Nos. 14-CV-106 & 13-CV-126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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

V.

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

ON APPEALS FROM AN ORDER OF
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* DISTRICT OF COLUMBIA IN SUPPORT OF NO PARTY CONCERNING THIS COURT'S JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Legislative History

INTEREST OF AMICUS CURIAE

The District of Columbia has a significant interest in this Court's interpretation of the free speech rights-implementing protections of the Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.* (the "Act"). Accordingly, pursuant to D.C. App. R. 29, the District files this brief as *amicus curiae* to offer its views of the jurisdictional issues raised here in the Court's review of the denial of motions to dismiss under the Act.

This case arises out of a civil action filed by a nationally known climate scientist against the publisher of a magazine and one of its writers who published a highly critical article about the plaintiff's research and methods, and against a non-profit and an affiliated individual based on the non-profit's hyperlinking to the article on the Internet. The Superior Court found, based on a review of legal doctrine and the pleadings submitted, that the plaintiff scientist had met his resulting burden of showing that he is likely to succeed on the merits of his libel claims, and denied the special motions to dismiss under the Act, and for similar reasons also denied the defendants' motions for dismissal under Superior Court Rule of Civil Procedure 12(b)(6). Following defendants' appeals, this Court issued a show cause order as to why it should not dismiss for lack of appellate jurisdiction. In response, the parties briefed the issue to the motions panel and the District filed a brief as *amicus curiae* addressing that topic (as did several other *amici*). On April 30, 2014, a motions panel denied the motion to dismiss, noted the issue of appealability from the denial of a motion to dismiss under the Act is "one of first impression," discharged the show cause order, and ordered the parties to brief the jurisdictional question to the merits panel. Appellants have now done so, each providing

short discussions addressing the issue and asserting, correctly in our view, that the Court has appellate jurisdiction here.

The District has a strong interest in this Court's recognizing that the Act provides a protection that is or is akin to a qualified immunity such that collateral order review is appropriate of a denial of a motion to dismiss under the Act, and provides this brief to amplify the parties' discussion as to why that review is warranted here.[1]

INTRODUCTION AND OVERVIEW

Through the Act, the Council of the District of Columbia joined the majority of states in crafting a legislative response to the perceived threat to speech rights from "SLAPPs"—Strategic Lawsuits Against Public Participation. SLAPPs are typically civil actions that arise out of the defendant's communications on an issue of public concern. SLAPPs can be particularly insidious. As noted by the Council's Judiciary Committee Report, such suits "are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." D.C. Council, Report on Bill 18-893 at 1 (Nov. 18, 2010) ("Comm. Rep."). By imposing the costs and the related burdens of defending a lawsuit, "*litigation itself* is the plaintiff's weapon of choice," *id.* at 4 (emphasis added), wielded to chill the speech of the defendant and sometimes that of third parties who would otherwise choose to speak out on a matter of public interest.[2]

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[1] The District takes no position as to the merits of the underlying tort claims in this case, or as to the disposition of the underlying motions.

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

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

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

Under the collateral order doctrine, a ruling denying a motion to dismiss must satisfy three conditions to qualify for this Court's review: "(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 Builders, Inc. v. Taylor*, 3 A.3d 1132, 1135 (D.C.

2010). In addition, denial of immediate review must "imperil a substantial public interest." *Id.* at 1137.

Under *Doe v. Burke*, 91 A.3d 1031 (D.C. 2014), which the Court issued this year after the motions panel in this case discharged the show cause order, there can be no serious doubt that collateral order review is available for denials under the Act of a motion to dismiss. *Doe,* applying the test just enumerated, held that denial of a special motion to quash a subpoena under the D.C. Anti-SLAPP Act is immediately appealable under the collateral-order doctrine. *Id.* at 1040. *Doe* recognizes that the Act creates a type of qualified immunity for anonymous speakers.

Consistent with *Doe*'s application of the Act, and with prior precedent of this Court and as reinforced by the uniform approach taken by the appellate courts in other jurisdictions, this Court should likewise hold that where, as here, the legislature intended to provide a substantive immunity from suit, the denial of an Anti-SLAPP motion to dismiss is appealable under the collateral-order doctrine. As we demonstrate below, a trial court's order denying a special motion to dismiss under the Act on legal grounds—that is, either the pure application of law or the application of law to factual allegations as laid out and responded to in pleadings, including motions and written responses—satisfies the test.[3]

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[3] The Court does not for purposes of this case need to resolve the closer question of whether and to what extent interlocutory review would be available following an evidentiary hearing in the trial court and witness credibility and other factual assessments made by the trial judge as predicate for making a finding on the likelihood of success on

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

ARGUMENT

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

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

An order conclusively determines a disputed question when "there is no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983). This Court

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the merits under the Act's governing standard. *Cf. Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002) (noting that to qualify for collateral order review, a trial court ruling must "turn[] on an issue of law rather than on a factual dispute").

has held that an order denying application of a privilege or immunity conclusively determines a question of law. *McNair Builders*, 3 A.3d at 1136; *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001); *United Methodist Church, Balt. Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990).

Denial of an Anti-SLAPP motion is no different. In holding that the conclusiveness element was satisfied by an order denying a motion to quash under the Act, *Doe* cited with approval to the approach taken by federal appellate courts in reviewing appeals of denials of motions to dismiss under state Anti-SLAPP Acts. Those courts have consistently held that denial "is conclusive as to whether the anti-SLAPP statute required dismissal" because "[i]f an anti-SLAPP motion to strike is granted, the suit is dismissed . . . . [Or] [i]f the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *see also, e.g.*, *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 174 (5th Cir. 2009) (identical reasoning); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147-48 (2d Cir. 2013). Similarly, there is no indication here in the Superior Court's orders that it did not conclusively resolve the questions before it as to whether dismissal under the Act was warranted; it resolved precisely that question, and it is that question which is squarely presented to this merits panel.

B. The denial of a motion to dismiss under the Act on legal grounds resolves an important issue separate from the merits.

Denial of a motion to dismiss under the Act on legal grounds likewise "resolve[s] an important issue completely separate from the merits of the action," *Stein v. United*

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

Doe's reasoning is entirely applicable here since the Act's motion to quash provision, D.C. Code § 16-5503, calls for the trial court's assessment of the likelihood of success on the merits just as the motion to dismiss provisions do. Although under the Act "a plaintiff may defeat a special motion to quash by showing a likelihood of success on the merits, the purpose of this inquiry is still to determine whether the defendant is being forced to defend against a meritless claim, not to determine whether the defendant actually committed the relevant tort." *Doe*, 91 A.3d at 1038. "Put another way, the denial 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." *Id.* at 1039 (internal quotation marks and alterations omitted); *accord Batzel*, 333 F.3d at 1025; *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2010); *Henry*, 566 F.3d at 175. The key is that at the special motion to dismiss stage under the Act, there is no binding or firm determination of whether plaintiff *will* succeed in his or her claims at trial or has made any particular factual showing.

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

Finally, even if any doubt existed as to whether in the disposition of an Anti-SLAPP motion there can be *complete* separation from the merits, given the nature of the immunity, policy interests decisively favor a finding of separability, particularly the goal of avoiding the "chilling effect on the exercise of constitutionally protected rights." Comm. Rep. at 1. As *Doe* noted, "[b]ecause of the nature of the court's inquiry, therefore, the concerns that drive the separability requirement are not relevant here." *Doe*, 91 A.3d at 1038 n.10. And as the Fifth Circuit decision in *Henry* (relied on in *Doe*) held, applying this precise reasoning in regards to the Louisiana statute, the importance of the interests that statute serves "thus resolves any lingering doubts about separability." *Henry*, 566 F.3d at 177.

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

An order is effectively unreviewable on appeal of final judgment if it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989) (internal quotation marks omitted). This component of the collateral order doctrine may be satisfied on a showing of two elements. First, the right, fairly construed, must be a right to be free from *suit* altogether, as opposed to being a more limited "right whose remedy requires the dismissal of charges." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989); *see also Mitchell*, 472 U.S. at 526. Second, as noted recently by this Court, the Supreme Court's decision in *Will v. Hallock*, 546 U.S. 345 (2006), "sharpened the threshold analysis for applying the collateral order doctrine by requiring that 'some particular value of a high order' must be 'marshaled in support of the interest in avoiding trial.'" *McNair Builders*, 3 A.3d at 1137 (quoting *Will*, 546 U.S. at 352). What must be at issue is "not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Will*, 546 U.S. at 352-53. Denial of a special motion to dismiss under the Act qualifies under both aspects of this appropriately high standard.

1. The Act creates a qualified immunity from suit.

As the Court in *McNair* stated in reference to a state Anti-SLAPP statute (Louisiana's), "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." *McNair*, 3 A.3d at 1136. *Doe* cemented that understanding. As the Court there stated, proceeding from the baseline understanding that denial of a motion to dismiss under the Act is the denial of an immunity from the right not to stand trial: "Here we consider the denial of a special motion to quash, not *the denial of a special motion to dismiss, which explicitly protects the right not to stand trial.* But we conclude that the former *also* confers an immunity of a sort from suit." *Doe*, 91 A.3d at 1039 (emphasis added).

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

The right at issue—the right not to endure a full trial, or even discovery, unless and until the trial judge, in his or her role as gatekeeper, has properly concluded that a suit can proceed—is plainly a right that would be destroyed if not vindicated before trial. "[SLAPP lawsuits] are often without merit, but achieve their filer's intention of punishing

or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Comm. Rep. at 1. If appeal had to await final judgment, the weapon would have already been used and the damage done, both to the particular defendants and to any others in the public who may want to vigorously and publicly participate in discussions of important issues affecting the community. *Id.* For the defendant faced with a meritless tort suit designed to intimidate speakers from exercising their First Amendment rights, a subsequent judgment on dispositive motions after a protracted period of discovery or following a trial is insufficient, even with the availability of fees or sanctions. As the Council indicated, the harm it sought to combat is the distraction and the chilling of speech that takes place prior to a judgment and certainly prior to any appeal. *Id.*

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

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

Such a holding will be fully in line with *Doe*, for the reasons already laid out, and with earlier precedents of this Court. This Court has routinely recognized "that an order denying a claim of immunity from suit under the First Amendment satisfies the collateral order doctrine and is thus immediately appealable." *District of Columbia v. Pizzulli*, 917 A.2d 620, 624 (D.C. 2007) (internal quotation marks omitted); *Heard*, 810 A.2d at 877; *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Wash., D.C. v. Beards*, 680 A.2d 419, 425-26 (D.C. 1996); *United Methodist Church*, 571 A.2d at 791-92. Although much of this precedent deals with the First Amendment's Establishment Clause and Free Exercise Clause, the chilling of speech that the Act addresses is closely analogous to the interests of religious institutions under those constitutional protections. Just as in appeals involving other types of qualified immunity from trial, and consistent with the holdings of peer federal and state courts of appeals, a holding allowing prompt appellate review of Anti-SLAPP motions in the District denied on legal grounds is warranted here.

In urging this conclusion, we do not overlook the fact that the Council did not use the word "immunity" in the Act. Rather, as *Doe* explained, it makes no difference that the Anti-SLAPP Act "does not explicitly provide for the immediate appeal of the denial of a special motion," because the Act clearly creates an immunity from suit, the denial of which supports a right of immediate appeal. *Id.* at 1039 n.12. The controlling analysis of the legislature's intent is substantive, and, as this Court did in *Doe*, courts of appeals have, appropriately, repeatedly reviewed the denial of a state Anti-SLAPP statute motion on interlocutory appeal notwithstanding that the statute did not include the word "immunity." *See* 14 M.R.S.A. § 556 (reviewed in *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010)); La. Code Civ. Proc. Art. 971 (*Henry*); Cal. Civ. Proc. Code § 425.16 (*Batzel*); *see also Mitchell*, 472 U.S. at 526-27 (holding that denial of a claim of qualified immunity implied under the federal Constitution satisfied the collateral order doctrine).

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

phrased it "an immunity of a sort from suit," 91 A.3d at 1039—that makes collateral order review fully appropriate.[4]

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

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

In *Batzel*, decided before *Will*, the Ninth Circuit determined that the denial of motions under California's Anti-SLAPP scheme satisfies this element of the doctrine. 333 F.3d at 1025. "Because the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable on

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

appeal from a final judgment." *Id.* The Ninth Circuit, examining the structure of the statute and legislative history, found that the purpose of California's Anti-SLAPP motion "is to determine whether the defendant is being forced to defend against a meritless claim." *Id.* The court treated "the protection of the anti-SLAPP statute as a substantive immunity from suit." *Id.* at 1025-26.

After *Will*, and following the Ninth Circuit's reasoning in *Batzel*, the First Circuit in *Godin* similarly held that an order denying a special motion to dismiss pursuant to Maine's Anti-SLAPP statute "would be effectively unreviewable on appeal from a final judgment," since Maine's "'lawmakers wanted to protect speakers from the trial itself.'" 629 F.3d at 85 (quoting *Batzel*, 333 F.3d at 1025).

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

context that those interests' "importance weighs profoundly in favor of appealability." *Id.*

Recently, the Ninth Circuit had cause to reaffirm *Batzel* in light of the Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) (holding that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine). In *DC Comics*, the Ninth Circuit again reaffirmed that the denial of motions under California's Anti-SLAPP scheme satisfy this element of the test. 706 F.3d at 1015. The court underscored the importance of the public interests that the statute protects: "It would be difficult to find a value of a 'high[er] order' than the constitutionally-protected rights to free speech and petition that are at the heart of [the State's] anti-SLAPP statute." *Id.* at 1015-16. Further entrenching Anti-SLAPP protections within the "particular values of a higher order" under *Will*, the court noted that "[s]uch constitutional rights deserve particular solicitude within the framework of the collateral order doctrine." *Id.* at 1016.

This Court has ample reason to follow the well-reasoned path of these peer appellate court decisions. *Doe* relied substantially on such decisions to conclude that collateral order review of denials of a motion to quash under the Act is appropriate. 91 A.3d at 1038-40. And *McNair*, in rejecting an interlocutory appeal of an order that denied a claim of judicial proceedings privilege, cited with approval the Fifth Circuit's decision granting collateral review of a state Anti-SLAPP statute as an example of a *proper* grant of such review. *See* 3 A.3d at 1138 ("Following *Will*, the Fifth Circuit in [*Henry*] identified another public interest worthy of protection on interlocutory appeal,

that of enforcing a statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights . . . . We conclude that when compared with the examples noted by the Court in *Will* and the interests at issue in *Henry* . . . [,] the [privilege] asserted in this case does not protect a substantial public interest of the high order required . . . ." (internal quotation marks omitted)).

Thus, under *Will* and consistent with the ample body of appellate precedent in this and other courts before and after *Will*, denial of a special motion to dismiss under the Act on legal grounds implicates a particular value of a high order fully sufficient to warrant interlocutory review.[5]

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

Nothing in *Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order), or *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009)—the two authorities cited in this Court's (subsequently discharged) show cause order—remotely undermines the recognition of collateral order review by this Court of denials on legal grounds of a motion to dismiss under the Act.

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

The unpublished order in *Newmyer* is devoid of any precedential or persuasive value. Under the Court's rules, generally, "opinions of the court will not cite to or rely upon unpublished opinions or orders of the court." D.C. R. App. Ct. I.O.P. IX-D (2011); *see Seabolt v. Police & Firemen's Ret. & Relief Bd.*, 413 A.2d 908, 912 n.12 (D.C. 1980); *Carter v. United States*, 614 A.2d 913, 916 n.5 (D.C. 1992). The exceptions listed in Rule 28(g) of this Court's rules, which would allow for citation to an unpublished order, do not apply in any way to this dispute, for they apply only "when relevant (1) under the doctrines of law of the case, res judicata, or collateral estoppel; (2) in a criminal case or proceeding involving the same defendant; or (3) in a disciplinary case involving the same respondent." D.C. App. R. 28(g).

Further, to the extent the Court looks at it for persuasive value, *Newmyer* has no force here. First, it contained no reasoning. Second, no party or amicus in *Newmyer* argued that the Act provided a qualified immunity or similar right, so the issue was not before the panel and could not have been decided or even fully considered by it in issuing its short order dismissing the appeal. And, third, the panel there did not address or purport to apply this Court's *published* decisions in *McNair Builders* and elsewhere delineating its collateral order precedents, nor of course did the panel in *Newmyer* have the benefit of the subsequently published and on point opinion of this Court in *Doe*.

Reliance on *Englert* would be likewise misguided. The Ninth Circuit there construed the *absence* of express provisions for interlocutory review as evidence of the Oregon legislature's view that the right conveyed by the statutes in question was *not* an immunity from suit, and therefore that appellate review post-judgment was sufficient.

551 F.3d at 1106-07. This holding has no force here, for two reasons. First, *Englert* has been superseded by statute; in its wake, the Oregon legislature installed language making explicit that interlocutory review is available as a matter of Oregon law. *See DC Comics*, 706 F.3d at 1016 n.8.

Second, *Doe* expressly, and correctly, rejected application of *Englert*'s logic to the District of Columbia context. As *Doe* made explicit, the absence in the Act passed by the Council of an express provision granting interlocutory review tells this Court nothing of use about the operative question of whether the Council intended to provide for a qualified immunity from suit. As the Court explained:

> because of the limitations placed on the D.C. Council under the Home Rule Act, we conclude that the D.C. Council's failure to codify an immediate appeal provision for the denial of a special motion to quash cannot reasonably be analogized to the Oregon legislature's failure to create an immediate appeal in *Englert*. Congress created the current District of Columbia Courts system, defined the jurisdiction of the District's courts, and prohibited the Council from legislating to expand (or contract) their jurisdiction. . . . We therefore read little into the absence of a provision that the Council may not have been empowered to include in the first place.

91 A.3d at 1039 n.12. Thus, the fact that the Act lacks a provision expressly authorizing interlocutory appeal to this Court is simply not informative as to whether the lawmakers "intended to provide a right not to be tried." *Englert*, 551 F.3d at 1105.[6]

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[6] We note, however, that the Council complied with this Home Rule Act limitation in creating a speech rights-implementing immunity that carries with it the potential for interlocutory appeal under this Court's established jurisdictional rules. The Council did not affect the rules by which this Court determines its jurisdiction; the District instead asks the Court to apply those rules based on a new substantive right. This Court has made clear that the Council has authority to change substantive law even if in doing so it

And, as to what the District's lawmakers actually intended, the evidence from the Council, as discussed, is quite clear. The Council sought to extend "qualified immunity to individuals engaging in protected actions," to help "ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish," and thus to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Comm. Rep. at 4. Thus, under the Council's stated understanding of the immunity, a denial of a special motion to dismiss under the Act would have been understood to be immediately appealable under normal application of the collateral order doctrine as developed and applied by this Court.

Moreover, on the *specific* issue of interlocutory appellate review, the Council stated its clear policy preference. As originally introduced, the Act provided for interlocutory appeal. *See* Comm. Rep. at 4-8 (containing D.C. Council, Bill No. 18-0893, § 3(e) (introduced Jun. 29, 2010, by Council members Cheh and Mendelson)). The Council made clear that it continues to believe the right to immediate appeal appropriate, and it removed that provision from the final version of the Act only due to the concern that such a provision could violate the Home Rule Act: "As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While *the Committee agrees with and supports the purpose of this provision*, a recent decision of

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affects what cases a court in the District of Columbia may hear. *See District of Columbia v. Sullivan*, 436 A.2d 364 (D.C. 1981).

the D.C. Court of Appeals [*Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011),] states that the Council exceeds its authority in making such orders reviewable on appeal." *Id.* at 7 (emphasis added). Thus, the evidence indicates that the Council "agrees with and supports" the availability of a right to immediate appeal from the denial of a special motion to dismiss under the Act, and views the right at issue as one to be free from suit or trial where the conditions of the statute are met. That is key. That demonstrable legislative intent justifies the availability of collateral order review.

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

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

First, this Court's decision on the availability of interlocutory review based on the qualified immunity provided by the Act could give much-needed guidance to lower courts and litigants in the District of Columbia to confirm the nature of the protections provided by the Act. Guidance and clarity would reduce uncertainty and help protect judicial resources in the Superior Court and federal courts, which have had a number of

cases raising questions under the Act without the benefit of guidance from this Court's construction of the Act's dismissal provisions.[7]

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

Finally, the Court in recognizing such collateral order review can and should retain flexibility and the ability to tailor its review to the equities of a particular case. Granting collateral review appeal is of course *not* tantamount to reversal, *see, e.g.*, *Pizzulli*, 917 A.2d 620 (granting collateral review of trial court's order denying defendants' motion to dismiss based upon judicial immunity from prosecution, and

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[7] *See, e.g.*, *Abbas v. Foreign Policy Grp., LLC*, 2013 WL 5410410 (D.D.C. Sept. 27, 2013), *appeal docketed*, No. 12-1565 (D.C. Cir. Oct. 23, 2013) (finding that the Act is applicable in federal court); *Boley v. Atl. Monthly Grp.*, 2013 WL 3185154 (D.D.C. June 25, 2013); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012) (same), *aff'd on other grounds without reaching the Anti-SLAPP issue*, 736 F.3d 528 (D.C. Cir. 2013); *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012) (finding that the Act cannot apply in federal court); *Payne v. District of Columbia*, 2012 CA 006163 B (D.C. Super. Ct. May 28, 2013) (granting dismissal pursuant to the Act); *Lehan v. Fox Television Stations, Inc.*, 2011 CA 004592 B (D.C. Super. Ct. Nov. 30, 2011) (same); *Snyder v. Creative Loafing, Inc.*, 2011 CA 003168 B (D.C. Super. Ct. Apr. 26, 2011) (case voluntarily dismissed before the Anti-SLAPP motion was fully briefed and decided).

affirming).[8] The summary affirmance process of D.C. App. R. 27(c) remains fully available for this or any other appeal reviewing the denial of a motion to dismiss under the Act where the Court deems it suitable.

Policy considerations thus reinforce the conclusion that collateral order review is justified here.

CONCLUSION

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

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify that on August 11, 2014, this brief was served by electronic mail to:

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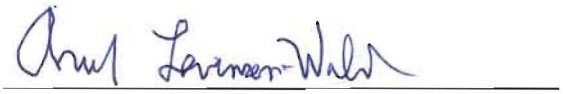

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