Nos. 13-CV-1043 & 13-CV-1044

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MICHAEL E. MANN, PH.D.,
PLAINTIFF-APPELLEE,

V.

NATIONAL REVIEW, INC., *et al.*,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM AN ORDER OF
THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

UNOPPOSED MOTION OF DISTRICT OF COLUMBIA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF NO PARTY CONCERNING THIS COURT'S JURISDICTION

The District of Columbia has a significant interest in this Court's interpretation of the free speech rights-implementing protections of the Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.* (the "Act"). Accordingly, consistent with D.C. App. R. 29, the District seeks leave to file the attached brief *amicus curiae* in the above-captioned pending appeal. All parties consent to the motion. Although no briefs on the merits have yet been filed, the Court issued a show-cause order regarding its jurisdiction, and the attached brief would address that topic. The District believes its brief would assist the Court in considering its jurisdiction.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The District of Columbia has a significant interest in this Court's interpretation of the free speech rights-implementing protections of the Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.* (the "Act"). The Council of the District of Columbia sought in the Act to codify a qualified immunity from suit for individuals engaged in constitutionally protected speech who are, as a result, subjected to a meritless civil action. As this Court has long recognized, "the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation." *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002) (internal quotation marks omitted). "This immunity from suit is effectively lost if a case is erroneously permitted to go to trial." *Id.* The District government takes no position whatsoever as to the merits of the underlying tort action in this case. The District's amicus participation here is focused on its interest in this Court recognizing the availability of immediate appeals for speakers on a topic of public interest who are sued and whose motion to dismiss under the Act has been denied by the trial court based on pleadings and a written record.

INTRODUCTION AND OVERVIEW

Through the Act, the Council joined the majority of States in crafting a legislative response to the perceived threat to speech rights from "SLAPPs"—Strategic Lawsuits Against Public Participation. SLAPPs are typically civil actions that arise out of the defendant's communications on an issue of public concern. SLAPPs can be particularly insidious. As noted by the Council's Judiciary Committee Report, such suits "are often without merit, but achieve their filer's intention of punishing or preventing opposing points

of view, resulting in a chilling effect on the exercise of constitutionally protected rights." D.C. Council, Report on Bill 18-893 at 1 (Nov. 18, 2010) ("Comm. Rep."). By imposing the costs and the related burdens of defending a lawsuit, "*litigation itself* is the plaintiff's weapon of choice," *id.* at 4, wielded to chill the speech of the defendant and sometimes that of third parties who would otherwise choose to speak out on a matter of public interest.[1]

To combat the perceived problem, the Council in the Act sought to "ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish," so that "District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id.* The Act provides that a party may seek early dismissal of any claim arising from "an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). In particular, the Council stated explicitly its intent to enact an immunity—to follow the legislatures of other jurisdictions that have extended a "qualified immunity to individuals engaging in protected actions." Comm. Rep. at 4.

The Act's qualified immunity provision works as follows. If a "special motion to dismiss" pursuant to the Act is filed, the claim must be dismissed with prejudice if it arises from an act in furtherance of the right of advocacy on issues of public interest, *unless* the plaintiff can show that "the claim is likely to succeed on the merits," in which case the plaintiff's claim survives. D.C. Code §§ 16-5502(b), (d). In addition, the Act provides for a provisional stay of discovery upon the filing pursuant to the Act of a special motion to

[1] We do not suggest by filing this amicus brief that this suit fits this description.

dismiss, and also for cost-shifting of any ultimate discovery, in the trial court's discretion. D.C. Code § 16-5502(c).

This case arises out of a civil action filed by a nationally known climate scientist against the publisher of a magazine and one of its writers who published a highly critical article about the plaintiff's research and methods, and against a non-profit and an affiliated individual based on the non-profit's hyperlinking to the article on the Internet. The court below found, based on a review of legal doctrine and the pleadings submitted, that while the defendants' comments were made on an issue of public interest, the plaintiff had met his resulting burden of showing that he is likely to succeed on the merits of his libel claims, and denied the special motions to dismiss under the Act. *See* Omnibus Order, *Mann v. Nat'l Review, Inc.*, 2012 CA 008263 B (D.C. Super. Ct. July 19, 2013) at 17 ("*Mann* Omnibus Order") ("The content and context of the statements [by the defendants are] . . . aspersions of verifiable facts that Plaintiff is a fraud."); *id.* at 8-23; Order, *Mann*, 2012 CA 008263 B at 9-22 ("*Mann* Order"). For similar reasons, the Superior Court also denied the defendants' motions for dismissal under Superior Court Rule of Civil Procedure 12(b)(6). *See Mann* Omnibus Order at 23-25; *Mann* Order at 22-24.

Following defendants' appeals, this Court issued a show cause order as to why it should not dismiss for lack of appellate jurisdiction, citing *Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order dismissing appeal of denial of motion to dismiss under the Act), and *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009) (declining to grant interlocutory review of the denial of a motion to dismiss under the then-applicable version of the Oregon Anti-SLAPP Act).

Pursuant to the well-established contours of the collateral order doctrine, however, this Court has jurisdiction over appeals from the denial on legal grounds of an Anti-SLAPP motion to dismiss. "Under the collateral order doctrine, . . . a ruling such as the denial of a motion to dismiss may be appealable if it has a final and irreparable effect on important rights of the parties." *McNair Builders v. Taylor*, 3 A.3d 1132, 1135 (D.C. 2010) (internal quotation marks omitted). This Court has repeatedly "said that the denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus to be immediately appealable." *Id.* at 1136 (internal brackets and quotation marks omitted).

To qualify for this Court's collateral order review, a trial court's order must (1) "conclusively determine a disputed question of law," (2) "resolve an important issue that is separate from the merits of the case," and (3) "be effectively unreviewable on appeal from a final judgment." *Id*. at 1135 (collecting cases). As we demonstrate below, a trial court's order denying a special motion to dismiss under the Act on legal grounds—that is, either the pure application of law or the application of law to factual allegations as laid out and responded to in pleadings, including motions and written responses—satisfies all three elements.[2]

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[2] The Court does not for purposes of this case need to resolve the closer question of whether and to what extent interlocutory review would be available following an evidentiary hearing in the trial court and witness credibility and other factual assessments made by the trial judge as predicate for making a finding on the likelihood of success on the merits under the Act's governing standard. The Court, correctly in our view, has emphasized that to qualify for collateral order review, a trial court ruling, as here, must "turn[] on an issue of

More fundamentally, this application of the collateral order doctrine—long recognized as calling for a "practical . . . construction," *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)—is necessary to implement the Council's clear intent in the Act to provide qualified immunity protections for those exercising their constitutionally protected rights to speak out on a topic of public interest. At the same time, we emphasize that the Court in recognizing such collateral order review should retain its full ability to tailor its review to the equities of this and future such cases. Granting collateral review appeal is *not* tantamount to reversal, and the summary affirmance process—with prompt return of the matter to the District Court for further proceedings—should remain fully available for this or any other appeal reviewing a denial of a motion to dismiss under the Act if it is evident to the Court upon initial review that the trial court's assessment was correct.

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law rather than on a factual dispute." *Heard*, 810 A.2d at 877 (internal quotation marks omitted).

ARGUMENT

I. This Court Has Collateral Order Jurisdiction Over A Trial Court's Order Denying On Legal Grounds A Special Motion To Dismiss Under The Act.

A. A trial court's order denying a special motion under the Act conclusively determines the disputed question of whether to grant dismissal under the Act's qualified immunity protections.

An order conclusively determines a disputed question when "there is no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983). This Court has held that an order denying application of a privilege or immunity conclusively determines a question of law. *McNair Builders*, 3 A.3d at 1136; *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001); *United Methodist Church, Balt. Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990).

Denial of an anti-SLAPP motion is no different. As appellate courts have consistently held, denial of an anti-SLAPP motion "is conclusive as to whether the anti-SLAPP statute required dismissal" because "[i]f an anti-SLAPP motion to strike is granted, the suit is dismissed . . . . [Or] [i]f the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *see also, e.g.*, *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 174 (5th Cir. 2009) (identical reasoning); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147-48 (2d Cir. 2013). Similarly, there is no indication here in the Superior Court's twin orders of 24 and 26 pages, respectively, that it did not conclusively resolve the questions before it as to

whether dismissal under the Act was warranted. *See Mann* Order at 5-23; *Mann* Omnibus Order at 6-22.

B. Such orders resolve an important issue separate from the merits.

Denial of a motion to dismiss under the Act on legal grounds likewise "resolve[s] an important issue completely separate from the merits of the action," *Stein v. United States*, 532 A.2d 641, 643 (D.C. 1987), as that concept is used in the doctrine. A claim of qualified immunity "is conceptually distinct from the merits of the plaintiff's claim" because "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985). A question of immunity is "separate from the merits of the underlying action . . . even though a reviewing court must *consider* the plaintiff's factual allegations in resolving the immunity issue." *Id.* at 528-29 (emphasis added).

Although trial courts' orders denying the defendants' Anti-SLAPP motions will typically involve an assessment of the plaintiff's probability of success, the analysis under Anti-SLAPP statutes on legal grounds likewise resolves a question separate from the merits, as the courts of appeals have repeatedly held. *Batzel*, 333 F.3d at 1025; *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2010); *Henry*, 566 F.3d at 175; *Godin v. Schenck*s, 629, F.3d 79, 84 (1st Cir. 2010). The key is that at the special motion to dismiss stage under the Act, there is no binding or firm determination of whether plaintiff *has* succeeded in his or her claims at trial or has made any particular factual or established legal showing. These differences reflect the important differences between the role of an Anti-SLAPP motion to dismiss of immunizing a defendant from meritless suit and the role of the

ultimate merits determination the finder of fact will make if such immunity is properly defeated. The policy behind the collateral order rule and separability requirements is served by preventing appeals on issues that will be "definitively decided later in the case," and thus promoting judicial economy. *Henry*, 566 F.3d at 175-76. In contrast, the trial court decides the Anti-SLAPP motion "before proceeding to trial and then moves on." *Id.* at 176. Immediate appellate review of the denial of the Anti-SLAPP motion thus "determine[s] an issue separate from any issues that remain before the district court." *Id.*; *see also Batzel*, 333 F.3d at 1025.

Finally, even if some doubt exists as to whether in the disposition of an Anti-SLAPP motion there can be *complete* separation from the merits, given the nature of the immunity, policy interests favor a finding of separability, particularly the goal of avoiding the "chilling effect on the exercise of constitutionally protected rights." Comm. Rep. at 1. As the Fifth Circuit held, applying this precise reasoning in regards to the Louisiana statute, the importance of the interests that statute serves "thus resolves any lingering doubts about separability." *Henry*, 566 F.3d at 177.

C. The district court's order would be effectively unreviewable on appeal from final judgment.

An order is effectively unreviewable on appeal of final judgment if "it involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989) (internal quotation marks omitted). This component of the collateral order doctrine may be satisfied on a showing of two elements. First, the right, fairly construed, must be a right to be free

from *suit* altogether, as opposed to being a more limited "right whose remedy requires the remedy of dismissal of charges." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (internal quotation marks omitted); *see also Mitchell*, 472 U.S. at 526. Second, as noted recently by this Court: the Supreme Court's decision in *Will v. Hallock*, 546 U.S. 345 (2006), "sharpened the threshold analysis for applying the collateral order doctrine by requiring that 'some particular value of a high order' must be 'marshaled in support of the interest in avoiding trial.'" *McNair Builders*, 3 A.3d at 1137 (quoting *Will*, 546 U.S. at 352). What must be at issue is "not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Will*, 546 U.S. at 352-53. Denial of a special motion to dismiss under the Act qualifies under both aspects of this appropriately high standard.

1. The Act creates a qualified immunity from suit.

The Act gives the defendant the qualified right to be free from the burdens of trial or from suit altogether on a claim if the presiding trial judge concludes that the claim arises from an act in furtherance of the right of advocacy on issues of public interest and that the plaintiff has not shown that the claim is likely to succeed on the merits. D.C. Code § 16-5502(b); *see also* Comm. Rep. at 4 (expressly indicating that the right was intended to be a "qualified immunity" right). To help protect this right, the Act grants a rebuttable presumption of a stay of discovery upon the filing of a special motion to dismiss under the Act, and provides for cost-shifting of any ultimate discovery in the court's discretion. D.C. Code § 16-5502(c).

The right not to endure a full trial, or even discovery, unless and until the trial judge, in his or her role as gatekeeper, has properly concluded that a suit can proceed, is plainly a

right that would be destroyed if not vindicated before trial. "[SLAPP lawsuits] are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Comm. Rep. at 1. If appeal had to await final judgment, the weapon would have already been used and the damage done, both to the particular defendants and to any others in the public who may want to vigorously and publicly participate in discussions of important issues affecting the community. *Id.* For the defendant faced with a meritless tort suit designed to intimidate speakers from exercising their First Amendment rights, a subsequent judgment on dispositive motions after a protracted period of discovery or following a trial is insufficient, even with the availability of fees or sanctions. As the Council indicated, the harm it sought to combat is the distraction and the chilling of speech that takes place prior to a judgment and certainly prior to any appeal. *Id.*

Such inhibition of discretionary action or speech is precisely a type of harm that the collateral doctrine is designed to ensure is not inflicted without the possibility of appellate review. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870-71 (1994); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 350 (D.C. Cir. 2007) (in explaining why qualified immunity denials in general satisfy the unreviewability component, noting that "the doctrine . . . do[es] not just protect covered individuals from judgments," but also provides "protection from . . . inhibition of discretionary action"); *see also Schelling v. Lindell*, 942 A.2d 1226, 1229-30 (Me. 2008) ("We allow interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP statute because a failure to grant review of these decisions at this stage would impose . . . the very harm the statute seeks to

avoid, and would result in a loss of defendants' substantial rights."); *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002) ("As in the governmental immunity context, the denial of a special motion to dismiss interferes with rights in a way that cannot be remedied on appeal from the final judgment. The protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process. Accordingly, we hold that there is a right to interlocutory appellate review from the denial of a special motion to dismiss filed pursuant to the anti-SLAPP statute.").

Such a holding will be fully in line with this Court's precedents. This Court has routinely recognized "that an order denying a claim of immunity from suit under the First Amendment satisfies the collateral order doctrine and is thus immediately appealable." *District of Columbia v. Pizzulli*, 917 A.2d 620, 624 (D.C. 2007) (internal quotation marks omitted); *Heard*, 810 A.2d at 877; *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C.*, 680 A.2d at 425-26; *United Methodist Church*, 571 A.2d at 791-92. Although much of this precedent deals with the First Amendment's Establishment Clause and Free Exercise Clause, the chilling of speech that the Act addresses is closely analogous to the interests of religious institutions under those constitutional protections. Just as in appeals involving other types of qualified immunity from trial, and consistent with the holdings of peer federal and state courts of appeals, a holding that prompt appellate review of Anti-SLAPP motions in the District denied on legal grounds is warranted here.

In urging this conclusion, we do not overlook the fact that the Council did not use the word "immunity" in the Act. It would be incorrect to conclude on that basis that this Court

lacks appellate jurisdiction over interlocutory appeals from the denial of Anti-SLAPP motions to dismiss. The controlling analysis of the legislature's intent is substantive, and courts of appeals have, appropriately, repeatedly reviewed the denial of a state Anti-SLAPP statute on interlocutory appeal notwithstanding that the statute did not include the word "immunity." *See* 14 M.R.S.A. § 556 (reviewed in *Godin*, 629 F.3d 79); La. Code Civ. Proc. Art. 971 (*Henry*); Cal. Civ. Proc. Code § 425.16 (*Batzel*); *see also Mitchell*, 472 U.S. at 526-27 (holding that denial of a claim of qualified immunity implied under the federal Constitution satisfied the collateral order doctrine). This Court should go down the same sound path.

The key is the evidence of what the lawmakers intended, and the evidence on that point here is clear. The Council stated its intent to extend "qualified immunity to individuals engaging in protected actions," to help "ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish," and thus to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Comm. Rep. at 4. There can be little doubt that the Act, fairly construed, creates a right that is or is closely akin to a qualified immunity that entitles defendants to collateral order review.[3]

[3] As Judge Weisberg noted in his order staying the proceedings below, the Act's protections do not need to be considered *precisely* an absolute or qualified immunity but are, at a minimum, a right "analogous to a claim of qualified immunity." Order (Oct. 2, 2013) at 2 n.2.

2. Denial of a special motion to dismiss under the Act implicates a First Amendment value of a high order.

Likewise, the denial of a special motion to dismiss under the Act implicates a "particular value of a high order." *Will*, 546 U.S. at 352. The stated purpose of the Act is to prevent a "chilling effect on the exercise of constitutionally protected rights." Comm. Rep. at 1. There can be little doubt that this set of free speech rights that the Act seeks to protect constitutes a "value of a high order." *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Although neither the Supreme Court nor this Court have spoken to that precise question in the context of collateral order doctrine analysis, numerous courts of appeals have, unsurprisingly, embraced this view.

In *Batzel*, decided before *Will*, the Ninth Circuit determined that the denial of motions under California's Anti-SLAPP scheme satisfies this element of the doctrine. 333 F.3d at 1025. "Because the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable on appeal from a final judgment." *Id.* The Ninth Circuit, examining the structure of the statute and legislative history, found that the purpose of California's Anti-SLAPP motion "is to determine whether the defendant is being forced to defend against a meritless claim." *Id.* The court treated "the protection of the anti-SLAPP statute as a substantive immunity from suit." *Id.* at 1025-26.

After *Will*, and following the Ninth Circuit's reasoning in *Batzel*, the First Circuit in *Godin* similarly held that an order denying a special motion to dismiss pursuant to Maine's

Anti-SLAPP statute "would be effectively unreviewable on appeal from a final judgment," since Maine's "'lawmakers wanted to protect speakers from the trial itself.'" 629 F.3d at 85 (quoting *Batzel*, 333 F.3d at 1025).

Likewise, the Fifth Circuit has held in the wake of *Will* that "[t]he denial of [a Louisiana Anti-SLAPP statute] motion satisfies the unreviewability condition." *Henry*, 566 F.3d at 178. This, held the Fifth Circuit, is because "the purpose of [Louisiana's Anti-SLAPP Act] is to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. [Louisiana's Act] thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute." *Id.* The Fifth Circuit observed that "*Will* ultimately held that the denial of a judgment bar motion under the Federal Tort Claims Act was not an immediately-appealable collateral order, as the order had no claim to greater importance than the typical defense of claim preclusion . . . [W]e find guidance in the Supreme Court's emphasis on the vindication of substantial public interests." *Id.* at 180. And it concluded that those interests' "importance weighs profoundly in favor of appealability." *Id.*

Recently, the Ninth Circuit had cause to reaffirm *Batzel* in light of the Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) (holding that disclosure orders rejecting a claim of attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine). In *DC Comics*, the Ninth Circuit again reaffirmed that the denial of motions under California's Anti-SLAPP scheme satisfy this element of the test. 706 F.3d at 1015. The court underscored the importance of the public interests that the statute protects: "It would be difficult to find a value of a 'high[er] order'

than the constitutionally-protected rights to free speech and petition that are at the heart of [the State's] anti-SLAPP statute." *Id.* at 1015-16. Further entrenching Anti-SLAPP protections within the "particular values of a higher order" under *Will*, the court noted that "[s]uch constitutional rights deserve particular solicitude within the framework of the collateral order doctrine." *Id.* at 1016.

This Court has ample reason to follow the well-reasoned path of its peer appellate courts. Indeed, though this Court has not squarely addressed the question (nor has it had occasion to address any aspect of the Act, which has been in legal effect for less than three years), it has in dictum strongly indicated this view as well. In an opinion rejecting an interlocutory appeal of an order that denied a claim of judicial proceedings privilege, this Court cited with approval the Fifth Circuit's decision granting collateral review of a state Anti-SLAPP statute as an example of a *proper* grant of such review. *See McNair Builders*, 3 A.3d at 1138 ("Following *Will*, the Fifth Circuit in [*Henry*] identified another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights . . . . We conclude that when compared with the examples noted by the Court in *Will* and the interests at issue in *Henry*, . . . the [privilege] asserted in this case does not protect a substantial public interest of the high order required . . . .") (internal quotation marks omitted).

Thus, under *Will* and consistent with the ample body of appellate precedents in this and other courts before and after *Will*, denial of a special motion to dismiss under the Act on

legal grounds implicates a particular value of a high order fully sufficient to warrant interlocutory review.[4]

D. *Newmyer* and *Englert* are inapt precedents for this dispute.

Nothing in *Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order) nor *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009)—the two authorities cited in the show cause order—undermines the recognition of collateral order review by this Court of denials on legal grounds of a motion to dismiss under the Act.

The unpublished order in *Newmyer* is devoid of any precedential or persuasive value. Under the Court's rules, generally, "opinions of the court will not cite to or rely upon unpublished opinions or orders of the court." D.C. R. App. Ct. I.O.P. IX-D (2011); *see Seabolt v. Police & Firemen's Ret. & Relief Bd.*, 413 A.2d 908, 912 n.12 (D.C. 1980); *Carter v. United States*, 614 A.2d 913, 916 n.5 (D.C. 1992). The exceptions listed in Rule 28(g) of this Court's rules, which would allow for citation to an unpublished order, do not apply in any way to this dispute, for they apply only "when relevant (1) under the doctrines of law of the case, res judicata, or collateral estoppel; (2) in a criminal case or proceeding

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[4] We note that this is so even though this Court could rule definitely in a post-trial appeal on the validity of the *merits* of the parties' legal claims and defenses regarding the libel claims. In holding that review of the denial of a state Anti-SLAPP statute motion to dismiss gave rise to collateral order review, the Second Circuit quoted the Supreme Court's recognition in analogous circumstances that the "'defense is meant to give . . . a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery'. . . . Accordingly, even though we could review the pertinent . . . law questions in a post-judgment appeal, that review would not be 'effective' in vindicating the compelling public interest protected by the pre-trial aspects of" Anti-SLAPP statutory protections. *Liberty Synergistics, Inc.*, 718 F.3d at 151 (quoting, in a parenthetical, *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996)).

involving the same defendant; or (3) in a disciplinary case involving the same respondent." D.C. App. R. 28(g).

Further, to the extent the Court looks at it for persuasive value, *Newmyer* has no force here. First, it contained no reasoning. Second, no party or amicus in *Newmyer* argued that the Act provided a qualified immunity or similar right, so the issue was not before the panel and could not have been decided or even fully considered by it in issuing its short order dismissing the appeal. And, third, the panel there did not address or purport to apply this Court's *published* decisions in *McNair Builders* and elsewhere delineating its collateral order precedents.

Reliance on *Englert* would be likewise misguided. The Ninth Circuit there construed the *absence* of express provisions for interlocutory review as evidence of the Oregon legislature's view that the right conveyed by the statutes in question was *not* an immunity from suit, and therefore that appellate review post-judgment was sufficient. 551 F.3d at 1106-07. This holding has no force here, for two reasons. First, *Englert* has been superseded by statute; in its wake, the Oregon legislature installed language making explicit that interlocutory review is available as a matter of Oregon law. *See DC Comics***,** 706 F.3d at 1016 n.8.

Second, and more fundamentally, the absence in the Act passed by the Council of the District of Columbia of an express provision granting interlocutory review tells this Court nothing of use about the operative question of whether the Council intended to provide for a qualified immunity from suit. Any contrary view is premised on a fundamental misunderstanding of the constraints governing the Council, defies the Council's stated policy

preference concerning the availability of interlocutory review, and ignores the role of this Court. Unlike those of Oregon and the other States, the District of Columbia legislature's authority is limited by the Home Rule Act, which provides in relevant part at D.C. Code § 1-206.02(a)(4): "The Council shall have *no authority to: . . . [e]nact any act,* resolution, or rule with respect to any provision of Title 11 (*relating to* organization and *jurisdiction of the District of Columbia courts*)" (emphasis added). As this Court has explained, that limitation means that under current law, until and unless altered by Congress, "the Council of the District of Columbia may not enlarge the congressionally prescribed limitations on [the court's] jurisdiction." *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723 n.15 (D.C. 1995). Thus, the fact that the Act lacks a provision expressly authorizing interlocutory appeal to the District of Columbia Court of Appeals is not informative as to whether the lawmakers "intended to provide a right not to be tried." *Englert*, 551 F.3d at 1105 (internal quotation marks omitted).[5]

As to what the District's lawmakers actually intended, the evidence from the Council, as discussed, is quite clear. The Council sought to extend "qualified immunity to individuals engaging in protected actions," to help "ensure a defendant is not subject to the expensive

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[5] We note, however, that the Council complied with this Home Rule Act limitation in creating a speech rights-implementing immunity that carries with it the potential for interlocutory appeal under this Court's established jurisdictional rules. The Council did not affect the rules by which this Court determines its jurisdiction; the District instead asks the Court to apply those rules based on a new substantive right. This Court has made clear that the Council has authority to change substantive law even if in doing so it affects what cases a court in the District of Columbia may hear. *See District of Columbia v. Sullivan*, 436 A.2d 364 (D.C. 1981).

and time consuming discovery that is often used in a SLAPP as a means to prevent or punish" and thus to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Comm. Rep. at 4. The Council thus naturally would have thought a denial of a special motion to dismiss under the Act would be immediately appealable under normal application of the collateral order doctrine as developed and applied by this Court.

Moreover, on the *specific* issue of interlocutory appellate review, the Council stated its clear policy preference. As originally introduced, the Act provided for interlocutory appeal. *See* Comm. Rep. at 4-8 (containing D.C. Council, Bill No. 18-0893, § 3(e) (introduced Jun. 29, 2010, by Council members Cheh and Mendelson)). The Council made clear that it continues to believe the right to immediate appeal appropriate, and it removed that provision from the final version of the Act only due to the concern that such a provision could violate the Home Rule Act: "As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While *the Committee agrees with and supports the purpose of this provision*, a recent decision of the D.C. Court of Appeals [*Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011),] states that the Council exceeds its authority in making such orders reviewable on appeal." *Id*. at 7 (emphasis added). Thus, the evidence indicates that the Council "agrees with and supports" the availability of right to immediate appeal from the denial of special motion to dismiss under the Act as part, and views the right at issue as one

to be free from suit or trial where the conditions of the statute are met. That is the key. That demonstrable legislative intent justifies the availability of collateral order review.

II. Policy Considerations Further Support The Exercise Of This Court's Jurisdiction.

For the reasons set forth above, a trial court's order denying a motion to dismiss under the Act satisfies the test for collateral order review. We note also that additional policy considerations further reinforce the exercise of appellate jurisdiction here. *Cf. United States v. MacDonald*, 435 U.S. 850, 861 (1978) (stating that the collateral order doctrine analysis was "dispositive," and then discussing "important policy considerations" that "reinforce[]" that conclusion).

First, this Court's decision on the availability of interlocutory review based on the qualified immunity provided by the Act could give much-needed guidance to lower courts and litigants in the District of Columbia to confirm the nature of the protections provided by the Act. Guidance and clarity would reduce uncertainty and help protect judicial resources in the Superior Court and federal courts, which have had a number of cases raising questions under the Act without the benefit of guidance from this Court's construction of the Act.[6]

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[6] *See, e.g.*, *Abbas v. Foreign Policy Grp., LLC*, 2013 WL 5410410 (D.D.C. Sept. 27, 2013), *appeal docketed*, No. 12-1565 (D.C. Cir. Oct. 23, 2013) (finding that the Act is applicable in federal court); *Boley v. Atlantic Monthly Grp.*, 2013 WL 3185154 (D.D.C. June 25, 2013); *Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29 (D.D.C. 2012), *appeal docketed*, No.12-7055 (D.C. Cir. June 15, 2012) (same); *3M Co. v. Boulter*, 842 F.Supp.2d 85 (D.D.C. 2012) (finding that the Act cannot apply in federal court); *Payne v. District of Columbia*, 2012 CA 006163 B (D.C. Super. Ct. May 28, 2013) (granting dismissal pursuant to the Act); *Lehan v. Fox Television Stations, Inc.*, 2011 CA 004592 B (D.C. Super. Ct. Nov. 30, 2011) (same); *Snyder v. Creative Loafing, Inc.*, 2011 CA 003168 B (D.C. Super. Ct. Apr.

Second, recognizing the availability of interlocutory review would not threaten to "open up the floodgates" for an onslaught of appeals of denials of Anti-SLAPP motions to dismiss. In over two years since the Act took legal effect, the Court has never issued an opinion construing the Act and *Newmyer* is the only other case where a losing movant even attempted to reach this Court on an appeal of the denial of an Anti-SLAPP motion.[7]

Finally, the Court in recognizing such collateral order review can and should retain flexibility and the ability to tailor its review to the equities of a particular case. Granting collateral review appeal is of course *not* tantamount to reversal. *See, e.g.*, *Pizzulli*, 917 A.2d 620 (granting collateral review of trial court's order denying defendants' motion to dismiss based upon judicial immunity from prosecution, and affirming).[8] The summary affirmance process of D.C. App. R. 27 (c) remains fully available for this or any other panel of this court reviewing the denial of a motion to dismiss under the Act where the Court deems it suitable.

Policy considerations thus reinforce the conclusion that the doctrine compels here.

CONCLUSION

For all these reasons, this Court should recognize that collateral order review appeal is available of a trial court's denial on legal grounds of a motion to dismiss under the Act.

26, 2011) (case voluntarily dismissed before the Anti-SLAPP motion was fully briefed and decided).

[7] In *Doe v. Burke*, No. 13-CV-83 (D.C. filed Sept. 6, 2013), the parties have briefed the related, but quite distinct, question of whether interlocutory appeal is available from the denial of a motion to quash under the Act.

[8] While, as stated above, the District takes no position on the merits, we note that Superior Court Judge Weisberg, who took the case after Judge Combs Greene had denied the motions to dismiss, expressed the view that "reversal is unlikely." Order (Sept. 12, 2013) at 2 n.2.

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CERTIFICATE OF SERVICE

I certify that on November 22, 2013, this brief was served by electronic and first-class mail, postage prepaid, to:

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