ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 11-7088

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

SHIRLEY SHERROD,
Plaintiff-Appellee,

v.

ANDREW BREITBART AND LARRY O'CONNOR
Defendants-Appellants.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF DEFENDANT-APPELLANT LARRY O'CONNOR FOR REVERSAL OF THE DISTRICT COURT'S ORDER

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

U.S. District Court for the District of Columbia

Plaintiff: Shirley Sherrod

Defendants: Larry O'Connor and John Doe*

U.S. Court of Appeals for the District of Columbia Circuit

Appellant: Larry O'Connor*

Appellee: Shirley Sherrod

Amicus curiae: Public Citizen, Inc.

Movants for amici curiae: Atlantic Media, Inc., Dow Jones & Company, Inc., Gannett Co., Hearst Corp., NBCUniversal Media, LLC, NPR, Inc., New York Times Co., POLITICO LLC, Reporters Committee for Freedom of the Press, Washington Post Co., Allbritton Communications Co.

B. Rulings Under Review

This is an appeal from a July 28, 2011 order of the U.S. District Court for the District of Columbia denying the Joint Special Motion by Defendants Andrew Breitbart and Larry O'Connor to Dismiss the Complaint under the Anti-SLAPP Act

* Named defendant and appellant Andrew Breitbart died on March 1, 2012.

of 2010 and the February 15, 2012 Statement of Reasons issued by the District Court. *See Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012) (Leon, J.).

C. Related Cases

On July 18, 2012, the Court directed the Clerk to "schedule this case for argument on the same date and before the same panel as No. 12-7012, *3M Company v. Boulter*," a case that also involves the appeal of a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act.

Also pending before the Court is *Farah v. Esquire Magazine*, 12-7055, which involves the appeal of a motion granted pursuant to the D.C. Anti-SLAPP Act.

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GLOSSARY

"SLAPP" stands for "Strategic Lawsuit Against Public Participation."

PRELIMINARY STATEMENT

In the summer of 2010, when the nation met Shirley Sherrod, there was something imprudent about her but also something candid – a person who spoke in a stream of consciousness before a rolling video camera about the complicated subject of race relations not appreciating that because she was a high-ranking federal official her words would resonate very differently outside of the Douglas, Georgia ballroom where she addressed an NAACP banquet. After BigGovernment.com publicized her homily to a home-town audience as evidence of a double standard in the way race can be publicly discussed in this country, she continued to talk with almost alarming frankness, admitting on national television that her provocative, rambling speech was newsworthy because of the ongoing feud between the NAACP and the Tea Party in the run-up to the 2010 mid-term elections.

But then she decided to file this classic "SLAPP suit" to punish Andrew Breitbart, his web producer Larry O'Connor, and the unnamed John Doe who provided Breitbart and O'Connor with two video excerpts of Sherrod's speech after it was shown on local cable television in Georgia. Her libel case is the first to arise in federal court in Washington, D.C. under the District of Columbia's 2010 anti-SLAPP statute. These protections from abusive libel litigation apply to this action. As several federal appeals courts have recognized, anti-SLAPP laws are given full weight in federal proceedings under the *Erie* doctrine. Furthermore, the statute does not

require retroactive application because the special motion to dismiss under the anti-SLAPP statute was filed after the new law went into effect.

This case should be dismissed under the new statute because, based on the complaint alone, Sherrod cannot show that she is likely to succeed on the merits. The statements published about her constitute pure opinion – a subjective evaluation which is constitutionally protected under the First Amendment. Her argument that characterizing her NAACP speech as "racist" is not protected opinion requires the existence of a single, true meaning to her words and to the word "racist." Such a singular meaning does not emerge from the fog of the nation's complex history of racial relations or from the loose language, often rhetorical, figurative, or hyperbolic, which occupies the semantics of race. The claim that Breitbart's subjective evaluation is actionable defamation because it is "verifiable" is as preposterous after this Court's seminal opinion in *Moldea v. New York Times*, 22 F.3d 310 (D.C. Cir. 1994) (*Moldea II*) as the suggestion that a book reviewer can be sued for terming a journalist "sloppy." Taken in context, and where Breitbart disclosed the factual predicate for his views as required by the authority in this Circuit, there is absolutely no basis for finding such statements to be provably false under the libel laws.

Sherrod's public posture about race in the two excerpts and the reaction of the NAACP audience were disturbing to the defendants because she described how she refused initially to do everything she could do to aid a person in need due to the color of his skin while her listeners nodded and murmured in approval. The rest of her

discursive and undisciplined remarks that evening do not dispel, and in fact confirm, that she remained deeply race conscious while wielding authority at the USDA. Breitbart, who is since deceased, made it clear at the time that he had only the two excerpts of the Sherrod speech that he posted, but that was all he needed to come to the honestly-held views he reached about her racial attitudes. Whether one agrees with him or not, Breitbart, in life as in death, is entitled to his opinion.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of different states. Sherrod is a resident of Georgia; Breitbart was and O'Connor is a resident of California.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine as set forth by the Supreme Court in *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), as discussed herein. *See infra* at 46.

The notice of appeal was timely filed pursuant to 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a)(1)(A) on August 26, 2011 from an order of the District Court dated July 28, 2011.

The appeal is from an order that does not dispose of all parties' claims, but is immediately appealable as discussed herein. *See infra* at 46.

ISSUES PRESENTED

1. Whether the District Court erred in refusing to grant O'Connor's timely-filed motion to dismiss pursuant to the D.C. Anti-SLAPP Act when the Act applies to defamation cases brought in federal court in the District of Columbia, including those that were pending at the time of the statute's enactment, and Sherrod cannot come forward with evidence to prove that her claims are likely to succeed on the merits.

2. Whether jurisdiction over this appeal is proper under 28 U.S.C. § 1291 and the collateral order doctrine as panels from the First, Fifth, and Ninth Circuits have concluded in order to protect parties from having to litigate meritless claims aimed at chilling First Amendment expression.

STATEMENT OF THE CASE

On December 7, 2010, the D.C. Council passed the District of Columbia Anti-Strategic Lawsuits Against Public Participation Act of 2010 ("Anti-SLAPP Act" or "Act"), codified at D.C. Code § 16-5501 *et seq.* (Addendum at 1-3). The legislation was signed on January 18, 2011 and published in the D.C. Register on January 28, 2011.

On February 11, 2011, Sherrod filed a complaint against Breitbart, O'Connor, and an unnamed "John Doe" defendant in the Superior Court for the District of Columbia for defamation, false light invasion of privacy, and intentional infliction of emotional distress. *See generally* Complaint ("Compl.") (JA____). On February 12,

2012, Breitbart and O'Connor (collectively, the "Defendants") were personally served with the complaint. The John Doe defendant has not been served.

On March 4, 2011, Defendants removed the case to the U.S. District Court for the District of Columbia. On March 10, 2011, they filed a consent motion to extend the time to file an answer, move, or otherwise plead in response to the complaint. On March 15, 2011, the District Court granted the motion in a minute order, which stated in relevant part: "[D]efendants Andrew Breitbart and Larry O'Connor shall have until April 11, 2011 to answer or otherwise respond to the complaint." (JA____).

On March 31, 2011, the D.C. Anti-SLAPP Act became effective following a mandatory period of review by the United States Congress as required under the Home Rule Act.

On April 7, 2011, the District Court held a status conference during which counsel for Defendants made an oral motion to extend again the time to answer, move, or otherwise plead. Counsel for Sherrod consented. On April 11, 2011, the District Court granted the motion. Its order stated in relevant part: "Defendants Andrew Breitbart and Larry O'Connor have up to and including April 18, 2011, to answer, move or otherwise plead in response to Plaintiff's Complaint." (JA____).

On April 18, 2011, Defendants filed 1) a Motion to Dismiss Pursuant to Rules 12(b)(3) and (6) or in the Alternative, Transfer Venue Under 28 U.S.C. §§ 1404(a) or 1406(a), and 2) a Special Motion to Dismiss the Complaint Under the Anti-SLAPP

Act. Sherrod opposed. On July 19, 2011, the District Court heard argument on the motions. On July 28, 2011, it denied both motions in brief minute orders. (JA____).

On August 19, 2011, Defendants asked the District Court to certify the ruling denying the Rule 12(b) motion. On August 26, 2011, they noticed their appeal of the denial of the anti-SLAPP motion. On October 21, 2011, Sherrod moved to dismiss the appeal or, in the alternative, for summary affirmance. Defendants opposed. On February 6, 2012, this Court remanded the case to the District Court for a statement of reasons for its denial of the anti-SLAPP motion. On February 15, 2012, the District Court complied. *See Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012) (JA____). On March 1, 2012, Breitbart died suddenly at the age of 43.

On March 23, 2012, appellants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC moved to consolidate their appeal in *3M Company v. Boulter*, Nos. 12-7102 and 7017, with this case. On April 10, 2012, 3M filed a motion to dismiss Davis's appeal in that case or for summary affirmance. On July 18, 2012, this Court denied the motion to consolidate. It also denied Sherrod's and 3M's motions for summary affirmance and ordered that the motions to dismiss be heard along with the merits. The Court then directed that the two cases be scheduled for oral argument on the same day before the same panel.

On August 14, 2012, counsel for Breitbart filed a suggestion of death in this Court. There has been no substitution of parties.

STATEMENT OF FACTS

The rhetorical labels "racist" and "racism" that lie at the heart of this case first appear in these facts long before Shirley Sherrod rose to speak to her NAACP hosts in Douglas, Georgia on an evening in late March 2010. They predate by well over a year Sherrod calmly telling a national network news audience that Andrew Breitbart, the now-deceased conservative blogger, was a "racist" who "would like to get us stuck back in the times of slavery. That's where I think he'd like to see all black people end up again."[1] They precede Sherrod revealing her retaliatory motive in filing the lawsuit that is the subject of this appeal. When asked by a reporter, "Would you like his site [BigGovernment.com] to be shut down?," she responded unequivocally: "That would be a great thing."[2] Breitbart, she said, is "one person I'd like to get back at."[3]

A. The NAACP and the Tea Party clash over "racism" in their ranks

Long before there was a SLAPP suit from Sherrod, and the anti-SLAPP motion from Breitbart and O'Connor, a war of words brewed between the NAACP and the Tea Party. As early as the spring of 2009, when the Obama Administration

[1] Transcript, Anderson Cooper 360 Degrees (July 29, 2010) (Addendum at 51). Appellants requested that the District Court take judicial notice pursuant to Federal Rule of Evidence 201(b) of this transcript and other factual information available in the public domain. *See Washington Post v. Robinson,* 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of newspaper articles); *Washington Ass'n for Television and Children v. F.C.C.,* 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) taking judicial notice of a speech); *Hamilton v. Paulson,* 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008) (taking judicial notice of website).

[2] Transcript, CNN American Morning (July 22, 2010) (Addendum at 61).

settled into office and the Tea Party movement took shape, adversaries of the Tea Party began to describe its opposition to the policies of the nation's first black president as having a "racist" component.[4] When these claims surfaced, Breitbart worked to dispel the notion that Tea Party criticisms of administration initiatives related to the race of the President.[5] By the time Tea Party supporters gathered in Washington, D.C. in March 2010 for a four-day Capitol Hill rally against the health care bill, Breitbart had become a well-known defender of the Tea Party cause.

On March 20, 2010, the media began to report that attendees at one Tea Party rally yelled racial insults at members of the Congressional Black Caucus.[6] On March 25, 2010, under the headline "Tea Party proves me right on racism," a Pulitzer-prize winning columnist published an opinion article stating that the Tea Party activists accused of harassing the congressmen "would not have said they were racists. Racists never do." On March 31, 2010, Fox News host Bill O'Reilly made reference to "a number of commentators" who "have called the Tea Party people racists."[7]

(continued)

[3] *Id.* (Addendum at 61).

[4] *See, e.g.,* Countdown with Keith Olbermann (April 16, 2009) (JA____).

[5] *See, e.g.,* Andrew Breitbart, *Big Hollywood Crew Joins Tea Party Protest*, BigGovernment.com (April 15, 2009); Andrew Breitbart, Question Democratic Authority? Not!, BigGovernment.com (April 19, 2009) (JA____).

[6] *See, e.g.,* Paul Kane, *Tea Party Protestors Accused of Spitting on Lawmaker, Using Slurs*, WASH. POST (March 20, 2010) (JA____).

[7] Bill O'Reilly, The O'Reilly Show, FOX NEWS (March 31, 2010) (JA____).

Breitbart reacted to these accusations by publicly calling for proof.[8] When weeks passed and no confirmation of the alleged slurs surfaced, Breitbart offered to donate $100,000 to the United Negro College Fund if anyone produced audio or video footage in support of the published accounts.[9] He stated that he believed that the claims had been fabricated to marginalize the Tea Party movement in the months leading to the November 2010 elections.[10]

It was during this period of open conflict between the NAACP and the Tea Party that Sherrod was honored at the NAACP's 20th Annual Freedom Fund Banquet and gave the speech that, according to the complaint, was seen by the Doe defendant when it was carried on local cable television. Compl. ¶ 57 (JA____). Sherrod alleges that after watching the March 27, 2010 speech the Doe defendant contacted Breitbart in order to publicize its contents. *Id.* (JA____).

Over the course of the next three months, the NAACP continued to warn of racism in the Tea Party.[11] As these accusations spread throughout the spring and into the summer, tensions between the NAACP and the Tea Party intensified. During a July 13, 2010 interview, NAACP President Benjamin Jealous defended his

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[8] *N-Word Feud: Lawmakers, activists, still arguing over whether protesters in youtube video used racial slurs*, CHI. TRIB. (April 14, 2010) (JA____).
[9] *Id.* (JA____).
[10] *See, e.g.,* Andrew Breitbart, *No More Beer Summits: Tea Party 'N—Word' Incident Didn't Happen, and the Congressional Black Caucus Owes America an Apology*, Breitbart.com (April 26, 2010) (JA____).

organization's attack on the Tea Party by referring to the allegations from the March 20, 2010 Capitol Hill rally:

> For more than a year we've watched as Tea Party members have called congressmen the N-word, have called congressmen the F-word. We see them carry racist signs and whenever it happens, the membership tries to shirk responsibility. If the Tea Party wants to be respected and wants to be part of the mainstream of this country, they have to take responsibility.[12]

At this very point in time – the week of July 10, 2010 – the NAACP met in Kansas City, Missouri for its annual convention. On July 12, 2010, the Kansas City Star reported that the NAACP was considering a special resolution claiming that Tea Party activists had engaged in "explicitly racist behavior" and used "racial" epithets.[13] Former Republican vice presidential candidate Sarah Palin wrote on Twitter of the KC conventioneers: "[N]otify me asap when NAACP renders verdict: are liberty-loving, equality respecting patriots racist?"[14] On the evening of July 13, 2010, the NAACP passed the resolution and, according to a press release, it asked the Tea Party to repudiate "racist" leaders within its ranks.[15] "[T]here is no place for racism … in

(continued)

[11] *See, e.g.,* Huma Khan, *NAACP vs. Tea Party: Racism Debate Heats Up as Sarah Palin Joins the Fray,* ABC NEWS (July 13, 2010) (JA____).

[12] *Id.* (JA____).

[13] Judy L. Thomas, *NAACP Considers Resolution Decrying Racist Elements in Tea-Party Movement*, K.C. STAR (July 12, 2010) (JA____).

[14] *Id.* (JA____).

[15] Press Release, *NAACP Delegates Unanimously Pass Tea Party Amendment*, NAACP (July 13, 2010) (JA____).

their movement," Jealous said.[16]

B. BigGovernment.com publishes the Blog Post

It was in the midst of this months-long and very loud public clash between Tea Party conservatives and NAACP liberals that BigGovernment.com published his 1,400-word, July 19, 2010 commentary (the "Blog Post") that is the subject of Sherrod's lawsuit. *See* Compl., Ex. 1 (JA____). In the first half of his commentary, Breitbart accuses the NAACP of demagoguery by demanding the repudiation of "racists" within the Tea Party. *Id.* (JA____). He argues that the claims of the Congressional Black Caucus about the March 2010 rally were themselves nothing but a "racial" smear. *Id.* (JA____). He blames the Democrats for using charges of "racism" against the Tea Party as an expedient political strategy. *Id.* (JA____). It has been, he says, a summer with "race and racism" taking "center stage" and the NAACP and the Congressional Black Caucus playing the "race card" as "their Stradivarius." *Id.* (JA____).

Over 800 words into the Blog Post, he introduces Sherrod and her March 27, 2010 public appearance at the NAACP dinner. He begins by noting that "by bringing up race, and demanding a zero tolerance of racism, the left, and the NAACP in particular, has opened itself up for scrutiny." *Id.* (JA____). He turns to the subject of the race consciousness in Sherrod's speech:

[16] *Id.* (JA____).

> In her meandering speech to what appears to be an all-black audience, this federally appointed executive bureaucrat lays out in stark detail, that
>
> her federal duties are managed through the prism of race and class distinctions.
>
> In the first video, Sherrod describes how she racially discriminates against a white farmer. She describes how she is torn over how much she will choose to help him. And, she admits that she doesn't do everything she can for him, because he is white. Eventually, her basic humanity informs that this white man is poor and needs help. But she decides that he should get help from "one of his own kind". She refers him to a white lawyer.

Id. (JA____).

The next section of the Blog Post continues with an embedded video excerpt from Sherrod's speech. Breitbart characterizes Sherrod's statements about her treatment of the white farmer – at first dismissing him on account of his race, then later doing more to help him – as "video evidence of racism" coming from a senior federal appointee and NAACP award recipient. *Id.* (JA____). The video excerpt plays as follows:

> The first time I was faced with having to help a white farmer save his farm, he – he took a long time talking, but he was trying to show me he was superior to me. I know what he was doing. But he had come to me for help. What he didn't know – while he was taking all that time trying to show me he was superior to me, – was I was trying to decide just how much help I was going to give him.
>
> I was struggling with the fact that so many black people have lost their farmland, and here I was faced with having to help a white person save their land. So, I didn't give him the full force of what I could do. I did enough so that when he – I – I assumed the Department of Agriculture had sent him to me, either that or the – or the Georgia Department of Agriculture. And he needed to go back and report that I did try to help him.
>
> So I took him to a white lawyer that we had – that had … attended some of the training that we had provided, 'cause Chapter 12 bankruptcy had

> just been enacted for the family farmer. So I figured if I take him to one of them that his own kind would take care of him. That's when it was revealed to me that, y'all, it's about poor versus those who have, and not so much about white – it is about white and black, but it's not – you know, it opened my eyes, 'cause I took him to one of his own …

Transcript of Speech by Shirley Sherrod, AmericanRhetoric.com ("Sherrod Tr.") at 5 (JA____).

When Sherrod states, "What he didn't know while he was taking all that time trying to show me he was superior to me, was I was trying to decide just how much help I was going to give him," there is some laughter in the audience. In the Blog Post, Breitbart connects the reaction of the NAACP spectators with the NAACP's accusations of racism against the Tea Party. "Sherrod's racist tale is received by the NAACP audience with nodding approval and murmurs of recognition and agreement," Breitbart writes. "Hardly the behavior of the group now holding itself up as the supreme judge of another groups' racial tolerance." Compl., Ex. 1 (JA____).

C. Sherrod urges "people of color" to take federal jobs

A similarly strong racial awareness permeates other parts of Sherrod's speech. The next portion of the Blog Post discusses an excerpt from the speech in which she tells her NAACP audience that life tenure is waiting for them in USDA jobs. When played, the embedded video shows Sherrod making the following statements: "There are jobs at USDA, and many times there are no people of color to fill those jobs because we shy away from agriculture … And you've heard of a lot of layoffs. Have you heard of anybody in the federal government losing their job? That's all that I

need to say, okay?" Sherrod Tr. at 1 (JA____).[17]

To Breitbart, this part of the speech reveals in Sherrod a high-ranking federal official who "nearly begs black men and women into taking government jobs at USDA – because they won't get fired." Compl., Ex. 1 (JA____). But the focus of his criticism remains on the Democratic Party, the NAACP, and the news media for their earlier Tea Party attacks. In the Blog Post, Breitbart reverts again to the complicated idiom of racism. He attacks Tea Party opponents for manufacturing a "racial schism" by prodding at "the racial hornet's nest." *Id.* (JA____).

The two embedded video passages were each preceded by introductory text slides. The slides coming before the story of the white farmer read:

> On July 25, 2009, Agriculture Secretary Tom Vilsack appointed Shirley Sherrod as Georgia Director of Rural Development. USDA Rural Development spends over $2.1 Billion in the State of Georgia each year. On March 27, 2010, while speaking at the NAACP Freedom Fund Banquet … Ms. Sherrod admits that in her federally appointed position, overseeing over a billion dollars … She discriminates against people due to their race.

Compl. ¶¶ 32-36 (JA____).

The slides coming before Sherrod's discussion of lifetime USDA jobs for African Americans read:

> On July 25, 2009, Agriculture Secretary Tom Vilsack appointed Shirley Sherrod as Georgia Director of Rural Development. USDA Rural Development spends over $2.1 Billion in the State of Georgia each year.

[17] Because the full text of the speech is referenced and cited in the complaint, *see* ¶¶ 25-46, 66, 70, 80 (JA____), the transcript of the speech is properly in the record.

> On March 27, 2010, while speaking at the NAACP Freedom Fund Banquet … Ms. Sherrod confirms every Tea Partier's worst nightmare. There is no accountability in government … And you can't get fired.

Id., Ex. 1 (second embedded video excerpt) (JA____).

After the publication of the Blog Post, Breitbart wrote to his followers on Twitter in the short, pithy style of that playful and provocative online platform, asking rhetorically, "Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?" *Id.* ¶ 60 (JA____). He told a journalist at Talking Points Memo shortly thereafter that the video excerpts were sent to him by a source and that he did not yet have the entire speech. "I don't have it," Breitbart was quoted as saying. "I think the [posted] video speaks for itself," he said. "The way she's talking about white people … is conveying a present tense racism in my opinion. But racism is in the eye of the beholder."[18]

Sherrod's March 27, 2010 speech contains many additional passages that demonstrate that in her federal role she was aware of promoting and protecting the interests of an African-American constituency based solely on its race. These sections include discussions of the following program areas under USDA jurisdiction:

> **Business development grants**
>
> One of things in the position I'm in … that really hurt … one of the programs we had with some of the most money in it, you know, it's with business and industry. And I sit up there and I'm signing off on six

[18] Rachel Sladja, *Breitbart on Sherrod's NAACP Speech: "I Did Not Edit This Thing,"* TALKING POINTS MEMO (July 20, 2010) (Addendum at 42-43).

> million, three million, two million – but who is it going to? Not one so far. And when I got a report on where we are with it, we're – we're approaching 80 million dollars since October 1st. But not one dime to a black business not one, – you know.

Sherrod Tr. at 8 (JA____).

> **Employment in rural development**
>
> In rural development, there are 129 employees and guess how many of them are people of color? Anybody want to take a guess that's in Georgia? There are 129 in my agency. How many? It's more than two. Little more than 12. There are less than 20 of us. We have six area offices in the State and subarea offices and when I look at who coming up the line in the agencies – in the agency, there are not many of us, 'cause we think "agriculture" is a bad word. We think it is working in the fields. Some of the best paying jobs you ever want to have, okay?

Id. at 9 (JA____).

> **The future of the family farm**
>
> You know, I was helping a family here recently: 515 acres of land, never had a drop of debt on it since the grandfather bought it years ago, and he – he died in 1974. And two cousins up in the North, guess what they decided? They tried to force a sale of every acre of it. … And we found some honest lawyers – they were white. I wish I could say that about all lawyers, especially black lawyers, but they will nickel and dime you to death. I don't have – sorry – I don't have two dozen pennies for most lawyers. But anyway that land has been saved, you know. But they were trying to force a sale of all of it. They'll eventually get 62 acres of the 515. And guess what? They have a white man already lined up to buy it.

Id. at 9 (JA____).

As is evident from comparing the full NAACP speech with the excerpts in the Blog Post, the portions published on BigGovernment.com appeared exactly as they were presented in the speech. While Sherrod describes herself as a victim of

"selectively" and "deceptively" edited videos, *see* Compl. ¶¶ 1, 40, 52, 68, 70, 73, 80, 84 (JA____), not one word was omitted, added, or re-ordered in either of the sections embedded in the Blog Post.

D. Sherrod blames the NAACP and the Obama Administration but sues Breitbart and O'Connor

On the evening of July 19, 2010, the USDA demanded and received Sherrod's resignation. *Id.* ¶ 77 (JA____). Approximately three hours later, the NAACP issued a statement condemning her and adding: "The reaction from many in the audience is disturbing. We will be looking into the behavior of NAACP representatives at this local event and take any appropriate action."[19]

On July 20, 2010, Sherrod appeared on CNN.[20] She expressed anger over the fact that the NAACP found her at fault and the Obama Administration asked for her resignation before they heard her side of the story.[21] Sherrod stated, "[The NAACP] is the reason why this happened. They got into a fight with the Tea Party, and all of this came out as a result of that."[22] Sherrod also revealed on CNN a critical fact she had neglected to state expressly to her audience at any time during her NAACP speech; namely, that her experience with the white farmer took place in the late

[19] NAACP Statement on the Resignation of Shirley Sherrod (July 20, 2010) (JA____).
[20] Transcript, CNN Newsroom (July 20, 2010) (JA____).
[21] *Id.* (JA____).
[22] *Id.* (JA____).

1980s.[23] Following her assertion, on July 21, 2010, Breitbart added at the very top of the Blog Post the following text: "Correction: While Ms. Sherrod made the remarks captured in the first video featured in this post while she held a federally appointed position, the story she tells refers to actions she took before she held that federal position." Compl., Ex. 1 (JA____).

According to numerous published reports, the government eventually offered Sherrod her job back.[24] She declined to return to work at the USDA and instead, on February 11, 2011, filed this lawsuit claiming defamation, false light, and intentional infliction of emotional distress. She identifies six statements as allegedly actionable.

- Statement No. 1: "Mrs. Sherrod admits that in her federally appointed position, overseeing over a billion dollars … She discriminates against people due to their race."
- Statement No. 2: The clip shows "video evidence of racism coming from a federal appointee and NAACP award recipient."
- Statement No. 3: "[T]his federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions."

[23] Kiran Chetry and John Roberts, Interview of Shirley Sherrod, Former USDA Director for Rural Development in Georgia, CNN (July 20, 2010) (JA____).
[24] *See, e.g.,* Jake Tapper and Huma Kahn, *White House Apologizes to Shirley Sherrod, Ag Secretary Offers Her New Job,* ABC NEWS (July 21, 2010) (JA____).

- Statement No. 4: "In the first video, Sherrod describes how she racially discriminates against a white farmer."
- Statement No. 5: Her speech is a "racist tale."
- Statement No. 6: "Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?"[25]

Along with her complaint, Sherrod issued a press release in which she describes the environment in 2010 between the NAACP and the Tea Party as one of "overheated political debate."[26]

SUMMARY OF ARGUMENT

To be actionable as libel, a statement must contain a provably-false assertion of fact. Shirley Sherrod's SLAPP suit must be dismissed under the D.C. Anti-SLAPP Act because she cannot show that she is likely to succeed on the merits of her claim. Read in the context of the Blog Post and the ongoing dispute between the NAACP and the Tea Party in the summer of 2010, rhetoric about her "racist tale" and similar characterizations of her racial attitudes are non-actionable opinion. Breitbart disclosed in the two video excerpts the basis for his views. Under D.C. Circuit authority, his subjective evaluation of her ideology as a senior government official is a

[25] *See* Compl. ¶ 94 (JA____).
[26] *See* Press Release, Sherrod Statement on Breitbart Lawsuit (Feb.14, 2011) (Addendum at 41).

supportable interpretation of the underlying facts and thus is fully protected under the First Amendment.

The D.C. Anti-SLAPP Act applies in federal court because it does not conflict with federal procedure rules and satisfies the "twin aims" of the *Erie* doctrine – "discouragement of forum shopping and avoidance of inequitable distribution of the laws." *Hanna v. Plumer*, 380 U.S. 380 U.S. 460, 468, 471 (1965). The anti-SLAPP motion was properly before the District Court because it was timely filed after the statute became effective and the legislative history clearly states that the statute was intended to protect current SLAPP defendants.

This Court has jurisdiction under the collateral order doctrine. Courts of Appeal for the First, Fifth, and Ninth Circuits have held that denials of anti-SLAPP motions are properly appealed on an interlocutory basis and the law of this Circuit supports application of the collateral order doctrine in this instance.

STANDARD OF REVIEW

This appeal raises questions of law which are reviewed *de novo*. *United States v. Cook*, 594 F.3d 883, 886 (D.C. Cir. 2010).

ARGUMENT

I. The motion under the D.C. Anti-SLAPP Act succeeds because Sherrod cannot show any provably-false statements of fact as a matter of law

Early motions practice plays a critical role in defamation cases because libel suits "pose a threat to freedom of the press even if a defendant ultimately prevails."

Mar-Jac Poultry, Inc. v. Katz, 773 F. Supp. 2d 103, 111 (D.D.C. 2011). As a result, this Circuit has instructed district courts to "apply close judicial scrutiny and properly dispose of defamation cases against the news media through summary procedures when and as soon as possible." *Id.* *See also Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("In the First Amendment area, summary procedures are … essential. For the stake here, if harassment succeeds, is free debate. … The threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."). Anti-SLAPP statutes are the ultimate expression of early judicial intervention in meritless libel litigation.

Defendants met their burden of showing that they acted in furtherance of their free speech rights on a matter of public concern. The expression at issue – Sherrod's NAACP speech and the Blog Post – relates to subjects of public importance, namely race relations, the role of government, and the competing ideologies of the NAACP and the Tea Party. Under the D.C. Anti-SLAPP Act, Sherrod must show that she is likely to succeed on the merits for her claims to survive the special motion to dismiss. As set forth below, she cannot meet this test each of the purported defamatory statements fails as a matter of law because it is a non-actionable, constitutionally-protected expression of opinion.

A. The terms "racist" and "racism" are the essence of protected opinion even when they may cause harm

Well-established constitutional and common law demonstrate that the accusation of being a "racist" is not verifiable as a provably-false statement of fact and is therefore non-actionable as a matter of law. For example, in *Edelman v. Croonquist*, 2010 U.S. Dist. LEXIS 43399, at **14-17 (D.N.J. May 4, 2010), a federal court found that statements made by a comedian who had labeled her mother-in-law and sister-in-law "racist" in her act were "opinion rather than fact" because the comedian had "explain[ed] her opinion … vis-a-vis her interactions with them." Similarly, in *Smith v. School District of Phila.*, 112 F. Supp. 2d 417 (E.D. Pa. 2000), a court found a statement in a school board resolution alleging that the plaintiff had made "racist" statements non-actionable opinion. In doing so, it "acknowledge[d] that a statement that plaintiff is 'racist[]' … would be unflattering, annoying and embarrassing," but that "such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric." *Id.* at 429.

This authority reflects the modern understanding of the term "racist" as nothing more than name-calling unless it is accompanied with a suggestion (that turns out to be false) that the defendant has undisclosed defamatory information about the plaintiff. In *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), the Seventh Circuit, in holding that accusation that a high school principal made "very racist statements" was protected opinion, described how the word "racist" has "been watered down by

overuse, becoming common coin in political discourse." The court continued: "In daily life 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face … It is not actionable unless it implies the existence of undisclosed, defamatory facts[.]" *Id.* *See also Telnikoff v. Matusevitch*, 702 A.2d 230, 249 (Md. 1997) (finding allegations that a plaintiff harbored "racialist views" and prescribed a "racial recipe" to discriminate against Russian Jews was protected "'rhetorical hyperbole' in the course of rebuttal during a vigorous public debate.").

Indeed, the term "racist" is not the only insult that has been subject to the same "leveling forces" of time and overuse. *Stevens*, 855 F.2d at 402. As another federal court observed, "Americans have been hurling epithets at each other for generations. From charging 'Copperhead' during the Civil War, we have come down to 'Racist,' 'Pig,' 'Fascist,' 'Red,' 'Pinko,' 'Nigger Lover,' 'Uncle Tom' and such." *Raible v. Newsweek*, 341 F. Supp. 804, 806 (W.D. Pa. 1972) (holding that statement that plaintiff was "racially prejudiced" was not actionable). *See also Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (finding term "fascist" a "political label" that could not be proven false because of "tremendous imprecision of the meaning and usage" of the term in "the realm of political debate.").

Under D.C. law, a statement is defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Weyrich v. New Republic*, 235 F.3d 617, 627 (D.C. Cir. 2001). But even if a statement has been found capable of a defamatory meaning, a defendant "may

escape liability if the defamatory meaning is established … as constitutionally protected expression." *White v. Fraternal Order of Police*, 909 F.2d 512, 523 (D.C. Cir. 1990). *See also Mar-Jac Poultry*, 773 F. Supp. 2d at 120 (even if broadcast tying plaintiff to terrorist groups was defamatory, court must still determine whether it was "protected by the First Amendment" as opinion).

It is common for a court to dismiss a statement that is defamatory because it is opinion. For example, in *Moldea II*, 22 F.3d at 320, this Circuit held that several statements about the plaintiff, an author, were capable of a defamatory meaning but then found that those same statements were constitutionally protected as opinion. Indeed, the Court ruled that even when an opinion is published "with an aim to damage [the plaintiff's] reputation," finding the statement actionable would "unacceptably interfer[e] with free speech." *Id.*

Statements of opinion are often more provocative and cause more debate and discomfort than statements of fact. Breitbart was disdainful of Sherrod's clumsy speech and questioned her judgment and suitability for public life. She felt harmed. But "we cannot react to that pain by punishing the speaker. As a Nation, we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

For Sherrod, as with anyone else who feels singed by the flames of public debate, "the way to preserve" the possibility of honest dialogue "is not to punish those who feel differently about these matters. It is to persuade them that they are

wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989). What the Supreme Court wrote about the political costs of penalizing flag-burning is equally relevant to the dangers to free speech posed by SLAPP suits:

> We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns. … [W]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Id. The answer to a SLAPP suit is an anti-SLAPP motion. Sherrod's effort to punish her critics and stifle speech must not be allowed to continue when there is nothing actionable in her complaint.

B. Courts must consider the context and genre of statements when deciding whether they are protected opinion

One Supreme Court case and two seminal decisions from this Circuit provide a clear roadmap for the dismissal of this SLAPP suit by Sherrod. Judge Starr gave the law of opinion lasting and elegant structural shape in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). He set forth an inquiry to determine whether statements are expressions of fact or protected opinion by calling for an examination of four factors:

1. "the common usage or meaning of the specific language of the challenged statement itself" to determine "whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous";

2. the statement's "verifiability," meaning whether the statement is "capable of being objectively characterized as true or false";

3. the "full context of the statement" to determine whether "unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content"; and

4. the "broader context or setting in which the statement appears," meaning whether the particular "type[] of writing h[as] ... social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."

Id. at 979. Applying this framework, the Court in *Ollman* determined that statements labeling the plaintiff a "political activist" who was an "outspoken proponent" of Marxism with an "avow[ed] desire to use the classroom" to indoctrinate his students were constitutionally-protected expressions of opinion. *Id.* at 971-72.

Six years later, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court echoed the work of Judge Starr. In *Milkovich*, the Supreme Court addressed a charge that the plaintiff while under oath in court "lied" – a classically problematic word in libel jurisprudence because it can be either a statement of fact or a statement of opinion depending on context. The opinion by Chief Justice Rehnquist – much like the opinion in *Ollman* – dismissed any "artificial dichotomy between opinion and fact." *Id.* at 19. But in calling for courts to examine the "general tenor" of the work to determine if a reader would understand statements as assertions of objective fact, *id.* at 21, the Chief Justice adopted the approach in *Ollman* and then shaped it based on the facts of the *Milkovich* case to find the assertion that the plaintiff "lied" under oath to be actionable.

This Circuit applied *Milkovich* four years later in a successful defense of the libel suit brought by author Dan Moldea. In *Moldea v. New York Times*, 15 F.3d 1137 (D.C. Cir. 1994) (*Moldea I*), the Court held that the claim in a book review that Moldea was a "sloppy" journalist was sufficiently factual in certain places to support a defamation action. In finding against the newspaper, the Court stated that it was "important to make clear that ... our analysis of this case is not altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story." *Id.* at 1146.

But on rehearing, this Court reversed its earlier holding for "fail[ing] to take sufficient account" of context. *Moldea II*, 22 F.3d at 311. It recognized that *Milkovich* was decided "against the backdrop of th[e] settled principle" that different genres of writing have different influences on the average reader, and that it had "erred in assuming that *Milkovich* abandoned the principle of looking to the context in which [the statement] appears." *Id.* at 314-15. Instead of "disavow[ing] the importance of context," the Supreme Court "simply discounted it in the circumstances of that case." *Id.* at 314. Courts are thus still required to consider the context of published statements when determining whether they are actionable. *Id.* at 310.

If the context is one in which a reader expects to be presented with statements of opinion, *Moldea II* instructs that defendants "must be given some leeway to offer 'rational interpretation'" of the facts. *Id.* at 313. In such cases, the "correct measure" of whether a statement is verifiably false is whether "*no reasonable person could find* that the [defendant's] characterizations were supportable interpretations" of true

underlying facts disclosed to the reader. *Id.* at 317 (emphasis in original). Any statements that fail to satisfy this stringent test are protected opinion. Applying the correct standard, this Court dismissed Moldea's case in its entirety.

The D.C. federal courts since *Moldea II* have consistently held that, "[i]n deciding whether a reasonable factfinder could conclude that a statement expressed or implied a verifiably false fact about" a plaintiff, "the court must consider the statement in context." *Weyrich*, 235 F.3d at 624. In *Weyrich*, this Court reversed summary judgment in favor of plaintiff Paul Weyrich based on an article in The New Republic that the prominent political consultant suffered from "bouts of pessimism and paranoia." *Id.* The Court held that "the First Amendment demands that [it] place these references in their proper context," and because The New Republic was "well[] understood" to be a "magazine of political commentary" the statement was found to be "neither verifiable nor d[id] it imply specific defamatory facts" about the plaintiff. *Id.* at 625. *See also Matusevitch v. Telnikoff*, 877 F. Supp. 1, 5 (D.D.C. 1995) (if statements that plaintiff espoused racialist views were "read in context ... a reader would reasonably be alerted to the statements' function as opinion and not as an assertion of fact").

The broad context here is similarly illuminating. The Blog Post was published in the midst of a fierce and furious rhetorical feud between the Tea Party and the NAACP. The contemporaneous press accounts cited herein only begin to reveal the ferocity of that debate. Sherrod's own July 20, 2010 statement concedes that fact

when she blamed the NAACP for picking a fight with the Tea Party. As Breitbart stated in the Blog Post before turning to Sherrod's remarks:

> For the past week, Americans who consider themselves aligned with the Tea Party movement have suffered the indignity of being falsely labeled racist by the NAACP and their pro-bono publicity managers, the main stream media. The constant calls to "repudiate the racists from your ranks" have not only been insulting, but have also served to force a false standard upon America's fastest growing and most vibrant political movement that no other group could ever live up to nor would ever be asked to live up to.

Compl., Ex. 1 (JA____).

The specific context and language in the Blog Post also loudly and defiantly announce the rhetorical blast that is coming. Breitbart saw the Congressional Black Caucus going "from camera hogs to ostriches in the snap of a finger" and playing the "race card" as "their Stradivarius." Compl., Ex. 1 (JA____). He described the NAACP as "playing with fire" and stirring the "racial hornet's nest." Compl., Ex. 1 (JA____). Depending on a reader's perspective, the word "racist" applied to Sherrod's speech may or may not be fair or fitting but a verifiable and objective statement of fact it is not. *Ollman*, *Milkovich*, and *Moldea II* require examination of context in every case, and there is no question that the publication at issue here, as in *Weyrich*, is known for sharp political commentary and pure opinion.

C. Where context and genre require, courts must find statements non-actionable as opinion or fair comment when they are based on underlying facts disclosed to the readers

The importance of context is crucial to the inquiry into whether a statement is actionable because, as explained above, it changes the "correct measure" of the statement's verifiability. *Moldea II*, 22 F.3d at 317. A statement that is made in a context where a reader expects the author to make interpretive statements is non-actionable opinion if the defendant "show[s] that it offered true facts in support of its judgment that served to support its statement of opinion." *Id.* at 312. In *Moldea II*, this Court found that the assertion about "sloppy journalism" was supported throughout the piece by facts that were principally true or by other supported statements of opinion. *Id.* at 312-13. The book review was thus non-actionable.

Indeed, the newspaper defendant met its burden under the "supportable interpretation" test even though this Court was "troubled" by one passage in the review that appeared to mischaracterize what the author wrote about a famous incident concerning Super Bowl III. *Id.* at 319. But the Court said it was "constrained to conclude" that the passage was "simply one of the "interpretations" offered in support of the reviewer's larger critique of the "sloppy journalism" in the book. *Id.* at 318. Thus, not every single basis for an opinion had to be accurate, the Court ruled, only one or more of them.

In the years since *Moldea II*, courts have continued to apply the "supportable interpretation" test when the context of the allegedly defamatory statements

demonstrates that defendants should be afforded additional "leeway" under the First Amendment. *Id.* at 313. In *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996), this Court affirmed a grant of summary judgment to a sportswriter who in a college basketball preview stated that the plaintiff, a coach, "usually finds a way to screw things up." The Court found that the article in which the allegedly defamatory statement appeared was "critical commentary" to which the "supportable interpretation" standard must be applied. *Id.* at 557. The Court then determined that the facts provided to the reader about the coach's win-loss record were "open to different interpretations by reasonable persons," and that the plaintiff had thus failed to prove that "no reasonable person could find that the characterization … [w]as supported by the facts." *Id.* at 557 (emphasis omitted).

Similarly, in *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580 (D.C. 2000), the D.C. Court of Appeals, in affirming on other grounds, credited a trial court's dismissal of a defamation claim based on a publication which purportedly implied that the plaintiff had violated the Railway Labor Act. In granting summary judgment to the defendant, Superior Court Judge Huvelle found that the reader "would understand" that the allegedly defamatory statement was "supported opinion" that represented the author's "interpretation of the facts presented." *Id.* at 591. Thus, since the reader was "free to

draw his or her own conclusions," the allegedly defamatory implication was protected opinion. *Id.*[27]

D. Statements that Sherrod's speech was racist and discriminatory are constitutionally-protected opinion because they are supported by reference to her own words

Applying the analytical framework of *Ollman*, *Milkovich*, and *Moldea II* to the Blog Post and the months-long war of words between the NAACP and the Tea Party over allegations of "racism," it is evident that the complaint must be dismissed. Sherrod would direct this Court to a truncated opinion inquiry where the sole consideration is whether it is "verifiable" that she gave a racist speech. Because she wrongly believes that her words (and the concept of racism in general) are only susceptible to a single understanding, she argues that it is an objective fact that she did not make racially offensive remarks. Not only is the endlessly arguable subject of the Blog Post far removed from the world of objective fact – "racism" like "sloppy journalism" and "bouts of pessimism and paranoia" is in the eye of the beholder – Sherrod would apply the wrong test to the opinion inquiry. Following D.C. Circuit precedent, this Court instead must look to whether "*no reasonable person could find*" that

[27] Similarly, the common law doctrine of fair comment protects the Blog Post. This body of law "applies where the reader is aware of the factual foundation for a comment, and therefore can judge independently whether the comment is reasonable." *Lane v. Random House*, 985 F. Supp. 141, 150 (D.D.C. 1995) (dismissing defamation claim under fair comment privilege where publisher labeled plaintiff "guilty of misleading the American public" in promotional materials accompanying book that criticized plaintiff's research).

Breitbart's "characterizations [of Sherrod] were supportable interpretations" of the facts disclosed in the two video clips. *Moldea II*, 22 F.3d at 317 (emphasis in original). Under that test, Sherrod's case cannot survive.

Though she identifies six statements in her pleadings, Sherrod's complaint boils down to essentially two bases for finding the statements actionable: 1) the subjective evaluation of her speech as "racist" and "discriminatory" and 2) the assertion that she has "managed" her "federal duties" through the "prism of race" and discriminated against people "in her federally appointed position." As much as she tries to frame this case as a tale of selectively-edited video, each of the video excerpts is a true and complete portion of her remarks and representative of the speech as a whole.

1. "Racist" and "discriminatory"

In statements 2, 4, 5 and 6, Breitbart expresses his belief that Sherrod's speech was evidence of "racist" and "discriminatory" behavior. These subjective assessments are supported by reference to an incontrovertible fact stated by Sherrod herself and disclosed in the video clips – that she initially withheld assistance to a white farmer for no other reason than his race. Sherrod claims that no one could possibly think that she was racist or discriminatory because portions of the speech not included in the excerpts provided to Breitbart show her – in her opinion – to be a racial healer, not a racial divider, due to the support she eventually gave to the white farmer.

What Sherrod refuses to see is that the subjective conclusion Breitbart made regarding her behavior was not that she failed to do the right thing in the end. In fact,

the Blog Post stated that in the video Breitbart had of the speech she *did* ultimately help the white farmer. Compl., Ex. 1 (JA____). Rather, the concern he identified with her conduct was that she didn't do the right thing *from the very beginning*. And the reason she did not was because of race. The disclosed facts also include Sherrod's own ambiguous words in describing her epiphany about the destitute white farmer: No matter how much she tries to move beyond race, she concedes that "it *is* about white and black." *See* Sherrod Tr. at 5 (emphasis added) (JA____). These irrefutable facts, fully disclosed to readers, provide more than the necessary predicate to shield Breitbart's characterizations as "supportable interpretations" of Sherrod's NAACP speech.

Furthermore, in alleging that she did not "admit" to any discriminatory behavior, she again chooses to wrestle with language that is inherently unverifiable. In the context of the disputatious culture of American politics, words such as "admit" or "concede" are classic examples of protected hyperbole. *See Greenbelt Cooperative Pub. Ass 'n v. Bresler*, 398 U.S. 6, 14 (1970) (finding that "even the most careless reader must have perceived" the word "blackmail" when used to describe the negotiating tactics of a public figure as "no more than rhetorical hyperbole" and a "vigorous epithet").

Breitbart disclosed the basis on which he drew his conclusions about Sherrod. Her real quibble is not with the amount of the speech shown in the two excerpts but with what Breitbart makes of her and her story – that her professed fair-dealing with the white farmer was, in his view, just another face of "racism" but with a fake feel-

good ending. *See Stevens*, 855 F.2d at 401 (statement that school principal made "very racist statements" non-actionable as an epithet); *Raible*, 341 F. Supp. at 806 (calling plaintiff "racially prejudiced" protected opinion). The view that her remarks were racist and discriminatory is supported and fully protected.

2. "Managed" her "federal duties" through the "prism of race"/discriminates "in her federally appointed position"

In statements 1 and 3, Breitbart connects the race-conscious sermon Sherrod delivered to the NAACP with her current role in government. His observation that she sees the world "through the prism of race and class distinctions" and takes race into account "in her federally appointed position" is supported by the statements in her speech, which she gave while serving at the highest levels of the USDA. She offered no disclaimer before addressing her listeners, no qualification that she was speaking as a private citizen and not as a top agricultural policy-maker whose personal worldviews would impact decisions made in her federal capacity.

The second video excerpt, in which Sherrod pleads with her NAACP audience to apply for government jobs from which they cannot be fired, provides a clear, truthful basis for Breitbart's subjective evaluation that race also frames her perspective on her USDA work. The USDA, like most federal agencies, has programs in place to achieve more minority representation in its workforce. To some, that is admirable affirmative action; to others it is reverse discrimination. His assessment of Sherrod's statements is opinion because he has disclosed a supportable basis for linking her

USDA duties to her admitted predisposition to perceive the experience of life in racial terms. Readers can judge for themselves whether they agree or disagree with him.

Sherrod would make this case about the use of an episode from the past to define her in the present. But her claim that it was easy to see from her speech that she met the white farmer in 1986, *see* Compl. ¶ 67 (JA____), is irrelevant to the actionability of her lawsuit as well as contrary to the record. The speech makes no such express statements. In hindsight, upon review of the entire speech, it is possible to deduce that she may have met the farmer many years ago, but while she has mentioned him by name and identified the year when they met many times since she initiated this SLAPP lawsuit, not once in her speech does she do either.

The fact that Sherrod's complicated interaction with the white farmer took place before she assumed federal office does not break the connection Breitbart saw between her USDA functions and his evaluation of her present attitudes as racist. Indeed, her entire speech, including the vast majority of her remarks that Breitbart did *not* have in his possession, was permeated with racial distinctions and how they have shaped Sherrod into the person that she is. It reveals a continuing and contemporary determination on her part to advance the interests of African Americans through the exercise of power she held by virtue of her federal office.

Sherrod is not the victim of having a selective editor but of having no editor at all. Her defamation claim must be dismissed under the Anti-SLAPP Act because she is not likely to succeed on the merits. All of Defendants' statements are supportable

interpretations based on truthful disclosed facts and are fully protected as opinion under the First Amendment.[28]

II. The D.C. Anti-SLAPP Act applies to defamation actions brought in federal court and the special motion to dismiss was timely filed

The District of Columbia has joined nearly 30 other jurisdictions to enact special legislation to dispose quickly of lawsuits that threaten to chill speech on matters of public interest. D.C. Code § 16-5501 *et seq.* (Addendum at 1-2). The D.C. Anti-SLAPP Act provides that a defendant who has acted in furtherance of the right to free speech on an issue of public concern may file a special motion to dismiss. § 16-5502(a) (Addendum at 1). Once a defendant makes this showing, the burden shifts to the plaintiff, who must come forward with evidence to prove that the claim is likely to succeed on the merits. § 16-5502(b) (Addendum at 2). If plaintiff fails to meet this burden, the motion is granted, the case is dismissed with prejudice, and the defendant may seek an award of litigation costs, including attorneys' fees. §§ 16-5502(d), 16-5504(a) (Addendum at 2).

A. The Anti-SLAPP Act applies

Federal courts have applied the provisions of state anti-SLAPP statutes against

[28] Sherrod's other claims fail along with her defamation claim. Where an allegedly defamatory statement is found to be non-actionable opinion, any related false light claim must be dismissed. *See Weyrich*, 235 F.3d at 627-28; *Moldea I*, 15 F.3d at 1151. District of Columbia law bars claims for false light or intentional infliction of emotional distress where there is no defamation as a matter of law. *See Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 317 (D.C. 2006).

claims for defamation and related torts for more than a decade. The three appellate courts that have decided the issue to date – the First, Fifth and Ninth Circuits – have all concluded that anti-SLAPP statutes are generally applicable in federal courts under *Erie* R.R. *v. Tompkins*, 304 U.S. 64 (1938).

While the general rule has been that federal courts sitting in diversity must apply the substantive law of the state and the procedural rules of the federal courts (*see id.* at 78), the Supreme Court has clarified that the line between substantive and procedural is not necessarily as clear as *Erie* had implied. In *Hanna*, 380 U.S. at 471, the Supreme Court stated that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes" and "each implies different variables depending upon the particular problem for which it is used."

Federal courts follow a two-part test in determining whether a state law is pre-empted under *Erie*. First, a court must determine whether the state statute is in "direct collision" with any Federal Rule of Civil Procedure. *Hanna*, 380 U.S. at 472. The contours of what constitutes a "direct collision" have been addressed in subsequent Supreme Court rulings, including recently in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010), where Justice Scalia wrote in a 5-4 decision that a court must determine whether the federal rule "answers the question in dispute." Justice Stevens, who provided the fifth vote for the majority and did not join the section of Justice Scalia's opinion quoted above, wrote in a concurring opinion that a court must first determine "whether the scope of the federal rule is

sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law." *Id.* at 1451 (Stevens, J. concurring) (quotations omitted). Second, if the state law does not conflict with the procedural rule, a court must make the "typical, relatively unguided *Erie* choice" by analyzing whether application of the state law would further the goals of *Erie* – that is, the "discouragement of forum-shopping and avoidance of inequitable distribution of the laws." *Hanna*, 380 U.S. at 468, 471.

The Ninth Circuit in *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999), examined whether specific provisions of the California anti-SLAPP law – which, like the D.C. statute, enables a libel defendant to make a preliminary dispositive motion and obtain attorneys' fees if it prevails – conflicted with Rules 8, 12 and 56 of the Federal Rules of Civil Procedure. It found no "direct collision" and further held:

> Although Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's "special motion to strike" adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a[n] entitlement to fees and costs. Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin aims" of the Erie doctrine.

Id. at 972-73. Both the federal rules and the anti-SLAPP statute "can exist side by side … each controlling its own intended sphere of coverage without conflict." *Id.* at 972.

The Fifth and First Circuits also held that anti-SLAPP statutes apply in federal court. In *Henry v. Lake Charles American Press LLC*, 566 F.3d 164 (5th Cir. 2009), the court recognized that the statute was enacted "as a procedural device to be used early in legal proceedings to screen meritless claims pursued to chill one's constitutional rights under the First Amendment." *Id.* at 169. However, because the law was only "nominally procedural," it would still "govern[] this diversity" action. *Id.* at 168. In *Godin v. Schencks,* 629 F.3d 79, 88 (1st Cir. 2010), concluded that the Maine anti-SLAPP statute "does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function … 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 [] activities." *Id.* at 88. Numerous federal district courts in multiple jurisdictions have also invoked anti-SLAPP protections.[29]

Against this widespread practice, a few district courts have decided the issue the other way. The continued validity of the two unpublished decisions from Massachusetts relied on by the District Court here, however, is questionable since

[29] *See*, *e.g.*, *Tennenbaum v. Arizona City Sanitary Dist.*, 799 F. Supp. 2d 1083 (D. Ariz. July 29, 2011); *Buckley v. DIRECTV*, 276 F. Supp. 2d 1271 (N.D. Ga. 2003); *Chi v. Loyola University Medical Center*, 787 F. Supp. 2d 797 (N.D. Ill. 2011); *Containment Tech. Group Inc. v. American Soc. of Health Sys. Pharmacists*, 2009 WL 838549 (S.D. Ind. March 26, 2009); *Russell v. Krowne*, 2010 WL 2765268 (D. Md. July 12, 2010); *Monaco Entertainment Group, LLC v. City of El Paso*, Cause No. EP-11-CV-561-DB (W.D. Texas April 3, 2012) (Addendum at 3-9); *Bible & Gospel Trust v. Twinam*, 2008 WL 5245644 (D. Vt. Dec. 12, 2008); *Aronson v. Dog Eat Dog Films Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010).

both cases pre-date the First Circuit's decision in *Godin*. *See Sherrod*, 843 F. Supp. 2d at 86 n.5.

Judge Wilkins' ruling in *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012), is thus the last decision still standing contrary to the rulings of courts of appeals and district courts across the country. In holding that the D.C. Anti-SLAPP Act conflicted with Rules 12(b)(6) and 56 and therefore cannot be applied in federal court, the *3M* court misconstrued unrelated precedent from this Circuit and refused to follow the direct authority from the other circuits that held there was no such conflict.

The *3M* court contends that decisions issued by this Court some 60 years ago, Advisory Committee Notes to the 1946 Amendments to Rule 12, and even the transcript of an Advisory Committee meeting in 1946, provide that Rules 12 and 56 were meant to be the "exclusive means" for federal courts to rule on pretrial motions seeking to dispose of cases on the merits. 842 F. Supp. 2d at 97. These sources, however, merely stand for the straightforward principle that Rules 12 and 56 provide means for litigants in federal courts to seek dismissal of a case based on the pleadings or on matters outside the pleadings.

Neither the cases from this Circuit, such as *Callaway v. Hamilton Nat. Bank of Wash.*, 195 F.2d 556, 558-59 (D.C. Cir. 1952), nor the advisory committee materials from 1946, actually state that the rules are necessarily meant to preempt *entirely* any other mechanism for pretrial disposition of a matter or to interfere with important policy interests advanced by legislation, such as the D.C. Anti-SLAPP Act. Indeed,

other courts that have examined this issue have reached the opposite conclusion, finding, for instance, that there was "no indication that Rules 12 or 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims," *Newsham*, 190 F.3d at 972-73, or that Rules 12 and 56 are "not so broad as to cover the issues within the scope" of the anti-SLAPP statute. *Godin*, 629 F.3d at 88.

The *3M* court merely states that it "disagrees with" and "declines to follow" the *Godin* and *Newsham* rulings, and it fails to cite any precedent where the Supreme Court, this Court, or any other court expressly stated that Rules 12 and 56 *exclusively* control any pretrial adjudication. The *3M* ruling fails to provide a sufficient basis for ignoring the well-established authority from courts across the country that anti-SLAPP statutes can and should be applied in federal court.[30]

B. Defendants' anti-SLAPP motion was timely filed and properly before the District Court

Because the D.C. Anti-SLAPP Act was in effect at the time Defendants filed their special motion to dismiss under the statute, it applies in these proceedings and no retroactive application of the statute is necessary. The District Court erred in applying such an analysis and in finding that the special motion was untimely. *Sherrod*, 843 F. Supp. 2d at 84-85 (JA____).

[30] Subsequent to the *3M* ruling, another district judge in this Circuit rejected the reasoning in *3M*, found *Godin*, *Henry*, and *Newsham* to be "persuasive," and granted a motion to dismiss under the D.C. Anti-SLAPP Act. *See Farah v. Esquire Magazine, Inc.*, 2012 WL 1970897 (D.D.C. June 4, 2012) (Collyer, J.).

On December 7, 2010, the D.C. Council passed the Act. The legislation was signed by the mayor on January 18, 2011. Sherrod filed her complaint on February 11, 2011 while the statute was undergoing mandatory review by Congress. On March 31, 2011, the review period ended and the Act went into effect. On April 12, 2011, the District Court granted a second consent motion to allow the Defendants additional time to file their initial pleading. In its order, it stated, "Defendants Andrew Breitbart and Larry O'Connor have up to and including April 18, 2011, *to answer, move or otherwise plead in response to Plaintiff's Complaint*." (JA____) (emphasis added).

On April 18, 2011, Defendants filed their special motion to dismiss pursuant to the Act. The motion – filed in full accordance with the broad extensions granted by the District Court and when the statute had been in effect for almost three weeks – was thus timely and an appropriate request for relief under an existing law. The District Court erred in holding otherwise. *Sherrod*, 843 F. Supp. 2d at 86 (JA____).[31]

No "retroactive" application of the statute was ever sought by the Defendants. The Ninth Circuit was confronted with a similar scenario in *Newsham*, 190 F.3d at 971-73, and applied the California anti-SLAPP statute without conducting any retroactivity analysis. In 1988, the plaintiffs in *Newsham* brought a *qui tam* action

[31] The District Court's citation to *Blumenthal v. Drudge*, 2001 U.S. Dist. LEXIS 1749, *7-8 (D.D.C. Feb. 13, 2001), is inapposite because there were no court-ordered extensions in that case.

alleging that defendant Lockheed submitted millions of dollars in false claims for excessive nonproductive labor hours on government projects. *Id.* at 966. In 1991, Lockheed filed state law counterclaims for breach of duty. *Id.* at 967. It was not until 1993, two years after the counterclaims were filed, that the California legislature passed its anti-SLAPP statute. *Id.* at 970.

After the anti-SLAPP statute went into effect, Lockheed moved to dismiss the counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) and the California anti-SLAPP statute. *Id.* at 972. The Ninth Circuit held that the anti-SLAPP statute applied without engaging in any retroactivity inquiry even after acknowledging that, at the time Lockheed filed its counterclaims, "the Anti-SLAPP statute had not yet passed." *Id.* at 972. As demonstrated in *Newsham*, it is irrelevant when Sherrod filed her complaint.

Indeed, courts consistently have held that anti-SLAPP statutes apply to pending cases. *See, e.g., Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 352 (1995) ("[T]he statute applies to actions which accrued before its effective date because it does not change the legal effect of past conduct."); *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1193-94 (W.D. Wash. 2010) (applying provisions of anti-SLAPP statute to case in federal court pending before enactment); *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E.2d 1198, 1208 (Ill. App. 2010) (applying newly enacted anti-SLAPP statute to pending case); *Anderson Development Co. v. Tobias*, 116 P. 3d 323, 336 (Utah 2005) (applying anti-SLAPP statute to case after statute was enacted where initial claims had

been filed prior to enactment). Defendants filed their special motion under the Act after the statute went into effect, and it was thus properly before the District Court.

Furthermore, the legislative history of the statute leaves no doubt that the D.C. Council intended for the Act to apply to cases pending at the time of enactment. In the "Fiscal Impact Statement – 'Anti-SLAPP Act of 2010,'" which was submitted to the Council before it issued its Report on the Act and was attached thereto, the Council was informed that "[i]f effective, the proposed legislation could have a beneficial impact on *current* and potential SLAPP defendants." Report on Bill 18-893, "Anti-SLAPP Act of 2010, Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010) ("Council Report") (Addendum at 34) (emphasis added). Because Breitbart and O'Connor were "current" SLAPP defendants when the statute went into effect, their motion was proper.

The District Court incorrectly determined that to apply the anti-SLAPP Act it would have to find that the statute applied retroactively. It then held that because there was "no clear legislative intent of retroactivity" in the law, *see Sherrod*, 843 F. Supp. 2d at 85 (JA____), it could not give the statute retroactive effect unless it found that it was purely procedural and lacked substantive consequences. *Id.* (JA____). Finding the Act "substantive" in nature, the District Court said that it could not be applied retroactively. *Id.* (JA____). Assuming that this analysis was necessary, which it was not, the District Court still had it wrong.

There is no change in the legal or substantive consequences for any conduct

alleged in the complaint that occurred prior to the Act's enactment. The elements of libel remain the same today as they were before the Act was passed. If the Blog Post was actionable when Sherrod filed her suit, it would remain actionable – notwithstanding the later enactment of the Act. Accordingly, even if the District Court was correct that a retroactivity analysis was required, it should have found that the statute must be retroactively applied because it did not change the substantive law of libel.

III. This Court has jurisdiction to hear this appeal under the collateral order doctrine

This Court's jurisdiction over this appeal is proper under 28 U.S.C. § 1291 and the collateral order doctrine as set forth by the Supreme Court in *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) and its progeny. The collateral order doctrine governs a "small class of rulings" that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Id.* at 546. These claims are "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." *Id.*

As the Supreme Court stated, the collateral order doctrine "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it[.]" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citing *Cohen*, 337 U.S. at 546). Section 1291 therefore

> entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do

> but execute the judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as "final."

Id. at 867 (quotations and citations omitted).

Under *Cohen*, the Supreme Court has defined the "latter category" of appealable non-final decisions as "compris[ing] only those district court decisions [(1)] that are conclusive, [(2)] that resolve important questions completely separate from the merits, and [(3)] that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip.*, 511 U.S. at 867. The interlocutory appeal of such orders is permissible and "do[es] not go against the grain of § 1291." *Id.* at 868.

The majority of courts that have confronted the issue of whether rulings under state anti-SLAPP statutes can be immediately appealable have concluded that jurisdiction exists over such appeals under the collateral order doctrine.

A. The Ninth, Fifth and First Circuit Courts of Appeal have ruled that appellate jurisdiction exists under the collateral order doctrine for appeals of orders pursuant to state anti-SLAPP laws

The Ninth Circuit was the first court to address whether a party could immediately appeal an unsuccessful anti-SLAPP motion. In concluding that the denial of a motion under California's anti-SLAPP statute is immediately appealable, the court in *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003), determined that the appeal satisfied all three-parts of the *Cohen* test as articulated in *Digital Equipment*.

First, the court held that denial of the anti-SLAPP motion was "conclusive as to whether the anti-SLAPP statute required dismissal" of the lawsuit because "if an anti-SLAPP motion to strike is granted, the suit is dismissed." *Id.* at 1025. Second, it found that denial of the anti-SLAPP motion "resolve[d] a question separate from the merits" because its purpose "is to determine whether the defendant is being forced to defend against a meritless claim." *Id.* Thus, the anti-SLAPP issue "exists separately from the merits of the defamation claim itself." *Id.*

Third, the court in *Batzel* held that denial of the anti-SLAPP motion was unreviewable on final judgment because the motion "is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression." *Id.* The court concluded that "[i]f the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression." *Id.* As such, the Ninth Circuit held that "a defendant's rights under the anti-SLAPP statute are *in the nature of an immunity*" because it "protect[s] the defendant from the burdens of trial, not merely from ultimate judgments of liability." *Id.* (emphasis added). *See also Hilton v. Hallmark Cards*, 580 F.3d 874, 880 (9th Cir. 2009) (reaffirming holding in *Batzel* that anti-SLAPP statutes fall within the "narrow class" of collateral orders).

The Fifth Circuit in *Henry* found that the denial of an anti-SLAPP motion pursuant to Louisiana's statute is immediately appealable as a collateral order. It explained that the purpose of the statute was "to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights" and that the law "thus provides a right not to stand trial, as avoiding the cost of trial is the very purpose of the statute. … If an [anti-SLAPP] motion is erroneously denied and unappealable, then the case proceeds to trial and this right is *effectively destroyed*." 566 F.3d at 178 (emphasis added).

Similarly, the First Circuit in *Godin*, 629 F.3d at 84-85, held that a district court's ruling refusing to apply the Maine anti-SLAPP statute was directly appealable as a collateral order because it was "conclusive as to the disputed question" of whether the anti-SLAPP motion should be granted, was "distinct from the merits of [the] action" and raised the "important issue" of whether the anti-SLAPP statute was applicable in federal court, and "would be effectively unreviewable on appeal from a final judgment."

This appeal of an order denying a motion under the D.C. Anti-SLAPP Act satisfies the *Cohen* test, and for the reasons identified in *Batzel*, *Hilton*, *Henry*, and *Godin*, the Court has jurisdiction to hear the appeal. Indeed, the D.C. Anti-SLAPP Act was intended 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." Council Report (Addendum at 10). As the D.C. Council noted, SLAPPs

> have been increasingly utilized over the past two decades as a means to muzzle speech … 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.

Id.

Here, as in *Batzel*, "a defendant's rights under the anti-SLAPP statute are *in the nature of an immunity*" because the statute "protect[s] the defendant from the burdens of trial, not merely from ultimate judgments of liability." 333 F.3d at 1025 (emphasis added). As such, an appeal after final judgment "would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression." *Id.* *See also Godin*, 629 F.3d at 84 (denial of anti-SLAPP motion "would be effectively unreviewable on appeal from a final judgment").

Sherrod has pointed to two rulings where the Ninth Circuit concluded that interlocutory appeals of orders denying anti-SLAPP motions are not appealable under the collateral order doctrine. Both decisions – *Englert v. MacDonnell*, 551 F.3d 1099 (9th Cir. 2009) (interpreting Oregon anti-SLAPP statute), and *Metabolic Research, Inc. v. Ferrell*, 2012 U.S. App. LEXIS 12280, *22 (9th Cir. June 18, 2012), *modifying earlier ruling,* 668 F.3d 110 (construing Nevada anti-SLAPP statute) – rely on reasoning that

has been rejected by the other circuits (as well as other panels in the Ninth Circuit) and is otherwise inapplicable under District of Columbia law.[32]

B. The existing case law in this Circuit supports a finding of jurisdiction to hear this appeal

The Supreme Court and this Court have applied the collateral order doctrine in similar contexts, such as where a defendant seeks an appeal to vindicate a "particular value of a high order" in support of his right not to stand trial at all. *Will v. Hallock*, 546 U.S. 345, 352-53 (2006) (explaining that an order that denies an asserted right to avoid the burdens of trial "that would imperil a substantial public interest" is "effectively unreviewable from a final judgment" (quotations omitted)). Such contexts include, among others:

- double jeopardy (*Abney v. U.S.*, 431 U.S. 651, 661-62 (1977));
- qualified immunity (*Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985));

[32] The courts in *Henry*, *Godin*, and *Hilton* declined to follow *Englert*. In addition, the law relating to interlocutory appeals in state court actions in Oregon and Nevada (which the Ninth Circuit appears to rely upon in those cases) is not comparable to District of Columbia law where the D.C. Court of Appeals has recognized the collateral order doctrine and cited *Henry* as an example of a federal appeals court finding "another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights." *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138 (D.C. 2010). The *Henry* court criticized the reasoning that the lack of a state court appellate remedy in the statute had any bearing upon whether an anti-SLAPP statute was reviewable as a collateral order in federal court. "Like Oregon's anti-SLAPP statute, [the Louisiana statute] does not include a provision expressly authorizing immediate appeal. … In any event … we hold that [the statute] creates a right not to

(continue)

- sovereign immunity (*La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837 (D.C. Cir. 2008));
- the Speech and Debate Clause of the U.S. Constitution (*In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009));
- Presidential immunity (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)).

In each of these cases, the Supreme Court or this Court found a substantial public interest that was "embodied in a constitutional or statutory provision entitling a party to immunity from suit." *Digital Equip.*, 511 U.S. at 879. Indeed, as the Supreme Court has cautioned, where immunity is involved there is "little room for the judiciary to gainsay its importance." *Id.* As articulated by the D.C. Council, the statute here invokes the same "substantial public interest" – immunity from suit – sufficient to establish collateral order review. *See supra* at 49-50.

The Court's interest in protecting the First Amendment rights of speakers on matters of public concern and preventing the "chilling effect" this case would have on the "exercise of constitutionally protected rights" is no less important than the other enumerated interests found worthy of protection in the jurisprudence in this area. The D.C. Anti-SLAPP Act falls squarely within the "narrow class" of cases in which

(continued)
stand trial, and denial of this right is therefore 'effectively unreviewable.'" *Henry* at 566 F.3d 183.

collateral orders are not only permissible but indeed required to serve important policy goals. *Digital Equip.*, 511 U.S. at 867.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the complaint dismissed in its entirety with prejudice under the D.C. Anti-SLAPP Act with attorneys' fees and costs under the Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

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/s/ Mark I. Bailen

7th day of September, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2012, I caused a copy of the foregoing Brief of Defendant/Appellant Larry O'Connor, which was filed by CM/ECF this same day, to be served via CM/ECF on all filers registered in this case.

/s/ Mark I. Bailen