ORAL ARGUMENT NOT YET SCHEDULED

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.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, INC. AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Parties and *Amici*. All parties appearing before the district court and in this Court are listed in the Brief for Defendant-Appellant. No *amici* appeared in the district court. Except for the American Civil Liberties Union (ACLU) of the Nation's Capital, *amicus curiae* and movants for *amici curiae* are listed in the Brief for Defendant-Appellant.

Rulings Under Review. References to the rulings at issue appear in the Brief for Defendant-Appellant.

Related Cases. This case has not previously come before this Court. Although the Court has directed the Clerk to schedule oral argument of this case before the same panel as a separate case involving the D.C. Anti-SLAPP Act, *3M Company v. Boulter*, No. 12-7012, the undersigned is not aware of any related cases as defined by Circuit Rule 28(a)(1)(C).

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

Amici curiae Public Citizen, Inc. and the American Civil Liberties Union of the Nation's Capital are non-profit organizations that have not issued shares or debt securities to the public and that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose of the organizations is to advocate for the public interest on a range of issues, including the protection of individuals' First Amendment rights.

/s/ Julie A. Murray
Julie A. Murray

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GLOSSARY

SLAPP	Strategic lawsuits against public participation
Act	District of Columbia Anti-SLAPP Act of 2010

STATUTES AND REGULATIONS

Relevant sections of the applicable statute, the District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501, 16-5502, and 16-5504, are contained in the Brief for Defendant-Appellant. The Committee Report on Bill 18-893, the legislative history of the Act, is also contained in the Brief for Defendant-Appellant.

INTEREST OF *AMICI CURIAE*[1]

Public Citizen is a public interest organization based in Washington, DC, with members and supporters nationwide. Since its founding in 1971, Public Citizen has urged individuals to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and has advocated for the protection of individuals' speech. For example, Public Citizen has litigated numerous cases involving the First Amendment rights of individuals who participate in public debates.

In recent years, Public Citizen has represented consumers, workers, investors, and other members of the public who have been sued for voicing criticisms. It has often invoked the protections of other jurisdictions' anti-SLAPP statutes. In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), Public Citizen as *amicus curiae* argued that the denial of a motion to dismiss under California's anti-SLAPP statute was an immediately appealable collateral order.

The American Civil Liberties Union of the Nation's Capital is the Washington, DC, affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than Public Citizen and the ACLU of the Nation's Capital or their counsel made a monetary contribution to the preparation or submission of this brief.

liberties of all Americans, particularly their right to freedom of speech. The ACLU of the Nation's Capital played a leading role in supporting passage of the D.C. Anti-SLAPP Act and filed an *amicus* brief in the first lawsuit involving that Act, *Snyder v. Creative Loafing, Inc.*, No. 2011 CA 3168 B (D.C. Super. Ct.) (dismissed with prejudice Sept. 10, 2011). The ACLU of the Nation's Capital has also represented defendants in other SLAPP suits and is familiar with the intimidating effect such lawsuits can have on free speech.

This Court granted Public Citizen's motion to participate as *amicus curiae* on February 6, 2012. A motion for leave to permit the ACLU of the Nation's Capital to participate as *amicus curiae* is pending with this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The D.C. Council passed the Anti-SLAPP Act of 2010 (the Act) to curb the proliferation of strategic lawsuits against public participation (SLAPPs). SLAPPs may appear to be typical tort cases but in fact are often filed for the purpose of punishing individuals who speak out on matters of public interest. 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), at 2, 4. The "goal of [SLAPP] litigation is not to win the lawsuit," but to intimidate the advocate "into silence." *Id.* at 4. In a SLAPP suit, then, "*litigation itself* is the plaintiff's weapon of choice," forcing an advocate to spend time and resources in his or her defense. *Id.* (internal quotation marks and alterations omitted).

By passing the Act, the D.C. Council sought to counter the "chilling effect" that SLAPPs have on citizens' First Amendment rights. *Id.* at 1; *see also id.* at 4. It thus created a mechanism whereby an individual conducting "advocacy on issues of public interest" could have a meritless suit quickly dismissed, sparing the advocate the intimidation and expense associated with protracted litigation that might limit his or her further expression. D.C. Code § 16-5502. Specifically, and as relevant to this case, the Act permits a party to file a special motion to dismiss a claim that arises from the party's advocacy on issues of public interest. *Id.* § 16-5502(a). Once the party makes a prima facie showing that the claim arose from

such advocacy, the motion is granted with prejudice, *id.* § 16-5502(d), "unless the responding party demonstrates that the claim is likely to succeed on the merits," *id.* § 16-5502(b).

As the Act's legislative history makes clear, the D.C. Council explicitly conceived of the rights conferred by the Act as "substantive" in nature, allowing advocates "to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." Report on Bill 18-893, at 4. Accordingly, the Council "[f]ollow[ed] the lead of other jurisdictions" that had "similarly" extended what it termed "absolute or qualified immunity to individuals engaging in protected actions." *Id.*

In this case involving the D.C. Anti-SLAPP Act, the district court denied on three legal grounds an anti-SLAPP motion filed by defendants-appellants Andrew Breitbart and Larry O'Connor. It concluded that (1) the Act is substantive and, therefore, does not retroactively apply in this case, which was filed before the Act became effective; (2) in the alternative, if the Act is procedural, it does not apply to diversity cases in federal court such as this one; and (3) Mr. Breitbart and Mr. O'Connor did not timely file their anti-SLAPP motion. *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 84-86 (D.D.C. 2012).

Public Citizen and the ACLU of the Nation's Capital express no view on whether the district court appropriately denied the anti-SLAPP motion.

Specifically, they do not address whether the Act applies retroactively or whether the anti-SLAPP motion was timely. And they take no position on whether Ms. Sherrod has established as a matter of law a likelihood of success on the merits, an issue raised on appeal by Mr. O'Connor in his request for this Court to dismiss Ms. Sherrod's complaint with prejudice. *See* Brief for Defendant-Appellant at 20-37, 53. Rather, they submit this brief to address two issues that are critical to the effective functioning of the Act.

First, this Court should hold that the district court's denial of the anti-SLAPP motion is a collateral order subject to immediate appeal because it presents pure questions of law, conclusively decided, that are separate from the underlying merits of Ms. Sherrod's claims and because the order is effectively unreviewable after judgment. That conclusion is supported by Supreme Court precedent, and in particular, by cases holding that an appellate court may review as a collateral order a denial of a claim of qualified immunity. Collateral order review in this case also is supported by decisions in the First, Fifth, and Ninth Circuits holding that denials of anti-SLAPP motions under similar state laws are subject to immediate appeal.

Second, if this Court reaches the question whether the Act applies in diversity cases in federal court, it should answer in the affirmative. No federal rule of procedure directly conflicts with the Act's provision permitting an individual to file an anti-SLAPP motion. Because there is no collision between federal and state

law, D.C. substantive law applies. Using the *Erie* doctrine as a guide, the Anti-SLAPP Act, which confers substantive rights on advocates in the nature of immunity, clearly constitutes substantive law.

ARGUMENT

I. This Court Has Jurisdiction Under the Collateral Order Doctrine.

Under 28 U.S.C. § 1291, this Court has jurisdiction over appeals from "final decisions" of the district courts. Such decisions generally "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (internal quotation marks omitted). But section 1291 is construed in a practical, rather than technical, way. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Accordingly, under the collateral order doctrine, courts have long interpreted section 1291 to permit the immediate appeal of a "small class" of decisions that do not conclude the litigation "but conclusively resolv[e] 'claims of right separable from, and collateral to, rights asserted in the action.'" *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *Cohen*, 337 U.S. at 546) (additional internal quotation marks omitted); *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 842 (D.C. Cir. 2008). 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.'" *Will*, 546 U.S. at 349 (quoting *Cohen*, 337 U.S. at 546).

Whether the collateral order doctrine permits immediate review of the district court's order depends on three criteria, first articulated by the Supreme Court in *Cohen.* Under *Cohen* and its progeny, a collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (internal quotation marks omitted); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Whether the claim raised by the order here is subject to immediate review under the collateral order doctrine "is to be determined for the entire category to which [the] claim belongs." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *see also Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 349 (D.C. Cir. 2007).

As discussed below, the district court's order denying the anti-SLAPP motion, which rests on pure questions of law, meets the *Cohen* criteria and is, therefore, a collateral order subject to immediate appeal.[2] This conclusion follows

[2] This case does not pose the question whether a denial of a D.C. anti-SLAPP motion will, in some circumstances, present a mixed question of fact and law, and if so, whether such a question is reviewable under the collateral order doctrine. To resolve this case, the Court may limit its jurisdictional holding to a category of denials under the Act presenting pure questions of law.

directly from the Supreme Court's jurisprudence, and in particular from those cases holding that appellate courts may review under the collateral order doctrine a denial of a claim of qualified immunity that turns on a question of law. It is also in accord with the majority of appellate decisions addressing whether denials of motions filed under anti-SLAPP statutes in other states are collateral orders.

A. The immunity from suit conferred by the D.C. Anti-SLAPP Act is analogous to qualified immunity for government officials.

As noted above, the D.C. Council sought to confer on an individual targeted by a SLAPP suit a substantive right to be free from suit under some circumstances, and it likened the Act's protection to the "absolute or qualified immunity" that other states had provided "to individuals engaging in protected actions." Report on Bill 18-893, at 4. In practice, an individual's right under the Act is most akin to qualified immunity. An individual does not enjoy "complete protection from suit" at the outset, as he or she would with absolute immunity, simply based on his or her role and activities as an advocate. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (describing the nature of absolute immunity for certain government officials, such as legislators engaging in legislative functions). Rather, an individual enjoys immunity from suit under the Act only after making a prima facie showing that the claim against which he or she defends arose from his or her advocacy on an issue of public interest, and further, only after the plaintiff fails to demonstrate a likelihood of success on the merits. D.C. Code § 16-5502(b). That

immunity thereafter protects the individual from the expense and intimidation of litigation proceedings, not just liability after judgment.

The immunity conferred by the Act is thus comparable to the qualified immunity accorded certain government officials in the performance of their duties. Under the qualified immunity doctrine, officials are shielded from suit for violating individuals' federal constitutional or statutory rights so long as the officials' "'conduct d[id] not violate *clearly established* . . . rights of which a reasonable person would have known.'" *Bame v. Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011) (quoting *Ortiz v. Jordan*, 131 S. Ct. 884, 888 (2011)) (emphasis added). That is, under the qualified immunity doctrine, an official does not enjoy immunity simply based on the fact that he or she was acting in an official capacity. Rather, the official is protected from suit unless he or she acted in a way that was "plainly incompetent" or "knowingly violate[d] the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotation marks omitted). Like successful SLAPP movants, once government officials prevail under this threshold analysis, they are spared the burden of "having to participate in [litigation] proceedings," not just liability after trial. *Kalka v. Hawk*, 215 F.3d 90, 94 (D.C. Cir. 2000).

The qualified immunity conferred by the Act is also similar to qualified immunity for government officials in that, in both cases, courts engage in a threshold immunity analysis separate from the underlying merits of a plaintiff's

claim. A court applies a two-step test to determine whether a government official is entitled to qualified immunity. Although the analytical order may vary, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), a court first usually asks "whether 'the facts alleged show the [official's] conduct violated a constitutional [or statutory] right,'" *Bame*, 637 F.3d at 384 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If the answer is yes, the court then "determine[s] 'whether the right was clearly established' at the time of the alleged violation." *Id.* (quoting *Saucier*, 533 U.S. at 201). Thus, like a determination on a SLAPP motion under the Act, the qualified immunity analysis does not determine whether a defendant did, in fact, violate the law. Rather, it focuses on the separate legal question of whether a right exists given a set of alleged facts, and if so, whether it was clearly established. *See Pearson*, 555 U.S. at 239.

The Act's provision for qualified immunity also has goals comparable to those motivating qualified immunity for government officials. Qualified immunity for officials is intended to avoid "'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 816); *see also Navab-Safavi v. Glassman*, 637 F.3d 311, 314 (D.C. Cir. 2011) (highlighting the protection that immunity affords to discretionary action). It seeks to ensure,

among other things, that officials facing a choice about whether to take a particular course of action do "not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (internal quotation marks omitted). Similarly, the Anti-SLAPP Act aims to eliminate the chilling effect that SLAPPs have on advocacy in the public interest, ensuring that advocates do not err on the side of silence instead of participating in public debate. *See* Report on Bill 18-893, at 1, 4.

Moreover, both the qualified immunity doctrine for officials and qualified immunity conferred by the Act share the goal of sparing defendants the burden of participating in litigation proceedings and, therefore, place a premium on early immunity determinations. Thus, under the Act, there exists a rebuttable presumption against discovery after an anti-SLAPP motion is filed, and the court must hold an expedited hearing on the motion. D.C. Code § 16-5502(c), (d). Likewise, "the validity of a qualified immunity defense [for government officials] should be determined as early as possible, preferably before discovery and trial." *Kalka*, 215 F.3d at 94; *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (stating that qualified immunity would not be nearly as effective if an official had to face "the burdens of such pretrial matters as discovery" (internal quotation marks omitted)).

An order denying qualified immunity for government officials on abstract legal grounds is immediately reviewable under the collateral order doctrine. *See*

Ashcroft v. Iqbal, 556 U.S. 662, 673-74 (2009); *Behrens*, 516 U.S. at 306, 313; *Mitchell*, 472 U.S. at 529; *Davis v. Billington*, 681 F.3d 377, 380 (D.C. Cir. 2012); *Farmer v. Moritsugu*, 163 F.3d 610, 613-14 (D.C. Cir. 1998). Likewise here, denial of the qualified immunity afforded under the Act in a special motion to dismiss under the Act should be immediately appealable.

B. The district court's denial of the anti-SLAPP motion, like a denial of qualified immunity, is reviewable under the collateral order doctrine.

Like an order denying qualified immunity for a government official on abstract legal grounds, the district court's order denying the special motion to dismiss under the Act on legal grounds meets the three *Cohen* criteria and qualifies for immediate appeal under the collateral order doctrine.

1. The denial of the anti-SLAPP motion conclusively decides the issue.

The first *Cohen* criterion for allowing an immediate appeal of a collateral order asks whether the order "conclusively determine[s] the disputed question." *Will*, 546 U.S. at 349. Nothing in the district court's minute order denying the anti-SLAPP motion to dismiss or the court's statement of reasons in response to this Court's remand, *see generally Sherrod*, 843 F. Supp. 2d at 84 n.2, "suggest[ed] that its determinations were tentative or subject to revision," *Exxon*, 473 F.3d at 349; *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983). Rather, the court made a conclusive determination on the special motion to

dismiss under the Act "by denying [the] motion to dismiss and allowing the litigation to proceed." *Exxon*, 473 F.3d at 349; *accord Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (holding that a court conclusively denied a motion to strike under California's anti-SLAPP law because, after denial, the "statute does not apply and the parties proceed with the litigation"). The order, therefore, meets *Cohen*'s first criterion.

2. The denial of the anti-SLAPP motion raises an important issue separate from the merits of the underlying tort action.

Cohen's second criterion asks whether the order "resolve[s] an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349. Here, the district court's order presents for review pure legal questions completely separate from the underlying merits of the case.[3]

Whether the anti-SLAPP statute applies retroactively, whether it applies to diversity cases in federal court, and whether the anti-SLAPP motion was timely are questions that do not implicate the same legal analysis necessary to the resolution

[3] This Court has at times described this criterion as "consist[ing] of two prongs: separability and importance," where the latter is determined "by the interest that would be harmed if immediate review were not allowed weighed against the interest in finality." *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 896 (D.C. Cir. 2006); *see also United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003), *abrogated on other grounds by Mohawk*, 130 S. Ct. 599. Because the Supreme Court has made clear in recent cases that the importance of the interest at stake also plays a key role in *Cohen*'s third criterion, *see Mohawk*, 130 S. Ct. at 605, importance is discussed below at I.B.3.

of Ms. Sherrod's tort claims. The issues raised have no bearing on whether the defendants actually engaged in conduct that constitutes defamation, false light, or intentional infliction of emotional distress, the bases for Ms. Sherrod's suit. *See Sherrod*, 843 F. Supp. 2d at 83-84. Nor is there any factual overlap between the issues raised by the district court's order and the underlying facts relevant to the tort claims.[4]

A determination that the issues raised by the district court's order denying the anti-SLAPP motion are separable from the merits is consistent with every federal court of appeals to address a similar question involving state anti-SLAPP statutes. *See Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 174-77 (5th Cir. 2009); *Batzel*, 333 F.3d at 1025. Those decisions deem separable the issue whether a state anti-SLAPP law applies in diversity cases in federal court, *Godin*, 629 F.3d at 85-92; whether a

[4] Mr. O'Connor also asks this Court to hold that Ms. Sherrod failed as a matter of law to demonstrate a likelihood of prevailing on the merits. *See* Brief for Defendant-Appellant at 20-37, 53. That legal issue, if addressed by the Court through its jurisdiction under the collateral order doctrine, is also separable from the underlying merits of Ms. Sherrod's tort claims. *See Henry*, 566 F.3d at 182 (reviewing under the collateral order doctrine whether a plaintiff had shown a probability of success on the merits); *Batzel*, 333 F.3d at 1026 (same); *cf. Mitchell*, 472 U.S. at 528-29 & n.10 (holding that whether a government official is entitled to qualified immunity is separable from the underlying legal and factual issues bound up with the merits of a plaintiff's claim that his rights were violated, even if the legal analysis "entail[s] consideration of the factual allegations that make up the plaintiff's claim for relief").

SLAPP movant made a prima facie showing of speech on an issue of public interest, *Henry*, 566 F.3d at 181; and whether a plaintiff demonstrated a likelihood of prevailing on the merits to avoid a SLAPP dismissal, *id.* at 181-82; *Batzel*, 333 F.3d at 1026.

Moreover, a determination that the district court's order raises completely separable issues follows from the Supreme Court's case law on qualified immunity for government officials. In *Mitchell*, the Supreme Court discussed at length why a denial of qualified immunity based on an issue of law is separable from the underlying merits of a claim that a plaintiff's rights were violated. In so doing, it relied heavily on the fact that "qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct." 472 U.S. at 527. From that fact, the Court concluded that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28; *see also id.* at 528 (analyzing the legal and factual questions that arise on review of denial of qualified immunity); *accord Iqbal*, 556 U.S. at 672.

Likewise, the Act confers on successful SLAPP movants a substantive right to dispense with SLAPP suits expeditiously and avoid the burdens of litigation, extending what the Council referred to as a "qualified immunity to individuals engaging in protected actions." Report on Bill 18-893, at 4. Under *Mitchell* and its progeny, *see, e.g.*, *Behrens*, 516 U.S. at 306, 313; *Farmer*, 163 F.3d at 613-14,

abstract legal questions arising from the application of that immunity, such as those at issue in the district court's order, are clearly separable from the underlying merits.

3. The substantive right conferred by the Anti-SLAPP Act is not reviewable after judgment.

To meet *Cohen*'s final criterion, an order must be effectively unreviewable after final judgment. *See Will*, 546 U.S. at 349. The loss of a "right to prevail without trial," however, is not sufficient to satisfy this criterion. *Id.* Rather, *Cohen*'s third criterion, like its second, incorporates some "'judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-52 (quoting *Digital Equip.*, 511 U.S. at 878-79). Thus, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts." *Id.* at 353; *see also Mohawk*, 130 S. Ct. at 605 (emphasizing whether delayed review "would imperil a substantial public interest or some particular value of a high order" (internal quotation marks omitted)).

The Supreme Court has made clear that the burden of showing a substantial public interest is minimal when a constitutional or statutory right of immunity is involved. "[T]here is little room for the judiciary to gainsay [the] 'importance'" of such a right; where one is concerned, "irretrievable loss can hardly be trivial." *Digital Equip.*, 511 U.S. at 879 (internal quotation marks and alterations omitted).

In this case, D.C. law confers a statutory right of immunity from suit that establishes the importance of the interest at stake if immediate review is unavailable. Although the question whether a decision is "final" under section 1291 is one of federal law, *see Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), federal courts of appeals considering whether denials of anti-SLAPP motions are collateral orders have consistently looked to the unique nature of each state's law in answering that question, *see, e.g.*, *Henry*, 566 F.3d at 178; *Godin*, 629 F.3d at 85. Federal courts of appeals do the same in determining whether they have jurisdiction under the collateral order doctrine to review denials of claims of qualified immunity for government officials based on state, rather than federal, law. *See, e.g.*, *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011); *Gray-Hopkins v. Prince George's County, Md.*, 309 F.3d 224, 231-32 (4th Cir. 2002); *Cantu v. Rocha*, 77 F.3d 795, 803-04 (5th Cir. 1996); *Brown v. Grabowski*, 922 F.2d 1097, 1107 (3d Cir. 1990). This Court may look not only to the statutory text of the Act, but also to the legislative history. *See Batzel*, 333 F.3d at 1025.

In this case, D.C. law creates a limited right of immunity for successful SLAPP movants by conferring a substantive entitlement not to participate in litigation proceedings and stand trial. As the legislative history of the Act states, the D.C. Council intended to confer substantive rights that give advocates a limited immunity from suit. *See* Report on Bill 18-893, at 4. The Council also indicated

that it considered immediate appellate review critical to the Act's effectiveness, stopping short of expressly creating a right to interlocutory appeal only because it believed itself without authority to do so. *Id.* at 7 (citing *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *subsequently vacated*, 30 A.3d 783 (D.C. 2011)). The legislative history of the Act, therefore, strongly indicates that the Council intended to confer a right of immunity from suit, not simply an immunity from liability, and believed that immediate appeal was an integral component of protecting that right.

This case is easily distinguishable from the two Ninth Circuit cases holding that denials of state anti-SLAPP motions in Nevada and Oregon are not sufficiently important to satisfy *Cohen*'s third criterion. First, *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009), held that a denial of a motion to strike under Oregon's anti-SLAPP statute was not a collateral order, relying on "the failure of the . . . statute to provide for an appeal from an order denying a special motion to strike." *Id.* at 1105. Critically, however, *Englert* interpreted the absence of this provision to signal that "Oregon lawmakers did not want to protect speakers from the trial itself." *Id.* at 1106 (internal quotation marks omitted); *see also id.* at 1107. No similar interpretation could conceivably apply here based on the D.C. Council's rationale for omitting such a provision from the Act.

Likewise, in holding that a denial of a special motion to dismiss under Nevada's anti-SLAPP statute was not a collateral order, *Metabolic Research, Inc.*

v. Ferrell, 2012 WL 2215834 (9th Cir. June 18, 2012), focused on the fact that state law did not, "implicitly or otherwise, confer[] an immediate right to appeal," *id.* at *5, and instead defined the right as one through which a person "is *immune from civil liability*," not from suit or trial, *id.* at *6. *Metabolic*, like *Englert*, viewed these facts as evidence "that the Nevada legislature did not intend for its anti-SLAPP law to function as an immunity from suit." *Id.* In this case, although the Act does not use the term "immune," the legislative history of the Act focuses on protecting advocates not just from liability, but from litigation itself, the real "weapon of choice" in SLAPP suits. Report on Bill 18-893, at 4 (internal quotation marks omitted). Moreover, the legislative history makes clear that the District of Columbia "agree[d] with and support[ed]" the availability of immediate appellate review, but that the Council believed itself without authority to directly authorize it. *See* Report on Bill 18-893, at 7.

By providing a statutory right of qualified immunity from suit, the Act thus furthers a substantial public interest of protecting advocates from the time and expense associated with lawsuits intended to intimidate them into silence. As a result, post-judgment review of a denial of a D.C. anti-SLAPP motion provides no remedy if "the defendant ha[s] been compelled to defend against a meritless claim brought to chill rights of free expression." *Batzel*, 333 F.3d at 1025 (so stating in the context of a denial from California's anti-SLAPP statute, which the court

described as conferring rights "in the nature of immunity"); *see also Mitchell*, 472 U.S. at 526 (recognizing in the context of qualified immunity for government officials that the right to avoid trial, and even pre-trial matters where possible, is "effectively lost if a case is erroneously permitted to go to trial").

Because the denial of the anti-SLAPP motion in this case meets all three *Cohen* criteria, it is a collateral order over which this Court has jurisdiction under section 1291.

II. The D.C. Anti-SLAPP Act Applies to State Causes of Action in Federal Court.

As described above (p. 4), the district court denied the anti-SLAPP motion on multiple grounds. The first—supported by the legislative history of the Act—was based on the court's conclusion that the statute is substantive. *Sherrod*, 843 F. Supp. 2d at 84-85. The Court held that because the statute is substantive, it does not retroactively apply to this case. *Id.* The court concluded, in the alternative, that *if* the Act were procedural for the purpose of retroactivity, then under the *Erie* doctrine, it would not apply to diversity cases in federal court. *Id.* at 85.

Under the principles articulated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, courts sitting in diversity apply state substantive, but not procedural, law, at least so long as no federal rule or statute answers the question at issue. *See, e.g., Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426-27 (1996); *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107-08 (D.C. Cir.

2012). Here, the Act is substantive under the *Erie* doctrine and, therefore, applies in federal diversity cases. Although not discussed by the district court as a threshold bar to the Act's application, but at issue in the pending appeal in *3M Company v. Boulter*, No. 12-7012 (D.C. Cir.), the availability of an anti-SLAPP motion does not directly collide with any federal procedural rules. The district court here thus properly turned to the *Erie* doctrine analysis, asking whether the state law is substantive or procedural. But the district court improperly contemplated that the Act could conceivably be procedural for *Erie* purposes and accordingly not applicable to this case.

Whether federal courts apply state or federal law to adjudicate aspects of a state cause of action depends at the outset on whether a federal rule or statute "answers the question in dispute." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *see also Burke*, 685 F.3d at 1107-08 (asking whether the federal rule or statute is "sufficiently broad to control the issue before the Court" (internal quotation marks omitted)). If not, the court engages in the "typical, relatively unguided Erie [c]hoice" and applies state substantive, but not procedural, law. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Specifically, the determination whether state law is substantive, and should accordingly be applied by federal courts sitting in diversity, is "guided by 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of

inequitable administration of the laws.'" *Gasperini*, 518 U.S. at 428 (quoting *Hanna*, 380 U.S. at 468).

If a federal statute or rule of procedure *does* answer the question in dispute, a court must ask whether a similar state law or rule is in "direct collision" with the federal law, that is, whether a state law or rule "attempts to answer the same question." *Shady Grove*, 130 S. Ct. at 1437, 1442 n.8; *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). If so, federal law applies unless it violates a constitutional grant of authority or, in the case of a federal rule, violates the Rules Enabling Act, 28 U.S.C. § 2072, which forbids federal rules of procedure from abridging, enlarging, or modifying any substantive rights. *Hanna*, 380 U.S. at 470-71.

The availability of a D.C. anti-SLAPP motion in federal court does not conflict with any applicable federal law and, under the *Erie* doctrine, is substantive. The First, Fifth, and Ninth Circuits, examining anti-SLAPP statutes similar to the D.C. Anti-SLAPP Act, have determined that anti-SLAPP motions are available to diversity litigants in federal court. *Godin*, 629 F.3d at 85-92; *Henry*, 566 F.3d at 168-69; *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (9th Cir. 1999). For example, in *Newsham*, the Ninth Circuit concluded that California's anti-SLAPP statute—specifically its provision for a special motion to strike and the availability of costs and fees to a prevailing

SLAPP movant—did not conflict with Federal Rules of Civil Procedure 8, 12, and 56. 190 F.3d at 972. *Newsham* emphasized that a SLAPP movant, if unsuccessful, "remain[ed] free" to bring a motion to dismiss under Rule 12 or a motion for summary judgment under Rule 56, and that these rules could coexist with the anti-SLAPP motion permitted under state law. *Id.* It specifically rejected the assertion of a direct collision between the anti-SLAPP statute and the federal rules based on, "in some respects, [their] similar purposes, namely the expeditious weeding out of meritless claims before trial." *Id.* *Newsham* concluded that this "commonality of purpose" did not negate the fact that "there [wa]s no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims." *Id.*

Newsham further concluded that *Erie*'s twin aims favored application of the law in federal court. It recognized that if the anti-SLAPP statute did not apply, "a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum" and "a litigant otherwise entitled to the protections of the [a]nti-SLAPP statute would find considerable disadvantage in a federal proceeding." *Id.* at 973. The same is true in this case, where a refusal to make available the anti-SLAPP mechanism in federal court would deny to advocates the qualified immunity conferred on them by the Act. *Cf. Napolitano v.*

Flynn, 949 F.2d 617, 621-22 (2d Cir. 1991) (applying state law of qualified immunity for government officials); *Gray-Hopkins*, 309 F.3d at 233 (same).

One district court case in this circuit, *3M Company v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012), has held to the contrary, concluding that the D.C. Anti-SLAPP Act directly conflicts with Federal Rules of Civil Procedure 12, 41, and 56. Relying heavily on a 1946 amendment to Rule 12, *Boulter* reasoned that the "text and structure of Rules 12 and 56 were intended to create a system of federal civil procedure requiring notice pleading by plaintiffs, whereby a federal court may dismiss a case when the plaintiff fails to plead sufficiently detailed and plausible facts to state a valid claim." *Id.* at 106. *Boulter* concluded that those rules did not permit "a federal court [to] dismiss a case without a trial based upon its view of the merits of the case after considering matters outside of the pleadings," except on summary judgment under Rule 56. *Id.* *Boulter* separately determined that the Act, which requires that an order of dismissal be with prejudice, directly conflicts with Rule 41, which *Boulter* read to confer discretion on district courts whether to dismiss a claim with or without prejudice. *Id.* at 104.

This Court should reject *Boulter*'s reasoning. With respect to Rules 12 and 56, neither rule on its face makes its coverage exclusive, and Public Citizen and the ACLU of the Nation's Capital agree with Mr. O'Connor that this Court's precedent does not require the conclusion that the federal rules displace motions such as

those filed under the Act. *See* Brief for Defendant-Appellant at 41-42. Moreover, *Boulter*'s reliance on the history of the 1946 amendment to Rule 12 is misplaced. The amendment made clear that a Rule 12(b)(6) motion to dismiss relying on matters outside the pleadings and considered by the court, often termed a "speaking motion," was permissible under the rules but must be converted to a motion for summary judgment under Rule 56. *See* Rule 12, Advisory Committee Notes, 1946 Amendment, subdivision (b). Moreover, as the Advisory Committee explained, the amendment was intended to clarify that courts reviewing Rule 12(b)(6) motions relying on matters outside the pleadings should not "resolve questions of fact on conflicting proof"; the amendment tied review of such motions to the standard applicable to summary judgment under Rule 56 to address this problem. *Id*. The Committee characterized the 1946 amendment as one that simply "regularize[d]" the practice that some courts already followed. *Id.*

Thus, contrary to *Boulter*'s determination that Rules 12 and 56 were meant to "occupy[] the field of weeding out meritless claims," *id.* at 109 (internal quotation marks omitted), nothing in the text or history of Rules 12 and 56 indicates that they speak to the question at issue here. That is, the rules do not govern whether a litigant, in addition to filing a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment, may file a state anti-SLAPP motion asserting a qualified immunity under the statute and posing legal questions distinct

from those at issue on Rule 12 or 56 review: (1) whether an advocate has made a prima facie showing of advocacy on an issue of public interest and (2) whether the plaintiff has demonstrated a likelihood of prevailing on the merits. Courts may, therefore, harmoniously rule on an anti-SLAPP motion while separately addressing a Rule 12 or Rule 56 motion that directly attacks the merits of a plaintiff's claim.

Boulter separately concluded that the D.C. Anti-SLAPP Act cannot apply in federal court because it conflicts with Rule 41. But Rule 41 provides in pertinent part only that "[u]nless [a] dismissal order states otherwise," an involuntary dismissal—with limited exceptions not at issue here—"operate[s] as an adjudication on the merits." Fed. R. Civ. P. 41(b). It "sets forth nothing more than a default rule for determining the import of a dismissal" when not otherwise specified by a court. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001); *accord Jones v. Horne*, 634 F.3d 588, 603 (D.C. Cir. 2011). Rule 41 plainly does not preclude a district court from entering a dismissal with prejudice where required by the terms of the statute creating the cause of action. Nor does it grant the type of unfettered discretion to district courts that *Boulter* deemed in direct collision with the Anti-SLAPP Act.

For these reasons, *Boulter* was wrongly decided. This Court should adopt the reasoning of the First, Fifth, and Ninth Circuits and hold that the D.C. Anti-SLAPP Act applies in federal court.

CONCLUSION

For the foregoing reasons, this Court should hold that it has appellate jurisdiction under the collateral order doctrine and, if it reaches the issue, that the D.C. Anti-SLAPP Act applies to state-law causes of action in federal court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 6,617.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on September 21, 2012, I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray