ORAL ARGUMENT SCHEDULED FOR MARCH 15, 2013

No. 11-7088

United States Court of Appeals for the District of Columbia Circuit

SHIRLEY SHERROD,

Plaintiff-Appellee

v.

ANDREW BREITBART, LARRY O'CONNOR, AND JOHN DOE,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CASE NO. 11-CV-00477-RJL, HON. RICHARD J. LEON

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January 2, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Circuit Rule 28(a)(1), counsel for Plaintiff-Appellee Shirley Sherrod hereby certifies that:

(A) Parties and *Amici*

The parties in interest in this case are the plaintiff, Shirley Sherrod, and the defendants, Andrew Breitbart and Larry O'Connor. Mrs. Sherrod, Mr. Breitbart, and Mr. O'Connor all appeared before the District Court and this Court. Mr. Breitbart died on March 1, 2012, and his counsel filed a Notification of Death in this Court on August 14, 2012. Mr. Breitbart's counsel have not filed a similar notice in the District Court. But in response to the District Court's repeated inquiries, Mr. Breitbart's counsel filed a notice stating only that "[n]o estate has been opened; and, there are no pending or imminent plans to open an estate for Mr. Breitbart."

No party intervened in the District Court or in this Court. Allbritton Communications Co., the American Civil Liberties Union of the Nation's Capital, Atlantic Media, Inc., the District of Columbia, Dow Jones & Company, Inc., Gannett Co., Hearst Corp., NBC Universal Media, LLC, New York Times Co., NPR, Inc., POLITICO LLC, Public

Citizen, Inc., Reporters Committee for Freedom of the Press, and Washington Post Co. have been granted leave to participate as *amici* in this Court.

(B) Rulings Under Review

The ruling under review in this case is the July 28, 2011 Order entered by Judge Richard J. Leon, which denied the April 18, 2011 Joint Special Motion by Defendants Andrew Breitbart and Larry O'Connor to Dismiss Complaint Under the Anti-SLAPP Act of 2010. Pursuant to this Court's February 6, 2012 Order, Judge Leon entered a Statement of Reasons for denying the motion on February 15, 2012. The Statement of Reasons is reported at 843 F. Supp. 2d 83 (D.D.C. 2012) (Leon, J.).

(C) Related Cases

On July 18, 2012, the Court denied a motion to consolidate this case with case No. 12-7012, *3M Company v. Boulter*. The Court further ordered, however, that the cases be argued on the same day before the same panel of this Court. Since that order, the parties in *3M Company v. Boulter* reached a settlement and dismissed that appeal.

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GLOSSARY

"Act"	District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*
"Defs.' § 1292(b) Mem."	August 19, 2011 Memorandum of Points and Authorities in Support of Defendants' Motion to Certify Order Denying Defendants' FRCP 12(b)(6) Motion to Dismiss for Interlocutory Appellate Review Pursuant to 28 U.S.C. § 1292(b), and Request for Expedited Ruling
"Defs.' Anti-SLAPP Mem."	April 18, 2011 Memorandum of Points and Authorities In Support of Defendant Andrew Breitbart's Special Motion to Dismiss Complaint Under the District of Columbia Anti-SLAPP Act of 2010
"Defs.' Rule 12(b) Mem."	April 18, 2011 Memorandum of Law In Support of 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) By Defendants Andrew Breitbart and Larry O'Connor
"SLAPP"	Strategic Lawsuit Against Public Participation

INTRODUCTION

On July 19, 2010, Andrew Breitbart and Larry O'Connor ignited a media firestorm when they published a defamatory blog post offering "video proof" that USDA official Shirley Sherrod "admits that ***in her federally appointed position***, overseeing over a billion dollars ... ***[s]he discriminates against people due to their race***." Compl. ¶ 4 (ellipsis in original) (JA ___).[1] Mr. Breitbart and Mr. O'Connor drew false support for this and other defamatory statements about Mrs. Sherrod from a portion of a speech she had given a few months earlier, which the Defendants selectively edited and embedded as video clips in the blog post to create the false impression that Mrs. Sherrod was admitting present-day racism. In fact, Mrs. Sherrod was describing events that had occurred ***twenty-three years before*** she held her USDA position and was encouraging people ***not*** to discriminate on the basis of race.

Mr. Breitbart and Mr. O'Connor's publication of the blog post to a worldwide Internet audience did extensive and irreparable damage to Mrs. Sherrod and her reputation. News stations across the country

[1] Emphasis added, and citation and quotation omitted, unless otherwise noted.

immediately and repeatedly aired the deceptively edited video clips of Mrs. Sherrod's speech and echoed Mr. Breitbart and Mr. O'Connor's false statements. Under duress, Mrs. Sherrod was forced to resign from her position at the USDA because her superiors—and millions of others—had quickly (but incorrectly) come to believe that Mrs. Sherrod had admitted to using her federal position to engage in racial discrimination. And although senior government officials and members of the news media eventually apologized to Mrs. Sherrod after the NAACP released an unabridged video of Mrs. Sherrod's speech, Mr. Breitbart and Mr. O'Connor have not apologized and stand by their false statements and defamatory conduct. Indeed, the blog post remains on Mr. Breitbart's website to this day.[2]

In short, if ever there were a valid defamation lawsuit, this is it. But despite Mr. O'Connor's best efforts to have the merits of this case adjudicated for the first time in this Court, none of this is appropriately considered now. After arguing in his opposition to Mrs. Sherrod's motion to dismiss this appeal that questions regarding the Court's

[2] http://www.breitbart.com/Big-Government/2010/07/19/Video-Proof--The-NAACP-Awards-Racism---2010

jurisdiction and the applicability of the D.C. Anti-SLAPP Act should be referred to a merits panel because they presented purportedly critical matters of first impression, those issues now take a back seat in Mr. O'Connor's merits brief to the unappealable "opinion" defense he has been improperly trying to present to this Court all along. For the reasons explained below, however, the threshold questions Mr. O'Connor now treats as an afterthought provide no fewer than four independent grounds to dismiss this appeal or affirm the District Court's order—each without reaching Mr. O'Connor's "opinion" defense.

First, this Court lacks jurisdiction over any aspect of this appeal. Mr. O'Connor acknowledges that no final judgment has been entered in the District Court, and he further concedes that this Court lacks jurisdiction to review the order denying his Rule 12(b)(6) motion to dismiss, where he actually asserted the ***very same*** "opinion" defense now featured in his opening brief. Mr. O'Connor nevertheless suggests that this Court has jurisdiction to review that defense solely because he "incorporated" it from his Rule 12(b)(6) motion into his Anti-SLAPP motion to dismiss. The text of the D.C. Anti-SLAPP Act, however, provides no "right not to stand trial" that might justify appellate review

under the collateral-order doctrine. Indeed, Mr. O'Connor never asserted any form of immunity from trial at any stage in the District Court. Moreover, although Mr. O'Connor concedes that this Court cannot review issues that are not conclusively decided and completely separate from the merits of Mrs. Sherrod's claims, even a cursory review of the "opinion" argument set forth in Section I of his brief—and the vast set of factual contentions on which it is based—shows why this interlocutory appeal fails to satisfy the collateral-order doctrine's stringent requirements.

Second, even if this appeal were proper, the District Court's order should be affirmed because the D.C. Anti-SLAPP Act was not effective when this case was filed on February 11, 2011. The same was true on March 4, 2011, when Mr. Breitbart and Mr. O'Connor removed this case to the District Court. And the same was true a week later, when Mr. Breitbart and Mr. O'Connor initially requested an extension of time to answer the Complaint. Indeed, the Act did not become effective until March 31, 2011—more than a month and a half after Mrs. Sherrod filed her claims. Because the Act contains no indication whatsoever that it was intended to apply retroactively and it does not "pertain only to

procedure," as required by District of Columbia law, the District Court correctly held that the Act does not apply to this case.

Third, even if this appeal were proper ***and*** the Act applied retroactively, it still would be inapplicable in federal court. As the District Court correctly recognized, Mr. Breitbart and Mr. O'Connor's decision to remove this case to federal court and file a motion under a statute that was not effective when Mrs. Sherrod filed her case placed them in a Catch-22 of their own making: the D.C. Anti-SLAPP Act does not retroactively apply to Mrs. Sherrod's case unless the Act is "purely procedural," but a purely procedural state law does not apply in federal court under the *Erie* doctrine. Statement of Reasons 4 (JA __). Mr. Breitbart and Mr. O'Connor offered no answer to this obvious contradiction in the District Court—and Mr. O'Connor still has no answer here. Instead, he has doubled down by arguing that the Act provides a substantive right not to stand trial for purposes of the collateral-order doctrine and the *Erie* doctrine, yet is still somehow purely procedural for purposes of the presumption against retroactivity. The rules of law and logic (not to mention commonsense) dictate that Mr. O'Connor cannot simultaneously prevail on all of these issues.

Fourth, even if Mr. O'Connor could overcome each of these hurdles, the District Court properly denied the Anti-SLAPP motion for yet another reason: Mr. Breitbart and Mr. O'Connor filed their motion well after the 45-day deadline set by the Act. Mr. O'Connor now asserts that the District Court unwittingly granted an extension of time when it allowed Mr. Breitbart and him extra time to file their Rule 12(b) motion to dismiss. But the District Court disagreed, and Mr. O'Connor has not established that the court abused its discretion when it interpreted ***its own*** scheduling order and denied the Anti-SLAPP motion as untimely.

In sum, although Mr. O'Connor contends that this appeal is about protecting him from frivolous legal claims, the most questionable claims in this case have come from him. Contrary to Mr. O'Connor's contradictory and unfounded assertions, the District Court's order is not appealable now and the Act does not apply to this case; and even if it did, the District Court was well within its discretion to rule the late-filed motion untimely. Accordingly, this appeal should be dismissed for

lack of jurisdiction or, in the alternative, the District Court's order should be affirmed.[3]

STATEMENT OF JURISDICTION

Mrs. Sherrod disputes that this Court has jurisdiction over this appeal. The District Court's order was not a final decision under 28 U.S.C. § 1291, and the collateral-order doctrine does not apply for the reasons stated at pages 20-40 of this brief.

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction over this appeal under the collateral-order doctrine.

2. Whether the District Court correctly held that the D.C. Anti-SLAPP Act does not apply to this case because Mrs. Sherrod filed her Complaint before the Act became effective and because it is not retroactive.

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[3] Although Mr. Breitbart and Mr. O'Connor jointly appealed the District Court's order, neither Mr. Breitbart nor any personal representative or estate acting on his behalf filed an opening brief. Therefore, while each of the arguments made herein applies equally to Mr. Breitbart's appeal, the Court would be justified in dismissing his appeal for the additional reason that Mr. Breitbart failed to file an opening brief by the deadline set by the Court. *See* Fed. R. App. P. 31(c); D.C. Circuit Handbook of Practice and Internal Procedure 37.

3. Whether the District Court correctly held that even if the Act were purely procedural such that it could apply to cases that were filed before the Act's effective date, the Act would not apply in federal court under the *Erie* doctrine.

4. Whether the District Court correctly held that even if the Act applies to this case, Mr. Breitbart and Mr. O'Connor filed their Anti-SLAPP motion to dismiss after the Act's express deadline for such motions.

RELEVANT STATUTORY PROVISIONS

The District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, is contained in the Addendum to Mr. O'Connor's brief.

STATEMENT OF THE CASE

This defamation case arises out of Mr. Breitbart and Mr. O'Connor's July 19, 2010 publication of the blog post *Video Proof: The NAACP Awards Racism–2010*, in which they used deceptively edited video clips and false written statements to assert that Mrs. Sherrod racially discriminated against a white farmer in her capacity as a USDA official. On February 11, 2011, Mrs. Sherrod filed her Complaint in the Superior Court for the District of Columbia against Mr. Breitbart, Mr. O'Connor, and the unidentified individual

(sued as JOHN DOE) who provided the video clips to them. The Complaint alleges claims for defamation, false-light invasion of privacy, and intentional infliction of emotional distress based on the false written statements in the blog post and on the publication of the deceptively edited video clips of Mrs. Sherrod's speech.

On March 4, 2011, Mr. Breitbart and Mr. O'Connor removed the case to the District Court. On March 15, 2011, the District Court granted Mr. Breitbart and Mr. O'Connor's request for an extension of time to respond to the Complaint. A further extension of time was granted several weeks later. On March 31, 2011, the D.C. Anti-SLAPP Act became effective.

On April 18, 2011, Mr. Breitbart and Mr. O'Connor jointly filed two related motions to dismiss. First, they filed a Rule 12(b) motion to dismiss or, in the alternative, to transfer. As relevant here, the Rule 12(b)(6) section of the motion argued that the textual statements in the blog post were "opinion" and thus failed to state a claim. *See* Defs.' Rule 12(b) Mem. 28-44 (JA ___). The motion did not, however, challenge the defamatory nature of the deceptively edited video clips themselves, *see id.*, which independently defamed Mrs. Sherrod, cast

her in a damaging false light, and intentionally inflicted emotional distress, Compl. ¶¶ 45, 93-94 (JA ___). Second, Mr. Breitbart and Mr. O'Connor filed a motion to dismiss based on the D.C. Anti-SLAPP Act even though the Act had not become effective until March 31, 2011—nearly two months after Mrs. Sherrod filed her Complaint. The Anti-SLAPP motion did not assert immunity or any special defense under the Act. Rather, the motion simply "incorporate[d] the relevant sections of Defendants' Rule 12(b)(6) Motion" and did not seek dismissal on any other ground. *See* Defs.' Anti-SLAPP Mem. 7 (JA ___). Mrs. Sherrod opposed both motions. After oral argument, the District Court denied the two motions on July 28, 2011.

Then, in a telling chronology, Mr. Breitbart and Mr. O'Connor sought interlocutory review of the two orders using two different procedures. First, with respect to their Rule 12(b)(6) motion, they filed a motion for § 1292(b) certification, expressly conceding that the "12(b)(6) Motion [was] not appealable as a matter of right … as a collateral order or otherwise." Defs.' § 1292(b) Mem. 2. Mrs. Sherrod opposed certification, explaining (among other things) that § 1292(b) does not permit the fact-intensive review Mr. Breitbart and

Mr. O'Connor had in mind for this Court. The District Court has not ruled on the § 1292(b) motion.

Second, with respect to their Anti-SLAPP motion, Mr. Breitbart and Mr. O'Connor asserted that the District Court's order could be appealed as of right and should be "considered concurrently with and incident to" their Rule 12(b)(6) motion because the Anti-SLAPP motion was "based on the ***same core factual record*** and presented the ***same core legal arguments***." *Id.* 1. Mr. Breitbart and Mr. O'Connor filed their Notice of Appeal on August 26, 2011.

On October 21, 2011, Mrs. Sherrod moved to dismiss the appeal for lack of subject-matter jurisdiction. In the alternative, she moved for summary affirmance because the D.C. Anti-SLAPP Act does not retroactively apply to her claims. Mr. Breitbart and Mr. O'Connor opposed dismissal and summary affirmance.

On February 6, 2012, this Court asked the District Court to explain its reasons for denying the Anti-SLAPP motion. The District Court issued its Statement of Reasons on February 15, 2012, explaining that it denied Mr. Breitbart and Mr. O'Connor's "'novel', if not overreaching, motion" because (1) the D.C. Anti-SLAPP Act is

substantive, or has substantive consequences, and therefore does not apply to cases that were filed before the Act became effective; (2) even if the Act were purely procedural, it would not apply in federal court under the *Erie* doctrine; and (3) the motion was untimely because it was filed after the 45-day deadline set by the Act. Statement of Reasons 2-6 (JA __).

On July 18, 2012, this Court referred Mrs. Sherrod's motion to dismiss to a merits panel, denied the motion for summary affirmance, and ordered that this case be scheduled for argument concurrently with *3M Company v. Boulter*, No. 12-7012. The *3M* case has since been dismissed.

STATEMENT OF FACTS

Shirley Sherrod has spent her entire adult life working to help poor farmers in the rural south. Compl. ¶¶ 9, 17-19 (JA ___). That work began long before August 2009, when she became the USDA's Georgia State Director for Rural Development, and it continued during her service as a USDA official. *Id.* ¶¶ 9, 20-22 (JA ___).

In recognition of her lifetime of public service, the Georgia NAACP invited Mrs. Sherrod to it 20th Annual Freedom Fund Banquet, where

it presented her with an award on March 27, 2010. *Id.* ¶ 25 (JA ___). During her remarks at the banquet, Mrs. Sherrod underscored the importance of assisting those in financial need without regard to race. *Id.* ¶ 26 (JA ___). To illustrate that point, Mrs. Sherrod told the audience about an experience from her own life that had occurred more than twenty years earlier. *Id.* ¶ 27 (JA ___). Discussing her work at a non-profit organization in 1986, Mrs. Sherrod explained that a poor, white farmer who was confronted with the prospect of losing his farm to foreclosure approached her for help. *Id.* (JA ___). Mrs. Sherrod explained to the NAACP audience that although she initially hesitated because there were so many black farmers who also needed her assistance, she ultimately went to extraordinary lengths to help the white farmer save his farm. *Id.* ¶ 28 (JA ___). Indeed, as Mrs. Sherrod explained in her speech, her encounter with the white farmer made her realize that it is most important to help those in need with regard to race. *Id.* (JA ___).

Several months later, and without ever contacting Mrs. Sherrod, Mr. Breitbart and Mr. O'Connor published a blog post on July 19, 2010, titled *Video Proof: The NAACP Award Racism–2010*. *Id.* ¶ 30 (JA ___).

The purported "video proof" at the heart of the blog post were two video excerpts from Mrs. Sherrod's March 27, 2010 speech, which had been selectively edited to omit critical portions of her remarks—including her explanation that race should not be a factor in deciding whether to help those in need. *Id.* ¶ 31 (JA ___). Although the video clips embedded in the blog post included a ***portion*** of her story about the white farmer, the selectively edited excerpt Mr. Breitbart and Mr. O'Connor published ended just seconds before Mrs. Sherrod explained that she ultimately helped the white farmer save his farm. *Id.* ¶ 42 (JA ___).

Moreover, Mr. Breitbart and Mr. O'Connor added textual statements to the video clips, which falsely asserted (among other things) that Mrs. Sherrod had admitted "that in her federally appointed position, overseeing over a billion dollars .... [s]he discriminates against people due to their race." *Id.* ¶¶ 35-37 (JA ___). The blog post also included an essay by Mr. Breitbart that contained other false and defamatory factual assertions about Mrs. Sherrod. For example, Mr. Breitbart wrote that:

- the excerpted video shows "video evidence of racism coming from a federal appointee and NAACP award recipient";
- "this federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions";
- "[i]n the first video, Sherrod describes how she racially discriminates against a white farmer"; and
- Mrs. Sherrod's speech is a "racist tale."

Id. ¶¶ 4, 48-50 (JA ___). Soon after the blog post was published, Mr. Breitbart further defamed Mrs. Sherrod through his Twitter account by "tweeting" a link to the blog post along with the message: "Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?" *Id.* ¶¶ 60-61. (JA ___).

Each of Mr. Breitbart's and Mr. O'Connor's statements about Mrs. Sherrod was false because (among other things) she was not a federal official at the time of her encounter with the white farmer (a man named Roger Spooner) and she did not "admit[]" to discriminating against him based on his race. *Id.* ¶ 55 (JA ___). Indeed, the theme of her speech was that no one should discriminate or make decisions about a person based on their race. *Id.* (JA ___). But Mr. Breitbart and Mr. O'Connor's textual statements and the edited video clips left the false impression that Mrs. Sherrod had discriminated against

Mr. Spooner in the course of her federal duties, and that she had "admitted" doing so.

Because Mr. Breitbart and Mr. O'Connor used the Internet to publish the blog post to a worldwide audience, their false factual assertions about Mrs. Sherrod spread quickly. *Id.* ¶ 70 (JA ___). Media outlets across the country immediately and repeatedly aired the misleading video clips and echoed Mr. Breitbart and Mr. O'Connor's defamatory statements about Mrs. Sherrod *Id.* (JA ___). Within hours, Mrs. Sherrod's supervisors demanded her resignation from the USDA. She complied. *Id.* ¶¶ 72-77 (JA ___).

Eventually, the NAACP released the unabridged video of Mrs. Sherrod's speech, leading to apologies from senior government officials and members of the media. *Id.* ¶¶ 80, 82-83 (JA ___). But Mr. Breitbart and Mr. O'Connor have not apologized and instead stand by their false statements. *Id.* ¶ 84. Indeed, the defamatory blog post, including the selectively edited video clips, remain on Mr. Breitbart's website to this day. *Id.* Mr. Breitbart and Mr. O'Connor's conduct has caused enduring damage to Mrs. Sherrod's reputation, as well as

emotional distress and financial damages from the loss of her employment at the USDA. *Id.* ¶¶ 86-90 (JA ___).

SUMMARY OF ARGUMENT

Each of the points raised in Mr. O'Connor's brief is unavailing. ***First***, this Court lacks jurisdiction to hear this interlocutory appeal. No final judgment has been entered in the District Court, and the collateral-order doctrine does not apply because the D.C. Anti-SLAPP Act contains ***no textual basis*** to support an immediate interlocutory appeal. Moreover, Mr. O'Connor's "opinion" defense—which is based on the particular facts and factual allegations of this case, not any abstract question of law—is not separate from the merits of Mrs. Sherrod's claims. It also will undoubtedly be raised again when the case proceeds in the District Court and can be reviewed on appeal after final judgment because it does not involve any sort of right not to stand trial or immunity from suit. Accordingly, this appeal should be dismissed at the outset.

Second, the District Court correctly held that the D.C. Anti-SLAPP Act does not apply to this case because Mrs. Sherrod filed her Complaint before the Act took effect. Under District of Columbia law,

new statutes that do not "pertain only to procedure" do not apply to pending cases unless there is a clear legislative showing that the statute should apply retroactively. The D.C. Anti-SLAPP Act is silent on the subject of retroactivity, but it does contain substantive provisions. Therefore, the District Court correctly held that the Act does not apply to this case.

Third, the District Court correctly held that even if the Act were purely procedural such that it could be applied in pending cases, it still would be inapplicable here because purely procedural state laws do not apply in federal court under the *Erie* doctrine. Moreover, the Act conflicts with the Federal Rules of Civil Procedure.

Fourth, the District Court acted within its discretion when it concluded that Mr. Breitbart and Mr. O'Connor filed their Anti-SLAPP motion after the 45-day deadline set forth in the Act, requiring that the motion be denied as untimely. Because Mrs. Sherrod served Mr. Breitbart and Mr. O'Connor with the Complaint on February 12, 2011, their motion to dismiss was due on March 29, 2011. They did not file their motion until April 18, 2011. Mr. O'Connor contends that the District Court granted an extension of time to file the motion, but the

District Court disagreed and held that the motion was untimely. The District Court's decision was correct and, in all events, is entitled to deference because the District Court was interpreting its own scheduling order.

***Fifth*,** although Mr. O'Connor would like this Court to review his "opinion" argument, it is inappropriate for the Court to do so. And even if the Court were to reach that argument, it does not provide a basis for reversal because Mr. Breitbart and Mr. O'Connor's statements about Mrs. Sherrod are verifiably false assertions of fact—not "opinion." Moreover, because Mr. Breitbart and Mr. O'Connor did not challenge the defamatory nature of the selectively edited video clips they embedded in their blog post, Mrs. Sherrod's claims would survive even if the Court were to conclude that their textual statements are "opinion." For all these reasons, this appeal should be dismissed or the District Court's order denying Mr. Breitbart and Mr. O'Connor's Anti-SLAPP motion to dismiss should be affirmed.

STANDARD OF REVIEW

A district court's legal conclusions, including its conclusions with respect to the retroactive application of a statute and the applicability

of state law in federal court under the *Erie* doctrine, are reviewed *de novo*. *See, e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 893 (D.C. Cir. 2010). Although the District Court did not consider Mr. O'Connor's "opinion" defense in its order or Statement of Reasons for denying Mr. Breitbart and Mr. O'Connor's Anti-SLAPP motion, the merit of that defense involves a legal conclusion that this Court would also review *de novo* if there were a legal conclusion to review.

This Court reviews the District Court's conclusions about the timeliness of Mr. Breitbart and Mr. O'Connor's Anti-SLAPP motion for abuse of discretion. *See, e.g.*, *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 424-25 (D.C. Cir. 2005) (district court's decision to deny summary judgment motion filed after deadline for dispositive motions reviewed for abuse of discretion).

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL.

This interlocutory appeal begins and ends with the threshold point that this Court lacks subject-matter jurisdiction. The District Court never granted leave for this appeal. And because Congress strictly limited appeals as of right to those taken from "final decisions of the district courts," 28 U.S.C. § 1291, a party ordinarily "is entitled to a

single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). The District Court's order here was not final because it permitted the case to proceed, *id.* at 867, and thus this Court lacks jurisdiction over this appeal.

Notably, Mr. O'Connor conceded this point with regard to the order denying his Rule 12(b)(6) motion to dismiss, where he and Mr. Breitbart asserted the "opinion" defense discussed in Section I of Mr. O'Connor's brief. Mr. O'Connor nevertheless contends that the order denying his Anti-SLAPP motion is immediately appealable under the collateral-order doctrine even though the only ground for dismissal that motion asserted was the ***very same*** "opinion" defense set forth in Mr. O'Connor's Rule 12(b)(6) motion to dismiss. Mr. O'Connor does not cite any provision of the D.C. Anti-SLAPP Act that supports this result because no such provision exists.

Like Rules 12(b) and 56 of the D.C. and Federal Rules of Civil Procedure, the D.C. Anti-SLAPP Act provides a mechanism for pretrial dismissal in certain cases if the law and the facts of the case otherwise

provide a basis to do so. In particular, the Act states that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). If the moving party "makes a prima facie showing that the claim at issue arises from an act" within the statute's scope, then discovery is stayed and the burden shifts to the opposing party to "demonstrate[] that the claim is likely to succeed on the merits." *Id.* § 16-5502(b). If the opposing party does not meet this standard, the claim is dismissed and the court may award the moving party "the costs of litigation, including reasonable attorney fees." *Id.* § 16-5504(a).

None of these provisions justifies Mr. O'Connor's attempt to circumvent the Supreme Court's repeated admonition that "the 'small class' of collaterally appealable orders" must be kept "narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006). Indeed, ***nothing*** in the text of the D.C. Anti-SLAPP Act suggests that a right to interlocutory appeal exists. Mr. O'Connor nevertheless would like this Court to recognize a new, categorical right to immediate appellate review that would throw open this Court's doors each and

every time the district court below denies an Anti-SLAPP motion. There is no basis to do so, however, and for good reason: the final-judgment rule would not be much of a rule at all if any and every supposed "advoca[te] on issues of public interest," D.C. Code § 16-5502(a), could immediately seek appellate review of an ***otherwise unappealable*** order simply because he included a carbon copy of his argument in a "special" motion to dismiss. But that is precisely what Mr. O'Connor hopes the Court will allow here.

Standing in his way are the collateral-order doctrine's three "stringent" requirements. *Will*, 546 U.S. at 349-50. In particular, Mr. O'Connor must show that orders denying motions under the D.C. Anti-SLAPP Act (1) are "effectively unreviewable on appeal from a final judgment," (2) resolve an "important issue completely separate from the merits" of the case, and (3) "conclusively determine the disputed question" decided by the district court. *Id.* Because orders denying motions under the Act do not satisfy any of these three requirements, Mr. O'Connor's appeal must be dismissed.

A. Orders Denying Motions Under The D.C. Anti-SLAPP Act Are Reviewable After Final Judgment.

First and foremost, orders denying motions under the D.C. Anti-SLAPP Act are not "effectively unreviewable" because they "can be adequately vindicated on appeal from final judgment." *See Digital Equip.*, 511 U.S. at 869. This unreviewability requirement is rigorous and is satisfied only if two conditions are met. First, immediate appeal must be necessary to preserve a true "right not to stand trial"—not just a claim for pretrial dismissal. *See Digital Equip.*, 511 U.S. at 871-73. Second, even where a true claim to immunity from suit is threatened, appeal still is not permitted unless it is also necessary to preserve "some particular value of a high order." *Will*, 546 U.S. at 352. "The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009).

No such "right not to stand trial" is at stake when a motion to dismiss under the D.C. Anti-SLAPP Act is denied. Rather, Anti-SLAPP motions are like Rule 12(b)(6) and Rule 56(a) motions in that they

merely provide a vehicle to assert some independent ground for dismissal (like Mr. O'Connor's "opinion" defense) in light of the applicable standard of review. *See, e.g.*, *Englert v. MacDonell*, 551 F.3d 1099, 1102 (9th Cir. 2009) (no appeal from orders denying motions under Oregon's similar anti-SLAPP statute because the act "does not alter the substantive law of defamation" and the motion "serves the same purpose as a motion for summary judgment").

For motions under the D.C. Anti-SLAPP Act, the applicable standard of review is likelihood of success on the merits. D.C. Code § 16-5502(b). But that standard does not make an order denying the motion immediately appealable, just as Rule 12(b)(6) and Rule 56(a) motions are not appealable because they ask whether the plaintiff stated a claim or whether the defendant is entitled to judgment as a matter of law. *See Digital Equip.*, 511 U.S. at 873; *Oscarson v. Office of the Senate Sergeant at Arms*, 550 F.3d 1, 2 (D.C. Cir. 2008) ("[D]enials of motions to dismiss are generally not reviewable."). Mr. O'Connor's unappealable "opinion" defense did not become appealable simply because he incorporated the relevant sections of his Rule 12(b)(6) motion into his Anti-SLAPP motion to dismiss.

Mr. O'Connor tries to deflect attention away from this fundamental defect in his position by ignoring the D.C. Anti-SLAPP Act's text altogether while focusing instead on cases from ***other*** jurisdictions that dealt with ***different*** anti-SLAPP statutes. *See* O'Connor Br. 47-49. According to Mr. O'Connor, these cases—and the Ninth Circuit's *Batzel v. Smith* decision (which involved California's anti-SLAPP statute), in particular—show that ***all*** anti-SLAPP statutes provide a right "in the nature of an immunity" that justifies interlocutory appeal under the collateral-order doctrine. *Id.* 48 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)).

That would only be true, of course, if all anti-SLAPP statutes were identical. They are not: each statute is distinguishable due to "significant differences" in the statutes' provisions such that "each state's statutory scheme must be evaluated separately." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012). For example, some anti-SLAPP statutes expressly provide immunity from liability (though not necessarily immunity from trial). *See, e.g.*, 735 Ill. Comp. Stat. § 110/15; R.I. Gen. Laws § 9-33-2(a); Tenn. Code § 4-21-1003(c). The D.C. Anti-SLAPP Act does not. *See* D.C. Code § 16-

5502(b). And some other anti-SLAPP statutes expressly provide for interlocutory appeal. *See, e.g.*, Cal. Civ. Proc. Code § 425.16(i). Again, the D.C. Anti-SLAPP Act does not.

These "significant differences" are why the Ninth Circuit itself has repeatedly declined to follow its own *Batzel* decision in cases where the anti-SLAPP statute at issue differed from California's. *Metabolic Research*, 693 F.3d at 796; *Englert*, 551 F.3d at 1102. As the Ninth Circuit explained in *Metabolic*, "the major distinguishing feature" of California's anti-SLAPP act is the ***statutory*** right to interlocutory appeal in state court, which was the primary basis for *Batzel*'s conclusion that the California act provided a right akin to immunity. *Metabolic Research*, 693 F.3d at 801. Setting aside that *Batzel*'s conclusion in this regard conflicted with two decisions of the California Supreme Court,[4] *Metabolic* recognized that *Batzel*'s reasoning does not apply to anti-SLAPP statutes—like the D.C. Anti-SLAPP Act—that do not provide for interlocutory appeal. *See id.*; *see also Englert*, 551 F.3d

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[4] In *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002), and *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 743-44 (Cal. 2003), the Supreme Court of California held that California's anti-SLAPP statute "neither constitutes—nor enables courts to effect—any kind of 'immunity.'"

at 1106.[5] *Metabolic* correctly distinguished the Fifth Circuit's *Henry* decision for a similar reason, 693 F.3d at 801 n.7,[6] and held that orders denying motions to dismiss under Nevada's anti-SLAPP statute are not immediately appealable—even though the statute expressly provided "immun[ity] from civil liability"—because "immunity from 'civil liability' is unquestionably different than immunity from 'suit' or 'trial,'" *id.* at 802. *See also Swint v. Chambers County Comm'n*, 514 U.S. 35, 43

[5] Public Citizen and the ACLU contend that, although the Act does not provide for interlocutory appeal, the D.C. Council purportedly wanted to allow "immediate appellate review" but "believed itself without authority to do so." Public Citizen Br. 18. The crux of *Amici*'s position thus is that the Court should read into the Act a right that the Council itself was powerless to add and which therefore is not a part of the statute. This Court has long recognized, however, that it has "no authority to enforce principles gleaned solely from legislative history … [with] no statutory reference point." *Int'l Broth. of Elec. Workers v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis omitted).

[6] Although Mr. O'Connor cites one line of *dicta* from *McNair Builders, Inc. v. Taylor* to suggest that the District of Columbia Court of Appeals has followed *Henry*'s holding, O'Connor Br. 51 n.32, *McNair* did no such thing. Rather, *McNair* supports Mrs. Sherrod's position in that the D.C. Court of Appeals recognized that *Will* and *Mohawk* "significantly refined the analytical framework" of the collateral-order doctrine and reinforced that the requirement of "unreviewability" is rigorous. *See* 3 A.3d 1132, 1142 (D.C. 2010). For that reason, *McNair* dismissed an interlocutory appeal from an order denying ***absolute immunity*** and overruled a prior case that had permitted such appeals. *Id.*

(1995) ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment.").[7]

Critically, the D.C. Anti-SLAPP Act provides even less than the Nevada statute because the D.C. Anti-SLAPP Act does not even provide immunity from civil liability (let alone a true right not to stand trial). Indeed, neither the words nor the notion of "immunity from trial" appear anywhere in the Act. For if they did, defendants could and would assert that immunity through an ordinary Rule 12(b)(6) motion, as is routinely done by government officials asserting a true qualified immunity from suit. That Mr. O'Connor did not do so here (opting for his "opinion" defense instead) speaks volumes about the purported "immunity" he says the Act provides.

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[7] Mr. O'Connor also relies on the First Circuit's decision in *Godin v. Schenks*, where the court held that it had limited jurisdiction to review solely whether the district court had properly concluded that Maine's anti-SLAPP statute does not apply in federal court under the *Erie* doctrine. 629 F.3d 79, 84 (2010). Although *Godin* was wrong on this point and should have required the defendant to seek review under 28 U.S.C. § 1292(b) for the reasons described herein, *Godin* ***declined*** to hold that it had jurisdiction over other issues that could arise out of the denial of an anti-SLAPP motion. *Id.* Therefore, *Godin* does not support Mr. O'Connor's position that this Court has jurisdiction to review the District Court's decisions regarding the retroactive application of the D.C. Anti-SLAPP Act, the timeliness of Mr. O'Connor's Anti-SLAPP motion, or his "opinion" defense.

For their part, *Amici* Public Citizen, the ACLU, and the District of Columbia concede that the Act's text does not actually provide immunity. *See, e.g.*, Public Citizen Br. 19; District Br. 10-11. *Amici* contend, however, that this Court should nevertheless hold that the Act ***impliedly*** creates the strongest type of immunity—a right not to stand trial typically afforded only to government officials and sovereign entities—because a few sentences of legislative history refer to the immunity provided by statutes ***in other jurisdictions*** and a right to interlocutory appeal that the D.C. Council ***omitted from the Act.*** *See* Public Citizen Br. 8, 19; District Br. 10-11. Even in ordinary circumstances, these references to immunity and appeal would not be a sufficient basis to find that the Act provides immunity from suit. *See, e.g.*, *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 755 & n.5 (D.C. 1983) (en banc) (single sentence of legislative history could not change plain meaning of statutory text); *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 472 (D.C. 2002) ("This court will not read into an unambiguous statute language that is clearly not there."). And they certainly are not a sufficient basis to create a right here given the collateral-order doctrine's "stringent" requirements. *See, e.g.*, *Will*,

546 U.S. at 353-54 (Federal Tort Claims Act's "complete bar to any action" against relevant employees of the government was not a "right not to stand trial" under *Cohen* because the judgment bar was designed to avoid litigation, not provide qualified immunity).

The key point here is one the Supreme Court has repeatedly emphasized. "Those seeking immediate appeal … naturally argue that any order denying a claim of right to prevail without trial satisfies the [unreviewability] condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters." *Id.* at 351. To guard against this result, "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye, for virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Swint*, 514 U.S. at 43. The jurisdiction of the courts of appeals, however, "should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digital Equip.*, 511 U.S. at 872. A claimed right to early dismissal—even one masquerading as a purported "immunity"—does not justify interlocutory appeal. *See, e.g.*, *Van Cauwenberghe v. Biard*, 486 U.S.

517, 524 (1988) (holding that "immunity from civil service of process" is not a "right not to stand trial" that justifies immediate appeal).

If the District of Columbia had wanted to provide a true immunity from trial, it certainly could have done so. *Cf., e.g.*, D.C. Code § 7-1231.08(f) (stating that covered parties "shall be immune from suit"). But it did not.[8] Instead, it chose to allow defendants in certain circumstances to test plaintiffs' likelihood of success on the merits at the motion to dismiss stage and equipped them with other substantive rights, such as the Act's attorneys'-fees provision. But those substantive rights do not provide an immunity from suit any more than Rule 12(b)(6) provides an immunity from defective legal claims or Rule 56(a) provides immunity where the defendant is entitled to judgment as a matter of law. The D.C. Anti-SLAPP Act may allow certain defendants to avoid the costs and burdens of litigation, but the

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[8] Even if the Anti-SLAPP Act did provide immunity, its protection still would not be "important" enough for collateral-order purposes. *See Will*, 546 U.S. at 351-52. Although the Supreme Court has allowed interlocutory appeals in limited circumstances to address certain claims of immunity, it did so to "preserv[e] the efficiency of government and the initiative of its officials" or to protect some other "high order" governmental interest. *See id.* at 352. No similar governmental interest is at stake when an Anti-SLAPP motion is denied. *See id.* at 353.

avoidance of litigation has never been sufficient on its own to "allow[] the immediate appeal of a pretrial order." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499 (1989). Accordingly, Mr. O'Connor's appeal must await final judgment.

B. Orders Denying Motions Under The D.C. Anti-SLAPP Act Do Not Resolve An Issue Completely Separate From The Merits.

The second *Cohen* factor requires Mr. O'Connor to demonstrate that orders denying Anti-SLAPP motions "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The reason for this requirement is straightforward: "allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.* at 476. Accordingly, collateral-order appeals are not permitted if the class of orders at issue "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 469.

That is equally true for interlocutory appeals involving claims of qualified immunity—a point Mr. O'Connor entirely ignores in his brief. As the Supreme Court explained in *Johnson v. Jones*, the reason some claims of qualified immunity are immediately appealable while others are not is that appealable claims involve only "the purely legal issue of what law was 'clearly established'" or similar "abstract issues of law," which are "significantly different from the questions underlying [the] plaintiff's claim on the merits." 515 U.S. 304, 313-14, 317 (1995). On the other hand, claims of immunity that turn on fact-intensive inquiries are not immediately appealable because they are not completely separate from the merits. *Id.* An interlocutory appeal "concerning this kind of issue" wastes appellate courts' time "by forcing them to decide in the context of a less developed record[] an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." *Id.* at 317.

Orders denying Anti-SLAPP motions are not "completely separate from the merits" for this reason. Indeed, to determine whether the plaintiff's claim "is likely to succeed on the merits," D.C. Code § 16-5502(b), the appellate court has no choice but to answer "the questions

underlying [the] plaintiff's claim on the merits," *Jones*, 515 U.S. at 314. This, in turn, requires the court to determine "the legal classification of a congeries of facts" that are "bound up with the merits" of the plaintiff's claim; but such "fact-related determinations do[] not comport with *Cohen*'s theory of appealability." *See Oscarson*, 550 F.3d at 3-6. Therefore, although Mr. O'Connor contends that the D.C. Anti-SLAPP Act provides a right "in the nature of an immunity," O'Connor Br. 50, that incorrect contention is ultimately insufficient.

Mr. Breitbart and Mr. O'Connor's Anti-SLAPP motion illustrates the point. Though their Rule 12(b)(6) motion "plainly [was] not separate from the merits," *see Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1133 (D.C. Cir. 2004), their Anti-SLAPP motion merely "incorporate[d]" its "relevant sections" to assert exactly the same argument, Defs.' Anti-SLAPP Mem. 7 (JA __). Both motions thus asked the District Court to analyze the extensive allegations in the Complaint—and a wide array of facts beyond the Complaint[9]—to

[9] As if to reinforce that this appeal does not satisfy the collateral-order doctrine, Mr. O'Connor asks the Court to take judicial notice of a host of facts not alleged in the Complaint that (according to Mr. O'Connor) are part of the "broad" factual context for Mr. Breitbart and Mr. O'Connor's statements about Mrs. Sherrod. O'Connor Br. 7 n.1. Setting aside

conclude that Mrs. Sherrod's claims were defective because the textual statements in the blog post were "nonactionable opinion." O'Connor Br. 7-37.

Mr. O'Connor's sole response to this point is a single sentence drawn from *Batzel*, O'Connor Br. 48, which stated that the "[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed," *Batzel*, 333 F.3d at 1025. The circularity of *Batzel*'s reasoning is apparent and would render the

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whether it would be appropriate for this Court to take judicial notice of a fact like the occurrence of a protest in Washington, D.C., O'Connor Br. 8, Mr. O'Connor asks for much more: he wants the Court to take judicial notice that the facts cited in footnotes 1-26 and the accompanying text of his brief are the "context" for the blog post and the motivating factor underlying Mr. Breitbart and Mr. O'Connor's statements about Mrs. Sherrod. That is not an appropriate use of judicial notice. *See* Fed. R. Evid. 201(b)(1)-(2).

Mr. O'Connor's request also contradicts Public Citizen and the ACLU's assertion that the Court's jurisdiction here is akin to its jurisdiction with respect to qualified immunity because in both situations, "courts engage in a threshold immunity analysis" relating to "abstract legal grounds" that are "separate from the underlying merits of a plaintiff's claim." Public Citizen Br. 9-11, 13. That, however, is plainly not what Mr. O'Connor has in mind. Indeed, although *Amici* contend that ruling on an anti-SLAPP motion does not require the Court to "determine whether a defendant did, in fact, violate the law," *see id.* 10, that is ***precisely*** the issue presented in Mr. O'Connor's brief.

collateral-order doctrine's requirement of separateness a dead letter: a court's review of whether a plaintiff's claim "is likely to succeed on the merits," D.C. Code § 16-5502(b), is inextricably tied with an evaluation of the merits. As a result, the issues that arise in Anti-SLAPP appeals "will substantially overlap [the] factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal." *See Biard*, 486 U.S. at 529. This Court has already recognized as much for Rule 12(b)(6) motions, *see Kilburn*, 376 F.3d at 1133, and it should reach the same commonsense conclusion for motions brought under the D.C. Anti-SLAPP Act.

C. Orders Denying Motions Under The D.C. Anti-SLAPP Act Do Not Conclusively Decide A Disputed Question.

Finally, Mr. O'Connor must establish that orders denying Anti-SLAPP motions "conclusively determine the disputed question" decided by the court below. *Livesay*, 437 U.S. at 468. This *Cohen* requirement saves appellate courts from resolving questions that ultimately become moot, perhaps because the district court subsequently revised its ruling, the issue did not affect final judgment in a manner warranting reversal, or the party that lost the ruling prevailed on the merits. *See, e.g.*, *United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999); *Banks v.*

Office of Senate Sergeant-At-Arms, 471 F.3d 1341, 1344-45 (D.C. Cir. 2006).

Anti-SLAPP motions implicate each of these concerns because the "disputed question" at hand—the plaintiff's ability to succeed on the merits—will recur throughout the district court proceedings. This case again is illustrative. If this Court were to conclude that Mr. O'Connor is not entitled to dismissal at this stage based on his "opinion" defense (which it should, assuming it reaches that issue at all), he presumably will take the position that the District Court (and eventually this Court) could revisit that defense later in the case. *See, e.g.*, *Cisneros*, 169 F.3d at 768 (dismissing appeal where the district court's "underlying rationale would remain subject to revision and reconsideration in light of the evidence produced at trial").

Moreover, Mr. O'Connor stated in his Anti-SLAPP motion that he and Mr. Breitbart were not "seeking to dismiss any claim in Plaintiff's complaint" on the grounds of "actual malice" but would assert that purported defense later in the case. *See* Defs.' Anti-SLAPP Mem. at 2 (JA __). If the District Court were to agree with Mr. O'Connor on that ground, this Court might never be asked to address his "opinion"

argument at all. *See Cisneros*, 169 F.3d at 768. That is the point of *Cohen*'s conclusivity requirement—to ensure that this Court does not waste its time prematurely addressing evolving inquiries like these.

Mr. O'Connor's sole response to this point is again drawn from *Batzel*, which stated that the denial of an anti-SLAPP motion is "conclusive as to whether the anti-SLAPP statute require[s] dismissal" of the relevant claims. O'Connor Br. 48 (quoting *Batzel*, 333 F.3d at 1025); *see also* Public Citizen Br. 13. But that is not the relevant question. For if it were, *Cohen*'s requirement of conclusivity would be satisfied in virtually all cases: appellants challenging the denial of a Rule 12(b)(6) motion, for example, would argue that the district court's order was "conclusive as to whether [Rule 12(b)(6)] required dismissal" of the plaintiff's claims. That is not the law. *See, e.g.*, *Cisneros*, 169 F.3d at 768.

The bottom line here is that this Court can effectively review the District Court's Anti-SLAPP order after the factual record on which it was based has been fully developed, after Mr. O'Connor has exhausted his opportunities to convince the District Court that he is entitled to dismissal, and after final judgment has been entered (if the Anti-

SLAPP order still matters to Mr. O'Connor at that time). And just as surely, there is no basis to apply "the blunt, categorical instrument of § 1291 collateral order appeal" given that a precise mechanism for discretionary review remains available under § 1292(b). *See Digital Equip.*, 511 U.S. at 883. If Mr. O'Connor believed that the issues involved in this appeal presented "new legal question[s]" or were "of special consequence" (as he has suggested in this Court), *Mohawk*, 130 S. Ct. at 607, he should have sought § 1292(b) certification. He did not. Accordingly, because the District Court's order was not a final decision or an immediately appealable collateral order, this appeal should be dismissed.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE D.C. ANTI-SLAPP ACT DOES NOT APPLY TO THIS CASE.

If the Court concludes, however, that it has jurisdiction over this appeal, it should nevertheless affirm the District Court's conclusion that the D.C. Anti-SLAPP Act does not apply to this case. First, the District Court correctly held that the Act "is substantive—or at the very least has substantive consequences"—and therefore does not apply to cases (like Mrs. Sherrod's) that were filed before the Act's effective date. Statement of Reasons 3-4 (JA ___). Second, the District Court correctly

held in the alternative that even if the D.C. Anti-SLAPP Act were "purely procedural" such that it could retroactively apply to cases filed before the Act's effective date, it still would not apply here because federal courts sitting in diversity do not apply state procedural law. *Id.* at 4 (JA ___).

As the District Court noted, Mr. O'Connor thus finds himself in a Catch-22: "***either*** the statute is partially substantive (or has substantive consequences) and is therefore not retroactive under D.C. law ***or*** it is purely procedural and inapplicable in federal court under *Erie*." *Id.* at 4-5 (emphasis in original) (JA ___). This contradiction presumably explains why ***none*** of the *Amici* who contend that the Act should apply in federal court under *Erie* supports Mr. O'Connor's position that the Act also applies to cases that were filed before the Act became effective. Indeed, ***all*** of the defendants-appellants in *3M Company v. Boulter*, and ***all*** of the *amici* in that case and here, agree that the Act is substantive as a matter of District of Columbia law. *See, e.g.*, Public Citizen Br. 6 (explaining that the Act "clearly constitutes substantive law"). Accordingly, this Court can

affirm the District Court's order here on retroactivity grounds without reaching any further issue in this case.

A. The D.C. Anti-SLAPP Act Does Not Apply To Cases That Were Filed Before The Act Became Effective.

Under District of Columbia law (as under federal law), "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect." *Bank of America, N.A. v. Griffin*, 2 A.3d 1070, 1076 (D.C. 2010) (holding that a court generally may not apply a new District of Columbia statute to a case that was filed before the statute's effective date if doing so would "affect the substantive rights of litigants"); *see also id.* at 1073 n.7 (following federal law and citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)). Any statute that does not "pertain ***only to procedure***" is subject to this rule. *Id.* Accordingly, "if a statute would attach new legal consequences to events completed before its effective date—by impairing rights a party possessed when it acted, increasing a party's liability for past conduct, or imposing new duties with respect to transactions already completed—then the statute does not apply retroactively to those events absent 'a clear legislative showing' favoring such a result." *Metroil, Inc.*

v. ExxonMobil Oil Corp., 672 F.3d 1108, 1113 (D.C. Cir. 2012) (citing *Bank of America*, 2 A.3d at 1076).

Here, the D.C. Anti-SLAPP Act does not include a "clear legislative showing" that it should apply retroactively, but it plainly affects the substantive rights of litigants like Mrs. Sherrod. In particular, the Act purports to heighten a plaintiff's burden at the threshold, requiring the plaintiff to "demonstrate[] that [her] claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Such burden-shifting and burden-heightening provisions are substantive as a matter of law. *See, e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (statutory amendment altering "standards of proof and persuasion in a way favorable" to one party "affect[ed] substantive entitlement to relief" and thus did not apply to pending case). Moreover, the D.C. Anti-SLAPP Act also allows the trial court to award a prevailing defendant "the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a). Cost-shifting provisions of this sort are also substantive. *See, e.g.*, *Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 610 F.3d 747, 750 (D.C. Cir. 2010) (new statutory attorneys'-fees provision did not apply to previously filed case because it "attach[ed] new legal

consequences" to opposing party's prior litigation conduct). Accordingly, because it is undisputed that the Act was not effective when Mrs. Sherrod filed her claims, the Act does not apply because it would substantively affect the consequences of filing those claims.

Indeed, Mr. O'Connor essentially conceded in the District Court that the Act is substantive, a point the District Court noted in its Statement of Reasons: "Here, defendants' own briefs and the [Act's] legislative history make clear that the D.C. Anti-SLAPP Act is substantive" because the Act was "designed, in part, to '***incorporate substantive rights*** that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.'" Statement of Reasons 3 (emphasis in original) (JA ___). Although those "substantive rights" do not include immunity from trial for the reasons explained above, they do mean that the Act does not apply to cases filed before its effective date.

Mr. O'Connor does not cite any case from the District of Columbia to the contrary, or (for that matter) any case applying District of Columbia law as to the presumption against retroactivity. What he

offers instead are four unavailing responses, none of which shows that the District Court's sound decision should be reversed.

First, although Mr. Breitbart and Mr. O'Connor initially asserted in the District Court that the Act "is retroactive," Defs.' Anti-SLAPP Mem. 1 n.1, Mr. O'Connor now contends that "[n]o 'retroactive' application of the statute was ever sought by the Defendants," O'Connor Br. 43. Rather, Mr. O'Connor suggests that "[b]ecause the D.C. Anti-SLAPP Act was in effect at the time Defendants filed their special motion to dismiss," the District Court should not have conducted any retroactivity analysis at all. O'Connor Br. 42. But that makes no sense: of course the law was in effect when Mr. O'Connor filed his motion; otherwise, there would have been no statute to file under. If the fact that the Act had become effective when he filed his motion obviated the need to evaluate the Act's retroactive effects, as Mr. O'Connor states, then no court would ***ever*** need to conduct a retroactivity analysis.

The sole case Mr. O'Connor cites in support of this proposition is the Ninth Circuit's *Newsham* decision, which (according to Mr. O'Connor) "was confronted with a similar scenario … and applied

the California anti-SLAPP statute without conducting any retroactivity analysis." *Id.* 43 (citing *United States* ex rel. *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971-73 (9th Cir. 1999)). Setting aside whether that case actually involved circumstances similar to this case,[10] *Newsham* did not say that it was inappropriate or unnecessary to conduct a retroactivity analysis. Rather, *Newsham* was silent on the question of retroactivity altogether and thus adds nothing here. *See, e.g.*, *Gray Panthers v. Schweiker*, 652 F.2d 146, 163 n.34 (D.C. Cir. 1980) (case from another circuit was not "persuasive precedent" because it did not conduct any analysis of the relevant issue or cite any authority).

Second, Mr. O'Connor cites several cases from other jurisdictions for the proposition that "courts consistently have held that anti-SLAPP statutes apply to pending cases." O'Connor Br. 44. He fails to point out, however, ***why*** those courts ruled the way they did. *Robertson v. Rodriguez*, for example, applied California's anti-SLAPP statute in a

[10] Unlike this case, the relevant claims in *Newsham* were initially dismissed on other grounds and then "reinstated" ***after*** the California anti-SLAPP statute was effective. *See Newsham*, 190 F.3d at 972. Only then did the defendant file an anti-SLAPP motion, *see id.*, perhaps explaining why the court did not conduct a retroactivity analysis.

pending case because it believed the statute was "merely … a procedural screening mechanism," 36 Cal. App. 4th 347, 356 (Ct. App. 1995), undercutting Mr. O'Connor's position that the California statute provides a substantive right akin to immunity, O'Connor Br. 48. *Anderson Development Co. v. Tobias*, in contrast, held that Utah's anti-SLAPP statute ***would*** have retroactive substantive consequences and ordinarily could not be applied in pending cases. 116 P.3d 323, 337 (Utah 2005). Unlike the D.C. Council, however, the Utah legislature stated its "unmistakable intent to subject a party" to retroactive liability through "explicit" statutory text. *Id.* *Tobias* thus supports Mrs. Sherrod's position, not Mr. O'Connor's.

Third, Mr. O'Connor asserts that "assuming" a retroactivity analysis is necessary, "the legislative history of the statute leaves no doubt" that the D.C. Council wanted it to apply to pending cases. O'Connor Br. 45. But the only "legislative history" Mr. O'Connor cites is a lone sentence from the "Fiscal Impact Statement" prepared by the District's Chief Financial Officer, which stated that "***[i]f effective***, the proposed legislation ***could*** have a beneficial impact on current and potential SLAPP defendants." *Id.* That is a far cry from a clear

legislative showing that the Act should be applied retroactively. *See, e.g.*, *Peoples Drug Stores*, 470 A.2d at 755 & n.5; *Metroil*, 672 F.3d at 1114.

Finally, Mr. O'Connor contends that the Act should be applied in this case "because it did not change the substantive law of libel." O'Connor Br. 46. But that makes no difference here. As Media *Amici* explain in their brief, the "substantive rights" provided by the Act are designed to prevent "abusive lawsuits" and the misuse of litigation. *See* Media Orgs. Br. 3-4; *see also* O'Connor Br. 1 (asserting that the Act provides "protections from abusive libel litigation"). Accordingly, the relevant conduct for retroactivity purposes is the act of filing a complaint, not the underlying libel alleged in the complaint. *See, e.g.*, *Hughes Aircraft Co. v. United States* ex rel. *Schumer*, 520 U.S. 939, 947-49 (1997) (new law did not apply to case filed before statute's effective date even though the statute did not change underlying cause of action).

The point here is straightforward. When Mrs. Sherrod filed her Complaint on February 11, 2011, she had no threshold obligation to demonstrate that her claims were "likely to succeed on the merits" before discovery began. D.C. Code § 16-5502(b). Rather, she only had

to allege "a short and plain statement of [her] claim[s]," which she did. *See* Fed. R. Civ. P. 8(a)(2). Nor did she face the prospect of paying Mr. Breitbart and Mr. O'Connor's "costs of litigation, including reasonable attorney fees," if the District Court concluded that her claims were not likely to succeed. D.C. Code § 16-5504(a). The D.C. Anti-SLAPP Act changed all that when it became effective on March 31, 2011—and in doing so, it substantively altered the consequences of filing defamation complaints. *See, e.g.*, *Martin v. Hadix*, 527 U.S. 343, 359-60 (1999) (amendment to attorneys'-fees provision had substantive consequences because it "upset the reasonable expectations of the parties"). Because the Act does not clearly state that it should have retroactive effect as required under District of Columbia law, it does not apply to this case.

B. The D.C. Anti-SLAPP Act Does Not Apply In Federal Court Under The *Erie* Doctrine.

The District Court correctly held in the alternative that even if the Act were "purely procedural" such that it would not present a retroactivity problem, it would not apply in federal court given the so-called "twin aims" of the *Erie* doctrine. *See* Statement of Reasons 3-4 (JA ___). As a result, the District Court properly held that

Mr. Breitbart and Mr. O'Connor faced a Catch-22 that doomed their Anti-SLAPP motion, even if there were no conflict between the Act and the Federal Rules of Civil Procedure. *See id.* at 4-5 (JA __).

As explained in *3M Company v. Boulter*, however, the Act ***does*** conflict with the Federal Rules because the "special" motion to dismiss it allows "squarely attempts to answer the same question that Rules 12 and 56 cover and, therefore, cannot be applied in a federal court sitting in diversity." 842 F. Supp. 2d 85, 102 (D.D.C. 2012); *see also Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). Mr. Breitbart and Mr. O'Connor confirmed as much when they incorporated the "opinion" defense set forth in their Rule 12(b)(6) motion into their Anti-SLAPP motion without asserting any other ground for dismissal.

Mr. O'Connor and *Amici* contend in response that the Act and the Federal Rules can operate in federal court "side by side" without any direct conflict. *See, e.g.*, O'Connor Br. 38-39. But that would be true for many state laws and rules that plainly do not apply in federal court. Indeed, based on Mr. O'Connor's and *Amici*'s conception of *Erie* and its progeny, a defendant in a diversity case in federal court should be

permitted to file motions to dismiss under Federal Rule 12(b)(6) ***and*** D.C. Superior Court Rule 12(b)(6) "side by side" because the two motions would not directly conflict with each other. That, of course, is certainly not the case, which is why the Supreme Court has made clear that the "appropriate test" is whether the Federal Rule is "sufficiently broad" such that it "control[s] the issue before the court." *See* *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) (state law designed to "penalize frivolous appeals" conflicted with the Federal Rules).

Here, the Federal Rules at issue are "sufficiently broad" and do not permit the application of the D.C. Anti-SLAPP Act. For example, Rule 12(b) states that "***[e]very*** defense" to a claim "in ***any*** pleading ***must*** be asserted in ***the*** responsive pleading"—namely, the answer. Fed. R. Civ. P. 12(b); Fed. R. Civ. P. 7(a) (listing the "[o]nly" pleadings allowed); *see also Shady Grove*, 130 S. Ct. at 1437 (state law did not apply where the Federal Rule "provide[d] a one-size-fits-all formula"). And although a party may respond to a complaint with a motion to dismiss instead of an answer, the responsive motion must be one listed in Rule 12(b)(1)-(7). *See* Fed. R. Civ. P. 12(b)(1)-(7). The "special"

motion to dismiss permitted by the D.C. Anti-SLAPP Act is not on that list. *Id.*

Moreover, if the defendant shows through a Rule 12(b) motion that the complaint should be dismissed, dismissal is ***without*** prejudice unless the plaintiff "could not possibly cure the deficiency." *See, e.g.*, *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012). The D.C. Anti-SLAPP Act, however, requires dismissal ***with*** prejudice ***even if*** the deficiency can be cured, D.C. Code § 16-5502(d), thus exacerbating the conflict with the Federal Rules. *See Burlington Northern*, 480 U.S. at 7 (mandatory nature of a state law conflicted with the Federal Rule's "discretionary mode of operation"). The conflicts do not end there, *see, e.g.*, *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-46 (9th Cir. 2001) ("the discovery-limiting aspects" of California's anti-SLAPP statute "collide with the discovery-allowing aspects of Rule 56"); but in all events, the Federal Rules "leav[e] no room for the operation of" the D.C. Anti-SLAPP Act. *See Burlington Northern*, 480 U.S. at 5.

The District Court below correctly recognized, however, that here it ultimately does not matter whether the Act conflicts with the Federal Rules. For even if there were no conflict, the Act still would not apply

under the "twin aims" of *Erie* (the second step of the *Erie* analysis) unless it is substantive. *See* Statement of Reasons 4 (JA ___). Indeed, each of the cases in Mr. O'Connor's and *Amici*'s briefs that applied an anti-SLAPP statute in federal court did so ***precisely because*** the court concluded that the relevant statute was substantive. *See, e.g.*, *Godin*, 629 F.3d at 85, 89 & n.10 ("[I]t is long settled that the allocation of burden of proof is substantive" and an "award of attorney's fees as a sanction for obstinate litigation is substantive for purposes of *Erie* analysis"); *Newsham*, 190 F.3d at 973; *Farah v. Esquire Magazine, Inc.*, No. 11-1179, 2012 WL 1970897, at *11 n.10 (D.D.C. June 4, 2012) ("It was certainly the intent of the D.C. Council and the effect of the [D.C. Anti-SLAPP Act]—dismissal on the merits—to have substantive consequences."); *see also* District Br. 15, 21, 28.

As the District Court explained in its Statement of Reasons, this means Mr. O'Connor faces an insurmountable Catch-22: if the Act provides "substantive rights" in the form of attorneys' fees and a heightened burden of proof (which, according to Mr. O'Connor, also constitute an immunity from suit) for purposes of the *Erie* doctrine and the collateral-order doctrine, the Act cannot also "pertain only to

procedure" such that it overcomes the presumption against retroactivity. Statement of Reasons 4-5 (JA ___).[11] Accordingly, the District Court's order denying Mr. O'Connor's Anti-SLAPP motion should be affirmed.

III. THE DISTRICT COURT CORRECTLY HELD THAT MR. BREITBART AND MR. O'CONNOR'S MOTION WAS UNTIMELY.

Even if this Court were to conclude that the D.C. Anti-SLAPP Act applies to this case, it should still affirm the District Court's order because it correctly held that Mr. Breitbart and Mr. O'Connor filed their motion after the 45-day deadline set forth in the Act. *See* D.C. Code § 16-5502(a). In particular, because Mrs. Sherrod served Mr. Breitbart and Mr. O'Connor with the Complaint on February 12, 2011, their Anti-SLAPP motion would have been due on March 29, 2011—two days before the Act even became effective. They did not file, however, until

[11] The District contends that the Catch-22 described by the District Court "is a false dichotomy" because the retroactivity and *Erie* inquiries "are distinct and should remain so." District Br. 5; *see also* O'Connor Br. 28. The point, however, is not that the line between substance and procedure is the same under a retroactivity analysis and an *Erie* analysis. It is that statutes in the District of Columbia do not apply retroactively unless they "pertain ***only*** to procedure." *See* Section II.A, *supra*. And ***no*** party or *Amicus* contends that a purely procedural state law applies in federal court. That is the source of the Catch-22, not any "false dichotomy."

April 18, 2011; thus, their motion was untimely and properly denied. *See* Statement of Reasons 5 (JA ___).

Mr. O'Connor does not dispute that he and Mr. Breitbart filed their motion more than "45 days after service of the claim." D.C. Code § 16-5502(a). Instead, Mr. O'Connor contends that Mrs. Sherrod and the District Court consented to the late filing of their "special motion to dismiss" when they agreed to Mr. Breitbart and Mr. O'Connor's requests for additional time to respond to the Complaint under Rule 12(b). *See* O'Connor Br. 43. But that makes no sense: because the Act was not in effect when they initially asked for more time to respond to the Complaint—and because Mr. Breitbart and Mr. O'Connor did not notify Mrs. Sherrod ***or*** the District Court of their intention to file this "special" motion—Mrs. Sherrod's and the District Court's routine consent would not have extended the time to file a motion under a statute that effectively did not exist.[12] Had Mrs. Sherrod and the District Court done so, as Mr. O'Connor suggests, they would have been

[12] Although the Act was effective when Mr. Breitbart and Mr. O'Connor requested a second extension of time on April 12, 2011, their motion had already become untimely (and thus procedurally defective) two weeks earlier.

consenting not just to an extension of time but also to the retroactive application of the statute. That is not plausible.

Mr. O'Connor nonetheless insists that the motion was timely because it was "filed in full accordance with the broad extensions granted by the District Court," regardless of the parties' intentions. *See* O'Connor Br. 43. The District Court disagreed, however, and reasonably concluded that its own orders did not extend the statutory deadline for filing a motion under the Act. *See* Statement of Reasons 5 (JA ___). And because the District Court was interpreting "its own order," its conclusion "is entitled to deference." *See, e.g., Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 279 (4th Cir. 2005) (district court's "interpretation" regarding the intended scope "of its own order is entitled to deference"); *In re Chicago, Rock Island & Pac. R.R. Co.*, 865 F.2d 807, 810 (7th Cir. 1988) ("We shall not reverse a district court's interpretation of its own order unless the record clearly shows an abuse of discretion. The district court is in the best position to interpret its own orders."). The District Court acted well within its discretion when it interpreted its order based on the actual request before it, which included no mention of the Act or its statutory deadline.

Accordingly, because the District Court's conclusion is reasonable, supported by the record, and not an abuse of discretion, the order denying Mr. Breitbart and Mr. O'Connor's Anti-SLAPP motion as untimely should be affirmed.

IV. THERE IS NO BASIS TO DISMISS MRS. SHERROD'S CLAIMS AGAINST MR. BREITBART AND MR. O'CONNOR.

In light of the foregoing, this Court need not and should not reach the "opinion" argument set forth at length in Mr. O'Connor's brief, O'Connor Br. 20-37—particularly since the argument presents a constitutional issue the Court should not decide unless absolutely necessary. *See, e.g.*, *City of Santa Monica v. FAA*, 631 F.3d 550, 559 (D.C. Cir. 2011) ("Before reaching a constitutional question, a federal court should consider whether there is a nonconstitutional ground for deciding the case, and if there is, dispose of the case on that ground.").[13]

[13] The District Court appropriately declined to address the "opinion" defense presumably for the same reason. *See, e.g.*, *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (district court abused its discretion by deciding First Amendment question before exhausting other grounds that would have avoided the constitutional issue). If, however, this Court were to conclude that it has interlocutory jurisdiction and that Mr. O'Connor should prevail on the statutory issues of retroactivity, the *Erie* doctrine, and timeliness, the Court should remand the case so that the District Court can review the "opinion" defense in the first instance

But even if the Court were to reach the question, Mr. O'Connor's argument fails because the selectively edited video clips and textual statements about Mrs. Sherrod that he and Mr. Breitbart published were defamatory and not "opinion."

A. Mr. Breitbart And Mr. O'Connor's Written Statements About Mrs. Sherrod Were Defamatory And Not "Opinion."

It is settled law that the First Amendment does not "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Jankovic v. Int'l Crisis Group*, 593 F.3d 22, 27 (2010). Opinions "can cause as much damage to reputation" as factual assertions because an opinion "may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19; *see also Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 628 (D.C. Cir. 2001) ("[T]he label 'political commentary' [does not] insulate the reporting of verifiable and arguably defamatory facts."). As *Milkovich* explained, "[s]imply couching such statements in terms of opinion does not dispel these implications"—even if the speaker "states the facts upon which he bases his opinion"—if "those facts are either

under the applicable standard. This Court is a "court of review, not of first view." *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

incorrect or incomplete, or if his assessment of them is erroneous." *Milkovich*, 497 U.S. at 18-19. Therefore, "[t]he dispositive question" is not whether a statement could be characterized as "opinion" but whether it is "susceptible of being proved true or false." *Id.* at 21.

Mr. O'Connor apparently does not disagree with these principles. Instead, he contends that "[w]ell-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." O'Connor Br. 22. That is so, Mr. O'Connor asserts, because "the word 'racist' has been watered down by overuse" and "is hurled about so indiscriminately that it is no more than a verbal slap in the face." *Id.* 22-23. Thus, "characterizing [Mrs. Sherrod's] NAACP speech as 'racist'" is, in Mr. O'Connor's view, not actionable. *Id.* 2.

The problem for Mr. O'Connor is that he and Mr. Breitbart did not just call Mrs. Sherrod a "racist";[14] they also asserted that "Mrs. Sherrod

[14] Even if the blog post had asserted only that Mrs. Sherrod was a "racist," that assertion still would be actionable because Mr. Breitbart and Mr. O'Connor linked their claims to a specific event—namely, Mrs. Sherrod's interactions with the "white farmer," Roger Spooner. Calling someone a "racist" in such circumstances is defamatory and not "opinion." *See, e.g.*, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d

admits that in her federally appointed position, overseeing over a billion dollars ... [s]he discriminates against people due to their race" and that she "manage[s]" her "federal duties" through "the prism of race and class distinctions." Compl. ¶ 94 (JA __). The blog post also states that Mrs. Sherrod "admits" these supposed facts "in stark detail," pointing to the selectively edited video clip of Mrs. Sherrod's "racist tale" about her encounter with the "white farmer" (Roger Spooner) as "video proof" of Mr. Breitbart and Mr. O'Connor's claims. In short, Mr. Breitbart and Mr. O'Connor went far beyond calling Mrs. Sherrod a "racist." Instead, they falsely asserted that she violated the law in her capacity as a federal official by discriminating against a specific individual on the basis of his race—and they reaffirmed that assertion when Mr. Breitbart "tweeted" that the Attorney General of the United States should "hold [her] accountable" for "admitting practicing racial discrimination." *Id.* ¶ 60 (JA __).

Because each of these statements is a factual assertion that is "susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21,

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649, 655 (D.C. Cir. 1966); *Puchalski v. Sch. Dist. of Springfield*, 161 F. Supp. 2d 395, 408 (E.D. Pa. 2001).

none is "non-actionable opinion" as Mr. O'Connor suggests. For example, as the unabridged video of Mrs. Sherrod's speech demonstrates, her encounter with Mr. Spooner occurred decades before she worked for the USDA as a "federal official"—a fact Mr. Breitbart and Mr. O'Connor themselves eventually must have verified because they belatedly added a factual "correction" to the blog post after the full video of Mrs. Sherrod's speech was released to the public. Moreover, the unabridged speech explains that Mrs. Sherrod did ***not*** discriminate against Mr. Spooner; she helped him save his farm. A "reasonable factfinder," *id.*, therefore could conclude that Mrs. Sherrod did not, in fact, "admit[]" to "discriminate[ing] against people due to their race" while working for the USDA.

The key point here, however, is not that the six factual statements identified in the Complaint are false (though they are). It is that it is ***possible*** to prove them true or false; indeed, it is something courts across the country do each and every day. *See, e.g.*, *Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000) ("[W]hether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal

court."); *see also Jankovic*, 593 F.3d at 28 (explaining that if facts "are verifiable enough to be the bases for" ordinary legal liability, then "they are surely … verifiable enough for defamation liability"). And because that is all the *Milkovich* standard requires, Mr. O'Connor's "opinion" defense must be rejected.

B. The "Supportable Interpretation" Standard of *Moldea II* Does Not Apply Here.

Mr. O'Connor nonetheless insists that the textual statements about Mrs. Sherrod are "non-actionable" because they are "supportable interpretations of true underlying facts disclosed to the reader." O'Connor Br. 27-28. According to Mr. O'Connor, this "supportable interpretations" standard, as set forth in the Court's *Moldea II* decision, is the "correct measure of whether a statement is verifiably false" and requires dismissal if "no reasonable person could find" that Mr. Breitbart and Mr. O'Connor's statements about Mrs. Sherrod were supportable. *Id.* (citing *Moldea v. N.Y. Times Co. (Moldea II)*, 22 F.3d 310, 313 (D.C. Cir. 1994)). Neither *Moldea II* nor the "supportable interpretations" standard it discussed, however, is applicable here.

First, although Mr. O'Connor contends that *Moldea II* applies to any defamatory statement that is presented in a "context" where the

"reader expects to be presented with statements of opinion," O'Connor Br. 27, *Moldea II* expressly stated that its "supportable interpretation" framework applies only if "the challenged statements [are] evaluations of a literary work," such as "when a reviewer offers commentary that is tied to the work being reviewed." *Moldea II*, 22 F.3d at 313. When "a writer launches a personal attack" on a person's "character, reputation, or competence," however, the "supportable interpretation" standard does not apply. *Id.* at 315 ("supportable interpretation" standard would not apply if book reviewer said a book was "badly written … because its author was a drug dealer"); *id.* ("The statements at issue in the instant case are assessments of a book, rather than direct assaults on [the author's] character, reputation, or competence as a journalist."). *Milkovich*—not *Moldea II*—thus governs here because Mr. Breitbart and Mr. O'Connor "launch[ed] a personal attack" on Mrs. Sherrod and her conduct, not the quality of any "literary work." *Id.* (explaining that *Milkovich* governs "garden-variety libel," even when it appears in "the medium of a book review").

Second, the reason *Moldea II* repeatedly stated that the "supportable interpretations" standard applies only to critiques of literary works is that in those circumstances, the reader has access to ***all*** of the facts that the ***author of the literary work*** chose to disclose, enabling the reader to "draw his or her own conclusions based upon those facts." *Id.* at 317 (quoting *Moldea v. N.Y. Times (Moldea I)*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994)). Here, on the other hand, "the reader" did not have access to all of the facts; instead, readers only knew about the facts ***Mr. Breitbart and Mr. O'Connor***—not Mrs. Sherrod—chose to disclose: the selectively edited video clips. *See Milkovich*, 497 U.S. at 18-19; *Jankovic*, 593 F.3d at 28.

This point bears emphasis. Although Mr. O'Connor contends that the video clips of Mrs. Sherrod's speech were not "selectively" or "deceptively" edited because "not one word was omitted, added, or re-ordered in either of the ***sections*** embedded in the blog post," O'Connor Br. 16-17, the point here is not that Mr. Breitbart and Mr. O'Connor altered the sections of the speech they actually posted (though they did by inserting slides containing their own textual statements). It is that they omitted most of the speech altogether and

thereby fundamentally changed the meaning of Mrs. Sherrod's words. *See, e.g.*, Compl. ¶¶ 42-45 (JA ___).[15] Thus, Mr. O'Connor's assertion that the "facts" were "fully disclosed to readers" is simply not correct. O'Connor Br. 34.

Accordingly, Mr. O'Connor is also not correct that the applicable standard here is "whether 'no reasonable person could find' that Breitbart's 'characterizations [of Sherrod] were supportable interpretations' of the facts disclosed in the two video clips." O'Connor Br. 32-33 (quoting *Moldea II*, 22 F.3d at 317). That standard would apply (if at all) only if readers of the blog post had access to the "actual text" Mr. Breitbart and Mr. O'Connor purportedly were "evaluating" (*i.e.*, the full speech, not a selectively truncated excerpt), *Moldea II*, 22 F.3d at 315—and if Mr. Breitbart and Mr. O'Connor's statements were directed at the quality of the speech, not Mrs. Sherrod's alleged character and behavior.

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[15] For example, Defendants removed critical introductory statements by Mrs. Sherrod—spoken seconds before her story about the white farmer—that expressly identified the point of her story and stated, without regard to race, that "the struggle is really about poor people." Compl. ¶ 41 (JA ___).

And even if the Court were to apply the "no reasonable person" standard set forth in Mr. O'Connor's brief, he concedes that his and Mr. Breitbart's conduct falls short because "upon review of the entire speech, ***it is possible***" to conclude that Mr. Breitbart and Mr. O'Connor's statements were not supportable, O'Connor Br. 36—perhaps explaining why they later added a "correction" to the blog post, Complaint ¶ 69 (JA __). For all these reasons, Mr. O'Connor has not established (under *Moldea II* or otherwise) that his and Mr. Breitbart's statements about Mrs. Sherrod were "opinion."

C. Mr. Breitbart And Mr. O'Connor's Publication of the Selectively Edited Video Clips Is An Independent Basis for Mrs. Sherrod's Claims.

Finally, Mr. O'Connor's assertion that Mrs. Sherrod's Complaint should be dismissed overlooks that her claims are based not just on Mr. Breitbart and Mr. O'Connor's textual statements, but also on their publication of selectively edited video clips, which independently defamed Mrs. Sherrod. *See, e.g.*, Compl. ¶ 94 ("Defendants have defamed Mrs. Sherrod by editing and publishing an intentionally misleading clip of Mrs. Sherrod's speech.") (JA ___). Mr. Breitbart and Mr. O'Connor did not challenge this independent basis for

Mrs. Sherrod's claims in the District Court, perhaps because they recognized that their ***conduct***—the editing and publication of misleading video excerpts—is not a statement of "opinion" in any sense of the word. *See, e.g.*, Defs.' Rule 12(b) Mem. 2 ("[D]ismissal is proper under Rule 12(b)(6) because the allegedly defamatory ***statements*** constitute protected expressions of opinion ....") (JA ___).

Moreover, as Judge Niemeyer recently explained in *Tomblin v. WCHS-TV8*, the act of publishing some facts while leaving out others is defamatory where, as here, the publication creates a false or misleading impression about the plaintiff. *See* 434 Fed. App'x 205, 211 (4th Cir. 2011) (no summary judgment in favor of defendant because "a jury could conclude" that defendant's television broadcast defamed plaintiff by omitting facts about plaintiff's conduct); *see also Price v. Stossel*, 620 F.3d 992, 995 (9th Cir. 2010) (no dismissal under California anti-SLAPP statute because defendant's broadcast of video clip of plaintiff's speech "chang[ed] the viewer's understanding of the speaker's words"); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 271-72 (7th Cir. 1983) (defendant's excerpting of report "carried a greater sting" than the report itself and "amplifie[d] the libelous effect" of

defendant's publication). Accordingly, because Mr. Breitbart and Mr. O'Connor's publication of selectively edited video clips defamed Mrs. Sherrod and is not "opinion," there is no basis to dismiss any of Mrs. Sherrod's claims.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of jurisdiction or, in the alternative, the District Court's order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and this Court's Circuit Rule 32(a), I hereby certify that the foregoing brief contains 13,908 words (excluding the exempted portions of the brief), as determined by the word counting feature of Microsoft Word 2007.

/s/ Thomas A. Clare, P.C.
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CERTIFICATE OF SERVICE

Pursuant to this Court's Circuit Rule 25(c), I hereby certify that on this 2nd day of January, 2013, I electronically filed the foregoing Brief for Appellee with the Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Thomas A. Clare, P.C.
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