Nos. 12-7012 and 12-7017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

On Appeal From The United States District Court For The District of Columbia
Case No. 1:11-CV-01527

3M COMPANY'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPEAL FILED BY DEFENDANTS LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC, DAVIS-BLOCK LLC AND THE DISTRICT OF COLUMBIA

Kenneth J. Pfaehler
David I. Ackerman
SNR DENTON US LLP
1301 K Street NW
Suite 600, East Tower
Washington, D.C. 20005-3364
Telephone: (202) 408-6468
Facsimile: (202) 408-6399

Michael J. Collins
Robert W. Gifford
BICKEL & BREWER
767 Fifth Avenue, 50th Floor
New York, New York 10153
Telephone: (212) 489-1400
Facsimile: (212) 489-2384

ATTORNEYS FOR PLAINTIFF 3M COMPANY

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Plaintiff-Appellee 3M Company ("3M") respectfully submits this reply in support of its motion to dismiss the appeals filed by defendants-appellants Lanny Davis ("Davis"), Lanny J. Davis & Associates, PLLC and Davis-Block, LLC (collectively, the "Davis Appellants"), and by intervenor-appellant District of Columbia ("Intervenor") (together with the Davis Appellants, the "Appellants"), as follows:

I.

<u>SUMMARY OF REPLY</u>

Appellants seek an interlocutory appeal from an order of the district court denying the Davis Appellants' special motion to dismiss 3M's claims pursuant to D.C. Code § 16-5501, *et seq*. (the "D.C. Anti-SLAPP Act" or "Act"). In doing so, Appellants do not dispute the controlling principle articulated by the United States Supreme Court that such orders are generally *not* immediately appealable.[1] Instead, Appellants contend that the Act warrants an exception to the general rule because: (1) the Act purportedly creates an immunity from trial; and (2) the D.C. Council intended to insert a right of interlocutory appeal into the Act, but lacked the authority to do so. Neither argument is persuasive. Appellants' attempts to shoehorn the Act into the collateral order doctrine's "immunity" exception are precisely the type of argument that the Supreme Court has called "too easy to be

[1] *See, e.g.*, *Will v. Hallock*, 546 U.S. 345, 349 (2006).

sound."[2] Appellants, as the district court correctly noted, are attempting to "clothe [the Act] in the costume of the substantive right of immunity—but this is largely a masquerade."[3] Moreover, whether or not the D.C. Council *intended* to grant an immediate right of interlocutory appeal is irrelevant; Appellants do not dispute that such a right was *not* created in the Act, either by the D.C. Council or by the United States Congress. Accordingly, the motion to dismiss should be granted.

II.

ARGUMENTS AND AUTHORITIES

A. The D.C. Anti-SLAPP Act Does Not Confer Immunity From Suit On The Davis Appellants.

Appellants do not dispute that the "effectively unreviewable" prong of the collateral order doctrine requires this Court to assess "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of high order.'"[4] The critical question raised by 3M's Motion to Dismiss, therefore, is whether the values underlying the Act are of the type that they can be protected through the normal appellate process when a special

[2] *Id.*

[3] *3M Co. v. Boulter*, No. 11-cv-1527, 2012 WL 386488, at *22 (D.D.C. Feb. 2, 2012).

[4] *Will*, 542 U.S. at 342-43.

motion to dismiss is denied.[5] As a practical matter, "this analysis has focused on whether the anti-SLAPP law in question functions as a right not to stand trial, i.e., an immunity from suit."[6]

As 3M demonstrated in its opening brief, an order is not "effectively unreviewable" merely because it requires defendant to "undergo the burden and expense of a trial" prior to obtaining an appeal.[7] Denials of motions to dismiss are generally not considered to be "effectively unreviewable," and the Supreme Court has cautioned that doing so "would leave the final order requirements . . . in tatters."[8] Here, the district court's order did nothing more than deny a motion to dismiss, albeit one asserted by the Davis Appellants under a D.C. statute rather than under Rules 12 or 56.

The Supreme Court's admonition that assertion of a "right not to be tried" should be viewed with "skepticism, if not a jaundiced eye"[9] is particularly appropriate in this case. Appellants assert that the Davis Appellants enjoy a *statutory* immunity from suit, yet cannot cite to *any* section of the Act that actually

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[5] That two of five Circuit Courts have dismissed appeals of orders denying anti-SLAPP special motions to dismiss, "demonstrates that an anti-SLAPP statute does not in and of itself satisfy the collateral order doctrine." *Metabolic Research, Inc. v. Ferrell*, No. 10-16209, 2012 WL 400436, at *4 (9th Cir. Feb. 9, 2012).

[6] *Id.*

[7] *Id.*

[8] *Will*, 546 U.S. at 349.

[9] *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

confers such an immunity. Instead, Intervenors assert that the Act offers private defendants such as the Davis Appellants "qualified immunity" from suit.[10] That claim, however, is erroneous as a matter of law because "qualified immunity" is a judicially created doctrine whose sole purpose is to shield *government* agents from liability for their official acts.[11] The Anti-SLAPP Act is not so limited.[12] As the district court correctly observed:

> The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure that directly conflicts with the operation of the federal rules as required by the binding precedent of this Circuit.[13]

Appellants attempt to salvage their argument by pointing to the legislative history of the Act,[14] in which the D.C. Council's Committee Report characterized

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[10] District of Columbia's Opposition to 3M Company's Motion to Dismiss [Doc. # 1370219] ("Intervenor's Brief") at 9-11.

[11] *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Under [the doctrine of qualified] immunity, government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"); *Bame v. Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011) ("Qualified immunity is 'a defense that shields officials from suit.'"); *see also Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (declining to extend qualified immunity to non-government employees).

[12] *See* D.C. Code § 16-5502.

[13] *Boulter*, 2012 WL 386488, at *20.

[14] *See* Intervenor's Brief at 14-17; Appellants' Opposition to Motion to Dismiss [Doc. # 1370227] ("Davis Appellants' Brief") at 13-15.

the Act's special motion procedures as "substantive," and referred to other jurisdictions as "having similarly extended absolute or qualified immunity to individuals engaging in protected actions."[15] However, the Act does not offer defendants immunity, but rather a "qualified right to be free from the burdens of trial . . . if the presiding trial judge . . . concludes . . . that the plaintiff has not shown that the claim is likely to succeed on the merits."[16]

Moreover, even if the legislative history of the Act created an immunity that does not appear in the Act's text, which it did not, it is irrelevant how the D.C. Council or Appellants characterize the Act, because "the jurisdiction of the Courts of Appeals . . . cannot depend on a party's agility in so characterizing the right asserted [as an immunity]."[17] After all, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'"[18] This Court should follow the clear instruction of the Supreme Court, and dismiss appellants' interlocutory appeal.

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[15] Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the Anti-SLAPP Act of 2010 ("Comm. Rep.") at 4, dated November 18, 2010.

[16] Intervenor's Brief at 9.

[17] *Digital Equip. Corp.*, 511 U.S. at 872.

[18] *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995).

B. The D.C. Anti-SLAPP Act Does Not Confer A Right To Immediately Appeal The Denial Of A Special Motion To Dismiss.

In the *Englert* and *Metabolic Research* cases, the Ninth Circuit declined to apply the collateral order doctrine because the underlying Nevada and Oregon state statutes at issue, like the D.C. Act, did not expressly provide for immediate appellate review of such denials.[19] Appellants' attempts to distinguish those cases from this matter fail.[20]

Englert, in particular, noted that the Supreme Court in *Will* "significantly clarified" the unreviewability prong of the collateral order doctrine and "again made clear that the 'mere avoidance of trial' was insufficient to invoke" the doctrine.[21] By not expressly providing for immediate appellate review of a denial of a special motion to dismiss, therefore, the Oregon anti-SLAPP statute did not provide a "right not to be tried," but rather only a "right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge."[22] In *Metabolic Research*—the latest case to decide the issue of whether a

[19] *Englert v. MacDonnell*, 551 F.3d 1099, 1106-07 (9th Cir. 2009); *Metabolic Research,* 2012 WL 400436, at *5-6.

[20] *See* Intervenor's Brief at 14-18; Davis Appellants' Brief at 15-17.

[21] *Englert*, 551 F.3d at 1105; *cf. Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (California anti-SLAPP motions are "effectively unreviewable" upon final judgment because the California statute established a "substantive immunity from suit" *and* expressly provided for immediate appeal in state court).

[22] *Id.* Appellants note that the Fifth Circuit, in *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009), granted a right to immediate appeal of a

denial of an anti-SLAPP special motion to dismiss is immediately appealable—the Ninth Circuit similarly found that the lack of a statutory right to immediate review under Nevada's anti-SLAPP law foreclosed the application of the collateral order doctrine.[23]

Appellants attempt to distinguish this matter from the facts of *Metabolic Research* and *Englert* by contending that the drafters of the Act originally specified a right of immediate appeal from an order denying a special motion to dismiss, but later removed it because granting that right would have violated the Home Rule

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denial of a special motion to dismiss even where the relevant statute did not specifically provide for such a right. *See* Intervenor's Brief at 18; Davis Appellants' Brief at 10. In doing so, however, the Fifth Circuit specifically distinguished *Englert* by finding that, under Louisiana law when the Louisiana anti-SLAPP law was passed, defendants already had an automatic right to appeal the denial of any special motion to dismiss under that statute through state law writs of supervision. *Id.* at 168. Intervenors also note that the First Circuit found that the collateral order doctrine applies to denials of a special motion to dismiss under the Maine anti-SLAPP statute, even though the Maine law did not expressly provide for immediate appeals. Intervenor's Brief at 16; *see also Godin v. Schecnks*, 629 F.3d. 79, 84-85(1st Cir. 2010). The *Godin* court, however, noted that, unlike here, the Maine Supreme Court had expressly found that Maine law permitted defendants immediately to appeal denials of special motions to dismiss. *Id.* at 84.

[23] *Metabolic Research,* 2012 WL 400436, at * 5-6. The Davis Appellants' contention that Nevada and Oregon state law either reject, or do not recognize, the collateral order doctrine is irrelevant to the question of whether the D.C. Anti-SLAPP Act provides a right to immediately appeal the denial of a special motion to dismiss. *See* Davis Appellants' Brief at 16-17. Moreover, the Davis Appellants do not contend that the Nevada and Oregon legislatures could not have placed such a right in their respective statutes.

Act,[24] under which the D.C. Council "may not enlarge the congressionally prescribed limitations on [the court's] jurisdiction."[25] However, this argument merely highlights the fact that the United States Congress—the only legislative body that can grant a right to immediate appeal in the D.C. courts—has not done so. Moreover, Appellants' discussion is irrelevant because this Court has "no authority to enforce principles gleaned solely from legislative history . . . [with] no statutory reference point."[26] It is undisputed that the Act itself provides no immediate right to appeal.

Appellants then point to dicta in the D.C. Court of Appeals' decision in *McNair Builder's, Inc. v. Taylor*,[27] to argue it is "probable" that the D.C. court would "hold that orders denying special motions to dismiss are immediately appealable."[28] Of course, the *McNair* court was not faced with the question of whether denial of a special motion to dismiss under the D.C. Anti-SLAPP Act was

[24] Intervenor's Brief at 17; Davis Appellants' Brief at 14-15; *see also* Comm. Rep. at 8 ("The provision that has been removed from the bill as introduced would have provided an immediate appeal over a *non-final* order (a special motion to dismiss)."). (emphasis added).

[25] *See* Intervenor's Brief at 16 ("Under the Home Rule Act, as codified in relevant part at D.C. Code § 1-206.02(a)(4), 'The Council shall have no authority to . . . . [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and the jurisdiction of the District of Columbia courts).'").

[26] *Int'l Broth. Of Elec. Workers v. NLRB*, 814 F.2d 697, 713 (D.C. Cir. 1987).

[27] 3 A.3d 1132, 1140 (D.C. 2010).

[28] Davis Appellants' Brief at 18; *see also* Intervenor's Brief at 17-18.

sufficient to invoke the collateral order doctrine.[29] Indeed, as Appellants acknowledge, the court never decided that question.[30]

In addition, it is doubtful that the D.C. Court of Appeals would decide in Appellants' favor. In *McNair*, the D.C. Court of Appeals expressly acknowledged that the Supreme Court's decisions in *Will* and *Mowhawk Industries Inc. v. Carpenter*[31] "significantly refined the analytical framework" to be applied to determining the availability of appeals under the collateral order doctrine.[32] Appling that new framework, it then refused to grant immediate appeal from an order denying absolute immunity from suit—an immunity that was intended to further core First Amendment principles, much as Appellants claim the D.C. Anti-SLAPP aims to do.[33] Thus, it is likely that the D.C. Court of Appeals would find that a private defendant's right to pre-trial dismissal of claims nominally within the purview of the Act was not on par with the rights found by the Supreme Court essential to protect "particular value[s] of high order," specifically: (1) presidential immunity; (2) qualified immunity for government officials; (3) Eleventh

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[29] *See* 3 A.3d 1132-42.

[30] *See* Davis Appellants' Brief at 18

[31] 130 S. Ct. 599 (2009).

[32] 3 A.3d at 1142.

[33] *Id.*

Amendment immunity; and (4) criminal double jeopardy.[34] Indeed, it is undisputed that, prior to the passage of the Act, the Davis Appellants would have had no basis to contend that the district court's denial of the First Amendment defenses raised in their Rule 12(b)(6) motion to dismiss was immediately appealable.[35]

III.

CONCLUSION

For foregoing reasons, Appellee 3M Company respectfully requests the Court to dismiss this appeal, and grant such other and further relief to which 3M may be entitled.

[34] *Will*, 546 U.S. at 352-53 (finding that such rights implicated some *governmental* "value of high order," such as "honoring the separation of powers" or "preserving the efficiency of government and the initiative of its officials.").

[35] First Amendment rights do not, in and of themselves, implicate the collateral order doctrine immediately appealable. *See Metabolic Research,* 2012 WL 400436, at *4; *United States v. Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999) (the First Amendment does not provide "rights to avoid trial altogether.").

Respectfully submitted,

By: /s/Kenneth J. Pfaehler
Kenneth J. Pfaehler
David I. Ackerman
SNR DENTON US LLP
1301 K Street NW
Suite 600, East Tower
Washington, D.C. 20005-3364
Telephone: (202) 408-6468
Facsimile: (202) 408-6399

Michael J. Collins
Robert W. Gifford
BICKEL & BREWER
767 Fifth Avenue, 50th Floor
New York, New York 10153
Telephone: (212) 489-1400
Facsimile: (212) 489-2384
ATTORNEYS FOR PLAINTIFF 3M COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of May, 2012, I caused true and correct copies of the foregoing 3M COMPANY'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTION TO DISMISS to be served on counsel of record by filing the document with this Court's ECF system, which will send notification of the filing to all counsel registered with that system, and by U.S. Mail, first class, postage prepaid to:

Counsel for Appellants Lanny Davis, Lanny J. Davis & Associates, PLLC and Davis-Block LLC:
Raymond G. Mullady, Jr.
Joseph O. Click
Blank Rome LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Counsel for Appellant District of Columbia:
Holly Michelle Johnson
Donna M. Murasky
Todd Sunhwae Kim
Office of the Attorney General for the District of Columbia
441 Fourth Street NW, 6th Floor South
Washington, D.C. 20001

/s/ David I. Ackerman

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