Nos. 14-cv-101, 14-cv-126 (consolidated)

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Michael E. Mann, Ph.D.,

Plaintiff-Appellee,

v.

National Review, Inc.;
Competitive Enterprise Institute; and Rand Simberg,

Defendants- Appellants.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B
(The Honorable Natalia Combs-Greene
The Honorable Frederick H. Weisberg)

Appellee's Opposition to Appellants' Response to the Court's Order To Show Cause Regarding Application of the Collateral Order Doctrine

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Rule 28(a)(2) Disclosure

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Amicus Curiae District of Columbia, represented by Irvin B. Nathan, Ariel B. Levinson-Waldman, Todd S. Kim and Loren L. Alikhan;

Amicus Curiae The Reporters Committee for Freedom of the Press, represented by Gregg P. Leslie and Cynthia A. Gierhart;

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Amicus Curiae Allbritton Communications Company, represented by Jerald N. Fritz;

Amicus Curiae American Society of News Editors, represented by Kevin M. Goldberg of Fletcher, Heald & Hildreth, PLC;

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Amicus Curiae The Association of American Publishers, Inc., represented by Jonathan Bloom or Weil, Gotshal & Manges LLP

Amicus Curiae Dow Jones & Company, Inc., represented by Mark H. Jackson and Jason P. Conti;

Amicus Curiae First Amendment Coalition, represented by Peter Scheer;

Amicus Curiae Freedom of the Press Foundation, represented by Marcia Hofmann;

Amicus Curiae Gannett Co., Inc., represented by Barbara W. Wall;

Amicus Curiae Investigative Reporting Workshop at American University, represented by Charles Lewis and Lynne Perri;

Amicus Curiae The McClatchy Company, represented by Karole Morgan-Prager and Juan Cornejo;

Amicus Curiae MediaNews Group, represented by David S. Bralow;

Amicus Curiae The National Press Club, represented by Charles D. Tobin of Holland & Knight LLP

Amicus Curiae National Press Photographers Association represented by Mickey H. Osterreicher;

Amicus Curiae National Public Radio, Inc., represented by Greg Lewis and Denise Leary;

Amicus Curiae NBCUniversal Media, LLC, represented by Beth R. Lobel;

Amicus Curiae The New York Times Company, represented by David McCraw;

Amicus Curiae News Corps, represented by Eugenie Gavenchak and Mark H. Jackson;

Amicus Curiae Newspaper Association of America, represented by Kurt Wimmer of Covington & Burling LLP;

Amicus Curiae North Jersey Media Group Inc., represented by Jennifer A. Borg;

Amicus Curiae Online News Association, represented by Jonathan D. Hart of Dow Lohnes PLLC;

Amicus Curiae POLITICO LLC, represented by Jerald N. Fritz;

Amicus Curiae Reuters America LLC, represented by Gail C. Gove;

Amicus Curiae The Seattle Times Co., represented by Bruce E. H. Johnson of Davis Wright Tremaine LLP

Amicus Curiae Society of Professional Journalists, represented by Bruce W. Sanford and Laurie A. Babinski of Baker & Hostetler LLP;

Amicus Curiae Student Press Law Center, represented by Frank D. LoMonte;

Amicus Curiae Time Inc., represented by Andrew Lachow; and

Amicus Curiae The Washington Post, represented by John B. Kennedy, James A. McLaughlin, and Kalea S. Clark.

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Plaintiff/Appellee Michael E. Mann, Ph.D. ("Dr. Mann") respectfully submits this Memorandum of Points and Authorities in Opposition to Defendants/Appellants' Response to the Court's Order to Show Cause Regarding Application of the Collateral Order Doctrine (the "Response") and in opposition to the *amicus curiae* briefs submitted by the Reporters Committee for Freedom of the Press (the "Reporters Committee"), the American Civil Liberties Union of the Nation's Capital (the "ACLU"), and the District of Columbia (together "*Amici*").

INTRODUCTION

In their Responses, Defendants and *Amici* urge this Court to provide an immediate right to review in every single case where a defendant moves for dismissal under the D.C. Anti-SLAPP Act of 2010 (the "Act"), D.C. Code § 16-5501 *et seq.* This right to review was considered and rejected by the D.C. Council. An expansion of this Court's jurisdiction would be particularly inappropriate where the legislature has affirmatively rejected a right to an immediate appeal. Should the D.C. Council believe that interlocutory appeal is necessary to advance the goals of the Act, the Council—and not this Court—should grant that right through an amendment to the Act.

The positions of the Defendants and *Amici* regarding the appealability of a decision under the Act will be addressed at length in this brief, but at the outset it is appropriate to address some of the broader concerns that should inform this Court's disposition of this case. These concerns deal with the practicality of this Court weighing in on this case at this nascent stage, the policies underlying the Act, the meritorious nature of this particular case, and the abuse of the Act by well-financed defendants and their law firms. These concerns lead us to echo the suggestion brought forward by the District of Columbia in its *amicus* brief: should this Court decide to

accept jurisdiction of this appeal, it should invoke the summary affirmance process of D.C. App. R. 27(c) and promptly return the matter to the Superior Court for further proceedings.

First, as a practical matter, Defendants and *Amici* are asking this Court to create a blanket exception from the final judgment rule for all denials of motions made under the Act. As such, they would have this Court delve into an only partially developed factual record. This Court would have to determine at this juncture whether there was sufficient evidence already in the record to demonstrate that the Defendants knew or recklessly disregarded the fact that Dr. Mann did not commit academic and scientific fraud. It would also have to determine whether—in this factual context—Defendants' readers understood that they were asserting that Dr. Mann had engaged in misconduct or that these readers simply thought that they were merely "expressing" their "disagreement" (their words) with his views. These determinations are inherently fact bound, involving an analysis of the eight studies exonerating Dr. Mann and his colleagues, the Defendants' knowledge of these studies, and the factual context of Defendants' statements—including the comments of their readers that are in the record. And if this Court were to find that the evidence on malice is insufficient at this point, but could be further developed, it must make the determination whether discovery on this issue should proceed.

This is not the role of this Court. Rather, interlocutory review is only appropriate in a "small class of rulings," "independent of the cause itself." *Will v. Hallock*, 546 U.S. 345, 349 (2006). To expand this Court's review beyond that would improperly "overpower . . . judicial efficiency . . . and the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals." *Id.* at 350 (internal citations and quotations omitted); *see also*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009).

Second, sound policy considerations warrant against the acceptance of an interlocutory appeal in this case. There is no question that this is not the type of case to which the Act was intended to apply. The Act was never intended to impede cases that were brought by individuals against powerful lobbying and media organizations, who possess unlimited resources to litigate these matters. Nor was the Act intended to impair the ability of individuals to pursue meritorious claims when their rights were infringed. Similarly, the fact that this Complaint presents meritorious claims cannot be legitimately disputed. On the issue of opinion, the law is clear that the assertion of "*academic and scientific fraud"* is a statement of fact subject to objective verification—and thus not protected "opinion." Moreover, the specific comments of Defendants' readers confirm the obvious—the fraud accusations were understood by virtually all of their readers to be what they were—accusations of fraud. On the issue of malice, Defendants have acknowledged that they were aware of each of the *eight* inquiries that have exonerated Dr. Mann and his colleagues. They were specifically aware of the conclusion of the Environmental Protection Agency (indeed, CEI petitioned the EPA for such an inquiry) which labeled their fraud allegations as a "myth." Two judges of the Superior Court have concluded that this is a meritorious case, and Judge Weisberg' in denying Defendants' motion for interlocutory certification noted that "reversal was unlikely."

Moreover, it is becoming apparent that whatever the "laudable" purpose of the anti-SLAPP statutes, these laws are now being abused for tactical purposes. We have not yet seen the full effect of the Act in the District of Columbia due to its relative recency, but the abuse of anti-SLAPP laws is being noticed in other jurisdictions that have older statutes. In particular, the appellate court in California has detailed the problems inherent in the misuse of anti-SLAPP statutes. *See Grewal v. Jammu*, 191 Cal. App. 4th 977 (2011). California courts have

experienced a virtual explosion in the number of anti-SLAPP motions that have been brought in recent years. Justice is being delayed, if not denied, and as the court observed, the beneficiaries of this delay and denial are the defendants and their law firms. The defendants remain able to continue their tortious conduct; and the law firms are able to benefit financially by filing unnecessary, if not frivolous, anti-SLAPP motions.

That is precisely what is happening here. This litigation has been pending over a year and a half, and, of course, no discovery has yet taken place. Defendants continue to play their malicious game of defaming Dr. Mann, aptly described by the Superior Court as a "witch hunt," and have succeeded in raising hundreds of thousands of dollars through their pledge to continue their harassment of this distinguished scientist. Despite the fact that two Superior Court judges have ruled that Dr. Mann's case is meritorious on three occasions, Defendants have still been able to tie this matter up procedurally. And this Court's review of the Superior Court's denial of Defendants' motions to dismiss will possibly tie up this case for another two years.

With that dilemma in mind, the District of Columbia has suggested an approach to deal with this situation. In its brief, the District takes care to point out that although the Act was enacted to deter lawsuits which were filed to chill free speech, it does not suggest that this case "fits this description." (Brief of *Amicus Curiae* District of Columbia in Support of No Party Concerning this Court's Jurisdiction ("D.C. Br.") at 2 n.1.) This, we believe, led the District to suggest that if this Court does accept jurisdiction of this interlocutory appeal, it should recognize its "ability to tailor its review *to the equities of this and future cases,"* and consider the implementation of its summary affirmance process. (D.C. Br. at 4).

Dr. Mann agrees with this approach. Should this Court decide that it has appellate jurisdiction, he requests that it consider the merits of the Superior Court's decisions pursuant to

D.C. App. R. 27(c) and "prompt[ly] return [this case] to the District Court for further proceedings." (D.C. Br. at 4). If appellate jurisdiction is accepted, this would be the only fair result given the posture and nature of this case.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Mann is a research scientist and academic known for his work regarding the paleoclimate—the study of the earth's past before instrument temperature records. Dr. Mann is currently a Distinguished Professor of Meteorology at the Pennsylvania State University ("Penn State") and was previously a faculty member at the University of Virginia. One of Dr. Mann's most significant contributions to the public's understanding of the field of paleoclimatology is the so-called "Hockey Stick Graph" depicting the unprecedented rise in global temperatures during the 20th century. The key finding illustrated by the Hockey Stick Graph, that Northern Hemispheric average temperatures for the most recent decades are probably the highest in at least 1000 years, has been replicated by a number of follow-up peer-reviewed studies.

Controversy about the Hockey Stick Graph began almost immediately after its publication. Certain individuals and advocacy groups criticized the conclusions of Dr. Mann and his colleagues, and those who opposed the concept of climate change began to use these criticisms to discredit Dr. Mann. This criticism reached its zenith with the theft of e-mails from the Climate Research Unit ("CRU") at the University of East Anglia in the United Kingdom, which included exchanges between Dr. Mann and his colleagues at CRU. A few of the more than one thousand CRU e-mails stolen from the University of East Anglia were "cherry-picked" by climate change skeptics (as described by the EPA), taken out of context, and misrepresented to falsely imply impropriety and academic fraud on the part of the scientists involved, including Dr. Mann. The skeptics claimed that the CRU e-mails proved that anthropogenic climate change was

a hoax perpetrated by scientists from across the globe colluding with government officials to reap financial benefits.

The CRU e-mails led to the controversy now derisively referred to as "Climategate." Following the publication of the CRU e-mails, and the subsequent baseless charge that these e-mails showed that global warming was a hoax, two universities and six governmental agencies independently investigated the allegations of fraud and misconduct regarding Dr. Mann. And every one of these investigations concluded that there was no basis to the allegations of fraudulent conduct, data manipulation, or the like.

Nonetheless, in the wake of the Jerry Sandusky child abuse scandal at Penn State, on July 13, 2012, Defendant Rand Simberg authored a weblog post on Competitive Enterprise Institute's ("CEI") website, OpenMarket.org, entitled "The Other Scandal In Unhappy Valley." In that post, Mr. Simberg described Dr. Mann as "the Jerry Sandusky of climate science" who had "molested and tortured data in the service of politicized science" and asserted that Dr. Mann had engaged in "data manipulation" and "academic and scientific misconduct," and that Dr. Mann was "the posterboy of the corrupt and disgraced climate science echo chamber." (As such, the District of Columbia's assertion that the Simberg piece merely hyperlinked to the Steyn post, D.C. Br. at 3, is factually inaccurate.) CEI subsequently removed the Sandusky comparison, stating that it was inappropriate. The remainder of these statements remain publicly available.

On July 15, 2012, Defendant Mark Steyn authored a post entitled "Football and Hockey" published on National Review's ("National Review") weblog "The Corner." Mr. Steyn's commentary republished Rand Simberg's "Jerry Sandusky of climate science" comparison and further described Dr. Mann as "the man behind the fraudulent climate-change 'hockey-stick'

graph, the very ringmaster of the tree-ring circus." All of these statements, including the Sandusky comparison, remain publicly available.

After the publication of the above statements, in July and August 2012, in two separate letters from his counsel, Dr. Mann demanded retractions and apologies from both National Review and CEI. National Review's counsel responded in an August 22, 2012 letter denying that the commentary at issue was actionable. National Review's Editor Rich Lowry subsequently posted his own response to the threat of legal action in an August 22, 2012, web piece entitled "Get Lost." In that post, Mr. Lowry wrote: "In common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." Mr. Lowry further stated that National Review would welcome any lawsuit because of the opportunity to obtain discovery from Dr. Mann. He described this as a "journalistic project of great interest" and stated that if his readers could raise sufficient funds, he may "hire a dedicated reporter to comb through the materials and regularly post stories on Mann." CEI then published an article in which it stated that Mr. Lowry's "Get Lost" article "expertly summed up the matter" and directed its readers to that article.

Defendants having refused to retract or apologize for their defamatory statements, Dr. Mann filed this lawsuit in October 2012. Shortly thereafter, Defendants filed motions to dismiss pursuant to the Act and Rule 12(b)(6) arguing that the statements at issue were constitutionally protected opinion and/or rhetorical hyperbole and that Dr. Mann had failed to plead actual malice. Prior to the trial court's ruling on Defendants' motions to dismiss, Dr. Mann moved to amend his complaint to include a defamation claim for the statement comparing Dr. Mann to Jerry Sandusky and stating that Dr. Mann had "molested and tortured data in the service of politicized science." The trial court granted Dr. Mann's motion to amend on July 10, 2013. On

July 19, 2013, the trial court denied Defendants' motions to dismiss, finding that Dr. Mann was likely to succeed on the merits of all of his claims; that Defendants' statements were accusations of fraud, not opinion or mere hyperbole; and that there was sufficient evidence of actual malice.

Defendants then asked the trial court to reconsider its orders denying the motions to dismiss and to certify for interlocutory appeal its orders denying the motions to dismiss. The trial court denied Defendants' motions for reconsideration and motion for interlocutory certification. In its order denying certification, the trial court noted its view that it was unlikely that the Court of Appeals would reverse the denials of Defendants' motions to dismiss and doubted that the denials of the motions to dismiss would be reviewed under the collateral order doctrine. *See* Order Denying Defendants' Joint Motion for Interlocutory Certification, 2 n.2 and 3 n.4 (D.C. Sup. Ct. Sept. 12, 2013).

Nonetheless, on September 17, 2013, defendants filed notices of appeal of the July 19 denials of the motions to dismiss, pursuant to the collateral order doctrine. This Court subsequently issued an Order to Show Cause, directing Defendants to show cause why their appeal should not be dismissed in light of the absence of a right to interlocutory review under the Act and in light of the inapplicability of the collateral order doctrine under *Newmyer v. Sidwell Friends Sch.*, No. 12-CV-847 (Dec. 5, 2012) and *Englert v. MacDonnell*, 551 F.3d 1099 (9th Cir. 2009). *Steyn v. Mann*, Nos. 13-CV-1043, -1044 (Oct. 18, 2013). On December 19, 2013, this Court dismissed as moot defendants' interlocutory appeal. *Steyn v. Mann*, Nos. 13-CV-1043, -1044 (Dec. 19, 2013).

On January 22, 2014 the trial court denied defendants' motion to dismiss for the *third* time, affirming the original denials of the motion to dismiss and finding that Dr. Mann was likely to succeed on the merits of all of his defamation and intentional infliction of emotional distress

claims. Nonetheless, in a further attempt to delay Dr. Mann from securing his day in court, Defendants filed this notice of appeal in January 2014.[1]

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY APPEAL

A. The Act Does Not Provide For Interlocutory Review

Nothing in the Act grants this court jurisdiction to hear this untimely appeal. An early draft of the bill included a provision allowing immediate appeals of denied motions to dismiss under the statute, but this provision was removed by the city council prior to passage. *See* COMM. ON PUB. SAFETY & THE JUDICIARY, REP. ON B. 18-893 ("Comm. Rep."), at 7. While certain members of the D.C. Council expressed a preference for including a right to immediate appeal, that preference was rejected. A right to immediate appeal is not a part of the Act and it would be extraordinary for this Court to recognize one, particularly in this case. If the Council had deemed an appeal necessary to achieve the Act's purpose, it, like other legislatures, could have included a right to immediate appeal. It did not and this Court need not create such a right.

Nor can Defendants argue that the Council is unable to enact an immediate right to appeal based upon this Court's jurisprudence. When enacting the Act, the Council's Committee on Public Safety and the Judiciary explained that it did not include an appeal provision because of this Court's decision in *Stuart v. Walker,* 6 A.3d 1215 (D.C. 2010). *See id.* The *Stuart* court held that "the D.C. Council cannot enact any legislation affecting the finality of orders for purposes of appealability to this court, or attempt to modify this court's jurisdiction in any other

[1] Mark Steyn, the remaining defendant in this lawsuit, has opted not to seek interlocutory review and recently filed an Answer and Counterclaim with the trial court.

way." 6 A.3d at 1217 n.3. The *Stuart* decision was vacated over two years ago. *Stuart v. Walker*, 30 A.3d 783 (D.C. 2011). Accordingly, the Council is free to amend the Act to include a provision for immediate appeal. It has not made any efforts to do so, calling into question the supposed critical importance of immediate appeal.

B. The Collateral Order Doctrine Does Not Apply

Having no statutory right to immediate appeal, Defendants are left to argue that they are entitled to an immediate appeal under the collateral order doctrine first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The collateral order doctrine is meant to accommodate a sharply limited group of rulings which, although they do not conclude a civil action, nonetheless conclusively resolve claims of right that are separable from, and collateral to, rights asserted in the action. *See, e.g.*, *Will*, 546 U.S. at 349-50; *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The Supreme Court has "repeatedly stressed" that the collateral order doctrine applies only to a "small class" of decisions, which must be kept "narrow and selective in its membership," and that it must never be allowed to swallow the general rule that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp.*, 511 U.S. at 867 (discussing Supreme Court precedent). A party invoking the collateral order rule must prove three requirements. The underlying order (1) must be effectively unreviewable on appeal from a final judgment, (2) must resolve an important issue that is separate from the merits of the case and (3) must conclusively determine a disputed question of law. *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010). As the Supreme Court has warned, a broad application of the collateral order doctrine will "overpower" the rule of finality. *Will*, 546 U.S. at 349-50. This Court has recognized that the Supreme Court views the collateral

order doctrine as "modest" in scope and described the conditions required for its application as "stringent." *McNair*, at 1136 (citing *Will*, 546 U.S. at 349-50). The stringent requirements have not been met here.

1. Orders Denying Motions Under The Act Are Reviewable After Final Judgment

Orders denying motions under the Act are not "effectively unreviewable" because they "can be adequately vindicated on appeal from final judgment." *See Digital Equip.*, 511 U.S. at 869. An order is effectively unreviewable only when two conditions are met. First, immediate appeal must be necessary to preserve a true "right not to stand trial"—not just a claim for pretrial dismissal. *See id.* at 871-73. Second, even where a true claim to immunity from suit is threatened, appeal still is not permitted unless it is also necessary to preserve "some particular value of a high order." "The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus.,* 558 U.S. at 108.

As the Supreme Court warned, "[t]hose seeking immediate appeal … naturally argue that any order denying a claim of right to prevail without trial satisfies the [unreviewability] condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement . . . in tatters." *Will*, 546 U.S. at 351. To guard against this result, courts must "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye, for virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995). The jurisdiction of this Court, however, "should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digital Equip.*, 511 U.S. at 872. Because the Act

does not provide immunity or any other "right not to stand trial," Defendants' appeal must await final judgment.

Defendants' entire argument in support of this Court's jurisdiction hinges upon their dubious assertion that the Act provides defendants with an immunity from suit. (Appellants Response to the Court's Order To Show Cause Regarding Application of the Collateral Order Doctrine ("Defs.' Br.") at 8-14). But, neither the words nor the notion of "immunity from trial" appear anywhere in the Act. Defendants and *Amici* contend, however, that this Court should nevertheless hold that the Act impliedly creates the strongest type of immunity—a right not to stand trial typically afforded only to government officials and sovereign entities, because of a few sentences of legislative history. Even if relevant, the legislative history does not state that the Council intended to provide defendants with immunity from suit. Rather, the D.C. Council's Committee Report merely characterized the Act's special motion procedures as "substantive," and referred to other jurisdictions as "having similarly extended absolute or qualified immunity to individuals engaging in protected action." *See* Comm. Rep., at 4. However, these references to immunity and appeal are not a sufficient basis to find that the Act provides immunity from suit.[2] *See, e.g., Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 755 & n.5 (D.C. 1983) (en banc) (single sentence of legislative history could not change plain meaning of statutory text); *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 472 (D.C. 2002) ("This court will not read into an unambiguous statute language that is clearly not there."). Because the

[2] Nor does the Act's mandate of dismissal "with prejudice" amount to the grant of an immunity from suit. *See Metabolic Research, Inc. v. Ferell,* 696 F.3d 795, 802 (9th Cir. 2012) (denial of motion to dismiss under Nevada anti-SLAPP statute not immediately appealable under the collateral order doctrine) and NEV. REV. STAT. § 41.660(4) (2010) (dismissal under Nevada's anti-SLAPP statute "operates as an adjudication on the merits.")

Act does not provide immunity or any other "right not to stand trial," Defendants' appeal must await final judgment.

If the District had wanted to provide immunity from suit, it could have written such a requirement into the law. *See, e.g.,* D.C. Code § 7-1231.08(f) (stating that parties "shall be immune from suit"). For example, the text of the proposed "Citizen Participation Act of 2009", upon which the ACLU claims the Act was modeled (Brief of the American Civil Liberties Union of the Nation's Capital, as *Amicus Curiae*, Supporting Appellants on the Issue of Appealability ("ACLU Br.") at 4-5), includes a provision asserting that the protected activity represented an immunity from civil liability. *See* Citizen Participation Act of 2009, H.R. 4364, 111th Cong. § 3 (2009). The D.C. Council chose not to write any purported immunity into the Act.[3] Accordingly, the Act does not provide an immunity from suit.

Moreover, even assuming *arguendo* that the Act created an immunity from suit—the inquiry does not end there. As this Court recognized in *McNair Builders*, the Supreme Court cautioned that "not mere avoidance of a trial, but avoidance of a trial that would impair a substantial public interest" is required before an appellate court invokes jurisdiction on the ground that an order is otherwise " 'effectively' unreviewable if review is to be left until later." *McNair*, 3 A.3d at 1136 (internal citations and quotations omitted). Applying the stringent requirements of *Will,* the *McNair* court dismissed an interlocutory appeal from an order denying absolute immunity pursuant to the judicial proceedings privilege. *Id. at* 1142. It further provided guidance regarding the types of "substantial public interest" that would satisfy the collateral order doctrine—none of which are in play here—honoring the separation of powers, preserving

[3] And, as the District of Columbia argues, the Council has the authority to create an immunity from suit. *See* D.C. Br., at 18 n.5 (citing *District of Columbia v. Sullivan*, 436 A.2d 364 (D.C. 1981)).

the efficiency of government and the initiative of its officers, respecting a State's dignitary interest, and protecting individuals from double jeopardy. *Id.* at 1138. The interest which is at stake here does not rise to the substantial issue necessitating immediate appeal.

Moreover, the heightened requirement that the Supreme Court announced in *Will* and that this Court adopted in *McNair*, renders of limited relevance this Court's pre-*McNair* application of the collateral order doctrine to other First Amendment privileges and immunities. (Defs.' Br. at 18-19.) For example, Defendants point to *District of Columbia v. Pizzulli*, 917 A.2d 620 (D.C. 2007) and argue that any order denying a claim of immunity under the First Amendment is immediately appealable. First, *Pizzulli* addressed the question of whether the defendants were protected from suit pursuant to judicial immunity—an absolute immunity from suit. 917 A.2d at 624. The Act does not provide an *absolute* immunity from suit, but merely forces plaintiffs to show a likelihood of success on the merits at an early stage. Moreover, the *Pizzulli* court did not address *McNair*'s requirement that immunity in question advance a substantial public interest for which the collateral order doctrine provide protection. This Court having subsequently found that the judicial proceeding privilege was not a substantial enough interest to invoke the collateral order doctrine, *McNair,* 3 A.3d at 1142, it is difficult to see how the claim of judicial immunity in *Pizzulli* would fare any better under *Will*.

Similarly, pre-*McNair* cases in which this Court exercised interlocutory review over orders denying motions that claimed immunity under the First Amendment's Free Exercise Clause are inapposite. Claims of immunity under the Free Exercise Clause are qualitatively different than any purported claim of immunity under an anti-SLAPP statute because the consideration of immunity under the Free Exercise Clause is "clearly independent of any liability" and does not "address the merits" of the plaintiff's claims. *United Methodist Church,*

Baltimore Annual Conference v. White, 571 A.2d 790, 792 (D.C. 1990); *see also Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419, 425-26 (D.C. 1996) (collateral order doctrine applied because the question of ecclesiastical immunity is "unrelated to the merits of the [defendants'] negligence claim"); *Heard v. Johnson*, 810 A.2d 871, 77 (D.C. 2002) ("The order denying the [ ] immunity dealt with an issue utterly separate from the merits of [defendant's] defamation claim"). Here, to the contrary, the denial of Defendants' anti-SLAPP motion was based upon Dr. Mann's showing a likelihood of success *on the merits*.

In an effort to bolster their arguments that the Act provides an immunity from suit for which an immediate appeal is necessary to protect a substantial public interest, Defendants and *Amici* look to other jurisdictions where courts have held that denials of anti-SLAPP motions are immediately appealable. However, Defendants ignore the key unifying principal in these cases—interlocutory appeal is permitted under the collateral order doctrine if, and only if, the text of a state's anti-SLAPP law or the general operation of state law provides a right of immediate appeal. *See, e.g. NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.,* --- F.3d ---, 2014 WL 941049, at *7 (noting that the provision in Texas's anti-SLAPP law providing for an expedited appeal 'whether interlocutory, or not" indicates that the statute protects a 'right to avoid trial in the first instance") (5th Cir. March 11, 2014); *Batzel v. Smith,* 333 F.3d 1018 (9th Cir. 2003) (concluding that orders denying California anti-SLAPP motions are "effectively unreviewable" because, unlike the D.C. statute, the California statute expressly provided for interlocutory appeal in state court); *DC Comics v. Pacific Pictures Corp.,* 706 F.3d 1009, 1016 (9th Cir. 2013) (noting that anti-SLAPP statutes that do "not provide for any consistent right of immediate appeal" are "more akin to defenses against liability than immunities from suit" and are therefore not immediately

appealable under the collateral order doctrine); *Metabolic Research*, 696 F.3d at 804 (rejecting interlocutory appeal because Nevada statute did not include a right of immediate appeal). Neither situation is present here.

As the Ninth Circuit explained in *Metabolic Research*, the unavailability of immediate appeal is significant evidence of the state legislature's view that an anti-SLAPP statute does not vindicate a sufficiently "substantial public interest" to justify application of the collateral order doctrine. 693 F.3d at 801. The *Metabolic* court, recognized that the Ninth Circuit's reasoning in *Batzel* does not apply to anti-SLAPP statutes—like the Act—that do not provide for interlocutory appeal. *See id.* Similarly, the court in *Englert v. MacDonnell*, in considering the collateral order doctrine's applicability to the Oregon anti-SLAPP statute ruled "that the Oregon anti-SLAPP statute fail[ed] the *Will* test at the threshold because it was not intended to provide a right not to be tried" but merely "a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge" before trial. 551 F.3d at 1104-05. Importantly, the *Englert* court's decision was "based on the failure of the Oregon anti-SLAPP statute to provide for an appeal from an order denying a special motion to strike." *Id.* Likewise, because the D.C. Act does not provide for immediate appeal, it too fails the *Will* threshold.

Nor does the Fifth Circuit's decision in *Henry v. Lake Charles American Press. Inc.*, 566 F.3d 164 (5th Cir. 2009) change the above analysis. In *Henry,* the Fifth Circuit held that a denial of a motion to dismiss under Louisiana's anti-SLAPP statute was immediately appealable, even though the Louisiana statute did not include an explicit right to an immediate appeal. 566 F.3d 164, 178 (5th Cir. 2009). However, as the Ninth Circuit recognized in *Metabolic Research,* in practice Louisiana courts allow immediate appeals pursuant to a writ of supervision, and therefore "uniformly and automatically review denials of anti-SLAPP motions prior to final

judgment," thus satisfying the collateral order doctrine requirement of a substantial public interest mandating immediate appeal. *Metabolic Research*, 696 F.3d at 801 n.7. And the *McNair* court's discussion of *Henry* does not signify that this Court would consider the rights afforded by the Act a substantial public interest justifying an immediate appeal.

Finally, the Reporters Committee's reliance on two decisions in Maine and Massachusetts in support of its assertion of a right to immediate appeal is unavailing.[4] Neither case considered the collateral order doctrine but rather considered Maine and Massachusetts jurisprudence regarding those states' final judgment rules. *See Morse Bros., Inc. v. Webster,* 772 A.2d 842, 848 (Me. 2001) (allowing appeal based upon the "death knell" exception to the final judgment rule); *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002) (allowing appeal based upon the doctrine of "present execution"). Further, as a factual matter, both cases centered around efforts by plaintiffs to prevent defendants from or to punish defendants for petitioning the government either in a court of law or before governmental entities. More importantly, both cases pre-dated the Supreme Court's decision in *Will v. Hallock* and the Ninth Circuit's decision in *Englert v. MacDonnell*, and do not address the essential question of whether the denial of an anti-SLAPP motion under Maine or Massachusetts law implicates "some particular value of high order … in support of the interest in avoiding trial." *Englert*, 551 F.3d at 1105. Accordingly, neither court's decision is dispositive as to whether this Court should allow an immediate appeal under the Act.

[4] Defendants also rely on the First Circuit's decision in *Godin v. Schenks*, where the court held that it had limited jurisdiction to review solely whether the district court had properly concluded that Maine's anti-SLAPP statute does not apply in federal court under the *Erie* doctrine. 629 F.3d 79, 84 (1st Cir. 2010). Importantly, *Godin* reserved the question of whether an order addressed to the merits of a ruling under an anti-SLAPP statute is immediately appealable. *Id.*; *see also, Lynch v. Christie*, No. 11–2172, 2012 WL 2369504, at *2 (1st Cir. June 25, 2012).

2. Orders Denying Motions Under The Act Do Not Resolve An Issue Completely Separate From The Merits

Defendants must also demonstrate that orders denying anti-SLAPP motions "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The reason for this requirement is straightforward: "allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.* at 476. Accordingly, collateral-order appeals are not permitted if the class of orders at issue "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 469.

Orders denying anti-SLAPP motions are not "completely separate from the merits" for this reason. Indeed, to determine whether the plaintiff's claim "is likely to succeed on the merits," D.C. Code § 16-5502(b), the appellate court has no choice but to answer "the questions underlying [the] plaintiff's claim on the merits," *Johnson v. Jones*, 515 U.S. 304, 314 (1995). This, in turn, requires the court to determine "the legal classification of a congeries of facts" that are "bound up with the merits" of the plaintiff's claim; but such "fact-related determinations do[] not comport with *Cohen*'s theory of appealability." *See Oscarson v. Office of the Senate Sergeant at Arms*, 550 F.3d 1, 3-6 (D.C. Cir. 2008). That is equally true for interlocutory appeals involving claims of qualified immunity. As the Supreme Court explained in *Johnson v. Jones*, the reason some claims of qualified immunity are immediately appealable while others are not is that appealable claims involve only "the purely legal issue of what law was 'clearly established'" or similar "abstract issues of law," which are "significantly different from the questions underlying [the] plaintiff's claim on the merits." 515 U.S. at 313-14, 317. On the other hand,

claims of immunity that turn on fact-intensive inquiries are not immediately appealable because they are not completely separate from the merits. *Id.* An interlocutory appeal "concerning this kind of issue" wastes appellate courts' time "by forcing them to decide in the context of a less developed record[] an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." *Id*. at 317. A court's review of whether a plaintiff's claim "is likely to succeed on the merits," D.C. Code § 16-5502(b), is inextricably tied with an evaluation of the merits.[5] This much is clear from a cursory review of the Superior Court's orders denying Defendants' motions to dismiss.

And should this Court accept jurisdiction of the trial court's interlocutory orders, it would by necessity be delving into the thick of an as-yet not fully developed factual record. For example, Defendants would ask the Court to determine whether the specific statements at issue in this case are protected opinion or rhetorical hyperbole. In deciding whether the offending statements were mere opinions, the appellate court would have to consider how those statements were understood by Defendants' readers (a factual question which was presented to the trial court), and would have to analyze the specific context of those statements. Only after considering those factual issues and applying them to the law of defamation, would this Court be able to answer the question of whether the statements are protected opinion. And if the Court decides that the statements are not protected, then Defendants would ask the Court to determine whether the facts of this case show that Defendants made the specific statements with actual malice, whether with knowledge of their falsity or a reckless disregard for the truth. This also would

[5] Dr. Mann respectfully submits that the Ninth Circuit's jurisprudence on this point is wrongly decided and has produced unfortunate results and that any argument that a decision denying an anti-SLAPP motion is completely separate from the merits is "not credible." *Makaeff v. Trump Univ. LLC*, 736 F.3d 1180, 1190 (9th Cir. 2014) (Watford, J., joined by Kozinski, Paez, and Bea, JJ., dissenting) (arguing that orders denying an anti-SLAPP motion do not satisfy the second prong of Cohen, because anti-SLAPP statutes require courts to assess the merits of the action).

require the Court to delve into the as-yet not fully developed factual question of whether Defendants knew that Dr. Mann was not a fraud or recklessly disregarding the multiple investigations exonerating Dr. Mann. This inquiry would require a fact-intensive examination of the nature of the investigations of Dr. Mann, Defendants' knowledge of those investigations, and Defendants' assertion that none of these investigations exonerated Dr. Mann.

Given the intensely fact-specific nature of the application of the opinion defense and the law of actual malice to this case, and the fact that these issues have not yet been fully developed in the trial court, the issues that arise in this appeal "will substantially overlap [the] factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

3. Orders Denying Motions Under The Act Are Not Conclusive

Finally, Defendants must establish that orders denying anti-SLAPP motions "conclusively determine the disputed question" decided by the district court. *Coopers & Lybrand v. Livesay*, 437 U.S. at 468. This requirement saves appellate courts from resolving questions that ultimately become moot—perhaps because the district court subsequently revised its ruling, the issue did not affect final judgment in a manner warranting reversal, or the party that lost the ruling prevailed on the merits. *See, e.g., United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999); *Banks v. Office of Senate Sergeant-At-Arms*, 471 F.3d 1341, 1344-45 (D.C. Cir. 2006). Anti-SLAPP motions implicate each of these concerns because the "disputed question" at hand—the plaintiff's ability to succeed on the merits—will recur throughout the lower court proceedings.

This Court can effectively review the Superior Court's anti-SLAPP order after the factual record on which it was based has been fully developed, after Defendants exhaust their

opportunities to convince the Superior Court that they are entitled to dismissal, and after final judgment has been entered.

II. THIS COURT HAS ALREADY RULED THAT THE DENIAL OF AN ANTI-SLAPP MOTION IS NOT IMMEDIATELY APPEALABLE

Defendants urge this Court to not give any weight to its decision in *Newmyer v. Sidwell Friends School,* No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order) concluding that collateral order review was unavailable for an order denying a motion under the Act. The fact remains that the only instance in which this Court has addressed the appealability of a denial of an anti-SLAPP motion, it has ruled that such a denial is unreviewable.

Faced with this elephant in the room, Defendants argue that the *Newmyer* court's holding is "entirely inapplicable to this case, because it does not address the availability of collateral order review of denial of an anti-SLAPP motion on the merits." (Defs.' Br. at 20). But there is simply no basis for Defendants' suggestion that an order denying an anti-SLAPP motion on procedural grounds would be less appealable than an order denying a motion for failure to show likelihood on the success on the merits. Further, Defendants' assertion that the *Newmyer* court did not consider whether the Act conferred an immunity from suit is made up whole cloth. Of course, we do not know what the *Newmyer* court considered dispositive when it dismissed the appeal. But we do know that the *Newmyer* court based its dismissal on *Englert*, which teaches that application of the collateral order doctrine hinges upon whether the Act confers an immunity from suit. And, contrary to Defendants' assertion in their brief (Defs.' Br. at 20 n.10), the appellant in *Newmyer* did in fact argue that the anti-SLAPP statute conferred an immunity. *See* Counter-Defendant/Appellant's Response in Opposition to Motion to Dismiss Appeal, No. 12-CV-847 (D.C. filed July 16, 2012), at 6-7.)

Similarly, Defendants' suggestion that this Court's should defer answering the jurisdictional question in this case because the panel in *Doe v. Burke*, No. 13-CV-83 (D.C. filed Sept. 6, 2013) "may recognize collateral order jurisdiction under the Anti-SLAPP Act" is without basis. The *Burke* panel has not yet issued its opinion, accordingly it has no relevance to the jurisdictional question here.

III. THIS IS NOT THE TYPE OF LAWSUIT THE ACT WAS INTENDED TO ADDRESS

In addition to not meeting the stringent standard set by the Supreme Court in *Will*, immediate appeal of this case does not advance the purpose of the Act. In its brief, the ACLU describes the purpose of anti-SLAPP statutes in general and the District of Columbia's statute's legislative history. As the ACLU sees it, virtually all defamation cases lack merit and are brought to "punish the opponent[]s and intimidate them into silence." (ACLU Br. at 4). Here, while the anti-SLAPP statute may technically apply, Dr. Mann's lawsuit is not a SLAPP, rather, it seeks damages for malicious, defamatory remarks directed to him. It does not seek to stifle opinion commentary about the phenomenon of climate change. As courts in the District of Columbia have made clear, and the ACLU acknowledges, the purpose of anti-SLAPP statutes is to prevent large corporations from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. *See Blumenthal v. Drudge*, No. Civ.A. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001). As a result, courts were given an early mandate to halt a baseless suit to ensure that innocent defendants would not be unnecessarily burdened by the discovery process.

Dr. Mann's case can hardly be called meritless. Further, unlike a traditional SLAPP suit, there is no economic bullying by Dr. Mann, who certainly is not a "large private interest[] [aiming] to deter common citizens from exercising their political or legal right[s]." *Id.* (citation

omitted). Nor has this suit had any effect whatsoever in stifling debate on this issue. The ACLU does not, and cannot, argue that Dr. Mann—a lone climate scientist attempting to combat false accusations of fraud and outrageous comparisons to a convicted serial child molester—is not the type of litigant that the statute was meant to deter from acting to vindicate his rights.

Nevertheless, the ACLU takes the extreme position that in order to combat the chilling effects of meritless lawsuits, the Council intended for the SLAPP statute to prevent the prosecution of meritorious lawsuits. As the ACLU states: "[n]ot every SLAPP is necessarily meritless," suggesting by inference that the meritorious cases should also be blocked. (ACLU Br. at 8). In the ACLU's view, "the Council made a public policy decision that the value of protecting free speech on issues of public interest outweighs the value of allowing every possibly meritorious tort claim to be fully litigated." *Id.* But this is a radical departure from the purpose of the Act and the intent of the Council in enacting this legislation; there is no evidence that the Council intended the Act to block meritorious suits.

IV. ANTI-SLAPP PROCEDURES ARE BEING ABUSED, AND THE ALLOWANCE OF INTERLOCUTORY APPEALS WILL ONLY COMPOUND THIS ABUSE

Amici also fail to consider the significant downside to their suggestion that allowing the immediate appeal of denials of anti-SLAPP motions—the distinct possibility that the Act itself will be misused and abused. To be sure, the Act was enacted for the laudable goal of deterring meritless suits aimed at chilling speech. But, as other jurisdictions with long-standing anti-SLAPP statutes have noted, "[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation." *Grewal v. Jammu*, 191 Cal. App. 4th at 998 (quoting *Navellier v. Sletten*, 29 Cal. 4th 82, 96 (2002)). The disease is particularly loathsome in cases such as this, where the prosecution of meritorious suits are frustrated and delayed at every turn.

Before this Court grants a right of interlocutory review that is conspicuously absent from the Act itself, it should consider California's experience. There, recognizing that "a losing defendant's right to appeal is the aspect of the anti-SLAPP statute most subject to abuse," the appellate court "urged" the California legislature to "seriously consider" "eliminating a losing defendant's right to appeal." *Id.* at 1002. In California the statute has morphed from a little-used statutory protection for environmental and other protestors to a … ***veritable explosion in appellate court decisions dealing with the statute***." *Id.* at 999. And the statistics evidence that the California appeals courts have been inundated with SLAPP-related appeals:

> Between 1992, when the statute was first enacted, and January 1, 2000 there were only 34 published appellate decisions on the statute. But between January 1, 2000 and September 25, 2003, there were 184 published and unpublished decisions. Of those decisions, 148 have been rendered from September 25, 2002 to September 25, 2003.

Id. at 999 (citations omitted). Notably, the explosion in appeals coincides with California's 1999 amendment to its anti-SLAPP statute which provided for immediate appeal of denials of anti-SLAPP motions. *Id.* at 1000. As a result, "one cannot pick up a volume of the [California] Official Reports without finding an anti-SLAPP case. Or four. This of course is just the published opinions." *Id.* at 998 (citations omitted). In fact, for the years 2002 to 2009, California's Judicial Council recorded between 500 and 600 anti-SLAPP motions per year. *Id*.

It is clear that this proliferation of SLAPP motions is not solely the result of meritless lawsuits. Defendants are misusing California's law to frustrate legitimate plaintiffs from obtaining justice:

> [the anti-SLAPP] law is being used by defendants to unreasonably delay a case from being heard on the merits, thus adding litigation costs and making it more cumbersome for plaintiffs to pursue legitimate claims. ... The filing of the meritless SLAPP motion by the defendant, even if denied by the court, is instantly appealable,

> which allows the defendant to continue its unlawful practice for up to two years, the time of appeal.

Id. at 1001 (citations omitted). This abuse is especially insidious in clearly meritorious cases such as Dr. Mann's:

> [A]nother, and more subtle, abuse can be found in a case where the defendant could in good faith claim that the plaintiff's action arose from protected activity, and thus could meet the burden under step one of the anti-SLAPP analysis. But as seen, that is only the beginning. And suppose further that the defendant (or the defendant's attorney) knows that the plaintiff could meet the burden under step two. The defendant nevertheless files the anti-SLAPP motion, knowing that it will ***cause the plaintiff to expend thousands of dollars to oppose it, all the while causing the plaintiff's case, and ability to do discovery, to be stayed. Would this not constitute a misuse of the procedure . . . And certainly when followed by the abuse coup de grâce—the appeal***.

Id. at 999-1000 (emphasis added).

To date, Defendants have succeeded in employing the Act to forestall Dr. Mann's right to have his day in court. This lawsuit was filed over a year and half ago. Defendants moved to dismiss and were afforded all of the protections offered by the Act—discovery was (and continues to be) stayed and Dr. Mann was obligated to show early on that he was likely to succeed on the merits of his defamation and intentional infliction of emotional distress claims. Dr. Mann met his burden. Nonetheless, Defendants unsuccessfully moved the trial court to reconsider its orders denying the motions to dismiss and to certify for interlocutory appeal its orders denying the motions to dismiss. In denying certification, Judge Weisberg noted that in his view it was unlikely that the D.C. Court of Appeals would reverse or even consider the denials of defendants' motions to dismiss. Not to be dissuaded, Defendants have appealed the denial of their motions to dismiss twice, paralyzing this lawsuit, potentially for years. Given the potential for abuse of the Act, especially with respect to meritorious cases such as Dr. Mann's, this Court should not afford Defendants yet another opportunity to further delay this lawsuit.

Delay is the most troublesome aspect of an immediate appeal. And surely at least the ACLU recognizes this. After all, in its testimony in support of the statute, the ACLU noted that this Court "often takes years to rule on appeals," and urged the D.C. Council "to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal." *See* Comm. Rep. at 20. While the ACLU argues that the right to immediate appeal is "critical,"[6]

> it should not trump all else. And a losing defendant's loss of the right to appeal a lost anti-SLAPP motion . . . is a much smaller price to pay than a winning plaintiff having to expend thousands of dollars in attorney fees on appeal, while the plaintiff's case is stayed for anywhere from 19 to 26 months, all in a setting where the original motion was without merit, if not downright frivolous.

Grewal, 191 Cal. App. 4th at 1003 (internal quotations and citations omitted). Dr. Mann is already paying the price for Defendants' interlocutory appeal. As Justice Richman noted in lamenting the rampant abuse of California's anti-SLAPP statute: "Justice delayed is justice denied. A lesser known saying, known to be attributable to prominent defense lawyers from major law firms, is that "Justice delayed is justice."" *Id.* at 999 (internal quotations omitted).

V. THE REPORTERS COMMITTEE IS CRYING WOLF: TRIAL COURTS CORRECTLY DECIDE DEFAMATION CASES

The Reporter's Committee tells this Court that it is "imperative" that an interlocutory appeal be permitted in defamation cases in order to "significant[ly] impact" the number of "meritless" defamation claims.[7] As support for this assertion, it cites the 2010 report of the

[6] A characterization which Dr. Mann disputes. The Act is certainly serving its purpose even without a right to interlocutory review, as can be gleaned from the District of Columbia's recitation of cases where defendants have availed themselves of the Act's protections. *See* D.C. Br. at 20 n.9.

[7] In its brief, the Reporters Committee asserts that it has an interest, as *amici curia*, in protecting free speech on behalf of a variety of media organizations. But the Reporters Committee's Executive Director was counsel of record to the defendant Competitive Enterprise Institute in

Media Law Resource Center (MLRC) for the proposition that "nearly 70 percent of defamation decisions that defendants appeal are overturned on appeal."[8] The Committee goes on to suggest that in view of this high percentage of appellate reversals, immediate appellate review is needed because the trial courts in this country are failing to do their job in properly policing defamation cases.

So let us test that proposition. When we look at the data contained in this report, it becomes readily apparent that the trial courts in this country are doing an excellent job in reviewing and deciding defamation cases.

First, let us start with the reversal rate of cases that have proceeded to trial, having survived summary judgment—the same standard applied under the anti-SLAPP statute. According to the MLRC Report, between 1980 and 2011, there have been 600 defamation cases tried in this country. (Ex. A, at 36). During that same period of time, 145 cases have been reversed or modified on appeal. (*Id.* at 74) This is a 25 percent rate, as opposed to the 70 percent rate set forth by the Committee. We would suggest that the 25 percent rate, using the denominator of 600 cases tried, is the proper comparison if the inquiry here is to determine whether an immediate appeal is needed because of the purported failure of the trial courts to dismiss cases at the summary judgment stage.

In any event, if the Committee's concern is the number of meritless defamation cases that are supposedly plaguing our judicial system, let's look at that too. On page 37 of the Report we learn that in recent years (from 2000 through 2011) there has been an average of only 11

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this case until April 21, 2014—less than one week before the filling of the Reporters Committee's *amicus* brief. The fact that its Executive Director did not, as set forth in the Committee's disclosure, participate in the drafting of the brief is quite beside the point. Simply put, the Reporters Committee is much less a "friend of the court" than a "friend of the defendant."

[8] A complete copy of the MLRC Report is attached hereto as Exhibit A.

defamation cases tried a year—in the entire country. And on page 36 we further learn that during this 11 year period, only 57 of those cases resulted in a plaintiff's verdict, approximately five per year. Even using the Reporters Committee's 70 percent rate of reversals (and we would submit that the more realistic percentage is 25 percent), that means that an immediate interlocutory appeal could be expected to prevent only three or four meritless defamation verdicts a year—again, in the entire country.

Finally, let us look at the supposed problem in the District of Columbia. Is the rash of defamation cases in this jurisdiction so acute that this court should create a special right for an immediate appeal? Here are the statistics. During the past 31 years, there has been only one plaintiff's defamation verdict appealed to the D.C. Circuit—and it was affirmed. (Ex. A, at 101.) During the same time period, there has not been one plaintiff's defamation verdict in our Superior Court, and of course, no appeals. *Id.* at 105. The singular message here is that our trial courts, and particularly those in the District of Columbia, are doing an excellent job in applying proper First Amendment guarantees in defamation cases.

We should also note that not all media organizations share the Reporters Committee's concerns, at least with respect to this lawsuit. Among them is the *Columbia Journalism Review* (CJR), perhaps the preeminent voice for responsible journalism in this country. Unlike the Reporters Committee and the other *amici*, CJR was shocked and dismayed by the Defendants' attack on Dr. Mann. Writing on its behalf, CJR editor Curtis Brainard referred to the Defendants' libels as "deplorable, if not unlawful," and stated that he fully supported Dr. Mann in this case. As Mr. Brainard stated:

> Deliberately enticing hatred of an individual by linking him to a child molester? This is unacceptable in a civil society, whatever your view on freedom of the press is.[9]

CONCLUSION

The Act does not provide a right to immediate appeal, and the denial of a motion under the Act does not satisfy the stringent requirements of the collateral order doctrine. Accordingly, this Court lacks jurisdiction over these appeals and they should therefore be dismissed. Alternatively, given the clear merit of Dr. Mann's lawsuit, the Court should follow the suggestion of the District of Columbia. It should summarily affirm the Superior Court's decisions and promptly return this matter to the Superior Court for further proceedings.

[9] *See* Curtis Brainard, "'I don't bluff': Michael Mann's lawyer says National Review must retract and apologize," Columbia Journalism Review (July 25, 2012), *available at*: http://www.cjr.org/the_observatory/michael_mann_national_review_m.php?page=2.

DATED: April 25, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 25, 2014, I caused a copy of the foregoing Appellee's Opposition to Response to Order to Show Cause to be served via first-class mail, postage prepaid, on the following:

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