IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

3M COMPANY, Plaintiff, - v - HARVEY BOULTER, PORTON CAPITAL TECHNOLOGY FUNDS, PORTON CAPITAL, INC., LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC, and DAVIS-BLOCK LLC Defendants.	Civil Action No. 1:11-cv-01527-RLW Judge Robert L. Wilkins

BRIEF OF INTERVENOR THE DISTRICT OF COLUMBIA

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INTRODUCTION AND OVERVIEW

This case concerns the ability of the District of Columbia government to protect its residents' rights to speak freely on matters of public importance. Plaintiff, a global corporation, filed a diversity jurisdiction action in this Court alleging defamation, conspiracy and other torts. Three of the named Defendants—a District of Columbia-based attorney and public affairs advisor, plus two affiliated firms—moved to dismiss pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Law 18-351 (the "Act"), a statute passed unanimously by the Council of the District of Columbia, signed by the Mayor, and reviewed by Congress. The Act enhances the protections available to defendants who are sued by persons on one side of a public policy debate seeking to punish or prevent the expression of opposing points of view. In response, plaintiff has moved to strike that motion, claiming that the Act exceeds the Council's authority under the Home Rule Act ("HRA") and that the Act's protections do not apply in federal court diversity actions. These arguments lack merit and should be rejected. Intervenor the District of Columbia—while taking no position on the merits of the underlying dispute—files this brief to make clear that (i) the Act was a valid exercise of the Council's well-established legislative authority under the HRA, and (ii) under governing precedent, the Act's free speech rights-implementing protections apply in federal court diversity actions.

First, the Act is a valid exercise of the Council's legislative authority as delegated to it by Congress in the HRA. That seminal federal law, passed by Congress in 1973 for the purpose of granting the District of Columbia government the powers of local self-government while relieving Congress of the burden of legislating on local District matters, has long been understood to empower the Council to enact laws over local affairs implementing substantive protections for District residents, as it did here. In the HRA, Congress delegated its legislative

authority over local District affairs to the Council, with specified exceptions that, as the D.C. Circuit and D.C Court of Appeals have made clear in interpreting Congress's intent, must be construed narrowly. Plaintiff bases its challenge to the validity of the Act on the argument that it violates one such exception to delegated authority—that located in Section 602(a)(4) of the HRA, which provides that the Council lacks authority to "[e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts) . . . ." D.C. Official Code § 1-206.02(a)(4).

Plaintiff's extreme theory of the HRA—which, if adopted by the courts, would require invalidation of a host of District of Columbia laws—is, fortunately, not required, let alone supported, by a close analysis of the statute, its legislative history in Congress, or a single judicial decision construing the scope of the Act's delegation of legislative authority to the Council. The faulty syllogism of plaintiff's claim is that the Act (i) gives protections that are likely to affect the manner in which courts resolve disputes litigated under the Act, and thus, in plaintiff's view, (ii) is necessarily "with respect to" D.C. Official Code § 11-946, which authorizes the local courts, but not the Council, to adopt "[r]ules that modify the Federal Rules" of Procedure, *id.*, and (iii) therefore violates the HRA. As we show below, this argument badly misreads the HRA and Congress's intent in that statute. The statutory text's critical references to "relating to organization and jurisdiction," reinforced by the legislative history and decades of Court of Appeals precedent, make clear that Congress's focus in Section 602(a)(4)'s exception was to ensure that the Council did not seek to alter the jurisdiction or structure of the local courts. The Act does not do that, and Plaintiff is unable to demonstrate otherwise.

Nor, contrary to what Plaintiff claims, is the Act in conflict with any District of Columbia rule of procedure. In the Act, the Council validly exercised its broad legislative authority by

carefully implementing substantive speech-protecting rights. Importantly, the Act's protections are narrowly limited to the specific perceived harms in the context of strategic lawsuits against public participation ("SLAPPs")—in which the courts, through the filing of a baseless lawsuit, are used to impose costs and burdens against those who speak publicly on a matter of public policy. The Act was carefully considered by the Council and implements substantive, free-speech rights by empowering defendants to fend off a SLAPP by providing for a remedy closely tailored to the harms that the Council sought to address. The protective provisions in the Act—governing burden-shifting, timing, and discovery cost-shifting—are closely tailored to the SLAPP context and are plainly not "rules of procedure" as contemplated by Title 11, nor in conflict with any rule of the local courts. As the First Circuit recently noted, Maine's Anti-SLAPP statute does "not create[] a substitute to the Federal Rules, but instead create[s] a supplemental and substantive rule to provide added protections, beyond those in Rule 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Godin v. Schenks*, 629 F.3d 79, 88 (1st Cir. 2010). The same logic holds here. The Act's substantive rights-implementing provisions *supplement* the protections against baseless claims available to litigants that already exist in the District of Columbia Rules of Civil Procedure, which are modeled directly on, and are largely identical to, the Federal Rules.

Second, and for similar reasons, nothing in the Federal Rules of Civil Procedure prevents application of the Act's substantive rights-implementing protections in federal court diversity jurisdiction matters. That conclusion is consistent with the one reached by all three federal appellate courts to have addressed the question in the context of state Anti-SLAPP laws, and is supported by the logic of the Supreme Court's recent decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,* __U.S__, 130 S. Ct. 1431 (2010). Further, the twin aims of the

doctrine first announced in *Erie R.R. Co v. Tompkins,* 304 U.S. 64 (1938), likewise require that the Act apply in federal diversity cases. Refusing to grant the protections of the Act to defendants because the plaintiff chose to file its case in federal court, rather than in the Superior Court of the District of Columbia, would allow plaintiffs who wish to file a SLAPP in the District to evade the application of the Act by filing in federal court. Thus, a defendant would be denied the benefit of the Act's protections in promotion of free speech on matters of public interest simply because of where the suit was filed. Such an approach would be inequitable and would promote forum-shopping. The Court should apply the Act's protections here.

I. THE COUNCIL'S ENACTMENT OF THE ANTI-SLAPP ACT WAS A VALID EXERCISE OF ITS WELL-ESTABLISHED LEGISLATIVE AUTHORITY UNDER THE HOME RULE ACT.

A. Congress Granted Broad Legislative Authority to the Council of the District of Columbia in the Home Rule Act.

The Constitution in Article I, section 8, clause 17, grants Congress the power to exercise "exclusive" legislative authority over the District of Columbia. U.S. Const., Art. I, § 8, cl. 17; *Banner v. United States,* 303 F. Supp. 2d 1, 4 (D.D.C. 2004); *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 94 (D.C. 2010) (*en banc*). Nearly four decades ago, Congress delegated "the bulk" of this authority to the Council of the District of Columbia ("the Council"), *see Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994), by passing the HRA, Pub. L. No. 93-198, 87 Stat. 774 (1973), *codified at* D.C. Official Code §§ 1-201.01 *et seq*. (2005 Supp.); D.C. Official Code § 1-204.04(a) (subject to specified limitations, "the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council . . ."). The HRA, with exceptions not relevant here, "allows Congress a layover period of thirty statutory days to review legislation submitted by the . . . Council. If Congress fails to pass a joint resolution of disapproval within that period, the legislation becomes law." *Bliley*, 23 F.3d at 508. In addition, Congress may at

any time of its choosing legislate regarding District of Columbia affairs "on any subject . . . including legislation to amend or repeal any law in force in the District . . . and any act passed by the Council." D.C. Official Code § 1-206.01. Congress therefore "always maintains final control over all legislation adopted for the District of Columbia." *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 237 (D.D.C. 2004), *aff'd in part, rev'd in part sub nom.*, *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005).

The paramount stated purposes of the HRA were to "grant the inhabitants of the District of Columbia powers of local self-government . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." D.C. Official Code § 1-201.02(a). Consistent with these purposes, the HRA provides that, "[e]xcept as provided in title VI of this Act [D.C. Official Code §§ 1-206.01 to 1-206.03], the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution." D.C. Official Code § 1-203.02; s*ee also District of Columbia v. Thompson*, 346 U.S. 100, 110 (1953) (indicating that such a formulation gives power as broad as a State's legislative power); *American Fed'n of Gov't Employees v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 133 F. Supp. 2d 75, 80 n.2 (D.D.C. 2001); *Convention Center Referendum Comm. v. D.C. Bd. of Elections & Ethics,* 441 A.2d 889, 903 (D.C. 1981) (*en banc*) (Ferren, J., plurality op.) ("Although subject to congressional review, the Council's powers of ordinary legislation are broad; they are limited only by specified exceptions and by the general requirement that legislation be consistent with the U.S. Constitution and the [HRA]").

This Court has recognized that it "must be cautious in assessing the validity of District of Columbia[] statutes being challenged, as they are not only the product of the . . . Council, but also congressional approval." *Seegars*, 297 F. Supp. 2d at 215 (citing *Martin Tractor Co. v.*

FEC, 627 F.2d 375, 380 (D.C. Cir. 1980)). Similarly, the District of Columbia Court of Appeals ("DCCA") has opined that "restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed, so as not to thwart the paramount purpose [of] the HRA, namely, to 'grant to the inhabitants of the District of Columbia powers of local self-government.'" *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (citing *Dimond v. District of Columbia,* 792 F.2d 179, 189–90 (D.C. Cir. 1986) (holding that the Council's limitation on the right to bring a tort action for certain non-economic losses was not an impermissible alteration of the jurisdiction of the Superior Court)); *see also* D.C. Official Code § 1-201.02(a). Accordingly, the "Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988) (citing *Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1274 (D.C. 1987), and *Yu v. D.C. Rental Hous. Comm'n,* 505 A.2d 1310, 1312 (D.C. 1986)).

B. The Narrow Exception In Section 602(a)(4) To The Council's Legislative Authority Permits The Council to Enact Laws That Do Not Alter The Jurisdiction of the DC Courts, Interfere Significantly With The Core Functions of the Courts, or Otherwise Conflict With The Provisions of Title 11.

Section 602(a)(4) of the HRA provides a narrow exception to Congress's delegation in the HRA. That provision states that 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 jurisdiction of the District of Columbia courts) . . ." D.C. Official Code § 1-206.02(a)(4). The statutory text's parenthetical statement following the reference to Title 11 is instructive, making clear that Congress's focus in this prohibition was on changes to the "organization and jurisdiction of the District of Columbia courts." That focus is further reinforced by the legislative history of Section 602(a)(4) and subsequent judicial interpretations that likewise

indicate that the exception was only meant to prevent the Council from passing laws that alter the core powers of the D.C. Courts.

The HRA's legislative history evidence supports the conclusion that the courts' jurisdiction, and not other aspects of the courts' practice, was Congress's main concern in enacting Section 602(a)(4)'s exception to the grant of delegated authority. Congress was not concerned with setting beyond the reach of the local legislature *other* aspects of the courts' practice, like whether particular rules of civil procedure must remain effective in every context. At the House Committee on the District of Columbia markup on a bill preceding the HRA, U.S. Representative Charles Diggs, the committee's chair, stated: "We believe that we've cleared up the problem of who shall have authority to modify the jurisdiction of the court system; namely, giving that to the Congress."[1] Representative Diggs proposed statutory language describing the courts' jurisdiction, and later in the meeting proposed a conforming amendment that included the current language of Section 602(a)(4).[2] U.S. Representative Brock Adams explained that the language would "provide that Title 11 of the District of Columbia Code shall remain in effect, that it shall be, not subject to change by the Council, . . . and in effect, leaves the jurisdiction to this Committee for the determination of how Title 11 may be changed in the future." *Id.* at 1098. In a later Committee meeting, Representative Diggs explained that Congress "reserve[d] . . . the right to modify the composition or the structure or jurisdiction of the courts." *Id.* at 1358.

This focus is understandable given the source of the concept for what became Section 602(a)(4). About a week before proposing that provision, on July 16, 1973, Representative

[1] House Committee on the District of Columbia, *Home Rule for the District of Columbia 1973–1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act* ("*Home Rule for the District of Columbia*") 1076 (Comm. Print 1974).

[2] *Id.* at 1077, 1097.

Diggs received a letter from the then-Chief Judge of the D.C. Court of Appeals, Gerard Reilly, stating that transferring to the Council power to alter the jurisdiction of the courts would be premature because of the recent enactment of the Court Reform Act. *Id*. at 1416–18. Then-Chief Judge Harold Greene of the Superior Court also wrote Representative Diggs a letter on July 18, 1973, in which he proposed an amendment: "Except as otherwise provided in this Act, the organization and jurisdiction of the District of Columbia courts shall be governed by title 11, District of Columbia Code, as amended by the District of Columba Court Reorganization Act of 1970." *Id*. at 1423–24. A Full Committee Staff Memorandum noted that Judge Greene's proposed amendment "provided for jurisdiction and organization of [the District's] courts not to be changeable by the Council" and the following disposition: "Specific language not adopted but concept included in Sub. 602(a)(4). Only Congress has authority to modify jurisdiction of courts." *Id*. at 1424. The Conference Report adopted the House amendments, including that "the Council could not change . . . the organization and jurisdiction of the D.C. Courts." *Id.* at 3013. It also noted that the conferees adopted "retention in Congress of authority over the composition, structure and jurisdiction of the D.C. courts." *Id*. at 3015. Representative Diggs reiterated this on the floor of the House. *Id*. at 3034. In light of this, application of Section 602(a)(4) here as suggested by Plaintiff, where the composition, structure, and jurisdiction of the courts are not at issue, would take the provision beyond what Congress intended in adopting the provision.

Interpretations of this exception by both the D.C. Circuit and the DCCA have similarly reflected an understanding that the exception only covers laws that alter the jurisdiction of the courts, otherwise interfere significantly with the courts' structure or core functions, or directly conflict with the provisions of Title 11. In *Dimond*, the D.C. Circuit confronted a challenge to

legislation that raised the minimum limit for suing for damages for an automobile accident in Superior Court to $5,000. *Dimond*, 792 F.2d at 182. The Court rejected the argument that the law changed the jurisdiction of the Superior Court (or the federal district court in diversity actions) by mandating that a certain group of tort claimants—those with damages claims totaling under $5,000—could no longer sue in those courts. *Id.* at 182, 190. The Court explained that the law "says absolutely nothing about the jurisdiction of the . . . Superior Court or the diversity jurisdiction of the District of Columbia District Court"; rather, it merely abolished a part of a cause of action. *Id.* at 190. "Although the partial abolition of a cause of action inevitably affects the cases a court adjudicates, this incidental byproduct does not amount to an alteration of the jurisdiction of the local and federal courts in violation of the [HRA]." *Id.* The D.C. Circuit held that the challenged legislation was a legitimate policy determination by the Council, and that limiting the number of tort suits—thereby generating savings from the avoided "transaction costs of litigation to establish fault"—was a permissible method to accomplish the legislation's goals. *Id.* at 187.

The D.C. Circuit has regularly relied on decisions of the DCCA in construing the Home Rule Act. *See, e.g., Heller v. District of Columbia*, __ F.3d __, 2011 WL 4551558, *4 (D.C. Cir. Oct. 4, 2011) (citing *Convention Ctr.,* 441 A.2d at 903). Here, the opinions of the DCCA on the HRA are binding or at a minimum highly instructive, *see Bliley*, 23 F.3d at 511, and should likewise be followed by this Court.

Consistent with the D.C. Circuit's approach, the DCCA has emphasized in its interpretation of Section 602(a)(4) that "the Council of the District of Columbia may not enlarge the congressionally prescribed limitations on our jurisdiction." *Jones & Artis Constr. Co. v. D.C. Contract Appeals Bd.*, 549 A.2d 315, 318 (D.C. 1988). For example, in *District of Columbia v. Sullivan*, motorists argued that enactment of the Traffic Adjudication Act violated Section 602(a)(4)

because the statute substituted administrative adjudication for trials by the Superior Court, and provided for appeals to the Superior Court rather than the DCCA. 436 A.2d 364, 365 (D.C. 1981). The DCCA rejected the motorists' arguments that the Council was impermissibly changing the responsibility of each court; though "certain violations no longer constitute criminal offenses," and the legislation thus undoubtedly had an effect on what cases the Superior Court would hear and how it would hear them, it did not relate to the "structure of the courts" and thus did not violate Section 602(a)(4)'s limitation on Congress's delegation of legislative authority to the Council. *Id.* at 366. The DCCA reiterated that the "core and primary purpose of the Home Rule Act" was to transfer legislative authority on local matters to the Council, and, accordingly, the DCCA's role was to interpret legislation so as to effectuate that purpose. *Id.* The DCCA noted that Section 602(a)(4)'s legislative history indicates that Congress intended that the Council not have the legislative power to alter the "structure" of the courts, because Congress had so recently comprehensively legislated on this subject.[3]

This approach—expansively reading the Council's legislative powers under the HRA while narrowly interpreting the 602(a)(4) exception—was likewise followed in *Hessey v. Burden*, 584 A.2d 1 (D.C. 1990). *Hessey* involved a voter initiative (subject to the same limitations as legislation passed by the Council) that would create an Office of the Public Advocate for Assessment and Taxation with authority to appeal and advocate on behalf of taxpayers. *Id.* at 2. The DCCA held that the initiative would not expand the jurisdiction of the Tax Division of the Superior Court and the DCCA in violation of Section 602(a)(4), because those appeals would fall within the jurisdiction presently vested in the Tax Division. *Id.* at 8 ("In our judgment, an enlargement of the class of

[3] *See id.* at 366 (§ 602(a)(4) was enacted "to give the newly enacted District of Columbia Court Reorganization Act of 1970 an opportunity to prove its effectiveness.") (citing Remarks of Rep. Adams, in *Home Rule for the District of Columbia*, at 1081).

persons who may bring such appeals does not affect the 'structure of the courts' or the jurisdictional arrangement Congress had decided upon in the [Home Rule] Act.").

Similarly, in *Umana v. Swidler & Berlin, Chartered*, the DCCA concluded that the Council's enactment of the Uniform Arbitration Act was permissible under Section 602(a)(4), noting that it did not "creat[e] appellate jurisdiction where none existed previously." 669 A.2d 717, 723 (D.C. 1995). Section 602(a)(4), explained the DCCA, "does not, of course, in any way limit the Council's authority to enact or to alter the substantive law to be applied by the courts. It simply means that the Council may not change the manner in which title 11 operates to prescribe the jurisdiction of the courts in administering those laws." *Id.* at 723 n.15 (citations omitted).

Indeed, even where the DCCA has struck down legislation under other statutory limitations of the HRA, it has rejected a wooden reading of the exceptions to the statute and has been careful to make clear that Section 602(a)(4) must be read with close attention to Congress's specific purposes. *In re Crawley*, 978 A.2d 608 (D.C. 2009), held invalid Council legislation that purported to assign prosecutions under the false claims statute to the Office of the Attorney General on the grounds that the statute violated Section 602(a)(8) of the HRA, which prohibits the Council from enacting legislation "relating to the duties or powers" of the United States Attorney for the District of Columbia. *Id*. at 613, 620. Despite very similar language in the two provisions, because of what the DCCA referred to as "the different *purposes s*erved by [§ 602(a)(4) and (a)(8)]," *id.* at 619 (emphasis added), the Court rejected the suggestion that it apply to the Section 602(a)(8) challenge the standard used to analyze legislation alleged to violate § 602(a)(4), *i.e.*, whether the legislation "impermissibly intruded" upon the courts' role or affected the "structure" of the courts. *Id*. This reinforces the governing, narrow standard for evaluating plaintiff's 602(a)(4) claim.

Against this wall of authority, the principal case mustered by plaintiff concerning its HRA theory—the DCCA's divided panel decision in *Stuart v. Walker—*provides no support to plaintiff's argument. *Stuart* is no longer good law, having been vacated for rehearing *en banc* by the DCCA over four months ago. S*ee* Order, *Stuart v. Walker*, 2011 WL 5319926 (D.C. July 8, 2011).[4] The most recent statement by the DCCA on the issue, therefore, is *Bergman*, in which the DCCA sustained a statute governing personal solicitation of business against an HRA challenge, even though regulation of lawyers' conduct is entrusted to the DC courts in Title 11. *Bergman*, 986 A.2d at 1211–12. The Court there applied the governing standard by explaining that:

> [T]he Council's passage of the Act, in the exercise of its power to enact legislation of general applicability, does not impermissibly burden or unduly interfere with this court's authority to exercise its *core* functions. . . . [T]o the contrary, it does not appear that the Act limits the authority or ability of the Court of Appeals to carry out its functions . . . in *any significant way*.").

Id. at 1230 (emphasis added).

As demonstrated below, the Act implements substantive rights-implementing protections, and is plainly valid under the governing standard because it does not intrude on courts' core functions or conflict with Title 11.

C. In The Anti-SLAPP Act, the Council Validly Exercised Its Broad Legislative Authority by Carefully Implementing Substantive Rights, and Ensuring that the Act Does Not Affect the Courts' Core Functions or Conflict With Any Title 11 Provision.

[4] Even if the panel opinion in *Stuart* were good law, it would not support the plaintiff's argument because the law at issue in *Stuart* as construed by the (now-vacated) DCCA panel opinion related to allowing appeals from arbitration judgments. *Stuart v. Walker*, 6 A.3d 1215, 1218–19 (D.C. 2010), *vacated pending reh'g en banc*, 2011 WL 5319926 (D.C. Jul. 8, 2011); *see also* http://www.dcappeals.gov/dccourts/appeals/calendar/docs/December_2011_ Regular.pdf (last visited November 21, 2011) (argument before *en banc* court is currently scheduled for December 19, 2011). Unlike the law in *Stuart* as construed by the panel, the Anti-SLAPP Act does not provide for any interlocutory appeal and does not affect the organization or jurisdiction of the District's courts, *see* Section I(C)(ii) *infra*.

i. Because the Act was carefully considered by the Council and implements substantive rights, it is presumptively valid under Section 602(a)(4).

After a legislative process that began with the introduction of the proposed bill in June 2010, followed by a public hearing, a mark-up hearing, and a detailed November 18, 2010 report from the Council's Committee on Public Safety and the Judiciary, the Anti-SLAPP Act of 2010 was passed by the Council on second reading by a vote of 12–0, and on January 19, 2011 was signed by Mayor Vincent C. Gray.[5] Following the completion of the thirty legislative day period of congressional review required under the Home Rule Act, and without a single public expression of disapproval of the Act by any Member of Congress, the legislation became effective on March 31, 2011. 58 D.C. Reg. 3699 (Apr. 29, 2011).

That legislation, D.C. Law 18-351, *codified at* D.C. Official Code §§ 16-5501 *et seq*., was designed by the Council to "extend[] substantive rights to defendants in a SLAPP [strategic lawsuit against public participation]." Comm. Rep. at 4. The Council found that the prevailing tort litigation regime was insufficient to protect citizens from "litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." *Id*. The Committee on Public Safety and the Judiciary summarized the "background and need" for the bill by explaining that it was developed to enhance

> a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or effort to petition the government on issues of public interest. Such cases 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. Further,

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[5] *See* 58 D.C. Reg. 743 (Jan. 28, 2011). *See also* http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (search for "A18-701") (as of November 28, 2011); Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010," November 18, 2010 ("Comm. Rep.") (attached as Ex. 1).

> defendants of a SLAPP must dedicate a substantial[] amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well.

Id. at 1.

At the core of the Act's protections is Section 16-5502, which provides in key part that a party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy "on issues of public interest"—as that term is defined in the Act—within 45 days after service of the claim. *Id.* at § 16-5502(a). It also provides a burden-of-persuasion rule for such special motions to dismiss:

> If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

Id. at § 16-5502(b). In addition, it provides for a stay of discovery upon the filing of a special motion to dismiss under this section until the motion is disposed of, except that "when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted," and provides "that [s]uch an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." *Id.* at § 16-5502(c).[6]

Regarding these protections, the Committee explained that in order for the District to follow other jurisdictions that have extended an "absolute or qualified immunity to individuals engaged in protected actions," the Act grants "substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard

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[6] The other four sections of the Act as codified set forth definitions (D.C. Official Code § 16-5501), provide for unnamed SLAPP defendants to move to quash a subpoena to protect their identity (*id.* at §16-5503), provide for fees and costs to the prevailing party (*id.* at §16-5504), and prescribe the scope of certain exemptions (*id.* at §16-5505).

expeditiously by the court." Comm. Rep. at 4. The Committee noted that 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, the legislation tolls discovery while the special motion to dismiss is pending." *Id.* As explained in the Committee Report, the Council thus sought in the Act to implement First Amendment-promoting protections: to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates[,] . . . [t]o prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act." *Id.* With the passage of the Act, the District joined the majority of the States, which have determined to provide qualified immunity and other protections against lawsuits "aimed to punish or prevent the expression of opposing points of view," by "allow[ing] a defendant to more expeditiously, and more equitably, dispense of a SLAPP." *Id*. at 1, 3.[7]

The set of policy judgments and assessments of the Act's compliance with the congressionally defined scope of the delegated legislative authority was not lightly reached by the Council over the Act's nearly half-year legislative process. As originally introduced, the Act contained a provision that would have provided for an *additional* protection for Anti-SLAPP defendants: "a right of immediate appeal from a court order denying a special motion to dismiss

[7] For other jurisdictions' Anti-SLAPP statutes: *see* Ariz. Rev. Stat. §§ 12-751, 752; Ark. Code Ann. §§ 16-63-501 to 508; Cal. Civ. Proc. Code § 425.16; Del. Code Ann. §§ 10.8136 to 8138; Fla. Stat. §§ 768.295 & 720.304; Ga. Code Ann. § 9-11-11.1; Haw. Rev. Stat. §§ 634F-1 to 634F-4; 735 Ill. Comp. Stat. §§ 110/1 to 110/99; Ind. Code §§ 34-7-7-1 to 34-7-7-10; La. Code Civ. Proc. Ann. § 971; Me. Rev. Stat. Ann. tit. 14, § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. §§ 554.01 to 554.05; Mo. Rev. Stat. § 537.528; Neb. Rev. Stat. §§ 25-21,242 to 25-21,246; Nev. Rev. Stat. §§ 41.635 to 41.670; N.M. Stat. Ann. §§ 38-2-9.1 to 38-2-9.2; N.Y. C.P.L.R. 70-a, 76-a, & 3211; Okla. Stat. tit. 12 § 1443.1; Or. Rev. Stat. §§ 31.150 to 31.155; 27 Penn. Cons. Stat.§§ 7707, 8301 to 8303; R.I. Gen. Laws §§ 9-33-1 to 9-33-4; Tenn. Code Ann. §§ 4-21-1001 to 1004; Tex. Civ. Prac. & Rem. Code §§ 27.001 to .011; Utah Code Ann. §§ 76B-6-1401 to 1405; Vt. Stat. Ann. tit. 12, § 1041; and Wash. Rev. Code §§ 4.24.500 to 525.

in whole or in part." Comm. Rep. at 12. The Council, however, closely considered the then-recently issued DCCA panel decision in *Stuart*, which had held that "the Council exceeds its authority in making such orders reviewable on appeal." Comm. Rep. at 7. As a result, the Council removed that provision, acknowledging the DCCA panel's decision, which at the time had not been vacated. *Id.*

Likewise, the Council considered a "preliminary concern" regarding whether the Act was consistent with the HRA raised in a letter from then-Attorney General Nickles. *See* Letter from Peter J. Nickles, Attorney General, to Phil Mendelson, Chairperson, Committee on Public Safety & the Judiciary (Nov. 17, 2010), attached to Comm. Rep.; Comm. Rep. at 6 (referencing the letter). The issue was raised prior to the Attorney General undertaking any "study[ing] in depth" of the issue. *Id.* Upon the Council's further analysis and considered judgment, the Act's substantive rights-implementing provisions were retained, unanimously passed by the Council, signed by the Mayor, reviewed by Congress without any disapproval, and thus duly codified into District of Columbia law.

In passing the Act, the Council exercised its powers—long-recognized as being within the classic powers of a legislature—to grant statutory defenses and immunity from liability. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("[T]he State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether . . ."). Indeed, there are dozens of statutory immunities on the books in District law, some enacted by Congress decades before home rule, and many enacted as exercises of the Council's broad police powers since then. These include several examples of statutory immunity from liability for a variety of allegedly defamatory speech acts, including immunity for any person making a report regarding a neglected or abused child (D.C. Official

Code § 4-1321.04), for persons providing information regarding arson (*id.* at § 5-417), and for persons reporting any suspected insurance fraud (*id.* at § 22-3225.13). The Council's legislative judgment in the Anti-SLAPP Act to immunize speakers on matters of public interest from unwarranted tort liability and from the burdens of litigation is an exercise of precisely the same legislative authority. The only material difference is that, instead of abolishing a cause of action for such alleged torts—as it plainly could have—the Council acted with more precision. It provided speakers with a qualified immunity that shields the speaker from liability unless his or her statements were so clearly defamatory that the person claiming defamation can demonstrate a likelihood of prevailing on the merits. The Council's enactment of these protections for this class of defendants in this specific category of suit was squarely within its Home Rule Act "authority to enact or to alter the substantive law to be applied by the courts," authority that Section 602(a)(4)'s exception does not "in any way limit." *Umana*, 669 A.2d at 723 n.15. The Act is thus presumptively valid, particularly since the "Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley*, 550 A.2d at 334 n.10. That presumption is confirmed here because the Act in providing those protections did not interfere with any core function of the courts.

ii. The Act does not interfere with the Court's core functions.

a. The Act does not interfere with, let alone significantly affect, the courts' jurisdiction or structure.

As detailed above, the Act provides for, among other things, an expedited motion to dismiss with a burden-of-persuasion rule and rules concerning discovery. *See* D.C. Official Code at § 16-5502 to -5504. The Act, on its face, says nothing about the jurisdiction of the Superior Court or the DCCA, or the courts' "fundamental" structure. *See Bergman*, 986 A.2d at

1226. There is no argument by plaintiff, let alone a demonstration, that it does. *See id.; see also Umana,* 669 A.2d at 723-24; *Sullivan,* 436 A.2d at 366 (the challenged law did not relate to the "structure of the courts" and thus did not violate Section 602(a)(4)); *Hessey*, 584 A.2d at 8.

b. The Act does not conflict with the Title 11 provision granting the courts' rulemaking authority, any other Title 11 provision, or with any specific Superior Court Rule.

Contrary to Plaintiff's claims, the Act does not conflict with the terms of Title 11. There is no statutory provision in Title 11 that the Act can be read to amend or abrogate. Plaintiff's claim that the Act conflicts with certain Superior Court rules of procedure both misses the point and fails on its own terms.

In the first place, the Superior Court Rules are not codified in Title 11, and so Section 602(a)(4) does not by its terms restrict the Council's authority to legislate with respect to them. The rights-implementing provisions in the Act are specific to the SLAPP context and are plainly not "rules of procedure" as contemplated by Title 11's command that proposed procedural rules be "submitted" to and "approv[ed]" by the DCCA prior to their taking effect. *See* D.C. Official Code § 11-946. Indeed, given the substantive rights implemented by the Act to help SLAPP respondents, there is a serious question as to whether the ordinary rules of civil procedure even *could* have been appropriate as a vehicle for Anti-SLAPP rights. *See, e.g.*, *Ford v. ChartOne, Inc.*, 834 A.2d 875, 879 (D.C. 2003) ("a Superior Court rule . . . cannot curtail substantive rights") (quoting *Fitzgerald v. Fitzgerald*, 566 A.2d 719, 728 (D.C. 1989)).

Nor, in any event, does the Act conflict with the Superior Court's rules of procedure. On its face, the Act implements speech-promoting rights through burden-shifting, timing-related, and cost-shifting mechanisms closely tailored, unlike the rules of procedure, to a very specific factual context: alleged strategic lawsuits against public participation. Like the Maine Anti-

SLAPP statute evaluated by the First Circuit, the Act does "not create[] a substitute to" rules of procedure, but "instead created a supplemental and substantive rule to provide added protections, beyond those in Rule 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Godin*, 629 F.3d at 88. Unlike the District of Columbia (or federal) rules of procedure, the Act is not addressed to "general [] procedures governing all categories of cases." *Id.* Rather, the Act "is only addressed to special procedures for state claims based on a defendant's petitioning activity." *Id.* The Act supplements the rules in this narrow and targeted context of SLAPP suits by granting defendants in such matters the opportunity to dispose of such suits in an expeditious and less costly fashion to reflect the legislature's policy preferences disfavoring SLAPP suits.

The hallmark of a SLAPP suit is that it "lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned, and of deterring future litigation." *United States ex rel Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999) ("*Newsham*") (citing *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 450 (Cal. Ct. App. 1994)). This characteristic does not render all protections enacted to remedy this problem a set of "procedural" rules. It is true that the remedy imposed by the Act—designed after all to remedy problems with the use of SLAPPs in the courts—imposes protections to decrease the costs and burdens of such litigation for SLAPP defendants. That is, of court, the *point* of the protections in the Act, which, like the problems the Council sought in the Act to remedy, is directed at a "defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Comm. Rep. at 1. The narrowness of the subject matter of the Act shows that the Council's

remedy here was substantive, and helps illustrate that any conflict with existing procedural rules is necessarily minor in the context of the rules of civil procedure, which address the full spectrum of civil disputes.

D. Plaintiff's Argument Conflicts with Congress's Intent in the Home Rule Act.

Plaintiff's HRA argument ultimately boils down to the contention that the Council is barred from enacting any law that would in any way impact, and thus be "with respect to," the "procedures" of the local courts. But, again, the word "procedures" does not appear in Section 602(a)(4), which speaks to the "provision[s] of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." And even if Congress *had* used that term in 602(a)(4), which it did not, the logic of plaintiff's argument here can *only* succeed if "with respect to" is read woodenly and without any meaningful limitation; indeed, Plaintiff argues that that exception in 602(a)(4) is as "broad as it is absolute." 3M Company's Motion To Strike Defendants' Special Motion To Dismiss And Cross-Motion For Discovery And Continuance ("Pl. Br.") at 21. But this approach would, as noted, conflict with Congress's stated intention in the HRA to "grant the inhabitants of the District of Columbia powers of local self-government . . . and, to the greatest extent possible . . . relieve Congress of the burden of legislating upon essentially local District matters." D.C. Official Code § 1-201.02(a). In addition, such an approach would conflict with federal and DCCA caselaw, which requires that Section 602(a)(4)'s "restrictions on the legislative authority of the Council . . . must be narrowly construed, so as not to thwart" those congressional purposes. *Bergman*, 986 A.2d at 1226; *see also Heller*, 2011 WL 4551558 at *4.

If accepted, plaintiff's arguments about the limits on the Council's authority would call into question the validity of whole swaths of District law as, arguably, impermissibly intruding on the prerogatives of the courts. This would include well-established and important statutes

that, like the Act here, call for expedited hearings in certain specific contexts[8] or for dismissal upon a party's failure to meet a specified standard;[9] or fee-waiver provisions.[10] Indeed, under the same logic, important statutes that have been passed by the Council and on the books for decades that create an evidentiary presumption would also on plaintiff's theory be invalid.[11]

Plaintiff's extreme and unfounded theory of the HRA is, fortunately, not required, let alone supported, by a close analysis of the statute, its legislative history in Congress, or a single judicial decision construing the HRA. The Anti-SLAPP Act is a valid exercise of the legislative authority over local matters delegated by Congress to the Council of the District of Columbia.

II. THE ANTI-SLAPP ACT APPLIES IN FEDERAL COURT DIVERSITY ACTIONS.

Separate from its HRA argument, plaintiff asserts that "even if the Council had the requisite authority to pass the Act, it cannot be enforced by a federal court sitting in diversity . . . because the Act's special motion procedure conflicts with the Federal Rules of Civil Procedure."

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[8] *See, e.g.,* D.C. Official Code § 16-2310(e) (codifying the Juvenile Speedy Trial Equity Act of 2008); *see also* D.C. Official Code § 16-924 (requiring expedited judicial hearing for child support); D.C. Official Code § 4-1303.33(b) (suit filed to compel disclosure of findings in cases of child fatality "shall be set for a hearing by the Superior Court at the earliest practicable time and shall be given all possible expedited treatment.").

[9] *See* D.C. Official Code § 16-804(b)(2) ("[i]f the motion [to seal criminal records] does not comply with the requirements of paragraph (1) of this subsection . . . then the motion shall be dismissed without prejudice unless the movant executes a written waiver with respect to that arrest or conviction."). *See also* D.C. Official Code § 46-301.01 *et seq*. (provisions for registration and modification of child support orders); D.C. Official Code 13-441 *et seq*. (Uniform Interstate Depositions and Discovery Act).

[10] *See* D.C. Official Code § 28-3905(i)(3)(C) ("Application to this Court to enforce an order shall be made at no cost to the … complainant.").

[11] *See, e.g.*, D.C. Official Code § 16-2343.01(a)(1) (providing by statute for an evidentiary rule regarding the admissibility of blood tests to determine parentage); D.C. Official Code § 42-3104(a) (providing a statutory presumption that, in certain proceedings for a preliminary injunction involving drug-related nuisance abatements, irreparable harm to the plaintiff outweighs any harm to the defendant).

Pl. Br. at 1; *see also id.* at 27–31. This likewise is incorrect. The Act's protections apply in diversity actions.

Under the Supreme Court's decision in *Erie*, federal district courts sitting in diversity jurisdiction generally apply the substantive law of the state in which the district court sits, and the Federal Rules of Civil Procedure generally govern procedural matters. *See Erie,* 304 U.S. at 78; *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Burke v. Air Serv Int'l, Inc.*, 775 F. Supp. 2d 13, 19 (D.D.C. 2011) (Kennedy, J.). The laws of the District of Columbia, as passed by the Council and approved by Congress, are considered state laws for the purposes of *Erie*. *See Novak v. Capital Mgmt. & Dev. Corp.,* 452 F.3d 902, 907 (D.C. Cir. 2006).

Plaintiff's challenge—arguing that federal procedural rules *preclude* application of a state-level statute in this diversity federal court action—is distinct from the ordinary *Erie* question. Under the Supreme Court's recent decision in *Shady Grove*, 130 S. Ct. 1431, which built on the framework of *Erie*, the test for whether a federal rule of civil procedure precludes application of a state law in a diversity action has two steps. First, the court must determine whether the Federal Rule is "'sufficiently broad' to 'control the issue' before the court, 'thereby leaving no room for the operation' of" the state law. *Shady Grove*, 130 S. Ct. at 1451 (Stevens, J., concurring) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980) (analyzing Fed. R. Civ. P. 23); *Godin*, 629 F.3d at 86–88 (noting that "this is not the classic *Erie* question" and applying this standard under *Shady Grove* to a challenge under the Federal Rules to the application of Maine's Anti-SLAPP Act).[12] If so, the federal rule must be given effect, so long

[12] *See also Garman v. Campbell County School Dist. No. 1*, 630 F.3d 977, 983 (10th Cir. 2010) (applying this standard from Justice Stevens' *Shady Grove* concurring opinion to a challenge under the Federal Rules to a Wyoming law in federal court). Neither the D.C. Circuit nor this Court appears to have addressed what the governing test is on this issue after *Shady Grove*. However, in addition to the First and Tenth Circuit opinions cited above, the federal

as the rule itself complies with the Rules Enabling Act, 28 U.S.C.§ 2072, which provides that the Federal Rules may not "abridge, enlarge, or modify any substantive right." Second, if the federal rule is *not* so broad as to control the issues raised, then the court analyzes whether the state law should be applied in light of the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Shady Grove,* 130 S. Ct. at 1437; *Hanna*, 380 U.S. at 468; *Walker*, 446 U.S. at 752–53.[13] Applying this governing two-step test, we submit it is clear that the Act's protections apply in federal court.

A. The Federal Rules of Civil Procedure Permit Operation of the Act's Rights-Implementing Provisions in Diversity Actions.

The question of whether a federal rule is "sufficiently broad to control the issue before the court," *Walker*, 446 U.S. at 749–50, was most recently examined by the Supreme Court in *Shady Grove*. There, the Court analyzed whether a New York Rule that prevents parties from bringing class action lawsuits on claims seeking the minimum measure of recovery imposed by statute was preempted by Fed. R. Civ. P. 23 in diversity cases. *Shady Grove*, 130 S.Ct. at 1436. Justice Scalia's opinion for the closely divided Court concluded that because the New York law

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district courts that have analyzed the issue have likewise recognized Justice Stevens' test as controlling on the basis that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Bearden v. Honeywell Int'l Inc*. 2010 WL 3239285, at *10 (M.D. Tenn. Aug 16, 2010) (quoting *Marks v. United States*, 430 U.S. 188, 190 (1977)); *see also Tait v. BSH Home Appliances Corp*., 2011 WL 1832941, *8–9 (C.D. Cal. May 12, 2011); *In re Wellbutrin XL Antitrust Litigation*, 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010); *McKinney v. Bayer Corp*., 744 F.Supp.2d 733, 747 (N.D. Ohio 2010); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 2010 WL 2756947, *2 (N.D. Ohio July 12, 2010).

[13] *Cf. Burke*, 775 F.Supp.2d at 19 ("Under this framework, a necessary threshold inquiry is whether there is a federal rule or statute that conflicts with the state rule at issue. [H]aving concluded that the District's rule does not conflict with any federal provision, the Court must next determine whether the rule is 'substantive' or 'procedural' within the meaning of the *Erie* doctrine.") (relying on pre-*Shady Grove* authority).

"attempts to answer the same question" as Rule 23, namely, the categorical question of when a class action may be brought, the New York rule could not be applied to bar class actions in federal diversity cases. *Id.* at 1437. Justice Stevens joined the Court's narrow holding that Rule 23 was sufficiently broad to preempt the New York rule. *Id.* at 1448 (Stevens, J., concurring). His concurring opinion providing the fifth vote on the narrowest, and thus controlling grounds—*see* cases collected infra at n.12—held that the critical question is not "whether the state law at issue takes the form of what is traditionally described as substantive or procedural," but, rather, "whether the state law actually is part of a State's framework of substantive rights or remedies." *Id.* at 1449 (reasoning that, under the Rules Enabling Act, "federal rules cannot displace a State's definition of its own rights or remedies").

Applying the test from Justice Stevens' *Shady Grove* concurrence in rejecting a challenge to a Maine Anti-SLAPP statute very similar to the one raised here, the First Circuit recently held that Federal Rules 12 and 56 do not control the standard applicable to special motions filed under the Maine Anti-SLAPP statute in federal court. *Godin,* 629 F.3d at 86. Federal Rules 12(b)(6) and 56 are "general federal procedures governing all categories of cases," while the Maine Anti-SLAPP statute sets forth "special procedures for state claims based on a defendant's petitioning activity." *Godin*, 629 F.3d at 88. "Neither Rule 12 nor Rule 56 . . . purport to be so broad as to preclude additional mechanisms meant to curtail rights-dampening litigation through the modification of pleading standards." *Id.* at 91. The First Circuit noted that "[i]n contrast to the state statute in *Shady Grove*," the Maine Anti-SLAPP statute "does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function," and noted that "Maine itself has general procedural rules which are the equivalents of Fed. R. Civ. P. 12(b)(6) and 56." *Id.* at 88. "That fact," the court stated, "further supports the view that Maine has not created a substitute to

the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Id.* Therefore, the First Circuit held, following both of the two other Circuits to have reached the issue *before* the Supreme Court's decision in *Shady Grove*, that Maine's Anti-SLAPP provisions likewise "can exist side by side [with the Federal Rules] each controlling its own intended sphere of coverage without conflict." *Id.* at 91 (quoting *Newsham*, 190 F.3d at 972 (holding that the California Anti-SLAPP Act's motion to strike and fee/cost-shifting provisions and Federal Rules 8, 12, and 56 "can exist side by side . . . each controlling its own intended sphere of coverage without conflict")),[14] and citing *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009) (holding in a diversity suit that the "nominally-procedural" Louisiana Anti-SLAPP statute was a substantive provision the application of which is not precluded by the Federal Rules)).

Further, the substantial weight of federal district court authority from around the country—both before and since *Shady Grove*—has applied state Anti-SLAPP statutes in diversity actions, as set out in the margin.[15] There can be little doubt that the result here, while

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[14] *But cf. Metabolife Int'l, Inc.* v. *Wornick,* 264 F.3d 832,845–46 (9th Cir. 2001) (holding that application of the discovery provisions of California's Anti-SLAPP statute would conflict with Fed. R. Civ. P. 56).

[15] *See Trudeau v.ConsumerAffairs.com, Inc.*, 2011 WL 3898041 (N. D. Ill. Sept. 6, 2011) (the Illinois analogue to the Anti-SLAPP Act "creates a new category of immunity against claims related to a defendant's exercise of his or her First Amendment rights. While it also provides for a procedure to enforce this immunity, it is not intended as a substitute for the federal rules. Rather, it is a 'supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional [First Amendment] activities.') (quoting *Godin*, 629 F.3d at 88); *Tennenbaum v. Arizona City Sanitary Dist.*, 2011 WL 3235828 (D. Ariz. July 29, 2011) (applying Arizona Anti-SLAPP statute); *Chi v. Loyola University Medical Center*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) ("The Court therefore will apply Illinois law, and specifically the [Illinois' Anti-SLAPP statute]"); *Balestra-Leigh v. Balestra*, 2010 WL 4280424 (D. Nev. Oct. 19, 2010) (applying Nevada Anti-SLAPP

not addressed yet by the D.C. Circuit, should be the same as that of the other three circuits and numerous district courts on the issue: the Federal Rules permit application of Anti-SLAPP protections in federal court diversity actions.

Controlling precedents from the Supreme Court and D.C. Circuit make clear that state protections may apply in diversity actions notwithstanding the fact that they may *relate* in part to procedural issues. Thus, for example, state bond-posting rules for shareholder derivative suits have been held to apply notwithstanding that Fed R. Civ. P. 23.1 governs shareholder derivative

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law in diversity action); *Russell v. Krowne*, 2010 WL 2765268 (D. Md. July 12, 2010) (holding that Maryland Anti-SLAPP statute applies in federal court); *Armington v. Fink*, 2010 WL 743524 (E.D. La. Feb 24, 2010) (applying burden-shifting, discovery, and attorney's fees provisions of Louisiana Anti-SLAPP statute); *Aronson v. Dog Eat Dog Films Inc.*, 738 F.Supp.2d 1104 (W.D. Wash. 2010) (applying burden-shifting and attorney's fees provisions of Washington Anti-SLAPP statute); *Containment Tech. Group Inc. v. American Soc. of Health Sys. Pharmacists*, 2009 WL 838549 (S.D. Ind. March 26, 2009) (applying Indiana Anti-SLAPP statute); *Bible and Gospel Trust v. Twinam*, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (applying discovery provisions of Vermont Anti-SLAPP statute); *USANA Health Sci., Inc. v. Minkow*, 2008 WL 619287 (D. Utah Mar. 4, 2008) (in applying the burden-shifting and discovery provisions of the California Anti-SLAPP statute, reasoning that the statute did not conflict with the Federal Rules and that its application would support "significant state interests furthered by the anti-SLAPP statutes" without threatening any federal interests); *New.Net Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1102 (C.D. Cal. 2004) (holding that discovery provision of California Anti-SLAPP statute applies in federal court); *Card v. Pipes*, 398 F.Supp.2d 1126, 1137 (D. Or. 2004) ("Oregon's anti-SLAPP procedure is available in this diversity case."); *Buckley v. DIRECTV,* 276 F.Supp.2d 1271 (N.D. Ga. 2003) (verification requirement of Georgia Anti-SLAPP statute applied in federal court). *But see South Middlesex Opportunity Council, Inc.* v. *Town of Framington*, 2008 WL 4595369, at *10 (D. Mass. Sept. 30, 2008) (holding, before the First Circuit's ruling in *Godin*, that "[s]tandards that put a more onerous burden on the non-moving party" conflict with the Federal Rules and do not apply in federal court"); *Adventure Outdoors, Inc.* v. *Bloomberg,* 519 F. Supp. 2d 1258,1278 (N.D. Ga. 2007), *rev'd on other grounds,* 552 F.3d 1290 (11th Cir. 2008) (holding that Georgia Anti-SLAPP statute "is contrary to the Federal Rules of Civil Procedure and does not apply" in federal court); *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (holding, before *Godin*, that the special motion provision of Massachusetts Anti-SLAPP law conflicts with the Federal Rules); *Rogers* v. *Home Shopping Network, Inc.,* 57 F. Supp. 2d 973, 980–81 (C.D. Cal. 1999) (holding, before *Newsham*, that discovery provisions of California Anti-SLAPP statute do not apply in federal court).

suits.[16] Similarly, state law rules governing statutes of limitations,[17] the burden of proof,[18] and the awarding of attorneys' fees[19] all govern in federal court diversity actions under the law applicable in this Circuit without displacing or conflicting with the Federal Rules of Civil Procedure.

In the same vein, the Act does not (and could not) replace or supersede the general provisions in the Federal Rules governing dismissal of cases or summary judgment or discovery. Likewise, as set out above, the District's courts have rules of general application that track the language of the Federal Rules, and those are supplemented but not displaced by the Act. *See* D.C. Super. Ct. R. Civ. Pro., 26 (procedures for discovery); 56 (procedures for summary judgment).

Rather, the Act's provisions function only in the specific context of cases where a defendant is the target of a lawsuit in response to constitutionally protected expressive activity, which reflects that, like its counterparts in other States, it is "meant to affect conduct outside of the litigation process, such as a person's decision to exercise his First Amendment rights without fear of retaliation." *Chi*, 787 F. Supp. 2d at 808; *see also Gacek v. Am. Airlines, Inc.*, 614 F.3d 298, 302 (7th Cir. 2010) (Posner, J.) ("If an ostensibly procedural rule of state law is confined to

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[16] *See, e.g.*, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

[17] *See Guaranty Trust Co v. York*, 326 U.S. 99 (1945) (holding that New York statute of limitations applies in diversity case); *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1458 (D.C. Cir. 1995) ("a federal court sitting in diversity looks to state law to determine whether a cause of action based upon state law has expired").

[18] See *Palmer v. Hoffman*, 318 U.S. 109 (1943) (state statute governing burden of proving contributory negligence applied in federal court); *Baltimore & O.R. Co. v. Postom*, 177 F.2d 53, 57 n.5 (D.C. Cir. 1949).

[19] *See United States. v. One Parcel of Property Located at 414 Kings Highway,* 1999 WL 301704, *4 (D.D.C. May 11, 1999).

a particular substantive area of law, this suggests that it probably was motivated by substantive concerns and therefore should be applied by the federal court in a case governed by state law."). The similarity between the Act's provisions "and Rules 12 and 56 as mechanisms to efficiently dispose with meritless claims before trial occurs does not resolve the issue" of whether the Act may be applied. *Godin*, 629 F.3d at 89 n.16. "Such an abstracted framing of the breadth of the Federal Rules is inappropriate." *Id.*; *see also Newsham*, 190 F.3d at 972 ("This commonality of purpose, however, does not constitute a direct collision—there is no indication that Rules 8, 12 and 56 were intended to occupy the field with respect to pre-trial procedures aimed at weeding out meritless claims.").

The Act's protections in the SLAPP-specific context include, as set forth above, a burden-of-persuasion rule for the special motions to dismiss, *see* D.C. Official Code § 16-5502(b), and a stay of discovery upon the filing of a special motion, with specified exceptions under which the non-movant may be granted discovery, *id.* at § 16-5502(c). The Act thus "provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis than the federal rules: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special rules" that the District has "created to protect such petitioning activity against lawsuits." *Godin*, 629 F.3d at 89. The Act likewise provides mechanisms for relief for a defendant in a SLAPP case different in kind than that provided for in a summary judgment rule. Rule 56 "creates a process for parties to secure judgment before trial on the basis that there are no disputed material issues of fact, and as a matter of law, one party is entitled to judgment. Inherent in Rule 56 is that a fact-finder's evaluation of material factual disputes is not required." *Id.* But the Act, like the Maine Anti-SLAPP statute evaluated by the First Circuit, "serves the entirely distinct function of protecting

those specific defendants that have been targeted with litigation on the basis of their protected speech. When applicable, [the Act] requires a court to consider whether the defendant's conduct had a reasonable basis in fact or law, and whether that conduct caused actual injury"; neither Fed. R. Civ. P. 12 or 56 controls those issues, *see id.* Nor does either Rule 12 or 56 "determine[] which party bears the burden of proof on a state-law created cause of action." *Id.* It is long-settled that the allocation of burden of proof is substantive in nature and controlled by state law. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Baltimore & O.R. Co. v. Postom*, 177 F.2d 53, 57 n.5 (D.C. Cir. 1949) ("Burden of proof on the issue of contributory negligence is a matter of substantive law and, hence, is governed by the local law of the forum.") (citing *Erie*, 304 U.S. at 64). Further, the Act "provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail. It is not the province of either Rule 12 or Rule 56 to supply substantive defenses or the elements of plaintiffs' proof to causes of action, either state or federal." *Godin*, 629 F.3d at 89; *see also Containment Tech.*, 2009 WL 838549, at *8 n. 2 ("The affirmative defense under the Anti-SLAPP statute puts the burden of proof on the defendant by a preponderance of the evidence, without trying to replace the familiar standard for summary judgment.").

In addition, and contrary to Plaintiff's assertion, Pl. Br. at 28, the Act's discovery-related provisions are not precluded by the Federal Rules. In particular, Plaintiff's contention that the Anti-SLAPP Act conflicts with Rule 56(f) is incorrect. Rule 56(f) does not mandate that a court grant discovery to every party opposing a motion for summary judgment; instead "a non-moving party seeking the protection of Rule 56(f) 'must state by affidavit the reasons why he is unable to present the necessary opposing material,'" and the Court then evaluates the representation. *McWay v. LaHood*, 269 F.R.D. 35, 38 (D.D.C. 2010). It is *not* inconsistent with Rule 56 to grant

a non-moving party the benefit of discovery only after he has made sufficient representations to justify the grant. *See Godin*, 629 F.3d at 90 ("The Maine statute, in imposing on the opponent of the motion the burden of justifying discovery, is consistent with the allocation of burdens under Rule 56 …"); *USANA Health Sci.*, 2008 WL 619287, at *2 ("the [California] anti-SLAPP law does not conflict with the Federal Rules of Civil Procedure because '[b]oth statutes confer discretion on the trial court to permit discovery in the face of a dispositive motion, in the appropriate case and upon a proper showing.'" (quoting *New.Net*, 356 F.Supp.2d at 1101); *Bible and Gospel Trust*, 2008 WL 5245644, at *1 (resolving discovery request under the Vermont Anti-SLAPP Act).

The issue of whether to grant discovery to a non-movant opposing a motion for dispositive relief is by its terms a fact-specific inquiry—it sometimes will yield a ruling by the Court that discovery is warranted and sometimes will not. *See, e.g.*, *Godin*, 629 F.3d at 90-91 (holding that the discovery provisions of the Maine Anti-SLAPP statute allows discovery "upon good cause shown" and may be applied under *Shady Grove,* and also that a party demonstrating good cause under Rule 56's standards would constitute good cause under the Maine Anti-SLAPP Act's discovery provision); *Price v. Stossel*, 590 F. Supp. 2d 1262, 1271 (C.D. Cal. 2008) (denying expedited discovery request where requested information was not essential to opposing Special Motion to Dismiss under state Anti-SLAPP Act). The District takes no position on whether the facts of *this* case warrant limited discovery for the plaintiff.

That said, *presumptively* requiring discovery by a plaintiff responding to Special Motion to Dismiss under the Act would undermine the protective purposes for which the Council passed the Act. The Council recognized, consistent with courts' observations from outside the District, that the provision creating a statutory default rule tolling discovery upon the filing of a Special

Motion to Dismiss was an important protection, designed "[t]o 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." Comm. Rep. at 4; *see also, e.g.*, *New.Net.*, 356 F. Supp. 2d at 1102 ("[S]ince the very objective of the [California Anti-SLAPP rule] is to permit early resolution of claims designed to chill the exercise of First Amendment Rights, any holding that would, in effect convert the statute into a variant on Rule 56 would undermine the statute's purposes.").

Likewise here, the burden-shifting, provisional stay of discovery, and cost-shifting provisions of the Act are an important part of the package of protections that the Act provides "SLAPPed" defendants to keep them from being required to engage in expensive discovery in litigation aimed at stifling expression protected by the First Amendment. D.C. Official Code §§ 16-5502(b), (c). Nothing in the Federal Rules requires otherwise, and the Act's set of protections, including the discovery provisions, are "so intertwined with a state right or remedy that it functions to define the scope of the state-created right," that they "cannot be displaced by" the Federal Rules. *Godin*, 629 F.3d at 89 (quoting *Shady Grove*, 130 S.Ct. at 1452 (Stevens, J., concurring) (noting that if the Maine Anti-SLAPP Act was deemed entirely displaced by the Federal Rules, "a serious question might be raised under the Rules Enabling Act").[20]

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[20] The Court should apply the Act's discovery-related protections, including the discovery-cost-shifting provisions, which serve as part of the Act's speech-promoting provisions by raising the burden and costs to SLAPP plaintiffs of engaging in discovery in litigation aimed at stifling defendants' expression protected by the First Amendment. D.C. Official Code §§ 16-5502(b), (c); *Garcia v. Wal-Mart Stores, Inc.*, 209 F.3d 1170, 1172 (10th Cir. 2000) (noting outside the SLAPP context that "applying the Erie doctrine, we hold that Colorado's cost-shifting statute applies . . ."). In any event, the First Circuit's analysis in *Godin* illustrates that any concern this Court may have about the operation of the discovery provisions is best reflected by the Court's applying the Act's discovery provisions such that they do not conflict in the Court's view with any required discovery ruled under the Federal Rules, rather than declining to apply the Act on any purported conflict grounds.

In short, nothing in the Federal Rules prevents "the operation" of the Act in federal court in diversity matters. *Shady Grove*, 130 S. Ct. at 1451 (Stevens, J., concurring).[21] Accordingly, the only remaining issue for the Court is whether the *Erie* twin aims analysis supports the Act's application, *see id.*

B. Application of the Act in Federal Court Serves *Erie*'s Twin Aims.

Application of the Act's protections in federal court will serve the "twin aims of *Erie,*" *i.e.*, avoiding inequitable administration of the laws and discouraging forum-shopping. *See Hanna*, 380 U.S. at 468; *Walco Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1170–71 (D.C. Cir. 1977); *Diffenderfer v. United States*, 656 F. Supp. 2d. 137, 138 (D.D.C. 2009) (holding that application of the District of Columbia's mandatory notice requirement of Medical Malpractice Proceedings Act serves the twin aims of *Erie* and thus applies in diversity cases). It would be inequitable to allow the use of a defense to parties subjected to a SLAPP Complaint in *state* court, but deny them the use of that defense in *federal* court, especially since the choice of forum is, in large part, the province of the plaintiff. *See Godin*, 629 F.3d at 91; *see also Hanna,* 380 U.S. at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of the result of a litigation materially to differ because the suit had been brought in federal court."). Furthermore, if plaintiffs are subject to the heightened burden of proof set forth in the Act if they file their case in local court, but avoid being subject to those standards if they file in federal court, that result would tend to promote precisely the type of forum shopping that *Erie* was designed to avoid. *See, e.g., Newsham*, 190 F.3d at 973 ("Plainly, if the [California] Anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing

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[21] Like the First Circuit in *Godin*, the Court here, therefore, need not reach the question of whether the application of the Federal Rules here to the exclusion of the application of the Act's provisions would violate the Rules Enabling Act.

meritless SLAPP claims would have a significant incentive to forum-shop. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable advantage in a federal proceeding."). The *Erie* twin aims analysis thus confirms that the Act's protections apply in diversity jurisdiction federal court proceedings.

CONCLUSION

The Act is a valid exercise of the legislative authority over local matters delegated by Congress to the Council of the District of Columbia, and its protections apply to diversity actions litigated in this Court.

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Respectfully submitted,

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