

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

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,

Defendants.

Case No. 16-cv-00740-RC

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**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTIONS TO DISMISS**

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Plaintiffs Simon Bronner, Michael Rockland, Michael L. Barton, and Charles D. Kupfer (collectively, “Plaintiffs”), by and through their attorneys, hereby respond to the Motion to Dismiss the Second Amended Complaint (“SAC”) filed by Defendants Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, John Stephens, and the American Studies Association (“ASA”), collectively, the Original Defendants.<sup>1</sup>

Defendants’ latest attack on the operative Complaint in this case is the fourth time they have approached this Court with the same defective arguments. Indeed, the arguments are even more clearly wrong now than they were the last three times they were offered, because they

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<sup>1</sup> Although John Stephens is not one of the defendants named in the original lawsuit, he is an employee of the ASA, one of the original defendants. The label “original defendant” is useful for purposes of differentiation.

contradict not only binding law and the pleading's allegations, but this Court's decisions in this very case.

Defendants' attack on the Second Amended Complaint completely ignores:

- Multiple clear holdings issued in binding decisions by the courts of the governing jurisdiction;
- This Court's earlier decisions in this very case;
- Defendants' own previous briefing, in which they made arguments flatly inconsistent with what they are saying now; and
- The testimony of their own witnesses regarding the meaning of by-law provisions, as clarified by the ASA's past practices, which Plaintiffs have sued to enforce.

Instead of reconciling their arguments to these preclusive statements of law and fact, Defendants invoke cases – for example, on the distinction between a direct and a derivative claim – from foreign jurisdictions when the rules in those decisions, and sometimes the decisions themselves, have been explicitly rejected as wrong or irrelevant by the governing authorities. Flailing at the charge that they have improperly spent ASA resources lobbying in support of their political goals, Defendants invoke IRS regulations that, without any uncertainty, do not apply to the ASA or to this case, but instead regulate – and permit lobbying by – an entirely different type of non-profit (a section 501*h*) which the ASA has never been.

More fundamentally, however, Defendants' attacks ignore the central wrongs at issue in this case – a series of abuses that cannot possibly be permissible. Based on Defendants' own emails and the ASA's financial records and federal filings, the Second Amended Complaint details how, among other things, the Individual Defendants in this case:

- Invaded the ASA's modest endowment, and took the money – to the tune of hundreds of thousands of dollars – to fund their private political crusade, impermissibly lobbying against laws that had no impact on the ASA itself, but with which the individual Defendants disagreed;

- Lied to, and concealed facts from, the ASA's membership about why the individual Defendants were running for ASA office and what they would do if elected;
- Clearly expressed indifference as whether their actions harmed ASA, so long as those actions advanced Defendants' favored political cause;
- Manipulated the ASA's voter rolls to exclude people who would vote against their favored candidates.

At bottom, the discovery already obtained in this case makes clear that the individual Defendants have fraudulently executed a hostile takeover of an academic society. They then took that society's money, its reputation, its office, its paid staff, its mailing list and all of its other resources and deployed them to advance the Defendants' private goal of changing the law in another country, and to change or oppose any laws in the United States that Defendants viewed as impediments to their international campaign.

Common sense is consistent with the law's teaching that these actions, carried out not only without full disclosure but after the explicit decision *not* to disclose Defendants' purpose to the membership whose permission was needed, are a breach of numerous legal and equitable duties.

**I. PLAINTIFFS HAVE STANDING TO BRING THESE DIRECT CLAIMS.**

(Original Defs.' Brief at subsection A.1., pp. 3-4, and subsection A.3., pp. 7-9.)

Plaintiffs have standing to bring the claims alleged in the SAC, each of which is properly alleged as a direct claim. Defendants argue, however, that all but one of the claims alleged in the SAC should be dismissed because they (wrongly) assert that these are derivative claims, and the Court previously dismissed claims plead as derivative in the FAC. (Original Defs.' Brief at 3-4, 7-9.)

We have been here before.<sup>2</sup> Defendants are still wrong. Cases from the District of Columbia, directly on point, clearly hold that members of nonprofit corporations have standing to bring exactly these types of claims individually. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 728-30 (D.C. 2011); *Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016). In both *Daley* and *Jackson*, the Court rejected defense arguments that the body of law governing claims ***brought by shareholders in for-profit corporations*** should govern whether a member of a non-profit has standing to bring claims against the non-profit or its officers and directors. There is nothing surprising about these holdings; indeed, the Third Circuit has held the same. *U.S. Gypsum Co. v. Quigley Co. (In re G-I Holdings, Inc.)*, 755 F.3d 195, 208 (3d Cir. 2014) (“the distinction applies to claims brought by shareholders in a corporation. . . . [plaintiffs] were not shareholders or investors in the Center, which, as a non-profit, non-stock corporation, has no shareholders”). Further discussion of *Daley*, *Jackson*, *U.S. Gypsum*, and the inapplicability of the “direct/derivative inquiry” is presented in section I.A., *infra*.

Defendants also fail to state what rule of law they believe does apply, and why. Defendants only tell us that “traditionally” courts use of any of three different tests to determine whether an action is derivative, followed by two string cites of cases almost entirely from other jurisdictions, and all involving for-profit entities. Defendants cite and quote cases from New York to Alabama and beyond, although the legal principles they cite them for “‘depend heavily on state law,’ specifically, the state of incorporation,” a point made in *Keller v. Estate of McRedmond*, the very first case in Defendants’ string cite. *Keller*, 495 S.W.3d 852, 869-70

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<sup>2</sup> This argument was first raised by Defendants with respect to the waste claim plead in the FAC in Defendants’ Motion for Judgment on the Pleadings. (Dkt. 35.) Plaintiffs hereby incorporate by reference their Opposition and [Proposed] Surreply to Defendants’ Motion for Judgment on the Pleadings (Dkt. 36 & Dkt. 40, Exh. 1).

(Tenn. 2016) (*quoting* 10 A.L.R.6th 293 at § 3 (2006). Defendants offer no analysis of the holdings in these cases; no application of law to facts. The type of entity (for profit or nonprofit, stock or nonstock, limited liability corporation, partnership), the type of claim (breach of contract, *ultra vires*, breach of fiduciary duty, waste), the pertinent facts – Defendants ignore them all. As explained in section I.B., *infra*, even if the cases cited in Defendants’ string cite did apply in this case, and *Daley* and *Jackson* were never written, Plaintiffs would still have standing to bring these claims individually.

A. **D.C.’s Highest Court Has Twice Held that the Inquiry Applied to Distinguish Between Direct and Derivative Claims Simply Does Not Apply in Cases Involving Non-Profit Entities.**

Plaintiffs have briefed this issue, and particularly the holdings in *Daley* and *Jackson*, extensively. (Dkt. 36, Dkt. 40-1.) Defendants here, as before, fail to even acknowledge the holdings in *Daley* and *Jackson*, much less attempt to distinguish them.<sup>3</sup>

1. ***Daley v. Alpha Kappa Alpha***

*Daley* involves claims alleging irregularities in fiscal management against Alpha Kappa Alpha sorority (“AKA”), a non-profit incorporated in the District of Columbia, and against certain past and present members of AKA’s Directorate. The claims arose from large payments

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<sup>3</sup> Defendants do briefly mention both cases, while refusing to address the critical holdings of both *Daley* and *Jackson*. *Daley* is briefly referenced in other sections of the brief. (Original Defs.’ Brief at 10, 16.) Defendants’ brief reference to *Jackson* is in this very section. Within a long string cite, defendants cite *Jackson* with the following quote: “In a derivative action, the *shareholder* seeks to assert, on behalf of the corporation, a claim belonging not to him but to the corporation.” (Original Defs.’ Brief at 7-8, emphasis added.) No one disagrees with that quote about claims brought by *shareholders*, which is actually a direct quote from *Flocco v. State Farm Mutual Auto. Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000), which indisputably involved a claim that actually was brought derivatively, and on behalf of a for-profit corporation. However, that quote in *Jackson* is immediately followed by the paragraph quoted above, which holds that the trial court correctly held that the *Jackson* plaintiffs had standing to bring their claims, *directly*, even though the claims “‘sp[oke] largely of injuries to the Church and its assets and property.’” 146 A.3d at 415.

made by AKA to the sorority president beginning in 2007, including a lump sum payment of \$250,000 and a monthly payment of \$4,000.<sup>4</sup> 26 A.3d at 726-27. The *Daley* plaintiffs, dues-paying members of AKA, brought ten claims against AKA and the individual defendants, including claims for breach of fiduciary duties, breach of contract, *ultra vires*, and corporate waste, *inter alia*.<sup>5</sup> The *Daley* plaintiffs alleged “that judicial intervention is necessary to restore those funds” and to “enjoin the appellees from taking any further action that would harm AKA[.]” *Id.* There is no question – the claims brought by the *Daley* plaintiffs arose from expenditures by the non-profit sorority, and the relief sought was restoration of those funds to AKA and injunction against future such expenditures.

The trial court dismissed the *Daley* plaintiffs’ claims on the grounds that they were brought “in the members’ own names rather than as a derivative suit.” *Id.* at 729. The Court of Appeals reversed, criticizing the lower court for adopting “too expansive a view of the requirement of derivative suits.” *Id.* The Court of Appeals held:

On its face, it would seem almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization. The trial court rejected this argument on the ground that the suit was brought in the members’ own names rather than as a derivative suit. *See, e.g., Estate of Raleigh v. Mitchell*, 947 A.2d 464, 469 (D.C. 2008). We think this is too expansive a view of the requirement of derivative suits. To begin with, the total equation of a stockholder in a for-profit corporation complaining of financial losses with a member of a nonprofit corporation in an on-going dues-paying basis aimed at social and charitable purposes and the accompanying emotional connotations is an uneasy fit.

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<sup>4</sup> No previous president of AKA had received a salary.

<sup>5</sup> One or more of the *Daley* plaintiffs also sought restoration of membership privileges, which they alleged were suspended in retaliation *after* the original lawsuit was filed.

*Id.* at 729.

*Daley* properly recognizes that this is a question of *standing*. And so the *Daley* court begins its analysis with the basic principles of standing, set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). From there, the *Daley* court holds that “it seems almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.” 26 A.3d at 729. This is not a particularly surprising holding, as there is no reason why cases addressing the ability of a for-profit corporation’s shareholders to bring claims on behalf of the corporation *should* restrict, or in any way govern, the question of whether a dues-paying member of a non-profit has standing to bring claims against the organization and/or its officers and directors. The Third Circuit held exactly the same, for exactly the same reason, in *U.S. Gypsum Co. v. Quigley Co.*:

We can see no reason why the direct/derivative inquiry should apply in this situation. Under the case law, the distinction applies to claims brought by shareholders in a corporation. *See [Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004)]*(“We set forth in this Opinion the law to be applied henceforth in determining whether a stockholder's claim is derivative or direct.”). G-I and the Former Members were not shareholders or investors in the Center, which, as a non-profit, non-stock corporation, has no shareholders. G-I has not brought to light any cases bearing any similarity to the situation here. Cases applying the distinction elsewhere in corporate and partnership law — such as to limited partnerships and LLCs — are [also] inapplicable, as the Center's structure and relationship with its Members is not similar to those corporate forms.

*U.S. Gypsum Co. v. Quigley Co. (In re G-I Holdings, Inc.)*, 755 F.3d 195, 208 (3d Cir. 2014).

Defendants could not possibly distinguish *Daley* on the facts, and did not try. The *Daley* court reversed dismissal of claims for breach of fiduciary duties, breach of contract, *ultra vires*,

and corporate waste claims arising from large expenditures from AKA funds, and breach of duties, fiduciary and contractual, relating to those expenditures – exactly the types of claims at issue here. In reversing the lower court’s dismissal of those claims, the *Daley* court rejected exactly the arguments the ASA Defendants make here: that claims arising from “corporate mismanagement,” and seeking judicial intervention to enjoin further such action and/or to restore those funds to the entity, cannot be brought on an individual basis by a dues-paying member of the non-profit.

## 2. *Jackson v. George*

Five years after *Daley*, the Court of Appeals reaffirmed the *Daley* holding in *Jackson v. George*. *Jackson* involved the alleged takeover Jericho Baptist Ministries, Inc. (“Jericho”), a church in the District of Columbia. Jericho was founded in 1962 and incorporated as a non-profit under District of Columbia law in 1962. In brief, the case alleged that in 2010, certain trustees of Jericho incorporated a new church under the same name in Maryland, and merged the two churches, transferring the assets of the original Jericho church to the Maryland church, and firing the pastor of the D.C. church. The *Jackson* plaintiffs – longtime *tithe*-paying members of the church – also alleged that a 2009 resolution that seated four of the trustees and removed two previous trustees was invalid, thus invalidating any acts by the trustees, including the merger. The defendants removed the *Jackson* plaintiffs from church membership in 2012; plaintiffs alleged that the trustee’s act to remove them was invalid for the same reason.

The *Jackson* defendants argued on motion to dismiss that the plaintiffs lacked standing, for the exact same reasons that ASA Defendants claim here. The trial court denied the motion to dismiss and the Court of Appeals affirmed. *Jackson* at 415. Both Courts quoted *Daley*. *Id.* (“Judge Nash recognized the court’s cautionary words about ‘too expansive a view of the requirement of derivative suits’ when allegations are made against a non-profit corporation and

its leaders”). Notably, considering the arguments raised by the ASA Defendants here, the trial court in *Jackson* acknowledged that the claims arose from injury to the Church’s property while also denying the motion to dismiss, and the Court of Appeal quoted the trial court on this point: “Judge Nash recognized that the Complaint ‘sp[oke] largely of injuries to the Church and its assets and property[.]’” *Id.*

The facts in *Jackson* are in some ways dissimilar to *Daley*, thus they somewhat expand the reach of *Daley*. First, Jericho, like most churches, does not install, suspend, and reactivate membership according to “regular recurring annual payment of dues.” *Daley* at 729. Of course, the ASA is a dues-paying nonprofit, like the AKA.<sup>6</sup> Regardless of this fact, the *Jackson* trial court and the Court of Appeals both quoted *Daley* warning against applying “too expansive a view of the requirement of derivative suits” when allegations are made against a non-profit corporation and its leaders” and allowed the claims to proceed individually. *Jackson* at 415.

Second, although “Judge Nash recognized that the Complaint ‘sp[oke] largely of injuries to the Church and its assets and property’” (*id.*), Judge Nash held that because the *Jackson* plaintiffs also brought a claim alleging that defendants barred them from attending the church (in 2012), a so-called “direct” injury, by any test – the *Jackson* plaintiffs had standing to bring all of the claims, almost all of which arose in 2009 and 2010, and, “spoke” of injury to Jericho and the church’s assets. And again, the Court of Appeals affirmed. Explaining in a footnote that this

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<sup>6</sup> Thus, this language in *Daley* applies perfectly to the ASA plaintiffs:

On its face, it would seem almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.

*Id.*

one injury was indisputably a direct claim, even if brought against a for-profit entity, or by a shareholder, the Court then affirmed the trial court’s decision allowing all of the claims raised in the complaint to proceed:

We next address appellants’ argument that appellees attempted to assert entirely derivative claims and that dismissal of the Complaint was required because, having failed to satisfy the statutory prerequisites for bringing a derivative action, appellees lacked standing to sue. . . .

. . . .

Here, Judge Nash recognized that the Complaint “sp[oke] largely of injuries to the Church and its assets and property,” but, citing *Johnson*, also observed that “courts have held that ‘the same facts can give rise to several sets of claims, some of which are personal and some of which are derivative.’”

*Id.* Again, although only one claim alleged an injury that was indisputably direct, the trial court and the appellate court held that the *Jackson* plaintiffs had standing to pursue all of the claims alleged in the complaint, including the bulk of the claims (by number, and by value), that “spoke to injury to the church and its assets.” *Id.*

The SAC alleges numerous claims that, like the one claim in *Jackson*, indisputably allege injury for breaches indisputably owed “directly” to the Plaintiffs, not the ASA. *See* section I.B., *infra*.

In *Jackson*, the claims against a nonprofit church, claims that largely “spoke to injury to the church and its assets,” were allowed to proceed directly. The Court of Appeals recognized and supported two separate bases for this holding: (1) unauthorized use of the *Daley* plaintiffs’ “tithes and offerings,” creating a “a ‘personal financial stake’” in the defendants’ mismanagement of the Church’s assets, and (2) one, single claim alleging an injury “particularized to them” associated from their removal from the church:

plaintiffs/appellees sought relief from appellants' conduct in (allegedly) barring them from Church . . . **and from appellants' allegedly unauthorized use of appellees' tithes and offerings.** Judge Nash did

not abuse his discretion in concluding that because plaintiffs/appellees alleged an injury particularized to them *and a ‘personal financial stake,’ they were entitled to proceed on the claims* they brought on their own behalves

*Jackson v. George*, 146 A.3d at 415.

3. *Cowin v. Bresler and Burman v. Phoenix Worldwide Industries Are Inapposite and Irrelevant.*

As we have stated, Defendants do not acknowledge the holdings in *Daley* and *Jackson*, much less attempt to distinguish them. Defendants do, however, cite two cases from D.C. federal courts. Both are entirely inapposite.

*Cowin v. Bresler*, 731 F.2d 410 (D.C. Cir. 1984), involves a for-profit entity incorporated in Delaware. A minority shareholder brought claims under the Securities Exchange Act of 1934 alleging loss of stock value as well as common law claims. Applying Delaware law to the state common law claims, the D.C. Court of Appeals held that the shareholder did not have standing to bring claims for loss of stock value.<sup>7</sup>

*Cowin* applied the “special injury” test that Defendants refer to in their brief. The same “special injury” test was later rejected by the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036-39 (Del. 2004). *See* Dkt. 36 & 40-1. Regardless, Defendants still rely on *Cowin*, a case that does not apply D.C. law, is not good law on this point, is and always was specific to *shareholders* of a for-profit entity, and also precedes the D.C. Court of Appeals decision in *Daley* (by 27 years). Suffice it say, *Cowin* is inapposite.

*Burman v. Phoenix Worldwide Indus.*, 384 F. Supp. 2d 316 (D.D.C. 2005), is also inapposite. *Burman* involved claims arising from misrepresentation during the solicitation

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<sup>7</sup> *Cowin*, 741 F.2d at 414 n. 4 (“Because Bresler & Reiner is incorporated in Delaware, the substantive law of that state governs our disposition of Cowin’s common law claims of corporate mismanagement, fraud, and self-dealing.”)

period for the purchase of stock in a for-profit corporation. Nothing about *Burman* contravenes the holdings in *Daley* and *Jackson*, as *Burman* has nothing to say about claims against nonprofit entities.<sup>8</sup>

Like *Cowin* and *Burman*, the remaining cases cited on pages 7-8 of Defendants Brief involve shareholders (or investors) in for-profit entities.<sup>9</sup> They are also out-of-state cases. Moreover, none of them contravene the holdings in *Daley* and *Jackson*.

**B. Every Claim Is Properly Brought as a Direct Claim.**

Defendants make the conclusory argument that “every claim except one is derivative in nature,” but fail to provide a claim-by-claim analysis. The relevant law and underlying facts vary across the SAC’s ten counts. Defendants paint them all with a broad brush – and the wrong color paint.

**1. Breach of contract**

It is a long-standing and clearly established matter of law that the bylaws of an organization “are akin to a contract enforceable by all individual members.” *Welsh v. McNeil*, 162 A.3d 135, 157 (D.C. 2017); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005) (“It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members”); *Daley*, 26 A.3d 723, 731 (D.C. 2011) (*quoting Meshel*); *Willens*, 844 A.2d at 1135. Defendants never specifically refer to the breach of contract claims asserted in Counts Three, Four and Five or attempt to make any real argument that the contract claims are derivative in nature. Clearly, they could not possibly do so.

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<sup>8</sup> *Burman* also precedes *Daley* and *Jackson*.

<sup>9</sup> With the sole exception of *Jackson* itself, which Defendants oddly include in their string cite.

2. **Ultra vires**

The *ultra vires* claims, also brought in Counts Three, Four, and Five, are also appropriately brought as direct claims. As this Court held in this very case:

*A member of an organization may directly sue that organization to enjoin actions that the organization did not have power to execute. See D.C. Code § 29-403.04(b)(1); see also Daley v. Alpha Kappa Alpha Sorority, Inc., 26 A.3d 723, 729 (D.C. 2011). Actions taken by the organization that are ‘expressly prohibited by state or by-law’ or outside the powers conferred upon it by articles of incorporation are ultra vires.*

*Bronner v. Duggan*, 249 F. Supp. 3d 27, 47 (D.D.C. 2017), *emphasis added*. The new claims include *ultra vires* claims arising from violations of explicit bylaws, and they are appropriately brought as direct claims, under this Court’s holding and under D.C. Nonprofit Corporations Act § 29-403.04(b), which provides that “The power of a nonprofit corporation to act may be challenged in a proceeding by: (1) A member, director, or member of a designated body against the corporation to enjoin the act; [or] (2) The corporation, directly, derivatively, or through a receiver trustee, or other legal representative.”

3. **Breach of fiduciary duties**

Claims for breach of fiduciary duty are properly brought as direct claims, whether against for-profit and non-profit entities. *See Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass’n*, 441 A.2d 956, 962-63 (D.C. 1982) (directors and developers of a housing cooperative must act in good faith on behalf of the cooperative’s individual members) (hereinafter, *Wisconsin Avenue*). The plaintiffs in *Wisconsin Avenue* brought direct claims for breach of fiduciary duty and breach of contract. Citing numerous cases holding that fiduciaries owe a duty not only to the corporation or membership organization, but to the individual stockholders or members as well, the *Wisconsin Avenue* court held:

Officers and directors of a corporation owe a fiduciary duty to the corporation **and to its shareholders**, which requires them to act in good faith in managing the affairs of the corporation. *See, e.g., United States v. Byrum*, [408 U.S. 125, 142 (1972)]; *SEC v. Chenery Corp.*, [318 U.S. 80, 85 (1943)]; *McKay v. Wahlenmaier*, [226 F.2d 35, 44 (1955)]; *Johnson v. American General Insurance Co.*, 296 F. Supp. 802, 809 (D.D.C. 1969). . . .

Similarly, promoters of a corporation stand in a fiduciary relation to **both the corporation and its stockholders**, which requires them to act with the utmost good faith and to **disclose fully all material facts to both the corporation and its stockholders**. *McCandless, Receiver v. Furlaud*, [296 U.S. 140, 156-57 (1935)]; *Dickerman v. Northern Trust Co.*, [176 U.S. 181, 203-04 (1900)]; *Post v. United States*, [407 F.2d 319, 328 (1968), *cert. denied*, 393 U.S. 1092 (1969)]; *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241, 1244 (5th Cir. 1971); *Earle R. Hanson & Associates v. Farmers Cooperative Creamery Co.*, 403 F.2d 65, 70 (8th Cir. 1968). The fiduciary concept is not limited to stock corporations but applies to membership organizations as well. *Post v. United States, supra*, [407 F.2d at 329].

Like promoters or directors of a corporation, developers of a housing cooperative **occupy a fiduciary position with respect to the individual members** of the cooperative.

*Wisconsin Avenue*, 441 A.2d at 962-63, emphasis added. *Wisconsin Avenue* follows the United States Supreme Court’s decision in *United States v. Byrum*, a case involving breach of fiduciary by a majority shareholder. After holding that a fiduciary owes duties to both the corporation and to its stockholders, the Supreme Court held that minority shareholders could bring direct claims for breach of fiduciary duties against the majority shareholder:

Byrum was similarly inhibited by a fiduciary duty from abusing his position as majority shareholder for personal or family advantage to the detriment of the corporation **or other stockholders**. There were a substantial number of minority stockholders in these corporations who were unrelated to Byrum. Had Byrum and the directors violated their duties, the minority shareholders would have had a cause of action under Ohio law.

*United States v. Byrum*, 408 U.S. 125, 142, 92 S. Ct. 2382, 2393 (1972), emphasis added. The result is the same under District of Columbia law. *See Wisconsin Avenue, supra; see also Willens v. 2720 Wis. Ave. Coop. Ass’n*, 844 A.2d 1126, 1136 (D.C. 2004) (“directors of the

Cooperative owed the duties of a fiduciary to the corporation *and to its members*,” emphasis added) and *Daley*, 26 A.3d at 729 (“the right of faithful representation” is “a direct claim”).

4. Corporate waste

As discussed above, the Court of Appeal held in *Daley v. Alpha Kappa Alpha* that dues-paying members of nonprofits, such as Plaintiffs here, have standing to pursue direct claims arising from financial mismanagement of the sorority. *See* section I.A.1, *supra*. Under *Daley*, Defendants’ argument that Plaintiffs’ claims must be dismissed as derivative clearly fails. *Daley* is determinative of the issue, directly on point, and binding under District of Columbia law.

One of the claims in *Daley* was a claim for corporate waste, and the only time that Defendants have acknowledged this holding in *Daley* was in their reply brief on their motion for judgment on the pleadings, seeking dismissal of the waste claim. (Dkt. 37.) Defendants were simply unable to distinguish *Daley*. They argued in their Reply on the Motion for Judgment on the Pleadings that *Daley* (and *Jackson*) “rested, ultimately, on a finding that the plaintiffs had been directly and individually injured.” (Dkt. 37 at 3.) This is clearly untrue. *Daley* clearly held that a dues-paying member of a nonprofit has standing to bring a claim addressing mismanagement of their payments against the Constitution and bylaws of the entity, and explained its rationale for doing so in clear and strong terms. In no way does this holding rely solely on the *Daley* plaintiffs’ additional direct claim for suspension of their membership, which was brought after the original complaint. Nothing in *Daley* suggests that the court would have ruled differently if the plaintiffs had not added a claim alleging that they were wrongly suspended from the sorority.

Defendants are still unable to distinguish *Daley*. They no longer try. In this Motion to Dismiss the SAC, Defendants argue again that the waste claim must be dismissed. (Original Defs.’ Brief at 22.) But rather than challenge the application of *Daley* (and *Jackson*), they now

rely on *Cowin v. Bresler*. (*Id.*) For all the reasons stated in section I.A.3., *supra*, and in plaintiffs' briefing on the motion for judgment on the pleadings, *Cowin* is inapposite. That said, reliance on *Cowin* with respect to the waste claim is particularly nonsensical. *Cowin* did not involve a waste claim (or a nonprofit, or an entity incorporated in the district).

*Daley* is clearly on point, determinative, and binding, as is *Jackson*. Plaintiffs have discussed both cases in detail in numerous briefs over the past year; but except for the one reply brief a year ago, Defendants fail to even acknowledge them. Plaintiffs incorporate these briefs by reference. (Dkt. 36 & 40-1.)

**II. PLAINTIFFS PROPERLY STATE CLAIMS FOR *ULTRA VIRES* ACTS, BREACH OF FIDUCIARY DUTY THROUGH MISREPRESENTATIONS AND OMISSIONS RELATING TO AN ELECTION, AND WASTE.**

Defendants also argue that the following claims (only) should be dismissed for failure to state a claim: the *ultra vires* claims brought against the Individual Defendants in Counts Three, Four and Five, the breach of fiduciary duty claim brought in Count One, and the waste claim brought in Count Nine.

Defendants do *not* argue that the Counts Two, Six, Seven, or Eight fail to state a claim, and do not move to dismiss those claims (except to the extent that Defendants incorrectly argue that Plaintiffs' claims cannot be brought directly, an argument refuted in Section I, *supra*.) Defendants also do not argue that the breach of contract claims brought against Defendant ASA in Counts Three, Four, and Five fail to state a claim, and do not move to dismiss those claims with respect to Defendant ASA.

**A. Plaintiffs Properly Allege *Ultra Vires* Claims.**

(Original Defs.' Brief at Section B, pp. 14-20.)

Defendants argue that the three new *ultra vires* claims brought in Counts Three, Four, and Five should be dismissed, simply because the Court previously dismissed an earlier and different *ultra vires* claim (without prejudice). (Original Defs.’ Brief at 14-15, “The Court has already ruled that the Resolution is not *ultra vires* and Plaintiffs should not be allowed to retest that ruling.”) Not surprisingly, Defendants state no authority in support of this argument. There is, of course, no rule prohibiting amending a complaint to include a claim that is the same *type* of claim as another that was previously dismissed without prejudice. Such a rule would turn Rule 15 on its ear. *See* Fed. R. Civ. Proc. 15(a)(2) (“The court should freely give leave when justice so requires”).

Indeed, a Plaintiff can even amend a complaint to include a claim that is not only the same *type* of claim, but is also based on the *same factual allegations* as one previously dismissed without prejudice, if, for example, the Plaintiff includes additional factual information that resolves the Court’s concerns about the presentation of the claim in the earlier complaint. This happens frequently.<sup>10</sup>

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<sup>10</sup> Defendants’ argument, including terminology such as “[t]his Court has previously ruled that the Resolution was not *ultra vires*” (Original Defs.’ Brief at 14), “[t]he Court has already ruled that the Resolution was not *ultra vires* and Plaintiffs should not be allowed to retest that ruling” (*id.* at 14-15), and “Plaintiffs’ claim that the Resolution was *ultra vires* was dismissed” (*id.* at 15) seem to suggest issue preclusion. But there was no judicial determination that would invoke the *law of the case* doctrine. The fact that the Court dismissed the previous *ultra vires* claim without prejudice (as well as the fact that the issue was not raised to the Court of Appeal) rules out any *law of the case* argument. Nor do *collateral estoppel* or *res judicata* apply, as both only preclude relitigation of issues in a different action after a final judgment. (*Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 78, 326 (D.C. Cir. 1997) (“a final, valid judgment on the merits precludes any further litigation between the same parties on the same cause of action”); *Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116, 126 (D.D.C. 2012) (*res judicata* protects the finality of judicial judgments in previous cases); *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. 1992) (for collateral estoppel to apply, “the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case”); *Restatement (Second) of Judgments* § 27 (1982) (“when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties”).)

Defendants do not specifically argue that any of the three new *ultra vires* claims is exactly the same as the previously-dismissed claim, nor can they.<sup>11</sup> The new *ultra vires* claims in Counts Three, Four, and Five do not allege that the Resolution itself is *ultra vires*. Instead, the new *ultra vires* claims allege that ***particular actions taken by Defendants violate specific provisions of the ASA bylaws.*** (See Section II.A.2, directly below.)

As this Court has already held,

[T]he new claims that Plaintiffs assert do not appear to be the same as those that this Court has already rejected nor do they appear outlandish on their face.

\* \* \* \*

Moreover, to the extent that Plaintiffs are asserting *ultra vires* claims, it is apparent from the Complaint that Plaintiffs have made efforts to cure defects that the Court identified in its prior opinion.

*Bronner v. Duggan*, 324 F.R.D. 285, 293 & at n.2 (D.D.C. 2018). Defendants do not reference this holding, which is directly on point.<sup>12</sup> Instead, they simply ignore the March of 2018 decision.

There is simply no question about it: these new *ultra vires* claims are not foreclosed by the dismissal of a previous *ultra vires* claim without prejudice.

Defendants also argue that the *ultra vires* claims brought in Counts Three, Four, and Five should be dismissed because they do not properly allege *ultra vires* claims. Defendants refer to this Court's 2017 decision dismissing the previous *ultra vires* claim, where the Court held, "[a]ctions taken by the organization that are 'expressly prohibited by statute or by-law' or

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<sup>11</sup> Although Plaintiffs did not replead the same *ultra vires* claim that was dismissed in 2017, such a claim would not necessarily be precluded, as the claim was not dismissed with prejudice.

<sup>12</sup> In fact, Defendants never once cite to the Court's (March of 2018) decision allowing Plaintiffs to amend and file the SAC, although they previously made nearly all (if not all) of the arguments brought in the Original Defs.' Brief in their Opposition to Plaintiffs' the Motion to Amend.

outside the powers conferred upon it by its articles of incorporation are *ultra vires*.” *Bronner v. Duggan*, 249 F.Supp.3d 27, 47 (D.D.C. 2017) (“Opinion on Motion to Dismiss the FAC” or “March 2017 opinion”).<sup>13</sup>

In drafting the SAC, Plaintiffs were careful to only allege *ultra vires* claims that conformed to the Court’s 2017 decision. The SAC thus cites to and quotes from the particular “statute or by-law” at issue in each of the *ultra vires* claims (*see, e.g.*, SAC ¶¶ 48, 124, 142-43), and also presents specific allegations of fact, largely taken from Defendants’ own documents, that show how Defendants violated the identified “statutes and by-laws” (*see, e.g.*, SAC ¶¶ 52-77, 123-37, 145-61).<sup>14</sup> As the Court held in the March 2018 Opinion, “it is apparent from the Complaint that Plaintiffs have made efforts to cure defects that the Court identified in its prior opinion.” *Bronner v. Duggan*, 324 F.R.D. at 293 n.2.

We respond to Defendants’ further arguments, specific to each of the three *ultra vires* claims, in the three subsections directly below.

1. **Count Three: Packing the National Council with Supporters of the Resolution in Violation of the ASA Constitution, Article VI, § 2.**

Apparently, Defendants do not dispute that Count Three alleges violation of an ASA bylaw, because Defendants argue, explicitly, that Plaintiffs’ claims ignore language “contained within the very bylaw upon which they rely.” (Original Defs.’ Mot. Dismiss at 16.) As

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<sup>13</sup> Defendants also cite to and quote from *Welsh v. McNeil*, 162 A.3d 135, 150 n. 43 (D.C. 2017), for the same proposition, but the cited and quoted language is double *dicta*. *Welsh* does not involve an *ultra vires* claim. Moreover, the language Defendants quote is actually a direct quote from another case, *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), although this is not indicated in Defendants’ citation. The quoted language is also *dicta* in *Columbia Hospital* – there was no *ultra vires* claim in that case, either. 15 F. Supp. 2d at 7 (“Plaintiffs correctly note that they are not disputing the legitimacy of the January pledge agreement because it was *ultra vires*”).

<sup>14</sup> Much of this information was unavailable to Plaintiffs just one month before; thus, these claims clearly do not merely repeat the *ultra vires* claim in the FAC.

discussed below, however, *the bylaw quoted by Defendants is not the same provision* invoked by, cited to, and quoted in Count Three.

Count Three alleges that Defendants' actions to pack the National Council with USACBI founders and endorsers – including ensuring that every single candidate for President nominated by the Nominating Committee was an active supporter of an academic boycott of Israel and had publicly endorsed USACBI – violated the ASA Constitution, article VI (Elections), § 2, attached hereto as Exhibit A.<sup>15</sup> Count Three correctly cites to, and quotes from, article VI, § 2:

199. Pursuant to the American Studies Association Constitution, “The Nominating Committee shall nominate candidates for the office of [President Elect], member of the Council, and members of the Nominating Committee. It shall present two nominees for each elected position. Nominees shall be representative of the diversity of the association’s membership.” (American Studies Association Const., art. VI, § 2.)

(SAC ¶ 199.) *Defendants would have the Court believe that article VI of the ASA Constitution includes a definition of “the diversity of the association’s membership.” It does not.* Defendants go so far as to actually quote an unrelated bylaw (without citation), suggesting that the quoted provision is from the ASA Constitution, article VI (Elections), § 2. (Original Defs.’ Brief at 16.) It is not.

The provision quoted in Defendants’ brief is not in article VI or any other article of the ASA Constitution. It is an excerpt from the ASA Bylaws, which until March 2016 was a separate document from the ASA Constitution. *See* Exhibit A, ASA Bylaws, art. VII (Conventions), § 4, for the quoted language in context.

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<sup>15</sup> This citation is to the ASA Constitution as it was at the time of the events alleged in the complaint. The ASA has since revised the Constitution and bylaws at least twice.

Moreover, the bylaw quoted by Defendants is specific to the planning of conventions and includes no information extraneous to that purpose. The quoted excerpt pertains to recommendations made by the chairs of the convention's Program Committee for other members of the Program Committee. Exhibit A, ASA Bylaws, art. VII (Conventions), § 4. It does not mention, and does not pertain to, the ASA nominating committee or elections to the National Council or the presidency. If Defendants had included the entire sentence they quoted from, it would have been apparent to every reader that the quoted provision is unrelated and irrelevant to Count Three. *See id.*

Contrary to Defendants' arguments, Defendants John Stephens testified explicitly that the nominating committee's mandate under the ASA Constitution, art. VI, § 2, was *not* limited to ensuring diversity only with respect to "age, racial, ethnic, regional, and gender" variation – the qualities mentioned in ASA Bylaw art. VII, § 4. (Excerpt from Stevens Dep. Trans., attached hereto as Exh. B.) Stephens testified that the ASA had implemented corrective action to ensure that at least one adjunct professor was on the National Council, in order to satisfy the diversity mandate. Adjunct, contingent and non-tenured status in employment is clearly not included in "age, racial, ethnic, region, and gender" – the factors that Defendants excerpt from an unrelated bylaw. And, as Defendant Stephens, long-time executive director of the ASA, testified explicitly, although adjunct and contingent (non-tenured) status in employment is also not covered by the employment discrimination laws, reparations were made to ensure diversity with respect to adjunct and contingent employment status:

21 Q. Okay. So you would agree with me that  
22 contingency in your employment or being an adjunct  
23 professor is not a category that is watched and  
24 enforced by the EEOC?  
25 A. Right.

1 Q. It's not religion, race, nationality, gender;  
2 right?  
3 A. Right.  
4 Q. And yet it is an issue with respect to  
5 diversity among the membership at ASA that there was a  
6 change made to ensure that that type of diversity was  
7 reflected?  
8 A. Yes. And the reason is that somewhere in the  
9 area of 50 to 60 percent of our membership is in that  
10 category, and there's no one who actually wears  
11 that -- was wearing that suit or outfit that was --  
12 that had a voice on the board.

(Exh. B at 218:21-219:12.)

Defendants argue for dismissal because contract provisions – in this case, the ASA’s Constitution – should be “interpreted according to its plain language.” (Original Defs.’ Brief at 16.) We would correct Defendants’ statement to point out that where this rule applies, *the provision should be interpreted according to its own plain language – not the language of another, inapplicable provision*. Moreover, as this Court previously held, in interpreting *ultra vires* claims, “a long-standing pattern of practice of corporate behavior may give rise to a by-law.” *Bronner I*, 249 F. Supp. 3d at 48, *quoting Family Fed. ’n for World Peace*, 129 A.3d 234, 251 (D.C. 2015). We cannot imagine a better interpreter of the ASA Constitution, art. VI, § 2, than the executive director, testifying here against the ASA’s interest.

2. **Count Four: Freezing the Membership Roles to Prevent Dissenters from Voting Against the Resolution in Violation of the ASA Constitution, Article 2, § 2.**

Count Four clearly and specifically alleges violation of the ASA Constitution, art. 2, § 2, which section provides that a member who is dropped from the rolls of the ASA membership for failure to timely pay his or her annual dues “may be reinstated at any time” merely by paying his or her annual dues. (Exh B, 150:3-23, 151:18-23, 154:14-155:4, 155:16-156:1.)

Defendants apparently believe that “may be reinstated at any time” means that reinstatement can occur at the time that best suits the political goals of the Individual Defendants. That interpretation clearly contradicts the deposition testimony of Defendant John Stephens, the plain reading of the ASA Constitution, the long-standing pattern and practice of the ASA, and, quite frankly, the experience of every person who has ever paid dues to renew their membership in any non-profit organization.

Defendant Stephen’s testimony is quoted in the SAC. After confirming that no members could have known there would be a vote on the academic boycott of Israel until November 25, and that the membership rolls were intentionally frozen on the morning of November 25, such that no members in arrears would be able to pay their dues to renew their membership in time to vote on the academic boycott of Israel, Defendant Stephens confirmed that the decision to freeze the membership rolls (to prevent long-time ASA members in arrears from voting on the academic boycott) was a first and only occurrence. His correspondence with other defendants at the time clearly reveals that this aberration in the ASA’s long-standing policy had one purpose: to prevent members who might disagree with the Individual Defendants from voting.

Defendant Stephens testified, against his interest, as executive director of the ASA, as follows:

Q. Is there any place in the bylaws that accounts for suspending the provision in the bylaws that says that membership is reactivated upon payment of dues in arrears?

THE WITNESS: Not that I'm aware of.

Q. Okay. Has this ever happened at any time that you recall?

A. No.

...

Q. And so the experience of members in the American Studies Association who, if they're procrastinators like me, who always do things at the very last minute, the experience of those people is that they can wait until a day before an election, pay their dues, and vote?

A. Yes.

...

Q. So up to the day that they were already banned from voting, they had no previous awareness that if they didn't pay their dues on time, this vote would happen and they would already be banned from taking part?

A. Well, no one would have known that because no one knew there was going to be a support vote until November 25.

Q. But on November 25 when that group got together and said, "We're going to do a support vote," they could have said, "So let's give folks five days to get their money in arrears to pay up their debt so that they can take part"?

A. Yes.

Q. But they didn't do that?

A. No.

...

Q. That heads up that you weren't going to be able to vote came after it was too late for people to pay their arrears and be able to vote?

A. They froze the membership roster on November 25.

Q. With no warning?

A. That was the board decided to freeze that --

Q. I hear you.

A. -- and they told me to instruct Johns Hopkins to hold all orders for membership until the vote was over.

(Exh. B at 150:3-23, 151:18-23, 154:14-155:4, 155:16-156:1.)

If Defendant Stephens' testimony is not enough, discovery produced by Defendants in this case reveals that the ASA routinely sends emails to members in arrears reminding them before every other election that if they quickly pay their dues, they will be able to vote in the election.

The SAC also quotes from correspondence between Defendant Stephens and Defendant Kauanui, then shared with other Individual Defendants serving on the ASA National Council, that quite obviously reflect the Defendants' intention to limit voting by persons they believed were more likely to oppose the resolution. Thus, these facts also go toward Plaintiffs' claims for breach of fiduciary duties.

For purposes of Defendants' Motion to Dismiss, the only issue is whether Plaintiffs have identified a bylaw that was violated by Defendants, recognizing that "a long-standing pattern of

practice of corporate behavior may give rise to a by-law.” *Bronner I*, 249 F. Supp. 3d at 48, quoting *Family Fed. ’n for World Peace*, 129 A.3d 234, 251 (D.C. 2015). Plaintiffs have clearly done so.

3. **Count Five: A Substantial Amount of the ASA’s Activities Spent Attempting to Influence Legislation in Violation of the ASA’s Statement of Election and the Tax Law Regulating Tax-Exempt Entities.**

Defendants argue that the *ultra vires* claim alleged in Count V has already been adjudicated by this Court. (Original Defs.’ Brief at 19.) Not true – not by a long shot. Defendants further argue that although the ASA spends an extensive, and certainly substantial, amount of time and resources spent on activities challenging legislation at the state level, that these activities do not violate the ASA’s commitment under its Statement of Election, because (they claim) these activities fall under exceptions specified in the tax code.

First, this claim in the SAC alleges that the ASA spent and spends a substantial amount of time attempting to influence legislation. This is not the same as question that the Court addressed when dismissing the *ultra vires* claim presented in the FAC. The Court held that the “boycott resolution itself was not an attempt to influence legislation” and that Plaintiffs had not “pointed to any existing, proposed, or pending legislation that the ASA may have been targeting with the resolution.” *Bronner I*, 249 F. Supp. 3d at 49.

Claim Five does not allege an *ultra vires* claim based on the boycott *itself*. Claim Five alleges a violation of an express bylaw – that “No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation . . .” (Statement of Election, ¶ 3, § 4, attached hereto as Exh. C.; SAC ¶ 142.) *At issue is the extent to which the ASA’s activities are focused on influencing legislation.*

Documents produced in discovery reflect an inordinate amount of ASA time and resources

dedicated to influencing the federal, state, and local legislatures, assemblies, and councils here in the United States – as well as in Israel. This claim turns on the whether a “substantial part” of the ASA’s activities go to influencing legislation, not whether any particular act alone, or even the resolution, itself, constitutes an *ultra vires* act.

As this Court noted when granting Plaintiffs’ Motion to File the SAC,

To the extent that Plaintiffs are asserting *ultra vires* claims, it is apparent from the Complaint that Plaintiffs have made efforts to cure defects that the Court identified in its prior opinion.

*Bronner II*, 324 F.R.D. 285, 293 n.2 (D.D.C. 2018). Indeed, Plaintiffs did take care to ensure that the *ultra vires* claims in the SAC did not repeat the defects identified by the Court. This claim clearly identifies the bylaw at issue (Exh. C, Statement of Election, ¶ 3, § 4) and how it is violated (a substantial part of the ASA’s activities spent on attempts to influence legislation). The SAC also specifies legislation that the ASA sought to influence, responding to the Court’s concern that the FAC to do. (*See, e.g.*, SAC at pp. 52-57.)

Second, Defendants’ argument that the substantial time and resource expenditures spent on influencing legislation are permissible, despite the clear language in the Statement of Election, because they fall under an exception in the Tax Code (*not* the Statement of Election). However, ***that section of the tax code does not apply to the ASA. Defendants’ reliance on 42 U.S.C. § 14503 is entirely misplaced, as that section of the tax code applies only to entities that have taken the election to report under section 501(h). The ASA’s Form 990s show that the ASA has not taken the section 501(h) election. This is critical because those entities that take the 501(h) election pay some taxes.***

Even if section 14503 did apply (and it does not), the SAC identifies numerous examples of legislation that the ASA expended substantial resources to influence that are not “aimed *directly at the ASA*” (Original Defs.’ Brief at 20), much less “might affect the existence of the

organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization” – the actual standard set in the statute. Thus, even if the exceptions set out in the Tax Code § 501(h) did apply, and even if they somehow also constitute exceptions to the ASA’s own promise in the Statement of Election, Count Five still survives, because the SAC alleges that a substantial part of the ASA’s activities are and were directed at influencing legislation that is not covered by the exceptions set forth in Tax Code § 501(h)(2). And, finally, the resolution of this question is one of fact, and not appropriately determined on a motion to dismiss.

***However, again, Defendants misrepresented the applicable law. Section 501(h) does not and has not applied to the ASA.***

**B. Count One Brings Claims for Breach of Fiduciary Duty – Not Fraud – and Reliance Is Not an Element.**

(Original Defs.’ Brief at section C, pp. 21-22.)

Defendants’ sole argument for dismissal of Count One is that Plaintiffs fail to allege that they relied on Defendants’ numerous omissions and misrepresentations of information clearly material to the ASA membership’s decisions regarding how to vote on critical issues, including the election of National Council members and the vote on whether to adopt the boycott.

***Reliance is not an element of this breach of fiduciary duty claim.*** *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1997) (“action for a breach of fiduciary duty arising out of disclosure violations in connection with a request for stockholder action do not include the elements of reliance, causation and actual quantifiable money damages” (*Id.* at 12)). Whether or not any of the Plaintiffs relied on the Defendants’ many material omissions and misrepresentations in deciding how they would vote is of no consequence, whatsoever, to this Motion to Dismiss.

Defendants actually recite what they claim to be five required elements of Count One, and they include reliance. (Original Defs.’ Brief at 21.) ***The “elements” set out in Defendants’***

*brief are not the elements of the claim brought in Count I or any other breach of fiduciary claim, but rather the elements of common law fraud.* Indeed, the two authorities that Defendants rely on – *D.C. Jury Instruction 20.01* and *Shiff v. American Ass’n of Retired Persons*, 697 A.2d 1193 (D.C. 1997) – both clearly set forth those same five elements as the elements of common law fraud. Indeed, ***the actual title of Jury Instruction 20.01 is Fraudulent Misrepresentation—Elements of The Claim.*** Similarly, *Shiff v. American Ass’n of Retired Persons* presents the same set of elements under the clearly bolded heading, “Common Law Fraud.”<sup>16</sup> Nothing in *Schiff* suggests that the case involves breach of fiduciary duty. The defendants in *Schiff* were not fiduciaries of the Plaintiffs and were not alleged to be. Fiduciary duties are not even mentioned in *Schiff*.

It is difficult to understand how Defendants could have confused the breach of fiduciary duty claim with common law fraud. Count One is clearly labeled as breach of fiduciary duty:

**COUNT ONE**

**Breach of Fiduciary Duties Against the Individual Defendants by All Plaintiffs**

**(Material Misrepresentations and Omissions in Connection with Elections to Office and Seeking Member Approval of Boycott Resolution and Amendment of the Bylaws)**

(SAC at p. 69.) Below this heading, the SAC clearly describes a breach of fiduciary duty claim. (See SAC ¶ 193, “the Individual Defendants owe all the duties of a fiduciary to the American Studies Association and all of its members,” and ¶ 194 “the Individual Defendants breached their fiduciary duties of loyalty, care, candor and good faith by making or causing to be made material misrepresentations and omissions to members, when seeking election to the National Council

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<sup>16</sup> Defendants did not provide a pinpoint cite for specific pages in *Schiff*, but the case addresses three claims: unlawful trade practices in violation of the D.C. Consumer Protection and Procedures Act, common law fraud, and unjust enrichment. 697 A.2d at 1194. The elements recited in Original Defs.’ Brief are set forth at 697 A.2d at 1197-98 under the heading “Common Law Fraud.”

and approval of the Boycott Resolution[.]”) There is no mention of “fraud” or “fraudulent” in Count One. (SAC ¶¶ 191-93.)

Whether Defendants are unable to distinguish between breach of fiduciary duty and common law fraud or knowingly misrepresented the applicable law is impossible to know. However, this much is certain: Defendants made this same argument nearly a year ago in their brief opposing Plaintiffs’ Motion for Leave to File a Second Amended Complaint (Dkt. 66 at 7).<sup>17</sup> In that brief, Defendants cited *Hercules & Co. v. Shama Restaurant Corp.*, 613 A.2d 916, 923 (D.C. 1992) for the proposition that “Plaintiffs’ reliance on the representation is a necessary element.” (Opp. Mot. File SAC at 7.)

Although Defendants’ argument at that time was only two sentences long – and clearly erroneous – Plaintiffs responded with a full-page argument. (Plfs.’ Reply Mot. to Amend, Dkt. 67 at 15-16.) Citing *Malone*, Plaintiff’s reply brief showed that a breach of fiduciary duty claim arising from material misrepresentations or omissions relating to a vote by stockholders (or, in the case of a nonprofit, dues-paying members) does not require reliance. Plaintiffs further showed that Defendants’ reliance on *Hercules & Co. v. Shama Restaurant Corp.* was misplaced, because *Hercules*, like *Shiff*, involved a claim for fraud. Indeed, *Hercules* explicitly rejects the rule for which Defendants invoked it. *Hercules* at 923 (“one cannot close his eyes and blindly rely upon the assurances of another *absent some fiduciary relationship*”), emphasis added.

Having been caught once before misstating the elements of the claim at issue in Count One, it is striking that Defendants would do so again. This time, they substituted out one fraud

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<sup>17</sup> In two sentences, Defendants argued: “Plaintiffs do not even allege that they relied on any alleged misrepresentation. Said another way, there are no allegations in the proposed Second Amended Complaint that the Plaintiffs themselves changed their vote because of any representation by any party. See *Hercules & Co. v. Shama Restaurant Corp.*, 613 A.2d 916, 923 (D.C. 1992) (Plaintiffs’ reliance on the representation is a necessary element).”

case for another fraud case, and went so far as to cite the Jury Instructions for fraudulent misrepresentation, while oddly never using the word “fraud” or any derivative of the word.

We cannot know whether Defendants intentionally sought to mislead the Court or whether this argument was presented in good faith, but we know this: Count One presents a breach of fiduciary claim, and reliance is not an element of that claim.

### III. THIS COURT CONTINUES TO HAVE FEDERAL DIVERSITY JURISDICTION.

(Original Defs.’ Brief at subsection A.2., pp. 4-7, and subsection A.4., pp. 10-14.)

In *Bronner I*, this Court held that the claims and allegations in the FAC satisfied the amount-in-controversy requirement:

*Plaintiffs' claims plainly meet the low standard for establishing a sufficient amount in controversy.* The complaint asserts that over \$75,000 is in controversy in the case, albeit in a cursory fashion. See Compl. ¶ 9. *It is far from legally certain that Plaintiffs could not recover over \$75,000.* The complaint seeks monetary, injunctive, and declarative relief for waste, breach of contract, breach of fiduciary duties, ultra vires acts, and violation of the D.C. Nonprofit Corporation Act. See Compl. at 25-31. It specifically alleges that the ASA will lose membership dues from many former members for years to come. Compl. ¶ 60. The complaint also specifically states that the boycott resolution has "resulted in the improper expenditure of ASA funds related to membership dealings, public relations, legal matters, and . . . employee time and effort," and that Individual Defendants are "consciously attempting to appropriate the assets and reputation of the ASA to achieve purposes . . . at odds with[] [the] purposes and mission . . . [of] the ASA." Compl. ¶¶ 80, 84.

249 F. Supp. 3d at 38, *emphasis added*.

The SAC also seeks monetary, injunctive, and declarative relief. The only difference is that the SAC includes additional allegations showing that the amount-in-controversy is substantially higher than even Plaintiffs imagined when the FAC was filed in April of 2017.

Documents produced in discovery revealed that the Defendants were not paying the expenses arising from the backlash after the adoption of the academic boycott contemporaneously, instead carrying tens of thousands of dollars on an American Express card and letting other expenses accrue; because the ASA employed a cash-basis method of accounting, the impact of the resolution on the ASA's financial health was not apparent in the Form 990 filed for fiscal year 2013, the year of the Boycott Resolution. (JS 940.) But by fiscal year 2016, the ASA's reported expenses had increased 33% over fiscal year 2012.<sup>18</sup> (Calculated from ASA Form 990s for fiscal years 2012 and 2016; see Dkt. 88 and exhibits attached thereto.) Revenues fell 7% over the same period. (Calculated from ASA Form 990s for fiscal years 2012 and 2016. *Id.*) Indeed, the reported revenue for fiscal year 2016 – the most recent form filed by the ASA – was the lowest the ASA had reported since fiscal year 2009, the heart of the financial crisis. *Id.*

To cover the shortfall, Defendants changed the ASA bylaws to allow them to invade the ASA's Trust and Development Fund. The first withdrawal was in fiscal year 2015, in an amount over \$112,000, according to correspondence produced by Defendants in discovery. The ASA's Form 990 for that year shows that ASA revenue for sale of securities of \$156,024, and that the securities were sold at a loss of \$16,240. After the (Proposed) SAC was filed, we learned from ASA's Form 990 for fiscal year 2016 that the association had sold securities of \$268,085 that year, at a loss of \$19,319. *Id. The sale of securities in fiscal years 2015 and 2016 – is*

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<sup>18</sup> Fiscal year 2012 ended on June 30, 2013 – less than six months before the adoption of the Resolution.

*equivalent to 33% of the value of ASA's investments at the end of fiscal year 2014 (\$1,281,986).*<sup>19</sup>

The financial information directly above is one example of allegations in the SAC that were not included in the SAC, and they speak particularly to the valuation of the injunctive and declaratory relief sought.

A. **Contrary to Defendants' Position, This Court Has Already Held that the Direct Claims Alleged in the FAC Satisfy the Amount-in-Controversy Requirement.**

Every allegation in the FAC relating to the amount-in-controversy requirement is also alleged in the SAC. There is no logical argument that could possibly explain how the Court could find that the FAC satisfied the amount-in controversy requirement in *Bronner I*, but that the SAC does not.

The Court questioned defense counsel on this very point. At the status conference on August 15, 2018, counsel for the Original Defendants stated that they did not believe they should be required to (continue to) respond to discovery until the Court ruled on their (at that time, unfiled) Motion to Dismiss the SAC. This exchange followed:

10 THE COURT: What is [the basis of your motion]?  
11 MR. SEAMAN: Well, there were several. One is --  
12 the primary -- a primary one is that the Court doesn't have  
13 subject matter jurisdiction. There is a -- this is the  
14 second amended complaint that doesn't allege \$75,000 of  
15 damage to the individual plaintiffs. And in our view,  
16 that's what has to happen, and that hasn't happened. That's  
17 a nutshell version of the argument.  
18 THE COURT: **Didn't I address that in my first**  
19 **opinion?**

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<sup>19</sup> For further discussion of the decline of the ASA's financial health, see Plaintiffs' Supplemental Brief on the Issue of Subject Matter Jurisdiction ("Plaintiffs Supplemental Brief"), Dkt. 88, at pp. 4-13. Plaintiffs' Supplemental Brief, all pages, and Plaintiffs' Response to Defendants' Supplemental Brief, Dkt. 90, are incorporated herein by reference.

20 MR. SEAMAN: I don't think so, Your Honor. The  
 21 first motion to dismiss was oriented towards the ASA. The  
 22 motions to dismiss for lack of subject matter jurisdiction  
 23 had to do with the ASA as the, quote-unquote, victim of the  
 24 alleged acts of the defense. **At that point, the Court had**  
 25 **not determined that this was not properly a derivative**  
 1 **action. So we did not address the absence of allegations of**  
 2 **\$75,000 worth of damage to each individual plaintiff . . .**

(Aug. 15, 2018 Hearing Trans. 16:10-17:6, attached hereto as Exh. D, emphasis added.)

Defense counsel misstated the posture of the case in *Bronner I*. First, the FAC alleged direct claims for corporate waste and *ultra vires* acts.<sup>20</sup> Defendants were aware of this at the time: entire sections of their briefs specifically addressed the direct claims. (Motion to Dismiss the FAC at 28, “VIII. The “Direct Claims” Asserted in Counts II and III Must be Dismissed as Against the Individual Defendants”; Defendants’ Reply on Motion to Dismiss the FAC, Dkt. 25, at 22, “F. The Direct Claims in Counts II and III Must Be Dismissed.”) And Defendants did address damages to the individual plaintiffs at the time, albeit briefly. (Dkt. 21 at 11, “there are no factual allegations of any specific financial amounts alleged to . . . [be] owed to the Plaintiffs”; *see also* Dkt. 25 at 16.)

Second, the Court dismissed the derivative claims *in the very same decision* that it held that the FAC satisfied the amount-in-controversy requirement: *Bronner I*. It is simply disingenuous for Defendants to assert that the Court did not hold that the direct claims brought in the FAC satisfy the amount-in-controversy requirement. The Court was right: it “did address that in [the] first opinion.”

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<sup>20</sup> Both claims were brought both directly and derivatively against all defendants. The *ultra vires* claim was dismissed for failure to state a claim, but not because it was only brought derivatively.

**B. Defendants' Argument that Jurisdiction Requires Claims for Individual Damages Is Simply Wrong.**

(Original Defs.' Brief at subsection A.2., pp. 4-7.)

Section A.2. of Defendants' Brief argues that the Court lacks jurisdiction because “[the only damages Plaintiffs seek are those incurred by the Association (as would be appropriate in a derivative claim). This is fatal from a jurisdictional perspective.” (Original Defs.' Brief at 4.) This argument is a red-herring.<sup>21</sup> The assertion that jurisdiction only exists where there are claims for individual damages is unsupported and unsupportable. Not surprisingly, Defendants do not cite a single case in support of this proposition.

There are numerous combinations of claims and remedies that do not seek individual damages. (*Id.*) By their very nature, claims for injunctive and declaratory relief do not seek individual damages. The Court does not lose jurisdiction over such claims.

Defendants' reference to damages “incurred by the association (as would be appropriate in a derivative claim)” further confuses their argument. The question of *whether a claim that alleges damage to a corporation can be brought directly is a question of standing, not a question of jurisdiction.* The law clearly provides standing for plaintiffs to bring claims for damages “incurred by” a corporation in certain circumstances. It cannot be that the court has no jurisdiction over such claims if the plaintiff seeks injunctive relief only.

Consider § 29-403.04 of the D.C. Nonprofit Corporations Act, which provides for *ultra vires* claims. Subsection (b)(1) allows for a member to bring a direct *ultra vires* claim to enjoin the act, but does not provide for damages. Under Defendants' theory, there would be no jurisdiction over such a claim.

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<sup>21</sup> It is also factually incorrect. Plaintiffs did indeed allege individual damages.

Consider also *Daley v. Alpha Kappa Alpha*. The plaintiffs in *Daley* sought to restore to AKA large sums of money paid by the sorority to its president.<sup>22</sup> As discussed above, the Court of Appeals held that the *Daley* plaintiffs had standing to pursue their claims directly. Among other things, the Court of Appeals held that the plaintiffs “had a ‘direct, personal interest’ in the cause of action, even if ‘the corporation’s rights are also implicated.’” *Daley*, 26 A.3d at 729, quoting *Franchise Tax Board of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336 (1990). The *Daley* plaintiffs did not seek individual damages. Of course, the Court had jurisdiction over the case.

There is clearly no legal basis for this jurisdictional argument. It may be that Defendants have confused the standing issue with jurisdiction. Or, it may be that Defendants are really arguing that the SAC does not satisfy the amount-in-controversy requirement, although they do address that argument separately, in section A.4. Because Defendants provide no legal argument, it is difficult to respond section A.2.

However, to the extent that Defendants may have intended to argue that the SAC does not satisfy the amount-in-controversy requirement because the requirement is only met by claims for individual damages, defendants are wrong. We address this argument subsection on the amount-in-controversy, below.

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<sup>22</sup> According to the Court of Appeals decision, the *Daley* plaintiffs did not seek individual damages – only restoration of the funds to the sorority. Although the *Daley* plaintiffs also brought a direct claim for suspension of membership, which they claimed was an act of retaliation after they brought the lawsuit, the Court clearly did not require the addition of the direct claim to find that the plaintiffs had standing to bring the claims arising from the payments from AKA to the president, nor did they seek monetary damages relating to the suspension – just reinstatement.

C. The SAC Alleges Damages Sufficient to Satisfy the Jurisdictional Amount.

(Original Defs.’ Brief at subsection A.4., pp. 10-14.)

Defendants appear to argue that only individual damages contribute to the amount-in-controversy calculus. This is, of course, untrue.

In *Jackson*, the Court allowed claims for damages to the Jericho D.C. church to proceed directly and in *Daley*, the damages to the church were not “individual damages.” Yet the Court ruled in both cases that the plaintiffs had standing to bring them. It cannot be that standing exists where there is no amount-in-controversy.

In this circuit, the value of an injunction can be measured either by the value to the plaintiff or the cost to implement the injunction borne by the defendant. When the value is measured by the cost to the defendant, the amount-in-controversy is not zero.

As this Court explained when it held that amount in controversy alleged by the FAC was satisfied the \$75,000 requirement, “the sum claimed by the plaintiff controls if the claim is apparently made in good faith.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (footnote omitted). The Court further held:

For a court to reject the amount claimed by the plaintiff, “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount.” *Id.* at 289. This means that a court should find jurisdiction at this motion-to-dismiss stage of the proceedings even if it has serious doubts as to the bases for establishing the amount in controversy. *See Compton v. Alpha Kappa Alpha Sorority, Inc.*, 64 F. Supp. 3d 1, 14 (D.D.C. 2014), *aff’d*, 639 F. App’x 3 (D.C. Cir. 2016). Even a “cursory” allegation of the amount in controversy, if it exceeds the jurisdictional requirement, is sufficient to survive a motion to dismiss.

(MTD Opinion at 12.) Applying this standard, the Court held that “Plaintiffs’ claims plainly meet the low standard for establishing a sufficient amount in controversy. . . .It is far from legally certain that Plaintiffs could not recover over \$75,000.” *Id.*

The same standard applies today, as we are still in an early phase of the case, and discovery is incomplete. Plaintiffs are waiting on thousands of documents that defendants agreed to provide, but have not yet done so. Thousands of other documents are at issue in a discovery motion pending in front of the Court.

Under this same standard, and with the inclusion of all the claims and allegations at issue when the Court held that the claims and allegations presented in the FAC satisfied the \$75,000 requirement, and with the addition of new factual allegations related to expenses, revenues, and the invasion of the Trust Fund, as well as the eight new claims, the SAC clearly satisfies the \$75,000 requirement.

1. **Claims for Relief and Damages**

Plaintiffs seek injunctive, declaratory and monetary relief, arising from the following claims against the Individual Defendants and the ASA:

- ***New Claims for Breach of Fiduciary Duties.*** Counts 1 and 2 present claims against the Individual Defendants for breach of fiduciary duties, and seeks, *inter alia*, monetary damages and declaratory relief.
- ***New Claims for Breach of Contract.*** Counts 3, 4, and 5 present claims against the American Studies Association. These claims arise from the ASA's violation of three separate provisions of the ASA bylaws. As this Court has held with respect to the continuing claims for breach of contract that were brought in the First Amended Complaint, "[a] nonprofit organization's 'Constitution and Bylaws form a contract between that [organization] and its' members.'" Plaintiffs seek injunctive and declarative relief.
- ***New Claims for Ultra Vires Acts.*** Counts 3, 4, and 5 present *ultra vires* claims against the Individual Defendants, as well as the claims against the ASA for breach of contract described above. Although the underlying violations of the ASA bylaws are the same, the claims for *ultra vires* acts are brought against the Individual Defendants, while the claims for breach of contract are brought against the ASA as an entity. These claims are brought for monetary damages *and* for injunctive and declarative relief (¶¶ 207, 215, 225).
- ***Continuing Claims for Voting Irregularities Brought in the Alternative.*** Aside from the new claims identified above, the SAC brings claims that

were also brought in the FAC, including two claims for voting irregularities, in Counts Six through Nine. Counts Six (Breach of Contract – Voting Process Contrary to Bylaws) and Seven (Breach of the D.C. Nonprofit Corporation Act) are again brought in the alternative. These claims are brought against the American Studies Association, not the Individual Defendants. Damages sought include monetary (referencing Count 2), injunctive, and declaratory relief.

- ***Continuing Claim for Breach of Contract by Plaintiff Barton.*** Count Eight is brought solely by Plaintiff Barton against the ASA (only) for refusal to let him vote on the Resolution. He seeks monetary, declarative and injunctive relief.
- ***Continuing Claim for Waste.*** Count Nine is brought against all Defendants – the ASA and Individual Defendants. This claim is brought against the ASA and the Individual Defendants. Plaintiffs seek damages, including ***but not limited to*** “damages from the Individual Defendants on behalf of the American Studies Association.” ¶ 244. As discussed below, this statement regarding the availability of damages from Individual Defendants does not exclude appropriate damages from the ASA, including declaratory and injunctive relief as well as monetary relief. Rather, Plaintiffs allege that Defendants’ waste of corporate assets “resulted in [all] the damages alleged herein and outlined in prior Counts and previous paragraphs.” *Id.*

## 2. Valuation of Injunctive and Declaratory Relief.

Aside from the value of monetary damages alleged against the Defendants, the value of injunctive and declaratory relief are also included when assessing the amount in controversy. Where a plaintiff asks for declaratory or injunctive relief, a court generally measures the amount in controversy based on the object of the litigation. See *Busby v. Capital One. N.A.*, 932 F.Supp.2d 114, 132 (D.D.C. 2013), citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977). In the District of Columbia, courts “look to either the value of the right the plaintiff seeks to enforce or the cost to the defendants to remedy the alleged denial of that right. *Id.*, citing *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978), see also *Geo Specialty Chems, Inc. v. Husisian*, 951 F.Supp.2d 32, 39-40 (D.D.C. 2013). In addition, D.C. courts are not obligated to precisely ascertain the value of injunctive relief; “so long as the plaintiff’s pleadings amount to more than a ‘formal allegation’ that the relief is worth more than \$75,000,

that is sufficient.” *Info Strategies, Inc. v. Dumosch*, 13 F.Supp.3d 135, 142 (D.D.C. 2014), citing *Smith*, 553 F.2d, at 1100-1.

Thus, even if there were no recovery of money damages against the Defendants, the \$75,000 requirement would be satisfied by the value of the injunctive and declaratory relief sought in the SAC.

For all the reasons detailed above, and set forth in the briefs incorporated herein, Plaintiffs respectfully request that this Court deny this Motion to Dismiss.







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### ARTICLE I: Name and Object

Sec. 1. The name of this society shall be the American Studies Association

Sec. 2. The object of the association shall be the promotion of the study of American culture through the encouragement of research, teaching, publication, the strengthening of relations among persons and institutions in this country and abroad devoted to such studies, and the broadening of knowledge among the general public about American culture in all its diversity and complexity.

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### ARTICLE II: Members

Sec. 1. The members of the association shall be:

- (a) Any person interested in the study of American culture, upon payment of one year's individual dues;
- (b) Any cultural or educational non-profit organization interested in the study of American culture, upon the payment of one year's institutional dues; and
- (c) Any honorary members of the association. Honorary members shall be elected by an affirmative vote of two thirds of the voting members of the National Council and be exempt from the payment of dues.

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Sec. 2. Any member whose dues are six months in arrears shall be dropped from the rolls. Members who are so dropped may be reinstated at any time by the payment in advance of one year's dues.

Sec. 3. Only individual members in good standing shall have the right to vote or hold office in the association.

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## ARTICLE III: Affiliated Societies

Sec. 1. Any society committed to the study of American culture may be admitted to the status of Affiliated Society by an affirmative vote of two-thirds of the voting members of the National Council.

Sec. 2. Any Affiliated Society which at any business meeting of the Council shall announce its intention to terminate its affiliation with the association may at the succeeding business meeting effect such termination.

Sec. 3. A Society's affiliation with the association may be terminated for sufficient reason by a vote of two-thirds of the voting members of the Council.

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## ARTICLE IV: Officers

Sec. 1. The elected officers shall be the president and the vice president. The appointed officers shall be the executive director, the editor of the Encyclopedia of American Studies, and the editor of the American Quarterly.

Sec. 2. The president shall serve a one-year term, following a one-year term as vice-president. The president shall preside at meetings of the Council, of the Executive Committee, and of the Association. It shall be his or her duty, to formulate policies and projects for presentation to the Council and to fulfill the chartered obligations and purposes of the Association.

Sec. 3. The vice president shall be elected for a one-year term followed by a one-year term as president. The vice president shall preside at meetings of the Finance Committee. He or she shall be a member of the Council and of the Executive Committee. If the office of the president shall through any cause, become vacant, the vice president shall thereupon become president for the remainder of the president's term, followed by the normal one-year term as president.

Sec. 4. The executive director shall be the chief administrative officer of the association. It shall be his or her duty, under the direction of the president and Council, to oversee the affairs of the association, to have responsibility for the continuing operations of the association, to supervise the work of its committees and staff, to assist in the formulation of policies and projects for submission to the Council, to execute instructions of the Executive Committee and of the Council, and to perform other such duties as the Executive Committee and the Council may direct.

Sec. 5. The editor of the American Quarterly shall insure that the Quarterly fulfills its stated aim to aid in giving a sense of direction to studies in the culture of the United States, past and present, and that the Quarterly conducts its affairs in a manner consistent with the aims of the association.

Sec. 6. The editor of the Encyclopedia of American Studies shall be concerned with the development and maintenance of the Encyclopedia and shall insure that it functions as a resource consistent with the aims of the association.

Sec. 7. The appointed officers shall be designated by the Executive Committee with the ratification of two-thirds of the voting members of the Council for specified terms of office not to exceed three years and shall be eligible for reappointment as designated in the association's bylaws. They shall receive such compensation as the Executive Committee may determine with ratification by the Council.

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## ARTICLE V: Council

Sec. 1. There shall be a Council, constituted as follows:

only)

[Register here to submit a proposal for the 2016 annual meeting \(members only\).](#)

Log in not required to view the ASA web pages.

In order to perform a specific action, such as submitting a proposal or application, multiple logins may be required.

## EVENTS

[Mar. 1 | 2016 Community Partnership Grants](#)

Applications for the 2016 Community Partnership Grants Program to assist American Studies collaborative, interdisciplinary community projects due

[Mar. 1 | 2016 Regional Chapter Grants](#)

Applications for the 2016 grants program to assist regional American Studies conferences and projects due

[Apr. 1 | Apply for Standing and Prize Committees](#)

For details, [click here](#)

- (a) The president and the vice president;
- (b) The immediate past president, who shall serve a one-year term;
- (c) Thirteen members elected in a national election by the membership-at-large, five to be elected every first year, and four to be elected every second and third year, serving staggered three-year terms;
- (d) Two student members elected in a national election by the membership-at-large, to be elected every first and third year, serving staggered three-year terms.
- (e) One member, who is a secondary educator, elected in a national election by the membership-at-large, to be elected every third year, serving a three year term; and
- (f) One international member elected in a national election by the membership-at-large, to be elected every third year, serving a three-year term.
- (g) The executive director, the editor of the Encyclopedia of American Studies, and the editor of the American Quarterly, serving as non-voting members.

Sec. 2. The Council shall conduct the business, set fiscal policy, and oversee the general interests of the association. The Council shall fix the amount of dues and the date upon which any change of dues becomes effective. It may appoint such committees as it deems necessary. It shall call a meeting of the association at a time and place it deems appropriate. The Council shall hold at least one business meeting annually, at a time and place to be determined by the Executive Committee, for the election of members to committees, for the approval of the budget, for the consideration of reports and recommendations from the officers and committees, for the discussion of policies and of instructions that should be given to the elected or appointed officers, and for the transaction of other such business as may come before it. It shall report on its deliberations and actions through the publications of the association.

Sec. 3. To transact the necessary business in the interim between the annual business meetings of the Council, there shall be an Executive Committee constituted as follows:

- (a) The president and the vice president;
- (b) The immediate past president, who shall ex officio serve a one-year term; and
- (c) Three voting members of the Council, elected annually by the Council. The Executive Committee in the conduct of the Association's business shall be subject always to the general direction of the Council.

Sec. 4. For the general management of the financial affairs of the Association, there shall be a Finance Committee constituted as follows:

- (a) The vice president, serving as chair;
- (b) Three voting members of the Council, elected annually by the Council; and
- (c) The executive director, serving as a non-voting member.

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## ARTICLE VI: Elections

Sec. 1. There shall be a Nominating Committee, consisting of six members elected in a national election by the membership-at-large for staggered terms of three years, two members to be elected annually. The president shall annually appoint the chair of the Nominating Committee from among the committee's membership for a one-year term.

Sec. 2. The Nominating Committee shall nominate candidates for the office of vice president, member of the Council, and members of the Nominating Committee. It shall present two nominees for each elected position. Nominees shall be representative of the diversity of the association's membership. With the exception of the student, international, and the secondary educator positions on the Council, candidates shall be listed in alphabetical order without further distinctions.

Sec. 3. Nominations may also be made by petitions carrying in each case the signatures of at least twenty-five members of the association in good standing and indicating in each case the

particular vacancy for which the nomination is intended. The chair of the Nominating Committee must receive nominations by petition at least four weeks before the committee makes its own nominations. The chair shall ascertain that all candidates nominated by the committee or by petition have consented to stand for election.

Sec. 4. The ballot shall be distributed to the full membership of the association at least six weeks after the completion of the nominations. No vote received after the due date specified on the ballot shall be valid. Election shall be by a plurality of the votes cast for each vacancy. The votes shall be counted, sealed, and deposited in the headquarters of the association, where they shall be kept for at least one year. In the case of a tie vote, the choice among the tied candidates shall be made by majority vote of the voting members of the Council.

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## **ARTICLE VII: Regional Chapters**

Sec. 1. The Council and officers of the association shall seek to promote the welfare of the regional chapters. The Council and officers of the association shall also encourage the regional chapters to further the objectives of the association and shall support the chapters in this effort.

Sec. 2. Each regional chapter shall have a constitution approved by the Council. The Council shall insure that the constitutions of the regional chapters are consistent with the provisions of the constitution of the association. The Council shall also insure that the elections of the regional chapters are conducted openly and fairly.

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## **ARTICLE VIII: Various**

Sec. 1. The Council may receive gifts and may take, receive, hold, and convey funds and property, both personal and real, necessary for the purposes of the association's incorporation, and other real and personal property the income of which shall be applied to the purpose of the association, to the extent authorized by the District of Columbia.

Sec. 2. The Council shall adopt bylaws consistent with the provisions of the constitution, upon any matter of concern to the association.

Sec. 3. The Council shall adopt such regulations and rules as maybe necessary to give full force and effect to the constitution and bylaws and to determine their procedures.

Sec. 4. Amendments to this document may be proposed by the Executive Committee or by petitions carrying the signature of at least twenty-five members of the association in good standing. Such proposed amendments shall be submitted in writing to the members of the Council at least thirty days prior to any business meeting of the Council. At this meeting, the amendments shall be submitted to a vote, a favorable vote of two-thirds of the voting members of the Council being required for approval by the Council. Amendments approved by the Council shall be submitted to the members of the association by a mail ballot within three months of the Council's approval. Ratification shall require a favorable vote of the majority of the members voting.

Sec. 5. The Council shall, upon adoption of this constitution, have the power to decide upon the details of the transition from the existing organization to the one embodied in this document.

Sec. 6. The Trust and Development Fund shall be administered by a Board of Trustees. The vice president of the association shall serve as the chair of the Board. The president, with the advice and consent, of the Council shall appoint five other trustees. No more than two of the appointive trustees shall be currently serving as members of the Council. Each appointed member shall serve a term of five years, except in the case of an appointment to complete an unexpired term. The Fund shall consist of all endowment and trust funds and other such funds as may be assigned to it by the Council, and with appropriate professional advice, the Board of Trustees shall direct the investment of the Fund's resources in a fiscally sound and socially responsible manner. At least once annually, the Board shall publicly issue an official accounting of the Fund's receipts, investments, and expenditures. The Council may, at its pleasure, assign any surpluses from the general operating funds to the Trust and Development Fund. No appropriation shall be made from the Fund's capital except upon the request of at least two-thirds of the voting members of the Council approved by at least four members of the Board of Trustees. The Finance Committee of the Council shall meet at least once each year with the Board of Trustees of the association to discuss investment policies and the financial needs of the association.

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## Bylaws, Article I: Dues

Sec. 1. Individual member dues shall be based on a calendar year.

Sec. 2. Institutional member dues shall be based on a fiscal year.

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## Bylaws, Article II: Officers

Sec. 1. If the office of vice president shall, through any cause, become vacant, the Council shall elect an ad interim vice president from its membership. He or she shall be eligible to succeed himself or herself in accordance with Article VI, Section 2, of this constitution.

Sec. 2. Whenever the vice president shall have succeeded to the office of president in accordance with the provisions of Article IV, Section 3, of this constitution, he or she shall be eligible to succeed himself or herself in accordance with Article VI, Section 2, of this constitution.

Sec. 3. The executive director shall be appointed in accordance with Article IV, Section 7, of this constitution. The executive director may be reappointed, by a vote of two-thirds of the voting members of the Council, for additional terms of office not to exceed three years each. The executive director shall be notified in writing by the president at least one year before the expiration of a given term if the appointment will not be renewed. The executive director's performance shall be reviewed annually by the elected officers at the spring business meeting of the Executive Committee.

Sec. 4. The editor of the American Quarterly shall be appointed in accordance with Article IV, Section 7, of this constitution. The term of office shall be three years and may be renewed, for a maximum of two additional terms, by a vote of two-thirds of the voting members of the Council. The editor shall be notified in writing by the president at least one year before the expiration of a given term if the appointment will not be renewed.

Sec. 5. The president and the vice president shall serve without compensation.

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## Bylaws, Article III: Board of Editors

Sec. 1. The Executive Committee shall, upon recommendation by the editor in consultation with the executive director, appoint a Board of Advisory Editors of the American Quarterly, to assist the editor on matters of general editorial policy and scholarly orientation. The Advisory Board shall consist of at least twelve members. Only individual members of the association in good standing shall have the right to serve on the Board of Advisory Editors. Their terms shall be for three years and are renewable for one additional term. The executive director shall, ex officio, be a member of the Board of Advisory Editors, without vote.

Sec. 2. The Executive Committee shall, upon recommendation by the editor in consultation with the executive director, appoint a Board of Managing Editors of the American Quarterly, to advise the editor about the disposition of manuscripts submitted to the journal. The Managing Board shall consist of at least eight members. Only individual members of the association in good standing shall have the right to serve on the Board of Managing Editors. Their terms shall be for three years and are renewable for one additional term. The Editor may, at his or her discretion, designate any member of the association in good standing, to serve pro temp for a one-year maximum term as a visiting member of the Board of Managing Editors. The executive director shall, ex officio, be a member of the Board of Managing Editors, without vote.

Sec. 3. The Executive Committee shall, upon recommendation by the editor in consultation with the executive director, appoint Associate Editors of the American Quarterly, to assist the editor with his or her duties. Only individual members of the association in good standing shall have the right to serve as the Associate Editor. The term of the Associate Editor shall be for three years and is renewable for two additional terms.

Sec. 4. The Executive Committee shall, upon recommendation by the editor in consultation with the executive director, appoint a Book Review Editor of the American Quarterly, to assist the editor with the book review section of the journal. Only individual members of the association in good standing shall have the right to serve as the Book Review Editor. The term of the Book Review Editor shall be for three years and is renewable for two additional

terms.

Sec. 5. The Executive Committee shall, upon recommendation by the editor in consultation with the executive director, appoint an Exhibition Review Editor of the American Quarterly, to assist the editor with the exhibition review section of the journal. Only individual members of the association in good standing shall have the right to serve as the Exhibition Review Editor. The term of the Exhibition Review Editor shall be for three years and is renewable for two additional terms.

Sec. 6. All appointments to editorial boards and offices commence on July 1.

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## **Bylaws, Article IV: Council**

Sec. 1. The Council may, at its discretion, fill any vacancy in its elected membership by designating any member of the association in good standing to serve as Council member ad interim until the close of the next annual business meeting.

Sec. 2. Whenever any vacancy shall occur in the membership of the Executive Committee or of the Finance Committee, the president may, at his or her discretion, designate a voting member of the Council to serve ad interim as a member of the committee in question.

Sec. 3. Council meetings shall be open to all members of the association.

Sec. 4. The executive director, under the direction of the president, shall prepare the agenda for the business meetings of the Council. Agendas, including the complete texts of all proposals requiring formal action by the Council, shall be sent to all Council members at least four weeks in advance of the meeting. Agendas shall also be available for distribution to all other members of the association attending the meeting.

Sec. 5. Council Members unable to attend a business meeting for a valid reason may submit a proxy vote in writing to the executive director prior to the business meeting. The proxy vote shall address itself to a specific resolution, shall be in writing, and shall include the voter's name. A proxy vote shall not be applied to a resolution introduced subsequent to the proxy. The proxy shall be considered valid if it addresses the sense of the resolution even if that resolution is amended in minor elements. If a question shall arise in this regard, the presiding officer of the association shall determine the applicability of the proxy.

Sec. 6. Except where specified in the association's constitution or bylaws, a majority vote by all voting members of the Council, including those casting proxy votes, will be sufficient for approval of a proposal.

Sec. 7. The president shall preside at the business meeting. In his or her rulings from the chair, the provisions of the constitution and bylaws shall guide him or her, and where not in conflict with these, by the current edition of Robert's Rules of Order Newly Revised. The president shall cause official minutes of the business meeting to be prepared, which shall include a record of all motions and their disposition, together with all votes cast thereon, when recorded.

Sec. 8. The president may, at his or her discretion, appoint an official parliamentarian from among the voting members of the Council. The parliamentarian shall hold office for a term of one year. He or she shall advise and assist the president in the conduct of the business meeting, and shall perform such additional duties as are appropriate to his or her office.

Sec. 9. The Executive Committee shall transact the necessary business of the association in the interim between the annual business meetings of the Council. The executive director, under the direction of the president, shall prepare the agenda for the annual spring business meeting of the Executive Committee. All Council members shall receive the agenda, including the complete texts of all formal proposals requiring formal action by the Executive Committee, at least four weeks in advance of the annual spring business meeting of the Executive Committee.

Sec. 10. The Finance Committee shall consider the budget prepared by the executive director and submit it to the Council for approval in accordance with Article IV, Section 4, of these by-laws. The budget shall be available for distribution to the membership of the association at the Council's meeting. A public accountant at the end of the association's fiscal year shall review the financial accounts of the association. The association shall have a June 30 fiscal year-end. The executive director shall be bonded.

Sec. 11. The Council may elect the same three voting members of the Council to concurrent terms on the Executive and Finance committees.

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## Bylaws, Article V: Committees

Sec. 1. The Council shall appoint such committees as it deems necessary. In order to advance the activities of the association, there shall be both standing committees, as designated by the bylaws, and ad hoc committees, as recommended by the Executive Committee with the approval of the Council. All committees are bodies of the association and shall function at the discretion of the Council and with the Council as the final supervisor of their activities.

Sec. 2. In pursuance thereto, the Council shall define the jurisdiction of each committee, shall determine its budget, and shall decide upon its basic policies and procedures.

Sec. 3. All standing and ad hoc committees shall report in writing to the executive director at least one month in advance of the annual business meeting of the Council. The executive director shall distribute such reports to the members of the Council and they shall be published in whole or in substance in the American Studies Association Newsletter.

Sec. 4. Close attention shall be given in the composition of all committees to the diversity of the association's membership.

Sec. 5. The Executive Committee shall, at its annual spring business meeting, review all applications and nominations for appointment to the boards and standing committees of the association. Applications and nominations for board and committee positions shall be due on April 1. An applicant or nominee must be a current member of the association, must have indicated his or her willingness to serve, and must have supplied appropriate information on scholarship, teaching, and university and public service. All appointments shall commence on July 1.

Shortly after the spring business meeting of the Council, the Executive Director, under the direction of the President, shall prepare a list of appointments that the meeting produces and circulate it among the Council for ratification. If a member of Council objects to an individual, his or her appointment shall be suspended until the Executive Committee has reconvened to consider the objection either by electronic or telephone conference. If a member of Council raises a problem with a category of appointment, the Executive Committee, at its regular meeting on the evening preceding the annual fall business meeting of the Council, shall consider the problem and present the Council with formal recommendations for resolving it.

Sec. 6. International Committee. The association shall have as one of its standing committees the International Committee. The International Committee shall have as its function to keep the Council and the association's membership informed of the issues affecting international scholars and students in the profession and shall have responsibility for special tasks involving international scholars and students in the membership. The International Committee shall be composed of ten members of the association, one of whom shall be the international member of the Council. The nine non-Council members shall be named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these nine members shall serve three-year, non-renewable, staggered terms. Five of these members shall come from, and represent the interests of, the five separate regions of the world. The chair of the International Committee shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the International Committee.

Sec. 7. Women's Committee. The association shall have as one of its standing committees the Women's Committee. The Women's Committee shall have as its function to keep the Council and the association's membership informed of the issues affecting women in the profession and shall have responsibility for special tasks involving women in the membership. The Women's Committee shall be composed of seven members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these seven members shall serve three-year, non-renewable, staggered terms. One of these members shall be an international member of the association. The chair of the Women's Committee shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the Women's Committee.

Sec. 8. Students' Committee. The association shall have as one of its standing committees the Students' Committee. The Students' Committee shall have as its function to keep the Council and the association's membership informed of the current interests, needs, and professional orientations of American Studies students. The Students' Committee shall be composed of eight members of the association, two of whom shall be the student members of the Council. These six non-Council members shall be named by the Executive Committee with the approval of the Council, following an open call to the membership for self-

nominations and suggestions. Each of these members shall serve three-year, non-renewable, staggered terms. For this purpose, student members of the association shall be defined as undergraduate or graduate students officially enrolled, at the beginning of their term, in a degree-granting program. The chair of the Students' Committee shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the Students' Committee.

Sec. 9. Minority Scholars' Committee. The association shall have as one of its standing committees the Minority Scholars' Committee. The Minority Scholars' Committee shall have as its function to keep the Council and the association's membership informed of the issues affecting minority scholars in the profession and shall have responsibility for special tasks involving minority scholars in the membership. The Minority Scholars' Committee shall be composed of six members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these six members shall serve three-year, non-renewable, staggered terms. The chair of the Minority Scholars' Committee shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the Minority Scholars' Committee.

Sec. 10. Committee on American Studies Departments, Programs and Centers. The association shall have as one of its standing committees the Committee on American Studies Departments, Programs and Centers. The Committee on American Studies Departments, Programs and Centers shall have as its function to keep the Council and the association's membership informed of the current interests, needs, and professional concerns of American Studies departments, programs, and centers and shall have responsibility for special tasks involving the association's institutional membership. The Committee on American Studies Departments, Programs and Centers shall be composed of six members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these six members shall serve three-year, non-renewable staggered terms. They shall hold appointments in an American Studies department, program, or center at the time of appointment. The chair of the Committee on American Studies Departments, Programs and Centers shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. Ex officio members may be appointed from time to time to assist in the work of the standing committee. The executive director shall, ex officio, be a member of the American Studies Departments, Programs and Centers.

Sec.11. Committee on Regional Chapters. The association shall have as one of its standing committees the Committee on Regional Chapters. The Committee on Regional Chapters shall have as its function to keep the Council and the association's membership informed of the current activities, interests, and needs, of the regional chapters; to act as a liaison between the association and the regional chapters; and to have responsibility for special tasks involving the association's regional chapters. The Committee on Regional Chapters shall be composed of one member of the association from each of the regional chapters. The members shall be named by the Executive Committee with the approval of the Council, following a request to the regional chapters for their recommendations, and an open call to the membership for self-nominations and suggestions. Each of these members shall serve three-year, non-renewable staggered terms. They shall be members in good standing of their respective chapters, as well as of the association. The chair of the Committee on Regional Chapters shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the Committee on Regional Chapters.

Sec.12. K-16 Collaboration Committee. The association shall have as one of its standing committees the K-16 Collaboration Committee. The K-16 Collaboration Committee shall have as its function to keep the Council and the association's membership informed of the current interests, needs, and professional orientations of K-16 educators involved with American Studies programs or curricula. The K-16 Collaboration Committee shall be composed of at least six members of the association, one of whom shall be the member of Council elected to the secondary educator's slot. The non-Council members shall be named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these members shall serve three-year, non-renewable, staggered terms. The majority of the K-16 Collaboration Committee shall be practitioners in the field of secondary education. The chair of the K-16 Collaboration Committee shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. It is possible for the Chair and the member of Council elected to the secondary educator's slot to be the same person. The executive director shall, ex officio, be a member of the K-16 Collaboration Committee.

Sec. 13. Committee on Critical Ethnic Studies. The association shall have as one of its standing committees the Committee on Critical Ethnic Studies. The Committee on Critical Ethnic Studies shall have as its function to keep the Council and the association's membership informed of the current activities, interests, and professional concerns affecting Ethnic Studies programs, departments, and scholars; to act as a liaison among association standing committees; to be responsible for liaison with other ethnic studies organizations, and to have responsibility for special tasks involving Ethnic Studies scholars and scholarship. The Committee on Critical Ethnic Studies shall be composed of six members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these six members shall serve three-year, non-renewable, staggered terms. The chair of the Committee on Critical Ethnic Studies shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. The executive director shall, ex officio, be a member of the Committee on Critical Ethnic Studies.

Sec. 14. Committee on Graduate Education. The association shall have as one of its standing committees the Committee on Graduate Education. The Committee on Graduate Education shall have as its function to keep the Council and the association's membership informed of the current issues affecting graduate education in American Studies, Ethnic Studies, and other interdisciplinary graduate-level instruction; to act as a liaison between the association and national organizations concerning graduate education in the field, such as, but not limited to, the National Research Council; to act as a liaison among association standing committees on issues concerning graduate education; and shall have responsibility for special tasks involving the association's institutional members that have Ph.D. and M.A. degree granting programs concerning graduate education. The Committee on Graduate Education shall be composed of six members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. Each of these six members shall serve three year, non-renewable staggered terms. They shall all hold appointments in an American Studies, Ethnic Studies, or our other interdisciplinary departments or programs which offer the Ph.D. or M.A. degree, and at least half of the members of the committee shall be current or former Directors of Graduate Studies at their respective institutions. The chair of the Committee on Graduate Education shall be named from the committee's membership by the Executive Committee with the approval of the Council and shall serve a single term not to exceed three years. Ex-officio members may be appointed from time to time to assist in the work of the standing committee. The executive director shall, ex officio, be a member of the Committee on Graduate Education.

Sec. 15. Prize Committees. The Council shall appoint such prize committees, as it deems necessary. Each prize committee shall function at the discretion of the Council and with the Council as the final supervisor of their activities. The Council shall define the purpose of each association prize, the frequency with which it shall be awarded, the amount of each award, the terms of each prize committee, and each prize committee's basic policies and procedures. Each prize committee shall have as its function to administer the awarding of a prize designated by the association and to submit nominees for such prizes to the Council for its approval. There shall be a single winner each prize each year. There may also be named up to five finalists for a prize. Each prize committee shall be composed of three members of the association named by the Executive Committee with the approval of the Council, following an open call to the membership for self-nominations and suggestions. The chair of each prize committee shall be named from the committee's membership by the Executive Committee with the approval of the Council.

A. The Carl Bode-Norman Holmes Pearson Prize shall be awarded periodically to an individual for outstanding contribution to American Studies and for lifetime achievement. Each of the three prize committee members shall serve three-year, non-renewable terms.

B. The Mary C. Turpie Prize shall be awarded periodically to an individual for outstanding abilities and achievement in American Studies teaching, advising, and program development at the local or regional level. Each of the three prize committee members shall serve three-year, non-renewable terms.

C. The John Hope Franklin Publication Prize shall be awarded annually to the best-published book in American Studies. Each of the three prize committee members shall serve one-year, non-renewable terms.

D. The Lora Romero First Book Publication Prize shall be awarded annually for the best-published first book in American Studies that highlights the intersections of race with gender, class, sexuality and/or nation. Each of the three prize committee members shall serve one-year, non-renewable terms.

E. The Ralph Henry Gabriel Prize shall be awarded annually to the best doctoral dissertation in American Studies. The competition is limited to candidates receiving the Ph.D. degree in American Studies, American Ethnic Studies, or American Women's Studies. Each of the three prize committee members shall serve one-year, non-renewable terms.

F. The Constance P. Rourke Prize shall be awarded annually to the best article published in American Quarterly. Each of the three prize committee members shall serve two-year, non-renewable terms.

G. The Gene Wise - Warren Susman Prize shall be awarded annually for the best paper presented by a graduate student at the annual convention. Each of the three prize committee members shall serve two-year, non-renewable terms.

H. The Yasuo Sakakibara Prize shall be awarded annually for the best paper presented by an international scholar at the annual convention. Each of the three prize committee members shall serve two-year, non-renewable terms.

Sec. 16. Whenever any vacancy shall occur in the membership of a standing committee, the Executive Committee may, at its discretion, designate any member of the association in good standing to serve ad interim as a member of the committee in question.

Sec. 17. Ex officio members may be appointed to the standing committees by the Executive Committee with the approval of the Council to advise and assist the committee in question.

Sec 18. A member of the Council, named by the Executive Committee with the approval of the Council, shall serve, ex officio, on each standing committee and task force of the association.

Sec. 19. Ad hoc committees may be created from time to time by the Executive Committee with the approval of the Council as deemed necessary to carry on the work of the association. The functions of such a committee shall be specified when the committee is designated, and the committee shall cease to exist upon the completion of the task assigned, or, automatically, at the end of a maximum three-year period. The Executive Committee with the approval of the Council for maximum three-year terms shall name the chair and members of such a committee. The Executive Committee may at its discretion, fill any vacancy in the membership of an ad hoc committee to serve as a committee member ad interim until the completion of the committee's tasks or term.

Sec. 20. Committee member responsibilities. In addition to specific roles required by membership on individual committees, members of American Studies Association committees are expected to actively participate in the work of the committee, provide thoughtful input to committee deliberations, and focus on the best interests of the association and committee goals rather than on personal interests.

Members should

- Review all relevant material before committee meetings.
- Attend committee meetings and voice objective opinions on issues.
- Pay attention to association activities that affect or are affected by the committee's work.
- Support the efforts of the committee chair and carry out individual assignments made by the chair.
- Work as part of the committee and staff team to ensure that the committee's work and recommendations are in keeping with the general association mission and goals.

Sec. 21. It is possible to remove a member from a committee if that individual is ineffective, works against the committee, or gives out inaccurate information on behalf of the committee. Discussing and removing committee members should be done under conditions of strict confidentiality. The chair should talk with the ineffective board member. If the majority of the committee is in agreement, the chair should set up a time to discuss the situation. Schedule a leave of absence if there are legitimate reasons for the ineffective behavior. The leave should cover the rest of his or her term or designate a period for the leave, after which the chair should reevaluate the member. The chair may informally ask for a resignation from the member. If the committee member is non-responsive, or fails to resign, then the chair may formally request a resignation his or her resignation.

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## Bylaws, Article VI: Delegates to Other Organizations

Sec. 1. The president of the association shall as appropriate, in consultation with the

Executive Committee and the ratification of the Council, appoint delegates to the meetings of various professional organizations.

Sec. 2. The president of the association shall, in consultation with the Executive Committee and with the ratification of the Council, appoint a delegate to the American Council of Learned Societies for a term of four years, with new terms of office commencing January 1.

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## **Bylaws, Article VII: Conventions**

Sec. 1. The Council shall call an annual meeting of the association at a time and place it deems appropriate. To plan and organize an annual meeting, there shall be a Program Committee and a Site Resource Committee.

Sec. 2. The Executive Committee shall select a site for each convention at least three years in advance of the convention date. The Executive Committee shall consider the fiscal condition of the association, our ability to safely meet and freely conduct our business at the convention site, the amount of local and regional support, the adequacy of the conference facilities, the employment practices of conference hotels and vendors, and the proximity of the meeting site to the majority of association members, when selecting future convention sites. The Executive Committee shall, whenever possible, respond to invitations from regional chapters willing to host the convention. The principles involved in the selection of the convention site shall include geographical rotation in order to maximize attendance, diversify participation, and insure a reliable budgetary surplus of convention revenues over expenditures.

Sec. 3. The chair(s) of the Site Resource Committee shall be named by the president-elect, in consultation with the executive director and the members of the Executive Committee, approximately eighteen (18) months in advance of the convention date. The chair(s) shall, in consultation with the president-elect, the executive director, and the program committee chair(s), name the members of the Site Resource Committee.

Sec. 4. The chair(s) of the Program Committee shall be named by the president-elect, in consultation with the executive director and the members of the Executive Committee, approximately eighteen (18) months in advance of the convention date. The chair(s) of the Program Committee, in consultation with the president-elect, the executive director, the members of the Executive Committee, and the chairs of the standing committees of the association shall name the members of the Program Committee. The chair(s) shall name at least nine (9) but no more than twelve (12) Program Committee members. The nominations, together with appropriate biographical material on all nominees, shall be submitted for approval to the Executive Committee at least two months in advance of the annual fall business meeting of the Council. Only members of the association in good standing shall have the right to serve on the Program Committee. Prospective members of the Program Committee must have indicated a willingness to serve and must have supplied appropriate information on scholarship, teaching, and university and public service. The chair(s) when preparing recommendations for Committee members shall choose the best qualified members consistent with reasonable representation of the major fields of American Studies scholarship and the diversity of the association's membership in order to maintain a balance of age, racial, ethnic, regional, and gender participation. When approaching ASA members about possible service on the Program Committee, the chair(s) should make clear that the Executive Committee votes on the appointments to the Committee.

Sec. 5. The Program Committee shall, in accordance with the Guide to the Work of the Program Committee, determine the convention theme, the procedures for evaluating proposals, and the general content of the meeting. One slot shall be reserved for the Council for a general meeting session.

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## **Bylaws, Article VIII: Elections**

Sec. 1. The Nominating Committee shall prepare a ballot to be sent to the executive director no later than January 1 for electronic polling of the membership with elections to be completed by March 1.

Sec. 2. The ballot shall present the names of any persons nominated by petition as specified in Article VI, Section 3, of the constitution. Nominations by petition must be in the hands of the Nominating Committee no later than October 1.

Sec. 3. The Council may, by resolution, provide for additional nominations to be made for any

position where there is a vacancy through death or by resignation of a candidate.

Sec. 4. Whenever prospective vacancies of one year or more occur in the offices of president, vice president, elected Council members, and members of the Nominating Committee, the Nominating Committee shall nominate at least two candidates for the unexpired term of any such office.

Sec. 5. Annually the executive director shall publish a "nominations announcement" in the June and September issues of the Newsletter. The announcement shall list all association positions for which elections are to be held in the forthcoming calendar year, and shall invite all members of the association to submit to the chair of the Nominating Committee on or before October 1 any recommendations for nominations thereto.

Sec. 6. On or before February 1 the chair of the Nominating Committee, or the executive director acting on his or her instructions, shall post an electronic ballot on a secure web server, accessible to the full membership of the association, together with candidates' statements and appropriate biographical material on all nominees. Such ballots shall identify as such all nominations submitted by the Nominating Committee and all nominations submitted by petition. Ballots shall be marked clearly with a due date of March 1, and no ballot submitted after that time shall be counted. The right to a secret ballot shall be insured.

Sec. 7. The Nominating Committee, or the executive director acting on its instructions, shall thereafter count and record the election results in such manner that insures the integrity of the counting and recording process. The chair of the Nominating Committee, or the executive director acting on his or her instructions, shall notify all candidates forthwith of the results of the election, and the executive director shall prepare an announcement of such results for the June edition of the Newsletter.

Sec. 8. In the event of a tie in the balloting for any office, the chair of the Nominating Committee, or the executive director acting on his or her instructions, shall prepare an electronic ballot listing the tied candidates and the Council shall decide between such candidates no later than April 1.

Sec. 9. All persons elected to association office in the annual winter election shall assume office on the following July 1.

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## **Bylaws, Article IX: Regional Chapters**

Sec. 1. The Council shall pay such annual rebates to each regional chapter as it deems appropriate, consistent with the goal of fostering the general health and fiscal stability of both the association and the regional chapters. By a two-thirds vote, the Council shall fix the amount of chapter rebates and the date upon which any change of rate becomes effective. The amount shall be based on individual members dues received by the American Studies Association during a calendar year.

Sec. 2. A chapter's rebate shall be paid within one month of the executive director's receipt from the appropriate chapter officer of a detailed accounting of the chapter's income and expenditures for the immediately preceding year.

Sec. 3. The executive director shall provide annually without charge to each chapter a list of association members in that chapter.

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## **Bylaws, Article X: Professional Ethics**

Sec. 1. Individuals with powers of nomination may not nominate their own spouses or family members to offices in the association. In the case of nominations made by the Executive Committee, the Council, the Nominating Committee, or any other association board, committee, or body, individuals who are part of such nominating bodies should disqualify themselves from discussion or consideration of spouses or family members for association offices.

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## **Bylaws, Article XI: Public Issues**

Sec. 1. The Executive Committee is empowered to speak for the association on public issues where these directly affect our work as scholars and teachers. Such issues include, but are

not restricted to, academic freedom; freedom of access to information; appointments to and policies of granting and funding agencies.

Sec. 2. The Executive Committee is empowered to speak for the association on public issues where these directly affect our ability to safely meet in national or regional conventions, and freely conduct our business. Such issues include, but are not restricted to, the passage or existence of anti-sodomy laws; laws and regulations which restrict freedom of speech, or the availability of abortion (considered as a health measure); or laws and regulations tending to discriminate against particular classes or groups of association members.

Sec. 3. Should an issue arise which, in the opinion of the Executive Committee or Council, seems to require public action, speech or demonstration by the association at a particular annual meeting, the Council shall meet to formulate a response. The Council shall convene an emergency meeting of the membership on the first full day of the annual meeting, to recommend a course of action, and conduct a public discussion of the issue(s); and the vote of two-thirds of those in attendance may approve the recommended action.

Sec. 4. The association may not intervene, directly or indirectly, in any political campaign for or against a candidate for public office. The association may not endorse candidates, contribute to campaigns, raise funds, distribute statements or become involved in any other activities that may be beneficial or detrimental to a candidate.

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## **Bylaws, Article XII: Association Trust and Development Fund**

Sec. 1. The Trust and Development Fund shall have as its main purpose to insure the long-term, financial stability of the association in accordance with Article VIII, Section VI, of the Constitution of the American Studies Association. The Fund may also from time to time make small grants in support of the projects, activities, or prizes of the association.

Sec. 2. The Executive Director shall deposit all funds contributed to the American Studies Association, its projects, activities, or prizes, in the Trust and Development Fund. All such contributions shall be promptly acknowledged in accordance with Internal Revenue Service rules and regulations for 501(3) (c) tax-exempt organizations.

Sec. 3. The interest and dividend income of the Trust and Development Fund may be used during the fiscal year for the purposes of the association's incorporation to the extent authorized by the Internal Revenue Service and the District of Columbia. No expenditure shall be made from the Fund's principal balance or capital gains. All surpluses at the end of the fiscal year shall be assigned to the Fund's principal balance.

Sec. 4. The fiscal year budget for the Trust and Development Fund shall be available for distribution to the membership of the association at the annual business meeting of the Council. A public accountant at the end of the association's fiscal year shall audit the financial accounts of the Fund. The Fund shall have a June 30 fiscal year-end.

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## **Bylaws, Article XIII: Amendment of the Bylaws**

Sec. 1. These bylaws may be altered, amended, or repealed at any business meeting of the Council by a resolution adopted by two-thirds of the voting members, provided that such changes have been set forth in the notice of such meeting mailed to the Council members at least thirty days prior to the meeting. Council members unable to attend a business meeting for a valid reason may submit a proxy in writing to the executive director prior to the meeting in accordance with Article IV, Section 5, of these bylaws.

Last updated May 2013

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIMON BRONNER, MICHAEL ROCKLAN, )  
CHARLES D. KUPFER, and MICHAEL L. ) Civil Action No.  
BARTON, ) 16-cv-00740-RC  
Plaintiffs, )  
v. )  
LISA DUGGAN, CURTIS MAREZ, )  
AVERY GORDON, NEFERTI TADIAR, )  
SUNAINA MAIRA, CHANDAN REDDY, )  
and THE AMERICAN STUDIES )  
ASSOCIATION, )  
Defendants. )  
-----)

- - -

Wednesday, August 23, 2017

- - -

30(b)(6) Deposition of The American Studies  
Association, by and through its designee, JOHN  
STEPHENS, PH.D., taken at the offices of Veritext  
Legal Solutions, 1250 I Street Northwest, Washington,  
D.C., beginning at 10:11 a.m., before Nancy J. Martin,  
a Registered Merit Reporter, Certified Shorthand  
Reporter.

1 and November 25, 2013?

2 A. Yes.

3 Q. Was -- is there any record of a deadline for  
4 eligibility to vote prior to November 24, 25, 2013?

5 MR. SEAMAN: Objection. Scope.

6 THE WITNESS: I didn't know, and no one knew,  
7 actually, there would be a vote until November 25.  
8 That is, the council had not decided to put it out for  
9 a vote until November 25. There had been no  
10 discussion at the previous meetings about putting it  
11 out for a vote. That discussion took place at the  
12 Sunday meeting.

13 BY MS. GROSS:

14 Q. Is there any place in the bylaws that  
15 accounts for suspending the provision in the bylaws  
16 that says that membership is reactivated upon payment  
17 of dues in arrears?

18 MR. SEAMAN: Same objection.

19 THE WITNESS: Not that I'm aware of.

20 BY MS. GROSS:

21 Q. Okay. Has this ever happened at any time  
22 that you recall?

23 A. No.

24 Q. This is the only time that this kind of  
25 action was taken?

1           A. Well, we have had times when we've proposed  
2 amendments to the constitution or the bylaws of the  
3 association, and those have been placed on the end of  
4 an election ballot where we elect officers, counselors  
5 nominate committee members.

6           Q. And with respect to that election, people can  
7 pay dues in arrears the day of the election and vote;  
8 correct?

9           MR. SEAMAN: Scope.

10          THE WITNESS: The people have -- the ballot  
11 is issued, more or less, on January 15. And the  
12 closing date is March 1, and people can renew up to  
13 March 1. And assuming that their order is processed  
14 by the back offices of the credit card processor and  
15 the Johns Hopkins Press, then that person would be  
16 eligible to vote on that day.

17 BY MS. GROSS:

18          Q. And so the experience of members in the ASA  
19 who, if they're procrastinators like me, who always do  
20 things at the very last minute, the experience of  
21 those people is that they can wait until a day before  
22 an election, pay their dues, and vote?

23          A. Yes.

24          Q. And there was nothing warning anybody prior  
25 to this election that "If you haven't already paid

1 your dues in arrears as of November 25, we're telling  
2 you right now on November 25 you're not going to be  
3 able to vote"?

4 A. The way in which they --

5 MR. SEAMAN: Can I have a standing objection  
6 to this line? This is a new line.

7 MS. GROSS: I thought we had a standing  
8 objection for the whole -- if it's about being outside  
9 the issues, which I don't think I am -- you think I  
10 am. But I thought that we had a standing objection  
11 with respect to being outside the 30(b)(6) issues. If  
12 not --

13 MR. SEAMAN: Well, why don't you go back to  
14 inside the scope of the notice. So I'm just -- as you  
15 change lines of questioning, I'm asking for standing  
16 objections just to be fair.

17 MS. GROSS: That's fine. I'm going to ask  
18 you to not make them speaking objections so that we  
19 don't sit here all day.

20 MR. SEAMAN: That's not a speaking objection.  
21 I'm just objecting to the scope. That's not a  
22 speaking objection.

23 MS. GROSS: So you can say, "object to  
24 scope," and that takes three syllables.

25 MR. SEAMAN: I'm trying to save time,

1 actually, believe it or not, because I'm trying to  
2 preserve a line of questioning that I consider to be  
3 outside the scope.

4 MS. GROSS: You're trying to save time by my  
5 not asking the questions. That doesn't save time on  
6 my end.

7 MR. SEAMAN: I'm not telling him not to  
8 answer. I'm trying to preserve the record. That's  
9 all.

10 MS. GROSS: Okay.

11 Q. I'm going to go back and ask you that  
12 question again.

13 A. It was a long question. It seemed to be  
14 several questions, like a compound question.

15 Q. Oh, listen to your lawyerly terminology.

16 A. Is that lawyerly?

17 Q. Compound question. If we were in trial, he  
18 could have made that objection.

19 A. I don't know. That sounds like city council  
20 meetings.

21 Q. Okay. I last asked you, and so the  
22 experience of members in the ASA who, if like me,  
23 procrastinate and do things like pay their bills at  
24 the very last minute, their experience is that they  
25 can pay their arrears the day before a vote and

1 they'll be able to vote?

2 A. This is true, and it's true that all votes  
3 previously were taking place during the winter.

4 Q. But there had never been a situation before  
5 where somebody would find out, before they had the  
6 opportunity to pay their arrears, that they had  
7 already missed the deadline to vote in an election?

8 A. The only thing -- or the one thing that  
9 would -- where this was stated or signaled was on the  
10 election ballot itself, which said --

11 Q. Which nobody got before November 25 because  
12 there was no decision there was going to be a vote.

13 A. Right.

14 Q. So up to the day that they were already  
15 banned from voting, they had no previous awareness  
16 that if they didn't pay their dues on time, this vote  
17 would happen and they would already be banned from  
18 taking part?

19 A. Well, no one would have known that because no  
20 one knew there was going to be a support vote until  
21 November 25.

22 Q. But on November 25 when that group got  
23 together and said, "We're going to do a support vote,"  
24 they could have said, "So let's give folks five days  
25 to get their money in arrears to pay up their debt so

1 that they can take part"?

2 A. Yes.

3 Q. But they didn't do that?

4 A. No.

5 Q. Okay.

6 A. The ballot stated "Active members of the  
7 association" --

8 Q. But nobody got the ballot before it was too  
9 late --

10 A. No. I'm just saying that's -- you're asking  
11 me what the indication or the heads up might have  
12 been, and that was the indication or the heads up.

13 Q. Okay. So to clarify, that heads up came  
14 after it was too late to fix it?

15 A. Could you rephrase that.

16 Q. That heads up that you weren't going to be  
17 able to vote came after it was too late for people to  
18 pay their arrears and be able to vote?

19 A. They froze the membership roster on  
20 November 25.

21 Q. With no warning?

22 A. That was the board decided to freeze that --

23 Q. I hear you.

24 A. -- and they told me to instruct Johns Hopkins  
25 to hold all orders for membership until the vote was

1 over.

2 Q. And do you have records of that  
3 communication?

4 A. Either -- I don't have -- wait, yes. But  
5 it's not an E-mail record. The instructions I sent  
6 over to the associate director of the press asking him  
7 to have his tech guy set up the ballot. Along with  
8 that I sent instructions to the board to freeze the  
9 membership roster as of November 25.

10 Q. Okay.

11 A. So that meant that anybody who tried to  
12 vote -- somebody could have gone in and placed an  
13 order, and there were people that, on both sides of  
14 the issue, that attempted to do so. But their order  
15 wasn't officially -- or wasn't supposed to be  
16 officially recorded until December 15, or whichever  
17 the final date of the vote was, the due date of a  
18 ballot was.

19 MS. GROSS: Okay. So -- okay. I lost my  
20 real-time. I'm not sure what happened.

21 MR. SEAMAN: Would this be a good time to  
22 take a break?

23 MS. GROSS: Sure.

24 (A recess was taken from 2:19 p.m.

25 to 2:23 p.m.)

1           And he said that "We had a CSR, customer  
2 service representative, that was not at the meeting  
3 where we discussed these issues of who was eligible  
4 and who wasn't."

5           And I said, "Okay. So how should we handle  
6 this? What should we do? I don't think that vote  
7 should be counted."

8           And he said, "I agree with you." And since  
9 all votes are date stamped, we were able to identify  
10 the voter and cancel the vote.

11           Q. Okay. Were you able to confirm that there  
12 was only one other person?

13           A. According to Johns Hopkins Press and its  
14 spokesperson.

15           Q. Okay. Is there documentation of the  
16 nominating committee's nominating process?

17           A. There is documentation of the rules and  
18 procedures that the nominating committee is expected  
19 to follow. There is a schedule of work that I issue  
20 to the committee each year, and criteria that they're  
21 given is primarily drawn from the bylaws. I give them  
22 deadlines, and they're instructed to select candidates  
23 from active members of the association, and there are  
24 guidelines there that this final slate, not  
25 necessarily a final outcome, should reflect a

1 diversity of the association's membership and  
2 diversity including standard affirmative action  
3 definition, but also geographic -- the large research  
4 institutions, small colleges, now even by employment  
5 status. So we have a position for adjunct and  
6 contingent faculty on the committee. So they get  
7 these instructions that they're supposed to do, and  
8 they're supposed to nominate the best, qualified  
9 people for the particular positions.

10 Q. How do they -- I mean you've got 4,000,  
11 estimate, people and, you know, they need to pick two  
12 people to run against each other for president. Is  
13 there any documentation of how that decision is made?

14 A. They will get a membership roster. They will  
15 then install the members of the association that are  
16 current members. They're instructed to select  
17 candidates from that list because those are the  
18 members. They're also advised that if they wish to  
19 nominate someone who has been a member and has  
20 forgotten that they are a member, as long as they  
21 renew their membership and are eligible to serve, then  
22 they might be considered. So they get that.

23 They are advised to look -- if they want to  
24 find out what service and offices people have held,  
25 they can go to our website and look in the front

1 section of our annual meeting programs going back to  
2 1996, and it will list all the board and committee,  
3 council members, et cetera, going back to that time.

4 The deliberations are held separate from the  
5 staff. They don't include me. They don't include the  
6 elected officers currently. And they don't include  
7 any other board members. So it's an independent  
8 nominating committee that works apart from the  
9 appointed and elected officers and board members of  
10 the association.

11 That doesn't mean that they don't talk or ask  
12 questions or communicate, but they're not prohibited  
13 from communicating; that is, the nominating committee  
14 is not prohibited from communicating with the current  
15 officers. In fact, sometimes they're encouraged to  
16 find out what the issues are that the association is  
17 facing so that they can advise potential candidates  
18 who have questions about what they're inheriting, what  
19 that would be.

20 Q. Is there --

21 A. In other words, are you willing to run for  
22 office --

23 Q. When this is going on?

24 A. "What do I have to do? What is going on? I  
25 hear about this. How much work is this? What are the

1 things that the association is doing," and so forth.

2 Q. If I was to tell you that from the year 2011  
3 'til the present time every person slated to run for  
4 president was a vocal if not heavily invested  
5 supporter of BDS or USACBI, would that surprise you?

6 A. Yes, because I can think of at least two  
7 people who were very skeptical of this and --

8 Q. Who ran for president within the past five  
9 years?

10 A. Oh, in the past five years? Since 2013? Is  
11 that right with --

12 Q. Remember, I don't have the most recent year.  
13 So that's why --

14 A. Are you starting with Curtis Marez? Because  
15 presidents before -- Matthew Jacobson was our  
16 president in 2012 --

17 Q. Yeah. Yeah. I'm starting with Curtis  
18 Marez --

19 A. Okay.

20 Q. -- and the person he ran against. Both  
21 people slated for president that year.

22 A. Okay.

23 Q. Same with the next year, Lisa Duggan and the  
24 person she ran against. That was Avery; right?

25 A. Okay. I get those two.

1 Q. And then the year after that as well.

2 A. David Whitaker and David Eng.

3 Q. Yes.

4 REPORTER MARTIN: David what?

5 THE WITNESS: Eng, E-n-g. Okay.

6 BY MS. GROSS:

7 Q. And then the year -- the one right now is  
8 where I saw the trend end.

9 A. Okay.

10 Q. Otherwise, that's what I saw. That doesn't  
11 surprise you?

12 A. I don't think either candidate this past  
13 year --

14 Q. I didn't notice anything this past year  
15 there, to be perfectly honest.

16 A. Well, it takes time to work things through.

17 Q. So --

18 A. A different nominating committee.

19 Q. And how did the nominating committee members  
20 become members of the nominating committee?

21 A. Nominating committee nominates candidates for  
22 president, for counsel and for nominating committee.

23 Q. Right. So there's a self-perpetuating issue  
24 there, isn't there?

25 A. Potentially, yes.

1 MR. SEAMAN: Objection. Form.

2 BY MS. GROSS:

3 Q. Okay. Were any Jewish people nominated for  
4 president in those same years --

5 A. I don't know everyone's religion.

6 Q. Are you aware of anyone who you know is  
7 Jewish or that you would suspect to be Jewish?

8 A. Again, I don't know who -- I believe that  
9 there are Jewish members of the current board.

10 Q. Of the board, yes, but of the people -- well,  
11 I don't know. But I'm speaking of the people  
12 nominated to run for president. What about executive  
13 officers; right? So that executive council, tell me  
14 how that works. You've got the president, the past  
15 president, and the president elect?

16 A. Right.

17 Q. And then you've got some number of members  
18 from the council who are appointed to be on the  
19 executive board; is that right?

20 A. From the council.

21 Q. Right. So some people are sort of elevated  
22 from the council to also be on the executive board?

23 A. Typically, on the basis of their willingness  
24 to do the work.

25 Q. Okay. So that's -- who picks them?

1           A. Well, the president will nominate -- what we  
2 did -- what we've done in the past several years, past  
3 two or three years is we've put out a call to the  
4 current members of the council, and we've asked them  
5 to self-nominate. And then the president gets to  
6 pick -- or the president elect gets to pick a person  
7 who's in the cohort of which he or she was elected  
8 president.

9           Q. Say that again.

10          A. So, in other words, if I'm elected president  
11 in 2017 and there are five council members who are  
12 elected in 2017, I get to pick one of the people who  
13 is willing to do the work or volunteer to do the work.

14           The person who is the next president gets the  
15 same privilege. So of those five people nominated  
16 that year -- and these are the regular members, not  
17 the student or -- you know, we have two student  
18 members or the international member. They are the  
19 at-large members. So that's how it works internally.

20          Q. I'm going to read to you the members of the  
21 executive committee for the year 2013 through 2014.

22          A. Okay.

23          Q. Curtis Marez, I guess he was the current  
24 president. Lisa Duggan, president elect; Matthew Frye  
25 Jacobson, former president; Karen Young, Chandan

1 Reddy, Nikali Palestine.

2 A. Okay.

3 Q. Are you aware of any of those people being  
4 opposed or uncertain about the resolution?

5 A. Yes.

6 Q. Who?

7 A. Nikali actually said to the executive  
8 committee that they needed to proceed with the utmost  
9 caution, that they were temporary custodians of the  
10 association, and that they need to understand that  
11 future incarnations of their body, the executive  
12 committee or the council, may very well wish to act  
13 differently, and they needed to respect their role,  
14 which was a temporary one.

15 Q. Okay. So he's written publicly about  
16 Palestine and Israel?

17 A. Yes.

18 Q. And you're aware of his view --

19 A. Yes.

20 Q. -- on the political issue?

21 A. He said that the board meeting --

22 MR. SEAMAN: I'm just going to interject.  
23 Again, my continuing objection to this line.

24 THE WITNESS: He said that the board needed  
25 to put its responsibilities to the association first.

1        Whatever their judgment at the end would be, that that  
2        should be their first order of business. And he was  
3        supported on that by two members, along with Matthew  
4        Jacobson, at the May 2013 executive committee meeting.  
5        He was supported by Priscilla Wold.

6        BY MS. GROSS:

7            Q. Who was not a member of the May 2013 -- oh,  
8        you're going to the previous year now.

9            A. Yes. Yes.

10          Q. Oh. Okay.

11          A. And what I'm referring to is as the  
12        resolution was first being presented. Okay. That was  
13        presented, or the prospect of a resolution was being  
14        discussed. So Priscilla Wold agreed with Matthew  
15        Jacobson and with Nikeel Singh that the board needed  
16        to behave going forward as a board.

17          Q. So that year, 2012 to 2013, which ends in  
18        June of 2013 --

19          A. Would have had two Jewish members of the  
20        executive committee, two Jewish presidents.

21          Q. -- and the fiscal year when the vote actually  
22        took place, Matthew Frye Jacobson, he's still on it  
23        because he's past president and you can't get rid of  
24        him.

25          A. Yes.

1 Q. Everybody else --

2 A. Was not.

3 Q. -- and had open and known views about the  
4 Palestinian question?

5 A. I didn't know it at the time. I do so now.

6 Q. You do so now. Not just because I'm saying  
7 it, but you understand that now?

8 A. Well, as I referred earlier in the -- I went  
9 to that website, the US- --

10 Q. USACBI?

11 A. And I noticed a number of names I recognized.

12 Q. Okay.

13 A. But I didn't know this before.

14 Q. And then if you were to look at the entire  
15 council for that year, 2013 to 2014, I'm going to  
16 leave out the international person and --

17 A. The students.

18 Q. -- the students.

19 Do the students vote?

20 A. Yes.

21 Q. Okay. And their vote counts the same as a  
22 nonstudent?

23 A. Yes.

24 Q. So we have Jennifer DeVere Brody, Ann  
25 Sevetkavic. I'm not sure if I'm pronouncing these

1 right. Lisa Duggan, a defendant, Avery Gordon, a  
2 defendant. Matthew Frye Jacobson. A. Patrick  
3 Johnson. Is that a student or --

4 A. No. He's a faculty member.

5 Q. Okay. We have Ms. Kehaulani Kauanui.

6 A. Uh-huh.

7 Q. And she's a founding member of USACBI; right?

8 A. Okay.

9 Q. Marisol LeBron. She's a student. Karen  
10 Young. Sunaina Maira, Martin Manlansin. Is that a  
11 student?

12 A. No. He's faculty.

13 Q. Does he have public views that you're aware  
14 of?

15 A. No.

16 Q. Curtis Marez. Roya Rastegard, that's a  
17 student. Curtis, defendant. Sunaina is a defendant.  
18 Chandan Reddy, defendant.

19 REPORTER MARTIN: Slow down, please.

20 MS. GROSS: Sorry.

21 Q. Chandan Reddy, C-h-a-n-d-a-n. Juana Maria  
22 Rodriguez?

23 A. Right.

24 Q. Maria Josefina Saldana-Portillo --

25 REPORTER MARTIN: Maria what?

1 MS. GROSS: Josefina Saldana-Portillo.

2 Q. And Nikali Palestine.

3 So excluding the students and excluding the  
4 international members, more than half of the members  
5 of the National Council were not just people who  
6 internally had a preference for the resolution but  
7 were outspoken, hard-working advocates for USACBI and  
8 for the boycott of Israel; correct?

9 A. If -- I mean I recognize that now. I didn't  
10 know what people's views or affiliation, whatever.

11 Q. Do you think that when people were voting to  
12 make these members of the National Council, did they  
13 know?

14 A. I think you're asking did they state this in  
15 the candidate statements?

16 Q. Or -- well, I have the candidate statements.  
17 So I know what they say there, but is there discussion  
18 about this outside of the candidate statements because  
19 the candidate statements don't say, "I am a founding  
20 member of USACBI"?

21 A. Okay.

22 Q. None of them do.

23 So my question is how do people know that  
24 both of the candidates that are up for president are  
25 vocal advocates for this issue?

1           A. Well, I wouldn't know that people were  
2 founding members of USACBI unless they announced it.

3           Q. Okay. Or generally about they're strong  
4 advocates for this position, which did you have some  
5 sense of that running the administrative office?

6           A. To be honest, I didn't know what BDS was  
7 until May of 2013.

8           Q. I think you're the only member of ASA who  
9 feels that way.

10           MR. SEAMAN: Object to the form.

11           THE WITNESS: Well, I mean if you look at how  
12 many people didn't vote and how many people did vote,  
13 there's --

14 BY MS. GROSS:

15           Q. Okay. Do you think that there was a higher  
16 turnout for the vote among people who wanted the  
17 resolution as opposed to people who had no idea what  
18 was going on or didn't want it?

19           A. I'm sure.

20           MR. SEAMAN: Object to form.

21 BY MS. GROSS:

22           Q. Was your answer, "I'm sure"?

23           A. I'm sorry?

24           Q. Was your answer, "I'm sure"?

25           A. I mean I would imagine that the people who

1 wanted to pass the resolution would have made every  
2 effort to vote in favor of the resolution. I mean  
3 it's almost a truism.

4 Q. And if you're an American studies professor  
5 in Ohio who, you know, goes to the conference once  
6 every five years if there's a particular paper you're  
7 interested in, you may have no idea; is that right?

8 MR. SEAMAN: Objection to form.

9 THE WITNESS: I don't know how to answer  
10 that.

11 BY MS. GROSS:

12 Q. Okay. Okay. Did you find any documents in  
13 your search related to USACBI?

14 A. No.

15 Q. No references to the term?

16 A. No.

17 Q. Okay. Did you find materials pertaining to  
18 the nomination of Yasbir Puar to the nominating  
19 committee?

20 A. No.

21 Q. You didn't find a statement or anything?

22 A. Only the candidate statement that I received  
23 from her during the year she stood for election.

24 Q. Okay. Did you turn that over to counsel?

25 A. That is in -- that is in the election

1 booklets that I have.

2 Q. Okay.

3 A. I think I turned it over. I'm not --

4 Q. Okay.

5 A. No. No. What I did was I turned over the  
6 URLs to those election booklets --

7 Q. Okay.

8 A. -- which are on a site that I verified as  
9 still operating at the Johns Hopkins Press.

10 Q. Okay.

11 A. So the syntax will take you to the candidate  
12 statements from the election of 2016, election of  
13 Robert Warrior back to, I think the election of either  
14 Kevin Gaines or Ruth Wilson Gilmore.

15 Q. Okay.

16 A. That was the 2009 and 2010, or 2008, 2009  
17 elections.

18 MS. GROSS: I dare say that I just need to  
19 look over my notes to make sure I didn't miss  
20 anything. Actually, hold on. I do need -- the rest  
21 of this, I do have some left, but it's very quick, and  
22 then you're going to be going home, which I'm sure  
23 that you will appreciate.

24 THE WITNESS: My dog will appreciate it.

25 MS. GROSS: I will appreciate it.

1 (Pause in proceedings.)

2 BY MS. GROSS:

3 Q. What kind of software is used for budgeting  
4 and finances?

5 A. Excel.

6 Q. Okay. No fancy, homemade --

7 A. No.

8 Q. -- or, you know --

9 A. My budgets are typically based on precedent  
10 and the end of the year financial statement, with  
11 adjustments that -- for special projects, such as the  
12 website build or the purchase of the encyclopedia --

13 Q. Okay.

14 A. -- where we're, in a sense, applying to  
15 ourselves for a grant.

16 Q. I hope you get it. Is there any sort of  
17 remote access to a network for people working --  
18 including interns unpaid as well as only you paid  
19 working at ASA?

20 A. When we had a task force to produce the white  
21 papers, the task force worked through Google docs, but  
22 these were set up on a project-by-project or a  
23 one-time basis.

24 Q. Okay. Was there one for resolution-related  
25 issues?

1 A. I don't believe so.

2 Q. Would you check?

3 A. No. I don't have -- if there was one, it was  
4 not one I had access to --

5 Q. Okay.

6 A. -- or knew existed because I think a lot of  
7 that took place on Facebook or over E-mail, which I've  
8 lost.

9 Q. Who has an ASA E-mail address aside from you?

10 A. No one.

11 Q. All right.

12 A. We had generic addresses to research, to  
13 publications, to annual meetings, to newsletters, and  
14 I have allowed my graduate assistants for the first  
15 time to -- the way you can configure that is that even  
16 though the newsletter address will say research at the  
17 ASA.net, it will be the person's name and not the --  
18 it will be the person's name, but the E-mail address  
19 will still be research. The way you can --

20 Q. I think I know what you mean.

21 A. It's when you set it up, you can assign a  
22 user or a name to that particular E-address. And two  
23 people can share an E-mail address while working on --  
24 staff, graduate students on the same project. So  
25 right now I have two people working on a conference.

1 So they can share an E-mail address.

2 MS. GROSS: Okay. That's clever. If we can  
3 take a short break so I can just look at my notes and  
4 make sure I asked everything I meant to ask, but I  
5 think that I'm largely finished. So that's nice.

6 (A recess was taken from 3:43 p.m.  
7 to 3:54 p.m.)

8 MS. GROSS: Okay. I just have one area I'd  
9 like to go back to briefly, and then I'll be ready to  
10 close.

11 Do you want to question and rehabilitate at  
12 all?

13 MR. SEAMAN: I think I'll have just one.

14 MS. GROSS: Okay.

15 Q. So, Mr. Stephens, a little while ago I had  
16 asked you about the nominating committee and how they  
17 go about making selections. You noted that there is a  
18 provision in the bylaws that requires that the  
19 nominating committee reflect the diversity of the  
20 membership.

21 A. That the slate --

22 Q. The slate. Excuse me. And that's --

23 A. Not the results.

24 Q. Let me say that question again so that in the  
25 transcript we have an excerpt of it being properly

1 asked.

2 You mentioned previously that there's a  
3 provision in the bylaws that requires that the slate  
4 of candidates for office set out by the nominating  
5 committee reflect the diversity of the membership.

6 A. That's correct.

7 Q. In your time at the ASA, do you have a  
8 recollection of that bylaw being enforced?

9 A. Yes.

10 Q. Can you tell me about that.

11 A. Very often the slates do reflect the  
12 diversity of the association along the criteria that  
13 are expressed. However, the results of the election  
14 are often -- more often skewed toward the research  
15 institutions and people who have a record of  
16 publication or have a public persona that's well known  
17 to the voters.

18 So unless, as we did this past year, we pair  
19 adjunct contingent faculty, we would not succeed in  
20 getting an adjunct contingent faculty person elected  
21 to the board in an at-large election.

22 Q. Okay. So that, I understand. You set aside,  
23 or the ASA sets aside a position that would only be  
24 filled by an adjunct or a contingent?

25 A. In that particular --

1 Q. In that particular -- okay.

2 A. And when the elections are for the at-large  
3 seats, there's considerable bias towards people who  
4 are well known, who are well published, or who in some  
5 way are popular or who are, as I said, at a research  
6 institution where a graduate school may exist.

7 Q. Can you name a research institution or two so  
8 I have a better --

9 A. UCLA is a research -- one institution.  
10 Notre Dame is a research one, NYU, Harvard.

11 Q. So when was this incident when there was an  
12 issue, a question of whether or not the slate was  
13 diverse?

14 A. It wasn't so much an incident. It was after  
15 the election when the results come in and people say,  
16 "Well, you had this slate, but you wound it up with  
17 the same outcome. You're basically -- you don't have  
18 people who are -- whose primary purpose is teaching,"  
19 or "You don't have people who are of a particular  
20 age." It used to be people of a particular  
21 demographic. Diversity was a very strong issue. In  
22 the '80's it had to do with gender, or in particular  
23 it was sex.

24 Q. So, first of all, what year was it, or  
25 approximately, when the positions set aside for an

1 adjunct or contingency --

2 A. This year was the first year, after receiving  
3 several years of complaints, that that voice wasn't  
4 recognized. That's kind of a blow-back from 2008  
5 because contingency is the No. 1 issue in the academy  
6 right now.

7 Q. What is "contingency"?

8 People who hold part-time jobs at three or  
9 four institutions without benefits and get paid on a  
10 per-course basis and don't have a regular salary.

11 REPORTER MARTIN: And don't have a regular  
12 salary?

13 THE WITNESS: And don't have a regular  
14 salary.

15 You're paid by the course. So you can wind  
16 up teaching a full course load, say four or five  
17 courses for \$28,000 a year. 70 percent of the  
18 positions in universities now are contingent or  
19 nontenurable.

20 BY MS. GROSS:

21 Q. Okay. So you would agree with me that  
22 contingency in your employment or being an adjunct  
23 professor is not a category that is watched and  
24 enforced by the EEOC?

25 A. Right.

1 Q. It's not religion, race, nationality, gender;  
2 right?

3 A. Right.

4 Q. And yet it is an issue with respect to  
5 diversity among the membership at ASA that there was a  
6 change made to ensure that that type of diversity was  
7 reflected?

8 A. Yes. And the reason is that somewhere in the  
9 area of 50 to 60 percent of our membership is in that  
10 category, and there's no one who actually wears  
11 that -- was wearing that suit or outfit that was --  
12 that had a voice on the board.

13 Q. 50 or 60 percent of --

14 A. Are either graduate students or contingent or  
15 part time or nontenurable -- you know, nontenurable  
16 faculty; that is, they hold lines that they will  
17 never -- that will never result in tenure.

18 Q. How long has that been such a large  
19 proportion?

20 A. It began in a huge way in 2008 with the  
21 recession, and it's been reported on extensively, even  
22 in the mainstream press like the New York Times or The  
23 Post as the No. 1 phenomenon within the economics of  
24 higher education. So if you send your child to Yale,  
25 the odds are very, very good that you won't meet a

STATEMENT OF ELECTION TO ACCEPT  
OF THE  
AMERICAN STUDIES ASSOCIATION

TO: The Recorder of Deeds  
Washington, DC

Pursuant to the provisions of the District of Columbia Non-Profit Corporation Act, the undersigned corporation elects to avail itself thereto:

FIRST: The name of this corporation is the American Studies Association.

SECOND: A resolution recommending that the corporation accept the District of Columbia Non-Profit Corporation Act, was adopted in the following manner: The resolution was adopted at a meeting of the Council of the American Studies Association, serving as the Association's Board of Directors, which meeting was held on October 21, 1971, at a which a quorum was present, and the resolution received the vote of a majority of the council members (directors) in office, which method of adoption, in accordance with the Association's By-Laws, is an acceptable alternative to having the resolution adopted by the Association's members.

THIRD: The corporation is organized exclusively for educational and academic study purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law).

(1) Except as restricted herein, the corporation shall engage in any and all lawful activities incidental to the foregoing purposes including but not limited to the study of American civilization. Among the specific ways in which the corporation shall attempt to achieve this objective are the following: facilitating communication among those disciplines which deal with phases of American civilization; fostering interdisciplinary research;



encouraging the establishment of regional societies for American studies; and attempting to attract interested laymen to membership in the Association.

(2) The property, assets, profits and net income of this corporation are irrevocably dedicated to educational purposes and no part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its directors, officers, or other private persons, except that the corporation is authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in this paragraph THIRD.

(3) No officer, Council member, or member of the corporation, or any private individual shall be entitled to share in the distribution of any of the corporation assets upon dissolution of the corporation.

(4) No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

(5) Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on by an organization exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law) or by an organization, contributions to which are deductible under Section 170 (c)(2) of the Internal Revenue Code 1954 (or the corresponding provision of any future United States Internal Revenue Law).

(6) In the event that the corporation shall at any time be a private foundation within the meaning of Section 509 of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law), the corporation, as long as it shall be such a private foundation, shall distribute such income as may be necessary in each taxable year to such time and in such manner as not to subject the corporation to tax under Section 4942 of said Code, and shall be absolutely prohibited from and shall refrain from engaging in the following acts:

- a. Any act of self-dealing, as defined in Section 4941(d) of said Code.
- b. Retaining any excess business holdings, as defined in Section 4943(c) of said Code.
- c. Making any investment in such manner as to subject the corporation to tax under Section 4944 of said Code.
- d. Making any taxable expenditures, as defined in Section 4945(d) of said code.

FOURTH: The corporation shall have members. Membership in the Association shall be open to institutions and organizations interested in the study of American civilization as determined by the Council (Board of Directors). FIFTH: The corporation shall be divided into five classes of members. The designation of each class of members is as follows:

FIFTH: The corporation shall be divided into five classes of members. The designation of each class of members and their qualifications are as follows.

- a. Institutional Member – Institutions that contribute \$50.0 per year to the Association;

- b. Sponsoring Member – Persons who contribute \$25.00 or more per year to the Association.;
- c. Regular Member – Persons who pay the annual dues of \$15.00;
- d. Student Member – Students who pay an annual dues of \$5.00; and
- e. Retired Member – Former members who have retired or reached the age of 65 years who pay an annual dues of \$5.00.

The By-Laws shall provide for the rights and limitations of the members of each class and the conferral, limitation or denial of the right to vote.

The five classes of members shall receive the American Quarterly and any other publications of the Association. The proportionate amount of annual dues to be paid by the respective classes as well as other qualifications or requirements of each membership classification may be amended by a majority vote of the Council.

SIXTH: The By-Laws shall provide for the manner of the election or appointment of Council members (directors) and officers.a

SEVENTH: The By-Laws shall provide for the regulation of the internal affairs of the corporation.

EIGHTH: Upon the dissolution of the corporation, the Council (Board of Directors), after paying or making provision for the payment of all of the liabilities of the corporation, shall distribute all assets of the corporation to such organization and organizations operated exclusively for charitable, educational, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Board of Directors shall determine.

NINTH: The address, including street and number, of the corporation's registered office in the District of Columbia is Suite 800, 1001 Connecticut Avenue, N.W., Washington, D.C. 20036, and the name of its initial registered agent at such address is Richard J. Medalie.

TENTH: The names and respective addresses, including street and number of the corporation's officers are as follows:

<b>Name</b>	<b>Office</b>	<b>Address</b>
Robert H. Walker	President	c/o George Washington University Washington, DC
Robert Sklar	Vice President	c/o University of Michigan Ann Arbor, Michigan
Arthur P. Dudden	Executive Secretary	University of Pennsylvania Bennett Hall Philadelphia, Pennsylvania 19104
Allen F. Davis	Treasurer	c/o Temple University Philadelphia, Pennsylvania
Donald N. Koster	Bibliographer	c/o Adelphi University Garden City, New York

ELEVENTH: The names and respective addresses, including street and number of the corporation's Council members (directors) are as follows:

<b>Name</b>	<b>Address</b>
Betty E. Chmaj	c/o Wayne State University, Detroit, Michigan
Richard Beale Davis	c/o University of Tennessee, Knoxville, Tennessee
Charles H. Foster	c/o University of Minnesota, Minneapolis, Minnesota
Eugene Leach	c/o Yale University, New Haven, Connecticut
Michael McGiffert	c/o University of Denver, Denver, Colorado
Charles P. Peavy	c/o University of Houston, Houston, Texas
Lois Rudnick	c/o Brown University, Providence, Rhode Island
James H. Stone	c/o San Francisco State College, San Francisco, California
Wilcomb Washburn	c/o Smithsonian Institution, Washington, DC 20560
Carl Bode	c/o University of Maryland, College Park, Maryland
Archibald J. Byrne	c/o University of Illinois, Chicago, Circle, Chicago, Illinois
Thomas C. Cochran	c/o University of Pennsylvania, Philadelphia, Pennsylvania
Richard H. Collin	c/o Louisiana State University, New Orleans, Louisiana
Kenneth E. Davison	c/o Heidelberg College, Tiffin, Ohio

Hugh D. Hawkins  
Richard L. Herrstadt  
Arlin Turner  
Thomas Casey  
Francis S. Grubar

c/o Amherst College, Amherst, Massachusetts  
c/o Iowa State University, Ames, Iowa  
c/o Duke University, Durham, North Carolina  
c/o Marist College, Poughkeepsie, New York  
c/o George Washington University, Washington, DC  
20006

Mary Land  
Roderick Nash  
John J. Reed  
Albert Stone  
Henry Wasser

c/o Washington State University, Pullman, Washington  
c/o University of California, Santa Barbara, California  
c/o Muhlenberg College, Allentown, Pennsylvania  
c/o Emory University, Atlanta, Georgia  
c/o Richmond College, City University of New York,  
New York, New York

AMERICAN STUDIES ASSOCIATION

By: \_\_\_\_\_  
President

ATTEST:

\_\_\_\_\_  
Executive Secretary

2065976

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

- - - - - x  
SIMON BRONNER, MICHAEL ROCKLAND, CA No. 1:16-cv-00740-RC  
CHARLES D. KUPFER and  
MICHAEL L. BARTON,

Plaintiffs, Washington, D.C.  
v. Wednesday, August 15, 2018  
2:00 p.m.

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

Defendants.

- - - - - x

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TRANSCRIPT OF STATUS CONFERENCE  
HELD BEFORE THE HONORABLE RUDOLPH CONTRERAS  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Civil Action 16-740, Simon  
3 Bronner, et al., v. Lisa Duggan, et al.

4 Will counsel please approach the podium and  
5 identify yourselves for the record.

6 MR. MARCUS: Jerome Marcus for the plaintiff and  
7 my colleague Jennie Gross is with me.

8 THE COURT: Good afternoon.

9 MR. SEAMAN: Jeff Seaman, Your Honor, for  
10 Defendant ASA, Tadiar, Maira, Reddy, John Stephens -- and I  
11 think I've got everybody here -- and Curtis Marez. Also  
12 with me today is Tom Mugavero.

13 MR. MUGAVERO: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 MR. KLEIMAN: Good afternoon, Your Honor. Mark  
16 Kleiman appearing for the Defendants Kehaulani Kauanui and  
17 Jasbir Puar.

18 THE COURT: Welcome to the party.

19 MR. KLEIMAN: Thank you, Your Honor.

20 MS. LAHOOD: Good afternoon, Your Honor. Maria  
21 LaHood with the Center for Constitutional Rights  
22 representing Defendant Steven Salaita. Thank you.

23 THE COURT: Welcome aboard.

24 All right. What are the discovery disputes about?

25 MR. MARCUS: Should I approach the podium?

1 THE COURT: Sure.

2 MR. MARCUS: Your Honor, we are back in discovery  
3 after the Court dissolved the stay and we've sent the  
4 defendants a letter which identifies a series of issues.  
5 With respect to the existing defendants, the issues that I'm  
6 about to discuss are live. With respect to the new  
7 defendants, the only issue is that their initial disclosures  
8 were due, I think, on the 16th of July and we don't have  
9 them. So I don't know how Your Honor wants me to proceed.  
10 I can march down the other issues with respect to the other  
11 defendants, if Your Honor wishes.

12 THE COURT: Let's do the initial disclosures first  
13 since that sounds easier.

14 MR. MARCUS: Okay. All right. Well, our position  
15 is very simple. They're due.

16 THE COURT: Okay.

17 MR. MARCUS: There's no stay.

18 THE COURT: Let's hear from the new --

19 MR. MARCUS: August 7th, Your Honor. I beg Your  
20 Honor's pardon.

21 THE COURT: Okay. When do you intend to produce  
22 those things?

23 MR. KLEIMAN: Thank you, Your Honor.

24 It's my client's position that there should be a  
25 stay on discovery as to the new defendants, including the

1 initial disclosures. Let me briefly explain why. If the  
2 Court wants to entertain argument on it, we can, or we could  
3 brief it.

4 Under what we believe are the proper standards, if  
5 we have a -- this is a quote from a couple of Southern  
6 District of New York cases -- a not unfounded basis for  
7 believing and arguing that there are dispositive motions to  
8 dismiss that can be brought, where the discovery really  
9 ought to be balanced -- and you -- the Court should be  
10 comparing the burden on the individual defendants with what  
11 the plaintiffs are going to get. I just want to make a  
12 couple of quick points about this.

13 The first is, we do have a basis for what we think  
14 is an argument that our defendants really enjoy immunity  
15 from suit in this case, and that is the Volunteer Protection  
16 Act. It's a federal statute. It's separate from the  
17 volunteer protection provisions in the D.C. Corporations  
18 Code. There are two things that are unique about it. The  
19 most important one is that unlike the D.C. Code, the federal  
20 Volunteer Protection Act immunizes from liability anybody  
21 whose acts are -- who acts as a volunteer whose acts are  
22 harmful to third parties. In other words, not to the  
23 organization itself. Given the way this case has been set  
24 up, until now -- and, yes, I am new to the party -- it  
25 appears as though the VPA immunity would apply because the

1 plaintiffs would have to be able to demonstrate based on  
2 their pleadings that these latter-named defendants had  
3 actually intended to cause harm not to the ASA; not to the  
4 organization, but to these individual defendants. That's  
5 the way the VPA is set up and there's case law interpreting  
6 it that way.

7 The reason that becomes important for us is that  
8 it's a strictly very narrow legal question. It's not as  
9 though there is going to be discovery that the plaintiffs  
10 could propound, nor have they alleged anything suggesting  
11 any animus or intent to harm the individual plaintiffs in  
12 this action. It's a narrow issue. It's one we think this  
13 Court can decide straight up or down in the law. And as to  
14 Dr. Kauanui and Dr. Puar and, I think, some of the other  
15 later-named defendants as well, it would dispose of their  
16 participation in the case completely. So we -- our position  
17 is that we think there should be a stay on Rule 26 and  
18 discovery obligations until we get this resolved. As Your  
19 Honor knows from the order the Court signed just very  
20 recently, motions to dismiss are going to be filed. We've  
21 got a briefing schedule agreed upon. So it's not as though  
22 this is going to be dragged on indeterminately.

23 Thank you.

24 THE COURT: Okay. Thank you.

25 MS. LAHOOD: Thank you, Your Honor.

1 I would just add in addition to the grounds for  
2 dismissal stated and to subject matter jurisdiction grounds,  
3 Dr. Salaita also has a personal jurisdiction defense and I  
4 don't want to do anything to waive that, including possibly  
5 making initial disclosures or producing discovery. Just to  
6 clarify, we did ask plaintiffs to stipulate to extend the  
7 time for initial disclosures until after the motion to  
8 dismiss is decided and they all -- they also haven't made  
9 initial disclosures to the new defendants.

10 THE COURT: Okay.

11 MS. LAHOOD: Thank you.

12 MR. MARCUS: Just with respect to the last point,  
13 Your Honor, nobody is -- we don't have an obligation to make  
14 initial disclosures and -- been requested.

15 I find it a little odd that a month-and-a-half  
16 after this stay was dissolved -- defendants were served in  
17 February -- there's no motion for a stay. If I wanted a  
18 stay, I would come to a court and ask for one. I would file  
19 a paper. That's the way that's done. And to simply refuse  
20 to produce the discovery and then, when they're called on  
21 the carpet, to say, Oh, well, I really think there ought to  
22 be a stay and, maybe, someday, I'll file a motion asking for  
23 one, it seems to me, is totally inappropriate. This Court  
24 has had four facial attacks on the complaint. Four. Three  
25 of them have been rejected; one is still under

1 consideration. At this point, it seems to me really beyond  
2 the pale that the defendants say, Oh, well, maybe, the whole  
3 case really is going to go away and, therefore, I have no  
4 obligation to produce discovery.

5 So our position is the Court, I think, has heard  
6 everything that needs to be heard. I would suggest,  
7 although the federal statute has not been invoked, the first  
8 requirement is that the defendant has the burden of  
9 demonstrating that they were acting within the scope of  
10 their responsibilities. I don't see how anybody could read  
11 our complaint without it being clear that we alleged that  
12 they were not acting within the scope of their  
13 responsibilities. That's our allegation; that they were  
14 breaching their obligations to the organization. The new  
15 defendants have been added at a time when their conduct  
16 involves simply putting their hands into the cookie jar and  
17 taking cookies out to do what they want. They're taking  
18 money out of the endowment to spend on their pet projects at  
19 the expense of the organization. There's no more simple  
20 violation of a breach than that. If the defendants want to  
21 brief it, that's fine, but the idea at this point  
22 two-and-a-half years after this case started that we're  
23 still talking about facial attacks on the complaint that  
24 would justify stopping the train, I think, is just silly.

25 THE COURT: All right.

1 MS. GROSS: If I may -- Jerome, may I?

2 MR. MARCUS: Please.

3 THE COURT: When is the motion to dismiss due?

4 MS. GROSS: I believe that's the 27th of this  
5 month.

6 MR. SEAMAN: That's correct. August 27th.

7 MS. GROSS: If I may just briefly add a point --  
8 and I did brief this in the last set of briefs -- what  
9 they're talking about with respect to the federal statute is  
10 an affirmative defense, and I have two points about that.  
11 The first is, the law is incredibly clear in this Circuit  
12 and we briefed it in detail that you have to plead the  
13 affirmative defense in the answer, and then discovery having  
14 to do with the factual issues underlying the affirmative  
15 defense must go on before the Court can make a decision, you  
16 know, at the motion-to-dismiss phase. And I've cited  
17 numerous cases having, you know -- that are quite clear  
18 about this point that whether it's a state statute for  
19 exculpation of either a Director or of a volunteer -- and it  
20 is no different with respect to a federal statute -- if you  
21 want exculpation, you plead it. You give the other side the  
22 opportunity to do discovery on the factual issues underlying  
23 that affirmative defense and then both sides brief it to the  
24 Court and the Court makes a decision based on that  
25 information.

1 THE COURT: Okay. So simultaneous to your motion  
2 to dismiss, file a motion to stay and, to the extent that  
3 you're asking as you did here today that it -- I not -- no  
4 discovery, including initial disclosures, be accomplished  
5 until I rule on the motion to dismiss, you're going to have  
6 to make some sort of showing of a burden on the individual  
7 defendants and then I'll decide that before I decide the  
8 motion to dismiss.

9 All right. Let's hear the other discovery issues  
10 with respect to the prior defendants.

11 MS. GROSS: Okay. So you know, just so that  
12 there's -- everything is clear here, all the issues that I'm  
13 about to discuss have to do with discovery that was served  
14 on the defendants before the second amended complaint. None  
15 of this involves the new defendants who are represented here  
16 by the new counsel today.

17 The first issue is that we had served a second set  
18 of requests for production on Defendant ASA only. It was a  
19 short set of requests. All of those issue -- all of the  
20 requests clearly derived from the original complaint -- the  
21 first amended complaint and that set of requests was served  
22 in February. The stay began before the 30 days were up --  
23 about 9 days before the 30 days were up. Adding those 9  
24 days to when the stay ended, that material would have been  
25 due in July, and I think the exact date is July 16th. In

1 this letter that lists a number of discovery disputes, this  
2 is the first one. We received nothing. And when I say  
3 nothing, I mean no response document; clearly no discovery  
4 documents; no objection; no -- and we didn't even hear then  
5 or until just the past day or so -- couple of days this  
6 argument that that discovery should be stayed. There should  
7 be no discovery. It's clear that this discovery is related  
8 to the ongoing issues from the first amended complaint that  
9 are not different and not minimized in the second amended  
10 complaint. There's no -- that first amended complaint has  
11 survived not just one but numerous attacks and there's no  
12 basis for a stay of discovery on issues related to the first  
13 amended complaint. So that's -- the first issue is the  
14 discovery served in February on only Defendant ASA, not the  
15 other individual defendants, that has just not been  
16 received; not responded to; not even an argument to us that,  
17 I think a stay is appropriate, until just the past few days;  
18 just lack of acknowledgement that it happened.

19 The second issue is slightly complicated, not  
20 very. You may recall that last October, we were here and  
21 defendants' counsel explained to the Court and to us for the  
22 first time that they had used search terms to identify a set  
23 of documents that, then, they put through the TAR process.  
24 And Your Honor asked us at the time, did we know about the  
25 search terms? We had -- we did not. You had ordered them

1 to produce those search terms to us and to talk with us  
2 about it. A few days later, I received those search terms.  
3 I looked at them and I was okay with them which I told the  
4 other side. Months later when we were in a dispute over the  
5 use of the TAR -- because, as Your Honor had also ordered,  
6 they were supposed to work with us and explain to us what  
7 they were doing in the TAR process, but they never did -- we  
8 were working with our consultants who said to me, you know,  
9 Jennie, get this report. This will help me understand what  
10 they did. I asked for the report. It turns out the report  
11 includes the search terms that they used. And the search  
12 terms that they used to identify the documents that were  
13 even going to start the process were far more restrictive  
14 than the ones that they told us that they were going to use  
15 and that we had agreed to, including that the wild cards  
16 were eliminated such that "harass" which, under the terms  
17 that I had agreed to, would include "harass, harassed,  
18 harassment," now only included "harass". Aside from the  
19 elimination of the wild cards which is a very big deal -- if  
20 you have done much electronic searching, I'm sure you  
21 understand -- other terms were just eliminated or string --  
22 put in string searches that restricted the volume of  
23 documents that they'd pull up.

24 So when I saw this list, I said to opposing  
25 counsel, you know, Wait a minute. Is this list of search

1 terms that I'm seeing numbers and reports for in this report  
2 that we asked you for? These aren't the search terms that  
3 you used to collect the documents. And it took weeks of my  
4 bugging them until they would give me an answer and,  
5 finally, the answer was, Yes. We've restricted the search  
6 terms more so that it would be, you know, more precise; more  
7 accurate. Your Honor had ordered them to show us the search  
8 terms. We did agree to the first set of search terms they  
9 gave us -- I gave them no argument about it -- and they used  
10 a different set.

11 In my conversations with opposing counsel, it's  
12 been explained to me that it's approximately 8,000 documents  
13 that they think would have been encapsulated by the set of  
14 search terms that we thought they were using but were not  
15 encapsulated by the set of search terms that they did use.  
16 In conversations prior to the stay, counsel informed me that  
17 they were just going to produce them, and so we had not yet  
18 moved to compel them which I would have done in January, but  
19 I thought that they were coming. That's another issue on  
20 this list of six issues. I've still not heard from the  
21 other side that they are going to produce them or that they  
22 have a change of opinion and that they're not going to  
23 produce them. My only understanding is that they apparently  
24 think that this should be covered by the same stay that they  
25 think that the previous set should have been covered by.

1 Okay?

2 THE COURT: Okay.

3 MS. GROSS: Do you want for them to respond and  
4 then I'll come back?

5 THE COURT: Yeah, let's get them to respond to  
6 those first couple of issues.

7 MS. GROSS: Sure.

8 MR. SEAMAN: Thank you, Your Honor. I'll address  
9 them in serial.

10 The first issue has to do with the second request  
11 for production of documents. The documents they've  
12 requested are a list of all members of the association at  
13 various points in time and how they voted; what their  
14 addresses are; what theirs names are; and how they voted on  
15 the resolution. That is not information that we possess.  
16 That -- it's true. We have not had a conversation with the  
17 other side about this, and the reason we haven't had a  
18 conversation with the other side about this is, as  
19 everybody's already said, the position of these defendants  
20 as well as the new defendants is that discovery should be  
21 stayed in this case. And I'll -- I'm happy to address that,  
22 if the Court wants to hear that. I would like to address  
23 that now, because I think it's, sort of -- from the  
24 30,000-foot view, that is probably the -- from our  
25 perspective, the primary issue and if that -- or I can

1 address the nitty-gritty on each of the individual issues,  
2 but from the 30,000-foot view, we feel very strongly about  
3 the likelihood -- well, I'll put it a different way -- about  
4 our arguments for dismissal of this entire case. Some of  
5 those arguments have already been addressed in memoranda  
6 before the Court in the most recent round of memoranda, and  
7 we intend -- it's no secret in this room -- we intend to  
8 include that same argument in another motion to dismiss that  
9 we're going to file by August 27th.

10 Our view on discovery altogether, Your Honor, is  
11 that if it's going to take a month or two or three to  
12 resolve this issue about whether this case should even be  
13 before this Court -- and that is one of the principal  
14 arguments in our motion to dismiss -- it will be, and  
15 there's no -- nobody's going to be surprised by that -- is  
16 whether this Court even has subject matter jurisdiction. To  
17 date, we have produced over 100,000 images to the  
18 plaintiffs. It is true, as Ms. Gross pointed out, we did  
19 have a conversation shortly before the Court issued the stay  
20 order about resolving this issue that had to do with the  
21 production that we made in the fall of 2017 and there were  
22 problems. And we -- after talking with Ms. Gross and Mr.  
23 Marcus about it, we recognized them. We proposed a  
24 resolution where we were going to review what we've been  
25 calling the delta, the difference between what would have

1       been produced by the original terms that we used to gather  
2       documents and the ones that we actually used in the TAR  
3       process. And I'm happy to address that in detail, if the  
4       Court wants, but right now, I'd like to talk about the  
5       motion to dismiss. It is true that we addressed that --

6               THE COURT: What -- the basis of your motion to  
7       dismiss is the federal statute that they indicated that they  
8       were going to assert in theirs?

9               MR. SEAMAN: No, Your Honor. No.

10              THE COURT: What is it?

11              MR. SEAMAN: Well, there were several. One is --  
12       the primary -- a primary one is that the Court doesn't have  
13       subject matter jurisdiction. There is a -- this is the  
14       second amended complaint that doesn't allege \$75,000 of  
15       damage to the individual plaintiffs. And in our view,  
16       that's what has to happen, and that hasn't happened. That's  
17       a nutshell version of the argument.

18              THE COURT: Didn't I address that in my first  
19       opinion?

20              MR. SEAMAN: I don't think so, Your Honor. The  
21       first motion to dismiss was oriented towards the ASA. The  
22       motions to dismiss for lack of subject matter jurisdiction  
23       had to do with the ASA as the, quote-unquote, victim of the  
24       alleged acts of the defense. At that point, the Court had  
25       not determined that this was not properly a derivative

1 action. So we did not address the absence of allegations of  
2 \$75,000 worth of damage to each individual plaintiff which  
3 now has to be the case. That has been challenged. We  
4 brought it up on our last round of memoranda; that the  
5 plaintiffs didn't respond to it, and we intend to do it  
6 again, but it is different. It's a different argument from  
7 the one that was made prior and, in our view, the outcome  
8 should be different, of course.

9 THE COURT: And I -- okay. I understand it's a  
10 different argument. Couldn't it have been raised before?

11 MR. SEAMAN: It possibly could have been raised  
12 before, Your Honor. I don't think that's a -- it could have  
13 been. Subject matter jurisdiction is always an issue for  
14 the Court.

15 MR. MUGAVERO: May I step in briefly, Your Honor?

16 THE COURT: Yeah.

17 MR. MUGAVERO: I believe the answer to Your  
18 Honor's question is, it was raised in this last round of  
19 motions. The Court, in a footnote, noted that while it had  
20 been raised, it needed, I believe the phrase was, a  
21 well-fashioned motion to dismiss in order to be ripe. We  
22 can't promise that the motion to dismiss will be  
23 well-fashioned, but it will, in fact, be a motion to  
24 dismiss.

25 THE COURT: Okay.

1 MR. MUGAVERO: Thank you. Excuse me.

2 MS. GROSS: May I briefly, Your Honor?

3 THE COURT: No, I'm not going to stay discovery  
4 until I get a motion for -- to stay and, in the meantime,  
5 we're going to resolve these discovery disputes and move  
6 forward with the discovery.

7 MR. MUGAVERO: Quick question, Your Honor.

8 THE COURT: Yeah.

9 MR. MUGAVERO: May we be given leave to file that  
10 motion to stay with our motion to dismiss?

11 THE COURT: Yeah.

12 MR. MUGAVERO: Thank you, Your Honor.

13 THE COURT: You can file it sooner if you'd like  
14 as well, but --

15 MR. MUGAVERO: Fair enough.

16 THE COURT: -- in the meantime, we're going to  
17 move forward.

18 So let's address the two discovery issues that  
19 have been teed up.

20 MR. SEAMAN: Okay. Your Honor, the -- with regard  
21 to the set of documents that we were talking about before,  
22 the several thousand documents --

23 THE COURT: Well, let's -- the first one was the  
24 issue about the February discovery on ASA which they say  
25 there has not even been a response yet.

1 MR. SEAMAN: That's right, Your Honor. We have --  
2 we -- those are not documents we possess, but I have  
3 contacted Johns Hopkins University Press which handles that  
4 realm of information. And I've contacted them. I have a  
5 schedule to talk to them next week about it, the Editor of  
6 the journal.

7 THE COURT: So when do you expect to provide a  
8 response to that --

9 MR. SEAMAN: I could provide that in -- I don't  
10 know what the Editor's going to tell me. So I don't know if  
11 it's even available. So I can't answer the question. I  
12 could get responses within three weeks, but I don't know if  
13 I can have documents. I can't tell the Court that I can  
14 have documents within three weeks. I can have responses.

15 THE COURT: All right. Get those responses to  
16 them within three weeks.

17 MR. SEAMAN: On the next issue, Your Honor, the  
18 documents that were the subject of the dispute over TAR back  
19 in November, we will -- part of the arrangement was -- or  
20 the agreement, we offered to -- the plaintiffs' main issue  
21 was -- and they may address this, but I'm going to  
22 summarize -- they didn't like TAR. They had a lot of  
23 problems with TAR and how the process worked. So after some  
24 time recognizing that, we decided we were going to put eyes  
25 on this bundle of documents that was the difference between

1 the original search terms and this -- and -- the October  
2 search terms and the search terms that we --

3 THE COURT: Is her recounting of the chronology  
4 correct that you guys originally told them that you used  
5 certain search terms and that turned out to be erroneous?

6 MR. SEAMAN: The terms that we gave them were the  
7 terms we used to collect documents; then we -- then  
8 during -- it's correct that during the TAR process, we used  
9 a narrower version of search terms. And our view is, that's  
10 no different from putting eyes on the -- it's another method  
11 of culling documents which is what we were doing.

12 THE COURT: I -- you're not going to convince me  
13 of that. It's different.

14 All right. So where are we with the delta between  
15 the one set of search terms and the other set of search  
16 terms?

17 MR. SEAMAN: Your Honor, we need to arrange a team  
18 of temporary attorneys to review those documents. The last  
19 round where we had -- I think we had about 15,000 documents  
20 --

21 THE COURT: How many documents? You said, 15,000?

22 MR. SEAMAN: Well, there -- what -- the globe of  
23 what we'd have to review for this, I think it's as -- it's a  
24 little larger than what Ms. Gross said. I think it's closer  
25 to 10,000.

1 MR. MARCUS: Ten thousand pages or 10,000  
2 documents?

3 MR. SEAMAN: Documents.

4 MR. MARCUS: That's a few boxes.

5 THE COURT: All right. How long do you think it  
6 will take to go through those?

7 MR. SEAMAN: Well, to arrange the team and get it  
8 reviewed, probably about the same time. Three weeks.

9 THE COURT: All right. Go ahead and do that.  
10 All right. What is the third issue?

11 MS. GROSS: Yes, Your Honor.

12 So the third issue has to do with the privilege  
13 log. And so we received a privilege log covering everything  
14 that had been produced in February and there were 413  
15 entries on that privilege log. When I reviewed the  
16 privilege log, I saw that 181 of them included at least one  
17 if not a number of people who clearly would destroy any  
18 privilege between a, you know -- having to do with a  
19 communication between an attorney and a client. This was  
20 just apparent from, you know, the headers of the emails.  
21 Aside from that, 188 appeared not to include an attorney at  
22 all. Now, there's some overlap. So it's not 181 plus 188.  
23 There are some that neither included an attorney, and also,  
24 included a number of people who would have destroyed  
25 privilege.

1           So I -- there are 91 remaining entries, entries  
2           that weren't apparently, you know -- wasn't obvious from the  
3           face of the privilege report not actually privileged, but we  
4           couldn't tell in many of those cases who was the attorney  
5           and who was the client. We just didn't know for sure that  
6           there wasn't someone there defeating privilege. I sent a  
7           letter to opposing counsel, including, attached to that  
8           letter, a list. These are all of the ones -- these are the  
9           Bates numbers for all of those documents that you've claimed  
10          to be privileged that seem clear to us to include at least  
11          one person who destroys privilege; Exhibit-B, here's a list  
12          of all of those that don't seem to have any attorney on them  
13          at all; C, here are all of those that have both of those  
14          problems; and then I said, With respect to the rest, we  
15          would like an amended log that specifies to us, you know,  
16          what are the relationships here such that you claim that  
17          there's an attorney-client privilege involving a  
18          communication in this document. No response to that letter.  
19          I sent that letter in February; no response in any way,  
20          shape or form, not even to say, I got your letter. It's  
21          going to take a while. So I raised it again in the same  
22          July 11th letter.

23                   Thank you, Your Honor.

24                   THE COURT: All right.

25                   MR. SEAMAN: Your Honor, I was going to say, it

1 would be helpful to have a specific identification of those  
2 documents. What Ms. Gross says is she sent me that. If I  
3 have that, I'll look at it. I don't recall that.

4 THE COURT: You don't recall the July --

5 MR. SEAMAN: I don't.

6 THE COURT: -- 11th letter?

7 MR. SEAMAN: I do recall --

8 MS. GROSS: We're happy to give it to you --

9 MR. SEAMAN: -- the July letter.

10 MS. GROSS: -- now again.

11 MR. SEAMAN: I do.

12 MR. MARCUS: We'll give it to you right now.

13 MS. GROSS: We're happy to give you --

14 MR. SEAMAN: I do have the July letter.

15 Our view is that in the -- the privilege log  
16 complies with Rule 26(d). We've provided the --

17 MR. MARCUS: Here you go, again. (Indicating.)

18 MR. SEAMAN: The privilege log has, on the far  
19 right-hand corner, an explanation of the reason for the  
20 claim; that either it's got "attorney" in the string; it's  
21 discussion of attorney-client material; or it's work  
22 product; or it is anticipation of litigation. It's  
23 discussions about advice of counsel in each one of those.  
24 We think we've complied with Rule 26(d).

25 THE COURT: All right. All right. What I'd

1 like to --

2 MR. SEAMAN: It provides the sufficient  
3 information to enable them to evaluate whether or not  
4 there's a privilege.

5 THE COURT: Okay.

6 MR. SEAMAN: I --

7 THE COURT: What I'd like you to do is submit to  
8 the Court a sampling of what you think are the 30 worst  
9 examples and why you think they don't comply.

10 And then you can respond to that.

11 And then I'll look at those 30 in camera under  
12 seal.

13 MS. GROSS: Okay. So as we pick out the 30, we  
14 can only do it based on, you know, the people that are on  
15 it. We don't have any more information about it --

16 THE COURT: No, but pick -- obviously, pick ones  
17 that don't appear to have an attorney involved and -- or  
18 have a -- the third party that you think vitiates the  
19 confidentiality --

20 MS. GROSS: Yes.

21 THE COURT: -- and then they can respond to why  
22 they think it -- that's not a problem and -- for these  
23 documents and then I'll take a look at the documents.

24 MS. GROSS: Okay. So we're going through the list  
25 quickly --

1 THE COURT: Okay.

2 MS. GROSS: -- which is good.

3 So when we received the major production from  
4 defendants in October, you know, we understood that a  
5 certain amount of documents were withheld because they were  
6 privileged and what we didn't know was that 6,000 documents  
7 were withheld as potentially privileged. Those 6,000  
8 documents didn't end up on the privilege list. I figured  
9 out that there were 6,000 missing documents because my  
10 consultant was bringing in those reports and, you know, I  
11 used to be a policy analyst. So I did a little math and I  
12 realized that there's stuff missing. And after numerous,  
13 numerous requests of opposing counsel asking, Why do I feel  
14 that there is a 6,000-document discrepancy? I finally  
15 received an answer -- I believe it was in January -- saying,  
16 Well, you know, there are a number of documents that we  
17 think could be privileged, but we haven't figured out if  
18 they're privileged yet or not.

19 Now, to be fair, after ongoing discussion about  
20 this, I did receive a set of documents that, you know, are  
21 purportedly those documents, and all we are asking for is to  
22 be clear that we have now received -- except for those  
23 documents that are on the privilege log, we have now  
24 received every document that was ever withheld for being  
25 potentially privileged or for any other reason. And in

1 other words, we're looking for some sort of certification  
2 because there have been so many issues here where, you know,  
3 there were documents withheld that we didn't know about and  
4 then we found out numbers didn't match and then we get an  
5 answer later. And I would say part of what I'm saying here  
6 is, I don't know what I don't know. After four or five  
7 times finding out that, Hey, there's a discrepancy between  
8 what I asked for and what I got and the numbers don't match,  
9 you know, I don't know what I didn't find, and I would like  
10 -- we would like some sort of certification that, with  
11 respect to the documents that came up in the search, they've  
12 all been produced except for those that fall into this  
13 category of privileged or this category of whatever so that  
14 we know what we're talking about. So I've asked -- I asked  
15 defendants for that in this letter, as well.

16 THE COURT: Okay.

17 MS. GROSS: And I can give you the last issue, if  
18 you like --

19 THE COURT: No, let's --

20 MS. GROSS: -- or we can do these one at a time.

21 THE COURT: Let's hear that one.

22 MR. SEAMAN: Judge, the answer is yes, except for  
23 those documents which we haven't reviewed yet. The ones  
24 that we just talked about earlier.

25 THE COURT: Okay.

1 MR. SEAMAN: So the answer's yes.

2 THE COURT: So absent the 10,000 or so that you're  
3 going to produce in three weeks, everything that you have  
4 deemed responsive has been produced except for those that  
5 are documented in the privilege log?

6 MR. SEAMAN: I -- well, I think the question was  
7 whether they -- what they're looking for is some sort of  
8 certification that we've produced everything other than what  
9 was privileged; that in other words, we're not holding back  
10 stuff that isn't -- that we're claiming is privileged. And  
11 the answer is with all -- with the exception of those that  
12 we're going to review in what we've been calling the delta,  
13 yes. Among those documents, we still need to review to see  
14 whether those are privileged.

15 THE COURT: Oh, I understand. But other than  
16 those 10,000 or so that you were referring to as the delta,  
17 there's not a group of documents that you're still  
18 considering whether you're going to assert privilege over or  
19 any other category that hasn't been -- that's responsive but  
20 hasn't been produced?

21 MR. SEAMAN: That's right, Your Honor. That's  
22 right.

23 THE COURT: All right.

24 MS. GROSS: So I appreciate hearing that, and I'm  
25 glad that it's on the record.

1 I just want to add that there is a set of about  
2 1,000 documents that, even with the numbers that counsel has  
3 given me for the subsets of documents that were potentially  
4 privileged and so on and so forth, still, the numbers don't  
5 match. I've asked him about it numerous times. The emails  
6 that I have received about it is, I'm asking my consultants  
7 to try to figure out what it is. So I don't know if there's  
8 anything more aside from that set of 1,000 or so documents,  
9 but at least that set does exist and we'd like to know why  
10 we don't have those or why those numbers don't match.

11 THE COURT: Okay.

12 MS. GROSS: The --

13 THE COURT: Let me hear from him on that -- on the  
14 mystery of the 1,000 documents.

15 MR. SEAMAN: Frankly, Your Honor, I don't know the  
16 answer. I don't know about 1,000 documents that are not --  
17 I wouldn't -- from our end, what I can do is look at  
18 documents and decide, as a lawyer, whether they're  
19 privileged or not, and that's what I can do. I'm not sure  
20 how to identify the 1,000 documents. Perhaps there's a  
21 reference in the letter that counsel's talking about about  
22 some that were not produced originally because one of the  
23 search terms was misspelled. I think we remedied that  
24 situation and I've got -- counsel's probably going to  
25 address that next. Perhaps that's an explanation, but I

1 don't know what the explanation is. I can say to the Court,  
2 what we've done is reviewed documents; held that which we  
3 believed to be privileged for whatever reason; identified  
4 the privilege to the plaintiff. That's my answer, Your  
5 Honor.

6 THE COURT: All right.

7 MS. GROSS: This would be an email from myself to  
8 Mr. Seaman; Mr. Mugavero; Mr. Marcus was also on the email  
9 as well as Mr. Hathway.

10 This report states that 18,090 documents were  
11 identified by the model as high responsiveness. We  
12 understand that the model identified 17,060 documents as  
13 responsive from our previous communications, and also, the  
14 search term report run on the set of documents marked  
15 responsive that you provided in December.

16 THE COURT: Slow down so the reporter can get it  
17 all.

18 MS. GROSS: Sorry.

19 Please explain the difference of 1,030  
20 documents -- underlined -- between the number of documents  
21 the TAR process identified as high responsiveness and the  
22 number of documents identified for production, and please  
23 let us know whether the production of documents that went  
24 through TAR will total 17,060 minus privileged documents or  
25 18,090 minus privileged documented, and it goes on.

1 MR. MARCUS: What's the date of that email?

2 MS. GROSS: February 13th, 2018.

3 MR. SEAMAN: Your Honor, may I?

4 THE COURT: You may.

5 MR. SEAMAN: This is -- this kind of discussion is  
6 why we agreed at great cost to the association to put the  
7 TAR process aside in the next step. We're going to put  
8 human beings on reviewing documents. I suspect the answer  
9 will -- we may not be able to answer that particular  
10 question. We're not using TAR anymore. We're going to put  
11 people on reviewing the documents that have not already been  
12 produced and reviewed already. We're going to review those  
13 and produce that which is responsive and not privileged. I  
14 think that should take care of it.

15 MR. MARCUS: Your Honor, I have to confess, I'm  
16 mystified as to why we had to be convened in the federal  
17 court in order to get answers to these questions. I just  
18 don't understand it. My colleague sends inquiry after  
19 inquiry. She stood up here and discussed five issues and  
20 the end of every issue is, I sent a letter and I never got  
21 an answer. And, as I think I suggested to Your Honor  
22 before, we're taking the time of an Article III judge and  
23 all of his staff just to get somebody to answer an email and  
24 I don't understand it. I've never seen anything like this  
25 before.

1 THE COURT: All right.

2 MR. SEAMAN: May I, Your Honor?

3 THE COURT: You may.

4 MR. SEAMAN: The answer to that question, Your  
5 Honor, is, as I said earlier, we believe this case shouldn't  
6 even be before the Court. The plaintiffs --

7 THE COURT: But it is.

8 MR. SEAMAN: -- have cost a great deal --

9 THE COURT: It is, and you have to talk to each  
10 other.

11 MS. GROSS: So we're left with just one last  
12 issue, but just for purposes of making sure that there's  
13 clarity with respect to the issue that was just raised, I'd  
14 like to add a point.

15 This is the first that we've heard that defendants  
16 are not going to use TAR in the next set. And, yes, I think  
17 that my counsel would agree that we think that that's good  
18 news, but, you know, as Your Honor knows, we've briefed the  
19 TAR issue and it's in front of the Court and, in the  
20 meantime, that was no explanation for sets of documents that  
21 never went into the TAR program. So for example, those  
22 documents that did not have the new set of search terms in  
23 them but would have been hit by the old set of search terms  
24 never went into TAR. And so it's not just a question of,  
25 Well, we use TAR because it's a better method of identifying

1 what we think is responsive, because TAR didn't even begin  
2 to narrow the set of documents until after it was narrowed  
3 by the search terms. So it's a very big deal that the set  
4 of documents that went into the TAR process were defined by  
5 this set of search terms that we never agreed to as opposed  
6 to the ones that we did. It's not this process or that  
7 process. It's this process doesn't start until this process  
8 is done. They needed to consult with us on both. They  
9 consulted with us on neither.

10 Okay. With -- the last issue has to do with the  
11 timing or the time frame of documents that were searched  
12 with respect to Defendant Marez. And my understanding is --  
13 and I believe that opposing counsel has acknowledged this,  
14 but it's certainly clear from looking at the universe of  
15 documents that the searches of his documents were limited to  
16 -- let's see if I can find the exact date.

17 (Brief pause.)

18 Yeah. Documents up to and ending in the calendar  
19 year of 2015. So they did not search for; thus, did not put  
20 through TAR; thus, never produced any documents from  
21 Defendant Marez with the date of January 1st, 2016, or later  
22 which is of particular concern now that we understand that  
23 250 million -- excuse me, 250,000, a quarter of a million,  
24 has been taken out of the trust fund in just the past two  
25 years; right? So none of those documents would have

1 appeared in Mr. Marez's discovery, and he was on the  
2 financial committee in that period of time.

3 So I have really two issues with respect to this.  
4 My first is, there's no explanation for why they chose that  
5 date to end the time frame of documents that they would  
6 produce; it's not clear to me if they have placed any other  
7 time frame restrictions on any other defendant's  
8 productions; and we want those documents. They are  
9 relevant, and they don't get to decide without talking to us  
10 or without objecting and bringing it to you that what  
11 they're going to produce ends in 2015. That was the last  
12 issue that was in the letter and, again, no response.

13 THE COURT: Okay.

14 MR. SEAMAN: Judge, our -- with regard to  
15 Professor Marez, he was no longer the President after 2015.  
16 Our understanding was that he was a defendant in his  
17 capacity as a member of the national council. That is the  
18 nature of the claims in this case. The claims and defenses  
19 in this case are what guide in discovery, what's relevant to  
20 those claims and defenses. Professor Marez was -- stopped  
21 being plaintiff -- or rather, President in 2015. We -- what  
22 I informed Ms. Gross was that that's the reason why we  
23 decided to stop or cut off the -- or the production at  
24 December 31st, 2015.

25 THE COURT: Okay. With respect to any other of

1 the individual defendants, was there a similar cutoff used?

2 MR. SEAMAN: We've actually produced documents  
3 into 2017 for Mr. Stephens, Duggan and Reddy and that was  
4 actually, sort of, by happenstance, but with regard to  
5 Curtis Marez whose -- we produced a great volume of  
6 documents from Curtis Marez, and so we were attentive to,  
7 you know, date parameters for that. That's why we stopped  
8 at 12/31/15, Your Honor.

9 THE COURT: Okay. Now, with --

10 MS. GROSS: May I respond?

11 THE COURT: Hold on.

12 With respect to those three other defendants,  
13 Stephens, Duggan and Reddy, were any cutoff -- end-date  
14 cutoffs used?

15 MR. SEAMAN: No specific date cutoffs, Your Honor,  
16 no.

17 THE COURT: Okay. All right.

18 MS. GROSS: There are a number of defendants in  
19 this case who were never President of the ASA. They were  
20 involved in the activities that are alleged in the complaint  
21 and, thus, we think that there are solid claims against them  
22 and we asked for discovery relating to those claims.

23 First of all, one point that opposing counsel did  
24 not make is that it is, I would say, routine or a pattern of  
25 the ASA that after you are President, you are, then, on the

1 financial committee for a certain number of years. Mr.  
2 Marez was one of those people. He was on the financial  
3 committee. He was involved or should have been involved --  
4 because his committee certainly was involved -- in the  
5 decision to change the bylaws such that money could be taken  
6 out of the trust fund, first; and, second, all issues having  
7 to do with spending would have gone through the financial  
8 committee. And so, you know, the argument suddenly that you  
9 have to be a President of the ASA at a particular time in  
10 order to have to turn over discovery materials just makes no  
11 sense. Our claims are what our claims are and to the extent  
12 that they involve a period of time after somebody is the  
13 President, then you turn over those documents. But the  
14 larger question is, why do defendants get to make this  
15 decision and not tell anybody?

16 THE COURT: No, I agree with that point. I'm  
17 at -- somewhat at a disadvantage on this because the two of  
18 you are far more versed in the facts than I. So what I'd  
19 like you to do on that specific issue is file a very short  
20 motion to compel that shows what claims you think the  
21 documents would be responsive to and why he not longer -- no  
22 longer being President doesn't matter, and then they can  
23 respond in due course.

24 MS. GROSS: Yes, Your Honor. Thank you.

25 THE COURT: Do you have any other issues for

1 today?

2 MS. GROSS: Not from that letter. The only other  
3 issue is just -- excuse me, Your Honor. We had raised with  
4 the other side whether they would be willing to do a joint  
5 motion for a new scheduling order. I made it clear that I  
6 didn't necessarily expect that we would agree on what the  
7 scheduling order would say, but that at the current time,  
8 the scheduling order's dates have all long since passed and  
9 it would be nice to have a scheduling order that's current.

10 THE COURT: All right. I, you know -- there comes  
11 a point in some cases where I abandon having people meet and  
12 confer and I think we've gotten to this point. So just file  
13 whatever you think is the appropriate scheduling order and  
14 they can respond.

15 MS. GROSS: Yes, Your Honor. Thank you.

16 THE COURT: All right.

17 All right. Anything from the other side that we  
18 need to resolve today?

19 MR. KLEIMAN: No, Your Honor.

20 MR. SEAMAN: No, Your Honor.

21 MR. MUGAVERO: No, Your Honor.

22 THE COURT: All right. I, you know -- I'm sorry  
23 that I have to abandon any notion that the two of you  
24 will -- can meet and confer in good faith, you know? You --  
25 I hope you do better going forward. I'm not optimistic of

1 that, but, you know, one of the quirks about this District  
2 is that there is far more District Court judges than there  
3 are magistrate judges. So I will personally get involved in  
4 all of it because it will take longer if I refer it to a  
5 magistrate judge and I will keep the case moving.

6 MS. GROSS: Thank you, Your Honor.

7 MR. SEAMAN: Thank you, Your Honor.

8 MR. MARCUS: Thank you, Your Honor.

9 THE COURT: Thank you. You're excused.

10 THE DEPUTY CLERK: All rise. This Honorable Court  
11 stands adjourned.

12 (Proceedings concluded at 2:49 p.m.)

13 \* \* \* \* \*

14 **CERTIFICATE OF OFFICIAL COURT REPORTER**

15 I, **TIMOTHY R. MILLER, RPR, CRR, NJ-CCR**, do hereby certify  
16 that the above and foregoing constitutes a true and accurate  
17 transcript of my stenographic notes and is a full, true and  
18 complete transcript of the proceedings to the best of my  
19 ability, dated this 17th day of August 2018.

20 **/s/Timothy R. Miller, RPR, CRR, NJ-CCR**  
21 **Official Court Reporter**  
22 **United States Courthouse**  
23 **Room 6722**  
24 **333 Constitution Avenue, NW**  
25 **Washington, DC 20001**

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