Nos. 14-cv-101, 14-cv-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Competitive Enterprise Institute, *et al.*,

Appellants,

and

National Review, Inc.,

Appellant,

v.

Michael E. Mann,

Appellee.

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

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

The parties in the trial and appellate proceedings, and their respective counsel, are:

> Plaintiff–Appellee Michael Mann, represented by John B. Williams of Williams Lopatto PLLC, Peter J. Fontaine and Catherine Rosato Reilly of Cozen O'Connor, and Bernard S. Grimm of Law Office of Bernard S. Grimm;
>
> Defendants–Appellants Competitive Enterprise Institute and Rand Simberg, represented by David B. Rivkin, Jr., Bruce D. Brown, Mark I. Bailen, and Andrew M. Grossman of BakerHostetler LLP;
>
> Defendant–Appellant National Review, Inc., represented by Michael A. Carvin and Anthony J. Dick of Jones Day; and
>
> Defendant Mark Steyn, represented by Michael J. Songer of Crowell & Moring LLP and Daniel J. Kornstein and Mark Platt of Kornstein Viesz Wexler & Pollard LLP.

Defendant–Appellant Competitive Enterprise Institute discloses that it has no parent corporation or subsidiaries and that no publicly held corporation owns more than 10 percent of its stock. Defendant–Appellant National Review, Inc., discloses that its voting shares are owned by Constitutional Enterprises Corporation, a Delaware Corporation, and that it has no other parent corporation.

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Having sued a magazine, a think tank, and their associates for criticizing his climate research and activism, Appellee Michael Mann now argues that the D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, has no bearing on this case and that this appeal should be dismissed for want of jurisdiction. The Act, he says, applies only against corporations; it establishes no right sufficiently important to merit appellate review; and, indeed, Defendants' very invocation of the Act to vindicate their First Amendment rights is symptomatic of a "loathsome" "disease." Mot. at 17.[1]

But the Anti-SLAPP Act is not, as Dr. Mann would have it, a minor procedural tweak. If it were, it could not possibly achieve the law's stated purpose of combating the "chilling effect" of litigation intended to "punish[] or prevent[] opposing points of view." Att. A, Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report on Bill 18-893, at 1. Instead, it guarantees a "substantive right[]"—an "immunity" from the burden of litigation—to defendants engaged in protected speech in order to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. at 4. As this Court has recognized, that right is a "public interest worthy of protection on interlocutory appeal" under the collateral order doctrine. *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138 (D.C. 2010).

To give effect to the immunity established by the D.C. Council—which would be lost if Defendants were forced to litigate a meritless case aimed at chilling First Amendment-protected expression on a matter of intense public interest—the Court should adhere to its own precedent and follow the lead of the First, Second, Fifth, and Ninth Circuits in holding that denial of

[1] After the Court filed its show-cause order, but before it had been received by the parties, Dr. Mann filed motions to dismiss the appeal for want of jurisdiction. Defendants address the arguments raised in that motion, which relate to the same subject as the Court's order. Citations are to the motion ("Mot.") that was filed in *Competitive Enterprise Institute v. Mann*, No. 14-101.

an anti-SLAPP motion is immediately appealable as a collateral order where, as here, the legislature intended to provide speakers with substantive immunity from suit.

BACKGROUND

A. The D.C. Anti-SLAPP Act

The D.C. Anti-SLAPP Act "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed at preventing their engaging in constitutionally protected actions on matters of public interest." Att. A at 4. The D.C. Council sought to "[f]ollow[] the lead of other jurisdictions," such as California, that have "extended absolute or qualified immunity to individuals engaging in protected actions." *Id.*[2] This approach, it explained, was necessary to protect defendants from being forced to "dedicate a substantial[] amount of money, time, and legal resources" to defend suits intended as "punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." *Id*. at 1. In this way, the Act "ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. at 4.

The statute immunizes any "act in furtherance of the right of advocacy on issues of public interest," which it defines as a "written or oral statement" to a government entity or the public concerning such matters as "environmental, economic, or community well-being" and the affairs of "public figure[s]." D.C. Code § 16-5501(1), (3). It does so by creating "a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest." Att. A at 7. To assert immunity, a party need only file a special motion to dismiss "mak[ing] 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." § 16-

[2] Mann acknowledges that the "District of Columbia statute was modeled after the California statute." Pl.'s Opp. to National Review's Motion to Dismiss, 8–9 (D.C. Sup. Ct. filed July 18, 2013).

5502(b). The mere filing of that motion automatically stays all discovery proceedings, § 16-5502(c)(1), so as to "ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP." Att. A at 4. If the defendant has carried this minimal burden, "the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." § 16-5502(b). The Act mandates that dismissal "shall be with prejudice." § 16-5502(d).

As initially proposed, the Anti-SLAPP Act expressly provided for immediate appeal "from a court order denying a special motion to dismiss in whole or in part." The Committee on Public Safety and the Judiciary removed that provision following the panel decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011), which held that statutory provisions expressly authorizing interlocutory appeal have no legal effect. The Committee expressed its agreement with the dissenting opinion in *Stuart*, which it read to provide "a strong argument for why the Council should be permitted to legislate this issue." Att. A at 7. Nonetheless, the Committee chose to respect *Stuart*'s holding and removed the provision. It made clear, however, that it still "agrees with and supports the purpose of this provision" authorizing immediate appeal, *id*., and chose not to alter the substantive protection created under the Act.

B. Dr. Mann Sues a Magazine, a Think Tank, and Two Journalists for Their Criticism of His Research

On October 22, 2012, Dr. Mann filed this action for defamation and intentional infliction of emotional distress against the Competitive Enterprise Institute and its adjunct fellow Rand Simberg ("CEI Defendants"), as well as National Review, Inc., and its writer Mark Steyn ("Na-

tional Review Defendants").[3] Dr. Mann is one of the creators of the controversial "hockey stick" graph, often cited as evidence of manmade or catastrophic global warming. The validity of the "hockey stick" is a matter of intense political and scientific controversy, with numerous critics calling into question both the statistical methods and the data on which it is based. In the eyes of the critics, the "hockey stick" presents a deeply flawed picture of global temperature trends, and its myriad flaws have been overlooked by many who are eager to accept the graph's conclusions for political purposes. Public criticism of the hockey stick intensified after the release of private emails involving Dr. Mann and his colleagues at the Climate Research Unit at the University of East Anglia—a highly publicized scandal known as "Climategate" that raised further questions about the soundness of the methods underlying the hockey stick.

Dr. Mann's lawsuit claims that Defendants defamed and inflicted emotional distress on him in blog posts criticizing Penn State's failure to seriously investigate his work in the wake of the Climategate scandal. On July 13, 2012, the day after the release of an investigative report by former FBI Director Louis Freeh regarding Penn State University's handling of the sexual assault allegations against former assistant football coach Jerry Sandusky, Simberg authored a post on CEI's OpenMarket weblog entitled "The Other Scandal In Unhappy Valley." *See* Att. B. Dr. Mann contends that the post caused him emotional distress and defamed him by stating that he "could be said to be the Jerry Sandusky of climate science" for the way that Penn State had similarly failed to adequately investigate Dr. Mann's research after the Climategate emails raised serious questions regarding his methods. Dr. Mann also contends that he was defamed by the post's characterization of those emails as revealing "data manipulation," its questioning of whether Penn State, in light of the Sandusky scandal, "would do any less to hide academic and scientific

[3] Although Defendant Mark Steyn is not a party to this appeal, a decision by this Court in the other Defendants' favor would likely dispose of the claims against him, as well.

misconduct," and its quotation of a climate-science commentator that Dr. Mann was "the posterboy of the corrupt and disgraced climate science echo chamber." *Id.* at 3–4.

On July 15, 2012, Steyn published a separate post entitled "Football and Hockey" on National Review's blog "The Corner," criticizing institutional corruption at Penn State with respect to both its handling of the Jerry Sandusky affair and its cursory investigation of Dr. Mann. *See* Att. C. Dr. Mann contends that Steyn's commentary caused him emotional distress and defamed him by quoting Simberg's "Jerry Sandusky of climate science" statement. He further asserts that Steyn's blog post defamed him by describing him as "the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." *Id*. at 1–2.

After the publication of these statements, Dr. Mann demanded public retractions and apologies from both National Review and CEI. National Review's counsel responded by letter on August 22, 2012, denying that the commentary at issue was actionable. National Review's Editor Richard Lowry posted his own response to the threat of legal action on the same day in a blog post entitled "Get Lost," in which he suggested that Dr. Mann "go away and bother someone else." Att. D. In that post, Lowry explained that Steyn's commentary could not possibly be defamatory because it did not assert any matter of judicially ascertainable fact, but instead employed colorful rhetoric to convey Steyn's opinion that the "hockey stick" is deeply flawed and misleading. As Lowry explained, "[i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." *Id.* Despite that clear disavowal of defamatory meaning, Dr. Mann filed suit against all Defendants, contending among other things that "calling Dr. Mann's research 'intellectually bogus' is defamatory per se and tends to injure Dr. Mann in his profession because it falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious

to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally." Complaint ¶ 72. Dr. Mann also alleged that CEI and Simberg are liable for the same statement because CEI hyperlinked to Mr. Lowry's response.

C. The Superior Court Denies the Defendants' Special Motions To Dismiss Under the D.C. Anti-SLAPP Act

Both sets of Defendants timely moved to dismiss Dr. Mann's claims under the D.C. Anti-SLAPP Act and Rule 12(b)(6). As relevant to this appeal, Defendants argued that they met their *prima facie* Anti-SLAPP burden because Dr. Mann was a public figure and that the speech at issue related to matters of public importance. Dr. Mann conceded both points and that the Act applied to the speech at issue.[4]

Defendants argued that Dr. Mann failed to carry his burden of demonstrating that he is "likely" to succeed on the merits of the case because the challenged statements are protected statements of opinion, phrased in the hyperbolic language typical of the public debate over global warming, which cannot be reasonably interpreted as stating facts about Dr. Mann. Defendants also argued that, in light of the widespread public criticism of his research and conduct, Dr. Mann was not "likely" to meet his burden under the First Amendment of demonstrating *by clear and convincing evidence* that the challenged statements had been made with actual malice—*i.e.*, knowledge of their falsity or reckless disregard for their truth. As to Dr. Mann's emotional distress claim, Defendants argued that the "Jerry Sandusky of climate science" statement was not outrageous and was constitutionally protected speech. Finally, the CEI Defendants argued that they cannot be held liable for libel on the basis of a hyperlink when they have not republished the challenged statements. While Defendants' motions were pending, Dr. Mann amended his complaint to add an additional claim for defamation relating to the Jerry Sandusky reference.

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[4] Pl.'s Opp. to National Review's Motion to Dismiss, 37 (D.C. Sup. Ct. filed July 18, 2013).

On July 19, 2013, the Superior Court (Judge Natalia Combs Greene) denied Defendants' motions to dismiss in two substantially similar orders, one per each set of Defendants. *See* Atts. E, Order, *Mann v. Nat'l Review et al.*, 2012 CA 008263 (D.C. Sup. Ct.); F, Omnibus Order, *Mann v. Nat'l Review et al.*, 2012 CA 008263 (D.C. Sup. Ct.). The court found that the Anti-SLAPP Act properly applied to Dr. Mann's claims as arising from covered acts in furtherance of the right of advocacy on issues of public interest. Att. E at 8. Nonetheless, even while acknowledging it was "a very close case," *id.* at 16 n.12, the court held that *all* of Plaintiff's claims should survive because they were all "likely" to succeed on the merits. In the court's view, Defendants' statements are actionable because they "rel[y] on the interpretation of facts (the [Climategate] emails)," *id*. at 14, and because "[t]o call his [Dr. Mann's] work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud." *Id*. at 16. Although the court recognized that "[l]anguage such as 'intellectually bogus[,]' 'data manipulation[,]' and 'scientific misconduct' in the context of the publications' reputation and columns certainly appear [sic] as exaggeration and not an accusation of fraud," it nonetheless held that these statements were not rhetorical hyperbole "when one takes into account all of the statements and accusations made over the years [and] the constant requests for investigations of Plaintiff's work." *Id.* at 17. The court similarly rejected (or declined to address) Defendants' other legal arguments. Its orders did not address the additional claim presented in the amended complaint.

Both sets of Defendants moved for reconsideration, in light of the Superior Court's numerous factual and legal errors, and also to dismiss the additional claim. Judge Combs Greene denied both motions for reconsideration, with scant or (in CEI's case) no reasoning. Atts. G, Order Denying Mark Steyn and National Review's Reconsideration Motions, *Mann v. Nat'l Review,*

et al., No. 2012 CA 008263 (D.C. Supp. Ct.); H, Order Denying Rand Simberg and CEI's Reconsideration Motion, Mann v. Nat'l Review, et al., No. 2012 CA 008263 (D.C. Supp. Ct.).

Defendants, meanwhile, had appealed the court's denial of their anti-SLAPP motions. This Court consolidated the appeals and requested briefing on its jurisdiction under the collateral order doctrine. That issue was addressed in briefing by all parties, as well as by three sets of *amici curiae* urging the Court to recognize collateral order jurisdiction over interlocutory appeals of orders denying anti-SLAPP motions: the District of Columbia, the American Civil Liberties Union, and a coalition of the Reporters Committee for Freedom of the Press and 19 other media organizations. The Court, however, never reached the jurisdictional issue, instead dismissing the appeals without prejudice for mootness, in light of the still-pending motions to dismiss the amended complaint.

On remand, Judge Frederick Weisberg, who had taken over the case, denied those motions in a January 22, 2014 order adopting the reasoning of the court's previous orders. Att. I, Order Denying Motions to Dismiss, *Mann v. Nat'l Review et al.*, No. 2012 CA 008263 (D.C. Sup. Ct.). The CEI Defendants filed a notice of appeal on January 24, and National Review followed suit on January 30.

ARGUMENT

I. Because the D.C. Anti-SLAPP Act Establishes an Immunity from Suit, the Collateral Order Doctrine Provides Jurisdiction for this Appeal

As every appellate court to have considered the issue has concluded, the denial of an anti-SLAPP motion is appealable under the collateral order doctrine where, as here, the legislature intended that the statute provide a substantive immunity from suit. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147–151 (2d Cir. 2013); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 174 (5th Cir. 2009);

Godin v. Shencks, 629 F.3d 79, 85 (1st Cir. 2010); *Schelling v. Lindell*, 942 A.2d 1226, 1230 (Me. 2008); *Fabre v. Walton*, 781 N.E.2d 780, 784–85 (Mass. 2002). The text and legislative history of the D.C. Anti-SLAPP Act demonstrate that the D.C. Council intended to confer upon anti-SLAPP defendants a "substantive right" in the nature of an "immunity" from suit. *See* Att. A at 4, 6. That legislative purpose controls the collateral order issue here.

The decisions of other courts recognizing the appealability of the denial of an anti-SLAPP motion are consistent with the law of this Court. This Court has recognized that the immunity established by the D.C. Anti-SLAPP Act for speech on matters of public interest is precisely the kind of compelling public interest that merits immediate review under the collateral order doctrine. In *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138–39 (D.C. 2010), this Court discussing Louisiana's anti-SLAPP statute, agreed with the Fifth Circuit that "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning matters of public significance" is one "worthy of protection on interlocutory appeal" under the doctrine. *Id.* at 1138–39.

The D.C. Council sought to promote that very interest when, in the D.C. Anti-SLAPP Act, it extended an "immunity to individuals engaging in protected actions" to "ensure that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Att. A. at 4. The D.C. Council repeatedly noted that the Anti-SLAPP Act "[c]reates a substantive right" to prompt dismissal of a lawsuit regarding an act in furtherance of a right of advocacy on issues of public interest. Att. A. at 6, 7. Immediate review is necessary to secure that right to be free from suit for protected speech and thereby to carry out the D.C. Council's intentions.

A. The D.C. Council Sought To Confer Immunity from Suit

Both the statutory text and the legislative history of the D.C. Anti-SLAPP Act conclusively demonstrate that it was "intended to provide a right not to be tried"—*i.e.*, a substantive right to be immune from suit for protected speech—"as distinguished from a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a [trial] judge before a defendant is required to undergo the burden and expense of a trial." *Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009). That intent, in turn, enables interlocutory appellate review under the collateral order doctrine.

Most significantly, the Act provides that any "dismissal shall be *with prejudice*." D.C. Code § 16-5502(b) (emphasis added). Thus, a plaintiff who is unable to demonstrate, at the *very outset* of litigation, that his "claim is likely to succeed on the merits," § 16-5502(b), forfeits that claim for all time—no matter what evidence he might later uncover or might have turned up in discovery and no matter even that simple amendment of the complaint might have corrected any deficiency in his case.[5] This is far more than a simple review of "the legal sufficiency of the evidence underlying the complaint" prior to trial; by operation of *res judicata*, it immunizes the defendant from any successive claim. In this respect, the Act provides defendants a powerful "substantive right" to be free from suit where the plaintiff's initial showing has, for whatever reason, fallen short. Just as the D.C. Council intended, the Act does more than alter court procedures; it provides SLAPP defendants with "substantive rights," foremost among them the right to be free from any SLAPP suit. *See* Att. A at 1, 4, 6, 7.

[5] In this respect, the D.C. statute differs from certain anti-SLAPP laws that have been held not to support a right to an interlocutory appeal under the collateral order doctrine. In *Englert*, for instance, the Ninth Circuit held that the Oregon statute did not support a collateral order appeal. But that statute merely created a "procedural defense to civil actions that can dismiss a case *without prejudice*." 551 F.3d at 1101 (emphasis added). Where a legislature does not give final effect to an anti-SLAPP dismissal, as with the Oregon statute, it is plain that the statute does not create the sort of immunity from suit created by the D.C. law.

The legislative history directly confirms this interpretation. As the Committee on Public Safety and the Judiciary's report on the Act explains, "the goal of [anti-SLAPP] litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." Att. A. at 4. In other words, "*litigation itself* is the plaintiff's weapon of choice." *Id*. (quoting testimony of Arthur Spitzer, Legal Director, ACLU-NCA). The remedy, as the Council saw it, was to "provide[] a defendant to a SLAPP with substantive rights to expeditiously and economically *dispense of litigation* aimed to prevent their engaging constitutionally protected actions on matters of public interest." *Id*. (emphasis added). And the way to do that was to establish an immunity from suit:

> Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.

Id.[6]

As with California's anti-SLAPP statute and other state statutes that have been found to support a collateral appeal on denial of a motion to dismiss, the statutory text and legislative history demonstrate that the Council "wanted to protect speakers from the trial itself rather than merely from liability." *Batzel*, 333 F.3d at 1025; *see also Liberty Synergistics*, 718 F.3d at 148

[6] In connection with an order staying proceedings below, Judge Weisberg reasoned that, although (in his view) the Anti-SLAPP Act's right is "technically not an absolute or qualified immunity," it should be treated as "analogous to a claim of qualified immunity." Order Staying Case Pending the Decision on Defendants' Interlocutory Appeals, 2 n.2 (D.C. Sup. Ct. Oct. 2, 2013). Consistent with Judge Weisberg's conclusion, the Second Circuit reasoned in *Liberty Synergistics* that it is immaterial whether an anti-SLAPP act's right is characterized as a qualified immunity. In *Liberty*, the court disagreed with the Ninth Circuit's view in *Batzel* that California's anti-SLAPP statute confers a "substantive immunity from suit." 718 F.3d at 148 n.9. Nonetheless, it agreed with the Ninth Circuit that the statute supports collateral order appeal because the right it establishes is in the "*nature* of immunity." *Id*. The "essence" of the California law, found to support a collateral order appeal in both *Batzel* and *Liberty Synergistics*, was to "protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression," and the denial of this right is sufficiently "final" to satisfy the collateral order standards. *Id.* (quotation marks omitted).

(anti-SLAPP rule "reflects a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity."). The whole point of such an anti-SLAPP statute "is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *Liberty Synergistics*, 718 F.3d at 147 (quotation marks omitted). The protections of the law are lost if defendants are "forced to litigate a case to conclusion before obtaining a definitive judgment through the appellate process." *Id.* (quotation marks omitted).

B. The Lack of an Express Appeal Provision Does Not Cast Any Doubt on the Legislature's Intent to Create an Immunity from Suit

In resisting collateral order jurisdiction, Dr. Mann focuses on the fact that the D.C. City Council did not expressly provide a right to interlocutory appeal in the statute's text. *See* Mot. at 8. But that has never been the test. The touchstone of appealability under the collateral order doctrine is not whether a statute expressly provides for such an appeal, but instead whether the statute is intended to immunize defendants from the burdens of trial. That is why courts look toward the statutory structure and the legislative history to determine whether the collateral order doctrine should apply. *E.g.*, *Batzel*, 333 F.3d at 1025 (surveying "the legislative history behind" California's anti-SLAPP statute). Indeed, in *Stein v. United States*, 532 A.2d 641, 644 (D.C. 1987), this Court recognized an implied right to immediate appeal under the collateral order doctrine because the statute suggested immunity was intended, despite the absence of an express provision for immediate appeal.

Courts have consistently *rejected* the contention that "a right to appeal must have been expressly established by the state legislature in order to create an immunity from suit" subject to collateral order appeal. *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1016 n.7 (9th Cir. 2013) (emphasis added); *see also Godin*, 629 F.3d at 85 (availability of appeal under state law

"relevant, but not conclusive"); *Henry*, 566 F.3d at 178 n.1 (holding that denial of a motion under Louisiana's anti-SLAPP statute was immediately appealable under the collateral order doctrine even though that statute does not expressly authorize immediate appeal because it establishes a right not to stand trial); *Stein*, 532 A.2d at 644.

In cases where the Ninth Circuit has held that a state statute does not support a collateral order appeal, it did so because, in those particular circumstances, the absence of such a provision evidenced the legislature's intent not to afford anti-SLAPP *immunity*. Thus, in *Englert*, the Ninth Circuit reasoned that the Oregon legislature's refusal "to provide for an appeal from an order denying a special motion to strike…suggests that Oregon does not view such a remedy as necessary to protect the considerations underlying its anti-SLAPP statute." 551 F.3d at 1105. Similarly, in *Metabolic Research*, the court reasoned that the Nevada "legislature could have mirrored California's unequivocal language concerning an immediate right to appeal had it intended to furnish one." *Metabolic Res., Inc. v. Ferrell*, 693 F.3d 795, 801 (9th Cir. 2012). Its affirmative decision not to do so demonstrated that it "did not intend for its anti-SLAPP law to function as an immunity from suit." *Id.* at 802.

Here, by contrast, the absence of an explicit provision for interlocutory appeal in no way undermines the legislature's clearly expressed intent to establish an immunity from suit. The sole reason the Council did not include an explicit appeal provision was that it believed such a provision would have had no legal effect in light of *Stuart v. Walker*, 6 A.3d 1215, 1217 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011), which held that the Council could not authorize an interlocutory appeal through an explicit statutory provision. But that decision did not disturb the long-settled understanding that the Council may create an immunity from suit that gives rise to an implied right of immediate appeal under the collateral order

doctrine. *See id.* at 1221 (Steadman, J., dissenting) (noting that "no argument is made here…that the stringent requirements of [the collateral order doctrine] are met"). Accordingly, the Council's decision to exclude the explicit interlocutory-appeal provision was nothing more than an attempt to respect this Court's holding in *Stuart* and casts no doubt on the Council's intention to create an anti-SLAPP immunity from suit. Indeed, in removing the explicit appeal provision, the Committee could not have been clearer that it "agree[d] with and support[ed] the purpose" of allowing an immediate appeal. Att. A. at 7.

In sum, the absence of an explicit statutory appeal provision cannot bear the talismanic significance that Dr. Mann would ascribe to it. The D.C. Council plainly intended to create a substantive anti-SLAPP immunity, which is enough by itself to confer a right of immediate appeal under the collateral order doctrine. Contrary to Dr. Mann's contention, the Council was not required to take the additional step of including an explicit appeal provision.

C. Denial of an Anti-SLAPP Motion Meets All Three Factors for Immediate Review Under the Collateral Order Doctrine

To qualify for immediate appellate review under the collateral order doctrine, a ruling denying a motion to dismiss must satisfy three conditions: "(1) it must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *McNair*, 3 A.3d at 1135 (quotation marks omitted). Applying this standard, the Court has observed several times that "the denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus to be immediately appealable." *Id*. at 1136 (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001)). Denial of a special motion to dismiss under the D.C. Anti-SLAPP Act is precisely that kind of ruling.

1. Denial of an Anti-SLAPP Motion Conclusively Determines a Disputed Question of Law

The Superior Court, by denying Defendants' motions to dismiss, has conclusively determined the disputed legal issue of Defendants' claim of immunity from suit. As the Ninth Circuit explained in *Batzel*, denial of an anti-SLAPP motion "is conclusive as to whether the anti-SLAPP statute required dismissal" because, "[i]f an anti-SLAPP motion to strike is granted, the suit is dismissed…. [Or] if the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation." 333 F.3d at 1025; *see also Henry*, 566 F.3d at 174 (identical reasoning); *Liberty Synergistics*, 718 F.3d at 147–48. More generally, and contrary to Dr. Mann's assertions (Mot. at 16), this Court has repeatedly held that an order denying application of a privilege or immunity conclusively determines a question of law for collateral-appeal purposes. *McNair*, 3 A.3d at 1136; *Finkelstein*, 774 A.2d at 340; *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990); *see also Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (conclusiveness requirement is satisfied when the trial court had ruled "that if the facts are as asserted by the plaintiff, the defendant is not immune"). Denial of an anti-SLAPP motion is no different.

2. Defendants' Immunity from Suit Is Separate from the Merits

Defendants' immunity from suit is separate from the merits of the Plaintiff's claims. "[T]he very nature of an immunity claim makes it collateral to and separable from the merits…." *White*, 571 A.2d at 792. In particular, "[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed." *Batzel*, 333 F.3d at 1025; *accord Henry*, 566 F.3d at 176 ("A court deciding an [anti-SLAPP] motion does not ask whether the plaintiff has proved her claim, but whether she has shown a sufficient probability of being able to prove her claim.").

Dr. Mann ignores this point, instead arguing that the issues decided in orders denying anti-SLAPP motions are not separate from the merits because they may "turn on fact-intensive inquiries." Mot. at 14–15. This is mistaken, in at least three respects. First, and consistent with the nature of an immunity from suit, this argument has been flatly rejected by courts reviewing orders denying anti-SLAPP motions. *See Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1185–86 (9th Cir. 2013) (Wardlaw and Callahan, JJ., concurring in denial of rehearing en banc) (surveying case law); *Henry*, 566 F.3d at 175 ("The immunity decisions indicate that some involvement with the underlying facts is acceptable, as the [Supreme] Court has found the issue of immunity to be separate from the merits of the underlying dispute 'even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.'") (quoting *Mitchell*, 472 U.S. at 529). Second, the principal issues at play here, as in nearly any other appeal of an anti-SLAPP order, involve questions of law, not fact. *See, e.g., Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000) (actionability under First Amendment); *Fisher v. Washington Post Co.*, 212 A.2d 335, 337–38 (D.C. 1965) (application of fair comment privilege). Third, to the extent that other issues, such as actual malice, may involve factual questions, the Court still would not wade into factual disputes, but only do as the Anti-SLAPP Act commands: determine whether Dr. Mann has carried his burden of demonstrating that his claims are "likely to succeed on the merits." D.C. Code § 16-5502(b). As bottom, the unremarkable assertion that a case involves facts as well as law is insufficient to defeat application of the collateral order doctrine.

3. Defendants' Immunity from the Burden of Litigation Is Entirely Unreviewable on Appeal from Final Judgment

Finally, Defendants' immunity from suit is effectively unreviewable if appellate review is deferred until there is a final judgment in the Superior Court. "Denial of immunity in its various

forms has been considered the embodiment of a ruling that is unreviewable from a final judgment, 'for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'" *McNair*, 3 A.3d at 1137 (quoting *Mitchell*, 472 U.S. at 525); *see also Finkelstein*, 774 A.2d at 341 ("the purported 'entitlement not to stand trial or face the other burdens of litigation' would be lost irretrievably").

On that basis, the First, Second, Fifth, and Ninth Circuits have specifically held that orders denying motions to dismiss under anti-SLAPP statutes meant to confer immunity from litigation are effectively unreviewable on appeal from a final judgment. *Godin*, 629 F.3d at 85; *Henry*, 566 F.3d at 177–78 ("Perhaps the embodiment of unreviewability, then, is immunity from suit…."); *Batzel*, 333 F.3d at 1025. As the Ninth Circuit explained, "[i]f the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression." *Batzel*, 333 F.3d at 1025; *see also Liberty Synergistics*, 718 F.3d at 149 ("the policy interest at stake is one of substantial importance that cannot be effectively vindicated after final judgment"). Similarly, the Supreme Court of Maine held that refusal to allow interlocutory review of an order denying an anti-SLAPP motion "would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights." *Schelling v. Lindell*, 942 A.2d 1226, 1230 (Me. 2008); *see also Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002) (same, under Massachusetts law).[7] Defendants here face the same potential injuries, with no remedy save collateral order review.

[7] In relevant respects, the Maine and Massachusetts anti-SLAPP statutes are identical to the District's. Both allow parties sued for their exercise of First Amendment rights to file a special motion to dismiss and, upon a minimal *prima facie* showing, require dismissal unless the plaintiff is

Recognizing as much, this Court has already identified the enforcement of "a statute that 'aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights'" as a "public interest worthy of protection on interlocutory appeal." *McNair*, 3 A.3d at 1138 (quoting *Henry*, 566 F.3d at 180). It explained:

> In *Henry*, the [Fifth Circuit] considered Louisiana's anti-SLAPP ("strategic lawsuits against public participation") statute, which was designed to bring an early end to meritless claims "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances," noting that in enacting the statute, the Louisiana legislature had "declare[d] that it is in the public interest to encourage continued participation in matters of public significance…."

Id. (quoting *Henry*, 566 F.3d at 180).[8] The dispositive factor, the Court explained, was that the Louisiana statute promoted a "public policy" of the "high order": "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning 'matters of public significance.'" *Id*. at 1138–39 (quoting *Henry*, 566 F.3d at 180). For that reason, interlocutory review was warranted. Astonishingly, Dr. Mann discusses the same portion of *McNair* without ever mentioning or addressing its reasoning on this point. *See* Mot. at 11.

Moreover, this Court has applied the collateral order doctrine to other First Amendment privileges and immunities. The Court has "held that an order denying a claim of immunity from suit under the First Amendment satisfies the collateral order doctrine and is thus immediately appealable." *District of Columbia v. Pizzulli*, 917 A.2d 620, 624 (D.C. 2007) (quotation marks

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able to demonstrate a likelihood of success on the merits. *See* 14 M.R.S.A. § 556; M.G.L.A. 23a § 59H. As noted, neither expressly provides for interlocutory appeal.

[8] Just as with the D.C. Anti-SLAPP Act, "[i]n order to succeed in dismissing a complaint under the Louisiana statute, the defendant must first make a *prima facie* showing that…'a cause of action against him arises from an act by him in furtherance of the exercise of his right of petition or free speech….'" *McNair*, 3 A.3d at 1138 n.5 (quoting statute) (quotation marks omitted).

omitted). "In defamation actions," it has "agreed with other courts which likewise have held that the denial of a motion to dismiss based on a claim of absolute privilege under the common law is immediately appealable as a collateral order." *Id.* (quotation marks omitted). And in a series of cases, it has exercised interlocutory review over orders denying motions that claimed immunity under the First Amendment's Free Exercise Clause. *White*, 571 A.2d at 792–93; *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); *Heard v. Johnson*, 810 A.2d 871, 876–77 (D.C. 2002). In fact, the only instance where the Court has denied interlocutory appeal of a rejected claim of immunity was in *McNair*, on the basis that denying immediate review regarding judicial proceeding immunity did not "imperil a substantial public interest"—a conclusion that it specifically juxtaposed with the availability of collateral order review regarding immunity under an anti-SLAPP statute. 3 A.3d at 1138–39.

For the reasons explained in *McNair*, there can be no question that denying immediate review imperils the substantial public interest that the D.C. Council sought to promote: "ensur[ing] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Att. A at 4. That interest cannot be served in the absence of collateral order review.

II. *Newmyer* Is Not Governing Law and Is, in Any Case, Unpersuasive

The Court should not give any weight to the "terse, unpublished order" in *Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order). *See Sherrod v. Breitbart*, 405 U.S. App. D.C. 395, 400 , 720 F.3d 932, 936 (2013) (characterizing order). That order's bare conclusion that collateral order review was unavailable for an order denying a mo-

tion under the D.C. Anti-SLAPP Act is non-precedential[9]; lacks any legal reasoning; and, as described above, misapplies this Court's precedents to the extent it is read to apply to apply generally to orders denying anti-SLAPP motions on the merits.

But the order is susceptible to a narrower reading. The Superior Court in that case denied an anti-SLAPP motion on two separate grounds: that it was filed outside of the statutory deadline and that it was frivolous in substance. The former holding, which is an adequate and independent ground for the denial, is a factual conclusion and therefore not subject to collateral order review. *McNair*, 3 A.3d at 1136 (disputed issue must be "an issue of law"). Dismissal of the appeal on that basis was a straightforward application of the Court's precedents, meriting no more than an unpublished order. Read in that fashion, the *Newmyer* order 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.[10]

III. The D.C. Council Rightly Rejected Dr. Mann's Policy Arguments

Although he conceded below that the Anti-SLAPP Act applies to his claims and that Defendants carried their *prima facie* burden under the Act, Dr. Mann now argues that its application here is somehow improper because he is a "lone" individual, rather than a corporation, and his suit "does not seek to stifle opinion commentary." Mot. at 16–17. But the Act makes no distinction between different kinds of plaintiffs, and why would it? An individual—whether a property developer or a climate activist backed by likeminded donors—can bring a harassing lawsuit in-

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[9] *O'Rourke v. District of Columbia Police and Firefighters' Retirement and Relief Bd.*, 46 A.3d 378, 383 n.9 (D.C. 2012) (unpublished opinion "is not binding precedent").

[10] In addition, because the appellant in *Newmyer* never argued that the D.C. Anti-SLAPP Act established any kind of immunity, it can be assumed that the panel did not reach out to decide that issue. *See* Counter-Defendant/Appellant Arthur G. Newmyer's Response in Opposition to Motion To Dismiss Appeal Filed by Counter-Plaintiff/Appellee James F. Huntington, *Newmyer v. Huntington*, No. 12-CV-847 (D.C. filed July 16, 2012).

tended to silence his critics just the same as a corporation. And Defendants here could be forgiven for doubting Dr. Mann's professed motives in suing them, given his repeated statements that this lawsuit is all about setting an example for others he accuses of being "climate deniers."[11]

Dr. Mann is certainly entitled to his opinion that Defendants' assertion of their First Amendment rights in litigation intended to stifle them is a "loathsome" "disease," Mot. at 17, but it is one that the D.C. Council rejected when it established an immunity against this kind of harassing lawsuit. The tradeoff inherent in any anti-SLAPP statute is that some potentially meritorious claims will be delayed so as to further society's broader interest in providing the vital "breathing space" that freedom of expression "need[s]…to survive." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U. S. 415, 433 (1963)). But here that tradeoff is not implicated because Dr. Mann's claims have no merit, and any delay in this case is largely the result of his own choice to amend his complaint after full briefing and argument on the original anti-SLAPP motions. More generally, Dr. Mann's complaint that the Anti-SLAPP Act inconveniences him cannot trump the policy decision made by the D.C. Council (to whom his complaints are better directed) to establish an immunity from suit. Finally, in the instance of a clearly meritless appeal, summary affirmance is available, D.C. App. R. 27(c), belying Dr. Mann's claim that collateral order review will lead to undue delays and abuses. *See also* D.C. Code § 16-5504(a) (providing for attorneys' fees).

IV. The Collateral Order Issue May Be Resolved by the Court's Decision in *Burke*

The precise issue raised in the Court's show-cause order is under active consideration by the Court in *Doe v. Burke*, No. 13-CV-83,which is an interlocutory appeal of an order denying a

[11] *See, e.g.*, Michael E. Mann, Facebook Post, October 23, 2012; Michael E. Mann, Facebook Post, May 16, 2012 (describing this lawsuit as part of a "larger battle…to fight back against the attacks" by "groups seeking to discredit the case for concern over climate change").

special motion to quash under the Anti-SLAPP Act. *See* D.C. Code § 16-5503. Having received briefing by the parties on the issue of its appellate jurisdiction and scheduled that issue for oral argument, the Court canceled the argument and directed the parties to proceed to brief the merits of the case. Order, *Doe v. Burke*, No. 13-CV-83 (D.C. filed Sept. 6, 2013). Briefing is complete, the case has been argued, and decision is pending. As the *Burke* panel may recognize collateral order jurisdiction under the Anti-SLAPP Act, its reasoning in *Burke* may well be dispositive of the Court's show-cause order. Dismissal of this appeal prior to the Court's decision in *Burke* therefore risks an inequitable result that would undermine the D.C. Council's central purpose of protecting core political speech against the chilling effect of litigation.

CONCLUSION

"The threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Guilford*, 760 A.2d at 592 (quotation marks omitted). The D.C. Council sought to mitigate that potential by creating an immunity from suit under the Anti-SLAPP Act. To give effect to that immunity, the Court should apply the collateral order doctrine and reach the merits of this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2014, I caused a copy of the foregoing Response to be served by first-class mail, postage prepaid, upon:

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