NOS. 14-CV-101, 14-CV-126

In The
DISTRICT OF COLUMBIA COURT OF APPEALS

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COMPETITIVE ENTERPRISE INSTITUTE, NATIONAL REVIEW INC., RAND SIMBERG,
Appellants,

v.

MICHAEL E. MANN, PH.D.,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CASE NO. 2012 CA 008263 B
THE HONORABLE NATALIA COMBS GREENE &
THE HONORABLE FREDERICK WEISBERG

Brief of Amici Curiae Newsmax Media, Inc., Free Beacon, LLC, The Foundation for Cultural Review, The Daily Caller, LLC, PJ Media, LLC, and The Electronic Frontier Foundation

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 28(a)(2) and 29(c) of the District of Columbia Court of Appeals, *amici* state as follows:

Newsmax Media, Inc. is a privately-held, non-governmental entity with no corporate parents, affiliates, and/or subsidiaries that are publicly held.

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The Foundation for Cultural Review is a non-profit 501(c)(3) organization with no parent company.

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The Electronic Frontier Foundation ("EFF") is a non-profit organization that does not have a parent corporation, and no publicly-held corporation owns 10% or more of EFF.

STATEMENT OF INTEREST

Amici predominately consist of online publishers dedicated to providing commentary, review, and reporting on public policy, government affairs, culture, and the arts.[1] *Amici* and other media groups serve a vital function by providing our pluralistic society with the information and analysis needed to take informed positions on social, political, and economic issues. The Electronic Frontier Foundation is a civil liberties organization that works to protect rights in the digital world and to ensure open discourse on the internet.

This case concerns *amici* because the lower court's opinion weakens constitutional protections for online speech. *Amici* are interested in protecting free speech rights through effective and well-enforced anti-SLAPP statutes. They have an especially pronounced interest because smaller entities like themselves lack the resources necessary to combat SLAPPs, making them more susceptible to their chilling effects on public policy and political speech. And like all Internet publishers, *amici* are interested in ensuring that the District of Columbia affords full constitutional protection for online speech that is consistent with First Amendment jurisprudence throughout the country.

SUMMARY OF THE ARGUMENT

By their very existence, anti-SLAPP statutes recognize the vital importance of open discourse on public policy and political matters. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). Speech on public issues, therefore, stands upon the

[1] **Appendix A** contains a more detailed description of each *amici*.

"highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) (citation omitted). The Superior Court's decisions, however, stifle public policy speech by diluting the degree of protection the D.C. Council intended its anti-SLAPP Act to provide for such speech in the nation's capital.

The decisions conflict with well-established canons of statutory construction. The Superior Court's holding that a *prima facie* showing is sufficient for a SLAPP plaintiff to satisfy his statutory "likely to succeed on the merits" burden is manifestly incompatible with that very language, impermissibly rendering it, and the protections it affords, a nullity. Instead, the proper showing should be akin to that required under a preliminary injunction standard, from which the "likely to succeed on the merits" language is borrowed. That standard demands a *clear* showing of a *substantial* likelihood of success on the merits. This conclusion is consistent with statutory construction rules, and strikes the proper balance between the need to ensure the "free flow" of public policy and political speech, and allowing meritorious claims to move forward. "Whatever is added to the field of libel is taken from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272, (1964).

The injury to wide-open debate on matters of intense public interest is acute in this case, where the statements at issue are core First Amendment-protected speech. By allowing Count V of the Amended Complaint to go forward, which alleges libel *per se* against Competitive Enterprise Institute ("CEI") merely for hyperlinking to a purportedly defamatory statement (J.A. 79-81), the Superior Court took a substantial portion from the field of free speech rights. The Superior Court's decisions are a clear departure from traditional First Amendment principles [2] as well as the Communications Decency Act. Moreover, the decisions violate sound public policy.

[2] *Amici* expressly adopt the First Amendment arguments contained in Appellants' Opening Briefs.

As the Southern District of New York found, enforcing the highest First Amendment protections for those who hyperlink has the benefit of promoting the spread of information on the Internet, allowing society "to engage more deeply with the issues raised." *Adelson v. Harris*, 973 F. Supp. 2d 467, 485 (S.D.N.Y. 2013) (citation omitted). "It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits." *Id.*

ARGUMENT

I. The District Of Columbia's Anti-SLAPP Act Provides Substantive Protections, Which Demand That A Plaintiff Make A Clear Showing That His Claim Will Succeed.

The District of Columbia enacted its anti-SLAPP Act (the "Act") to provide substantive protections, including summary dismissal, against non-meritorious defamation claims targeting public interest and political speech. *See Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (finding a SLAPP's "objective is to use litigation as a weapon to chill or silence speech"). "Such cases are often without merit, [they] 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," and the "impact is not limited to named defendants . . . but prevents others from voicing concerns as well." J.A. 167. In passing the bill, the D.C. Council made a legislative judgment that substantial public and private harms accrue immediately from the filing of unmeritorious suits seeking to punish expressive activity on issues involving the public interest, and that those harms increase as litigation continues.

To deter such suits and limit their chilling effect, the Act affords defendants "substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." J.A. 167. Permitting an unmeritorious suit to survive early dismissal both runs counter to the declared public policy of the Act and grants the SLAPP plaintiff much, if not all, of the benefit

he or she sought by the mere filing of the action. As this Court has noted, "[T]he threat of being put to the defense of a lawsuit brought by a [public figure] may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . . ." *Nader v. de Toledano*, 408 A.2d 31, 43 (D.C. 1979).

In drafting the Act, the D.C. Council recognized that because the litigation process itself is often the punishment, any process is already too much for meritless filings aimed at chilling free speech rights. J.A. 170. This Court has long recognized that, "'in the First Amendment area, summary procedures are even more essential'" than in other areas of litigation because the "threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 592 (D.C. 2000) (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)). Thus, the "special motion to dismiss" is the key provision implementing the D.C. Council's purpose to "protect the targets of SLAPPs and encourage 'engag[ement] in political or public policy debates.'" *Doe No. 1*, 91 A.3d at 1036 (citation omitted). Section 16-5502(b) of the Act distinctly provides that the special motion to dismiss "shall be granted unless the responding party demonstrates that the claim is *likely* to succeed on the merits." D.C. CODE § 16-5502(b) (emphasis added). This likelihood of success requirement is textually unique among other anti-SLAPP statutes from the various States,[3] and should not simply be construed as equivalent to them. Thus, while guided by the statutes "set forth in a number of other jurisdictions," the District's anti-SLAPP Act evidences a deliberate legislative intent to impose a higher burden on SLAPP plaintiffs.

[3] Public Participation Project, State Anti-SLAPP Laws, http://www.anti-slapp.org/your-states-free-speech-protection/ (reporting the status of anti-SLAPP laws by State).

A. The Standard used by the Lower Court Renders the "Likely to Succeed on the Merits" Language a Nullity.

The lower court erred in holding that a SLAPP plaintiff "must satisfy a standard comparable to that used on a motion for judgment as a matter of law." J.A. 109, 164. Its holding is inconsistent with the very provision to which it applies, and renders it a nullity. Under the lower court's holding, a SLAPP plaintiff can satisfy his burden by "demonstrat[ing] that the complaint is legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 257 (D.D.C. 2013) (cited by the July 19, 2013 Order); *see also* J.A. 164 ("Viewing the alleged facts in the light most favorable to plaintiff, as the courts must on a motion to dismiss . . . ."). While a *prima facie* showing is the prevailing standard in California to satisfy the "probability" language in that State's statute, it is wholly inadequate and inapplicable to the "likely to succeed on the merits" language in the District of Columbia's anti-SLAPP Act.

This Court has held that a *prima facie* showing is separate from and not as burdensome as the showing necessary to satisfy the "likely to succeed" standard. *See Tennille v. Tennille*, 791 A.2d 79, 83 (D.C. 2002); *see also Mewborn v. U.S. Life Credit Corp*., 473 A.2d 389, 391 (D.C. 1984); *Clark v. Moler*, 418 A.2d 1039, 1043 (D.C. 1980). In *Tennille*, this Court held that a movant's *prima facie* showing need not be "'as strong as that of likely to succeed,'" and that all a *prima facie* showing requires are facts that would allow the court to rule in favor of the movant if the facts are found to be true. *See Tennille*, 791 A.2d at 83 (quoting *Clark*, 418 A.2d at 1043). Likewise, this Court in *Mewborn* also distinguished a *prima facie* showing from that necessary to satisfy the "likely to succeed" standard. *See Mewborn*, 473 A.2d at 391. Holding that an appellant need only present a *prima facie* showing, this Court stated that the appellant "does not have to 'make a showing as strong as that of likely to succeed.'" *Id*. (citation omitted).

Though *Tennille*, *Mewborn*, or *Moler* do not expressly articulate the showing required to satisfy the "likely to succeed" standard, they do make clear that such showing is distinct from—and substantially more burdensome than—a mere *prima facie* showing. Thus, the low *prima facie* bar advanced by the Superior Court impermissibly renders the "likely to succeed on the merits" standard, established by the D.C. Council, a mere nullity, and must be reversed. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375 (1988) (rejecting statutory interpretation that would render a provision a "practical nullity and theoretical absurdity"); *see also Davis v. Univ. of the District of Columbia*, 603 A.2d 849, 853 (D.C. 1992) (rejecting interpretation that "would be out of harmony with the statute and 'a mere nullity'").

Moreover, the Act plainly states that a SLAPP target must make a "*prima facie* showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. CODE § 16-5502(b) (emphasis added). If the D.C. Council intended to impose the same *prima facie* standard on the SLAPP plaintiff, it could have easily mirrored the language and done so. Because it did not, the D.C. Council clearly intended to impose a different standard on a SLAPP plaintiff. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 n.31 (1987) ("the fact that Congress has prescribed two different standards in the same Act certainly implies that it intended them to have significantly different meanings"); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (finding that courts presume the legislature acts intentionally when it "uses certain language in one part of a statute and different language in another").

B. The Ordinary Meaning of "Likely" Supports a Higher Burden.

Quite plainly, the ordinary dictionary definitions of "likely" and "probability" reveal a qualitative difference between them, indicating that the D.C. Council intended to impose a higher burden on SLAPP plaintiffs. "[T]he words of [a] statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Branch v. Fields*, 496 A.2d 607, 609 (D.C. 1985) (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979)); *see also United States v. Goldenberg,* 168 U.S. 95, 102-03 (1897). In finding the ordinary meaning, this Court has held that "the use of dictionary definitions is appropriate in interpreting undefined statutory terms." *West End Tenants Ass'n v. George Wash. Univ.*, 640 A.2d 718, 727 (D.C. 1994) (quoting 2A SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.07 (5th ed. 1992)).

Merriam-Webster defines "likely" as "having a high probability of occurring or being true," "very probable," "without much doubt," and "in all probability." MERRIAM-WEBSTER DICTIONARY (online ed. 2014). Thus, comparing apples to apples, establishing success on the merits "in *all* probability," as "likely" is defined, is unequivocally a higher burden than establishing only *some* "probability" of success on the merits. Indeed, the same dictionary defines "probability" as merely "the *chance* that something will happen." MERRIAM-WEBSTER DICTIONARY (online ed. 2014) (emphasis added).

Mann speciously argues that "[t]his is a distinction without a difference," (Pl.'s Mem. of Points and Authorities in Opp'n at 38), equating the word "probability" with "likelihood." While Mann correctly states the dictionary defines "probability" as "likelihood" and vice versa, the comparison is inapt because "likelihood" does not appear anywhere in the Act. And notably, as this Court recognizes, "likely" is also not equivalent to "likelihood." As discussed below, *infra* at 10, this Court instead equates "likely" with a "*substantial* likelihood." *See, e.g., Ortberg v.*

Goldman Sachs Grp., 64 A.3d 158, 162 (D.C. 2013). *Cf. Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006) ("A substantial probability is [] equivalent to the standard required to secure a civil injunction—likelihood of success on the merits.") (internal quotations omitted).

C. The District of Columbia's Anti-SLAPP Act Incorporates the Clear Showing Requirements from the District of Columbia's Jurisprudence.

Though the D.C. Council referred to California's anti-SLAPP statute for guidance while drafting its own, the Council did not follow its approach in all respects. In particular, the Council's deliberate use of the word "likely" instead of "probability," as contained in California's version, denotes a higher burden than that adopted in California. This higher burden requires a SLAPP plaintiff to make a *clear* showing of a *substantial* likelihood of success on the merits.

The calculated change in language is noteworthy and should be given special weight. There exists a "general presumption" that, when a legislative body "alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson*, 503 U.S. 333, 336 (1992) (addressing federal statute); *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). "[A] change in legislative language gives rise to the presumption that a change was intended in legislative result." *United States v. Brown*, 422 A.2d 1281, 1284 (D.C. 1980) (internal citation omitted).

Likewise, courts are obliged to presume that the legislature, by using terms or phrases that have been given a particular meaning and construed in certain ways by the courts, intended that courts would apply that meaning in the statute under consideration. *See 1618 Twenty-First St. Tenants' Ass'n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003). "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meanings of

centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Id*.

This Court, as well as other courts sitting in the District of Columbia, have applied or defined "likely to succeed on the merits" in evaluating the extraordinary relief of a preliminary injunction. *See, e.g., Zirkle v. District of Columbia*, 830 A.2d 1250, 1262 (D.C. 2003) (affirming denial of preliminary injunction because movant is not "likely to succeed" on the merits absent a substantial showing); *see also Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014) (same). In articulating the injunction standard, this Court uses "likely to succeed" and a "substantial likelihood of success" interchangeably, indicating that "likely" is a heavy burden to meet. *See District of Columbia v. Sierra Club*, 670 A.2d 354, 361 (D.C. 1996) ("A preliminary injunction is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief").

As the Supreme Court held in *Mazurek v. Armstrong*, the "likely to succeed" burden is not met by merely "*some* evidence" that an element of a claim will be shown, but requires "*a clear showing*," a "requirement for substantial proof [that] is much higher." 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original). Under this standard, "the trial court must find that the moving party has clearly demonstrated a substantial likelihood of success on the merits." *Ortberg*, 64 A.3d at 162 (quoting *Feaster v. Vance*, 832 A.2d 1277, 1287-88 (D.C. 2003)). A clear demonstration requires credible evidence, not merely allegations. *See Liberi v. Taitz*, 759 F. Supp. 2d 573, 578 (E.D. Pa. 2010) (denying preliminary injunction). And a mere evidentiary showing of "more likely than not" will not suffice.[4] *See Revision Military, Inc. v. Balboa Mfg.*

[4] The lower court erroneously stated that a preponderance of the evidence is sufficient to satisfy the preliminary injunction standard. J.A. 108 (citing to *Zirkle,* 830 A.2d at 1257). While the standard of proof for the underlying claims in *Zirkle* might have been a preponderance of the

Co., 700 F.3d 524, 526 (Fed. Cir. 2012) (noting that a "clear or substantial likelihood" standard is "heightened" as compared to a "standard of whether success is more likely than not"). By deliberately adopting the term "likely" in the anti-SLAPP Act, the D.C. Council intended that SLAPP plaintiffs likewise be subject to the same high burden.

II. Hyperlinking Does Not Give Rise To A Defamation Claim.

Even if the required showing for the "likely to succeed on the merits" standard is as low as the Superior Court held, CEI can bear no liability for hyperlinking to the allegedly defamatory article. As technology advances and new media and platforms emerge for published content, courts must continue to ensure that they consistently apply established First Amendment protections to preserve the rights of free speech and the press in these newly developed spaces. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (applying First Amendment principles to video games); *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to" online speech). In this vein, courts have held that hyperlinking is simply the modern, digital equivalent of attribution in the same way as a footnote or endnote. *See, e.g., Adelson*, 973 F. Supp. 2d at 484 ("The hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law").

A. Hyperlinking is Not Republication.

Because the mere act of hyperlinking to defamatory content cannot, in and of itself, give rise to a claim for libel by republication, CEI bears no liability under Count V of Mann's Amended Complaint. Courts have found republication to occur only when it presents the entirety of the actionable content before a new audience, or when the original text of the article was

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evidence, this Court did not hold that the showing to grant the preliminary injunction was identical.

changed. *See United States ex rel Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1073 (W.D. Wash. 2012) (citing to *Salyer v. So. Poverty Law Ctr.*, 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009). As noted above, a hyperlink is simply an attribution or a reference to the linked article. *See, e.g., Salyer*, 701 F. Supp. 2d at 917 (a "hyperlink is simply a new means for accessing the referenced article"). Courts have thus overwhelmingly held that a hyperlink is not a republication and, therefore, cannot support a claim for libel. *See, e.g., In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 165-66 (3d Cir. 2012).

A comment coupled with the hyperlink to the defamatory content does not change the outcome. Thus, CEI's opinion that the hyperlinked article "expertly summed up the matter," is of no moment. In *Philadelphia Newspapers*, for example, at issue was commentary that favorably referenced and hyperlinked to allegedly defamatory material. The commentary read: "But if you follow the remarkable reporting of my colleague Martha Woodall (http://go.philly.com/charter), you'll see greedy grown-ups pilfering public gold under the guise of enriching children's lives." *Id*. at 166. The Third Circuit found that the comment/hyperlink combination did "not amount to the restatement or alteration of allegedly defamatory material . . . necessary for a republication." *Id*. at 175. As in *Philadelphia Newspapers*, CEI's reference/hyperlink also does not constitute a republication of the allegedly defamatory article.[5]

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[5] As CEI and Simberg pointed out in their Opening Brief, "[w]ere the law otherwise, every major Internet service, from Google to Facebook, would face staggering liability in the District for their hyperlinks . . . ." CEI Br. at 47. Indeed, as Mann himself recognizes, (J.A. 63), the District of Columbia's long-arm statute provides plaintiffs with enough reach to hail defendants into D.C. courts for activity conducted on the Internet. *See, e.g., Lewy v. So. Poverty Law Ctr., Inc.*, 723 F. Supp. 2d 116, 128 (D.D.C. 2010) (finding personal jurisdiction under the long arm statute for online defamation claim); *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998) (same). As the Supreme Court presciently recognized, "[a]s technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase." *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). If permitted to stand, the Superior Court's holdings on hyperlinking and the anti-

B. Section 230 of the Communications Decency Act Preempts State Law Claims Arising out of Hyperlinking.

Count V of the Amended Complaint preempted by federal law. Under Section 230 of the Communications Decency Act ("CDA"), an Internet publisher can bear no civil liability for hyperlinking to someone else's article or otherwise republishing another's statements:

> (c)(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
>
> (e)(3) No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230. Thus, in order to fall within the ambit of Section 230's immunity: (1) the defendant must be a provider or user of an interactive computer service; (2) the plaintiff must seek to hold the defendant liable as a publisher or speaker of content; and (3) the content must have been provided by another information content provider. *See id*. Here, Section 230 preempts Count V of Mann's Amended Complaint, which alleges libel per se against CEI for hyperlinking to an allegedly defamatory statement. J.A. 79-81.

1. CEI is a provider of an "interactive computer service."

Section 230 defines an "interactive computer service" as:

> Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions

47 U.S.C. § 230(f)(2). The hyperlink giving rise to Mann's claim appeared only on CEI's website: http://cei.org/news-releases/penn-state-climate-scientist-michael-mann-demands-apology-cei. "'Courts generally conclude that a website falls within' the definition of an

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SLAPP standard will have the perverse effect of making the District of Columbia, the nation's capital and seat of government, the preferred forum where public policy and political speech go to die.

interactive computer service." *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012) (finding defendants immune from claims under the CDA) (quoting *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 473 (E.D.N.Y. 2011), *aff'd* 2014 U.S. App. LEXIS 11003 (D.C. Cir. June 13, 2014); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) ("the most common interactive computer services are websites"). In affirming *Klayman*, the Circuit Court explained, "Facebook qualifies as an interactive computer service because it provides information to "multiple users" by giving them "computer access * * * to a computer server," 47 U.S.C. § 230(f)(2), namely the servers that host its social networking website." 2014 U.S. App. LEXIS 11003, at *7. Likewise, as CEI is also a website provider, it too qualifies as an interactive computer service by providing "multiple users" information and access to their website through a server.

2. Mann seeks to hold CEI liable as a publisher and a speaker.

Section 230 precludes liability for alleged conduct that "derives from the defendant's status or conduct as a publisher or speaker." *Barnes v. Yahoo!, Inc.*, 570 F.3d 327, 330 (9th Cir. 2009). Here, the Amended Complaint clearly seeks to hold CEI liable as a publisher and speaker of the content to which it hyperlinked. J.A. 79-81. Specifically, paragraph 86 states, "by publishing the aforementioned statement on the Internet, CEI . . . ," and paragraph 88 states, "CEI made the aforementioned statement . . . ." J.A. 80.

3. The hyperlinked article was provided, not by CEI, but by "another information content provider."

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information *provided by* another information content provider." 47 U.S.C. § 230 (emphasis added). Though Section 230 does not define "provided," courts have consistently found the term to mean published, made available, or disseminated. *See, e.g., Atl. Recording*

Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690. 700-02 (S.D.N.Y. 2009) (finding immunity where defendant located songs made available on third-party websites and hyperlinked to that content on its own website); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1197 (2003) (finding immunity where defendant selected allegedly defamatory articles disseminated on the Internet and posted them as hyperlinks to his own website).

Vazquez v. Buhl, which contains facts indistinguishable from this case, is particularly instructive. *See* 150 Conn. App. 117, 140 (2014). There, cnbc.com published a story by its editor that hyperlinked to an allegedly defamatory article, identified the article's author as a "veteran financial reporter," and promoted the article by stating, "I don't want to steal [author's] thunder, so click on her report for the big reveal." *Id.* at 121. The plaintiff argued that cnbc.com was not immune under Section 230 because: (1) cnbc.com, itself, had located and hyperlinked to the article; and (2) cnbc.com amplified, endorsed, and adopted the hyperlinked article, and vouched for its author's credibility by adding the commentary to its own story. *See id*. at 134. Thus, under the plaintiff's reasoning, cnbc.com "provided" the article, and had "creat[ed] or develop[ed]" it.[6] The court rejected the plaintiff's argument, finding first that the article was "provided by" the third-party when it published the article on its own website. *See id*. at 129-130. The court further found that cnbc.com's commentary fell far short of the material contribution and active participation required to deprive an otherwise immune entity from Section 230's protections.[7] *See id*. at 139. Likewise, by merely hyperlinking to the third-party article, CEI did not publish or make the statements contained within them. And CEI's passing comment that the hyperlinked

[6] Under Section 230, an "entity that is responsible, in whole or in part, for the creation or development of information" is an "information content provider." 47 U.S.C. § 230(f)(3).

[7] The Court contrasted the facts to *Roommates*, in which the Ninth Circuit deprived a website of Section 230 immunity where the website materially contributed to housing discrimination by *creating* a questionnaire requiring users to indicate their racial preferences. *Roommates*, 521 F.3d at 1167-68.

article "expertly summed up the matter" is not a material contribution to the creation or development of the hyperlinked article. As in *Vazquez*, whose facts are precisely similar to those upon which Count V rests, the claim should be preempted by Section 230. *See also Atl. Recording Corp. v*, 603 F. Supp. 2d at 700-02; *Barrett*, 343 Ill. App. 3d at 1197.

CONCLUSION

For the reasons above, and those presented by Appellants, this Court should reverse and remand the decisions of the Superior Court.

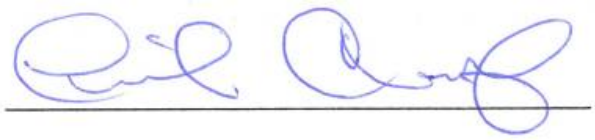
Date: August 11, 2014

Respectfully submitted,

AMICI CURIAE

NEWSMAX MEDIA, INC., FREE BEACON, LLC, THE FOUNDATION FOR CULTURAL REVIEW, THE DAILY CALLER, LLC, PJ MEDIA, LLC, and THE ELECTRONIC FRONTIER FOUNDATION

By Counsel



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APPENDIX A

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