**Nos. 12-7012 & 12-7017**

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## United States Court of Appeals for the District of Columbia Circuit

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3M COMPANY,

Plaintiff-Appellee,
v.

LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC AND DAVIS-BLOCK LLC,

Defendants-Appellants.

and

THE DISTRICT OF COLUMBIA,

Intervenor-Appellant.

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

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# 3M COMPANY'S MOTION TO DISMISS

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Plaintiff-Appellee 3M Company ("3M") respectfully submits 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 appellant District of Columbia, which was an intervenor below (together with the Davis Appellants, the "Appellants"), as follows:

## PRELIMINARY STATEMENT

The Appellants bring this appeal from an order entered February 2, 2012, of the District Court for the District of Columbia that denied the Davis Appellants' special motion to dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5501, *et seq*. (the "Anti-SLAPP Act").[1] The District Court found D.C.'s Anti-SLAPP procedures to be inapplicable in a federal court exercising its diversity jurisdiction. The District Court held:

> [T]he Supreme Court has observed that pleading standards and summary judgment rules are classic examples of appropriate procedural rules. *Shady Grove*, 130 S.Ct. at 1441.[2] In addition, the D.C. Anti-SLAPP Act is codified with procedural matters in the D.C. Code, and the Act applies to all claims, not just to claims brought under District law, seriously undermining any contention that the Act "serves the function of defining [state] rights or remedies." *Shady Grove*, 130 S.Ct. at 1457 (Stevens, J., concurring). The Act is a summary dismissal procedure that the Defendants and the District

[1] A copy of the District Court's Memorandum Opinion is attached as Exhibit 1.

[2] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co*., 130 S. Ct. 1431, 1441 (2010).

> seek to clothe in the costume of the substantive right of immunity – but this is largely a masquerade.[3]

This appeal does not fall within the statutory grounds for appeal established by 28 U.S.C. §§ 1291 or 1292, and it does not appear that Appellants contend otherwise. Rather, the Davis Appellants asserted in the District Court that they would bring this appeal under the collateral order doctrine.[4]

The District Court's order, which correctly finds that the Anti-SLAPP Act is a procedural statute that is preempted by Federal Rules of Civil Procedure 12 and 56, does not merit "extraordinary treatment" under the collateral order doctrine. The district court simply declined to apply a local procedural instrument for pretrial dismissal in a federal diversity proceeding. Denial of this initial dispositive motion affords no greater right to immediate appeal than do routine denials of motions for summary disposition under Rules 12 and 56. Nothing in the Act justifies its inclusion in "the 'small class' of collaterally appealable orders."[5]

To allow immediate appellate review under the circumstances herein would undermine the final-judgment rule.

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

[4] Exhibit 2, Relevant Excerpts of the Transcript of Scheduling Conference Before the Honorable Robert L. Wilkins, Feb. 21, 2012, at 13:6-10 ("We felt that the *Cohen* type appeal route would be cleaner, less burdensome on this court, and more likely to succeed, quite frankly, in getting us to where we need to be, which is before the DC Circuit.").

[5] *Will v. Hallock*, 546 U.S. 345, 351 (2006).

For the reasons detailed herein, the Court should reject Appellants' attempt to immediately appeal from the denial of a "special motion" to dismiss, and summarily dismiss Appellants' appeal for lack of jurisdiction.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Davis Appellants Intentionally Defamed 3M Company in a Public Relations Campaign Designed to Coerce a Settlement of Litigation in the United Kingdom.

This case arises out of a series of wrongful acts planned and implemented by the Davis Appellants, including the publication of damaging and false allegations against 3M. *3M Co.*, 2012 WL 386488, at *3. The Davis Appellants slandered 3M in an effort to pressure the company into paying over $30,000,000 to settle a lawsuit brought by Porton Technology Funds and Porton Capital, Inc. (collectively, "Porton") in the High Court of London. Defendants pursued this course of conduct knowing that these claims were worth far less than that amount—a fact confirmed by the High Court's judgment awarding them less than $1.4 million and finding that 3M had not engaged in any misconduct.[6] This lawsuit concerned 3M's decision to cease marketing a medical product called Baclite (the "BacLite

[6] Approved Judgment in the High Court of Justice, Queen's Bench Division, Commercial Court, No. 2008 Folio No. 877 (Porton Technology Funds et. al. v. 3M Company), [2011] EWHC 2895 (Nov. 7, 2011) (hereinafter "Approved Judgment"), at ¶ 349 (A copy of the High Court Opinion is attached as Exhibit A to Plaintiff 3M Company's Consolidated Response in Opposition to the Motion to Dismiss of Defendants Lanny J. Davis, Lanny J. Davis & Associates, PLLC,

Litigation"). *3M Co.*, 2012 WL 386488, at *2.

In March 2011, Claimants hired the Davis Appellants to launch a public relations offensive in America and England against 3M. *See id.* at *3. This campaign included public relations events staged by the Davis Appellants, an interactive website targeted at 3M, and written statements widely distributed to the media. Through these means, the Davis Appellants spread false and defamatory information that injured 3M's reputation. *See id.* at *5. Among other things, the Davis Appellants falsely and maliciously repeated accusations that 3M caused the death of "thousands and thousands" of people when it chose to cease its attempts to market BacLite, although the Davis Appellants knew these statements were untrue.[7]

### B. The Proceedings in the District Court Below

In June 2011, 3M filed a complaint in New York state court against Porton Capital Technology Funds, Porton Capital, Inc. and their director and Chief Executive Officer, respectively, Harvey Boulter (the "Boulter Defendants" and

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Davis-Block LLC, Porton Capital Technology Funds and Porton Capital, Inc., filed December 15, 2011).

[7] Significantly, the High Court implicitly vindicated 3M's claims against the Davis Appellants by rejecting the allegations of wrongdoing that Claimants (the Davis Appellants' employers) had asserted against 3M during trial. For example, the High Court rejected Porton's allegations that 3M purposefully interfered with Porton's commercial interest in BacLite. Specifically, "BacLite would never have been a commercial success and future sales of the product would have been limited." *Id.* at ¶ 269.

together with the Davis Appellants, the "Defendants"). That action was voluntarily discontinued without prejudice, and re-filed in the United States District Court for the District of Columbia on August 24, 2011. 3M filed its First Amended Complaint in the District Court on December 9, 2011. *3M Co.*, 2012 WL 386488, at * 5.

With the action pending in a federal court sitting in diversity and no discovery having occurred, defendants filed "special" motions to dismiss 3M's claims under § 16-5502 of the D.C. Anti-SLAPP Act of 2010. *Id.* The Davis Appellants' special motion was premised on the contention that their libelous campaign in pursuit of private enrichment was actually "in furtherance of the right of advocacy on issues of public interest." *Id.* Thus, they claimed, they were entitled to immediate summary dismissal of 3M's claims. *Id.*

3M opposed the special motions and moved to strike them on the grounds (among others) that the D.C. Anti-SLAPP Act is a local procedural statute that conflicts with Federal Rules 12 and 56 and has no applicability in a federal court sitting in diversity. In addition, 3M argued that the act could not be applied pre-discovery even assuming *arguendo* its applicability, and that the act violates the Home Rule Act. After 3M moved to strike the "special motion," the Attorney General for the District of Columbia intervened to defend the validity of the Act and to defend its applicability in a federal court sitting in diversity. *Id.* at *1.

### C. The District Court's Order

On February 2, 2012, after full briefing and argument, the district court denied the Davis Appellants' anti-SLAPP motion on the grounds that the "special motion" procedure under the D.C. Anti-SLAPP Act does not apply to a federal court sitting in diversity and is pre-empted by Rules 12 and 56.[8] The district court relied on the United States Supreme Court's teaching in *Shady Grove*[9] that "if a federal rule answers or covers the question in dispute, the federal rule governs." *3M Co.*, 2012 WL 386488, at *7. The district court found that the "special motion to dismiss" procedure under the D.C. Anti-SLAPP Act addresses the same question in dispute as Federal Rules of Civil Procedure 12 and 56, and, therefore, the Federal Rules preempt the act's application. *Id.* at **13-16.

The district court also found that the act cannot apply in a federal court exercising its diversity jurisdiction because the act "strips a federal court of the discretion it otherwise has to determine whether a claim will be dismissed without prejudice." *Id.* at *16. The D.C. Anti-SLAPP Act mandates that a dismissal under its provisions must be with prejudice. The district court found that this provision directly conflicts with the Federal Rules, which "vest a district court with

[8] *Id.* at *22. *See also Sherrod v. Breitbart*, No. 11-477, 2012 WL 506729, at *2 (D.D.C. Feb. 15, 2012) (if the D.C. Anti-SLAPP Act is shown to be purely procedural "the *Erie* doctrine bars its application in federal court").

[9] *See Shady Grove Orthopedic Assocs.*, 130 S. Ct. at 1437.

discretion to determine whether dismissal under Rule 12(b) would operate as an adjudication on the merits." *Id.*

The district court found that "[t]he Act is a summary dismissal procedure," which "the Defendants and the District seek to clothe in the costume of the substantive right of immunity – but this is largely a masquerade." *Id.* at *22. Accordingly, the court denied the Anti-SLAPP motions to dismiss.

### D. The Davis Appellants And The Intervenor Appeal The Order.

On February 17, 2012, the Davis Appellants filed a notice of appeal from the Order.[10] Shortly thereafter, on February 23, 2012, the District of Columbia also submitted a notice of appeal from the Order.[11] On March 14, 2012, the two appeals were consolidated under the caption above.

## ARGUMENT

The Court lacks jurisdiction over this appeal because none of the three bases for appeal pertain here. First, the district court's order is not a final decision permitting appeal under § 1291. Second, it is not one of the enumerated types of interlocutory decision that can be appealed under § 1292. And third, it is unappealable under the collateral order doctrine because the order is "effectively

[10] Notice of Appeal of Defendants Lanny Davis, Lanny J. Davis and Associates PLLC and Davis-Block LLC, filed February 2, 2011, Civil Action No. 1:11-cv-01527-RLW.

[11] Notice of Appeal of Intervenor District of Columbia, filed February 23, 2011, Civil Action No. 1:11-cv-01527-RLW.

reviewable after final judgment."

### A. The Order Is Unappealable Under § 1291 Because It Is Not A Final Decision.

It has long been the policy of the federal courts that appeals will lie only from a final decision.[12] Congress codified that policy in 28 U.S.C. § 1291 by strictly limiting appeals of right to those taken from "final decisions of the district courts."[13] A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute judgment."[14]

Here, the Order was not a final decision because it permitted 3M's defamation claim against the Davis Appellants to continue.[15] The order also left

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[12] *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999).

[13] 28 U.S.C. § 1291; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy,* Inc., 506 U.S. 139, 142 (1993).

[14] *Digital Equip. Corp.*, 511 U.S. at 867; *Robinson-Reeder v. Am. Counsel on Edu.*, 571 F.3d 1333, 1336 (D.C. Cir. 2009).

[15] *See 3M Co.*, 2012 WL 386488, at *28; *cf. Englert v. MacDonnell*, 551 F.3d 1099, 1107 (9th Cir. 2009) (district court's order denying anti-SLAPP motion was not a "final decision" because "rather than ending the litigation on the merits, it permits the litigation to proceed in the ordinary manner to final judgment"); *American Hawaii Cruises v. Skinner*, 893 F.2d 1400, 1402 (D.C. Cir. 1990) (denial of summary judgment with instruction to a party not a "final order" under § 1291 because it did not "end the litigation on the merits"). "Ordinarily, a denial of a motion to dismiss or for summary judgment is not a 'final decision' within the meaning of 28 U.S.C. § 1291, and therefore is not reviewable." *McSurely v. McClellan*, 697 F.2d 309, 315 (D.C. Cir. 1982)

Harvey Boulter, to date not served with a summons in this action,[16] as a named defendant on all of 3M's claims.[17] Were it not for the Davis Appellants' improper notice of appeal and purported transfer of jurisdiction to this Court, this action would be proceeding to discovery in the district court.

### B. The Order Is Not Appealable Under 28 U.S.C. § 1292.

#### 1. The Order Is Not Among The Enumerated Orders That May Be Immediately Appealed.

Where the decision appealed from is not final, § 1292(a) provides for immediate appeals in only three enumerated instances. An immediate appeal is authorized from: (i) orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions;" (ii) orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof;" and (iii) decrees in "admiralty cases in which appeals from final decrees are allowed." 28 U.S.C.A. § 1292(a). The District Court's February 2 order does not fall within any of these categories.

#### 2. The District Court Did Not Certify The Order For Appeal Pursuant To § 1292.

Alternatively, § 1292 offers another means of obtaining immediate review of a district court order. Pursuant to § 1292(b), a district court may certify that the

[16] 3M intends to seek leave of the district court to make substituted service on Boulter.

[17] *See 3M Co. v. Boulter*, 2012 WL 386488, at *23.

appeal involves "a controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of litigation."[18] Congress passed § 1292(b) "primarily to ensure the courts of appeals would be able to 'rule on … ephemeral question[s] of law that m[ight] disappear in light of a complete and final record'"[19] and to assure the "prompt resolution of knotty legal problems" in particular cases identified by the district courts.[20]

In this action, the Davis Appellants did not even seek certification from the district court—apparently because they felt they were unlikely to get it. At a Rule 26(f) hearing on February 21, 2012, the Davis Appellants, advised the District Court that they had elected not to seek certification because, in their view, a collateral order appeal "would be cleaner, less burdensome on [the district court], and more likely to succeed, quite frankly, in getting us to where we need to be, which is before the D.C. Circuit."[21] Rather than giving the district court an opportunity to certify the issue of law presented by their notice of appeal, the Davis Defendants instead seek to create a new class of interlocutory appeal pursuant to the collateral order rule.

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[18] 28 U.S.C.A. § 1292(b).

[19] *See Weber v. U.S.*, 484 F.3d 154, 160 (2d Cir. 2007) (quoting *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996)).

[20] *See Weber*, 484 F.3d at 160; *see also Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990).

[21] Ex. 2 at 13:6-10.

### C. The Collateral Order Doctrine Does Not Permit The Immediate Appeal Of The Order.

The collateral order doctrine operates as a practical construction of §§ 1291 and 1292, not as an exception to them.[22] It is meant to accommodate a sharply limited group of rulings which, although they do not conclude a civil action, nonetheless conclusively resolve claims of right that are separable from, and collateral to, rights asserted in the action.[23] The Supreme Court has "repeatedly stressed" that the collateral order doctrine applies *only* to a "small class" of decisions, which must be kept "narrow and selective in its membership,"[24] and that it must never be allowed to swallow the general rule that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[25]

There are three requirements for a collateral order appeal. An appellant must show that an order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and

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[22] *See Digital Equip. Corp.*, 511 U.S. at 867.

[23] *See, e.g., Will*, 546 U.S. at 345; *Digital Equip. Corp.*, 511 U.S. at 867; *see also, e.g., La Reunion Aerienne v. Socialist Peoples Libyan Arab Jamahiriya*, 533 F.3d 837, 842-43 (D.C. Cir. 2008) (noting that collateral orders are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

[24] *Digital Equip. Corp.*, 511 U.S. at 867 (discussing Supreme Court precedent).

(3) is "effectively unreviewable on appeal form a final judgment."[26]

Here, the District Court determined that the D.C. Anti-SLAPP Act should not be applied by a federal court sitting in diversity.[27] Even assuming *arguendo* that the District Court conclusively determined a disputed question that was completely separate from the underlying merits of the action, its Memorandum Opinion and Order does not meet the third requirement of the collateral order doctrine, as it is not "effectively unreviewable" after a final judgment.[28]

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[25] *Id.* at 868; *Abney v. United States*, 431 U.S. 651, 656 (1977).

[26] *Will*, 546 U.S. at 349 (*quoting Puerto Rico Aqueduct & Sewer Auth*, 506 U.S. at 144). *See also, e.g., Digital Equip. Corp.*, 511 U.S. at 868; *La Reunion Aerienne*, 533 F.3d at 842-43.

[27] In this respect, the order in this action differs from the more usual type of order in which a court applies a state's anti-SLAPP law, yet denies the defendant's special motion to dismiss upon an assessment of the facts and the merits of the plaintiff's claim in accordance with the anti-SLAPP law's particular procedures.

[28] The issue of appealability under the collateral order doctrine is to be determined for the "entire category to which a claim belongs, without regards to the chance that the particular litigation at hand might be speeded, or a 'particular injustic[e]' averted, by a prompt appellate court decision." *Digital Equipment Corp.*, 511 U.S. at 868 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)). As discussed below, however, the state anti-SLAPP laws differ in material respects. The District Court's order below was limited to its consideration of the D.C. Anti-SLAPP's applicability in federal court under the *Shady Grove* doctrine. Although this Court is obliged to rule on the appealability of the collateral order doctrine as a categorical matter, the "category" should be confined to orders denying the application of the D.C. Anti-SLAPP Act in federal court, given the differences between D.C.'s law and those of other states. *Digital Equip.*, 511 U.S. at 868; *see also, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985) (noting that the Supreme Court has "expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular

### 1. An Immediate Appeal Is Not Proper Because The Order Can Be Effectively Reviewed After Final Judgment In This Matter.

The Supreme Court has held that the collateral order doctrine's "effectively unreviewable" requirement is satisfied only where delaying review until entry of final judgment "would imperil a substantial public interest"[29] or "some particular value of a high order."[30] The "crucial question is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders."[31] Even such fundamental values as a defendant's right to pre-trial dismissal[32] and First Amendment protections[33] do *not* merit

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ruling should be subject to appeal"); *Metabolic Research, Inc. v. Ferrell*, No. 10-16209, 2012 WL 4000436. at *4 (9th Cir. Feb. 9, 2012); *Englert*, 551 F.3d at 1106.

[29] *Will*, 546 U.S. at 352-53 ("In each case, some particular value of high order was marshaled in support of the interest in avoiding trial … it is not the mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later"); *Mohawk Indus., Inc. v. Carpenter*, 130 S.Ct. 599, 601 (2009).

[30] *Metabolic Research*, 2012 WL 400436, at *3; *Mohawk Industries*, 130 S.Ct. at 606; *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498–99 (1989).

[31] *Mohawk Industries*, 130 S.Ct. at 606.

[32] "We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Mohawk Industries*, 130 S. Ct. at 606.

[33] *See Metabolic Research*, 2012 WL 400436, at *4 (9th Cir. Feb. 9, 2012) ("an anti-SLAPP statute's aim of protecting its citizens' First Amendment rights can, in some circumstances, be adequately protected without recourse to immediate appeal"); *Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006) ("the denial of

application of the collateral order doctrine because these defenses can be effectively reviewed after final judgment.[34]

In this case, the underlying purposes of the D.C. Anti-SLAPP Act can be fully vindicated without creating a new class of interlocutory appeals.[35] After all, the "right" granted by the D.C. Anti-SLAPP Act is merely the creation of a procedural motion to effect early dismissal of certain types of claims.[36] As the Supreme Court has made clear, the denial of a potentially dispositive pre-trial motion does not satisfy the "effectively unreviewable" requirement because that rule would undermine the purpose of the final order rule:

> Those seeking immediate appeal . . . naturally argue that any order denying a claim of right to prevail without trial satisfies the [unreviewability] condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirements of § 1291 in tatters."[37]

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*Noerr–Pennington* immunity is not immediately appealable under the collateral order doctrine"); *U.S. v. Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999) (the First Amendment does not provide "rights to avoid trial altogether"); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2012); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995).

[34] *See Metabolic Research*, 2012 WL 400436, at *4; *Hinshaw*, 436 F.3d at 1003; *Hsia*, 176 F.3d at 526; *see also Snyder*, 131 S. Ct. at 1214 (affirming post-trial reversal of verdict against protestors who asserted First Amendment defense throughout district court proceedings); *see also Swint*, 514 U.S. at 43.

[35] *See Metabolic Research*, 2012 WL 400436, at *4; *Englert*, 551 F.3d at 1107.

[36] D.C. Code § 16-5502.

[37] *Cf. Will*, 546 U.S. at 351 (no appellate jurisdiction over order denying Rule 12 motion).

In other words, an order is not "effectively unreviewable" if it merely denies a defendant the "right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge before a defendant is required to undergo the burden and expense of a trial."[38]

Here, the district court correctly ruled that special motions to dismiss brought pursuant to the D.C. Anti-SLAPP Act are similar to Rule 12(b)(6) motions and Rule 56 motions in that they "answer the same question that Rules 12 and 56 cover."[39] Just as the collateral order doctrine does not create a right to interlocutory appeal from the denial of a Rule 12 or Rule 56 motion, it likewise does not establish a right to interlocutory appeal from the denial of an anti-SLAPP special motion.[40]

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[38] *Metabolic Research*, 2012 WL 400436, at *4; *Englert*, 551 F.3d at 1105. To be sure, interlocutory review is available for the limited and special category of orders denying "a legislatively approved *immunity from trial*," as opposed to a "mere claim of a right not to be tried." *Metabolic Research*, 2012 WL 400436, at *4. However, Courts of Appeals should view claims of a "right not to be tried with skepticism, if not a jaundiced eye [because] virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Swint*, 514 U.S. at 43. Indeed, the "the jurisdiction of the Courts of Appeals should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digital Equip. Corp.*, 511 U.S. at 872.

[39] *3M Co.*, 2012 WL 386488, at * 14.

[40] *See Englert*, 551 F.3d at 1107 (declining to permit immediate appeal from orders denying motions under Oregon's analogous anti-SLAPP statute because the special motion under that law "serves the same purpose as a motion for summary judgment"); *see also Metabolic Research*, 2012 WL 400436, at *4.

### 2. The Appellate Jurisprudence Supports Dismissing This Appeal.

Were the Court to take this appeal under the collateral order doctrine, it would be espousing a right to immediate federal appellate review that does not exist in the courts of the District of Columbia on appeals from the same law. Neither the D.C. Anti-SLAPP Act nor other D.C. law provides for immediate appeal from a trial court's denial of a special motion to dismiss.[41] Instead, D.C. authorizes an award of costs and attorneys' fees to a prevailing party, upon appeal after final judgment, as substantial protection sufficient to vindicate any erroneous decision.[42]

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[41] D.C. Code § 16-5502; *see generally*, D.C. Code § 11-721 (limiting the District of Columbia Court of Appeals' jurisdiction and not providing that the Court of Appeals has jurisdiction over an order denying a special motion to dismiss brought pursuant to the D.C. Anti-SLAPP Act). To be sure, the District of Columbia's version of the collateral order doctrine has been interpreted to permit interlocutory appeal from the denial of a motion to dismiss based on "a claim of absolute privilege under the common law" or "absolute immunity." *D.C. v. Pizzulli*, 917 A.2d 620, 624-25 (D.C. 2007) (granting interlocutory appeal where the trial court denied a motion to dismiss premised on sovereign immunity). By contrast, the Davis Appellants asserted only the right, pursuant to the Anti-SLAPP Act, to benefit from heightened burdens of proof in connection with their "special" motion to dismiss. As the District Court found, the Anti-SLAPP Act does not create an immunity from suit, only a special procedure for expedited disposition. *See* Order, at 35 ("The D.C. Council could have, but chose not to, simply gran[t] a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities.") (emphasis added).

[42] *See* D.C. Code § 16-5504 (the "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees"); *see also* D.C. R. Civ. P. 11(c) (permitting the court to impose sanctions on attorneys and parties who bring

As the Ninth Circuit recently held in *Metabolic Research, Inc. v. Ferrell,*[43] the unavailability of immediate appeal in state court is significant evidence of the state legislature's view that an anti-SLAPP statute does not vindicate a sufficiently "substantial public interest" to justify application of the collateral order doctrine.[44] That rationale applies equally in this Court, which should similarly conclude that the D.C. Anti-SLAPP Act does not vindicate a "substantial public interest" sufficient to merit the extraordinary creation of a right to interlocutory review in federal court that does not exist in the District's courts.

To be sure, and as discussed by the *Metabolic Research* court, Courts of Appeals considering anti-SLAPP laws from other states, with different statutory language, have occasionally permitted interlocutory appeals from orders denying

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frivolous lawsuits in bad faith); *Metabolic Research*, 2012 WL 400436, at *4 (where Nevada's anti-SLAPP law "provided award of costs and attorneys' fees to make the litigant whole after she prevails on the appeal from a final judgment and has, in addition, given her the option to pursue the unscrupulous litigator with an action for damages," this further satisfied the court that "the class of claims taken as a whole, can be adequately vindicated by other means"); *Mohawk Industries*, 130 S. Ct. at 605 ("That a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment … has never sufficed").

[43] 2012 WL 400436, at *5-6.

[44] *Id.*; *Englert*, 551 F.3d at 1106-07 (order denying anti-SLAPP motion not immediately appealable where Oregon's anti-SLAPP statute and law did not confer same right).

the application of a special motion to dismiss in federal court.[45] This is not a surprising circumstance, given that state anti-SLAPP laws vary widely in a number of respects, including whether or not they create an immediate right of appeal as of right,[46] their substantive scope,[47] their procedure,[48] the applicable legal standards,[49]

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[45] *See Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010)*; Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003).

[46] *Compare Metabolic Research*, 2012 WL 400436, at *3-6 and *Englert* 551 F.3d at 1107, *with Godin*, 629 F.3d at 85, *Henry*, 566 F.3d at 178, and *Batzel*, 333 F.3d at 1025.

[47] For example, the D.C. Anti-SLAPP Statute applies to causes of action based on acts "in furtherance of the right of advocacy on issues of public interest," while Maine's anti-SLAPP statute applies to the "exercise of the right to petition under the United States Constitution or the constitution of Maine. *Compare* D.C. Code § 16-5502(a) *with* Me. Rev. Stat. tit. 14., § 556; Or. Rev. Stat. § 31.150(2)(d) (permitting a special motion to strike for causes of action arising from any "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest"); Nev. Rev. Stat. § 41.660 (1) (permitting a special motion to dismiss for actions based upon "a good faith communication in furtherance of the right to petition"); La. Code Civ. P. art. 917 (A)(1) (permitting a special motion to dismiss for a cause of action arising from "any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana constitution in connection with a public issue"); *and* Cal. Civ. Proc. Code § 425.16 (b)(1) (permitting a special motion to dismiss for a cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue")."

[48] *Compare* D.C. Code § 16-5502 (a); *with* La. Code Civ. P. art. 917(A)(1); *and* Me. Rev. Stat. tit. 14., § 556 (permitting a special motion to dismiss to be brought to enforce Maine's anti-SLAPP statute); *and* Or. Rev. Stat. § 31.150(1) (permitting a special motion to strike to be brought to enforce Oregon's anti-SLAPP statute); *and* Nev. Rev. Stat. § 41.660(1)(a) (permitting a special motion to dismiss to be brought to enforce Nevada's anti-SLAPP statute); *and* Cal. Civ. Proc. Code §

and the statutory remedy.[50] Despite these variations, however, the Ninth Circuit's harmonizing principle accounts for each decision concerning the availability of interlocutory appeal reached by the federal Circuit courts: interlocutory appeal should be permitted *if, and only if, the text of a state's anti-SLAPP law or the*

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425.16(b)(1) (permitting a special motion to strike to be brought to enforce California's anti-SLAPP statute).

[49] Pursuant to the D.C. Anti-SLAPP Act, a special motion will not be granted if "the responding party demonstrates that the claim is likely to succeed on the merits," while Maine's anti-SLAPP law provides that a motion brought thereunder will not be granted if the responding party's "exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused injury to the responding party." *Compare* D.C. Code § 16-5502(b) *with* Me. Rev. Stat. tit. 14., § 556; Or. Rev. Stat. § 31.150(1) (anti-SLAPP motion will not be granted if the plaintiff establishes "that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case"); Nev. Rev. Stat. § 41.660 (3)(a) (anti-SLAPP motion is treated as a motion for summary judgment); La. Code Civ. P. art. 917(A)(1) (anti-SLAPP motion will not be granted if the "court determines that the plaintiff has established a probability of success on the claim"); Cal. Civ. Proc. Code § 425.16(b)(1) (anti-SLAPP motion will not be granted if "the court determines" that the plaintiff has established "a probability" of prevailing on the claims").

[50] The D.C. Anti-SLAPP Act authorizes the award of "costs of litigation, including reasonable attorneys fees," to the prevailing party irrespective of the underlying causes of action, whereas California's anti-SLAPP law limits the availability of attorneys fees and costs for the prevailing party. *Compare* D.C. Code § 16-5504; *with* Cal. Civ. Proc. Code § 425.16(c); *see also* Me. Rev. Stat. tit. 14., § 556 (prevailing defendant on an anti-SLAPP motion is not entitled to attorneys fees and costs if the cause of action is brought under certain statutes); Or. Rev. Stat. § 31.152(3) (the court "shall" award reasonable attorney's fees and costs to a prevailing defendant on an anti-SLAPP motion); Nev. Rev. Stat. § 41.670 (if the court grants an anti-SLAPP motion, the defendant may bring a separate action to recover attorney's fees, compensatory and punitive damages); La. Code Civ. P.

*general operation of state law provides a right of immediate appeal*.[51] Because the District of Columbia City Council has not itself deemed the matters at issue in an Anti-SLAPP motion sufficiently important to warrant immediate interlocutory appeal in the courts of the District, the Court should not expand the stringent limitations of the collateral order doctrine to create such a right in the federal courts.

## CONCLUSION

For all of the 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.

art. 917(B) (guaranteeing award of attorney's fees and costs to the prevailing party).

[51] *Compare Metabolic Research,* 2012 WL 400436, at *5-6 (denying interlocutory appeal) *and Englert,* 551 F.3d at 1106-07 (9th Cir. 2009) (order denying an anti-SLAPP motion not immediately appealable because Oregon's anti-SLAPP statute and state law did not confer an immediate right to appeal), *with Godin,* 629 F.3d at 85 (order immediately appealable and observing that the Maine Supreme Court's interpretation of the Maine anti-SLAPP statute permitted interlocutory appeals of orders denying special motions to dismiss in Maine courts); *Henry*, 566 F.3d at 178 (Lousiana anti-SLAPP order immediately appealable, observing that Louisiana appellate courts applying civil law uniformly and automatically reviewed denials of anti-SLAPP motions under writs of supervision); *cf. Batzel,* 333 F.3d at 1025 (California anti-SLAPP motions are "effectively unreviewable" upon final judgment because the California statute established a "substantive immunity from suit" *and* expressly provided for interlocutory appeal in state court).

Respectfully submitted,

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