3. The plaintiff must establish actual damages, even if the statement is defamatory per se.

L.S.S., ¶ 36. "[T]he clear and convincing [evidence] standard requires proof that a fact is 'highly probable and free from serious or substantial doubt.'" *Creekside*, ¶ 36 (quoting *Destination Maternity v. Burren*, 2020 CO 41, ¶ 10).

¶ 14 "A statement is published with actual malice if it is published with actual knowledge that it was false or with reckless disregard

for whether it was true." *L.S.S.*, ¶ 40. A plaintiff can show actual malice by proving that the defendant in fact "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Id.* (quoting *Fry v. Lee*, 2013 COA 100, ¶ 21). To survive an anti-SLAPP motion, the plaintiff must "establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial." *Id.* at ¶ 41.

III. BLM's and Brooks-Fleming's Statements

A. Additional Facts

¶ 15 In March 2021, BLM published the following statement on multiple social media platforms:

> In late February, a woman came forward to BLM5280 alleging that Director Tay Anderson is the perpetrator of her sexual assault. At the request of the alleged survivor, we are publicly sharing this information in hopes of ensuring her and all of our safety and wellbeing. We trust that our supporters and community partners, as well as Dir. Anderson's supporters and community partners, will be mindful of the struggle in outing oneself as a survivor of sexual assault: particularly when bringing allegations forth against a person in a position of power and influence. As such, the alleged survivor has requested to remain anonymous at this time. Please respect her boundaries.

> At present, the alleged survivor's only requests of Dir. Anderson are that he issue a public apology and seek help from a licensed professional with relevant expertise. The alleged victim's requests are in alignment with restorative justice — one of our guiding values as a chapter. Bear in mind that although these allegations have not gone through a formal legal process, BLM5280 is fiercely committed to protecting, uplifting, and believing Black women, decidedly as it relates to sexual violence. When we say protect Black women this must entail calling in those who have allegedly caused harm, including elected officials. Until Dir. Anderson has accounted for himself in these ways, he will not be welcome to share space with BLM5280 physically or on any of our platforms.

¶ 16 Following BLM's statement, DPS hired ILG Legal Services, LLC (ILG) to investigate the sexual assault allegation. ILG issued a report containing the results of its investigation later that year. The ILG investigation was unable to substantiate the claim that Anderson committed sexual assault against the individual referenced in BLM's statement.

¶ 17 As ILG was conducting its investigation, Brooks-Fleming testified as a member of the public before Colorado's House Judiciary Committee during a hearing on Senate Bill 21-088, the

Child Sexual Abuse Accountability Act. Her testimony contained the following allegations and statements:

- A "sexual predator" was "currently targeting DPS students."
- Sixty-two DPS students "reported directly to [her]" beginning in August 2020.
- Some of the students came directly to her home seeking medical attention.
- "All in all, sixty-one high school students and one recent graduate" sought help from Brooks-Fleming.
- All sixty-two victims were undocumented or DREAMers.
- The victims "listed offenses from unwanted touching . . . to violent acts of rape."
- The victims "made comments like, 'no one ever stops him' [and] 'none of you ever do anything.'"
- "Rape is bad. Child rape is worse. Child rape in DPS should be the thing that we can all agree on, should never happen, and that one is way too many."

¶ 18 Brooks-Fleming ended her testimony by urging the legislators to vote to pass the legislation.[4]

¶ 19 After the hearing, on the same day, Brooks-Fleming issued a follow-up statement regarding her testimony, which she apparently posted to social media. As relevant here, Brooks-Fleming said, "There we go. I said what I said. Rape is terrible . . . . So, if you or someone you love, is a victim of the person and you know exactly who I'm talking about, please reach out to me directly . . . . Thanks. 62 victims and counting. One is too many."

¶ 20 The scope of ILG's investigation was amended to include Brooks-Fleming's allegations. The ILG report concluded that it could not substantiate Brooks-Fleming's allegations that Anderson committed sexual assault or sexual misconduct against DPS students.[5]

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[4] The entire statement is set forth below in Appendix 1.

[5] Though it could not substantiate Brooks-Fleming's allegations or the allegations of the accuser who allegedly came forward to BLM, the ILG report noted that it "[did] not express an opinion . . . about the truthfulness of the allegations (whether from witnesses or from individuals who did not participate in the process)."

B. Anti-SLAPP Step One: Protected Activity

¶ 21 Anderson contends that BLM's and Brooks-Fleming's statements are not protected by the anti-SLAPP statute because the statements (1) falsely reported criminal conduct; (2) do not involve an ongoing controversy; and (3) violated criminal statutes. We disagree.

¶ 22 We agree with the district court that BLM and Brooks-Fleming satisfied the first step by establishing that Anderson's claims arise from acts "in furtherance of [their] right of petition or free speech . . . in connection with a public issue." § 13-20-1101(2)(a).

¶ 23 The statute provides that an "[a]ct in furtherance of a person's right of petition or free speech . . . in connection with a public issue" includes "[a]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." § 13-20-1101(2)(a)(III).

¶ 24 BLM and Brooks-Fleming established that their statements were made in a public forum (on social media and before the legislature) and in connection with a matter of public interest (allegations of sexual assault against an elected official). *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) ("[T]he public's

interest extends to 'anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'") (citation omitted); *see also Sipple v. Found. for Nat'l Progress*, 83 Cal. Rptr. 2d 677, 684-85 (Ct. App. 1999); *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30, 37 (Ct. App. 1990).

¶ 25 Nevertheless, Anderson contends that BLM's and Brooks-Fleming's statements were not protected activity because the statements were false reports of criminal conduct and constitute the crime of false reporting to authorities.[6]

¶ 26 Anderson relies primarily on the decision of a magistrate judge of the United States District Court for the District of Colorado, who concluded that false reporting of a crime to the police was not protected activity, even though the purported falsity was contested.

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[6] Anderson refers to the crime of false reporting to authorities as "illegal false reporting." The parties dispute whether Anderson's argument that the false reporting constitutes a crime is preserved. But because it is closely connected to Anderson's argument that false reporting — whether or not a cognizable criminal offense — falls outside the anti-SLAPP statute, we address it.

See Stevens v. Mulay, Civ. A. No. 19-CV-01675-REB-KLM, 2021 WL 1300503, at *9 (D. Colo. Feb. 16, 2021) (unpublished order). However, on review, the district court declined to adopt that aspect of the magistrate's decision. *Stevens v. Mulay*, Civ. A. No. 19-CV-01675-REB-KLM, 2021 WL 1153059 (D. Colo. Mar. 26, 2021) (unpublished order). The court said, "[Defendant] contends the magistrate judge erred in concluding that false allegations of criminal conduct do not implicate the anti-SLAPP statute, at least where, as here, the purported falsity of the charges is contested. To that extent, I agree with [defendant]." *Id.* at *3. The court continued,

> While the anti-SLAPP law "cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law," an activity may be deemed unlawful as a matter of law, and thus the motion denied at the first step of the court's inquiry, only "when the defendant does not dispute that the activity was unlawful, or uncontroverted evidence conclusively shows the activity was unlawful."

Id. (citations omitted).

¶ 27 This view is consistent with that adopted by a division of this court in *L.S.S.* The division held that, "when allegations of making false reports are controverted, they are insufficient to render [the]

alleged conduct unlawful as a matter of law and outside the protection of" the anti-SLAPP statute. *L.S.S.*, ¶ 30 (quoting *Kenne v. Stennis*, 179 Cal. Rptr. 3d 198, 209 (Ct. App. 2014)). We agree with the holding in *L.S.S.* and follow it.

¶ 28 We don't discern any evidence conclusively establishing that BLM or Brooks-Fleming committed the crime of false reporting to authorities, which, as relevant here, requires the perpetrator to

> [1] knowingly cause[] the transmission of a report to law enforcement authorities of a crime or other incident . . . *when he or she knows that it did not occur*; or
>
> [2] . . . knowingly cause[] the transmission of a report to law enforcement authorities pretending to furnish information relating to an offense or other incident . . . *when he or she knows that he or she has no such information or knows that the information is false* . . . .

§ 18-8-111(1)(a)(II), (III), C.R.S. 2023 (emphasis added). Indeed, BLM's and Brooks-Fleming's knowledge of the falsity of the sexual assault allegations is precisely the issue they and Anderson contest.

¶ 29 Anderson also raises two unpreserved contentions. He asserts that BLM's and Brooks-Fleming's statements are unprotected because they constitute the criminal offense of attempt to influence a public servant. And he contends that the statements do not

concern a public issue because they did not "pertain to an ongoing controversy, dispute, or discussion" at the time they were published.

¶ 30 While Anderson claims that he preserved these issues for review, his citations to the record don't support that assertion. In his combined response to the motions to dismiss and during the hearing, Anderson raised the "false reporting" argument addressed above. And during the hearing, Anderson also argued that (1) the person who allegedly reported her assault to BLM didn't exist; (2) BLM found someone to play the part of the alleged victim after the fact; and (3) BLM and Brooks-Fleming were "lying." These statements aren't sufficient to preserve Anderson's "attempt to influence" and "ongoing controversy" arguments; therefore, we won't address them. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1188 n.4 (Colo. App. 2011) ("We review only the specific arguments a party pursued before the district court."); *see also Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992) ("Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal.").

C. Anti-SLAPP Step Two: Reasonable Likelihood of Prevailing

1. BLM

¶ 31 Anderson contends that the district court erred by concluding that he did not have a reasonable likelihood of prevailing on his defamation claims against BLM. We disagree.

a. Statement "Layers"

¶ 32 The district court concluded that BLM's statement contained only one factual assertion: "[A] woman came forward . . . alleging that [Anderson] is the perpetrator of her sexual assault." The court analyzed the elements of falsity and actual malice as to this assertion only. Anderson asserts that the court erred by failing to recognize that BLM's statement contains two "layers" of defamatory factual assertions: (1) that a woman reported that Anderson had sexually assaulted her and (2) that Anderson in fact committed the sexual assault.

¶ 33 Anderson relies on *Milkovich v. Lorain Journal Co.*, which noted the following:

> [T]he statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level

> of falsity which would ordinarily serve as the basis for a defamation action . . . .

497 U.S. 1, 20 n.7 (1990).

¶ 34 At issue in *Milkovich* was whether statements in a newspaper column were "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21. If so, the statements could form the basis of a defamation claim. On the other hand, if the statements were opinion, which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," they were constitutionally protected and were not actionable as defamation. *Id.* at 20 (citation omitted).

¶ 35 *Milkovich* used the "Jones lied" example to illustrate that "expressions of 'opinion' may often imply an assertion of objective fact," and simply prefacing a statement with the words "I think" or "I believe" is not dispositive of whether the statement is one of pure opinion. *Id.* at 18-19; *see also Keohane v. Stewart*, 882 P.2d 1293, 1299 (Colo. 1994) (adopting *Milkovich*).

¶ 36 To determine whether a statement is one of pure opinion, a court engages in a two-part inquiry. "First, the court must determine if the statement is 'sufficiently factual to be susceptible of being proved true or false.'" *Lawson*, ¶ 31 (quoting *Milkovich*, 497

U.S. at 21). "Second, the court must determine 'whether reasonable people would conclude that the assertion is one of fact.'" *Id.* (quoting *Keohane*, 882 P.2d at 1299).

¶ 37 Whether the *Milkovich* "opinion versus fact" inquiry even applies in this context is not clear. BLM did not assert below, and does not assert on appeal, that its statement is not actionable because it is one of pure opinion. And the district court seems to have presumed that the statement *was* actionable because it analyzed the elements of falsity and actual malice, which would be unnecessary if the statement could not form the basis of a defamation claim.

¶ 38 Assuming that the *Milkovich* inquiry applies, we nevertheless agree with the district court that BLM's statement does not assert that Anderson in fact committed sexual assault.

¶ 39 Step one of the inquiry is satisfied: whether Anderson committed assault is certainly capable of being proved true or false. Step two of the inquiry — whether reasonable people would conclude that BLM was asserting that Anderson in fact committed the assault — is a closer call. To make the step-two determination, we must consider "(1) how the assertion is phrased; (2) the context

of the entire statement; and (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed." *Lawson*, ¶ 34 (quoting *Keohane*, 882 P.2d at 1299).

¶ 40 Determining "how the assertion is phrased" is difficult because the statement does not contain a direct assertion, whether couched as opinion or otherwise, that Anderson committed sexual assault. For this reason, BLM contends that its statement was similar to those made by school board members in *Pierce v. St. Vrain Valley School District RE-1J*, 944 P.2d 646 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999). In *Pierce*, the plaintiff was accused of sexual harassment by members of a school board. *Id.* at 648. An investigation by an independent party concluded that plaintiff had subjected female employees to harassment. *Id.* The board reviewed the investigator's report and sought the plaintiff's resignation. *Id.* Eventually, the school district and the plaintiff entered into a confidential settlement agreement in which the plaintiff agreed to announce his resignation for "personal reasons" in exchange for monetary compensation and confidentiality regarding the harassment allegations. *Id.*

¶ 41 The board members then made statements to the Denver Post that (1) "allegations of sexual harassment" were made to the board; (2) the allegations "were flying around back in May"; (3) the Board "found basis for the rumors"; and (4) the plaintiff resigned for personal reasons because of the rumors. *Id.* at 648-49, 651. The plaintiff sued the board members for defamation. *Id.* at 649. A division of this court said that "the truthfulness of the harassment allegations themselves is not at issue in this case." *Id.* at 651. Rather, the defamation claim concerned only the truth of the statements as they were made to the Post; for example, whether the board did, in fact, receive allegations and find a basis for them. *Id.*

¶ 42 Nevertheless, Anderson relies on two assertions that, he says, imply BLM's belief in his guilt: (1) BLM's assertion that it is "committed to protecting, uplifting, and believing Black women, decidedly as it relates to sexual violence"; and (2) BLM's declaration that Anderson will no longer be "welcome to share space" with it until he "has accounted for himself" by taking the steps requested by the alleged victim.

¶ 43 These assertions somewhat distinguish BLM's statement from those in *Pierce*, which did not contain commentary pertaining to

whether the board believed the alleged victims or impose consequences on the alleged perpetrator. And without additional context, we might tend to agree with Anderson that they could be read as an endorsement of the alleged victim's credibility or the truth of the sexual assault allegations.

¶ 44 But when we examine the statement as a whole, we do not read it as an assertion that Anderson committed sexual assault. The statement faithfully uses the words "alleged" or "allegedly" to describe the reporting party and her allegations, and it explicitly acknowledges that the "allegations [against Anderson] have not gone through a formal legal process." Additionally, while BLM discusses the "safety and wellbeing" of the alleged victim and the community, it does so in the context of explaining that it was publicly sharing the allegations "[a]t the request of the alleged survivor."

¶ 45 Moreover, after stating its commitment to the general principles of "protecting, uplifting, and believing Black women," BLM explains that "protect[ing] Black women must entail calling in those who have *allegedly* caused harm." (Emphasis added.) This explanation serves to reaffirm that BLM's statement is not one

opining on Anderson's guilt or the credibility of the alleged victim. Instead, it explains that to adhere to a general commitment to protect Black women, BLM was imposing a consequence on Anderson even though the allegations against him had not been proved.

¶ 46 Finally, BLM posted the statement on social media platforms. While the posts had the potential to reach a wide audience, we don't see that as indicative of whether reasonable people would conclude that BLM's statement was an assertion that Anderson committed sexual assault. Notably, BLM did not make the statements to DPS or request any assistance from DPS or any other organization to investigate or punish Anderson's alleged conduct. *See Lawson*, ¶ 35 (noting that the defendant told a police officer he felt threatened, with the expectation that the officer would investigate the threat, indicating that the defendant's statement was one of fact). And while we acknowledge that DPS did commence an investigation based on the statement, we agree with BLM that it might well have done so based on the report of the allegations alone, without BLM's limited commentary.

¶ 47 Considering the language and context of the statement, we determine that reasonable people would not conclude that BLM was asserting as a fact that Anderson committed sexual assault. Therefore, like the district court, we assess the elements of defamation only as to BLM's factual assertion that "a woman came forward to [BLM] alleging that" Anderson had committed sexual assault against her.

b. Falsity

¶ 48 Anderson next asserts that the district court erred by concluding that he did not establish a probability that he could prove BLM's statement was false by clear and convincing evidence. We disagree.

¶ 49 In its special motion to dismiss, BLM asserted that the alleged victim reported her assault allegations to Dr. Apryl Alexander, a forensic psychologist, and Ari Lipscomb, a social worker. Alexander and Lipscomb were both members of BLM. After meeting with the alleged victim on multiple occasions, Alexander and Lipscomb conveyed the allegations to BLM's leadership. To support its position, BLM submitted an affidavit from Alexander attesting that she received allegations from the alleged victim, to whom she spoke

on more than one occasion; that she had no evidence to suggest the victim was not credible; and that she accurately reported the allegation and conveyed her impression of the victim's credibility to the BLM board. BLM also submitted an affidavit from Brown, attesting that she received the report of allegations from Alexander and Lipscomb, neither of whom expressed any doubt as to the victim's credibility.

¶ 50 In his opening brief, Anderson contends that he proffered sufficient evidence to demonstrate falsity because (1) ILG could not substantiate the sexual assault allegation; (2) the district attorney declined to file charges based on the allegation; (3) the alleged victim retracted the allegation; and (4) Anderson and those close to him have consistently maintained his innocence. But while these facts, if true, bear on whether Anderson committed sexual assault, none cast doubt on whether BLM in fact received the allegations from the alleged victim. Indeed, Anderson's evidence that the alleged victim later "retracted" the allegation tends to corroborate BLM's assertion that it initially received an allegation.

¶ 51 In his reply brief, Anderson argues that BLM "manufactured" the allegations and that "[a]t best one individual *may* have been

convinced to serve as a stand-in for the BLM victim *post facto*, provided she spoke through [Brooks-Fleming] and never provided sworn testimony to law enforcement, investigators, news media, etc." Even if we were to address this argument raised for the first time in the reply brief, *but see IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 718 (Colo. App. 2008) (appellate court does not consider arguments raised for the first time in a reply brief), Anderson does not direct us to any evidence in the record supporting those assertions.[7]

¶ 52 Accordingly, we agree with the district court that Anderson failed to establish a likelihood that he can prove BLM's statement was false.

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[7] Anderson does not provide any record citations for his contentions that the allegations were "manufactured" or that BLM convinced a woman to pose as the victim after the fact. Rather, under the heading "Preservation of Issues," Anderson cites to blocks of pages of his response and amended response to the motions to dismiss, as well the transcript of the hearing before the district court. This is not an appropriate way to present an argument to the appellate court because it shifts the task of locating and synthesizing relevant facts and arguments from the appellant to us. *See Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006). Moreover, while the arguments made in Anderson's responses and at the hearing are relevant to whether Anderson preserved the contentions for review, they are not evidence that can support his claim that BLM's statement was false.

c. Other Contentions Regarding BLM's Statement

¶ 53 Because Anderson can't prove falsity, we need not address his contentions relating to actual malice. And because Anderson's claims against Brown are based on the same statement, we need not address his argument that Brown is not immune from liability under the Volunteer Service Act. *See* § 13-21-116(2)(b)(I), C.R.S. 2023.

2. Brooks-Fleming

¶ 54 Anderson contends that the district court erred by concluding that he could not establish a probability of showing by clear and convincing evidence that Brooks-Fleming's statements were false and made with actual malice.[8] We agree in part.

a. Privilege

¶ 55 As a preliminary matter, we address Brooks-Fleming's assertion that Anderson cannot demonstrate a probability that he will prevail because one or both of her statements are absolutely privileged.

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[8] Brooks-Fleming concedes the statements were defamatory per se even though she did not directly name Anderson therein.

¶ 56 A witness who publishes defamatory material during testimony before the legislature is absolutely immune from civil liability for defamation based on that material, so long as it has some relation to the legislative proceeding. Restatement (Second) of Torts § 590A (Am. L. Inst. 1977); *see Lininger v. Knight*, 123 Colo. 213, 221, 226 P.2d 809, 813 (1951) (suggesting Colorado's recognition that statements made during legislative proceedings are absolutely privileged); *see also Jennings v. Cronin,* 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978) (recognizing legislative privilege); *Webster v. Sun Co.*, 731 F.2d 1, 4-5 (D.C. Cir. 1984) (recognizing legislative privilege and collecting cases).

¶ 57 Brooks-Fleming gave her testimony during a hearing in support of Senate Bill 21-088, the Child Sexual Abuse Accountability Act. Hearings on S.B. 21-088 before the H. Judiciary Comm., 73d Gen. Assemb., 1st Reg. Sess. (May 25, 2021). The then-pending bill would allow a child victim of sexual assault that occurred while the victim participated in a youth program to bring a civil claim against the program's organizers if they knew or should have known of a risk of sexual misconduct against minors. S.B. 21-088, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

Brooks-Fleming testified that the assault victims were current or former DPS students who made statements indicating that their prior reports had not resulted in action from any institution. She urged legislators to pass the bill "so that we the people can hold enabling institutions accountable, since it seems like no one else will." *Infra* Appendix 1.

¶ 58 We conclude that Brooks-Fleming's legislative testimony bore sufficient relation to the subject of the legislative proceeding to be entitled to absolute privilege. Thus, we affirm the district court's dismissal of Anderson's defamation claim as to this statement.

¶ 59 However, we reject Brooks-Fleming's contention that her follow-up statement should also be privileged. At oral argument, Brooks-Fleming's counsel asserted that the follow-up statement was simply a link to Brooks-Fleming's legislative testimony. But as far as we can discern, that isn't supported by the record, which does not contain the follow-up statement.[9] The district court found, and Brooks-Fleming does not contest, that Brooks-Fleming made two

[9] The record contains a YouTube link that purports to be the follow-up statement. However, when clicked, the link leads to a YouTube page with the message "Video unavailable. This video is private."

separate statements, both of which were defamatory per se. Further, the court quoted from Brooks-Fleming's follow-up statement, and the quotation does not match any of her legislative testimony, though it apparently references her testimony and contains the same general allegations. *See infra* Appendix 2. Brooks-Fleming doesn't deny making the follow-up statement or argue that the district court misquoted her; therefore, we accept the court's findings as to the content of her follow-up statement.

¶ 60 Moreover, even if Brooks-Fleming merely linked her follow-up statement to her legislative testimony, it would still not be entitled to absolute privilege because it is a republication of her defamatory statements to the general public.

¶ 61 In *Hutchinson v. Proxmire*, the Supreme Court analyzed the effect of republication on a legislator's legislative privilege under the Speech or Debate Clause of the United States Constitution. 443 U.S. 111, 123-33 (1979). There, the legislator repeated the essence of a defamatory speech he made to the Senate in a press release and in a newsletter distributed to members of the public. *Id.* at 115-17. After noting that the purpose of the Speech or Debate Clause was to "protect the integrity of the legislative process by

insuring the independence of individual legislators," *id.* at 127 (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)), the Court held that the press release and newsletter were not protected by the Speech or Debate Clause because they were "not a part of the legislative function or the deliberations that make up the legislative process." *Id.* at 133. We see no reason why those same principles shouldn't apply here. *See Lunderstadt v. Colafella*, 885 F.2d 66, 75-77 (3d Cir. 1989) (applying principles in *Hutchinson* to legislative witness testimony); *cf. GetFugu, Inc. v. Patton Boggs LLP*, 162 Cal. Rptr. 3d 831, 839-40 (Ct. App. 2013) (holding that litigation privilege does not protect republication to the general public through the press).

¶ 62 Accordingly, we conclude that Brooks-Fleming's follow-up statement isn't privileged.

b. Actual Malice

¶ 63 We next address Anderson's contention that the district court erred by concluding that he could not prove that the follow-up statement was false and made with actual malice. We agree with Anderson.

¶ 64 The district court did not rule directly on whether Anderson was likely to prove that Brooks-Fleming's statement was false. As to actual malice, the district court relied almost entirely on the timing of the ILG report in relation to when Brooks-Fleming published her statement. It reasoned that, although the report found her allegations unsubstantiated, Anderson could not rely on the report to show actual malice because it wasn't released until after Brooks-Fleming made her statements.

¶ 65 However, the relevance of the ILG report is not limited to whether Brooks-Fleming would have been able to view the report's findings before making her statement. The court's conclusion overlooks other evidence contained within the report that tends to support falsity and actual malice. Specifically, the report revealed inconsistencies in Brooks-Fleming's own account of the events underlying her allegations that Anderson committed sexual assault or other sexual misconduct against sixty-two DPS students.

¶ 66 ILG interviewed Brooks-Fleming one day after she gave her testimony and follow-up statement. According to the ILG report, Brooks-Fleming claimed that the first two sexual assault victims, both of whom had injuries, came to her in August and September of

2020. Yet, in October 2020, Brooks-Fleming praised Anderson on social media as a "brave and worthy role model." And while Brooks-Fleming claimed that by the end of October 2020, she received sixty-two reports of sexual assault and sexual misconduct by Anderson, she invited Anderson to speak at a political event for DPS in November 2020. Then, five days after Brooks-Fleming's testimony and follow-up statement, she posted the following to social media: "I NEVER SAID HUS [sic] NAME I NEVER SAID HIS NAME I NEVER SAID HIS NAME — TOLD YALL I WAS ON HIS SIDE [three skull emojis]."[10]

¶ 67 The report also detailed how Brooks-Fleming then changed "a number of details" in her chronology in a written statement provided after her initial interview. According to the revised chronology, Brooks-Fleming "received most of the allegations after she publicly praised [Anderson] and asked him to speak at an event to benefit homeless youth." The ILG report noted that the discrepancies in the timeline were not minor and indicated a

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[10] The ILG report says that this social media post was made on May 30, 2020, "five days after" Brooks-Fleming's testimony. Because Brooks-Fleming did not testify until May 25, 2021, we assume the reference to "2020" was a mistake.

"serious disassociation between [Brooks-Fleming's] actions and her allegations."

¶ 68 In addition to the ILG report, Anderson submitted an affidavit attesting (1) "at no point in my entire life have I ever sexually assaulted anyone or engaged in conduct that could reasonably be interpreted as sexual assault"; (2) "there is no truth whatsoever to [Brooks-Fleming's] claims regarding me sexually assaulting or sexually abusing students"; and (3) "I received messages, speaking requests and touching tributes from [Brooks-Fleming] during the time that she alleges she was receiving complaints of sexual abuse against me."

¶ 69 Brooks-Fleming submitted no affidavits or other evidence supporting her position. She directs us to a social media post in the record that might tend to corroborate that one victim reached out to her for assistance. She also argues that she did not allege that Anderson sexually assaulted all sixty-two victims but that some of the victims were subjected only to unwanted touching. She implies that the ILG report corroborates her allegations because it found that Anderson "made unwelcome sexual comments and advances, and/or engaged in unwelcome sexual contact." But this

finding was in reference to Anderson's behavior toward members of the Never-Again Colorado Board of Directors, not toward DPS students.

¶ 70 In any event, we cannot weigh the evidence or determine credibility at this stage. And on review of the parties' submissions, we cannot conclude, as a matter of law, that a reasonable juror presented with such evidence would not be able to find by clear and convincing evidence that (1) Brooks-Fleming's statement was false and (2) she knew the statement was false or in fact entertained serious doubts as to its truth when she made it. *See L.S.S.*, ¶ 48 (although the plaintiff's showing wasn't "particularly compelling," the court could not conclude as a matter of law that a reasonable juror would not be able to find that the defendant knew at least one of her statements was false).[11] We therefore conclude that

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[11] Brooks-Fleming asserts that Anderson failed to "produce competent, admissible evidence" to support his claims. However, while she challenges the sufficiency of the evidence Anderson proffered to demonstrate falsity and actual malice, she does not contend the district court should have disregarded any particular piece of evidence because it was not competent and admissible. Accordingly, we express no opinion as to (1) whether a party bringing or defending against an anti-SLAPP motion must support their position with "competent, admissible evidence"; or (2) whether the evidence in this case met that standard.

Anderson proffered sufficient evidence of falsity and actual malice to survive Brooks-Fleming's anti-SLAPP motion as to her follow-up statement.

c. Attorney Fees

¶ 71 Brooks-Fleming requests her attorney fees and costs incurred on appeal as a prevailing defendant under section 13-20-1101(4)(a).[12] That section provides as follows: "[I]n any action subject to [the procedures established in] this section, a prevailing defendant on a special motion to dismiss is entitled to recover the defendant's attorney fees and costs." § 13-20-1101(4)(a).

¶ 72 Because we have affirmed the district court's order granting Brooks-Fleming's special motion to dismiss as to her legislative testimony but reversed the order as to her follow-up statement, the district court, in its discretion, may consider Brooks-Fleming a partially prevailing defendant. *Rosenblum v. Budd*, 2023 COA 72, ¶ 62. "Whether a party prevailed on an anti-SLAPP motion — and to what extent the partial success warrants an apportionment of

[12] To the extent Brooks-Fleming requests her fees and costs incurred during the proceedings below, she doesn't identify where that argument is preserved; therefore, we decline to address it.

fees — is a determination that lies within the broad discretion of a district court." *Id.* at ¶ 63; *see also Gonzales v. Windlan*, 2014 COA 176, ¶ 55 (holding that where "multiple issues were contested and each party arguably prevailed in part," the trial court is "in the best position to determine 'the significance of each party's successes in the context of the overall litigation' for purposes of awarding costs") (citation omitted).

¶ 73 We therefore remand this matter to the district court under C.A.R. 39.1 to determine whether Brooks-Fleming is a partially prevailing party and, if she is, her reasonable appellate fees and costs. *Rosenblum*, ¶ 64.

IV. Senthilnathan's Statements

A. Additional Facts

¶ 74 A month after ILG issued its report, Senthilnathan published a video on social media accompanied by a written statement. *See infra* Appendix 3. Her written statement included the following remarks:

- "The 60+ allegations made on [Anderson] is false. But there are more victims where Tay Anderson targets young white

political female organizers in this community. There are some women of color involved too."

- "He tries to flatter women with his 'Youngest Black Elected Official' position, where he has sexually assaulted many women."
- "These women cannot come forward because their image and their job as a political organizer will be put on the line. They cannot afford this, these are workers living paycheck to paycheck."
- "Women who have been sexually assaulted by [Anderson] are silenced because he uses his followers to an advantage."
- "How dare you exploit your identity like that Auontai Anderson when you really did commit the crime?"
- "I am calling out Tay Anderson on this because its time someone speaks up on the truth."
- "I don't have a reason to lie to this community or this family that has raised me and mentored me well."

¶ 75 Senthilnathan's video contained the following additional remarks:

- "I want to initially state that the investigation that surfaced, it's absolutely correct. The sixty allegations and more that was made is just false. It is completely false. And so I really hate the way that this investigation was conducted because even though those sixty allegations and more that was made, like, is false, there are real victims out there who have been sexually harassed by [Anderson]. And, I hate to say it, but these women cannot come forward, they cannot file a police report because their job is on the line."
- "I don't even want to make this video, I don't even want to get involved, but there's so many victims that have reached out to me this past year . . . ."
- "Like I said, there are more victims and that is the truth. That is the absolute truth. [Anderson] has acted inappropriately with other women."

B. Analysis

¶ 76 Senthilnathan contends that the district court erred by concluding that Anderson established a probability that he could prove actual malice and damages.

1. Actual Malice

¶ 77 As with Brooks-Fleming, the district court did not directly address whether Anderson demonstrated a probability that he could prove falsity as to Senthilnathan's statement; instead, it went straight to actual malice. Because Senthilnathan doesn't assert that this was error, we address only actual malice and damages.

¶ 78 The district court relied almost entirely on the timing of the ILG report to determine whether Anderson could prove actual malice. The court concluded that Anderson could establish malice because Senthilnathan accused Anderson of sexual assault after acknowledging that the ILG report did not substantiate any of the sexual assault claims previously made against him.

¶ 79 We agree with Senthilnathan that the district court's reasoning was flawed. Senthilnathan's statement does not repeat the allegations that ILG found to be unsubstantiated.[13] Instead, she alleges that Anderson victimized other women whose assaults were outside the scope of the ILG investigation.

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[13] We reiterate that, although ILG could not substantiate the allegations, the report explicitly expressed no opinion about the allegations' truthfulness.

¶ 80 Nevertheless, the district court did not err by concluding that Anderson established a reasonable probability that he would be able to prove actual malice.

¶ 81 In his affidavit, Anderson alleged that (1) he never committed sexual assault; and (2) he, through counsel, requested that Senthilnathan remove the defamatory posts, but she declined to do so. *See Golden Bear Distrib. Sys. of Tex., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (evidence of refusal by publisher to retract a statement after it has been shown to be both false and defamatory may be relevant to the issue of actual malice in certain circumstances), *abrogation on other grounds recognized in Hiller v. Mfrs. Prod. Rsch. Grp. of N. Am., Inc.*, 59 F.3d 1514 (5th Cir. 1995); *Abdelsayed v. Narumanchi*, 668 A.2d 378, 381 (Conn. App. Ct. 1995) (a refusal to retract an accusation of plagiarism after an investigation concluded plagiarism was not committed might be relevant to showing recklessness at the time of publication).

¶ 82 We also note that Senthilnathan's statement reflects hostility toward Anderson for reasons seemingly unrelated to the assault allegations. She describes him as toxic, egoistic, arrogant, manipulative, obsessive, and narcissistic. Her statement expresses

anger or frustration that, in her view, Anderson "put down many young people for his rise" and "chose to endorse a white man over DPS candidate Jorge Hernandez Arjona because he didn't want his 'Youngest Black Elected Official' position being taken away from him." *See L.S.S.*, ¶ 40 ("[E]vidence of the defendant's 'anger and hostility toward the plaintiff' may serve as circumstantial evidence of actual malice 'to the extent that it reflects on the subjective attitude of the publisher.'" (quoting *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 722 (Ct. App. 2021)).

¶ 83 While Senthilnathan's video statement vaguely references victims that "reached out to her," she provided no affidavits, even from herself, or any other evidence supporting her position. Thus, unlike BLM and Brown, there isn't any evidence in the record suggesting that she actually received reports of sexual assault or that the assaults in fact took place. Although the burden rests with Anderson to show a reasonable likelihood of success, we still must assess "whether the allegations *and defenses* are such that it is reasonably likely that a jury would find for the plaintiff." *Salazar*, ¶ 21 (emphasis added). And we evaluate the evidence put forward

by a defendant to determine if it defeats the plaintiff's claim as a matter of law. *L.S.S.*, ¶ 23.

¶ 84 As with the plaintiff's evidence in *L.S.S.*, while Anderson's showing isn't "particularly compelling," we cannot conclude, as a matter of law, "that a reasonable juror presented with [the] evidence would not be able to find by clear and convincing evidence" that Senthilnathan knew her statement was false or acted with reckless disregard as to its truth or falsity when she made it. *Id.* at ¶ 48.

2. Actual Damages

¶ 85 We also reject Senthilnathan's contention that the district court erred by concluding that Anderson established a reasonable likelihood that he could prove actual damages.

¶ 86 Actual damages may be established by proving "harm to reputation, personal humiliation, mental anguish, or physical suffering." *Keohane*, 882 P.2d at 1304.

¶ 87 As evidence of actual damages, Anderson submitted an affidavit attesting that (1) Senthilnathan's statements raising new allegations of sexual assault after the ILG report "cleared" him caused emotional and mental anguish and (2) he received "immense

criticism" as a result of Senthilnathan's allegations that he attempted to bully or silence victims.

¶ 88 Senthilnathan contends that Anderson's affidavit isn't sufficient and that he failed to demonstrate a reasonable probability of success because he did not provide evidence to corroborate his account of his mental anguish or quantify any damage to his reputation. But in *Keohane*, our supreme court held that the plaintiff's testimony regarding his emotional distress was, alone, sufficient for the jury to conclude that he had suffered actual damages. *Id.* at 1304-05. Thus, while corroborating evidence would certainly make Anderson's claim stronger, Anderson's affidavit regarding his emotional state is sufficient for his claim to survive an anti-SLAPP motion.

V. Nondefamation Claims

¶ 89 The district court concluded that Anderson's nondefamation claims were all premised on the same statements that formed the basis of the defamation claims. Thus, if the defamation claims failed, the nondefamation claims would also fail. Because the district court dismissed the defamation claims as to BLM, Brown, and Brooks-Fleming, it dismissed the nondefamation claims as well.

Additionally, it dismissed the civil conspiracy and aiding and abetting claims against Senthilnathan because it found that Senthilnathan did not act in concert with BLM or Brooks-Fleming. Finally, because the court denied Senthilnathan's special motion to dismiss, it ruled that all remaining claims against Senthilnathan could proceed.

¶ 90 The parties don't contest the district court's "linking" the fate of the nondefamation claims to the defamation claims. Because we determine that the district court erred by dismissing Anderson's defamation claim based on Brooks-Fleming's follow-up statement, it also erred by dismissing the nondefamation claims arising from that statement.[14] Likewise, because the district court did not err by dismissing the defamation claim against Brown and BLM, it did not err by dismissing the nondefamation claims against those parties. Also, Anderson doesn't contest the district court's dismissal of the civil conspiracy and aiding and abetting claims as to Senthilnathan.

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[14] We express no opinion as to the validity of the nondefamation claims or whether they are subject to dismissal on some other basis.

VI. Disposition

¶ 91 For the reasons stated, we

- affirm the portions of the district court's order granting BLM and Brown's special motion to dismiss as to all claims against them;
- affirm the portions of the order denying Senthilnathan's special motion to dismiss as to the defamation claims and as to the claims for extreme and outrageous conduct and intentional infliction of emotional distress, and tortious interference with a business relationship;
- affirm the portion of the order granting Brooks-Fleming's special motion to dismiss as to all tort claims based on her legislative testimony; and
- reverse the portion of the order granting Brooks-Fleming's special motion to dismiss all tort claims based on her follow-up statement.

¶ 92 The portions of the order that are not challenged on appeal remain undisturbed.

JUDGE J. JONES and JUDGE BERNARD concur.

APPENDIX 1

Brooks-Flemings's statement to the legislature[15]:

> My name is Mary-Katherine Brooks Fleming. I'm a small business owner, a mother to 4 children, 3 of whom attend DPS and I'm a survivor of the most violent rape imaginable. I don't have to tell you that rape's bad right? And that child rape is worse? I feel that needs to be said because no one ever seems to hear, care or do anything. And I'm hoping that what I'm here to tell you today will compel you to do something because there's a sexual predator currently targeting DPS students. 62 in total have reported directly to me. In the summer of 2020, Wall of Moms formed, and we became a point of contact for people in the community who had nowhere else to go for help.
>
> In late August, I received a request from a DPS student for physical protection from a specific adult. Others came forward, asking for similar protection from the same individual, one who is in a position of trust to them. By autumn the asks had escalated; individuals were now coming directly to my home, asking for medical attention. One was as young as 14 and he needed stiches. All in all, 61 high school students and 1 recent graduate would turn to me for help. 62 victims, as young as 14, 61 were undocumented or DREAMers, all were so

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[15] We note that the record includes website links to Brooks-Fleming's testimony but no transcript. It is true that the General Assembly makes audio recordings of its hearings available to the public. However, for the sake of consistency with the record, we rely on the district court's recitation of Brooks-Fleming's statement, the accuracy of which the parties do not dispute.

afraid of this one man, they were all afraid of this same man to be perfectly clear, that they could not whisper his name. All of them listed offenses from unwanted touching, which is a third-degree felony in this state, to violent acts of rape that mirror my own. None wanted to report to the police, most made comments like, 'no one ever stops him' 'none of you ever do anything' indicating this was not the first time they had in fact asked directly for help and later I would learn that there are multiple NDAs were in place with white survivors of this person, which should be a clue that lots of mandatory reporters aren't.

Those who came to my home didn't have health insurance, couldn't afford emergency rooms, and even if they could they wanted to avoid mandatory reporters for fear that such an interaction could jeopardize their family. It is horrifying to realize that someone knew who to prey on, knew that these children, that their silence was guaranteed. And I want all y'all to know that mine never is. These are children. Rape is bad. Child rape is worse. Child rape in DPS should be the thing that we can all agree on, should never happen, and that one is way too many.

These children, their brains are still developing. Their fear is tangible. It is real. We have to stop putting the onus on children to feel and act like adults. They should have the time to decide when and if they want to come forward and how they want to handle this situation. We are failing our kids. We cannot overlook this injustice. Since our institutions don't protect us, and the police cannot assist us, the absolute least we can do

is ensure that public institutions are held accountable for who they hire and that should start and end with our schools. As a parent, as a voter, as a decent human being, I beg for your vote of yes on SB88, so that we the people can hold enabling institutions accountable, since it seems like no one else will.

Here's another statistic for you, there is only a 3% chance that this person will ever see justice because that's how rape works and that's how hard it is to prosecute. Yeah, the ramifications for schools are big, they should be. Instead, of silencing survivors with NDAs, we've got to stop rapists.

APPENDIX 2

Brooks-Fleming's statement on social media[16]:

> There we go. I said what I said. Rape is terrible. If you have been hesitating to come forward because of your own immigration status or that of certain family members, I want you to know that we have attorneys on hand, that are ready to take care of your family whether or not you come forward. We don't need you to talk to the police, we're never going to ask you to talk to reporters. We want to make sure if you have what you need in order to be safe. So, if you or someone you love, is a victim of the person and you know exactly who I'm talking about, please reach out to me directly so I can hook you up with some free immigration attorney assistance. This post is public, feel free to share . . . Thanks. 62 victims and counting. One is too many.

[16] The record includes a website link to Brooks-Fleming's social media statement. We rely on the district court's recitation of Brooks-Fleming's statement, the accuracy of which the parties do not dispute.

APPENDIX 3

Senthilnathan's written statement on social media[17]:

> This video was extremely hard to make. The 60+ allegations made on Tay is false. But there are more victims where Tay Anderson targets young white political female organizers in this community. There are some women of color involved too.
>
> Running for office is not a popularity contest. Activism is not a competition.
>
> I understand that young people want to scale in someway, and that is absolutely fine, but there is also a duty we have to serve the community, especially when you are an elected official. You have to be a humble servant. I honestly don't know how Tay Anderson has gotten away with being elected and not communicate [sic] back with his constituents.
>
> Tay is toxic, egoistic, and arrogant. He tries to flatter women with his "Youngest Black Elected Official" position, where he has sexually assaulted many women. These women cannot come forward because their image and their job as a political organizer will be put on the line. They cannot afford this, these are workers living paycheck to paycheck.
>
> He has put down many young people for his rise. He has divided many young BIPOC. He chose to endorse a white man over DPS

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[17] The record included Senthilnathan's video without the written statement. We rely on the district court's recitation of Senthilnathan's written statement, the accuracy of which the parties do not dispute.

candidate Jorge Hernandez Arjona because he didn't want his "Youngest Black Elected Official" position being taken away from him.

I want to make you aware that Tay is manipulative, and acts differently with everyone in the community. I am viewed as a threat in his eyes because I'm just another youth trying to make change in the world. In fact, I'm garbage to Tay Anderson. Many white adults that comment in support of Tay Anderson are being used by him. Tay only talks to organizers in the community if they are "useful" to him. When was the last time he expressed his gratitude for your blood, sweat, and tears you spent helping him get elected?

Tay has become the ultimate politician. He is consumed by his image, and his obsessive, narcissistic behavior. Tay does not have an interest in serving the community but himself, his own agenda in getting elected.

You can even ask about the time where he had been planning for Representative Leslie Herod to run against Diana Degette so that he could take over her seat. Tay can fool the thousands of White community members because it looks good on them to say that "they helped a Black man get elected." But you won't fool a brown woman like me. Can you try to play race card [sic] on me Tay?

Tay posts nice stories on social media all the time to "suit" his fellow followers, when in reality that is further from the truth. Women who have been sexually assaulted by Tay are silenced because he uses his followers to an advantage.

How dare you exploit your identity like that Auontai Anderson when you really did commit the crime? There are thousands of POC living in this country with their life on the line.

You aren't representing young people on this board. We are thoroughly ashamed of you because that is not how our generation works. Stop whining like a 3 year old. I am a 19 year old South Asian woman and I have my shit together. I ran for office here in Douglas, during the rise Asian hate here. And I ran in a community with full of [sic] Trump Supporters. I've had my fair share of racism. As a 23 year old Black man who is elected, you need to get your shit together.

I am even helpful enough to come back in this moment to show positive reinforcement to Tay Anderson, but I'm sure he will get on high horse and leave. What Tay Anderson needs is a college education. He is thoroughly uneducated on charter schools. I ask the community to evaluate his voting record. Tay Anderson also takes the credit from the work of other directors.

Tay Anderson also likes his little bubble. I am asking for Black people in this community to not be blindsided by what Tay reports only to you. Are you with him when he is around other young female political organizers within this community? Are you seeing his actions?

One last thought. Earlier Jeff Fard released a live on Director Cobian and Jennifer Bacon. These two women see the truth on Tay just as much as I do. I have self-respect as a woman. And other women do too. We don't work on campaigns because of future whatever is

running. When a man commits a crime, has made some mistakes, sexually assaulting a woman — women only come back when they see that they are a changed man. Women believe in giving a second chance and bringing out the positivity. I took offensive to what Jeff Fard had to say because it's not fair to the women — the decisions that we choose to make "when men suddenly decide to act up". We throw out support to see you win as a changed man.

I know based on my post and video, many of you may feel conflicted. Plenty of organizers that worked on my campaign, have also worked on Tay Anderson's. And it must be difficult to hear this truth on Tay, especially when you have been fooled by this entire time.

No matter how much support I lose, I am calling out Tay Anderson on this because its time someone speaks up on the truth. I don't have a reason to lie to this community or this family that has raised me and mentored me well.

If you're having a hard time, forget about me. Think about how Tay Anderson, a young black man, made it a pure competition and pushed down a young Hispanic man Jorge Hernandez who had a dream to represent his Hispanic community. Think about how Tay chose to endorse a White man in this election so that he could save his position in the end. More than happy to answer your questions or concerns you may have. Peace and truth to this community only #tayanderson."