UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY SHERROD, Appellee, v. ANDREW BREITBART and LARRY O'CONNOR, Appellants.	)	No. 11-7088 ORAL ARGUMENT NOT YET SCHEDULED

EMERGENCY MOTION TO STAY DISTRICT COURT'S OCTOBER 31, 2012 ORDER COMMENCING DISCOVERY PROCEEDINGS DURING PENDENCY OF APPEAL AND MOTION FOR TEMPORARY STAY OF ORDER PENDING ADJUDICATION OF EMERGENCY STAY

Pursuant to Federal Rule of Appellate Procedure 8(a) and D.C. Circuit Rule 8(a), Defendant-Appellant Larry O'Connor hereby moves for an emergency stay of a District Court order to proceed with discovery in this case while the appeal of an order denying his special motion to dismiss pursuant to the District of Columbia Anti-SLAPP Act is pending before this Court. O'Connor also seeks a temporary stay of the order pending adjudication of this emergency motion. The Court and counsel for Plaintiff-Appellee Shirley Sherrod have been notified of this motion by telephone before filing. Counsel for Sherrod does not consent to the requested relief.

I. INTRODUCTION

While O'Connor is reluctant to file a motion that should be "unnecessary" to use this Court's precise term, the District Court has given him no choice. The

District Court's decision to proceed with discovery while an appeal on a dispositive issue is pending before the Court of Appeals has made this emergency motion for a stay necessary. It is all the more "necessary" because the precise purpose of the public policy underlying the basis for the dispositive motion under the Anti-SLAPP Act is to stop discovery and other litigation costs that chill free speech. The Anti-SLAPP Act was enacted to help defendants "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." *See* Report on Bill 18-893, Committee on Public Safety and the Judiciary, Nov. 18, 2010, at 1 (attached hereto as Exhibit A). As the D.C. Council recognized, "[s]uch cases are often without merit, but achieve [the plaintiff's] intention of punishing or preventing opposing points of view." *Id.*

The Court of Appeals has reversed the District Court for committing a fundamental jurisdictional error before. In *Bombardier Corp. v. National Railroad Passenger Corp.* (*Amtrak*), No. 01-2335 (Oct. 31, 2002) (Leon, J.), the District Court denied Amtrak's motion to stay the proceedings while it appealed an order to compel arbitration. Slip op. 2, 4 (attached hereto as Exhibit B). Amtrak then sought from this Court a stay of the proceedings. The Court ordered the relief Amtrak requested while noting that the motion for a stay was "unnecessary." *See Bombardier Corp. v. National Railroad Passenger Corp.*, No. 02-7125, 2002 U.S. App. LEXIS 25858, **1-2 (D.C. Cir. Dec. 12, 2002). The Court held:

> [B]ecause a non-frivolous appeal from the district court's order divests the district court of jurisdiction over those aspects of the case on appeal, this court has exclusive jurisdiction to resolve the threshold issue whether the dispute is arbitrable, and the district court may not proceed until the appeal is resolved.

Here, as in *Bombardier*, this Court has "exclusive jurisdiction to resolve the threshold issue" of whether Sherrod's complaint should be dismissed pursuant to the D.C. Anti-SLAPP Act. *See* Brief of Appellant Larry O'Connor, Sept. 7, 2012, at 53. The appeal is neither frivolous nor defective on its face. Because the questions under review are dispositive, no portion of the discovery Sherrod has requested is segregable from the issues now pending before this Court. The District Court has no jurisdiction to proceed to discovery, and this Court's intervention to protect the status quo is, unfortunately, necessary.

O'Connor files this motion on an emergency basis because in an e-mail on November 12, 2012, counsel for Sherrod stated that she sought answers to discovery from O'Connor no later than November 30, 2012. O'Connor also seeks a temporary stay of the District Court's October 31, 2012 order to give this Court sufficient opportunity to consider the merits of the emergency motion for a stay and to ensure that O'Connor is not required to respond to the discovery before this emergency motion can be adjudicated.

II. STATEMENT OF FACTS

On April 18, 2011, O'Connor and Defendant Andrew Breitbart filed a joint motion to dismiss Sherrod's complaint under the D.C. Anti-SLAPP Act. *See* D.C.

Code § 16-5501 *et seq.* On July 19, 2011, the District Court heard arguments on the motion. On July 28, 2011, it issued a minute order denying the anti-SLAPP motion. Minute Order, July 28, 2011. On August 26, 2011, O'Connor and Breitbart noticed an appeal of the order denying the anti-SLAPP motion. [Dkt. 41.]

In the interim, on August 2, 2011, Sherrod served her first set of discovery consisting of a single document request and a single interrogatory to O'Connor and Breitbart regarding the identity of and documents relating to the John Doe defendant who provided the excerpts of Sherrod's NAACP speech at issue in this case. O'Connor and Breitbart responded by letter dated September 6, 2011 advising Sherrod that the case had been stayed as a consequence of the appeal. On September 14, 2011, Sherrod served a second set of discovery requests for documents and other information aimed squarely at the core issues of the case, including as follows:

- All information and documents supporting Defendants' contention that none of the alleged defamatory statements in fact are defamatory;
- All actions on the part of Defendants to ascertain the truth or falsity of the alleged defamatory statements, and all related documents;
- The identity of each person who directly or indirectly participated in the publication of the July 19, 2010 Blog Post on BigGovernment.com, and all documents reflecting such actions;

- All information relating to edits or alterations made to video to Plaintiff's speech, and all related documents;
- All facts and documents relating to the "correction" to the Blog Post;
- All documents concerning Plaintiff, including as to her employment by and resignation from the U.S. Department of Agriculture;
- All documents concerning the Blog Post;
- All documents concerning the video clips embedded in the Blog Post;
- All documents concerning O'Connor's employment with any and all Breitbart-related entities;
- All facts explaining why Plaintiff's claim and award in *Pigford v. Glickman* class action is relevant to this case;
- All documents relating to or reflecting the organizational structure of all Breitbart-related entities, including Breitbart.com LLC, Breitbart.com, Breitbart.tv, BigGovernment.com, BigJournalism.com, and BigPeace.com;
- All facts and documents relating to Defendants' affirmative defenses.

A. The District Court stays discovery

On August 29, 2011, after serving her first set of discovery but before serving her second set, Sherrod moved for a conference pursuant to Federal Rule of Civil Procedure 16 in order to commence discovery. [Dkt. 43.] The discovery she sought was not needed to oppose the special motion to dismiss, which raised only legal

issues. On October 12, 2011, without waiting for a response from O'Connor and Breitbart, the District Court granted her motion. [Dkt. 44.] O'Connor and Breitbart objected on grounds that the notice of appeal had stripped the District Court of jurisdiction and that it could not proceed during the pendency of the appeal. [Dkt. 45.] On October 17, 2011, the District Court issued a minute order withdrawing its previous order and stating that the motion for a Rule 16 conference and a previously-filed motion for remand would "remain open until the Court of Appeals rules on the Defendants' pending appeal." Minute Order, October 17, 2011.

On October 21, 2011, after the District Court had effectively stayed the discovery process, Sherrod moved in this Court to dismiss the appeal or for summary affirmance of the District Court's decision. On February 6, 2012, this Court remanded the case to the District Court ordering it to issue a statement of reasons explaining why it had denied the special motion to dismiss under the Anti-SLAPP Act. On February 15, 2012, the District Court complied. [Dkt. 50.] *See Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012). Stating that writing an opinion on the anti-SLAPP motion had not been a "realistic option" due to its caseload, the District Court asserted that it had denied the motion because it did not believe that the new law applied to this case. *Id.* at 84 n.2.

On March 1, 2012, Breitbart died suddenly at the age of 43. Breitbart is no longer a party in either the District Court or this Court.[1]

B. District Court *sua sponte* notices status conference

On June 26, 2012, the District Court noticed *sua sponte* a status conference for July 10, 2012. At this point in time, this Court had not ruled on either the appeal of the denial of the anti-SLAPP motion – to which O'Connor was now the only party – or on Sherrod's motion to dismiss the appeal or for summary affirmance. The District Court stated at the beginning of the July 10, 2012 hearing:

> [T]he Court of Appeals sent the case back to me on February 6 with a statement of reasons. I gave them a statement of reasons in nine days. That was February 15. July 15 is around the bend. I don't know what's going on. Maybe they're writing for the ages. I don't know what they're doing, I just have no idea, but it seemed to me that I should get some sense of what's – what, if anything, there is that can be done rather than let the case just sort of float. Now, that may be the pleasure of the Court of Appeals. They may just want it to float along . . . Now, as a general rule, when a case goes on appeal, the [District] Court loses jurisdiction over it, but there may be some things that I could be helpful with.

July 10, 2012 Hearing Tr. at 4 (attached hereto as Exhibit C).

Counsel for Sherrod argued in favor of commencing discovery, claiming that "there's plenty left over in terms of this case, quite apart from the interlocutory appeal based on the collateral order doctrine that we're dealing with." *Id.* at 10. But in opposing any discovery when a fully dispositive appeal was pending at the Court of Appeals that if granted would "dismiss the case in its entirety," counsel for O'Connor

[1] On August 14, 2012, counsel for Breitbart filed a suggestion of death in this Court. There has been no substitution of a new party to take Breitbart's place.

pointed out that the District Court had considered this issue in October 2011 and had then correctly decided to withdraw its order for a Rule 16 scheduling conference until this Court had ruled on the pending appeal. *Id.* at 13.

The District Court suggested that it would convene the parties again in September or October to revisit the issue of commencing discovery. It made it clear that it was eager to exert jurisdiction over the case again:

> I don't know how long it is going to take the Court of Appeals. I'm frankly a little stunned that it's taking this long. I mean, I responded within nine days . . . We have a case that's a live case that needs to move forward, and I think everyone in this room thought by now we would have heard something by now; we haven't and time is wasting. . . . I understand [O'Connor's] position and it certainly seemed like the right approach way back when . . . . But I'm not going to just sit by idly for the next few months and let this thing just sort of float along.

Id. at 10, 12, 14, 18.

The case did not "just sort of float along." One week later, on July 18, 2012, this Court denied Sherrod's motion for summary affirmance and ordered her motion to dismiss the appeal to be heard along with the appeal of the District Court's denial of the anti-SLAPP motion. The case was referred to a merits panel for full briefing. On July 26, 2012, this Court set a briefing schedule that was set to conclude on November 28, 2012.[2]

[2] The briefing was suspended on October 22, 2012 following a motion by the D.C. Attorney General seeking leave to file an *amicus curiae* brief and to modify the briefing schedule of the parties in order to accommodate the filing of the Attorney General's brief. The motion remains pending.

C. Sherrod moves for full discovery as the appeal moves to full briefing

On August 10, 2012, *after* this Court denied her motion to dismiss the appeal or for summary affirmance and ordered full briefing on O'Connor's appeal, Sherrod filed in the District Court a Motion to Commence Discovery, to Convene a Rule 16 Scheduling Conference, and to Compel Responses to her Outstanding Discovery Requests. [Dkt. 55.] In her motion, Sherrod asked the District Court to proceed with all discovery, including wide-ranging depositions identified by Sherrod and interrogatories seeking the identity of the John Doe defendant. *Id.* On August 27, 2012, O'Connor again opposed discovery on the grounds that the District Court has been divested of jurisdiction to proceed. [Dkt. 56.]

On September 7, 2012, pursuant to this Court's scheduling order, O'Connor filed a merits brief seeking reversal of the District Court's order denying his special motion to dismiss under the Anti-SLAPP Act. In his prayer for relief, he has asked for "the complaint to be dismissed in its entirety with prejudice." *See* Brief of Appellant Larry O'Connor, Sept. 7, 2012, at 53. Because Breitbart is no longer a party to the appeal, no brief was filed on his behalf. On September 21, 2012, Public Citizen, Inc. and the American Civil Liberties Union of the Nation's Capital filed an *amici curiae* brief supporting O'Connor's position that denial of a special motion to dismiss under the D.C. Anti-SLAPP Act is immediately appealable because the statute affords protections that are akin to an immunity from suit. On September 24, 2012,

nearly 20 national news organizations filed an *amici curiae* brief supporting O'Connor's position that the Anti-SLAPP Act applies in federal court.

On October 3, 2012, while preparing Sherrod's merits brief to this Court on the viability of the claims in the complaint, counsel for Sherrod argued to the District Court at a status hearing that full discovery on these claims should proceed despite the fact that the issues on appeal were potentially dispositive of the case: "[T]heir argument is, well, if we win in the D.C. Circuit, this case is gone so we shouldn't have to go forward with discovery here. First of all, I would just say that they would have to win on everything in the D.C. Circuit." October 3, 2012 Hearing Tr. at 26 (attached hereto as Exhibit D). Counsel for O'Connor made it clear at the hearing that the District Court lacked jurisdiction to proceed in any way because the presence of dispositive issues before the Court of Appeals, the risk of inconsistent rulings if the District Court were to proceed, and the immunity questions regarding the Anti-SLAPP Act all weighed strongly against it. *Id.* at 22-24.

D. The District Court reverses its position and starts discovery

Nevertheless, on October 31, 2012, the District Court granted Sherrod's motion to commence discovery even while acknowledging that the Court of Appeals is presently considering "whether this case should be dismissed under the D.C. Anti-SLAPP Act." [Dkt. 61.] (attached hereto as Exhibit E). In its five-page order, the District Court did not identify any change in circumstance since its ruling one year earlier in which it found that discovery was premature "until the Court of Appeals

rules on the Defendants[']' pending appeal." Minute Order, Oct. 17, 2011. The District Court took no position on whether O'Connor's appeal could proceed under the collateral order doctrine. Instead, it concluded without analysis that "proceeding with discovery in this case will not conflict with the issues on appeal." [Dkt. 61.] This motion to the Court of Appeals followed.[3]

III. ARGUMENT

This Court has recognized the well-established rule that a non-frivolous, properly-noticed appeal "divests the district court of jurisdiction over those aspects of the case" involved in the appeal and that the district court "may not proceed" until the appeal is decided. *See Bombardier*, 2002 U.S. App. LEXIS 25858, at **1-2. A party should not have to move an appellate court to have this basic jurisdictional rule observed by a trial court. But since confirmation of this rule is now necessary, O'Connor requests a stay of the proceedings in the District Court pending disposition of his appeal. In deciding whether a stay is warranted, this Court must consider: (1) whether the petitioner is likely to prevail on the merits; (2) whether, without a stay, the petitioner will be irreparably injured; (3) whether the issuance of a stay will substantially harm other parties interested in the proceeding; and (4) wherein lies the public interest. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*,

[3] Though he is deceased and no longer a party, the District Court inexplicably ordered Breitbart to respond to discovery. This emergency motion is filed solely on behalf of O'Connor.

559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Each of the factors may "be applied flexibly according to the unique circumstances of each case." *McSurely v. McClennan*, 697 F.2d 309, 317 (D.C. Cir. 1982).[4]

A. O'Connor is likely to succeed on the merits

O'Connor is likely to succeed on the merits of the jurisdictional question because (1) the District Court has proceeded with discovery while O'Connor's appeal is pending on an issue that might dispose of the case in its entirety and (2) the discovery the District Court has ordered poses the risk of inconsistent rulings between the appellate and trial courts.

It is a well-settled rule that only one court is vested with jurisdiction at any time. As the Supreme Court stated in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982):

> [A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

There are three exceptions to the *Griggs* rule, and none of them applies here. The first exception allows a district court to proceed during an appeal if the order at issue is non-appealable. But the category of non-appealable cases is generally limited

[4] O'Connor files this motion pursuant to Federal Rule of Appellate Procedure 8(a)(2) and has not moved in the District Court as the October 31, 2012 order beginning discovery failed to afford O'Connor the relief he requested.

to those where the notice of appeal is defective on its face. *See Ruby v. Secretary of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966) ("Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case."); *United States v. Sparks*, Crim. No. 12-113, 2012 U.S. Dist. LEXIS 115221 (D.D.C. Aug. 10, 2012) (same).

The District Court has not declared that its July 28, 2011 order denying the anti-SLAPP motion is non-appealable. To the contrary, it expressly stated in its October 31, 2012 order that is the subject of this motion that "[t]his issue will likely be addressed by the Court of Appeals" and that it "takes no position on the matter." [Dkt. 61.] Moreover, while Sherrod has argued that the order is not appealable under the collateral order doctrine, this Court has refused to summarily affirm the District Court or dismiss O'Connor's appeal. Instead, it has ordered full briefing on the appeal. Even if the District Court had deemed the order non-appealable (which it has not), it would usurp the authority of the Court of Appeals for the District Court to exercise jurisdiction over a case when the precise issue pending before this Court could terminate it.

The second exception to the *Griggs* rule allows a district court to proceed if it classifies an otherwise proper appeal as substantially "frivolous." *See Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) ("In the absence of the district court's reasoned finding of frivolousness … the trial is automatically put off."). The District Court has

not made any finding that the pending appeal is frivolous. Indeed, this Court has denied every attempt by Sherrod to short-circuit O'Connor's appeal, and full briefing is now underway on several issues under the Anti-SLAPP Act, including whether Sherrod's claims must be dismissed. The second *Griggs* exception thus does not apply.

The third exception under *Griggs* is that a matter may proceed in a district court while the appeal of a collateral order is pending if "segregable" issues exist which will not be impacted by the appeal. *See Apostol*, 870 F.2d at 1337-38. As the Seventh Circuit noted, in collateral order cases, the district court may only proceed where "there is no concurrent exercise of power on the same subject and little overlap of the issues." *Id.* Though not explaining any reasoning or citing *Griggs*, the District Court appeared to base its ruling on this practice when it concluded that "proceeding with discovery in this case will not conflict with the issues on appeal." [Dkt. 61.]

But the District Court erred in finding no conflict. In this case, there is significant overlap of the issues and a risk of inconsistent rulings in the two forums. For example, Sherrod has sought from O'Connor in discovery the identity of the John Doe defendant who provided the video excerpts at issue. Doe is an anonymous speaker who, under D.C. law, is entitled to protection of his identity as a defendant absent a finding that a viable defamation claim exists. *See Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009). If this Court finds that the anti-SLAPP statute, which requires a plaintiff to prove a likelihood of success on the merits to defeat a special motion to dismiss, precludes Sherrod's claims while at the same time the District Court finds the

claims actionable and orders the identity of the Doe revealed, inconsistent rulings will undermine the fair and well-ordered administration of justice. It is for this reason that when proceedings in a district court are "inextricably tied" to issues on appeal, as is the case here, the district court is divested of jurisdiction. *Apostol*, 870 F.2d at 1338.

More broadly speaking, when an appeal is dispositive, no portion of any requested discovery can be said to be segregable from the issues pending before the appellate court. *See id.* (finding that district court was without jurisdiction to proceed where dismissal of entire action was "precisely the 'aspect[] of the case involved in the appeal.'"). In staying the trial court proceedings while it determined whether the defendants were entitled to qualified immunity, the Seventh Circuit in *Apostol* recognized that "[i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Accordingly, the appeal "divest[ed] the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial" or to proceed with discovery. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.")).

Courts of appeal have thus followed the teachings of *Griggs* whenever an appeal concerns a dispositive issue that could terminate the litigation. In *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997), the Seventh Circuit held that the district court could not proceed while an order denying a motion to compel arbitration was pending before the appellate court because the appeal, if

successful, would end the case. It rejected the decision in *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990), which had found arbitrability to be "distinct from the merits of the litigation." *Bradford-Scott*, 128 F.3d at 506. The Ninth Circuit's reasoning was unpersuasive, the Seventh Circuit held, because "[w]hether the litigation may go forward is precisely what the court of appeals must decide." *Bradford-Scott*, 128 F.3d at 506.[5]

As the Fourth Circuit explained in *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260 (4th Cir. 2011), when staying a district court order to proceed with discovery during the appeal of a motion to compel arbitration:

> The core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims. Therefore, because the district court lacks jurisdiction over "those aspects of the case involved in the appeal," it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue. *That the present case involves only the continuation of discovery does not change that rationale.* Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction.

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[5] The *Bradford-Scott* rule that an appeal on a dispositive issue deprives the district court of jurisdiction is the predominant view. *See Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) ("[U]pon the filing of a non-frivolous appeal … the district court should not exercise control over the aspects of the case involved in the appeal."); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (agreeing with majority rule that the district court is automatically divested of jurisdiction during the appeal of dispositive motions where the appeal "is neither frivolous or forfeited"); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160-62 (10th Cir. 2005) (appeals involving dispositive issues are "poor candidates for exceptions to the principle that a notice of appeal divests the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals.").

Id. at 264 (citations omitted) (emphasis added).

Consistent with the majority view in the other circuits, the law in this Circuit is clear that once a notice of appeal is filed, "[t]he district court does not regain jurisdiction over [the issues subject to appeal] unless the court of appeals issues its mandate." *United States v. Defries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (citing *Griggs*, 459 U.S. at 58)). *See also Bombardier*, 2002 U.S. App. LEXIS 25858, at *2 (citing *Griggs*, 459 U.S. at 58 and *Bradford-Scott*, 128 F.3d at 505-06). No exception to the jurisdiction-shifting rule recognized in *Griggs* applies in this case. O'Connor has shown a likelihood of success on the merits that the District Court has been divested of jurisdiction until the appeal is resolved and this Court issues the mandate.

B. O'Connor will be irreparably injured if discovery proceeds during the appeal

O'Connor will suffer irreparable injury if the District Court proceeds with discovery while the appeal of his anti-SLAPP motion is pending.

Anti-SLAPP statutes are "designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003). The D.C. Anti-SLAPP Act embodies that intent at its core. As the D.C. Council recognized, "[l]itigation itself is the plaintiff's weapon of choice" in SLAPP suits. *See* Report on Bill 18-893, Committee on Public Safety and the Judiciary, Nov. 18, 2010, at 4. To proceed with discovery would "effectively destroy" the protections of the statute and allow plaintiffs to "punish the [defendants]

and intimidate them into silence" by depriving them of their First Amendment rights through costly, drawn-out legal proceedings. *Id.* O'Connor would thus be irreparably harmed by allowing discovery to proceed while his appeal is pending. *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.").

Whether the D.C. Anti-SLAPP Act provides for an interlocutory appeal is a question of first impression the Court of Appeals has been asked to decide in the pending case. While the issue is under review, a stay of the lower court proceedings is warranted to preserve the status quo. If this Court agrees with O'Connor that a right to interlocutory review exists because the statute confers immunity-like protections to libel defendants, the right will have been effectively destroyed in this case by the actions of the District Court unless this Court intervenes.

C. Sherrod will not be substantially harmed by a stay of the proceedings

A stay of discovery in this case would not cause any substantial harm to Sherrod. In her motion to commence discovery before the District Court, Sherrod offered no compelling justification to proceed with discovery now rather than waiting until the appeal is resolved. [Dkt. 55.] Nor did the District Court state that its October 31, 2012 order responded to any urgent need to begin discovery. [Dkt. 61.] Indeed, to the contrary, the District Court has indicated nothing other than its general frustration with the pace this Court has followed in processing the appeal. *See supra* at 7-8.

The discovery Sherrod seeks is the type of discovery that the D.C. Anti-SLAPP Act expressly stays while a special motion to dismiss remains unresolved.[6] The only specific harm Sherrod claims is her purported need for evidence from non-party witnesses Roger and Eloise Spooner – the "white farmer" described in Sherrod's speech and his wife whom she initially declined to assist with the "full force" of what she could do because they were white. [Dkt. 55.] *See also* Brief of Appellant Larry O'Connor, Sept. 7, 2012, at 24. But she did not indicate that they were in poor health or give any reason for urgency other than their age. *Id.* In any event, Sherrod could obtain evidence from the Spooners through other means, such as an affidavit, as they appear to be supportive of her. Nor did the District Court limit discovery only to the Spooners or suggest that Sherrod would be harmed in any way, let alone significantly, if she obtains discovery from the Spooners if and when the Court of Appeals decides that this case can proceed. With potentially dispositive issues pending in this Court on whether Sherrod even has a claim, she will not be substantially harmed by a stay.

D. The public interest favors issuance of a stay

The public has a compelling interest in seeing the proceedings in the District Court stayed for the same reason O'Connor will be irreparably injured if discovery is allowed to begin while his appeal is pending. If O'Connor prevails, future plaintiffs will not be able to succeed in "punish[ing] and intimidat[ing]" SLAPP defendants

[6] *See* D.C. Code § 16-5502(c) ("[u]pon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.").

through burdens of discovery while an appeal of an order denying anti-SLAPP protections is pending. *See* Report on Bill 18-893, Committee on Public Safety and the Judiciary, Nov. 18, 2010, at 4. The public's interest lies in having the proceedings stayed to enable this Court to resolve these questions without having O'Connor's rights sacrificed because he is the first defendant to raise the issues.

V. CONCLUSION

For the foregoing reasons, O'Connor respectfully requests that the Court order that the District Court has been divested of jurisdiction, issue an emergency stay of the District Court proceedings during the pendency of this appeal, and if necessary issue a temporary stay of the District Court proceedings to give it the opportunity to fully consider this motion.

Respectfully submitted,

/s/ Mark I. Bailen

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2012, I caused a copy of the foregoing Emergency Motion to Stay District Court's October 31, 2012 Order Commencing Discovery Proceedings During Pendency of Appeal and Motion for Temporary Stay of Order Pending Adjudication of Emergency Stay, 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